



MEDICAL MALPRACTICE BOOTCAMP

September 20, 2019

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Friday, September 20, 2019

MEDICAL MALPRACTICE BOOTCAMP

7 CLE Hours Including

1 Professionalism Hour | 4 Trial Practice Hours



**State Bar
of Georgia**

INSTITUTE OF CONTINUING LEGAL EDUCATION

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State Bar
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HOW CAN WE HELP YOU?



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.



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.

TESTIMONIALS

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.

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.

Contact SOLACE@gabar.org for help.

FOREWORD

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

Michelle E. West

Director, ICLE

Rebecca A. Hall

Associate Director, ICLE

AGENDA

PRESIDING:

Lee P. Gutschenritter, Program Chair, Finch McCranie LLP, Atlanta

7:30	REGISTRATION AND CONTINENTAL BREAKFAST (All attendees must check in upon arrival. A removable jacket or sweater is recommended).	12:15	LUNCH (Included in registration fee.)
8:15	WELCOME AND PROGRAM OVERVIEW <i>Lee P. Gutschenritter</i>	12:30	LUNCH AND LEARN: OVERVIEW OF RECENT APPELLATE COURT DECISIONS IN MEDICAL MALPRACTICE CASES <i>Kristin L. Pierson</i> , Bendin Sumrall & Ladner LLC, Atlanta
8:30	COUNTERING STANDARD OF CARE DEFENSES: HOW TO FRAME YOUR CASES FOR SUCCESS <i>Lee P. Gutschenritter</i>	1:15	POWER SHAKE: BRINGING ADVANCED COURTROOM TECHNOLOGY TO YOUR NEXT DEPOSITION <i>Lloyd N. Bell</i> , Bell Law Firm, Atlanta
9:15	DEFENDING MEDICAL MALPRACTICE CASES: STRATEGIES AND TACTICS FROM THE DEFENSE PERSPECTIVE <i>Lindsay A. Forlines</i> , Weathington McGrew LLC, Atlanta	2:00	BREAK
10:00	PROFESSIONALISM IN MEDICAL MALPRACTICE CASES <i>Richard W. Hendrix</i> , Finch McCranie LLP, Atlanta	2:10	CONNECTING WITH JURORS IN OPENING AND CLOSING <i>R. Adam Malone</i> , Malone Law Office, Atlanta
11:00	BREAK	3:10	APPORTIONMENT ISSUES IN MEDICAL MALPRACTICE CASES <i>Abby Grozine</i> , Carlock Copeland & Stair LLP, Atlanta
11:15	NURSING HOME LITIGATION SPOTLIGHT: SEXUAL ASSAULT CASES & BEDSORE CASES <i>Katherine G. "Kate" Hughes</i> , Wagner Hughes LLC, Atlanta <i>Gretchen H. Wagner</i> , Wagner Hughes LLC, Atlanta	4:10	ADJOURN

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COUNTERING STANDARD OF CARE DEFENSES: HOW TO FRAME YOUR CASES FOR SUCCESS

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COUNTERING STANDARD OF CARE DEFENSES: **HOW TO FRAME YOUR CASE FOR SUCCESS**

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DEFINING THE STANDARD OF CARE

In Georgia, the legal duty owed by medical professionals is to exercise “a reasonable degree of care and skill.” See O.C.G.A. § 51-1-27. Expert testimony must set forth how or in what way the defendant deviated from the parameters of acceptable professional conduct. See Kapsch v. Stowers, 209 Ga. App. 767 (1993). It is not sufficient to show that the physician testifying on the duty of care would have done something differently. See Bowling v. Foster, 254 Ga. App. 374 (2002). A plaintiff is required to offer expert medical testimony to the effect that the defendant physician failed to exercise that degree of care and skill which would ordinarily have been employed by the medical profession generally under the circumstances. See Bowling v. Foster, supra.

QUALIFIED EXPERT TESTIMONY

The applicable standard of care can be shown through the testimony of a qualified expert witness. O.C.G.A. § 24-7-702 states:

a) Except as provided in Code Section 22-1-14 and in subsection (g) of this Code section, the provisions of this Code section shall apply in all civil proceedings. The opinion of a witness qualified as an expert under this Code section may be given on the facts as proved by other witnesses.

(b) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise, if:

(1) The testimony is based upon sufficient facts or data;

(2) The testimony is the product of reliable principles and methods; and

(3) The witness has applied the principles and methods reliably to the facts of the case which have been or will be admitted into evidence before the trier of fact.

(c) Notwithstanding the provisions of subsection (b) of this Code section and any other provision of law which might be construed to the contrary, in professional malpractice actions, the opinions of an expert, who is otherwise qualified as to the

acceptable standard of conduct of the professional whose conduct is at issue, shall be admissible only if, at the time the act or omission is alleged to have occurred, such expert:

(1) Was licensed by an appropriate regulatory agency to practice his or her profession in the state in which such expert was practicing or teaching in the profession at such time; and

(2) In the case of a medical malpractice action, had actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given as the result of having been regularly engaged in:

(A) The active practice of such area of specialty of his or her profession for at least three of the last five years, with sufficient frequency to establish an appropriate level of knowledge, as determined by the judge, in performing the procedure, diagnosing the condition, or rendering the treatment which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue; or

(B) The teaching of his or her profession for at least three of the last five years as an employed member of the faculty of an educational institution accredited in the teaching of such profession, with sufficient frequency to establish an appropriate level of knowledge, as determined by the judge, in teaching others how to perform the procedure, diagnose the condition, or render the treatment which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue; and

(C) Except as provided in subparagraph (D) of this paragraph:

(i) Is a member of the same profession;

(ii) Is a medical doctor testifying as to the standard of care of a defendant who is a doctor of osteopathy; or

(iii) Is a doctor of osteopathy testifying as to the standard of care of a defendant who is a medical doctor; and

(D) Notwithstanding any other provision of this Code section, an expert who is a physician and, as a result of having, during at least three of the last five years immediately preceding the time the act or omission is alleged to have occurred, supervised, taught, or instructed nurses, nurse practitioners, certified registered nurse anesthetists, nurse midwives, physician assistants, physical therapists, occupational therapists, or medical support staff, has knowledge of the standard of care of that health care provider under the circumstances at issue shall be competent to testify as to the standard of that health care provider. However, a nurse, nurse practitioner, certified registered nurse anesthetist, nurse midwife, physician assistant, physical therapist, occupational therapist, or medical support staff shall

not be competent to testify as to the standard of care of a physician.

(d) Upon motion of a party, the court may hold a pretrial hearing to determine whether the witness qualifies as an expert and whether the expert's testimony satisfies the requirements of subsections (a) and (b) of this Code section. Such hearing and ruling shall be completed no later than the final pretrial conference contemplated under Code Section 9-11-16.

(e) An affiant shall meet the requirements of this Code section in order to be deemed qualified to testify as an expert by means of the affidavit required under Code Section 9-11-9.1.

(f) It is the intent of the legislature that, in all civil proceedings, the courts of the State of Georgia not be viewed as open to expert evidence that would not be admissible in other states. Therefore, in interpreting and applying this Code section, the courts of this state may draw from the opinions of the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137 (1999); and other cases in federal courts applying the standards announced by the United States Supreme Court in these cases.

(g) This Code section shall not be strictly applied in proceedings conducted pursuant to Chapter 9 of Title 34 or in administrative proceedings conducted pursuant to Chapter 13 of Title 50.

FINDING THE STANDARD OF CARE¹

The first thing to understand is that the standard of care is a legal construct that generally has very little to do with how doctors practice on a day to day basis. Many people assume that the standard of care that applies to doctors is written down somewhere. In reality, this is rarely the case. And even where the standard of care is written down, it is often too general to be of use in the treatment of any particular patient. While this may seem strange, it makes sense given the hundreds of medical specialties in existence today and the practically infinite series of symptomatic variables that can apply to an individual patient.

¹ The remainder of this paper consists of selected excerpts taken from *The Medical Malpractice Trial*, by Michael Koskoff & Sean McElligott, pp. 1 - 81. It is an excellent resource for all trial lawyers, and is available for purchase at <https://www.trialguides.com/products/the-medical-malpractice-trial>.

But if the standard of care is not written down, where can you find it? The definition tells us that the standard of care exists in the minds of “reasonably prudent physicians in like or similar circumstances.” In reality, this is a fiction. Doctors do not actually think in terms of standard of care in their day to day practice. Consequently, litigation may be the only time when doctors truly attempt to recognize the standard of care that applies to given situations.

If you are used to trying car wreck cases, the idea of elastic liability rules disconnected from day-to-day practice may seem strange. In car wreck cases, the rules tend to be written down. Also, drivers on the road know the rules and follow them daily. For example, there are clear traffic laws describing what driver has the right-of-way in a given situation. For example, a driver must yield the right-of-way when making a right turn on a red light. If the driver fails to yield in these situations, the driver has violated the rule. There is no need to call two experts to stand to testify about what traffic laws are “recognized as acceptable and appropriate by reasonably prudent similar drivers.” But in medical malpractice cases, this is how the liability rules are determined.

In reality, doctors think a lot about how to best treat their own patients. They give some consideration to how their colleagues might treat similar patients differently. But they give very little thought to what the national minimal standards are in the United States for treating a particular type of patient.

Further, unlike traffic laws, treatment methods are constantly changing based on available technology and scientific understanding. Younger doctors may come out of training with different methods of treating patients. Older doctors may change their ways based on an important journal article, or the invention of a new medical device. Good doctors pay attention to how they individually treat patients, but they do not have much incentive to try to understand the minimum standards that apply to an entire specialty, particularly as the minimum standards can change on a

frequent basis.

Because the standard of care is unwritten and patient-specific, the definition of standard of care will be a battle ground in every case. Almost every medical malpractice case will involve opposing experts who present competing versions of the standard of care. Accordingly, the liability rules apply to the defendant's conduct will almost always be in dispute in a medical malpractice case.

Again, we can contrast the medical malpractice case with an automobile case. In a car wreck case, the parties almost always agree on the liability rule to be applied, because the rules of the road are mostly written down. For example, the parties in a car wreck case will not dispute that the speed limit on a particular road is 55 miles per hour. The battle ground in an auto case is more likely to be about the facts of what happened. For example, there may be a dispute as to whether the driver was going 55 or 65 miles per hour. Ultimately, the facts determined in the auto case mean everything, because everyone knows and easily understands the rules that apply. You might say that the typical auto case involves *known* rules and *unknown* facts.

The medical malpractice case presents the opposite problem. It involves *known* facts but *unknown* rules. The facts are largely known because the defendants have a professional and legal obligation to document what they did for the patient in the patient's medical records. There are obviously many malpractice cases which do involve important factual disputes. However, the main issue in many malpractice cases is "what standard should the defendant be judged?"

Because the standard of care is a battleground, each side will present its own version of the standard of care in medical malpractice cases. The competing versions tend to follow a particular pattern that is helpful to the plaintiff. For example, the rule that the plaintiff advocates will be one that would have prevented the harm, had only the defendant complied with it. The rule that the

defense advocates will be one that presents the harm as inevitable, regardless of the treatment. If you look for this pattern in your case, you will probably find it without much difficulty.

Under the defense's version of the standard of care, the harm to the plaintiff is always unavoidable (at least as far as the defendant's conduct is concerned). The plaintiff's injuries are always the type that happens despite careful and skillful care. The plaintiff is the noise in an otherwise safe system.

Under the plaintiff's version of the standard of care, the harm to the patient is always preventable if only the doctor follows the standard of care. The patient is like every other patient and we must keep patients safe.

The basic standard of care pattern will be present in most medical malpractice cases if you look for it. We all know the jurors do not like to think of any injury is unavoidable. Even if the injury will never likely happen to a juror, the juror will still have a hard time accepting that an injury is truly unavoidable. This is a story problem for the defense and a story opportunity for the plaintiff.

MEDICAL JUDGMENT

The medical judgment defense is frequently raised in medical malpractice cases. Here are three kernels of truth underlying the medical judgment defense:

- 1) Professionals such as doctors are required to use their best medical judgment on a daily basis in treating their patients.
- 2) Two different doctors, honestly and diligently using their best medical judgment, will sometimes disagree as to the best way to treat a patient.
- 3) Differing medical judgments might cause two different doctors to treat the same patient differently.

All three of these things are true. Here is the fourth element to the medical judgment defense, which is not true: A treatment that is the result of a doctor's best medical judgment is within the standard of care. This is false.

The last premise is false because the standard of care is objective and not subjective. As a legal matter, a doctor can use his best judgment and still violate the standard of care.

The medical judgment defense works because it has the effect of "depolarizing" the case. The plaintiff wants to present the jury with a stark choice between right and wrong. The standard of care is to do (X); the defendant did not do (X), and harm resulted. When we frame the case this way, we have storytelling, education, and empowerment set up perfectly in a polarized way. The medical judgment defense disrupts this polarization by attempting to expand the range of conduct that is allowed within the standard of care. The standard of care is to do X, Y or Z. The medical judgment defense allows every doctor their own opinion.

The medical judgment defense is effective for a few different reasons. First, everyone agrees with the three predicate propositions above. Everyone will agree the doctors are required to use their best judgment on a daily basis in treating their patients. In fact, the very concept of a professional (doctor, lawyer, banker) implies people using their education, training and experience to form judgments in different factual scenarios. Likewise, if people are truly using their best judgment, we have to allow for disagreements in judgment. Two doctors might have different education, training, or experience, and this might lead them to different conclusions about how best to treat a patient. However, we disagree with the last proposition which is that any treatment that results from an honest disagreement among professionals must be within the standard of care. The fact is that some treatment decisions are outside of the standard of care, even when these decisions result from considered and deliberate judgment of a physician.

A second reason the medical judgment defense is so effective is that it places the medical experts in an unfavorable context for the jury and relieves the jury of their obligation to decide between the two. It is not much of a stretch to state that these experts simply have “differing opinions,” and there is space for both to be correct.

When the defense raises a medical judgment defense, the underlying issues is often the extent to which medicine is an art or a science. The defense will frequently conduct Voir Dire on whether jurors believe medicine is an exact science. They do this because the one juror who will buy into a subjective, unscientific approach to medicine. The concept of medical judgment itself is at odds with the evidence-based approach of modern medicine. The evidence-based approach emphasizes the scientific literature, checklist, in algorithmic thinking over intuition and judgment. For plaintiffs, we want medicine to be a science because there is always a right and a wrong answer.

The first step in countering the medical judgment defense is asking whether the defendant doctor actually made a judgment as the defense argues or is the medical judgment defense actually revisionist history. Did the doctor prospectively struggle over two or more possible ways to treat a patient and have to make a difficult judgment call? Or did the doctor do something inadvertently or carelessly and then after the fact seeks to recast this decision as one of medical judgment? Or did he do something the way he was trained to do it 20 or 30 years earlier, despite the fact that recent studies suggest a different approach? So, when you review the medical records and throughout discovery, look for answers to these questions.

- Did the doctor document considering two alternatives?
- Did the doctor discuss his thinking with the patient or the patient’s family and give them a chance to weigh in?
- Outside of the record, did the doctor review the most recent studies on the topic?

- How long did the doctor spend thinking about this issue before making a decision that could mean life or death for the patient?

These will all be difficult questions for a doctor to answer if there really was no process leading up to the decision that is allegedly the act of medical judgment.

TAKEAWAYS

The defense uses the medical judgment to depolarize the case. Present the case as two standards of care (one that protects the patient and one that protects the doctor). Don't let them muddy the water.

The medical judgment defense attempts to take advantage of the fact that judgment is an actual and legitimate part of medicine. Remember that medical judgment has its limits. The standard of care is always objective, not subjective.

This is a battle of stories. Ask whether the doctor actually made an informed, deliberate judgment in treating the patient or whether the doctor is trying to explain away a careless error. Does the record support the idea of reason decision making?

Know the scientific literature better than the defendant and use it.

THE RISK OF THE PROCEDURE DEFENSE

The risk of the procedure defense comes up most often in surgical cases where the injury the plaintiff suffered is similar to injuries that many other patients who undergo the same procedure also suffered. The medical literature will correlate the procedure with a particular adverse outcome as a statistical matter. A typical study will be based on a retrospective analysis of thousands of patient medical records from a single institution.

The problem with the risk of the procedure defense is that it assumes far too much from the statistical data. Typically, the data states only how many injuries occur after a specified type

of surgery. Significantly, the data includes patients who have had surgeries done with different techniques, by surgeons with different experience and skill, and sometimes with different devices. Accordingly, we cannot extrapolate from the data that the particular injury is an unavoidable consequence of the procedure itself. Instead, the injuries could be the result of many other causes including inexperienced or unskilled surgeons using improper techniques. In other words, rather than a risk of the procedure, the studies could just be documenting a particular risk of bad technique associated with the procedure. A bad technique is preventable.

The risk of the procedure defense is so popular among defense attorneys is because it has a tendency to provide defendants with the benefit of the doubt. If a predicted risk simply materialized, the defendant cannot be blamed; it is the operation of chance. The key to countering this strategy is to show that the risk materializes only when the doctor negligently fails to adhere to the standard of care designed to prevent it. This shifts the focus back to whether the doctor complied with the standard of care, which is where the focus belongs anyway.

For every risk of a procedure, there is a standard of care designed to prevent that risk from manifesting as an injury. For example, infection at the site of an incision is a known risk of a surgical procedure. The standard of care to prevent that risk from happening is to prep the incision site with Betadine. So, despite the fact that the risk of infection at an incision site is a known risk of the procedure, it does not mean that the harm from such a risk is unavoidable. In fact, this harm is easily preventable with the simple precaution.

There are many examples in medicine of known but preventable risks. For example, a patient falling off the bed while under anesthesia is a known risk of anesthesia. The standard of care to prevent this risk from happening is the use of bedrails. Amputation of the wrong leg is a risk of leg amputation surgery. The standard of care to prevent that from happening is marking

the correct leg with a marker and double checking the surgery site before cutting. If you think about it, every standard of care in medicine is designed to address a known risk to the patient. A surgeon would not defend a wrongfully amputation case by claiming the risk of the procedure, even if the regularity of its occurrence could be reduced to a statistic in a medical journal.

TAKEAWAYS

The risk of the procedure defense will almost always assume far too much from the statistical data. Look carefully at the studies to see if they exclude victims of malpractice.

For every risk in medicine there is a standard of care designed to prevent that risk from occurring. So, a simple statistical correlation between a procedure and a harm does not mean the injury is unavoidable.

Be as precise as you can in describing the defendant's failures. Precise failures would be a more likely explanation for harm than a nebulous statistical risk.

THE MISDIAGNOSIS CASE

1. A large percentage of medical malpractice cases involve some form of misdiagnosis.
2. Misdiagnoses happen and follow a consistent pattern in which doctors diagnose patients without going through proper diagnostic methodology—known in medicine as *a differential diagnosis*.
3. A misdiagnosis that results from a failure to perform a proper differential diagnosis is entirely preventable.

THE DIFFERENTIAL DIAGNOSIS

In order to understand how a misdiagnosis occurs, you first need to understand a differential diagnosis process. The differential diagnosis is the cornerstone of modern diagnostic medicine. Every doctor learns about differential diagnosis in medical school and practices it

during residency. When applied correctly, it is a very effective tool for correct diagnosis. But although differential diagnosis is one of those things that every doctor knows how to do, few manage to do it consistently well.

The process, however, is well established and can be broken down into the following steps:

1. Gather relevant information.
2. Make an inclusive list of potential diagnoses.
3. Eliminate potential diagnoses until a diagnosis is reached.

GATHER RELEVANT INFORMATION

There are two types of symptoms, *subjective* and *objective*:

A subjective symptom is something the patient reports as part of their subjective experience. For example, a patient might report the existence of a headache. There is no way for a doctor to verify the existence of a pain in the patient's head, so this is considered a subjective symptom, that is, reported by the patient.

An objective symptom is one that the doctor can verify through a physical exam, test, or other objective measure. For example, the existence of a fever of 102 degrees is an objective symptom. The existence of a rash on the patient's arm is an objective symptom when the physician observes it on physical exam.

MAKE A LIST OF POTENTIAL DIAGNOSES

The second step in the differential diagnosis process is to make a list of *all of the possible diagnoses* that could explain the symptoms. This is like gathering up all of the potential suspects who could have committed a crime. The idea is to make the list as inclusive as possible.

The most serious conditions are always at the top of the differential list. The conditions get less serious as the list proceeds. This is by design. As discussed below in step 3, serious and

life-threatening conditions should be ruled out first. As such, the most serious conditions are at the top of the list, and the doctor will start ruling out from top to bottom.

ELIMINATE POTENTIAL DIAGNOSES

The third step in a differential diagnosis is to eliminate potential diagnoses from the list. This is like eliminating the crime suspects who have a good alibi. The doctor usually accomplishes this through a more targeted information-gathering process, sometimes in conjunction with additional objective tests.

The vast majority of misdiagnosis cases happen when the physician diagnoses a patient with *a less serious but statistically more common* condition. In these situations, the doctor has simply settled on the statistically likely condition that explains most of the patient's symptoms. Thus, a harmful misdiagnosis typically occurs when the physician (to save time or effort) diagnoses the patient with the most statistically likely condition that explains the symptoms. This is an unfortunate but extremely common medical error.

ESTABLISHING THE SPEED LIMIT

Think of the misdiagnosis case like a speeding case in the automobile context. The differential diagnosis is like the speed limit—everyone knows what it is, but few people follow it consistently. There are three steps to this process, outlined below in different parts of a physician's deposition:

1. A differential diagnosis is required with new symptoms.
2. A differential diagnosis requires a list of potential diagnoses.
3. Apply the diagnosis to the facts of the case.

EARLY DIAGNOSIS EQUALS BETTER OUTCOME

Misdiagnosis cases usually present challenging causation issues that will require causation experts who are different from standard-of-care experts. If the misdiagnosis of a brain tumor was done by a primary care doctor, you will need a primary care doctor to testify on the breach of the standard of care. But you will probably also need a surgeon or an oncologist to testify about what the patient's outcome would have been had the tumor been diagnosed in a timely fashion. Causation cases involving separate experts can take on a life of their own, and comprehensive treatment of this subject is beyond the scope of this book. But one principle that every doctor will agree with is that the earlier the diagnosis, the better chance there is for a cure.

TAKEAWAYS

- The differential diagnosis is the cornerstone of modern diagnostic medicine and will be central to every misdiagnosis case.
- A proper differential diagnosis has three steps:
 1. Elicit the patient's subjective and objective symptoms.
 2. Make a list of the potential conditions that could explain the symptoms.
 3. Rule out potential conditions, beginning with the most serious.
- Misdiagnoses happen when doctors settle on a benign, statistically common diagnosis before ruling out a serious condition. This is the plaintiff's story.
- Although misdiagnosis cases can present thorny causation problems, remember that there is a principle in medicine: "The earlier the diagnosis, the better chance for a cure."
- A serious condition that goes undiagnosed will almost always be less common than a benign condition. Don't be fooled by the defense's rare-condition narrative. The differential diagnosis is designed to prevent precisely this type of error.

DEFENDING MEDICAL MALPRACTICE CASES: STRATEGIES AND TACTICS FROM THE DEFENSE PERSPECTIVE

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LINDSAY A. FORLINES

PRACTICE AREAS:

- Medical Malpractice Defense
- General Liability Defense

BAR & COURT ADMISSIONS:

- Georgia, 2008
- Georgia Supreme Court, 2008
- Georgia Court of Appeals, 2008
- Northern District of Georgia, 2008

EDUCATION:

- University of Georgia School of Law, JD, 2008
- University of Georgia, BA, 2003, *magna cum laude*



PROFESSIONAL PROFILE:

Lindsay has been defending physicians, nurses, hospitals and other healthcare providers against alleged professional negligence since she began practicing law in 2008. During this time, she has gained experience successfully representing medical professionals throughout the litigation process. Lindsay also represents physicians in pre-litigation claims and non-litigation matters, such as investigations by the Georgia Composite Medical Board.

Lindsay graduated Magna Cum Laude from the University of Georgia in 2003 with a degree in Journalism, specializing in broadcast journalism. She attended law school at University of Georgia School of Law, where she graduated in 2008. Lindsay's proudest law school accomplishment was being selected for the Willis J. "Dick" Richardson Jr. Student Award for Outstanding Trial Advocacy.

From 2012-2015, Lindsay proudly served her hometown as an elected official on the Avondale Estates Board of Mayor and Commissioners. She also served as president of the DeKalb County Municipal Association in 2013. Lindsay is a repeat instructor at the Emory University Kessler-Eidson Program for Trial Techniques, and also a repeat featured speaker and panelist at the Georgia Association for Women Lawyers Leadership Academy. Additionally, Lindsay was a featured speaker at Resurgens Orthopaedics' 2017 Back-to-Basics Conference, held at St. Joseph's Hospital.

PROFESSIONAL & COMMUNITY ACTIVITIES:

ICLE , State Bar of Georgia, Medical Malpractice Liability Institute, Co-Chair (2017)
GCEP's Georgia Emergency Medicine Leadership & Advocacy Conference, Featured Speaker (2017)
National High School Mock Trial Competition, volunteer judge (2017)
ICLE Conference: Fundamentals of Health Care Law, Featured Speaker (2019)
Georgia Society for Healthcare Risk Management, Winter Meeting and Annual Conference, Featured Speaker (2019)

AWARDS:

Georgia Super Lawyers, Rising Star, 2019

PROFESSIONALISM IN MEDICAL MALPRACTICE CASES

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IS PROFESSIONALISM AN OLD-FASHIONED IDEAL?

**BY:
RICHARD W. HENDRIX**

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IS PROFESSIONALISM AN OLD-FASHIONED IDEAL?

At times it seems like we as a profession have lost our way. Similarly, as a country, it sometimes seems we have collectively lost our way. Values such as character, civility, virtue, honesty, integrity, and patriotism are increasingly being called into question as archaic or “old-fashioned” ideals – and, as such, are no longer in vogue or sufficiently “modern”. The “modern” mentality seems to be that we no longer need to rely on these ideals. In today’s “modern” society, we are encouraged to believe that everything is open to a secular humanistic interpretation regardless of what the issue may be. Indeed, moral relativism, writ large, occupies the public domain.

Is there good and evil? Is there right and wrong? Such concepts no longer matter according to some, rather we simply need to look at each situation and apply our own relative ideals in addressing them. The problem with this mentality, however, is that such logic when applied in actual life simply does not work. There is good and evil in the world. There are absolutes. There is right and wrong. And there are principals and standards – freedom, ethics, love and social responsibility – by which we, as a society, and particularly as professionals, should live by. Character, civility, integrity, honor, virtue, selflessness, sacrifice, service: these are

terms that must be embodied by our profession. (May I include kindness, morality and manners as well?) If not, we will continue to be lost in the wilderness which permeates the moral relativism of the new information “modern” age.

To be clear, much has been achieved in today’s world. We are a more prosperous and egalitarian society and have achieved a collective standard of living unparalleled in human history. Groups, long disadvantaged and discriminated against, now, have more opportunity than ever before to share in this prosperity, and Civil Rights, once denied, are available to more than ever before. This is not to say our society currently rests in a cradle of perfected equality and opportunity; rather, it is to acknowledge how far we have come together as Group. But in enjoying these rightly won Civil Rights, I fear our society is, nonetheless, increasingly losing its civility and its connection to many of the “old-fashioned” values necessary for both civility and these only recently-won Civil Rights to thrive. I fear we may have “thrown the baby out with the bathwater,” and will be unable to continue the necessary work of Civil Rights, tackle the pressing problems of today and tomorrow, or fulfill our roles as professionals in the practice of law.

Recently a famous actor was awarded a Tony Award for his stage performance. In receiving his award, in the presence of all those in attendance, the actor used crass vulgarity to describe our sitting President. Regardless of one's politics, it occurred to me when I was watching this that we really have lost our way in society. It used to be that using vulgarity (the F word no less) in public was shunned and discouraged by society – if not career threatening altogether. Now, however, such vulgarity is portrayed by some to be fashionable and “modern.” Only a few years ago, dishonoring the Office of the President – even if the President may himself behave inappropriately – with such vulgarity would have been considered to be completely out of the bounds of civil behavior and totally inappropriate. There is a reason why Congress stands and applauds when the President walks into the House of Representative's chamber during the State of the Union – it is out of respect for the Office, not necessarily the individual who holds it.

Now, in today's modern society, such behavior is considered “acceptable” as a form of political “resistance.” It as if the conviction of one's beliefs empowers an individual to express those beliefs in a manner proportionate to how strongly they are held. The reality, however, is often the opposite and, we owe it to ourselves and

our causes to express strongly held beliefs and criticisms in a manner in which they are likely to be listened to, and not just simply heard.

Ultimately, the referenced actor received an ovation for his very public display of vulgarity. To even criticize anyone who uses such terms is today considered by some to be provincial and out of step with the new “normal”: the new moral and civil normal of our depressingly “modern” society. Obviously, in the context of the article being written, the question arises – how does this social commentary apply to us lawyers?

Now, I would submit, more than ever, we lawyers need to embrace the time-honored tradition of Professionalism. Certainly, this requires competency, and scholarship. But, more importantly, if we are to embody these traditions today, I suggest we must also engage in a degree of professional introspection. Have we as a profession lost our way like so many in society seem to have done? Are we committed to excellence? Are we truly committed to pursuing justice? Must we adhere to the timeless standards of selflessness, service and even sacrificial devotion to cause regardless of the political conflicts omnipresent in society? Are we instead and as a profession more focused on the almighty dollar and accompanying narcissistic rewards? Should our professional ideals be subordinate to our desire for

economic, financial and social “success”? Are we honest enough to even admit that these are issues that must be critically examined by all lawyers in today’s progressive society?

I hope so, and I would submit that we as lawyers must hold ourselves to higher standards than the general public. We are on the front lines every day, called to ethically solve problems for our clients and, as best we can, achieve justice in the process. We are the infantry. In order that justice might be achieved in our progressive world, it has become imperative that we as a profession subordinate our own needs for the greater good of our clients and society. Money will come if we do it right, but we cannot focus solely on money. We must focus on what I refer to as “old-fashioned” ideals. Indeed, our own professional rules acknowledge that they alone cannot “exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules, [and that these] . . . [r]ules simply provide a framework for the ethical practice of law.” Bar Rule, Pt IV, Ch. 1, Scope § 14. If we are to let our “conscience” and “approbation of professional peers” guide us, Bar Rule, Pt IV, Ch. 1, Preamble § 14, what is to guide our consciences and those of our peers? Not only, therefore, must we be competent, prepared, honest and forthright, in our journey towards

professionalism we must rediscover virtues that many today call old-fashioned, out-of-step ideals: character, competency, virtue, integrity, steadfastness, loyalty, sacrifice, fidelity, and (dare I say it or is it too old-fashioned to even express: love for our fellow man?)

We as lawyers know that we will not always agree with our adversaries. However, it is important that we as lawyers always be courteous to our adversaries. We must agree to disagree in a civil way. At the heart of the Prussian enlightenment lay a belief in the transformative powers of conversation – civil conversation – and a deep-seated belief and practice in what Immanuel Kant termed the “cautious language of reason.” These individuals avoided vulgarity or “immoderate speech,” and they eschewed satirical or mocking remarks. They believed that if reason and progress were to blossom, civility was necessary to ensure that issues took prominence over individuals and their passions.¹ We can see these sentiments echoed in our current rules where despite our duty to diligently and “zealously assert” our client’s position, we are nonetheless encouraged not to engage in “offensive tactics” and to treat “persons involved in the legal process with courtesy and respect.” Bar Rule, Pt IV, Ch. 1, Preamble § 14; Bar Rule 1.3 cmt. 1.

¹ Christopher Clark, *Iron Kingdom: The Rise and Downfall of Prussia, 1600-1947*, pp. 247-52 (First Harvard University Press ed. 2008.)

As was so famously asked by Rodney King following the Los Angeles riots, years ago: “Why can’t we all just get along?” Why we cannot, I do not know; nevertheless, we must aim to do so. I submit that we lawyers must return to old-fashioned ideals in our dealings with our clients, with our adversaries and with society in general. Respectfully, in order to adhere to our duty to “remain[] an upright person” and to “help[] maintain the legal profession’s independence from government domination,” we have a professional duty to do so. Bar Rule, Pt IV, Ch. 1, Preamble §§ 8, 10.

The simple fact is that we are all brothers and sisters. We must learn to love each other, care for each other, be courteous to one another and as the Golden Rule states: “Do unto others as we would have done unto ourselves.” Respectfully, only in so doing will our quest for justice be achieved. We must return to our roots, otherwise we will fail in our duty as lawyers to ourselves, to our fellow bar members, and to society. We lawyers have a professional duty which we must fulfill. As members of the infantry and being on the frontline of dealing everyday with a plethora of societal and legal issues, we must pursue justice as professionals, and we must embody these time-honored, old-fashioned standards and principles for the

greater good of our civil society. In a very real sense, as professionals, I would submit we have a fiduciary duty to do so. We cannot forget that the failure of others to fulfill their duties does not excuse us from fulfilling ours. Indeed, it makes it all the more important that we do so.

I heard a colleague recently remark upon one of the older and more venerated law firms in our state. The remark was made that partners at this firm are no longer internally rewarded for community work or even for service within State or local bar organizations. After all, time devoted to State or local bar organizations is time away from billable hours! Given that the Bar encourages us to devote a certain amount of time each year to pro bono work, and seeks to remind us that “[e]very lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer,” this news was particularly discouraging. Bar Rule 6.1; Bar Rule 6.1 cmt. 1. Unfortunately, partners who devote time to serving their profession or communities, without pay, risk financial punishment in this “modern” yet venerated law firm because their “realization rates” are diminished by the lack of time they spend on billable hours.

Is this reported disregard for the ideals of our Profession not a siren call for all of us? Is this something that we can tolerate as a Profession? The salient question arises again: have we lost our way? Where is our sense of duty? Where are the leaders in the Bar and in our law firms? Is this who we are: businessmen only, focused on the bottom line and not on our duties as Professionals? Should we simply follow the trend lines of modern civil society? Here, I suggest we all consider the wisdom of the following well-known Bible verse: “For whosoever will save his life shall lose it; but whosoever shall lose his life ... shall save it. For what shall it profit a man, if he shall gain the whole world, and lose his own soul.” Matthew 16:26.

I will end this rant, polemic or epistle (however it is viewed) with two vignettes which hopefully will leave us all on a more positive note. Not long ago I represented a client, a small company, who impressed me with something that they did which I really thought was quite beautiful. They began their Board meetings with the Pledge of Allegiance to the United States of America. (Yes, everyone stood before the flag.) They also opened their meetings with a prayer, seeking guidance and wisdom in their business decisions. Is there something wrong with this? Is this too “old-fashioned” for the rest of us? I would submit these practices, rooted in “old-fashioned” notions are a great way to start any meeting when discussing important

business matters. And yes, we lawyers will not be harmed in honoring a higher power, our Country, and our fellow man, which includes our clients, each other, and especially adversaries with whom we may disagree. There must be civil discourse. And yes, there must be a renewed fidelity to the traditions of selfless service that make our Profession a noble and honorable one.

With respect to honoring each other, I will close this article with another vignette which is also emblematic of why it is that we can end this discussion on a positive note. Recently, I attended a calendar call in Bartow County. An established lawyer was seeking to admit a new lawyer in her office to the local Bar. The presiding Judge, in the presence of all the lawyers present for a very busy calendar call and motions calendar, then administered the oath and welcomed the new lawyer to the local Bar. Thereafter, without any prompting, all the members of the local Bar formed and stood in line and each and every lawyer present (and there were many) proceeded to shake the hand of the newly admitted lawyer and to welcome her to the Bar. It was wonderful and gratifying to see, and kudos to the Bartow County Bar for doing it! And perhaps this too was old-fashioned, but it nevertheless epitomized old-fashioned professionalism.

For all you trial lawyers, the next time you try a case and lose it, don't forget to shake your opponent's hand and congratulate them on their hard-won victory. Don't forget to remember who you are. You are graced to be in a profession where you may be of service to others. You are blessed to be able to assist clients with their problems. Do not squander this privilege. Instead, return to the old-fashioned values of honor, integrity, virtue, honesty and duty. Yes – to be professional we must practice our craft and develop competency – but being a true professional requires much more than scholarship or avoiding sophistry.

I simply suggest that it is not old-fashioned to be courteous. It is not old-fashioned to stop using vulgarity in public. It is not old-fashioned to show respect to our civic leaders regardless of how we feel about their individual political views. It is not “old-fashioned” to focus on selfless service without focusing on the almighty dollar. If we began showing respect to one another and indeed, loving and serving one another as we are called to do, perhaps the vignettes set forth herein may serve as an example for ourselves, our clients and society. This is our calling as lawyers and, I submit, a pre-requisite to being professional.

We as lawyers can and must do better than some of our more famous, “modern” friends. We must lead the way – out of the wilderness – back to this country’s and our profession’s time-honored roots of honor, respect, virtue, character, integrity, duty and patriotism. These are the principles that make our profession great and the standards of conduct our country desperately needs us to embody – now more than ever.

Can I even say it? I will: Amen!



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State Bar of Georgia

A Lawyer's Creed

To my clients, I offer faithfulness, competence, diligence, and good judgment. 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.



State Bar of Georgia

Aspirational Statements

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.

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.

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 toward 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 canceled appearance;

(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;
- (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. 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 the 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.

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AGENDA	PRESIDING:		BREAK		BREAKOUT SESSIONS	
	Michelle E. West , Director, Transition Into Law Practice Program State Bar of Georgia, Atlanta	10:55		2:45	ACTING FOR YOUR CLIENT (This breakout session is available for the Live and Video Conference locations.) Moderator: <i>Hon. Cassandra Kirk</i> , Chief Magistrate Judge, Fulton County Magistrate Court, Atlanta Panelists: <i>Donald R. "Dick" Donovan</i> , District Attorney, Paulding Judicial Circuit, Dallas <i>Nicholas A. "Nick" Lotito</i> , Davis Zipperman Kirschenbaum & Lotito LLP, Atlanta <i>Leah J. Zammitt</i> , Zammitt Law LLC, Woodstock	
	Jeffrey R. Davis , Executive Director, State Bar of Georgia, Atlanta	11:10	BREAKOUT SESSIONS			
7:30	REGISTRATION (All attendees must check in upon arrival. A removable jacket or sweater is recommended.)		DOCUMENT AND STRATEGY CONSIDERATIONS WHEN FILING A LAW SUIT (This breakout session is available for the Live and Video Conference locations.) Henry M. Quillian, III , Taylor English Duma LLP, Atlanta			
8:15	WELCOME TO THE STATE BAR OF GEORGIA Jeffrey R. Davis		CRIME, PUNISHMENT & IMPLICATIONS (This breakout session is available for the Live location only.) Robert D. James, Jr. , Morris Shim James Attorneys at Law, Atlanta Patricia A. McKenzie , Law Offices of Patricia A. McKenzie, Lawrenceville		HOW TO SUCCEED AS AN ASSOCIATE (This breakout session is available for the Live location only.) Moderator: <i>Carmen R. Toledo</i> , King & Spalding LLP, Atlanta Panelists: <i>Tracee R. Benzo</i> , Benzo Law LLC, Atlanta <i>Carol V. Clark</i> , The Law Offices of Carol V. Clark, LLC, Atlanta <i>Jeanine G. Garvie</i> , Attorney at Law, Atlanta <i>Joshua I. Bosin</i>	
8:30	WELCOME FROM STATE BAR OFFICERS AND BOARD OF GOVERNORS Hon. Kenneth B. Hodges, III , President, State Bar of Georgia, Judge, Court of Appeals of Georgia, Atlanta		MAKING YOUR MARK IN A TRANSACTIONAL PRACTICE (This breakout session is available for the Live location only.) Timothy W. Bratcher , Greenberg Traurig LLP, Atlanta			
8:45	GREETINGS FROM THE STATE BAR'S YOUNG LAWYERS DIVISION Hon. Rizza O'Connor , President, Young Lawyers Division, State Bar of Georgia; Judge, Toombs County Magistrate Court, Lyons	12:10	LUNCHEON WITH YLD AND LOCAL ATTORNEYS (Included in registration fee.)		ESQUASI - HOW NON-TRADITIONAL LEGAL CAREERS CAN WORK FOR YOU (This breakout session is available for the Live location only.) Moderator: <i>Cristen W. Dutcher</i> , Clinical Assistant Professor of Business Law, Coles College of Business, Kennesaw State University, Kennesaw Panelists: <i>Karyl A. Davis</i> , Manager of Internal Communications, Troutman Sanders LLP, Atlanta <i>Joann Y. Kang</i> , Team Lead for Health Systems and Data Visualization, Office on Smoking and Health, Centers for Disease Control and Prevention, Atlanta <i>John Trotti</i> , Senior Manager - Contracts, Iron Mountain Intellectual Property Management, Inc., Norcross	
9:00	LAUNCH YOUR CAREER WITH THE ASSISTANCE OF THE STATE BAR Michelle E. West • TILPP • CLE Opportunities • Pro Bono Training & Opportunities	1:10	GREETINGS FROM THE SUPREME COURT OF GEORGIA Hon. Harold D. Melton , Chief Justice, Supreme Court of Georgia, Atlanta			
9:20	NAVIGATING ISSUES OF SEXUAL HARASSMENT IN THE WORKPLACE Moderator: <i>Joshua I. Bosin</i> , Holland & Knight LLP, Atlanta Panelists: <i>Eleanor M. Attwood</i> , Legare Attwood & Wolfe LLC, Decatur <i>Raquel H. Crump</i> , McFadden Davis LLC, Atlanta <i>James E. Rollins, Jr.</i> , Schwartz Rollins LLC, Atlanta	1:30	HOW TO AVOID BAR COMPLAINTS & MALPRACTICE Moderator: <i>Paula J. Frederick</i> , General Counsel, State Bar of Georgia, Atlanta Panelists: <i>Jenny E. Jensen</i> , The Jensen Firm, Duluth <i>Christine L. Mast</i> , Hawkins Parnell & Young LLP, Atlanta <i>R. Gary Spencer</i> , R. Gary Spencer, P.C., Atlanta			
10:10	MONEY MATTERS Moderator: <i>Joy Gorney</i> , JAG Financial, Inc., Alpharetta Panelists: <i>Niv Persaud</i> , Transition Planning & Guidance, LLC, Atlanta <i>Moise Piam</i> , The Piedmont Group of Atlanta, LLC, Atlanta	2:30	BREAK	3:45	ADJOURN	



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State Bar of Georgia

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State Bar of Georgia

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FAQ/Judicial District Professionalism Program [-] Hide All Answers

1. How does JDPP relate to the Office of General Counsel or the Judicial Qualifications Commission?

Answer:

The Program operates independently from the disciplinary systems presently in place with the Office of General Counsel and the Judicial Qualifications Commission. The JDPP is informal, private and voluntary rather than formal and mandatory, and it does not address violations of the Rules of Professional Conduct or violations of the Code of Judicial Conduct.

2. How is JDPP authorized?

Answer:

The Program was submitted to and approved by the Executive Committee and Board of Governors of the State Bar of Georgia and ultimately by the Georgia Supreme Court by Order dated February 24, 2000. The Supreme Court adopted Rules governing the operation of the Program which are found at Part XIII of the Rules and Regulations for the Organization and Regulation of the State Bar of Georgia ("Bar Rules"). At the same time, the Supreme

Court approved Internal Operating Procedures for the administration of the Program and granted the Bench and Bar Committee of the State Bar authority to adopt additional Operating Procedures not inconsistent with the Rules.

3. What do Judicial District Professionalism Committees do?

Answer:

The JDPCs promote traditions of civility and professionalism through increased communication, education, and the informal use of local peer influence to alter unprofessional conduct on a voluntary basis. A JDPC may choose to serve the following functions:

- * Mentoring - providing guidance in "best practices" for lawyers and judges
- * Mechanism for privately receiving and attempting to resolve inquiries and requests for assistance from lawyers and judges on an informal basis. In this regard, JDPP addresses disputes between lawyers and lawyers and disputes between lawyers and judges.
- * Initiator of other creative programs developed and implemented by each committee for the particular Judicial District.

4. What does JDPP not handle?

Answer:

- * Lawyer/client disputes. Inquiries by clients or other members of the public are handled by the Consumer Assistance Program or other appropriate State Bar programs.
- * Fee disputes. These can be handled by the Fee Arbitration Program of the State Bar.
- * Employment matters. Example: Allegation that managing attorney sexually harasses associates and support staff.
- * Lawyer/vendor disputes. Example: Court reporter alleges that lawyer has not paid bill.
- * Disciplinary matters. Example: Lawyer receives trust account check from opposing counsel; check bounces.

5. What is considered an "inquiry" for purposes of the JDPP?

Answer:

Inquiry means any inquiry or concern expressed about unprofessional conduct as outlined in the Bar Rules or Internal Operating Procedures for the JDPP, but does not include any disciplinary charge, ethics violation, criminal conduct, or any other matter which falls under the provisions of Part IV (Discipline) of the Bar Rules or the Code of Judicial Conduct. For purposes of the JDPP, the party making the inquiry or expressing the concern is called the inquiring party. The party about whom the inquiry or concern is expressed is called the responding party.

6. What is the Judicial District Professionalism Program (JDPP)?

Answer:

What is the Judicial District Professionalism Program (JDPP)?

JDPP is an informal, private, and voluntary program developed by the Bench and Bar Committee of the State Bar to improve the profession and bolster public confidence in the judicial system.

The goal of the JDPP is to promote professionalism through increased communication, education, and the informal use of local peer influence to open channels of communication on a voluntary basis. While no judge or lawyer is required to cooperate or counsel with the JDPP, the Program is intended as a source of support for all Georgia judges and lawyers in maintaining and enhancing the professionalism of the legal system.

7. What is the procedure for a JDPC inquiry?

Answer:

Step 1: Concern or inquiry is reported to:

- * State Bar Executive Director Jeff Davis, or any member of the Board of Governors or

- * State Bar Consumer Assistance Program (CAP) intake staff lawyer; (404) 527-8759 or (800) 334-6865.

Step 2: Person receiving inquiry and information:

- * Routes inquiry to CAP for preparation of JDPP Inquiry Data Form.

- * May call the local JDPC Chair of the Judicial District where the responding judge/lawyer maintains his or her principal office.

Step 3: CAP intake staff will:

- * Assign JDPP inquiry number.
- * Gather Inquiry Data Form information. Note: In the interest of privacy, this form does not contain the name of any person about whom an inquiry or concern has been expressed (responding party).
- * Place phone call to local JDPC Chair to provide name of responding party.
- * Forward JDPP Inquiry Data Form to local JDPC Chair.

Step 4: Local JDPC Chair will:

- * Refer inquiry to local sub-committee of JDPC for handling; or
- * Call a meeting to discuss appropriate action based upon nature of inquiry.

Step 5: Local JDPC or sub-committee of JDPC will determine whether:

- * Inquiry merits study or intervention.
- * Judicial Advisor should be consulted, depending upon nature of the inquiry.

* Inquiry needs to be referred to Lawyer Assistance, Law Practice Management, or other State Bar program.

Step 6: If local JDPC determines further study or intervention is warranted, a meeting with the responding lawyer/judge will be scheduled, or sub-committee members and/or Judicial Advisors will be designated to handle.

Step 7: If local JDPC determines no further study or intervention is warranted, inquiry will not be pursued further.

Step 8: After resolution of inquiry, JDPP Inquiry Data Form will be completed showing how inquiry was handled and then returned to Consumer Assistance Program. This form does not contain the name of any person about whom an inquiry or concern has been expressed.

8. What is the structure of the JDPP?

Answer:

The JDPP is the name of the overall program which is comprised of committees of Board of Governors members from each of Georgia's ten Judicial Districts. These committees are called Judicial District Professionalism Committees. Each Judicial District Professionalism Committee (JDPC) consists of the current members of the Board of Governors of the State Bar of Georgia

from the particular Judicial District. The JDPC members for each of the Judicial Districts select one or more Judicial Advisors within each district. The longest serving member on the Board of Governors serves as the Chair for that District.

9. What kinds of issues does JDPP handle?

Answer:

Inquiries from only lawyers or judges are referred to JDPP. JDPP committees may address the following patterns of conduct:

Unprofessional Judicial Conduct:

- * Incivility, bias or conduct unbecoming a judge
- * Lack of appropriate respect or deference
- * Failure to adhere to Uniform Superior Court Rules
- * Excessive delay
- * Consistent lack of preparation
- * Other conduct deemed professionally inappropriate by each JDPP with the advice of the Judicial Advisors

Unprofessional Lawyer Conduct:

- * Lack of appropriate respect or deference
- * Abusive discovery practices
- * Incivility, bias or conduct unbecoming a lawyer
- * Consistent lack of preparation

- * Communication problems
- * Deficient practice skills
- * Other conduct deemed professionally inappropriate by each
Judicial District Professionalism Committee

Inquiries or requests for assistance relating to conduct in pending litigation or ongoing transactional matters are generally better left to the judicial process or the negotiations of the parties.

Consequently, any JDPP response to such requests should generally be delayed to the conclusion of the matter.

IS PROFESSIONALISM AN OLD-FASHIONED IDEAL?

**BY:
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IS PROFESSIONALISM AN OLD-FASHIONED IDEAL?

At times it seems like we as a profession have lost our way. Similarly, as a country, it sometimes seems we have collectively lost our way. Values such as character, civility, virtue, honesty, integrity, and patriotism are increasingly being called into question as archaic or “old-fashioned” ideals – and, as such, are no longer in vogue or sufficiently “modern”. The “modern” mentality seems to be that we no longer need to rely on these ideals. In today’s “modern” society, we are encouraged to believe that everything is open to a secular humanistic interpretation regardless of what the issue may be. Indeed, moral relativism, writ large, occupies the public domain.

Is there good and evil? Is there right and wrong? Such concepts no longer matter according to some, rather we simply need to look at each situation and apply our own relative ideals in addressing them. The problem with this mentality, however, is that such logic when applied in actual life simply does not work. There is good and evil in the world. There are absolutes. There is right and wrong. And there are principals and standards – freedom, ethics, love and social responsibility – by which we, as a society, and particularly as professionals, should live by. Character, civility, integrity, honor, virtue, selflessness, sacrifice, service: these are

terms that must be embodied by our profession. (May I include kindness, morality and manners as well?) If not, we will continue to be lost in the wilderness which permeates the moral relativism of the new information “modern” age.

To be clear, much has been achieved in today’s world. We are a more prosperous and egalitarian society and have achieved a collective standard of living unparalleled in human history. Groups, long disadvantaged and discriminated against, now, have more opportunity than ever before to share in this prosperity, and Civil Rights, once denied, are available to more than ever before. This is not to say our society currently rests in a cradle of perfected equality and opportunity; rather, it is to acknowledge how far we have come together as Group. But in enjoying these rightly won Civil Rights, I fear our society is, nonetheless, increasingly losing its civility and its connection to many of the “old-fashioned” values necessary for both civility and these only recently-won Civil Rights to thrive. I fear we may have “thrown the baby out with the bathwater,” and will be unable to continue the necessary work of Civil Rights, tackle the pressing problems of today and tomorrow, or fulfill our roles as professionals in the practice of law.

Recently a famous actor was awarded a Tony Award for his stage performance. In receiving his award, in the presence of all those in attendance, the actor used crass vulgarity to describe our sitting President. Regardless of one's politics, it occurred to me when I was watching this that we really have lost our way in society. It used to be that using vulgarity (the F word no less) in public was shunned and discouraged by society – if not career threatening altogether. Now, however, such vulgarity is portrayed by some to be fashionable and “modern.” Only a few years ago, dishonoring the Office of the President – even if the President may himself behave inappropriately – with such vulgarity would have been considered to be completely out of the bounds of civil behavior and totally inappropriate. There is a reason why Congress stands and applauds when the President walks into the House of Representative's chamber during the State of the Union – it is out of respect for the Office, not necessarily the individual who holds it.

Now, in today's modern society, such behavior is considered “acceptable” as a form of political “resistance.” It as if the conviction of one's beliefs empowers an individual to express those beliefs in a manner proportionate to how strongly they are held. The reality, however, is often the opposite and, we owe it to ourselves and

our causes to express strongly held beliefs and criticisms in a manner in which they are likely to be listened to, and not just simply heard.

Ultimately, the referenced actor received an ovation for his very public display of vulgarity. To even criticize anyone who uses such terms is today considered by some to be provincial and out of step with the new “normal”: the new moral and civil normal of our depressingly “modern” society. Obviously, in the context of the article being written, the question arises – how does this social commentary apply to us lawyers?

Now, I would submit, more than ever, we lawyers need to embrace the time-honored tradition of Professionalism. Certainly, this requires competency, and scholarship. But, more importantly, if we are to embody these traditions today, I suggest we must also engage in a degree of professional introspection. Have we as a profession lost our way like so many in society seem to have done? Are we committed to excellence? Are we truly committed to pursuing justice? Must we adhere to the timeless standards of selflessness, service and even sacrificial devotion to cause regardless of the political conflicts omnipresent in society? Are we instead and as a profession more focused on the almighty dollar and accompanying narcissistic rewards? Should our professional ideals be subordinate to our desire for

economic, financial and social “success”? Are we honest enough to even admit that these are issues that must be critically examined by all lawyers in today’s progressive society?

I hope so, and I would submit that we as lawyers must hold ourselves to higher standards than the general public. We are on the front lines every day, called to ethically solve problems for our clients and, as best we can, achieve justice in the process. We are the infantry. In order that justice might be achieved in our progressive world, it has become imperative that we as a profession subordinate our own needs for the greater good of our clients and society. Money will come if we do it right, but we cannot focus solely on money. We must focus on what I refer to as “old-fashioned” ideals. Indeed, our own professional rules acknowledge that they alone cannot “exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules, [and that these] . . . [r]ules simply provide a framework for the ethical practice of law.” Bar Rule, Pt IV, Ch. 1, Scope § 14. If we are to let our “conscience” and “approbation of professional peers” guide us, Bar Rule, Pt IV, Ch. 1, Preamble § 14, what is to guide our consciences and those of our peers? Not only, therefore, must we be competent, prepared, honest and forthright, in our journey towards

professionalism we must rediscover virtues that many today call old-fashioned, out-of-step ideals: character, competency, virtue, integrity, steadfastness, loyalty, sacrifice, fidelity, and (dare I say it or is it too old-fashioned to even express: love for our fellow man?)

We as lawyers know that we will not always agree with our adversaries. However, it is important that we as lawyers always be courteous to our adversaries. We must agree to disagree in a civil way. At the heart of the Prussian enlightenment lay a belief in the transformative powers of conversation – civil conversation – and a deep-seated belief and practice in what Immanuel Kant termed the “cautious language of reason.” These individuals avoided vulgarity or “immoderate speech,” and they eschewed satirical or mocking remarks. They believed that if reason and progress were to blossom, civility was necessary to ensure that issues took prominence over individuals and their passions.¹ We can see these sentiments echoed in our current rules where despite our duty to diligently and “zealously assert” our client’s position, we are nonetheless encouraged not to engage in “offensive tactics” and to treat “persons involved in the legal process with courtesy and respect.” Bar Rule, Pt IV, Ch. 1, Preamble § 14; Bar Rule 1.3 cmt. 1.

¹ Christopher Clark, *Iron Kingdom: The Rise and Downfall of Prussia, 1600-1947*, pp. 247-52 (First Harvard University Press ed. 2008.)

As was so famously asked by Rodney King following the Los Angeles riots, years ago: “Why can’t we all just get along?” Why we cannot, I do not know; nevertheless, we must aim to do so. I submit that we lawyers must return to old-fashioned ideals in our dealings with our clients, with our adversaries and with society in general. Respectfully, in order to adhere to our duty to “remain[] an upright person” and to “help[] maintain the legal profession’s independence from government domination,” we have a professional duty to do so. Bar Rule, Pt IV, Ch. 1, Preamble §§ 8, 10.

The simple fact is that we are all brothers and sisters. We must learn to love each other, care for each other, be courteous to one another and as the Golden Rule states: “Do unto others as we would have done unto ourselves.” Respectfully, only in so doing will our quest for justice be achieved. We must return to our roots, otherwise we will fail in our duty as lawyers to ourselves, to our fellow bar members, and to society. We lawyers have a professional duty which we must fulfill. As members of the infantry and being on the frontline of dealing everyday with a plethora of societal and legal issues, we must pursue justice as professionals, and we must embody these time-honored, old-fashioned standards and principles for the

greater good of our civil society. In a very real sense, as professionals, I would submit we have a fiduciary duty to do so. We cannot forget that the failure of others to fulfill their duties does not excuse us from fulfilling ours. Indeed, it makes it all the more important that we do so.

I heard a colleague recently remark upon one of the older and more venerated law firms in our state. The remark was made that partners at this firm are no longer internally rewarded for community work or even for service within State or local bar organizations. After all, time devoted to State or local bar organizations is time away from billable hours! Given that the Bar encourages us to devote a certain amount of time each year to pro bono work, and seeks to reminds us that “[e]very lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer,” this news was particularly discouraging. Bar Rule 6.1; Bar Rule 6.1 cmt. 1. Unfortunately, partners who devote time to serving their profession or communities, without pay, risk financial punishment in this “modern” yet venerated law firm because their “realization rates” are diminished by the lack of time they spend on billable hours.

Is this reported disregard for the ideals of our Profession not a siren call for all of us? Is this something that we can tolerate as a Profession? The salient question arises again: have we lost our way? Where is our sense of duty? Where are the leaders in the Bar and in our law firms? Is this who we are: businessmen only, focused on the bottom line and not on our duties as Professionals? Should we simply follow the trend lines of modern civil society? Here, I suggest we all consider the wisdom of the following well-known Bible verse: “For whosoever will save his life shall lose it; but whosoever shall lose his life ... shall save it. For what shall it profit a man, if he shall gain the whole world, and lose his own soul.” Matthew 16:26.

I will end this rant, polemic or epistle (however it is viewed) with two vignettes which hopefully will leave us all on a more positive note. Not long ago I represented a client, a small company, who impressed me with something that they did which I really thought was quite beautiful. They began their Board meetings with the Pledge of Allegiance to the United States of America. (Yes, everyone stood before the flag.) They also opened their meetings with a prayer, seeking guidance and wisdom in their business decisions. Is there something wrong with this? Is this too “old-fashioned” for the rest of us? I would submit these practices, rooted in “old-fashioned” notions are a great way to start any meeting when discussing important

business matters. And yes, we lawyers will not be harmed in honoring a higher power, our Country, and our fellow man, which includes our clients, each other, and especially adversaries with whom we may disagree. There must be civil discourse. And yes, there must be a renewed fidelity to the traditions of selfless service that make our Profession a noble and honorable one.

With respect to honoring each other, I will close this article with another vignette which is also emblematic of why it is that we can end this discussion on a positive note. Recently, I attended a calendar call in Bartow County. An established lawyer was seeking to admit a new lawyer in her office to the local Bar. The presiding Judge, in the presence of all the lawyers present for a very busy calendar call and motions calendar, then administered the oath and welcomed the new lawyer to the local Bar. Thereafter, without any prompting, all the members of the local Bar formed and stood in line and each and every lawyer present (and there were many) proceeded to shake the hand of the newly admitted lawyer and to welcome her to the Bar. It was wonderful and gratifying to see, and kudos to the Bartow County Bar for doing it! And perhaps this too was old-fashioned, but it nevertheless epitomized old-fashioned professionalism.

For all you trial lawyers, the next time you try a case and lose it, don't forget to shake your opponent's hand and congratulate them on their hard-won victory. Don't forget to remember who you are. You are graced to be in a profession where you may be of service to others. You are blessed to be able to assist clients with their problems. Do not squander this privilege. Instead, return to the old-fashioned values of honor, integrity, virtue, honesty and duty. Yes – to be professional we must practice our craft and develop competency – but being a true professional requires much more than scholarship or avoiding sophistry.

I simply suggest that it is not old-fashioned to be courteous. It is not old-fashioned to stop using vulgarity in public. It is not old-fashioned to show respect to our civic leaders regardless of how we feel about their individual political views. It is not “old-fashioned” to focus on selfless service without focusing on the almighty dollar. If we began showing respect to one another and indeed, loving and serving one another as we are called to do, perhaps the vignettes set forth herein may serve as an example for ourselves, our clients and society. This is our calling as lawyers and, I submit, a pre-requisite to being professional.

We as lawyers can and must do better than some of our more famous, “modern” friends. We must lead the way – out of the wilderness – back to this country’s and our profession’s time-honored roots of honor, respect, virtue, character, integrity, duty and patriotism. These are the principles that make our profession great and the standards of conduct our country desperately needs us to embody – now more than ever.

Can I even say it? I will: Amen!



State Bar of Georgia

RULE 1.1 COMPETENCE

A lawyer shall provide competent representation to a client. Competent representation as used in this rule means that a lawyer shall not handle a matter which the lawyer knows or should know to be beyond the lawyer's level of competence without associating another lawyer who the original lawyer reasonably believes to be competent to handle the matter in question. Competence requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

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

Comment

Legal Knowledge and Skill

[1A] The purpose of these rules is not to give rise to a cause of action nor to create a presumption that a legal duty has been breached. These rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability.

[1B] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person subject to Rule 6.2: Accepting Appointments.

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake;

major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.

Maintaining Competence

[6] To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education.

Richard Hendrix

To: Richard Hendrix
Subject: FW: Georgia and ABA Resources
Attachments: 2019 Solo and Small Firm Institute Agenda.pdf; Beginning Lawyers Program Agenda.pdf; Georgia's 2019 Solo and Small Firm Institute and Technology Sho.pdf; Law Office Start Up Resources.pdf; Solo and Small Firm Resources.pdf; Judicial District Professionalism Program.pdf

Attached are a few Georgia resources. I only included links to the ABA resources

Law Office Start Up Resources – Attached

<https://www.gabar.org/committeesprogramssections/programs/lpm/Start-Up-Resources.cfm>

→ Referenced links on webpage (only viewable to GA Bar members) – attached
<https://www.gabar.org/committeesprogramssections/programs/lpm/soloportal.cfm>

Georgia's Solo & Small Firm Institute – Attached

<https://www.gabarsolo.org/>

→ 2019 Solo and Small Firm Institute Agenda – Attached
<https://www.gabarsolo.org/agenda.html>

Beginning Lawyer's Program, available on replay via webcast – Attached

[https://www.gabar.org/customcf/cle/uploadedPDFs/10147_beginningLawyers0219\[1\].pdf](https://www.gabar.org/customcf/cle/uploadedPDFs/10147_beginningLawyers0219[1].pdf)

Judicial District Professionalism Program [FAQ] – Attached

<https://www.gabar.org/aboutthebar/faq/faqs.cfm?filter=Judicial%20District%20Professionalism%20Program#>

ABA CLE – A Day in the Life of a Small Firm Lawyer: Potential Ethics Traps for the Unwary (On-Demand CLE)

<https://www.americanbar.org/events-cle/ecd/ondemand/347023878/>

ABA CLE – Common Mistakes 101: Avoiding Legal Malpractice (On-Demand CLE)

<https://www.americanbar.org/events-cle/ecd/ondemand/334331864/>

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State Bar of Georgia

(/index.cfm)

Solo & Small Firm Resources

Discussion Board

Log in here (<https://groups.google.com/forum/#!forum/gasolosmallattys>) to participate in discussions with other Georgia solo and small firm lawyers. We're currently talking about the Bar's Insurance Broker, online marketing, website design and more!

Video Resources

Below are links to videos of each session of the "Start Up Conference - Chicago Bar CLE" featuring Jim Calloway, Natalie Kelly, Catherine Sanders Reach and Reid Trautz from Oklahoma Bar Association, State Bar of Georgia, Chicago Bar Association and American Immigration Lawyers Association respectively. NOTE: THESE VIDEOS ARE BEING OFFERED AS A MEMBER BENEFIT. NO CLE CREDIT HAS BEEN APPROVED FOR VIEWING THESE VIDEOS.

Starting a Practice

Budgeting and Finance

Building a Client Base

Web and Social Media

Money Talks

Managing the Matter

Pandora's Box

Georgia's Solo & Small Firm Groups and Sections

State Bar of Georgia - Young Lawyers Division Solo and Small Firm Committee

Atlanta Bar Association - Sole Practitioner/Small Firm Section

Cobb County Bar Association - Solo and Small Firm Section

Georgia Association of Black Women Attorneys - Solo and Small Firm Section

Georgia Association for Women Lawyers - Solo/Small Firm Practitioner Affinity Group

To have your Georgia-based solo or small firm group or section added to our list of entities, please contact the State Bar's Law Practice Management Program at solosmall@gabar.org (<mailto:solosmall@gabar.org>).

**NURSING HOME
LITIGATION SPOTLIGHT:
SEXUAL ASSAULT CASES &
BEDSORE CASES**

[*<< Back to Table of Contents*](#)

**NURSING HOME LITIGATION
CASE SPOTLIGHT:
The Sexual Assault Case &
The Bedsore Case**

**Katherine “Kate” Hughes &
Gretchen Wagner**



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THE SEXUAL ASSAULT CASE

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SEXUAL ASSAULT IN A NURSING HOME

“Nurse Charged With Sexual Assault After Woman in Incapacitated State Gave Birth”

“Police have charged a male nurse with sexual assault and abuse of a vulnerable adult less than a month after a woman in an incapacitated state unexpectedly gave birth at a health-care facility in Phoenix.” Wootson, Jr., Cleve & Brice-Sadler, Michael. “Nurse Charged With Sexual Assault After Woman in Incapacitated State Gave Birth.” *The Washington Post*, 23 January 2019.

“Sick, Dying and Raped in America’s Nursing Homes”

"You prepare for a phone call your mother has passed. You don't prepare for a phone call that your mother has been RAPED." Ellis, Blake & Hicken, Melanie. “Sick, Dying and Raped in America’s Nursing Homes.” *CNN Investigations*, 22 February 2017.

* * *

After a story broke earlier in 2019 detailing how an incapacitated nursing home resident was found pregnant and gave birth to a baby, there has been an increasing awareness of sexual abuse and assault in nursing homes. Many families, nursing home staff, law enforcement and regulatory agencies have been in sheer disbelief that this type of phenomenon is happening to elderly and sometimes weak or ill nursing home residents. Nursing home residents are some of the most vulnerable victims of sexual attack because many of them have dementia, Alzheimer’s or other confusion or memory loss in addition to being weak and unable to fight off their attackers.

Sexual abuse, assault or battery can involve anything from unwanted touching, exposure or other non-consensual sexual activity. Sexual abuse against a nursing home resident can be committed by nursing home staff, such as nurses, caretakers, maintenance personnel, kitchen staff or anyone who works at the facility. The most common perpetrators of sexual assault are the caretakers (usually Certified Nurse Aides or “CNAs”) entrusted to care for the residents since they are the ones in daily intimate contact with the residents, many times alone, when performing Activities of Daily Living (“ADLs”) such as changing their clothing or bathing them. Sexual assault can also be committed by other residents. Sometimes the resident perpetrators have mental or behavioral disorders such as dementia, aggression or confusion, leading to the assault, while other times it is more-clear minded and intentional. Sexual assaults can also be committed by individuals from outside the facility, such as visitors and outside vendors, but this can lead to a different type of scenario more akin to premises liability.

The atrocity of the sexual abuse itself is compounded when nursing homes do not believe the resident when they claim they have been assaulted and dismiss their allegations as confusion or memory loss. In that instance, cases or employees are not reported, necessary evidence is not collected and the perpetrator is permitted to continue to remain in contact with the victim and other residents, creating a risk that the perpetrator will commit other violations. Nursing homes

have, in some cases, taken the defensive position that they cannot prevent residents from engaging in consensual sexual activity.

In order to protect nursing home residents from potential abuse, nursing homes are required to follow certain federal and state regulations to screen prospective employees. Nursing homes must also assess incoming residents to determine if they can be adequately cared for in a manner safe to them and other residents. If a prospective resident has certain criminal history or displays other behaviors that should alert the nursing home that the prospective resident may pose a risk to other residents, staff and visitors, the nursing home must either not accept the resident into the facility or, if it does, have a plan in place for protecting others from the resident. If it becomes evident that the plan will not protect others from harm, the nursing home should discharge the resident out of the facility.

I. Forms of Sexual Abuse, Battery & Assault

- Inappropriate nudity of the victim
- Inappropriate nudity of the perpetrator (exposing genitals, etc.)
- Non-consensual inappropriate touching
- Rape (vaginal)
- Rape (anal)
- Forcible oral sex

II. Signs of Sexual Assault & Sexual Abuse

A large problem, and one some perpetrators may be counting on, is that many nursing home residents are too confused to report that they have been sexually assaulted or are non-communicative and unable to report the attack. The victim may also be scared that they will be in trouble if they report the abuse or that it will result in additional abuse. This requires nursing homes and resident's families to be extra vigilant in watching and interpreting possible signs of abuse.

Physical signs of abuse to look for:

- Sexually transmitted disease;
- Resident holding their genital area as if in pain;
- Bruising to the genitals, thighs and other unexplained bruising;
- Unusual vaginal bleeding
- Bleeding from the anus
- Vaginal pain
- Anal pain
- Torn clothing
- Soiled sheets or undergarments

Behavioral signs of abuse to look for:

- Resident not wanting anyone to touch them
- Flinching when someone comes near the resident
- Resident acting afraid when others come near them
- Change in resident behavior such as increased agitation
- Change in eating or sleeping patterns
- Crying

III. Consent

Due to resident's rights and other restrictions upon placing limitations upon a resident's freedoms, nursing home residents must have the right to engage in consensual sex. However, this is a very difficult issue since many nursing home residents do not have the capacity to consent. Some nursing homes have reported widespread sexual activity amongst the nursing home residents and an inability to keep this later in life sexual activity under control. Consent cannot be a catch all excuse for any and all resident sexual activity, even if it appears to be consensual on the surface. If a resident is having sexual relations and it is determined that the resident does not have the capacity to consent due to their level of cognition, the facility could be held liable for failing to protect the resident from abuse. A nursing home cannot simply take the position that "it is consensual and we can't do anything to prevent it".

IV. Employee versus Resident Sexual Abuse

The term "nursing home" is used to describe several different types of long-term care facilities, including skilled nursing facilities, assisted living facilities, personal care homes and other different types of rehab and long-term acute care facilities. Each type of facility has its own regulations and requirements for employee background checks and other requirements regarding hiring and retention of employees. This article focuses mainly on skilled nursing facilities, but the general premises remain the same or similar for other types of facilities and hospitals.

A skilled nursing facility funded by Medicare or Medicaid cannot employ anyone who has been "found guilty of abuse, neglect, exploitation, misappropriation of property, or mistreatment by a court of law," "had a finding entered into the state nurse aide registry concerning abuse, neglect, exploitation, mistreatment of residents or misappropriation of their property" or "[h]ave a disciplinary action in effect against his or her professional license by a state licensure body as a result of a finding of abuse, neglect, exploitation, mistreatment of residents or misappropriation of resident property" 42 CFR §483.12 A facility also may not employ individuals with a "conviction" or "prior employment history" of child or client abuse, neglect or mistreatment. 42 CFR §483.420

A report was published in 2011 by the Department of Health and Human Resources Office of the Inspector General ("OIG") detailing its investigation into how many long-term care facilities employed individuals with criminal convictions. Office of the Inspector General (2011) *Nursing Facilities' Employment of Individuals With Criminal Convictions* (OEI-07-09-00110).

Table 3: Percentage of Nursing Facilities That Employed Various Percentages of Employees With Criminal Convictions

Percentage of Employees With Criminal Convictions	Percentage of Nursing Facilities
None	7.7%
Up to 5.0%	51.8%
Greater than 5.0% to 10.0%	26.0%
Greater than 10.0% to 15.0%	6.3%
Greater than 15.0% to 20.0%	5.7%
Greater than 20.0% to 25.0%	2.5%
Total	100.0%

Source: OIG analysis of FBI criminal history records and nursing facility employee data, 2009.

Over 90% of long-term care facilities employed one or more employees with one or more criminal convictions. Almost all of the convictions discovered were dated before the employee was hired at the long-term care facility. In response to these findings, the OIG made a recommendation to CMS to implement a more unified system of performing background checks for employees providing direct access care to patients in long-term care facilities.

Federal Requirements

Federal law does not specifically require that long term care facilities check state or Federal Bureau of Investigation (FBI) criminal history records to screen potential employees to determine if they would be ineligible to work in a long-term care facility under 42 CFR §483.12. In 2010, the Patient Protection and Affordable Care Act (“PPACA” or “ACA”) established the Nationwide Background Check Program (“NBCP”). The NBCP is a voluntary program, which provides grants to states to implement comprehensive national background check programs for direct patient access employees in long-term care facilities and other similar providers. Under the NBCP, employees who provide direct patient care undergo fingerprint state checks, FBI background checks, and state abuse and neglect registries checks. Georgia was awarded funding by CMS under the NBCP in 2012.

State Requirements

State requirements for background checks differ from state to state. Georgia currently only requires long-term care employees to undergo a name-based state background check, however Georgia recently enacted the “Georgia Long-term Care Background Check Program” which will go into effect October 1, 2019 requiring comprehensive background checks for Georgia facilities. O.C.G.A. § 31-7-350, et seq. This new law will require applicants for employment at a facility to consent to a finger-print national and state background check that includes state criminal, nurse aide registry, professional licensing boards, state sexual offender registry, and the FBI database.

A facility listed under the Georgia Long-term Care Background Check Program may not employ someone for direct patient access under any of the following circumstances:

- Appears on a registry check;
- Finding of neglect, abuse, or misappropriation of property by a state or federal agency;
- Professional license not in good standing; or
- “Unsatisfactory determination” by the Department of Community Health.

O.C.G.A. § 31-7-354

If a facility employs such an individual, DCH would impose civil penalties and fines against the facility. Similarly, an owner of facility who appears on a registry check, or whose background check results are found by the Department of Community Health to be “unsatisfactory” may not operate a facility.

The Georgia Long-term Care Background Check Program will require facility owners and employees who routinely have “Direct Access” to be screened.

"Employee" means any individual who has direct access and who is hired by a facility through employment, or through a contract with such facility, including, but not limited to, housekeepers, maintenance personnel, dieticians, and any volunteer who has duties that are equivalent to the duties of an employee providing such services. Such term shall not include an individual who contracts with the facility, whether personally or through a company, to provide utility, construction, communications, accounting, quality assurance, human resource management, information technology, legal, or other services if the contracted services are not directly related to providing services to a patient, resident, or client of the facility. Such term shall not include any health care provider, including, but not limited to, physicians, dentists, nurses, and pharmacists who are licensed by the Georgia Composite Medical Board, the Georgia Board of Dentistry, the Georgia Board of Nursing, or the State Board of Pharmacy. O.C.G.A. § 31-7-351(7)

"Direct access" means having, or expecting to have, duties that involve routine personal contact with a patient, resident, or client, including face-to-face contact, hands-on physical assistance, verbal cuing, reminding, standing by or monitoring or activities that require the person to be routinely alone with the patient's, resident's, or client's property or access to such property or financial information such as the patient's, resident's, or client's checkbook, debit and credit cards, resident trust funds, banking records, stock accounts, or brokerage accounts. O.C.G.A. § 31-7-351(6)

The Georgia Long-term Care Background Check Program applies to all of the facilities listed below:

"Facility" means:

- (A) A personal care home required to be licensed or permitted under Code Section 31-7-12;
- (B) An assisted living community required to be licensed under Code Section 31-7-12.2;
- (C) A private home care provider required to be licensed under Article 13 of this chapter;
- (D) A home health agency as licensed pursuant to Code Section 31-7-151;
- (E) A provider of hospice care as licensed pursuant to Code Section 31-7-173;
- (F) A nursing home, skilled nursing facility, or intermediate care home licensed pursuant to rules of the department; or
- (G) An adult day care facility licensed pursuant to rules of the department.

O.C.G.A. § 31-7-351(8)

Respondeat Superior

There are numerous ways in which a nursing home would be responsible for sexual abuse committed by its employees. Under some circumstances, the nursing home may try to argue that the employee was not acting within the course and scope of their employment when committing the abuse and that it could not foresee that one of its employees would commit a criminal act and therefore would not be responsible for their actions. However, claims of negligent hiring, retention and training negate these arguments.

- **Negligent Hiring:** If a nursing home hires someone with a prohibited background by state or federal law, or otherwise has knowledge that the employee could be a danger to the residents, there would be a claim for negligent hiring.
- **Negligent Retention:** Once an employer is placed on notice that the employee is a potential threat to the residents and the nursing home continues to employ the employee, it would be liable for negligent retention. For example, in cases where the nursing home does not believe a resident's allegations against a particular employee and fails to investigate the incident or monitor the employee and the employee assaults other residents, the nursing home would be liable for negligent retention.
- **Negligent Training:** There are also instances where the employee who has abused a resident has not been properly trained by the facility.

There are also other circumstances where a nursing home can be held liable for the criminal conduct of its employees. Depending upon the circumstances, if the abuse is closely tied in with the provision of care or as a means of keeping the resident in line, it can be considered professional negligence and still fall under *respondeat superior*. Failing to keep reasonable oversight over the employees can also expose a nursing home to vicarious liability for the acts of its employees. If the nursing home placed its residents at risk by giving its employees significant

power or control over vulnerable residents and by regularly placing those employees in intimate and personal contact with the residents in an unsupervised and unchecked manner, it is possible the nursing home will be vicariously liable. Holding an employer liable for the actions of its employees in those cases incentivizes appropriate precautions to be made by the employer.

V. Resident Versus Resident Sexual Abuse

Under federal regulations, nursing homes that participate in the Medicare program must be in “substantial compliance” with the requirements for long-term care facilities set forth under the Code of Federal Regulations. 42 CFR § 483.10 (Resident’s Rights); 42 CFR §483.12 (Freedom from abuse, neglect and exploitation); 42 CFR §483.20 (Resident Assessment); 42 CFR 483.21 (Care Planning); 42 CFR § 483.24 (Quality of Life) et al. These regulations require nursing homes to assess residents and develop comprehensive individualized care plans for each resident, to respond to changes in a resident’s condition, to protect residents from abuse, neglect and other mistreatment, and to investigate allegations of abuse. Nursing homes must be administered in a manner that enables them to use their resources effectively and efficiently to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident. “The resident has the right to be free from abuse, neglect” 42 CFR §483.12 In addition to following federal and state regulations, nursing homes must adhere to the standard of care in its care and treatment of residents.

Nursing homes must take steps to ensure each resident is protected from abuse from other residents.

1-Admission: A nursing home must only accept residents that it has determined it can safely care for in a manner that does not risk harm to themselves or others. If the prospective resident has medical conditions or behaviors that the nursing home is not equipped to manage, it must not accept the resident. If a nursing home is aware of such behaviors, for example a history of sexual aggression or criminal history, it is not necessarily a complete bar to the resident’s admission into the facility as long as the facility has fully assessed the resident and the resident’s needs and potential risks to the resident and others and planned accordingly.

2-Comprehensive Assessment: The nursing home is required to make an initial comprehensive assessment of each resident and the residents’ needs and periodic or as needed updated assessments. This would include a consideration of any known medical conditions, behavioral conditions or known criminal history that could be dangerous to the resident or others. There is not a specific federal regulation requiring a nursing home to perform a sexual offender search or criminal background check for prospective residents, although CMS has taken the position in the past that there are circumstances where the nursing home should have performed such checks as part of making a “comprehensive assessment” where the facility had reason to suspect its residents had criminal histories, the facility catered to residents with behavioral and aggressive tendencies and the nursing home had a policy regarding checking

criminal backgrounds of its prospective residents¹. In the *Emerald Park* case, DHHS found that “the absence of an explicit requirement does not excuse Petitioner's failure to research the criminal records of some of its residents given what Petitioner knew about its resident population in general and about these residents in particular.” DHHS Decision No. CR1462, *Emerald Park Healthcare Center v. CMS* If a resident is assessed by the nursing home as potentially having a mental or behavioral disorder or other similar issues that have not been assessed by a physician, it is important to report these findings to the resident’s physician and likely obtain a physician assessment of the resident to make a diagnosis and provide treatment orders.

3-Individualized Care Plan: Once a nursing home is aware of resident behavior that is a risk to the resident, other residents or staff and visitors, the nursing home must make an individualized care plan to prevent the resident from harming him/herself and others. If the initial care plan interventions do not work, changes to the care plan and interventions must be made. The care plan interventions must be individualized for each particular resident and each facility and situation will be different.

¹ See DHHS Decision No. CR1462, *Emerald Park Healthcare Center v. CMS*. CMS found Petitioner nursing home Emerald Park failed to comply with the requirement for a nursing home to perform a comprehensive assessment of its residents under federal regulations because it failed, in the case of 16 residents with criminal histories, to research and identify the residents' criminal backgrounds when Emerald Park admitted these residents to its facility. CMS asserted that, as a result, Emerald Park failed to comprehensively assess the propensities of these 16 residents to engage in aggressive behavior and/or commit sexual offenses. CMS alleged the nursing home’s failure to conduct these assessments put residents at Emerald Park at risk of assaults. The evidence presented to DHHS described Emerald Park as a facility that housed highly aggressive and dangerous individuals, some of whom had criminal records. Emerald Park knew that some of its residents might have criminal records, made evident in part by its residents' clinical records and by the fact that the facility's preprinted care plan form has a subsection in which the staff could record whether or not a resident had been convicted of a crime. Emerald Park’s policy was to conduct criminal background checks of those residents whom it suspected of engaging in criminal activities. Emerald Park’s staff also had some awareness of its residents' backgrounds and their propensities. Emerald Park failed to conduct criminal background checks of its residents notwithstanding its policy and its knowledge that some of its residents had histories of criminal behavior and failed to assess the impact that such behavior might have on the residents' present condition or on other residents. As a consequence of its failure to make a comprehensive assessment, Emerald Park’s staff was not sufficiently aware of the risks posed by its residents to protect its residents from the likely consequences of residents' criminal propensities. Many of the residents in question were violent, and in a few instances extraordinarily violent, individuals.

Although there is no concrete set of interventions to include on a care plan for an individual with behaviors that give risk to other residents, some of the interventions that could be included are:

- Re-direction
- 15-minute checks
- Locked unit
- Segregated unit (by sex)
- Segregate unit (mental status)
- 1:1 supervision
- Alarms
- Use of video cameras in hallways and common areas
- Physician or psychologist assessment
- Counseling
- Use of medications (as directed by the resident's physician)

4-Changes in Condition: Any significant changes in a resident's condition, including any changes to the resident's behavior or mental status must be reported to their responsible party and their physician. The physician may want to assess the resident and make new treatment orders.

Involuntary admission/1013: If the resident's behavior warrants, the physician may order the facility to send the resident out to the emergency room for a psychological evaluation and treatment. This is involuntary committal, sometimes referred to as a "1013," which refers to the form authorizing transport to emergency receiving facility for mental health evaluation. This form certifies that the individual appears mental ill AND 1) presents a substantial risk of imminent harm to self or others as manifested by recent overt **acts** or recent expressed **threats** of violence which present a probability of physical injury to self or to other persons; OR 2) appears to be so unable to care for his/own physical health and safety as to create an imminently life-endangering crisis. The resident may be cleared to return to the nursing home or may be required to go to a different type of facility where the resident's condition can be managed.

5-Discharge from the facility: If a nursing home determines that the resident cannot be safely managed at the facility and poses a threat to him/herself or others, the nursing home must transfer the resident out of the facility. The facility must transfer or discharge the resident if the safety of individuals in the facility is endangered due to the clinical or behavioral status of the resident or the health of individuals in the facility would otherwise be endangered.

- VI. Theories of Recovery**
 - A. Professional Negligence**
 - B. Simple Negligence**
 - C. Regulatory Violations**
 - D. Respondeat Superior**
 - E. Negligent retention hiring and training**
 - F. Premises Liability**
 - G. Punitive Damages**

- VII. Open Records Requests to local law enforcement (see attached example)**



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July 12, 2019

Bibb County Sheriff's Department

Attn: Records

Via email to: bsopenrecords@maconbibb.us

Re: OPEN RECORDS REQUEST
Our Client: XXXXXXXXXX
Date of Incident: xx/x/2017 & others
Location: [Name and address of facility]

To Whom It May Concern:

I represent XXXXX, who was a victim of rape at her nursing home, XXXX on XX X, 2017. The rape was reported to the Bibb County Sheriff's Department, who performed an investigation and had a sexual assault test performed. The assailant, XXXXX, was charged with rape.

We are requesting 2 categories of records, outlined below.

XX/X/17 Rape: Pursuant to O.C.G.A. § 50-18-70 and the Georgia Open Records Act, you are hereby requested to make available for review and copying the following documents related to the XX/X/17 rape incident by XXXXX against XX:

1. Reports
2. Arrest warrant
3. Disposition records
4. Photos
5. Sexual Assault test results or any communications involving the test or results
6. Notes
7. Witness statements
8. The entire investigative file
9. Crime lab reports
10. Any other documents

Other Reports of Assault, Battery or Sexual Assault, Sexual Battery or Rape:
Pursuant to O.C.G.A. § 50-18-70 and the Georgia Open Records Act, you are hereby requested to make available for review and copying the following documents related to incidents, which occurred at [Facility] for years 2013-present:

1. Reports of assault
2. Reports of battery

3. Reports of sexual assault
4. Reports of sexual battery
5. Reports of Rape

I certainly appreciate your attention to this matter. If you have any questions regarding this matter, please feel free to call me directly at 678-362-7821.

Sincerely,

/s/ Kate Hughes

Katherine Hughes

NURSING HOME PRESSURE ULCER CASES

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Nursing Home Pressure Ulcer Cases

Pressure ulcer injury cases are one of the more common types of cases against nursing homes. Individuals in nursing homes are particularly vulnerable to developing pressure ulcers because they are usually elderly, debilitated and depend on caregivers for normal activities of daily living such as grooming, toileting, mobility, eating, and their medical care. This paper focuses on nursing homes, but pressure ulcers can and do develop in other settings where individuals have these same risk factors, such as hospitals, personal care homes, assisted living facilities, and sometimes while living at home. We are seeing an increasing number of cases involving individuals who develop horrible pressure ulcers while residing in personal care homes. This is particularly concerning because personal care homes are not permitted to provide skilled nursing care, are less regulated than nursing homes and in cases we have seen, are retaining residents who no longer meet the criteria for a personal care home and need to be in a skilled care setting.

This paper starts by giving a general overview of what a pressure ulcer is and explaining the standards that govern nursing homes pertaining to preventing pressure ulcers and caring for individuals with pressure ulcers. After providing a foundation knowledge of pressure ulcers, we discuss evaluating a pressure ulcer case and provide litigation tips and the pitfalls to watch out for in these cases.

I. What is a pressure ulcer?

A pressure ulcer, also called a bed sore or decubitus ulcer, is a localized injury to the skin and/or underlying tissue usually over a bony prominence, as a result of pressure in combination with shear. These ulcers develop due to prolonged pressure on the skin, along with friction and shear. They most often develop on skin over the bony areas of the hips, tailbone, buttocks, heels and ankles. With prolonged pressure, these areas receive inadequate blood flow, which causes the tissue to die. In combination with pressure, friction and shear forces contribute to causing these injuries. Shear occurs when two surfaces move in the opposite direction. For example, if someone is in a bed with the head of the bed elevated and they slide down, as the tailbone moves down, the skin over the tailbone may stay in place causing a shearing injury. Friction occurs when the skin rubs against bedding or clothing, which can be a problem for fragile and moist skin. Pressure ulcer injuries can be very serious and can lead to infection, amputation and death, especially in the elderly. That is why it is particularly important to recognize those at risk for developing pressure ulcers and implement measures to prevent them from developing.

There are a number of things that may put someone at risk for developing pressure ulcers, but people most at risk are those who are unable to change positions and who spend most of their time in bed or a chair. People who are mobile and active are not at risk for developing pressure ulcers, and when sitting or lying, most people without mobility and sensory limitations naturally reposition themselves to relieve areas of pressure on their skin. Individuals in nursing homes typically have various limitations that put them at higher risk of developing pressure ulcers. Some of these risk factors include:

- Advanced age
- Immobility (wheelchair or chair bound)
- Need of assistance to move or change position

Lack of Sensory Perception (an inability to feel pain or discomfort that inhibits the awareness to realize a position change is needed)
Poor nutrition (people need enough calories, vitamins, protein, minerals to maintain healthy skin and prevent tissue breakdown)
Poor hydration
Incontinence
Medical conditions affecting blood flow (diabetes and vascular disease)
Mental deficits (dementia/Alzheimer's)

Pressure ulcers are staged into categories of severity according to the depth of the wound. The International NPUAP/EPUAP Pressure Classification System² categorizes pressure ulcers as Stage I, Stage II, Stage III, Stage IV, Unstageable, and Suspected Deep Tissue Injury. Skilled care providers use this system to identify the severity of a pressure ulcer. Stage I is intact skin with non-blanchable redness of a localized area, and may be painful, firm, soft, warmer or cooler as compared to adjacent tissue. Stage II is partial thickness loss of dermis presenting as a shallow open ulcer with a red pink wound bed, without slough, and may also present as an intact or open/ruptured fluid-filled blister. Slough is dead tissue, usually cream or yellow, and impedes wound healing. Stage III is full thickness tissue loss. Subcutaneous fat may be visible, but bone, tendon or muscle are not exposed. Slough may be present but does not obscure the depth of tissue loss. Stage III may include undermining (tissue destruction underlying intact skin along wound margins) or tunneling (area of tissue loss extending in any direction from the edge of the wound; results in dead space with potential for abscess formation). Stage IV is full thickness tissue loss with exposed bone, tendon or muscle, and slough and/or eschar may be present on some parts of the wound bed. These often have undermining and tunneling. Eschar is dead tissue that is brown, tan or black in color. Unstageable/Depth Unknown category is comprised of full thickness tissue loss in which the base of the ulcer is covered by slough (yellow, tan, gray, green or brown) and/or eschar (tan, brown or black) in the wound bed. Until enough slough/eschar is removed to expose the base of the wound, the true depth/wound category cannot be determined. The last category is Suspected Deep Tissue Injury/Depth Unknown, which is purple or maroon localized area of discolored intact skin or blood-filled blister due to damage of underlying soft tissue due to pressure and/or shear, and may be preceded by tissue that is painful, firm, mushy, boggy, warmer or cooler as compared to adjacent tissue. Staging the wound is an important part of the assessment and treatment process.

Pressure injuries affect from 1.3 million to 3 million adults in the United States, and the incidence rate varies according to environment. In the long-term care setting, prevalence ranges from 8.5% to 32.2%. According to the Agency for Healthcare Research and Quality, pressure injuries cost \$9.1 to \$11.6 billion per year, with the cost of individual patient care ranging from \$20,900 to \$151,700 per pressure ulcer. Pressure ulcer injuries are a significant and costly problem, and in most cases are preventable with proper care.

² Information about pressure ulcers and this classification system can be found at the website of The National Pressure Ulcer Advisory Panel – www.npuap.org.

II. Standards for Nursing Homes

A. Who sets the standards?

a. Federal and State Regulations

The U.S. Department of Health & Human Services has promulgated regulations pursuant to its authority under OBRA at 42 U.S.C. §§ 1395i-3 and 1396r related to the care, treatment and services provided to residents of skilled nursing facilities participating in the Medicare program and nursing facilities participating in the Medicaid program. Nursing homes who accept Medicare and Medicaid are subject to the federal regulations found at 42 CFR § 483, and must comply with the regulations or be subject to penalties. These regulations are used in nursing home litigation as standards that must be met by the nursing home. There are numerous regulations that may be applicable to a nursing home pressure ulcer case, including but not limited to:

- 42 CFR §483.10 provides that the resident has a right to live a dignified existence.
- 42 CFR §483.12(b) requires the facility to implement protocols to protect the resident from neglect.
- 42 CFR §483.20(b) and (g) require the facility to maintain a comprehensive and accurate assessment of the resident's medical needs, including the resident's general health, physical functioning, and skin condition, among other things.
- 42 CFR §483.21(b) requires the facility to develop and implement a comprehensive person-centered care plan for each resident that includes measurable objectives and timeframes to meet a resident's medical, nursing, and mental and psychosocial needs that are identified in the comprehensive assessment, and must describe the services to be furnished to attain and maintain the resident's highest practicable physical, mental, and psychosocial well-being.
- 42 CFR §483.25 requires that services provided or arranged by the facility meet professional standards of quality and be provided by qualified persons.
- 42 CFR §483.25(b)(1)(i) requires that the facility ensure, based on the comprehensive assessment of the resident, that the resident receives care, consistent with professional standards of practice, to prevent pressure ulcers and does not develop pressure ulcers unless the individual's clinical condition demonstrates that they were unavoidable; and (ii) a resident with pressure ulcers receives necessary treatment and services, consistent with professional standards of practice, to promote healing, prevent infection and prevent new pressure ulcers from developing.
- 42 CFR §483.35 requires the facility to have sufficient nursing staff with the appropriate competencies and skills sets to provide nursing and related services to assure resident safety and attain or maintain the highest practicable physical, mental, and psychosocial

well-being of each resident, as determined by resident assessments and individual plans of care and considering the number, acuity and diagnoses of the facility's resident population in accordance with the facility assessment required at §483.70(e).

- 42 CFR 483.35(a) requires the facility to provide services by sufficient numbers of each of the following types of personnel on a 24-hour basis to provide nursing care to all residents in accordance with resident care plans: (i) Except when waived under paragraph (e) of this section, licensed nurses; and (ii) Other nursing personnel, including but not limited to nurses aides.
- 42 CFR §483.70 requires that the facility be administered in such a way as to use its resources effectively and efficiently to maintain the highest practicable physical, mental and psychosocial well-being of each resident.
- 42 CFR §483.70 requires properly trained, qualified and competent staff.
- 42 CFR §483.70 requires the facility to operate and provide services in compliance with law and acceptable professional standards and principles that apply to professionals providing said services.
- 42 CFR §483.70(i) requires the facility to maintain clinical records in accordance with accepted professional standards and practices which are complete and accurate.

The Center for Medicare and Medicaid Services (CMS) uses pressure ulcer incidence as a quality of care indicator for long-term care facilities. Data about the percentage of the nursing home's short-stay residents with new or worsened pressure ulcers and long-term residents with pressure ulcers is published on the CMS website at [medicare.gov/nursinghomecompare/search](https://www.cms.gov/nursinghomecompare/search). As with the other categories of quality of care indicators, CMS also provides the national percentages and the state percentages against which the specific nursing home data may be compared. On this website, you can look up nursing homes certified by Medicare and/or Medicaid and find information pertaining to the quality indicators, ownership information, deficiencies, penalties assessed against the nursing home, and surveys. It is helpful to get on the website when you are initially evaluating a case to get an idea of the quality of the nursing home. It is also helpful to download the information as soon as possible in the evaluation phase, and periodically thereafter, as the website only contains the most recent survey plus the prior 2 surveys and the complaint surveys for the past 3 years. As time passes in litigation, the CMS website will be updated with new survey information and older information will drop off. The website also provides a star-rating system whereby certified nursing homes receive between 1 and 5 stars based on health inspections, staffing data, and quality of resident care measures. It must be remembered, however, that this information is just a snapshot of the quality of a nursing home.

The State of Georgia has promulgated the *Bill of Rights for Residents of Long-term Care Facilities* at O.C.G.A. §31-8-100 et seq., which sets out requirements for those providing care, treatment and services to residents of long-term care facilities in this state. In particular, O.C.G.A. §31-8-108(a) requires that residents of long-term care facilities receive care, treatment and services that are adequate and

appropriate and which must be provided with reasonable care and skill and in compliance with all applicable laws and regulations, and with respect for the resident's personal dignity, among other requirements. O.C.G.A. §31-8-108(b) provides that the resident is entitled to have any significant change in the resident's health status reported to persons of her choice by the facility within a reasonable time. Allegations of violations of the resident's statutory bill of rights may also be included as a claim in nursing home litigation.

b. Policies and Procedures of the Nursing Home

Standards of care pertaining to pressure ulcer prevention and care are also set internally by each nursing home in their written policies and procedures. Once in litigation, it is important to request the facility's written policies and procedures. You want to make sure to obtain any and all policies and procedures pertaining to care planning, nursing assessments, pressure ulcer prevention, pressure ulcer interventions, wound care, incontinence care, nutrition, documentation, staffing, etc. Oftentimes, the defense produces an index of the policies and procedures and you can select from the index any policies and procedures that may be applicable to the issues in your case and request production of those specific policies and procedures. During discovery, you will need to confirm that the produced policies and procedures were those that were in effect at the facility during the time period of the residency at issue. When you are able to show that the nursing home failed to follow its own policies and procedures, it does not bode well for the nursing home's defense.

c. Guidelines

There are respected organizations that publish guidelines for the prevention and treatment of pressure ulcers that serve as valuable references in these cases. Not only are they good educational resources, they are also helpful when it comes to deposing the wound care professionals and opposing experts. The Wound, Ostomy, Continence Nurses Society (wocn.org) has published "Guideline for Prevention, and Management of Pressure Ulcers." Also a helpful reference, The National Pressure Ulcer Advisory Panel (NPUAP): "Pressure Ulcer Prevention & Treatment: Clinical Practice Guidelines."

d. Standard of Care/Experts

Just as in medical malpractice cases, nursing home cases have allegations of professional negligence, typically alleging that the nursing care fell beneath the standard of care and such professional negligence proximately caused the alleged injuries. In order to file a medical malpractice action in Georgia, you must file with the Complaint an expert affidavit pursuant to O.C.G.A. § 9-11-9.1(a). This Code Section provides:

In any action for damages alleging professional malpractice against: (1) a professional licensed by the State of Georgia and listed in subsection (g) of this Code section; (2) a domestic or foreign partnership, corporation, professional corporation, business trust, general partnership, limited partnership, limited liability company, limited liability partnership, association, or any other legal entity alleged to be liable based upon the action or inaction of a professional licensed by the State of Georgia and listed in subsection (g) of this Code section; or (3) any licensed health care facility alleged to be liable based upon the action or inaction of a health

care professional licensed by the State of Georgia and listed in subsection (g) of this Code section, the plaintiff shall be required to file with the complaint an affidavit of an expert competent to testify, which affidavit shall set forth specifically at least one negligent act or omission claimed to exist and the factual basis for each such claim.

O.C.G.A. § 9-11-9.1(g) includes medical doctors, nurses, physicians' assistants, occupational therapists, physical therapists, among other professionals for which an expert affidavit is required.

The expert also needs to meet the minimum competency requirements of O.C.G.A. § 24-7-702(c), which provides:

Notwithstanding the provisions of subsection (b) of this Code section and any other provision of law which might be construed to the contrary, in professional malpractice actions, the opinions of an expert, who is otherwise qualified as to the acceptable standard of conduct of the professional whose conduct is at issue, shall be admissible only if, at the time the act or omission is alleged to have occurred, such expert:

(1) Was licensed by an appropriate regulatory agency to practice his or her profession in the state in which such expert was practicing or teaching in the profession at such time; and

(2) In the case of a medical malpractice action, had actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given as the result of having been regularly engaged in:

(A) The active practice of such area of specialty of his or her profession for at least three of the last five years, with sufficient frequency to establish an appropriate level of knowledge, as determined by the judge, in performing the procedure, diagnosing the condition, or rendering the treatment which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue; or

(B) the teaching of his or her profession for at least at least three of the last five years as an employed member of the faculty of an educational institution accredited in the teaching of such profession, with sufficient frequency to establish an appropriate level of knowledge, as determined by the judge, in teaching others how to perform the procedure, diagnose the condition, or render the treatment which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue; and

(C) except as provided in subparagraph (D) of this paragraph:

(i) is a member of the same profession;

(ii) is a medical doctor testifying as to the standard of care of a defendant who is a doctor of osteopathy; or

(iii) is a doctor of osteopathy testifying as to the standard of care of a defendant who is a medical doctor; and

(D) Notwithstanding any other provision of this Code section, an expert who is a physician, and as a result of having, during at least three of the five years immediately preceding the time the act or omission is alleged to have occurred, supervised, taught, or instructed nurses, nurse practitioners, . . . , physician assistants, physical therapists, occupational therapists, or medical support staff, has knowledge of the standard of care of that health care provider under the circumstances at issue shall be competent to testify as to standard of care of that health care provider. However, a nurse, nurse practitioner, . . . , physician assistant, physical therapist, occupational therapist, or medical support staff shall not be competent to testify as to the standard of care of a physician.

Typically, in nursing home cases you will want to have a nurse or medical doctor expert who is actively practicing in the nursing home setting to testify as to the standard of care and how the nursing home defendant breached the standard of care. At a minimum, in order to meet the competency requirements of O.C.G.A. § 24-7-702, the expert needs to have been practicing in the nursing home setting for at least three of the five years preceding the negligent care at issue. It is also beneficial if your nursing expert is also a licensed nursing home administrator or director of nursing at a nursing home, as that will provide a wider scope of practice on which the expert can testify. In most pressure ulcer cases, the negligence arises out of the failure to adequately prevent pressure ulcers, which is well within the scope of practice of most nursing home nurses. However, there are times when the negligence may also include failure to treat the pressure ulcers appropriately. In such cases, it is beneficial to have a wound care nurse or wound care specialist physician as your supporting standard of care expert because more specialized wound care knowledge may be necessary.

In evaluating your pressure ulcer case, you will need to determine which care providers were negligent and select your experts accordingly. In addition to the nursing care provided by the nursing home, you may also need to evaluate whether the attending physician's care was appropriate and compliant with the standard of care. If the attending physician's care was also negligent, you will have to have an expert affidavit from a physician that meets the requirements of O.C.G.A. § 9-11-9.1 and O.C.G.A. § 24-7-702. While a physician may be qualified to testify against a nurse under Georgia law, a nurse is not qualified to testify against a physician.

B. General Standards For Pressure Ulcer Prevention and Care

Risk assessment and risk factor intervention are key to pressure injury prevention. It is incumbent on nursing homes to conduct initial assessments, including a complete head-to-toe skin assessment of a resident upon admission and readmission. The head-to-tie skin assessment should document whether the resident has any existing wounds or skin breakdown, and if so, the skin breakdown should be further assessed and staged. The skin assessment should be documented.

In addition to assessing whether the resident has existing skin breakdown or pressure ulcers, the assessment should also include the resident's risk of skin breakdown. One of the most widely used risk assessment tools is the Braden Scale for Predicting Pressure Sore Risk. This scale allows nurses and other healthcare providers to score a person's level of risk for developing pressure ulcers by assessing six subscales: (1) Sensory Perception; (2) Moisture; (3) Activity; (4) Mobility; (5) Nutrition; (6) Friction and Shear. Each of these subscales contains a numerical range, with one being the lowest score possible. The Braden Scale score is then derived from adding up the numbers from each subscale. The lowest possible score is 6 and the highest is 23. The lower the score, the higher the risk of developing pressure ulcers. Individuals with scores of 15-18 are considered at-risk of developing pressure ulcers if other major risk factors are present. Individuals with scores of 13-14 are at moderate risk, with scores of 10-12 are at high risk, and with scores of 9 or below are at very high risk.

The goal of the assessment is to determine the resident's risk level of developing pressure ulcers, and to implement appropriate nursing interventions to minimize the risk. The lower the score (higher the risk), the more intense the nursing interventions to prevent pressure ulcers should be. Using the nursing assessment, the nursing home then develops a care plan with interventions to minimize the risk of the resident developing pressure ulcers. The care plan is the documented plan of care that specifies how the nursing home will meet the resident's needs and provide appropriate care. The prevention and care of pressure ulcers requires an interdisciplinary care team involving nursing, nutrition, and rehabilitation, and the care plan should address each of these care areas for residents at risk for pressure ulcers.

The various types of interventions include:

- Frequent turning and repositioning [minimum of every 2 hours]
- Support surfaces on bed and chairs [pressure reducing mattresses and cushions]
- Use of positioning devices [wedges, pillows]
- Elevate heels off bed
- Keep skin clean and dry
- Cleanse skin at time of soiling with pH-balanced cleanser
- Protective moisture barrier
- Active and passive range of motion exercises
- Lift sheets or lift equipment to reposition or transfer resident
- Refer to dietitian for nutritional assessment and interventions
- Maintain head of bed at or below 30 degrees, if consistent with resident's medical condition
- Report weight loss, poor appetite or gastrointestinal changes that interfere with eating
- Assist with meals, as needed
- Apply moisturizer to skin at least daily and PRN

The appropriate interventions should be included on the documented care plan for the resident - on both the initial care plan upon admission and the comprehensive care plan that is developed in the first few weeks of the admission. The implementation of the interventions should also be documented throughout the chart – on the care plan, nursing notes, flow sheets.

The majority of the daily care in nursing homes is provided by certified nursing assistants. Certified nursing assistants (CNA) are typically lower level providers who are “supervised” by the licensed LPNs and RNs. They go from room to room providing most of the hands-on care received by nursing home residents, such as toileting, hygiene, grooming, dressing, incontinence care, bathing/showering, feeding, transfers, repositioning, etc. Because CNAs are providing the bathing/showering, incontinence and hygiene care, they should be looking for skin breakdown continuously and reporting it to the nurse. Nurses typically rely on the CNAs to report the first signs of skin breakdown. Moreover, CNAs are supposed to document the ADL care they provide every shift during the admission. This documentation is typically on what is called an Activities of Daily Living Flow Sheet or CNA Flow Sheet. For each shift, these flow sheets should show the amount of assistance the resident required and the amount of assistance that was provided. Many times these flow sheets will be incomplete, inaccurate or absent, which typically bolsters the plaintiff’s case that care was not provided or was not provided consistently, and can support allegations of understaffing.

Assessments/reassessments are ongoing throughout the resident’s admission. There should be weekly skin assessments documented in the chart. If a new skin wound or pressure ulcer develops, it is a change in condition and should trigger an assessment and revision to the care plan with interventions to address the newly developed pressure ulcer. When pressure ulcers develop, the nursing home should notify the physician as well as the resident’s family/responsible party. These communications should be documented. The nursing home should have a documented assessment of the pressure ulcer, new interventions on the care plan to address the new pressure ulcer, and ongoing reassessments of the pressure ulcer and the effectiveness of the interventions. Moreover, appropriate wound care professionals should be consulted, as necessary, given the severity of the wound. Once a pressure ulcer develops, it should be regularly assessed and tracked by the appropriate wound care specialist(s). The ongoing assessments should include the wound measurements, the appearance and characteristics of the wound, the presence of drainage or an odor, signs of infection, and improvement or worsening. Wound care orders should be documented in the chart and the Treatment Administration Record (“TAR”) should demonstrate that the treatment orders were carried out.

Potential areas for pressure ulcer injury litigation arise when there is failure to:

- (1) Adequately assess a resident’s risk for skin breakdown;
- (2) Develop an individualized comprehensive care plan for the resident to address skin breakdown;
- (3) Implement adequate interventions to minimize the risk for skin breakdown;
- (4) Follow the care plan or carry out the interventions on the care plan (no pressure reducing mattress or wheelchair cushion is used, the resident is not kept clean and dry; the resident is left in urine and feces; etc)
- (5) Timely identify skin breakdown and obtain wound care, and revise the care plan to minimize further skin breakdown;
- (6) Follow wound care orders;
- (7) Continue assessing the pressure ulcers and address nonhealing and/or worsening pressure ulcers;
- (8) Obtain appropriate and timely care for pressure ulcers;

- (9) Obtain timely and appropriate care for infected pressure ulcers and residents with signs and symptoms of infection/sepsis.

III. Evaluating the Pressure Ulcer Case

a. Initial Screening

Plaintiffs' medical malpractice attorneys spend a lot of time screening cases; nursing home cases are no different. During the initial telephone conference with a potential client ("PC"), we typically want to get as much information as we can to screen the case and determine if it is a case suitable for further investment of time and money. In other words, if it is a potential case that warrants obtaining the medical records and investigating further. Here are some of questions we ask during the initial telephone conference with the PC:

- (1) We ask the PC for an overview of why they are calling; what happened;
- (2) What is the timeline: When was the resident in the nursing home? When did the pressure ulcer(s) occur? [statute of limitations problems?]
- (3) Did the pressure ulcer(s) develop in the nursing home? [the information we get from the PC may be unreliable, but it can be helpful to hear their perspective]
- (4) How bad did the pressure ulcer(s) get? From a damages perspective, were the pressure ulcers stage 3 or 4, did they get infected, did they require surgical debridement, did they require hospitalizations, what was the end result?
- (5) Other medical conditions that the resident had: diabetes, vascular disease, renal failure/dialysis? Were they on hospice? Why were they in the nursing home?
- (6) How many facilities are involved? Was it just one nursing home? Was the resident in and out of hospitals during the admission to the nursing home? Need to know how complex the tracking of the pressure ulcer will be; from how many different facilities will we need to request records.
- (7) Do you have pictures or videos of the pressure ulcers?
- (8) How involved was the PC/family in the resident's care?
- (9) What problems did they have with the facility?
- (10) What interventions did the nursing home have in effect for the pressure ulcers? Special mattress? Turning and repositioning? What does the PC know about what was being done by the nursing home?
- (11) Authority to act on behalf of the resident? Usually it is a family member calling. We need to know if the PC has authority to act on the resident's behalf, whether the resident is deceased, etc. Will we have authority to obtain the medical records?
- (12) Does the PC already have the medical records?
- (13) If applicable, does the PC have the death certificate?

b. Obtain the medical records

If it is a case that warrants further investigation, you must make sure you have all of the relevant medical records. Usually, the PC does not have the medical records, and even in cases where they believe they have the medical records, they usually are not complete records. Obtaining medical records is another discussion topic altogether. In order to evaluate a pressure ulcer case, it is important to obtain a complete set of records from the nursing home at issue. This should include all records: care plan,

assessments, MAR, TAR, orders, nursing notes, progress notes, MDS, wound care notes, wound photographs (if any), ADL/CNA Flow Sheets, therapy records, SBAR forms, discharge papers, admission papers, etc. Many times, there are categories of records that are glaringly missing from the produced records and you will have to follow up with the nursing home about the missing records. Sometimes you may get additional records in response to the follow-up. See below for additional tips under the Pitfalls and Defenses.

If the resident was admitted into the nursing home from a hospital, it is important to obtain the hospital records. The hospital records will show the condition of the resident while in the hospital, the reasons requiring nursing home care, and may show whether the individual already has skin breakdown prior to being admitted into the nursing home. It is also important to obtain hospital records when a resident is transferred from the nursing home to the hospital. In cases where the resident is in and out of the hospital from the nursing home, or is transferred from one nursing home to another, it is important to track where the pressure ulcer started, where it worsened, and whether each facility was providing appropriate pressure ulcer prevention and care. It is also important to obtain the records from the hospital or facility that received the resident from the nursing home at issue to evaluate the condition of the resident and state of the pressure ulcer upon leaving the nursing home's care. These records, as well as any other subsequent wound care records, will also be necessary to evaluate damages.

c. Number of facilities/providers potentially at fault

In evaluating the case and reviewing the records, it is important to evaluate all facilities who may have played a role in the development and worsening of the pressure ulcer(s). More than one facility may be at fault, and therefore, you may have to include all potential at fault facilities in the complaint. Moreover, you, along with the assistance of your expert(s), will have to determine whether individual providers (nurses, physicians, etc) should be named as defendants. In the evaluation phase, it is important to determine how complex and costly the case may be to pursue, and when there are multiple facilities and defendants involved, the complexity and costs increase significantly.

Did the pressure ulcer develop and worsen at one particular nursing home without any intervening hospital care? Did the pressure ulcer begin at the hospital, and if so how bad was it when the nursing home assumed responsibility? Did the pressure ulcer worsen under the nursing home's care, and if so, did the nursing home do everything they needed to do to try and prevent it from worsening? Was the resident in and out of the hospital, and if so, did the pressure ulcer worsen under the hospital's care rather than the nursing home's care? These are just examples of the types of questions that are part of the evaluation process.

d. Damages

In determining whether to take most medical cases, a key question is: What are the damages? Not every pressure ulcer injury is alike and not every pressure ulcer injury will support complex nursing home litigation. Typically, the pressure ulcer cases that will support litigation are those where the pressure ulcer has reached a Stage III or IV, and where there is significant medical care and expense as a result of the pressure ulcer(s), significant pain and suffering, and potentially loss of limb or life. Common damages in these cases, include:

- Stage III and IV pressure ulcer;

- Prolonged pain and suffering;
- Surgical debridements;
- Hospitalizations;
- Infected wounds;
- Ongoing significant medical care and expense (IV antibiotics, wound vacs, long-term acute care facility admission for wound care)
- Amputations;
- Sepsis;
- Death from sepsis or infection.

e. Expert Review

As discussed hereinabove, in order to file a pressure ulcer negligence case against a nursing home, you will need to file an affidavit from a qualified expert. After obtaining the medical records, we typically review the medical records ourselves, and if we believe it may be a case, we will then have nursing home expert(s) review the records. To be more efficient, it is our practice to have nursing home experts review the case who are qualified under Georgia law to provide the requisite expert affidavit to file the case. Therefore, if our expert reviews the records and finds the nursing home to be negligent, we can more efficiently get the lawsuit ready for filing.

IV. Value Drivers

Some factors that increase the strength and value of the case are apparent in the early stages of the evaluation, and others become apparent during litigation as discovery progresses. In addition to the actual damages, some of the factors that drive up the value of cases, include:

- Photographs and Video of the pressure ulcers
- Lack of documentation in the records
- Understaffing
- Problem facility (surveys/star rating/penalties)
- Egregiousness of the care/neglect
- Fraudulent documentation

V. Pitfalls and Defense

Other Causes: There may be causes for skin ulcers/wounds other than prolonged pressure and shear and the nursing home will often present such other causes in its defense. Other causes include: vascular disease, diabetes, resident noncompliance/refusals of care. It is important when evaluating your case in the early stages to determine the cause of the wound and evaluate these other potential causes. That being said, however, even if the wound is caused by another condition or noncompliance, there may be negligence in failure to timely recognize and address the wound and in failing to timely treat/address the underlying cause.

Unavoidability: Even when the ulcer is caused by pressure, the nursing home will likely argue that due to the resident's overall poor condition and possibly multiple organ failure, the pressure ulcers were unavoidable. The defense often contends that the pressure ulcers are unavoidable given the resident's

multiple comorbid conditions, their refusal to eat, and organ failure, and rely on a “failure to thrive” diagnosis in the records. The nursing home defense may also assert that the pressure ulcer was unavoidable due to the resident’s overall poor condition, and even that the resident was “actively dying” when the pressure ulcer developed. It is important in evaluating your case to determine the overall condition of the resident, the cause of the wound, and whether preventative measures would have made a difference in the outcome. It will also be necessary to have an expert who will support the case on causation. The expert will need to be able to link the negligence and the damages; the expert will need to testify to a reasonable degree of medical probability that the negligence proximately caused the claimed damages.

Multiple Facilities and hospitalizations: When a resident is moved in and out of nursing homes or has intermittent hospital admissions while residing at the nursing home, it can make it difficult to prove that the nursing home’s negligence proximately caused the pressure ulcer or cause the pressure ulcer to worsen. This is an issue that needs to be analyzed early on when initially evaluating the case. You will need to obtain all of the medical records from not only the facility at issue, but also any hospitals where the resident has been admitted during the nursing home admission or immediately prior to the nursing home admission, as well as records from any other nursing homes where he/she resided prior to and after the nursing home at issue. You will have to track when the pressure ulcer developed and under whose watch it developed, and then whether it worsened, and under whose watch it worsened. You will have to determine whether multiple facilities need to be included as defendants so as to not leave an empty seat that the defendants can blame. Moreover, in these circumstances where multiple defendants may need to be included, it will be particularly important to determine if the complexities of the case make the risks and costs outweigh the potential recovery.

VI. Litigating/Discovery

Discovery in nursing home litigation can be a long, tedious and time-consuming process. We typically serve initial written discovery (interrogatories, request for production of documents, and requests for admissions) with the Complaint to start the discovery process as early as possible. The goal is to obtain every record that the facility may have pertaining to the resident, which includes all medical records, business and billing records, MDS, care plans, ADL/CNA flow sheets, nursing records, wound care records, SBAR documentation, orders, MD progress notes, MAR, TAR, therapy records, etc. In addition to the medical and administrative records pertaining to your resident, you will also need to obtain the facility’s policies and procedures, staffing records (staffing assignment sheets and time cards), census information, facility map/layout, personnel files of the care providers and employed witnesses, 24-hour shift reports, incident reports, surveys, training materials, marketing materials for the time period of your resident’s admission, etc. A Rule 6.4 letter to opposing counsel is usually necessary as most nursing home defendants fail to produce the majority of the documents requested on the first pass. After the Rule 6.4 letter and requisite conference, additional documents will be produced, and then you can narrow down what may need to be the subject of a motion to compel.

At the outset, it is important to obtain all of your resident’s medical records. Undoubtedly, prior to filing the lawsuit during the evaluation phase, you requested a complete, certified copy of your resident’s medical and billing records from the facility. Many times, despite your best efforts, the facility fails to produce the complete record, and even with diligent follow-up by you or your office requesting very specific items that the facility failed to produce, the facility oftentimes still fails to produce

everything. Once in litigation, it is very important to make sure everything is produced. This often necessitates doing a OCGA 9-11-30(b)(6) deposition on the records issues to depose a corporate representative on how and where records are maintained, electronic records, the procedures for production, what efforts have been made to produce all of the requested records, and whether any additional records may exist that have not been produced. It is helpful to do the 30(b)(6) records deposition prior to beginning fact witness depositions so that you start fact witness depositions with a complete set of records.

Depending on your case and the specific allegations of negligence, for cases involving pressure ulcers, you will want to identify and potentially depose the care providers involved in the care that were responsible for skin assessments, developing the care plan, wound care, CNA's responsible for activities of daily living care, nurses who were responsible for the resident's care, the Director of Nursing and Assistant Director of Nursing, and potentially the Administrator. You will want to identify where the breakdowns in care occurred and the reasons for the breakdown.

**LUNCH AND LEARN:
OVERVIEW OF RECENT
APPELLATE COURT
DECISIONS IN MEDICAL
MALPRACTICE CASES**

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Medical Malpractice Case Law Update (September 2018-September 2019)

Kristin Pierson, Esq.

BENDIN SUMRALL & LADNER, LLC

Case <i>Proximate Cause</i>	Legal Principles	Conclusions
<u>EDOKPOLOR V. GRADY MEMORIAL HOSPITAL</u> 347 GA. APP. 285 (SEPTEMBER 14, 2018)	<ul style="list-style-type: none"> ◆ Plaintiff cannot recover for medical malpractice, even where there is evidence of negligence, unless Plaintiff establishes by preponderance of evidence that negligence either proximately caused or contributed to cause Plaintiff harm ◆ Plaintiff must show that purported violation or deviation is proximate cause of injuries sustained. He must prove that injuries complained of proximately resulted from such want of care or skill. Bare possibility of such result is not sufficient. There can be no recovery where there is no showing to any reasonable degree of medical certainty that injuries could have been avoided ◆ Conclusory and unsupported expert affidavit insufficient to establish genuine issue of fact as to causation in medical malpractice case 	<ul style="list-style-type: none"> ♣ Plaintiffs relied on Expert's Affidavit, which concluded with little explanation that Nurse's actions caused Patient's death by aspiration. ♣ Expert provided no evidence that Patient aspirated when ingesting medication and offered no link between aspiration to oral ingestion of medication

Case <i>Experts</i>	Legal Principles	Conclusions
<p><u>PARSON V. DEKALB MEDICAL CENTER</u> A18A0932</p> <p>(SEPTEMBER 6, 2018)</p>	<ul style="list-style-type: none"> ♦ § 24-7-702(d): If scientific, technical, or other specialized knowledge will assist trier of fact to understand evidence or to determine fact in issue, witness qualified as expert by knowledge, skill, experience, training, or education may testify thereto, if: <ul style="list-style-type: none"> ○ (1) Testimony is based upon sufficient facts or data; (2) Testimony is product of reliable principles and methods; and (3) Witness has applied principles and methods reliably to facts of case ♦ Trial Court is not permitted to admit opinion evidence that is connected to existing data only by the <i>ipse dixit</i> of Expert 	<ul style="list-style-type: none"> ♣ Trial Court did not abuse its discretion in excluding Expert's testimony; there was too great of a gap between unsupported opinions Expert offered and existing data in medical records ♣ Plaintiff failed to meet her burden to establish that Expert's assertions were supported by any reliability criteria and not speculation ♣ Expert did not provide basis for his assumptions, which were contradicted and disproven by medical records

Case <i>Expert Affidavit</i>	Legal Principles	Conclusions
<p><u>WENTZ V. EMORY HEALTHCARE</u> 347 GA. APP. 302</p> <p>(SEPTEMBER 17, 2018)</p>	<ul style="list-style-type: none"> ◆ § 9-11-9.1(e): If plaintiff files an affidavit which is allegedly defective, and defendant to whom it pertains alleges, with specificity, by motion to dismiss filed on or before close of discovery, that said affidavit is defective, plaintiff's complaint shall be subject to dismissal for failure to state claim, except that plaintiff may cure alleged defect by amendment within 30 days of service of motion ◆ Plain and ordinary meaning of § 9-11-9.1(e)—that “complaint shall be <i>subject to dismissal</i>”—undoubtedly provides trial court with discretion to dismiss Plaintiff's Complaint for failure to state claim if he fails to amend defective affidavit within 30 days. This discretion, however, is not absolute; it requires Trial Court to take action while case is still pending ◆ Statute does not bar Plaintiff from voluntarily dismissing and refiling their Complaint 	<ul style="list-style-type: none"> ♣ Because Plaintiff dismissed his original action without prejudice <i>prior to</i> Trial Court ruling on Hospital's Motion To Dismiss, thereby resulting in no final adjudication on merits of original Complaint, Plaintiff's claims are not barred by <i>res judicata</i>. Complaint may be renewed pursuant to § 9-2-61 ♣ Trial Court neither extended time for filing amendment nor did it grant Hospital's Motion To Dismiss for failure to state claim after 30 days to amend Affidavit expired ♣ Once 30-day window had passed for Plaintiff to amend his Expert Affidavit, defect does not become incurable, and suit can be saved by dismissal without prejudice and refiling of action ♣ Voluntary dismissal of Complaint before Trial Court granted Hospital's Motion To Dismiss avoided decision on merits. Therefore, Trial Court had no power to modify, change, or convert what was closed case

Case <i>Assumption of Risk/ Avoidance Doctrines</i>	Legal Principles	Conclusions
<u>BERRYHILL V. DALY</u> 348 GA. APP. 221 (SEPTEMBER 26, 2018)	<ul style="list-style-type: none"> ◆ Defendant asserting assumption of the risk defense must establish that Plaintiff: (1) had actual knowledge of the danger; (2) understood and appreciated risks associated with that danger; and (3) voluntarily exposed himself to risks ◆ Charge is appropriate where there is evidence Plaintiff had subjective knowledge of specific, particular risk of harm associated with activity or condition that proximately caused injury, yet proceeded anyway ◆ Knowledge requirement does not refer to Plaintiff's comprehension of general, non-specific risks that might be associated with such conditions or activities ***** ◆ Avoidance Doctrine: Plaintiff must use ordinary care to avoid consequences of defendant's negligence when it is apparent or when in exercise of ordinary care it should become apparent 	<ul style="list-style-type: none"> ♣ Cardiologist advised Patient not to engage in strenuous activity. However, this does <i>not</i> establish Patient knew he risked losing consciousness if he chose to disregard instructions, nor is there evidence Patient knew dizziness or loss of consciousness were possible side effects of medication. Thus, there is no evidence establishing 1st element for instruction on Assumption of the Risk. Error could have confused Jury into believing <i>any risk</i> assumed by Patient could have formed basis for no liability; new trial ordered ***** ♣ Cardiologist advised Patient not to engage in strenuous activity for week following surgery. Patient decided not to seek further clarification or guidance on this limitation before climbing into deer stand just few days later. Thus, it was jury question whether, in exercising ordinary care for his own safety, Patient could have avoided consequences of Cardiologist's alleged negligence

Case <i>Gross Negligence/ Non-Party Fault</i>	Legal Principles	Conclusions
<p><u>SOUTHWESTERN EMERGENCY PHYSICIANS V. QUINNEY</u> 347 GA. APP. 410 (SEPTEMBER 28, 2018)</p>	<p>♦ Showing of gross negligence necessarily equates to showing breach of duty of even slight care; accordingly, under plain language of § 51-1-29.5, emergency medical provider's legal duty has indeed been effectively modified to that of only slight care *****</p> <p>♦ Fault of a Non-Party cannot be considered for purposes of apportioning damages without some competent evidence that non-party <i>in fact</i> contributed to alleged injury or damage</p>	<p>♣ Court <i>rejected</i> Physician's argument that because § 51-12-33(c) [Apportionment Statute] requires only finding of "fault" of non-party generally, jury does not need to find non-parties <i>grossly</i> negligent to apportion them fault. Trial Court did not err in instructing Jury that gross negligence standard of care applied in apportioning fault to non-parties *****</p> <p>♣ There was <i>no evidence</i> that non-party Hospital was responsible for delay transferring Patient. Physician contends evidence absolving him necessarily implicates Hospital as administrative entity, but speculation is not evidence</p>

Case <i>Physician-Patient Relationship/EMTALA</i>	Legal Principles	Conclusions
<p><u>PHAM V. BLACK</u> 347 GA. APP. 585 (OCTOBER 10, 2018)</p>	<ul style="list-style-type: none"> ♦ There can be no liability for malpractice in absence of physician-patient relationship ♦ Although Doctor who has agreed to be on call makes himself available to be consulted regarding Patient's condition, that fact alone does <i>not</i> indicate Doctor has agreed to establish doctor-patient relationship with <i>any</i> patient who presents to hospital. Plaintiff has to show more than that Doctor was on-call physician at time of Patient's injury ***** ♦ EMTALA imposes certain requirements on hospitals with emergency departments. EMTALA only provides relief in personal injury action against participating hospital 	<ul style="list-style-type: none"> ♣ Hospitalist was hospitalist-on-duty at time Patient was being treated in ED and was called for consultation, but never met Patient and did not participate in his diagnosis or treatment. Where Hospitalist's sole involvement with Patient was consulting with his treating doctors regarding whether he should be admitted and ultimately refusing to admit him, we do not find that Hospitalist and Patient had doctor-patient relationship ***** ♣ EMTALA only imposes legal duty upon hospitals, not individual doctors. Legal duty to perform medical screening, stabilize patient, and restrict transfers until patient is stabilized fell upon Hospital by plain language of statute. Because EMTALA imposes no legal duty on individual doctors, Plaintiff cannot maintain cause of action against individual doctors

Case <i>Breach of Fiduciary Duty/ Statute of Limitation</i>	Legal Principles	Conclusions
<u>HUDDLE V. HEINDEL</u> 347 GA. APP. 819 (OCTOBER 26, 2018)	<p>♦ Physician-patient privity is absolute requirement for maintenance of professional malpractice action. Physician-patient privity is result of consensual transaction that establishes legal duty to conform to standard of conduct. Relationship is considered consensual where Patient knowingly seeks assistance of Physician and Physician knowingly accepts her as patient. Further, physician-patient relationship can be inferred from Physician's notes and conversations with parties that showed Physician agreed to continue to act as Patient's physician</p> <p>*****</p> <p>♦ Georgia has no specific statute of limitation for breach of fiduciary duty claims. Instead, courts examine injury alleged and conduct giving rise to claim to determine appropriate statute of limitation</p>	<p>♣ In case involving Therapist engaging in sexual relationship with Patient, Trial Court did not err in granting Therapist's MSJ on claim for professional negligence because there was no specific evidence giving rise to triable issue as to whether psychologist-patient relationship existed between Therapist and Patient and as the psychologist-patient relationship ceased</p> <p>*****</p> <p>♣ Breach of fiduciary duty claim was premised on Therapist engaging Patient in sexual relationship that began shortly after May 2014; suit was filed on December 2015, thus, within 2 years of alleged breach of fiduciary duty</p>

Case <i>Statute of Limitation</i>	Legal Principles	Conclusions
<p><u>HAYES V. HINES</u> 347 GA. APP. 802</p> <p>(OCTOBER 26, 2018)</p>	<ul style="list-style-type: none"> ◆ Generally, misdiagnosis itself is injury and not subsequent discovery of proper diagnosis such that 2-year statute of limitations begins to run on date Doctor negligently failed to diagnose condition ◆ New Injury Exception applies, however, where Patient's injury arising from misdiagnosis occurs subsequently—generally when relatively benign or treatable condition left untreated leads to development of more debilitating or less treatable condition. Thus, injury is subsequent development of the other condition ◆ Trigger for commencement of statute of limitations is date Patient received New Injury, which is determined to be occurrence of symptoms following asymptomatic period. When misdiagnosis results in subsequent injury that is difficult or impossible to date precisely, statute of limitation runs from date symptoms attributable to New Injury are manifest to Plaintiff 	<ul style="list-style-type: none"> ♣ Trial Court erred in finding that New Injury Exception did <i>not</i> apply ♣ Plaintiff pointed to evidence that Decedent's metastatic cancer did not manifest until October 24, 2014 and that Doctor's misdiagnosis in November 2013 contributed to improper treatment of her condition and thereby to development of more debilitating or less treatable condition

Case <i>Experts/Proximate Cause</i>	Legal Principles	Conclusions
<p><u>SWINT V. ALPHONSE</u> 348 GA. APP. 199 (NOVEMBER 1, 2018)</p>	<ul style="list-style-type: none"> ◆ Because Party is without power to prevent his or her witnesses from contradicting themselves when testifying, Party should not be held responsible when such contradictions inevitably arise in testimony of experts. Furthermore, simply because Expert's testimony is contradicted is no cause for disregarding it and fact that Expert's testimony is contradictory has never rendered that testimony inadmissible. To the contrary, such contradictions go solely to Expert's credibility, and are to be assessed by Jury in weighing testimony ◆ There is no requirement in Georgia law that plaintiffs use “a proximate causation expert” in medical malpractice action, and it is well-established that causation may be established by linking testimony of several different experts 	<ul style="list-style-type: none"> ♣ Trial Court erred in concluding that standard of care required only that Doctor give Patient positional holiday no later than 6th hour of surgery because testimony by Patient's Expert established that standard of care required Doctor to reposition Patient sometime between 4th and 5th hour of surgery; any conflict with testimony of others was for Jury to decide ♣ While evidence showed that Patient's Expert was expert in field of robotic urological surgery, had performed numerous robotic prostatectomies, was familiar with risks of compartment syndrome, and believed positional holiday after compartment syndrome had begun would have lessened injury, it could not be said evidence regarding causation was so clear and undisputed as to demand summary judgment for Doctor

Case <i>Statute of Repose/ Amendments to Complaint</i>	Legal Principles	Conclusions
<p><u>PREFERRED WOMEN’S HEALTHCARE V. SAIN</u> 348 GA. APP. 481 (JANUARY 28, 2019)</p>	<p>♦ Medical malpractice statute of repose prevents Plaintiff from amending Complaint in pending medical malpractice action to add individual party Defendant more than 5 years after alleged negligence because, at that point, Plaintiff's cause of action against that particular Defendant no longer exists</p>	<p>♣ Legislature never intended for amended pleadings and joinder of parties’ statutes to overcome statute of repose</p>

Case <i>Experts</i>	Legal Principles	Conclusions
<p><u>GLOVER V. ATKINSON-SNEED</u> 348 GA. APP. 679 (FEBRUARY 20, 2019)</p>	<ul style="list-style-type: none"> ◆ Under § 9-11-26(b)(4)(A)(i), Trial Court may exclude testimony of any expert not identified in response to opposing arty's interrogatories ◆ § 9-11-26(b) requirements for identifying expert witnesses apply only to experts whose knowledge of facts and opinions held were acquired or developed in anticipation of litigation or for trial, not to expert witness who is actor or observer of subject matter of suit ◆ Party may present expert testimony from fact witness who is testifying as to facts he or she observed or learned of during course of treating Plaintiff or otherwise working on Plaintiff's medical case. Additionally, such expert may testify as to any conclusions he or she drew about Plaintiff's condition and/or cause of that condition. Such fact witness may not, however, provide expert opinion testimony on standard of care and whether that standard was breached, unless witness has been identified as expert 	<ul style="list-style-type: none"> ♣ Plaintiff's motion to set aside verdict and for new trial was properly denied, as Plaintiff's Treating Physician was properly barred from providing expert testimony as to applicable standard of care and Doctor's breach thereof ♣ Treating Physician was not identified as expert witness and was only fact witness ♣ Treating Physician's standard of care opinions were not formulated as actor or observer of subject matter of suit; his knowledge of facts relevant to his opinion that Doctor was negligent in failing to diagnose and treat Plaintiff was acquired in anticipation of trial because he reviewed x-rays from Doctor's office just prior to his deposition and he did so not as part of his treatment of Plaintiff, but at request of Counsel

Case <i>Expert Affidavit</i>	Legal Principles	Conclusions
<p><u>WILLIAMS V. MURRELL</u> 348 GA. APP. 754 (FEBRUARY 22, 2019)</p>	<ul style="list-style-type: none"> ♦ § 9-11-9.1 is applicable only to those professional malpractice actions alleging professional negligence. It is only where failure of Professional to meet requisite standards of subject profession that necessity to establish such standards and violation thereof by expert testimony for guidance of Jury arises ♦ Those claims grounded on Professional's intentional acts are not required to be accompanied by expert affidavit. A fortiori, complaints asserting claims for intentional misconduct against Professional, including fraud and misrepresentation, do not require expert affidavit 	<ul style="list-style-type: none"> ♣ Trial Court erred by dismissing Plaintiff's fraud claims based on her failure to file Expert Affidavit with her Complaint because fraud claims were grounded in allegations of intentional misconduct, which claims did not need to be accompanied by Expert Affidavit; no expert testimony is required to establish that it is improper for physicians to defraud their clients.

Case <i>Apportionment</i>	Legal Principles	Conclusions
<p><u>TRABUE V. ATLANTA</u> <u>WOMEN'S SPECIALISTS</u> 349 GA. APP. 223 (MARCH 7, 2019)</p>	<ul style="list-style-type: none"> ◆ § 51-12-33(d)(1) provides that negligence or fault of Non-Party shall be considered if Defending Party gives notice not later than 120 days prior to date of trial that Non-Party was wholly or partially at fault. Plain and unambiguous meaning of text mandates strict compliance ◆ Employer's vicarious liability is derivative and imposed by Statute, based solely on its status as active tortfeasor's employer. Fault as used in § 51-12-33 extends to those who have breached legal duty in nature of tort that is owed for protection of Plaintiff ◆ Therefore, generally, where Party's liability is solely vicarious, that party and actively-negligent tortfeasor are regarded as single tortfeasor. Thus, where defendant Employer's liability is entirely dependent on principles of vicarious liability, <i>unless</i> additional and independent acts of negligence over and above those alleged against Servant or Employee are alleged against Employer, verdict exonerating Employee also exonerates Employer 	<ul style="list-style-type: none"> ♣ Trial Court erred by granting new trial as to apportionment because by failing to give mandatory notice required by § 51-12-33(b), Defendants waived their right to apportion damages on vicarious liability as to non-party

Case <i>Cross-Examination/ Learned Treatises</i>	Legal Principles	Conclusions
<p><u>MOORE V. WELLSTAR HEALTH SYSTEM</u> 349 GA. APP. 834 (MARCH 12, 2019)</p>	<p>♦ § 24-8-803(18) limits its scope to statements contained in published treatises, periodicals, or pamphlets, which are established as reliable authority. Application of even liberal interpretation of § 24-8-803(18), favoring admissibility, cannot eviscerate that explicit requirement</p>	<p>♣ There was no basis to find that Society Committee Findings fell within scope of learned treatise exception in § 24-8-803(18), as that exception did not expressly reference that type of document, which was written by American Society of Anesthesiologists about its own disciplinary proceedings against a different anesthesiologist not involved in current case for violation of specific Society guidelines</p> <p>♣ Because Committee Findings were used to unfairly impeach Plaintiff's Expert Witness as to core issue of standard of care, and because sanctioning of a different anesthesiologist by Society for violating Society expert-witness guidelines was conflated with standard-of-care issues reserved for Jury, admission of that evidence was not harmless, and Plaintiff was entitled to new trial</p>

Case <i>Expert Affidavit</i>	Legal Principles	Conclusions
<p><u>ZEPHANIAH V. GA. CLINIC</u> 350 GA. APP. 408</p> <p>(JUNE 11, 2019)</p>	<ul style="list-style-type: none"> ◆ By its specific terms, § 9-11-9.1(a) limits expert affidavit requirement to professional malpractice suits against members of one of enumerated professions or employer of same when Employer's liability is predicated on professional negligence of such Employee ◆ Supreme Court of Georgia has limited application of expert affidavit requirement to actions for professional negligence. As a result, claims grounded on Professional's intentional acts are not required to be accompanied by Expert Affidavit 	<ul style="list-style-type: none"> ♣ In Patient's claim against Medical Clinic alleging that Clinic Technician injured her in drawing her blood without her permission, Trial Court erred in granting Clinic's motion to dismiss for failure to file Expert Affidavit because Employee who injured her was not licensed professional for whom Expert Affidavit was required ♣ Additionally, Patient also alleged claims for intentional misconduct for which Expert Affidavit was not required: medical touching without consent constituted intentional tort of battery

Case <i>Proximate Cause/Damages</i>	Legal Principles	Conclusions
<p><u>HOUSTON HOSPITALS V. FELDER</u> 2019 GA. APP. LEXIS 319 (JUNE 14, 2019)</p>	<ul style="list-style-type: none"> ◆ Essential elements of medical negligence claim are: (1) duty inherent in doctor-patient relationship; (2) breach of that duty; and (3) that this failure be a proximate cause of injury sustained. Any injury resulting from want of such care and skill shall be tort for which recovery may be had ◆ Derivative claims of attorney fees and punitive damages will not lie in absence of finding of compensatory damages on underlying claim 	<ul style="list-style-type: none"> ♣ In case where Employee forged mammogram reports, denial of summary judgment to Hospital was reversed because Plaintiffs failed to show that they suffered physical, emotional, or pecuniary injury, as they consented to undergoing second mammogram; they did not have breast cancer. Therefore, failure of Radiologist to examine their mammography films did not exacerbate existing condition ♣ Plaintiffs did not cite to any evidence that suggested they suffered from breast cancer or invasive medical procedures as result of delay caused by Employee's misconduct

Case <i>Mental Health Code/ Immunity</i>	Legal Principles	Conclusions
<p><u>FULTON-DEKALB HOSPITAL AUTHORITY V. HICKSON</u> 2019 GA. APP. LEXIS 427 (JUNE 28, 2019)</p>	<ul style="list-style-type: none"> ◆ § 37-3-4 of Georgia's Mental Health Code does not provide immunity for failure to properly evaluate and/or treat patients between their arrival and discharge ◆ Good faith has been defined as state of mind indicating honesty and lawfulness of purpose; belief that one's conduct is not unconscionable or that known circumstances do not require further investigation 	<ul style="list-style-type: none"> ♣ In medical malpractice action in which 1st Doctor involuntarily committed Patient for inpatient treatment but 2nd Doctor rescinded order and Patient attempted to commit suicide 11 hours later, Hospital was <i>not</i> immune from liability under § 37-3-4 as it did not discharge Patient in good faith and in compliance with Georgia's Mental Health Code, § 37-3-1 et seq. ♣ Licensed Clinical Social Worker knowingly defied order by 1st Doctor to admit patient, consulted with 2nd Doctor to complete reassessment, and acted in violation of Hospital's own policies with respect to her recommendation to discharge Patient without attempting to corroborate his personal history from family members and without documented safety plan

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I. Introduction



Since the introduction of the iPad about nine years ago, the ubiquitous glass tablet has become an essential tool for the modern trial lawyer. The iPad has established itself as a powerful story telling device. Each year, the newest models offer cutting edge features that increase the productivity and utility that the iPad is capable of delivering.

2016 was a pivotal year for the direction of the iPad. The new iPad Pro is uniquely tailored for presentation, incorporating a larger 12.9-inch screen and accessories such as the Apple Pencil and Smart Keyboard. In the years since release, the Apple Pencil has developed into a precision tool for interacting with the screen without obstructing the view of the presentation. The Smart Keyboard magnetically connects and provides the user productivity customary to a traditional laptop. I have found the iPad to be an incredibly effective tool for all aspects of my practice.

II. Why use Technology in Your Deposition

The primary benefit I have found in using an iPad in depositions and trial is the ability to tell a clearer, more compelling story. As many commentators have noted, a trial is a competition among stories and the side that tells the story that most closely aligns with the jury's values and belief system will ultimately prevail. Effective storytelling is the key to success at trial. The iPad is a powerful tool to help tell - and show - the jury a powerful story.

At its core, a trial is a competition among stories. We tell one story to the jury, and the defense tells a different one. Both sides hope their story resonates and connects with the jury and leads the jury to a desired outcome.

Experienced trial lawyers realize, however, they are not telling the client's story, but instead they are telling the jury's story through the prism of the client. Stated differently, juries don't generally care deeply about the plaintiff, at least not initially, but they do care about themselves and their families. This is why voir dire is essential because it helps identify those juror stories and life experiences that you can take and use in your case to help the jury see the common stories and life experiences of your client. The story is everything.

There has been tremendous scholarly work exploring how humans used story structure throughout history the use of stories throughout human history. From the time we are infants, we are all hard-wired to receive and understand information in the story model, e.g. "Once upon a time ..." So we must bring this understanding to bear at trial and present our cases in a narrative, story format. This is true both in jury trials, motion practice and all other forums of trial work. Keeping this "story centered" approach in mind, I have developed a litmus test for iPad apps I use at trial: Does the app help tell the story? So what apps help tell the story at trial?

During a deposition, I connect the iPad to an HD TV via either HDMI or over WIFI with airport express and Apple TV. I always have both options available incase one fails. By using the Apps discussed below, I'm able to interact with exhibits, 3d body visuals and videos with the deponent in real time.

III. Best Apps

Perhaps the most valued tool the iPad possess is the diverse ecosystem of applications contained within the App Store. Certain apps can have an immediate and profound impact on your trial practice. The following are some of the apps that I consider essential in my legal practice.

a. TranscriptPad

TranscriptPad is one of the most useful apps available for depositions and pre-trial preparation. TranscriptPad allows you to import all of your deposition transcripts with the ability to read and annotate electronically. Gone are the days of highlighting, bending pages, and dog-earing deposition transcripts for future reference. TranscriptPad allows the user to create custom annotations to associate with specific texts. The ability to consolidate and effectively review all of your depositions within one app makes TranscriptPad a powerful app in the hands of a trial lawyer.



b. TrialPad

TrialPad is an essential app for organizing and referencing documents in a deposition, hearing, or trial setting. Within the app, the user can create folders for document management and presentation. The app shines for its ability to effortlessly organize, manage, search, annotate, and store documents or video while leveraging the portability of the iPad. The app is compatible with a dynamic range of output options. The screen can be displayed in any courtroom or boardroom through traditional plug and play technology, as well as pushed wirelessly to any Apple TV.

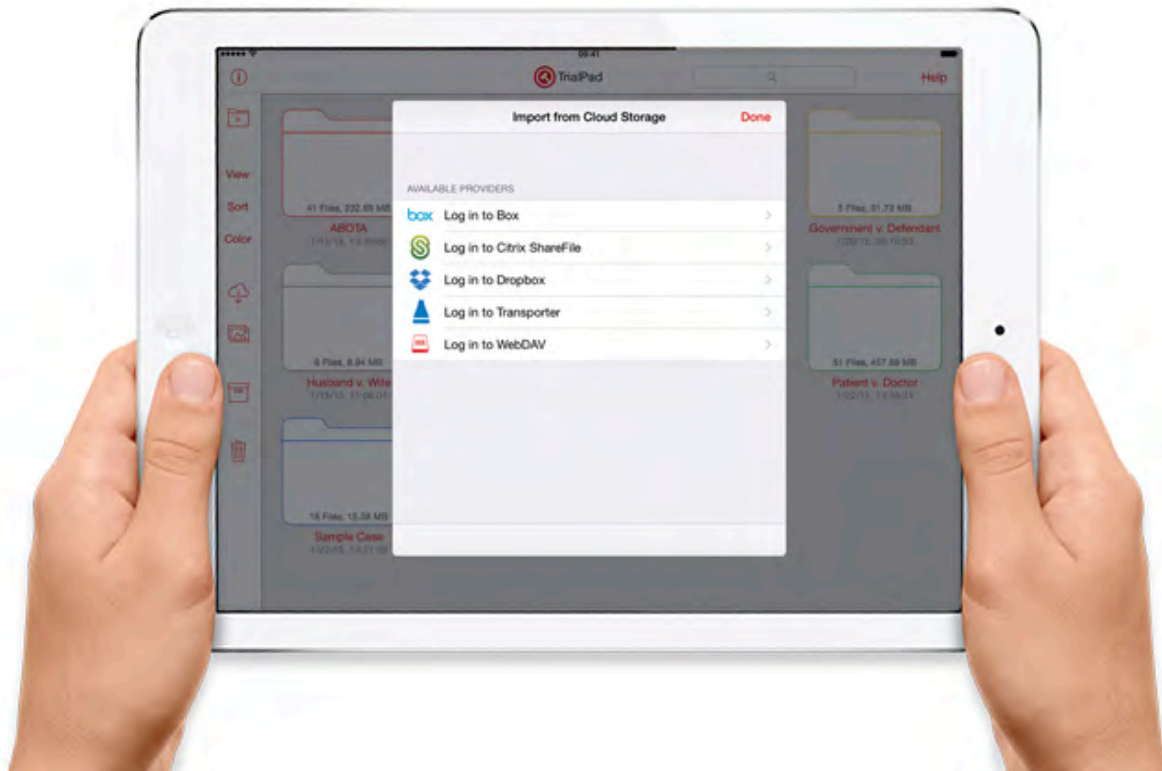
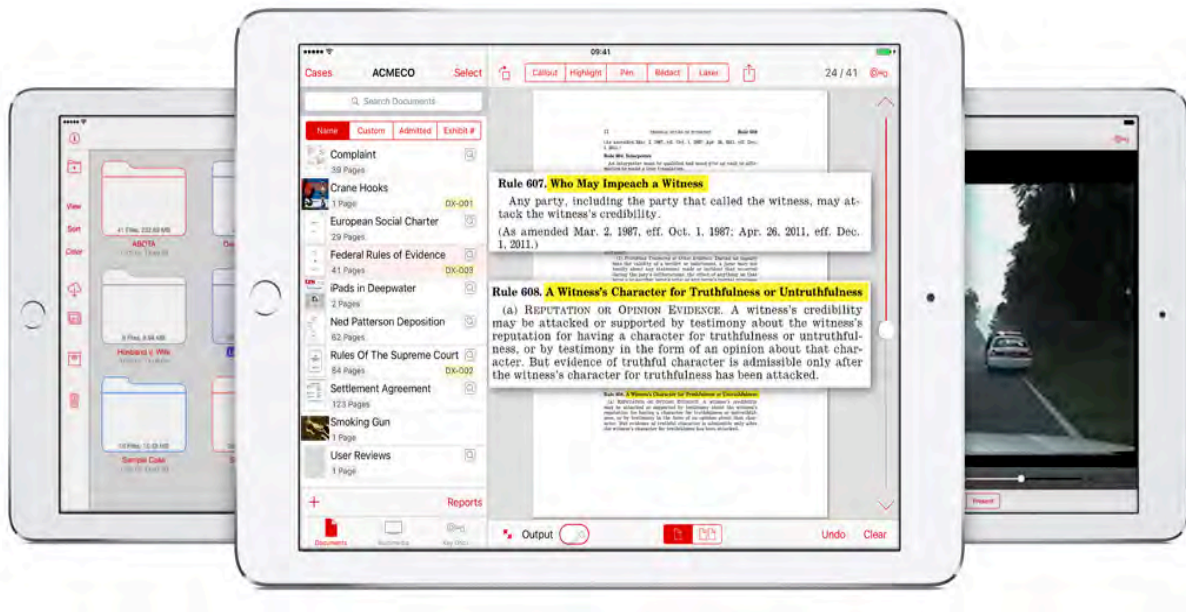
During the deposition I use TrialPad to display and interact with exhibits while asking questions of the deponent. I coordinate with the videographer to capture the documents on the screen and incorporate them using picture in picture. Similar to TranscriptPad, this app allows you to highlight medical records and call out important sections of the medical record.

TrialPad makes organization easy. Each matter can be stored in a separate folder, and documents or media can be moved around to fit the need of the user. Folders and icons can be color coded or customized to the users preference. TrialPad also includes a powerful search tool to provide instantaneous document retrieval.

Organization goes one step further with TrialPad's archive capability. The archive tools back up your files and allow for seamless information sharing to a second iPad or Mac. This feature makes it easy to share your case with another TrialPad user. The archive feature is particularly useful in the event your case is delayed or continued.

TrialPad allows you to have access to all of your cases on your iPad, placing all of your documents at your fingertips in an easy to access, organized way. The current iPad's

have fantastic storage and will be up to the task. The increased storage capacity for iPad has further increased the utility of TrialPad.



c. Paper

Don't feel intimidated if your artistic abilities are not up to par. Paper is an easy and effective way to illustrate points where words don't do the job. There are an assortment of

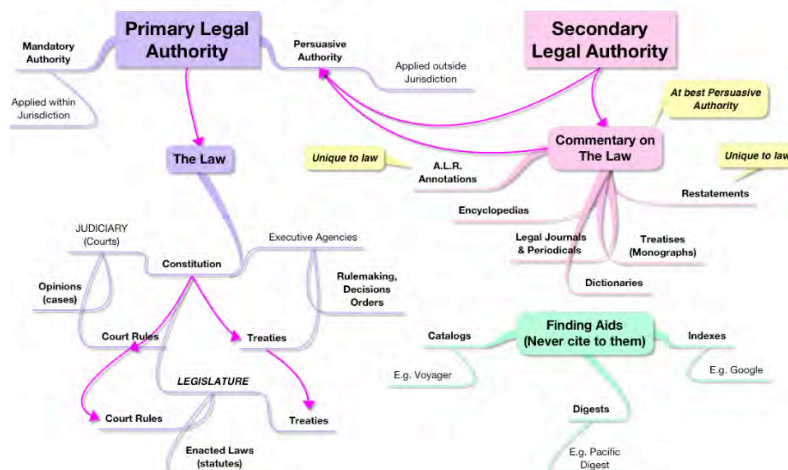
pens, brushes, and colors within the app to allow for the user to select. This app is a valuable legal tool, especially when paired with the precision of the Apple Pencil. Paper is available to download for free on iTunes.

For example, we recently used the app at a motions hearing and drew a blood vessel – really just a tube painted red (artery) and drew a line where the needle went in. This simple drawing helped us illustrate to the judge where the needle went in. Additionally, these simple drawings help connect with the visual learners on your jury, another benefit of the app.



d. iThoughts

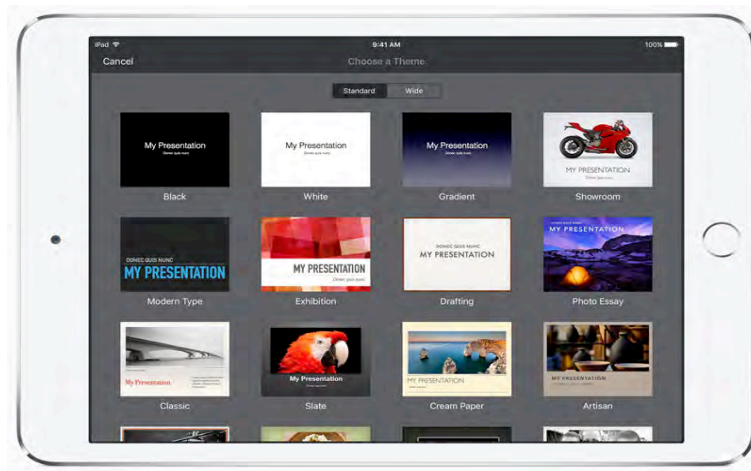
Are you a visual learner? iThoughts takes mind mapping and places it at your fingertips. The app allows the user to visually organize information in a hierarchical manner and move data around in a way to suite the visual learner. Mind mapping helps the learner see relationships between data and decide on the best structure for the given task. The app includes colors and symbols to help organize the data. There is cross compatibility between iPad and Mac. iThoughts is extremely useful for outlining a brief, discovery responses, mapping witness order, the structure for trial, evidence, and closing arguments. iThoughts plays a role to organize witnesses, testimony and various information. The app connects wirelessly to Apple TV for presentation to colleagues or a courtroom.



e. **Keynote**

Keynote is essentially Apple's version of PowerPoint. In my opinion, Keynote is a far more robust and engaging platform. Included in the app are stunning visual transitions and slides. The more advanced features require a learning curve, but navigating through basic features is very intuitive and easy to use. You can develop the slides on the Mac and export to the iPad for presentation, or develop the entire presentation directly on the iPad.

Why use keynote at trial? Keynote is a powerful story-telling tool when presenting to a jury, particularly during more "static" phases of trial, such as opening or closing arguments. Keynote slides provide visual reinforcement to the story and help to frame the issues. To better understand the effectiveness of Keynote I recommend going to the Apple website and watch any presentation given by Apple's President, Tim Cook, or the master of presentations, Steve Jobs.

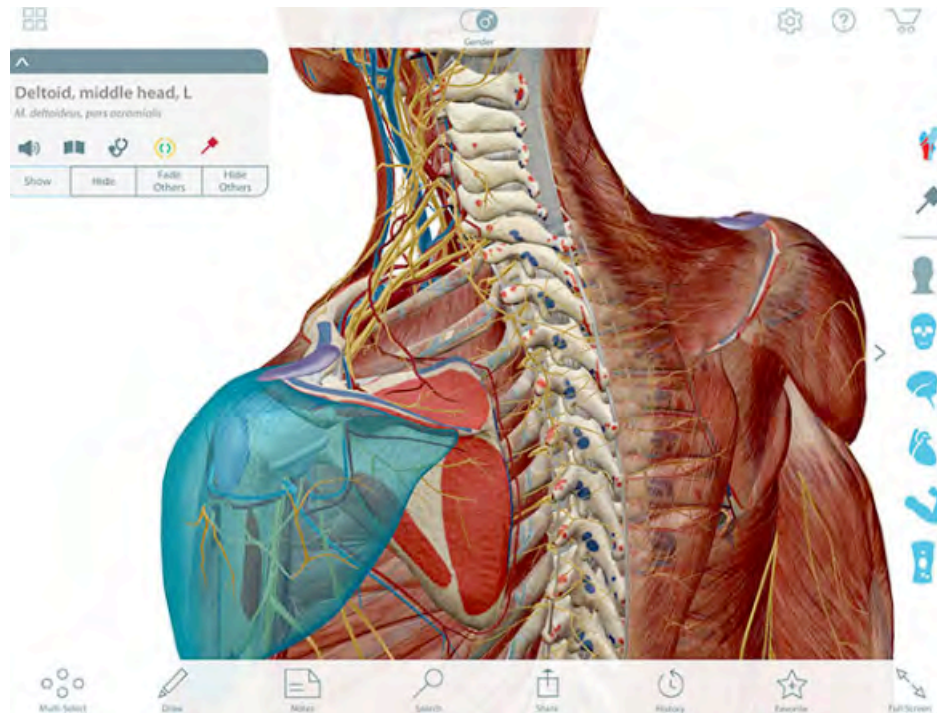


f. **VisibleBody3D**

Once you use this app, you will wonder how you ever practiced without it. VisibleBody3D is an anatomy app that allows you to view the anatomical structure of the human body in a 3 dimensional manner. The app includes all body systems, a comprehensive gross anatomical structure for male and female, as well as microanatomy.

The app allows you to manipulate the body in 3D while using pinch to zoom to focus on relevant structures, such as a particular disk. Also, simply touching a structure will provide accurate identification, encyclopedic definitions, and pronunciations.

This is truly a perfect marriage of hardware technology and software. The user has the ability to navigate through a 3 dimensional body with utmost precision and clarity. I use this app during depositions with medical experts to better visualize the paper records. This is a game changer.



IV. Final Thoughts

Each wave of technological innovation brings with it the ability for lawyers to incorporate new trial practices. When used correctly, the iPad equips the lawyer with an effective, efficient, and nimble device to tell their story. Never before has a lawyer possessed such a persuasive device in the palm of his hands. I recommend incorporating technology into your trial practice, and in doing so, become the most effective advocate you can be. Each of the aforementioned applications are available for download in the App Store.

CONNECTING WITH JURORS IN OPENING AND CLOSING

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CONNECTING WITH JURORS IN OPENING STATEMENTS

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I. Introduction

No litigator should underestimate the importance of the opening statement. After opening statements most jurors have made up their minds as to which side will likely prevail. All will readily admit, it is easier to keep a juror than to sway one later on. Even though jurors may try to keep an open mind, jurors being human like the rest of us will instinctively form opinions and then search for facts to support them. If you can't convince them to believe in your client and in your cause during your opening, you've probably lost your case before the first witness has been called.

What is a jury? Moe Levine, a pioneer of trial advocacy in the 1950's, believed it was a mistake to think of a jury as a collection of twelve individuals. He believed that once those twelve individuals were thrown together in the jury box, the group took on its own mind. Levine may have been the first to recognize even before the first so-called jury psychologist went in business, there is no such thing as jury "psychology." To study jury behavior requires an analysis of how people behave in groups which we all know is an entirely separate social science called "sociology."

Sociologists know that groups like to be led. Be mindful of what jurors are thinking and feeling when you begin your opening. Be their guide, answer their questions. The jury will quickly choose who to follow. If they follow you, you will likely win. If they follow your adversary, you will likely lose.

II. The Context Of Opening Statement And Preparing To Lead

Having given the prospective jurors a preview in *voir dire*, the great courtroom lawyers start their opening statements with a jury anxious to hear about the case. Juror interest and lawyer credibility are developed during *voir dire* by:

- (1) setting the tone for trial;
- (2) introducing concepts and evidence and conditioning the jurors for things to follow in the trial;
- (3) securing public commitments from jurors to be fair;
- (4) using language that creates connotations favorable to your clients, your witnesses, and other relevant facets of your case;
- (5) introducing the arguments you will use in the trial;
- (6) refuting opposition arguments;
- (7) enhancing your credibility; and
- (8) creating jury purpose.

Each phase of the trial serves a distinct purpose, while being interrelated with the other parts, but must remain fluid so that unpredictable occurrences can be confronted and washed away without obstructing the overall flow. This requires an unassailable theme, a comfortable

understanding of the applicable law, and perhaps most importantly, a mastery of every fact in the case.

As discussed in greater detail below, opening statement should be organized and delivered using a narrative structure. Within this storytelling structure, themes are developed that organize the evidence and claims of liability, set a serious tone, define jury purpose, specify the basis of authority for the claims, introduce key concepts and key pieces of evidence, define important terms, lay out the central arguments in the case, and refute the central contentions of the defendant. Opening statement should be a story that can be told in a manner making it easy to be repeated and retold by the jurors later. If delivered this way, it is easier to remember.

Direct examination is used to present facts in support of the story line, personalize your client, provide technical information, and enhance the credibility of the witnesses. The questions asked of all witnesses on direct examination are simple and direct, using everyday language. Their testimony is controlled by use of narrow questions calling for specific answers in most instances.

Cross-examination is used to achieve three purposes: (1) to destroy the credibility of the witness, (2) to controvert arguments or facts presented previously by the witness or by the defense, and (3) to elicit facts in support of the your case. The basic strategies used in questioning are designed to control all aspects of the witnesses' testimony. The testimony is controlled by the use of leading questions or the use of narrow questions calling for specific answers.

In closing arguments, a narrative structure is used that integrates the evidence, creates jury purpose, and creates meaning through the use of themes and the strategic use of language.

III. Suggestions For Preparing The Opening Statement

No single part of any trial can be prepared without giving thought to its relationship to each of the other parts and, most importantly, to the whole. No single part of a trial is more difficult to prepare than the opening statement.

A. Getting Your Mind In The Game

In order to get your mind prepared for developing your opening statement, consider the following questions:

- What is your client's condition?
- What is the liability story?
 - i. What are the risks the defendant needed to foresee and guard against?
 - ii. What are the rules of governing the defendant's conduct?
 - iii. What rules of conduct were violated by the defendant?
 - iv. What are the issues?
 - v. What witnesses can best tell the complete story?

1. What is the minimum number of witnesses necessary to tell the story?
 2. Why have anymore than the absolute minimum number of witnesses?
 3. Will you be rewarded for understatement?
- What legal questions will the jury have to answer?
 - i. What careless choices did the defendant make?
 - ii. Did your client make any careless choices?
 - What are the weaknesses in your case?
 - i. How will you confront those weakness?
 - ii. Can you turn them into strengths?
 - Why should the jury find in your client's favor?
 - i. What are the consequences if they don't?
 - ii. How will you explain this concept within the rules?
 - How will you minimize the idea that you are appealing to their sympathy versus their understanding?
 - i. Can you cause the jurors to understand the difference in price and value when it comes to compensating human suffering?
 - Why is the case important?
 - i. Why should the jury care as the conscience of the community?
 - Can you make the jury feel good about their verdict?
 - i. Can you give them a sound and solid answer to any criticism they might receive about their large verdict from others who were not on the jury and did not hear the evidence?
 - ii. Does the jury want to be led to a conclusion it can express with pride?
 - iii. Does the jury want to participate in a meaningful verdict?
 - iv. Does every juror want to believe that his or her presence in the case had meaning?

B. Purpose Of Opening Statement

The purpose of opening statement is to introduce the parties, the proof, and the relative positions of both sides so that the jury understands the question and issue joined before it and what job must be done by the verdict.¹

C. Themes In Opening Statement

A theme is a short statement that summarizes what the case is about. From the plaintiff's perspective, the case is about some bad choice the defendant made who is now refusing to accept responsibility for the consequences of that choice. Many believe effective themes are universal truths or moral imperatives, principles or values with which all would agree and which also identify bad behavior which everyone would condemn.

¹ Counsel for both parties may state to the jury what each expects to prove on the trial, and should be confined to a summary or recital of such matters of proof only as are admissible under the rules of evidence. Waits v. Hardy, 214 Ga. 41(3) (1958).

D. Argument In Opening Statement

It is generally understood that argument is not permitted in opening statement, but opening statement can be used to prepare and precondition the jury for what they will later hear in final argument.² Strong language and figures of speech are acceptable in the opening statement.³

Argument is not per se improper in opening statement. In Kilday v. Kennestone Physicians Ctr. LP, A08A2375 (3/20/09), defense counsel made the following remarks in his opening statement:

Unfortunately, we've come to a point in society where whenever an accident happens and somebody gets hurt, we immediately say, well, geez it must be somebody's fault. But that's not the case. And the facts of this case, we're going to show that this was not the fault of the defendant.

Plaintiff's objected to these remarks as improper argument in opening statement and the court overruled the objection. The Court of Appeals reviewed for abuse of trial court discretion and affirmed by holding the remarks were merely a preface to defense counsel's conclusion that he expected the evidence to show the defendant was not a fault, even though the plaintiff sustained an injury from an unfortunate event.

E. Discussing The Burden Of Proof In Opening Statement

The law does not forbid an explanation of the burden of proof in opening statement. What the law forbids is the introduction into a case by way of argument of facts which are not in the record and are calculated to prejudice a party and render a trial unfair. The range of comment in opening statements is necessarily in the discretion of the trial judge; and unless it can be shown that such discretion has been abused or positive injury has been done by the remarks of counsel, the discretion of the trial judge will not be controlled. There is no harmful error in allowing counsel to explain the burden of proof in a civil case in opening statement. McConnell v. Akins, 262 Ga. App. 892(3) (2003).

The burden of proof should always be discussed in *voir dire* and must be explained in opening statement if the jury is going to have any appreciation of the context within which they should view the evidence. Otherwise, the jurors will create their own context which will likely be erroneous and will remain with the juror throughout the presentation of evidence. If incorrect, the framework used by the juror will not likely stand a chance of being corrected at the end of the trial after the juror has already thought about the evidence as it was being introduced.

If there is an objection to arguing the law while explaining the burden of proof, respond that you have no intention of arguing; point out that neither the burden of proof, nor its application is in

² Preliminary statement that this is a "trumped up lawsuit," held not to require reprimand of counsel or instructions to disregard since counsel may state his client's contentions in the case. Waits v. Hardy, 214 Ga. 41(3) (1958).

³ Ridley v. Ridley, 25 Ga. App. 154 (1920), Waits v. Hardy, 214 Ga. 41 (1958), Beecher v. Farley, 104 Ga. App. 785 (1961).

dispute; suggest that the jury needs a brief description of the context within which to consider the evidence; and promise not to take a long time. More importantly, be sure to emphasize that expecting the jury to reason backwards to apply the standard in reverse after they have already heard all the evidence is contrary to the way the human mind works. None of us think backwards. We all know our phone numbers, but most of us would struggle to recite it backwards. We all know the alphabet, but very few of us can recite it backwards. The jury's job is hard enough and the lawyers ought to want to help where we can and so long as both sides can comment briefly on the standard, it cannot hurt and can only help. You may also explain the burden of proof in the context of the expert testimony by telling the jury when they hear legal phrases "more likely than not" or "to a reasonable degree of medical certainty" to listen carefully because these phrases have great legal significance and mean we are meeting our burden of proof. If you anticipate opposing counsel is likely to object anyway, request the preliminary pattern charge on burden of proof to be given before the opening statements start. Then if you comment on the burden of proof, you are merely commenting on a principle the court has already charged. McConnell v. Akins provides us with the authority since the defense will be unable to articulate any harmful prejudice.

Analogies are helpful in explaining the burden of proof. As David Ball teaches, to carry the burden by a preponderance means simply that you are more likely right than wrong. If the standard of proof were placed on a football field, it would not be necessary to score a touchdown, only that when all the evidence is in and the deliberations are over, you, the jury, believe the ball is over the 50 yard line in the defendant's territory.

It should have been explained in *voir dire* that you will prove your case far beyond a mere more likely right than wrong standard, but even if someone thinks you are only more likely right than wrong and not absolutely certain, then the law will require a verdict in your client's favor. Before being seated on the jury, all jurors should have indicated that they could follow the law even if they only believed you were more likely right than wrong without more.

The problem of "doubt" can be effectively addressed in opening by preparing the jury for your remarks on this subject to come later in closing. The burden of proof can be satisfied in the face of doubt, even substantial doubt. The level of certainty needed in making decisions in a courtroom is really no different than important decisions you make in real life. Rhetorical questions in closing seem to make the point best:

Is there anyone who ever made an important decision with absolute certainty? No. Even decisions like should I buy this car or that one? Should I go to this college or that one? Should I apply for this job or that one? Should I buy a house or lease an apartment? Should I accept this offer or that one? Should I live in this part of town or another? Or should I live in this town at all? Or even more important than those questions, how about this one for the men: Is now the right time to ask the woman I love to marry me? Or ladies, should I say yes? Should I marry at all? Or, are we ready for kids now or should we wait? Or, should we have kids at all?

If you think about it, all of these decisions were important and life altering, but none could be made with absolute certainty. All of them had to be made in the face of doubt and sometimes substantial doubt – and the law is no different – a courtroom is

no different – the decision of a jury in a civil case is no different. You are being asked to apply the same standard you have used for many important decisions in your life. Just as with the others, you can have doubt with this one, you can have lots of doubt, and you can still find that we have met our burden of proof so long as you believe we are more likely right than wrong. So if anyone says, “I’m not sure if the burden of proof was met because I have doubt,” you tell them that is not the question. You can have doubt, but the question is are we more likely right than wrong?

The burden of proof, the problem of “doubt”, and the fact the law permits the jury to find the burden of proof has been met even in the face of substantial doubt must be addressed in opening statement.

F. Use Of Visual Aids In Opening Statement

In most jurisdictions, Georgia included, the use of visual aids is allowed during opening statements. For example, O.C.G.A. § 9-10-183 provides that blackboards, models, and similar devices can be used in opening statement:

In the trial of any civil action, counsel for either party shall be permitted to use a blackboard and models or similar devices in connection with his argument to the jury for the purpose of illustrating his contentions with respect to the issues which are to be decided by the jury, provided that counsel shall not in writing present any argument that could not properly be made orally.

However, counsel do not have complete freedom to display photographs or other evidentiary material to the jury during opening statements. Some jurisdictions require counsel to get the court’s permission before using demonstrative aids in the opening. California Superior Court Rule 8.12 states:

During opening statement or presentation of evidence, counsel may not, without the consent of the trial judge, use a blackboard or paper on a bulletin board to write or summarize witnesses’ testimony or diagram, calculate or outline chronology therefrom.

Visual aids are an important part of opening statement. Studies show that people will retain more information when the information is conveyed through oral and visual means as opposed to oral alone. Care must be taken when choosing visual aids that they remain aids to the story and not the story themselves. We live in a technological society where people rely on technology as the media for information. Do not let the means of delivery overpower the message. Be careful of using too much technology and appearing “slick.”

IV. Structure And Sequence Of The Opening Statement

Much has been written on how to structure and sequence the perfect opening statement. There is no one way to structure and sequence the opening statement and no two cases are sufficiently similar to permit one to be completely wedded to any rigid template.

Certain topics must be covered in every opening statement. Topics must be sequenced in whatever manner the particular case demands for maximum comprehension and persuasion. The principle of primacy (that which the jury hears first, they are most likely to believe) applies here and its importance must not be overlooked. Jury consultants report that decision makers tend to blame whoever they personalized first and strongly suggest that the story begin with focus on the party at fault rather than your own client.

Sequencing is therefore critical to the delivery of a persuasive opening statement. Sequencing is about the order of topics in the story, not the order of facts. Topics in front carry more weight than those that come after.

A. Sequencing The Medical Negligence Opening Statement

In personal injury cases, more often than not, effective sequencing begins with setting contexts about overriding topics (safety, public protection, prevention, etc.), education about risks and rules, and introducing broad frames (on who, what, where, when, and how our story focuses) which build appreciation for important points that follow.

For example, an athlete suffers a broken leg which places him at risk for vascular injury. His fracture is repaired and he is admitted for observation. The doctor is notified of a change in the patient's symptoms consistent with a circulatory problem in his lower leg and foot. He chooses not to evaluate the patient that night and performs an incomplete evaluation the next morning. The patient's symptoms worsen and the nurses observing him choose not to report his progressively worsening symptoms to the doctor. It is later discovered that the patient's artery had been injured by the fracture and resulted in a progressive obstruction of blood flow, causing the death of his lower leg and foot. The leg and foot had to be amputated. The doctor claims his choices were reasonable based on the information provided to him. Likewise, the hospital claims its choices were reasonable based upon the doctor's orders. The plaintiff contends the doctor's choices and the hospital's choices both constituted violations of the standard of care. What comparisons need to be made before the jurors can associate this with a violation of the standard of care?

The following information is a minimum: the number one priority of all medical professionals is to protect patient safety, what protecting patients in this situation should look like, criteria for communication between doctor and hospital and hospital and doctor, red flags in the medical records that show the need for communication. If the plaintiff's sequence begins with the sentence starting this example without first setting a context about patient safety, risks that justify the rules, the standard of care, and a complete medical profile for comparison, the plaintiff's presentation will likely create suspicion rather than support.

In general, violations of the standard of care make much more sense when they can be compared to an already established standard of care. In terms of sequencing, standards first, violations second. In many cases, before jurors can understand the importance of standards, learning about the risks which the standards are designed to minimize is helpful. Then the sequence is risks, standards, violations, cause, and consequences. Always give the rules before the violations or else the jurors will create their own rules against which to measure the violations. Some cases are most persuasive starting with cause and consequences followed by risks, rules, and violations. These must be determined on a case by case basis.

B. Opening Statement Outlines

David Ball, Ph.D. (modified)

The following is my modification of a familiar and popular sequence suggested by David Ball:

(1) RULES

- a. Very briefly: Introduce & set the scene;
- b. Risks (jury needs to know the risks foreseeable to the defendant that justify the rules);
- c. Rules or standards = Principles of Safety;
- d. Violations;
- e. Cause;
- f. Consequences;
- g. Jury's job – to come as near as possible to putting plaintiff back in the position he or she was in before (fix, help, make up for).

(2) WHAT HAPPENED?

- a. Story of what the defendant did (The defendant's choices);
- b. Immediate harm.

(3) BLAME (Who and why we are suing)

- a. Blame (Who and why we are suing);
- b. Explain importance of the case and why we had to come to court;
- c. Explain burden of proof and level of certainty required;
- d. Introduce experts and their conclusions, define unfamiliar terms;
- e. Introduce key exhibits and retell the story highlighting the violations.

(4) UNDERMINE THE OTHER SIDE

- a. Undermine (What's wrong with the liability defenses?);
- b. Define the central liability question for the jury.

(5) CONSEQUENCES OF THE HARM

- a. Damages (What are the losses and harms?);
- b. Explain sympathy vs. understanding;
- c. Define the central damages question for the jury;

- d. Money (What does justice require?).

(6) CONCLUSION

- a. Restate the liability question the jury is there to decide (You will decide whether...);
- b. Restate the damages question the jury is there to decide (You will decide whether...);
- c. Conclusion.

Melvin M. Belli, Esq.

Of course, there are many other outlines and many have been proven by the success of the lawyers who made them. Melvin Belli, labeled in the 1950's by Life magazine the *King of Torts*, used an outline similar to this one:

- (1) Begin with the story of the client's condition;
- (2) Tell the liability story (Rules of conduct, the defendant's conduct and what the defendant did wrong – explain who the defendant is);
- (3) Explain the legal issues (Questions the jury must answer, proof, including the burden of proof, and introduction of the witnesses, and weaknesses);
- (4) Complete the story of injuries and damages (sympathy vs. understanding).

Professor Thomas Mauet

Thomas Mauet, professor of trial advocacy, has suggested a list of basic recommendations:

- (1) In the first two minutes of opening statement, you must:
 - i. State a compelling theme;
 - ii. Provide your summary of the facts;
 - iii. Demonstrate your enthusiasm about trying the case.
- (2) Storytelling:
 - i. Focus on the people, not the problem and personalize your client;
 - ii. Make the story vivid and take the jury to the scene;
 - iii. Follow a chronological narrative. Although you may start at the end and loop back;
 - iv. Alert the jury to coming attractions, i.e., listen to Dr. Williams when he explains what happens when a person's spine is broken.
- (3) Efficiency;
- (4) Don't Argue;

- (5) Don't overstate – the only thing you have to sell is your credibility;
- (6) Use a few key exhibits;
- (7) Volunteer weaknesses;
- (8) Anticipate and refute defenses;
- (9) Discuss damages:
 - i. Symptoms – describe the complaints that brought the plaintiff to the doctor;
 - ii. Diagnosis;
 - iii. Immediate treatment;
 - iv. Further treatment;
 - v. Prognosis;
 - vi. Total medical bills.
- (10) Conclusion.

A shorter version of the same suggestions:

- (1) Introduction – theme, overview summary, and enthusiasm;
- (2) Parties;
- (3) Scene;
- (4) Instrumentality;
- (5) Date, time, and weather;
- (6) Issue;
- (7) What happened;
- (8) Volunteer weaknesses;
- (9) Basis for liability;
- (10) Refute defenses;
- (11) Damages – symptoms, diagnosis, immediate treatment, further treatment, prognosis, conclusion.

V. Persuasive Storytelling

There are many great ideas and techniques being shared by many respected lawyers today on how to influence and persuade juries. Reality is that if you take the time to read the great ideas and techniques contained in the works of Melvin Belli, Moe Levine, and others of that era, you will find that the great ideas and techniques of today were the same great ideas and techniques of yesterday. Even more sobering is the reality that these ideas and techniques were not original to them either. We can be reminded that the great ideas and techniques are indeed great because they withstood the test of time. What are they?

- (1) Honesty/Credibility;
- (2) Humility;
- (3) Understatement/Efficiency; and

(4) Good storytelling.

Employed the right way, these skills will lead any audience to the conclusion you want.

A. Credibility

By being aware of who you are in the eyes of your audience, you are able to project honesty/credibility, humility, efficiency, and understatement. Step outside of what the perception is and you have assumed an unnecessary burden. I am referring to those of us who try cases against others who are older and more experienced, or before jurors who are more mature; to those of us who try cases in communities other than our home, and to those of us who are different in whatever way from the audience, the people in the jury box, and others in the courtroom. The moment we lose perspective on who we are in the eyes of those we seek to influence, act too big for our britches as they say, or the first time we overstate our case, or take too long to state it, we have lost the ability to persuade. We must remember who we are, remember our strengths, and be aware of our weaknesses. In short, we must know thyself.

B. Humility

This is not the humility you may see on television from an actor who sheds crocodile tears, but how you really feel. It takes humility to ask another person for help. Is there anything wrong with asking permission of jurors for the help your client needs? Wouldn't they more likely appreciate being asked for their help, rather than being commanded by you to decide a certain way.

If you stand before a jury that looks more mature, older than you, don't you feel it is presumptuous? Would it be wrong to say so? Do you think they would resent it if you stated what they are already aware of? Ask them for permission to explain your client's case. Tell them it will come as no surprise that you think your client should have their verdict. Apologize if you say things they already know, but explain that you say them not to demean but because you have lived with the case for so long and that you have studied with such care, you know they will forgive you, if in the exercise of your responsibility, you say the things you feel you must.

If they have meaning to the jury, you know they will accept them. If they have already thought of them, then they will forgive you. If they do not agree with you, then you shall not have prevailed anyway.

These are the thoughts of Moe Levine in his essay on the *Psychology of Closing Argument* written decades ago. The point of sharing them here is that they are still as relevant today as they were then. Asking for help doesn't mean the jurors shouldn't be reminded of their oaths to follow the law, but there is nothing wrong with reminding them that were in fact *asked* if they could follow before being permitted to sit on the jury.

C. Understatement/Efficiency

I have come to believe that no matter what your skill level, you cannot completely and accurately describe the human condition with words alone. Some things are intuitive and beyond verbal description. Moreover, when you enter the courtroom today, you are competing with the lawyers seen on television in programs like *The Practice* and *Boston Legal* and many others where the points are made between commercials. You cannot compete with this. You must leave something for the imagination. The imagination will always be more powerful than any words you might employ anyway. Consider the case of grieving parents who have brought suit for the death of their child. You might understate their loss this way:

Ladies and gentlemen, I tried to think of the words to describe the loss in this case. I realized that when a husband or wife loses a spouse, the survivor is called a widow or widower. Or when a child loses her parents, she is called an orphan. But when parents lose their child, . . . there are no words.

Another with which you may be familiar and is certainly not of my original thinking, is the case of the man who suffered amputation of both arms:

Ladies and gentlemen, I could spend a good deal of time talking to you about what the loss of two arms means to a human being. But I think this would be an affront to you since you are all human beings and all you have to do is think of all the things you could not do or how difficult things would become without arms. And so I am not talking about it. But I would like to tell you that I went to lunch with him. You know, he eats like a dog.

Need you say more?

Leave something for the imagination. Imagination is far better than any description you can put on it. Just think of the loss of a child – there are no words. Don't try to come up with any, you'll fail.

D. Storytelling

Good openings depend on good storytelling. Good storytelling invites the audience into the story so they *see* the events *as they are occurring*. There are many good books on storytelling and many of them recommend the following techniques:

Simplicity

A simple narrative with one fact per sentence keeps it simple. Instead of saying, "During a stormy night there was no one home," say, "It's a stormy night. No one is home."

Present Tense

Use the present tense. Past tense distances listeners from the events. Present tense provides a more immediate experience. Appeal to the senses when providing descriptions. Some studies have shown that the sense of smell is the most powerful.

Events

A story is a sequence of events, not facts, opinions, or explanations. An event is an action verb: something someone does or something that happens to someone. Each sentence in your story should take us to the next event. See the example above.

Practical Examples

(1) Professor Jim McElhaney

Professor McElhaney advocates “setting the hook” in opening statement by beginning at the end like this:

There’s a tall, white building downtown on Indian School Road. Every morning at 8:15 a city bus stops in front and a woman wearing a plain cloth coat gets off the bus. She goes inside the building and takes the elevator to the eighth floor.

She walks to the end of the hall and stops at a closed door.

She knocks on the door, but no one hears it.

She opens the door and turns on the light, but the man in the bed doesn’t see it.

She walks over to the window and opens the curtain, but the man doesn’t notice.

She kisses him on the forehead, but he doesn’t feel it.

She sits next to the bed and takes his hand, but he doesn’t react.

She tells him how the children are doing in school and what is going on in the neighborhood, but he doesn’t respond.

She says a little prayer and kisses him goodbye, but he doesn’t move or even smile.

Then she leaves the room, goes down the elevator, out of the building and walks to work.

Who is this man?

How did he get this way? Who is responsible for it?

That's what this case is all about.⁴

Professor McElhaney reminds us that injustice has the power to stir people's blood. "It's not how good *you* are, but how bad *they* are," he says. Some also believe it is not a good idea to start with the sympathy card, but to make them mad first. This depends on the case and the personalities of the people in the jury box. All believe you should put your concessions in the middle. You've got to make them, but you don't need to put them first or last. Professor McElhaney concludes this article with two important points: (1) Steal your opponent's thunder – challenge your own witnesses. Questioning your own evidence reinforces your credibility and the integrity of your case. (2) End strong. Leave them wanting more rather than knowing they've had too much.

(2) Moe Levine

Moe Levine is credited with bringing us the "whole man" concept for damages. He strongly advocated that you cannot injure part of a person without injury to the whole person. Injury to a part impacts the whole. Levine believed the greatest injury is the impairment of living. Here's an example of his thought on this subject in a case involving a sprained ankle. He would begin with a rhetorical question:

Is survival alone worth it? If all there is to life is survival, then who needs it? And so a man whose only real pleasure in life was hunting and who sprained his ankle so that he can never hunt again because of his weak ankle, how much has he been damaged? Just an ankle's worth or a man's worth? Damages do not consist of what you take from a man, but what you leave him.

(3) Summary Of Key Points For A Persuasive Opening Statement

- The story should be simple so it is easily understood and can be told and retold by others.
- It should have protagonists and antagonists.
- It should have a clear moral.
- It should be both vivid and memorable.
- It should be emotionally moving.
- The more complicated the case, the less details it should have.
- It should include emotionally evocative metaphors.
- It should include appropriate elements from the opposition's storyline and recast them as its own.
- It should be the kind of narrative parents could share with their children because it embodies core values, particularly about right and wrong.
- Remember people like their own ideas. This is why rhetorical questions are powerful.
- The more you argue, the harder you push, the more you tell the judge and jury how to think, the less effective you will be.

⁴ *Organizing the Case: Plan a good story, and start telling it to the jury in opening statement*, McElhaney on Litigation, ABA Journal, December 2008, pp. 24-25

- The key to effective advocacy is show, don't tell.
- Tell the story of the case, not the story of the trial. Tell what happened, not who you are going to call and what they will say. Remember to introduce your key witnesses.
- Use the rule of three, rhetorical questions, and don't forget the power of primacy and recency.

VI. Conclusion

Great persuaders have concluded their cases by saying: "And I have prayed that you will find within yourselves the strength to do what must be done without regard to personalities involved but with pride that what you have done is right. Thank you."

I say the same to you.

VII. APPENDIX A: Citations

McConnell v. Akins, 262 Ga.App. 892 (2003)

Next, McConnell argues that defense counsel was allowed to argue law to the jury in opening statements. The complained-of remarks were defense counsel's statements on an anticipated charge to the jury concerning the duty of livestock owners to keep their livestock from straying onto the roadways, the permissible inference of negligence, and *the burden of proof*. *McConnell cites to no authority that these remarks were reversible error, and we find none.* The range of comment in opening statements "is necessarily in the discretion of the trial judge; and unless it can be shown that such discretion has been abused and some positive injury done by the remarks of counsel, the discretion of the trial judge will not be controlled." (Citations and punctuation omitted.) *Waits v. Hardy*, 214 Ga. 41, 44, 102 S.E.2d 590 (1958). "*What the law forbids is the introduction into a case by way of argument of facts which are not in the record and are calculated to prejudice a party and render the trial unfair.*" *Id.* at 43, 102 S.E.2d 590.

Miller v. State, 243 Ga.App. 764 (2001)

The purpose of the opening statement is to give the jury and the court an outline of the evidence that the party anticipates presenting, whereas the purpose of the closing argument is to recount the evidence presented and suggest the conclusion demanded by that evidence. ^{FN12} The trial court has the right and duty to govern the scope of argument both before and after the presentation of evidence, and the proper range of argument is a matter within the court's discretion.

OCGA § 9-10-185. Improper conduct by counsel; duty of court: Where counsel in the hearing of the jury make statements of prejudicial matters which are not in evidence, it is the duty of the court to interpose and prevent the same. On objection made, the court shall also rebuke counsel and by all needful and proper instructions to the jury endeavor to remove the improper impression from their minds. In its discretion, the court may order a mistrial if the plaintiff's attorney is the offender. (NOTE: I have read the statute annotations and none indicate arguing law is example of impropriety)

Ransone v. Christian, 56 Ga. 351 (1876)

The interference of the court was doubtless based on the third rule of court, which requires questions of law to be argued exclusively to the court. Properly understood, the rule is a good one, and should be enforced. We take it to mean that in cases where counsel is making a legal argument or battling to establish a legal principle which he wishes the court to charge as the law of the case, he must argue to the court; but *we cannot suppose it was intended to prevent counsel from stating legal propositions to the jury*. If so, it would destroy all trial by jury by preventing counsel from intelligently discussing their cases before them, and the rule would be utterly void: Constitution, Code, section 5124. Counsel cannot know what the court will charge; they cannot lay down to the jury the law as he will charge it, unless they be gifted with fore-knowledge; *they must, therefore, be allowed to lay down to the jury the law which they think the court will charge, or, in other words, their own view of the law; and in the light of that law argue the facts*. To curtail this right within the narrow compass suggested by the ruling of the court below, would be to close the mouth of the counsel, and to overthrow all fair and full trial by jury. No harm can be done by the other course. All that counsel says is in the hearing of the court; the law he lays down is subject to the correction of the court, and to make a practical speech to the jury he must exercise the right to state his legal points to them. "There is reason in roasting eggs;" and statutes and rules of court must be so construed as not to upset great and fundamental rights.

Garrison v. Rich's, 154 Ga.App. 66 (1980)

Where counsel for plaintiff *misstated* law to jury by attempting to instruct jury as to defendant's burden of proof, trial court properly rebuked counsel and informed jury that court would instruct them as to the law.

Uniform Superior Court Rule 10.2 Opening Statements in Criminal Matters (NOTE: could not find corresponding civil rule)

The district attorney may make an opening statement prior to the introduction of evidence. This statement shall be limited to expected proof by legally admissible evidence. Defense counsel may make an opening statement immediately after the state's opening statement and prior to introduction of evidence, or following the conclusion of the state's presentation of evidence. Defense counsel's statement shall be restricted to expected proof by legally admissible evidence, or the lack of evidence.

Davenport v. Yawn, A09A0791 (05/05/09)

Whether to permit certain arguments by counsel during opening and closing statements is left to the trial court's discretion 'and unless some positive injury can be shown by remarks of counsel, the discretion of the trial judge will not be controlled. [Citations omitted]. While '[c]ounsel should not go outside the facts appearing in the case and the inferences to be deduced therefrom,' he may 'upon the facts in the record, and upon the deductions he may choose to draw therefrom, ... make almost any form of argument he desires.'

VIII. APPENDIX B: Sample Opening Statements

HARRIS V. SUMTER REGIONAL HOSP. ET AL.

BY MR. ADAM MALONE

Introduction

May it please the Court, Ms. Harris, Reggie, and members of the jury. Good morning.

JURORS: Good morning.

I know we took a long time yesterday picking the jury, but for all the lawyers and the Court it's very important to make sure that we got the fairest jury possible. We did take the time to do it, and I believe that we did that. And I want to thank you for your patience yesterday.

We're going to present our side of the case first. We will not waste your time. We will move expeditiously, and we will bring you every bit of evidence that you need in order to decide this case and reach the proper outcome.

Risks Justifying the Rules and the Rules

Now, I want to tell you what this case is about. You know a little bit from yesterday, but I want you to understand that you will learn in the evidence in this case that a broken leg can damage blood vessels. And when a blood vessel is damaged, and if the circulation is reduced, decreased or cut off, then the leg will die. And if the leg dies, it has to be amputated; otherwise, the person will die.

Now, doctors and hospitals know this. This is not something that's difficult. It's not something that's unusual. It's not something that doctors and hospitals have to go to books and read to understand. This is basic stuff. In fact, paramedics know it, certified nursing assistants know it, people in the Boy Scouts learn it, you learn it in first aid that whenever there is a fractured limb, there's always a risk that the blood vessels can be injured. And when blood vessels are injured and blood is cut off, that can create serious problems and put the limb in great jeopardy.

Theme

This case is about the predictable, obvious and totally preventable death of Reggie Harris, Jr.'s right leg and it's eventual amputation. It was predictable because of the nature of his fracture. He broke it just above the knee. There is a very important artery right behind that -- that bone, the femur bone. It's called the popliteal artery. It supplies the entire lower leg and foot with blood and it's dependent upon that artery in order to stay alive.

So doctors and hospitals know that whenever someone breaks that bone, there is a high risk, not just a risk, but a high risk of potential injury to the popliteal artery; and it's highly predictable. When things like this are predictable to professional medical providers, they have to be prepared for it. And to be prepared for it, they have to watch closely for warning signs.

You're going to learn in this case how to make the diagnosis yourself. There are several factors that careful health care providers pay attention to when monitoring a patient who has suffered a broken leg. And whenever those warning signs start to present themselves that's something that the doctor needs to know about, because if the doctor doesn't know about it he can't do anything about it.

So you're going to learn a lot about the relationship between doctors and hospitals, what the job of the doctor is versus what the job of the nurse is. Nurses, and you'll hear this term over and over throughout the trial, are the eyes and ears of the doctor when the doctor can't be at the patient's bedside. This makes sense. A doctor cannot be present at every patient's bedside at all times.

Some doctors have privileges at different hospitals, and they have patients at different hospitals. So they're entitled

to rely completely upon the nursing staff and the hospital to watch carefully the condition of their patient. And if there is any change from normal to abnormal or any warning signs at all, the doctor is entitled to be informed of those warning signs so he can give further instructions, or order appropriate tests, or get another physician involved, or intervene if intervention is necessary.

Blending the Story with the Theme

There were obvious warning signs after Reggie Harris was admitted to the hospital and after Dr. Marsh realigned the bone. He kept him in the hospital really for one reason and one reason only. That was so that he could be monitored closely for any potential change in his neurovascular status. You're going to hear that term. And neurovascular status means blood flow. It also means that there could be an injury to a nerve because a nerve runs right by that popliteal artery that I was telling you about, and the symptoms are virtually identical.

So when the symptoms present or these warning signs present, it could be an injury to a nerve but it might be an injury to the artery. And everybody knows that if it's an injury to an artery, that's a very bad thing because you can lose the leg. If it's a nerve injury, those things might resolve later; but you're not going to lose your leg with a nerve injury.

So there were obvious warning signs that we'll discuss in a few minutes that the nurses knew about, some of which were communicated to Dr. Marsh; and he elected for whatever reason not to do anything about it at the time that he was told.

But because the patient remained in the hospital and continued developing additional warning signs and additional symptoms over a -- over a period of about 30 hours, and the doctor was not made aware of the changes, by the time the doctor found out about it, it was too late. The leg was dead. And even though they tried, once they got him out of Sumter Regional Hospital and took him down here to Phoebe Putney, and they did everything they could to try and save his leg down here, they were unable to do it. And they had to perform two amputations, first below the knee and when that didn't work and the tissue was -- was still dead, they had to go through his knee.

Lastly, the case is about this being absolutely preventable. Whenever someone has an injured artery, they're -- we live in a wonderful society. We live in the United States of America. We have the finest healthcare system in the world. We have the finest doctors. Those doctors have the finest medical equipment. They have drugs, they have tools, they have everything they need to save people these days where years ago, a hundred years ago, people who broke their legs were just out of luck. They didn't have vascular surgeons. They didn't have the ability to get x-rays where they -- where they inject dye in the artery and see whether or not it's blocked. But today they do.

And Sumter Regional Hospital has those tools available. While they don't have any vascular surgeons on staff, they certainly have the diagnostic tools necessary to -- and the testing equipment necessary to make these diagnoses and when they have them, they know how to get the patient to a hospital that's got the staff and the services to take care of these patients.

You're going to hear evidence in this case, I think from everybody, that -- that this amputation, had it been -- had the problem with the blood flow and the artery injury been diagnosed in a timely manner, it was absolutely preventable. This was a predictable, obvious and preventable injury. That's why we're here in court.

We're here in court because all the defendants have denied responsibility, even though this was a predictable, obvious and preventable injury. We've brought this case to you so you can assign responsibility where responsibility is due and return a verdict that assigns full accountability.

Story of What Happened

Now, what I want to do is -- is tell you the story of what happened in this case. And in order to do that, we've got to leave this courtroom, go out to Pine Avenue, head down to Slappey Drive, make a right, and go about 45 minutes north to Americus, Georgia. We've got to go to Sumter Regional Hospital. And it's July the 18th of 2005. It's in the middle of the summer.

Reggie Harris is 14 years old. He's finished the eighth grade. He's about to enter the ninth grade. He loves to play football. He loves to play all kinds of sports. He wrestles, he loves basketball. But he really loves football, and he had been to the regional championships in the seventh and eighth grade at Staley Middle School where he -- where he went to middle school. And he was about to enter the ninth grade and enter his high school experience.

And he was on the -- the football team and they were already doing their summer camp to get ready for the fall football season. So on July the 18th of 2005, he and a friend were walking home after football practice when a dog jumped out from underneath a car and Reggie, being scared of dogs, started running. And he ran and he jumped off of a hill and when he landed, he landed wrong and that's how he broke his leg.

The ambulance came and they noticed that there was an obvious deformity to his right leg. So they did what every person who's trained to do who encounters a broken leg; that is, they assess it and they then want to make sure there's blood flow to everything below, to the lower leg and the foot.

So the paramedic did a very careful and thorough neurovascular evaluation and determined that there was no sign or symptom of any injury to his artery at that time. He could move his toes, he could feel, and they checked pulses in the foot to make sure that the blood is circulating down there. And he had a strong pulse at that time.

Now, since he had all those signs, and that was reassuring, but that did not mean that he had not injured his artery, because sometimes it takes a little while for -- for the blood to clot or for the artery to start to close. And you'll probably hear somebody explain in the trial explain it this way:

The kind of injury he had to his artery was sort of like someone turning a water faucet slowly and reducing the flow of water until ultimately it shuts the water off. And as the blood flow is reduced, certain symptoms or warning signs start to show up. They don't all -- sometimes people when they fracture their leg, they can completely cut the artery in half and then you've got all the symptoms that come on all of a sudden, all of them. Okay. But sometimes if it's a -- if it's a -- a small tear on the inside of the artery like he had, it takes some time for the artery to start to close off, and so symptoms come on gradually.

That's why you keep them in the hospital, because everybody knows that. Just because you don't have symptoms before, doesn't mean you don't have an injury to your artery and you're not going to develop them later. So he's taken to the emergency room.

Dr. Marsh gets a call and he's made aware that he has a 14-year-old patient in the emergency room who needs his services. Dr. Marsh is an orthopedic surgeon. We talked a little about that yesterday. An orthopedic surgeon is a bone doctor. They fix broken bones. Dr. Marsh came to visit him in the emergency room. And that's when he met Reggie for the first time, and he met his mother Sherry Thomas.

He then had an x-ray, and the x-ray showed that he did have a fracture. And you'll see the x-ray. The bone was pushed backwards into this area in the back of the knee that I told you about where the popliteal artery is. He knew at that time that because of where the -- where the bone had broken and where it had been pushed back to that there was a very high risk of injury to his artery.

Well, I told you that the paramedic assessed his blood flow and there was no sign of a problem at that time. The emergency room nurse assessed his blood flow and there was no problem or a sign at that -- of an artery injury at that time. Dr. Marsh, when he initially saw him and then got the x-ray and assessed him, and there was no indication of a blood flow problem at that time.

That did not mean that he didn't have an injury to his artery and I think Dr. Marsh will tell you that. Again, that's why he kept him in the hospital after he had fixed the fracture.

So what did -- what did Dr. Marsh do? The appropriate -- he did the appropriate thing, he took him to the operating room. And somebody mentioned surgery. This was not technically surgery that he did. He was placed under an anesthesia. Obviously, if you've got a broken leg and somebody's going to be moving bones around, that'll hurt. So he was placed under anesthesia so that he wouldn't feel that pain. Dr. Marsh straightened the bones out. And in order to make sure that they stayed where they were supposed to stay, he -- he just inserted some pins into the bones.

And that's standard procedure to make sure that they fuse properly.

Well, there was an assessment done, and there was no indication of a blood flow problem at the end of that procedure. Well, anyone who goes under anesthesia in any hospital and comes out of an operating room, next goes to what they call a recovery room. There they're received by a recovery room nurse and other recovery room personnel and are monitored to make sure that they don't have any adverse side-effects from the anesthesia or that something doesn't happen with -- with what the procedure was that was performed on them. And they are watched very closely for any changes and signs or symptoms and this is a very critical period.

Reggie got there about twelve forty-one at -- early in the morning on the 19th. This happened on the 18th, late in the afternoon after football practice, went to the emergency room and was assessed by Dr. Marsh, taken to the operating room. When he comes out, it's after midnight, so now we're into the 19th. I'll show you that timeline in a few minutes to help you keep these times and dates straight and just give you an overview of what's happening here. It's the middle of the night in Americus. Dr. Marsh lives in Albany. And after the procedure, he drives back home.

Well, twelve forty-one a.m. is when Reggie is -- arrives in the recovery room. About 30 minutes later or 40 minutes later, Nurse Allen who is a recovery room nurse, notices the very first couple of warning signs. Reggie complained of numb toes and he complained that he couldn't move them. And that was the first time that he complained of any numbness or any inability to move in his -- in his toes or feet at all.

This was a big warning sign, and the nurse knew it was a big warning sign. She also assessed his pulses and at some point, she determined that he had a thready pulse. And when I asked her what she meant by that, she said well, it was diminished, it was weaker. Now, granted this nurse didn't feel his pulses before he went to the operating room, but to her his pulse felt a little bit weaker than she believed it should have.

She picked up the telephone and she paged Dr. Marsh. Dr. Marsh called back about -- a little after twelve-thirty -- I'm sorry -- a little after one-thirty in the morning. And she reported to him that Reggie was complaining of numb toes and the inability to move them. But for some reason, she did not tell him about the diminished pulse. However, Dr. Marsh, being made aware of two of these critical changes, they call this motor and sensation. Motor meaning movement; sensation meaning feel -- can you feel. These are two big warning signs of a blood flow problem. It could also mean a problem with the nerves but it's just as likely that it could be a blood flow problem. Dr. Marsh chose not to have him sent for a test at that time.

Now, the test that you'll hear that the standard of care requires is called an arteriogram. And all an arteriogram is -- is an x-ray, and an x-ray where they inject dye into the artery. We know that they have the ability to do x-rays at Sumter Regional Hospital because he had an x-ray in the emergency room. And we know that they have the ability to do arteriograms because they've admitted it. They could've gotten an arteriogram if Dr. Marsh had ordered one, but he chose not to.

He went home. Reggie stayed in the hospital and he ultimately left the recovery room and he went to what they call the medical -- medical/surgical floor - the Med/Surg floor, to be closely monitored by the nurses down there.

The recovery room nurse took him, the Med/Surg floor nurse received him, and they exchanged what they call report. The receiving nurse was made aware of the inability to move his toes and numbness. There was no indication she was told about the thready diminished pulse.

And then the receiving nurse did her own assessment and she determined that he could not move his toes and that they were numb. And she noted that Dr. Marsh was aware of that. And we believe she noted that because the recovery room nurse told her that she had made Dr. Marsh aware of it. The receiving nurse didn't pick up the phone and call him back and say: Dr. Marsh, how long do you expect this patient should be in this condition? What sort of changes should I expect and how long should he be this way? Why is he this way? She did not pick up the phone and call him and ask him any questions.

He continues through the rest of that night. Shift changes at seven o'clock in the morning. Another nurse comes on. She does her assessment, we believe, although her entries in the medical records are never made on time. They're always made hours and hours after the fact. And we'll show that to you in the medical records.

But she -- she -- she documents an interesting finding that's -- that's unusual and it's inconsistent with what Reggie will tell you was going on and what his mother will tell you was going on and with what Dr. Marsh will tell you was going on when he was there an hour later. This nurse said that she assessed him at eight a.m., and that she found that his toes were mobile and that -- but his toes were cool to the touch. Now, toes cool to the touch is another warning sign. The thing about being mobile doesn't make any sense. Reggie says he -- he couldn't move his toes, his momma says he couldn't move his toes -- that he hadn't changed, in other words. There hadn't been a change in his condition where he had gotten better since he came out of that recovery room.

Well, Dr. Marsh came to see Reggie at nine o'clock that morning. He did an assessment and he squeezed the ends of his toes and he checked to see whether or not there was what they call capillary refill. That's where they squeeze in the nail beds. And if you squeeze on it and you let go and you see it pink back up again, that -- that indicates some tissue perfusion. It doesn't mean that there's not an artery injury. It just means that there's still some blood flow. It could be coming from capillaries or other blood vessels that make it pink back up.

But he noted at nine a.m., which supposedly would be an hour after this day-shift nurse had done her assessment saying he could move his toes. Dr. Marsh noted he could not move his toes and that his foot was numb from the ankle all the way down. Where before in the recovery room he had numbness in his toes, now his ankle is numb all the way to his toes and he cannot move. He says capillary refill is within normal limits and that he suspects it's probably a nerve injury. And he leaves.

He did not do an arteriogram. He did not do any further testing. He did not unwrap his foot. And by the way, his leg was wrapped from the top of his thigh all the way down leaving only his toes exposed at the end. So you'll see -- how do you check the pulse. You've got to reach up on the top of the foot and around back to make sure all the pulses are present, and you can't do that very well with the foot wrapped.

The nurses said that they jammed their fingers underneath the wrap and that's how they were checking. But Dr. Marsh didn't do that. He didn't check his pulses at all, and he left the hospital. Now, he left the hospital and left his patient in the hospital, again, for one reason only. That was so that he could be closely monitored by the hospital personnel and the nurses so that they could alert him as to what -- as to when and if Reggie developed any additional signs or symptoms, warning signs of a blood flow problem. And he was entitled to rely on them to do that.

Carrying this through the rest of the day, Reggie started complaining of pain. Obviously, when you break your leg, you're going to have some pain. But the significant thing about his complaints is he was not complaining of pain in his knee area where he broke it. That's where he would've been expected to have some pain. But he started complaining of pain in his lower leg and foot.

Those are areas that medical people will tell you he should not have had any pain. And that is a very ominous and alarming warning sign consistent with a reduction in blood flow or blood flow problem. Now he's got numb toes, he can't move them. Somebody thought that his -- his foot was cold or cool.

And his mother was telling the nurses that she felt like his foot was cool and they kept reassuring her, telling her that the doctor was aware of that. She knew something was wrong, but they kept making her feel like she was overreacting, telling her that the doctor was aware and that they were aware.

So now he's got numb toes and he can't move them. His toes are cool, and he's got pain in a place he shouldn't have it. All factors that are consistent with a serious blood flow problem, needing immediate intervention, diagnosis and intervention in order to make sure that his leg is not at risk for dying. Nothing happens. Nobody calls the doctor and tells him about this change in location of pain. They just give him some pain medication. This is on the afternoon of the 19th.

By eight o'clock that night -- shift changes -- shift changes at seven p.m. By eight o'clock that night, the night nurse who received him the night before comes back on. She does her assessment and she documents that he's got -- still has numb toes, still can't move them. Now she documents his toes are cool to the touch, and she documents the patient is complaining of leg pain in a place where Reggie and Sherry will tell you that it was hurting was in the lower leg and foot.

She just gave him some more pain medication. She didn't call Dr. Marsh and let him know about these additional warning signs. And how in ten minutes later when the pain medication that she gave him in the form of a pill, which is all he'd had before, which had been prescribed just for pain, was not controlling the pain any more.

Dr. Marsh had prescribed injections of Demerol and Phenergan for severe pain and an hour and ten minutes after this nurse gave the -- the oral medication that wasn't working, she then had to inject him with Demerol because his pain was no longer being controlled by that -- by that milder pain medication.

When she gave him the Demerol, she did not call Dr. Marsh and tell him that the oral medication was no longer controlling his pain, that his foot and leg are hurting so bad they're now having to give him injections. She did not tell him that.

We go through the rest of the night. At four forty-five in the morning, now we're on the 20th, his pain is so bad it wakes him up. She just gives him another injection of Demerol and doesn't call the doctor and tell him Reggie's got pain in his lower leg and foot that's not being controlled by oral Vicodin and she's having to give him injections.

At seven a.m. she -- she leaves. And then the day shift nurse, the one that was with him the day before, comes back on duty. Today she does an assessment and she notes: Numb toes, can't move, cool toes, pain of ten. They rate pain on a scale, one out of ten, ten being the worst. He's complaining of pain of ten-out-of-ten.

Sherry will tell you Reggie's a little modest and you'll meet him later this week. But this is a young man with a very high threshold for pain. He doesn't complain about anything. He doesn't complain about pain. He doesn't complain about anything. And you'll see he doesn't complain about having only one leg. He is a remarkable young man. And you'll come to see that and you'll -- I think you'll develop a level of respect for him like I have for that.

But in any event, the day shift nurse comes on and she notes: Can't move toes, still numb, cool toes, pain of ten-out-of-ten. And although she doesn't document it in her medical records, she testified in her deposition under oath that she tried to assess his pulse and find a pulse, and she could not find one. Now you have a patient with all of these other factors who for the first time, at eight o'clock in the morning on the morning of July the 20th, two days after he fractured his leg, about 37 hours after he complain of the first sign or symptom of a blood flow problem, he had no pulse in his foot.

Folks, a pulse-less foot is a medical emergency. You do not wait around. That would be like someone who had strangled your throat and cut off the circulation. Your brain will die. A pulse-less foot means there's no heartbeat in the foot. Without a heartbeat in the foot, the foot will die and the lower leg will die.

Well, this nurse says that she goes to try to call Dr. Marsh. She recognizes this as medical emergency. There is some mystery about what happened with this phone call, because Dr. Marsh didn't get any phone call at that time, at least that's what he testifies to. This nurse says that she couldn't get in touch with him, and so she waited around for an hour until nine o'clock and she called his office.

Folks, this is not how it works in the medical world. You don't wait around until the office is opened. Doctors have beepers and pagers, and hospitals have emergency room doctors, and they have ample access to doctors at Sumter Regional Hospital. I mean, you just don't wait with a medical emergency like this. You don't ignore the problem. Because once the artery becomes completely blocked off, there is a last chance window of opportunity to save the leg that lasts anywhere from four to eight hours.

Once that artery becomes completely blocked and there's no more blood flow to the lower leg and foot, you've got somewhere between four and eight hours to save it. Some people say six to eight and you'll hear that evidence in this case. So you cannot waste precious minutes and you certainly cannot wait precious hours.

For whatever reason, no doctor came to see this young man for four hours. Eight a.m., he's found with a pulse-less foot. No doctor is there at his bedside until twelve noon. When this doctor shows up, this doctor is Dr. Marsh's partner, this is Dr. Rhodes. Dr. Rhodes comes in and he unwraps young Reggie's foot for the very first time. And he tries to find a pulse, and he can't find a pulse.

He says, oh, my God, this may be a popliteal injury. We've got to rule it out, and we've got to rule it out by getting an arteriogram. The very test that should've been done the first time Dr. Marsh was notified of numb toes and inability to move them. And the very test that should've been done as Reggie continued to develop these additional symptoms over the course of all those hours he was there, to be closely monitored for this very problem, in that hospital. And they don't get that test, for whatever reason that's inexplicable to me, for another three hours and 15 minutes at Sumter Regional Hospital.

From twelve noon to three -- three fifteen, we don't have an arteriogram. But when we get it, we see when they inject the dye and they watch the dye run down, it stops, right at the level of his knee. And everybody knows then the blood flow is completely blocked. He's -- his leg is starved, his leg has been strangled of adequate blood flow, and he's in trouble.

And you know what? They can't do anything about it at Sumter Regional because they don't have a vascular surgeon there and they knew that. They knew it when they admitted him to that hospital. So they've got to get him to Phoebe Putney down here in Albany because this is the closest hospital with the adequate services to address the problem.

They know he doesn't have any blood flow confirmed at three fifteen. For some reason, it takes another two hours to get him in an ambulance. He doesn't leave that hospital until shortly after five p.m. but as soon as he arrives so -- get this folks. Eight a.m. that morning, he's found with a pulse-less foot, a medical emergency, and he's not transferred out of that hospital until after five o'clock that day. There's really no excuse for that. None, whatsoever. With precious opportunity and hours and minutes wasted, that could've been used to try and save his leg, it was wasted.

But when he arrives at Phoebe Putney an hour later, forty-five minutes to an hour later, they're ready for him, they jump right on the ball. Dr. Marsh had arranged for Dr. Holley to meet him at Phoebe Putney. When Dr. Holley looked at the leg, he felt like there might be some chance of saving it. He did what they call a four compartment fasciotomy where they basically open up, fillet open the leg here so they can relieve all the pressure and see if that might help kick start some circulation down there. And when it didn't after a couple of days, he had to perform the first amputation. And when that didn't -- when that didn't solve the problem, he had to do the second one.

That's the -- that's the story of what happened here, folks. Now, why did we bring this lawsuit? We brought it because they're responsible for Reggie losing his leg and they've denied that responsibility and they deny their accountability.

Explaining the Burden of Proof

In order for us to prevail in a lawsuit like this, we have to -- we have to prove our case. We have the burden of proof. In a civil case like this, the -- the burden of proof and the judge will tell you, is by a preponderance of the evidence. Unlike a criminal case, where you have to be convinced beyond a reasonable doubt, you can have a lot of doubt in a civil case.

All we have to do is show that what we say is more likely true than not true. If there were scales, all we'd have to do is tip them ever so slightly. If this were a football game, all we have to do is cross the 50 yard line. We don't have to score a touchdown. If we get the ball across the 50 yard line, then we've carried our burden of proof, under your oath that you took as the jury, you would be obligated to return a verdict in our favor.

Introducing Key Witnesses

Now, I want you to know that we think that we're going to prove this case far beyond the standard requirements. We think that we're going to be in the end zone by the time this case is over with, but all we have to do is cross the 50 yard line. In order to do that, we will bring you Dr. Thomas Grogan. Dr. Grogan will be the first witness -- or the second witness who testifies this morning.

And Dr. Grogan is an orthopedic surgeon. He's been practicing orthopedic medicine for the last nearly 30 years.

He's triple board-certified. He's board-certified in orthopedics. He's board-certified in pediatric orthopedics which means that he takes care of children, and bone and joint replacement. He's had over 30,000 new patients since the early 1990's.

He was -- he's a former full-time professor at the University of California in Los Angeles at UCLA. And after he went into private practice, he kept -- after he left UCLA as a full-time professor he kept his practice in Los Angeles where he's now in private practice and encounters these kind of problems all the time and has vast experience and can explain to you exactly what's supposed to happen.

I want to show you a couple of things to just give you a picture of what I was talking about before. And you'll -- you'll hear this from Dr. Grogan as well. But this shows the circulatory system together with our bones. Obviously, our heart is here. And in order for blood to circulate around the whole body they have to have hoses, in other words. We call them blood vessels. And this is how all of our tissues get blood supply.

Well, the bone that Reggie broke was right above here, right in the lower femur. And if you look at it from the backside, he broke it right about here and that's -- that's right where the popliteal artery is and you can see how close those vessels are to those bones and how easy it could be to injure the blood vessel. That's why the doctors and hospitals knew he was at risk for a blood vessel injury.

The type of fracture that he had is called a Salter-Harris II fracture. That's medical term -- terminology for the specific type of fracture that he had. But you can see from the actual x-ray this is his femur, and it's pushed backwards and it broke into. And that's why when Dr. Marsh realigned the bones he put the pins in so that it would hold it in place. And this would've healed normally and he would've -- he would've been out playing football and -- with no limitation whatsoever had -- had they not failed to address the arterial injury. And you'll hear that from the medical witnesses in this case.

But here's a medical illustration of -- of what this x-ray shows. It shows the artery back here; and when this bone went backwards, it stretched the artery. And while it didn't completely transect or cut the artery in half or even poke a hole in it, it injured the inside lining of the artery in what's called an intimal flap tear. And that's what this looks like.

And so if you imagine this is the outside walls of the artery and you see it stretched here, there are different layers to the artery and they each have names that you'll learn in this case. But the innermost layer is called the intima, and it's also the most rigid. The outside is more elastic. But this is rigid. And so when it's stretched, it's likely to tear.

And that's what happened to Reggie. It tore. And then over time this tear began to dissect further and get bigger. And as it did, this little tissue here began to flap over and ultimately completely block the artery. But as it got smaller and smaller, and the area through which the blood could pass got more narrow just like somebody turning the water down on a faucet, this produces warning signs. It produces symptoms. And medical people know that. So this is what happened to him.

Here's how they do a blood flow assessment. From Boy Scouts to paramedics to nurses to doctors, they look at motor, sensation, temperature, pain, pulses and capillary refill. No one of these by themselves can tell you what's going on with the patient. But when you assess all of them and you look at what's going on with all of them, that then leads you to conclude that there's a problem if you've got some have abnormalities over here. Motor, if you can move, it's normal. If you can feel, it's normal. If you're warm -- if you're warm, that's normal. Pain, if -- if pain's where it's supposed to be, and in proportion to what it should be, that's normal. Pulses, if they're present, that's normal. Capillary refill, as long as it pinks back up in less than three seconds, they consider that to be normal. Abnormal would be you can't move, numbness, cool or cold, change in pain pattern which would include change in location, change in severity, change in how it came on, the quality of pain and the duration of the pain, those are all things that you're going to learn about.

You will learn a lot of this from a nursing expert that we'll bring to you who's name is Melinda Atkins. She practices at Crisp Regional Hospital in Crisp County up in Cordele. Her hospital is about the same size as Sumter Regional. As a matter of fact, although she's been at Crisp Regional for the last nearly 20 years, she has done some work at Sumter Regional on the very floor that Reggie was kept.

She understands what the standard of care is for nurses in hospitals who are charged with the responsibility of monitoring postoperative patients with -- with leg fractures. She knows that this is a very important part of performing the proper monitor on him. And when abnormalities start to show up, the standard of care demands that nurses notify the doctor. When they fail to do that and a patient is injured because of it, then the hospital is responsible for that. And she will explain that to you.

Summarizing the Story with a Timeline, Undermining the Defense, & Defining the Issues

Now, I want to show you the timeline that I mentioned. You will note that this timeline is entitled "Limb Death Warning", because that's exactly what everyone of these star bursts is intended to represent. And this is how much warning these folks had and all the opportunity they had to prevent the amputation that occurred in this case.

I want to explain how it's laid out. You've got July 19th in this part of the gray and then you've got July the 20th over here. These are all of the hours that passed and the times at which various things happened. Can everybody see this? You will note that on the left side we have the blood flow assessment factors laid out for you; motor, sensation, temperature, pain, pulses, and capillary refill.

You will see as I mentioned to you before that the first problem that he had was he couldn't move his toes and he couldn't feel then at one fifteen in the morning after he came to the recovery room. Those first two signs, and Dr. Marsh was made aware of that. He knew it. Dr. Grogan will tell you that the standard of care required at that time for Dr. Marsh to get an arteriogram, and he chose not to.

And that was a deviation from the standard of care. Had he done it, the arteriogram would've shown a problem with an injury to the artery which could've been addressed, and all of what happened later would've been totally avoided. And he'd be here with his leg and we wouldn't be here at all.

When he goes to the floor and the report is given to the receiving nurse, again, can't move toes and toes are numb. And that nurse believes that Dr. Marsh is made aware, but she doesn't call him to find out what he's been made aware of and what's supposed to happen later. Nurse Atkins will tell you that this was a deviation from the standard of care on the part of the hospital. And that had Dr. Marsh been made aware a second time, Dr. Marsh then would've the opportunity to order an arteriogram. And he did not.

At eight a.m. is when Patricia Day, the daytime nurse, comes on duty. She notes the numb -- she notes the cool toes. I didn't put on here -- we didn't put on here the fact that she says some toes were mobile because that doesn't make any sense. But you will here her tell you and you will in see the medical record she documented that.

But you will also see that she didn't make that documentation until hours later, and she did it by transferring information from one piece of paper to another. And there's a lot of explanation that you'll have to ultimately decide what happened with that information, whether she was right or wrong or just -- or this is just bizarre. But she did note the cool toes. So now you have three problems on this blood flow assessment factor list. One, two, three.

Dr. Marsh is there at nine a.m. and he notes the "can't move toes and the numbness from the ankle down". And then he leaves without ordering the arteriogram or doing any further assessment. At one ten p.m. that day, and the times are documented right here, this is when the change in location of his pain occurred and went from his knee to his lower leg and foot. And he had pain of seven-out-of-ten on a scale of one to ten, and given medication without calling the doctor and letting him know about the change in location.

At eight p.m. is when the night nurse comes back on, and she now notes that he's got four of these problems on a -- on a blood flow assessment flow sheet: Motor, sensation, temperature, pain abnormalities. She gives him the medication without calling the doctor, doesn't tell the doctor he's got cool toes and the pain medication doesn't work. An hour and ten minutes later, she starts giving him injections.

And you can see these were oral with the pill bottles and with the hypodermic needles. That's when they're injecting him with medication for severe pain without calling the doctor and notifying him of those problems. At four forty-five, they give another injection. At eight a.m. on the 20th, that's when Nurse Day comes back on and notes all of

these problems, all of these abnormalities, and now for the first time with no pulse in his foot.

Dr. Marsh at some point is made aware of that. Dr. Rhodes shows up at twelve noon, four hours later, notes unable to move toes, cold foot, no pulse. He's got pain of ten-out-of-ten. They give him another injection and they don't get the arteriogram until actually three twenty-five p.m. No flow confirmed and don't get him in an ambulance until five fifteen. This is what happened at Sumter Regional Hospital.

Consequences of the Harm & the Jury's Job

Now, before I conclude I want to -- I want to tell you that you will be called upon to determine what the appropriate amount of money is necessary to fix what can be fixed, to help what can be helped, and to make up for those things which we can't fix or help but need balancing, need balancing. And in order to do that, we can fix things like past medical bills.

We'll introduce to you a summary of what his past medical expenses are, and they are about Two Hundred and Eighty Thousand dollars. All right. Just -- just in the short time that he's had the amputation and had -- had the prosthetics that he's had, that's how much money has already been incurred. But he's going to be an amputee for the rest of his life. He's 16 years old. He's got a reasonable life expectancy of somewhere between 55 and 60 years. And we've got to today or during this week, provide for that for the rest of his life. And that's where helping him comes into play.

You'll hear a lot about a life care plan that's been prepared by a witness named Kathryn Willard. She's a certified rehabilitation counselor and life care planner. And in this plan, she has determined what his current and future needs are by working with his doctor and also working with his current prosthetic whose name is Stephen Schulte.

A prosthetist is someone who specializes in artificial limbs and you'll hear from him. He will explain to you -- you will learn a lot about prosthetics. And it's very fascinating how far this science has come in just a short amount of time. We're already using -- many of you may remember the Bionic Man back in the 1970's. We're already in that era now.

Our goal here and the goal of the civil justice system is to restore Reggie to as near a condition as he was in before this tragic event occurred. We want to come as close as possible to replacing the leg that was lost. And medical science is not there yet but it's very close. And there are some very helpful prosthetics that we want you to consider allowing him to have by awarding enough money so that he could pay for it. That will be in his life care plan and you'll hear about that cost as well from Stephen Schulte. And you'll also hear that they're all medically appropriate and this has been blessed by his treating physicians.

You'll also hear about the impact that this has had on him as a human being. You'll hear a lot of that from his mother. You'll hear from his coach. You'll hear from his father. You'll hear from Reggie. And like I told you, he's not going to complain about anything. He -- after he suffered the amputation, he knew he could no longer play football and he lost his dream to do that, he didn't do like a lot of people might have done and gotten angry or resentful and withdrawn.

He went out and joined the marching band. It hurts him. It hurts him to walk and march in the marching band at school, but he does it because he wants to be a part of it and he wants to participate. And he's become an example and I believe become an inspiration to all of Sumter County because of his attitude and how he has progressed through this very difficult time.

Conclusion

So at the end of this case, ladies and gentlemen, we will come back to you and ask you to assign responsibility where responsibility is due and return a verdict that expresses full accountability. You will have the opportunity to allocate responsibility between Dr. Marsh and the hospital. You can determine if Dr. Marsh was ten percent responsible, 30 percent responsible, 80 percent responsible, and the other portion goes to the hospital. It will be completely up to you.

The defense attorneys for each of those defendants may have something to say to you about that. But at the end of the day, it will be up to you to decide. Once you put all the negligence in a sack that occurred in this case, you will need to dole out a proportionate share in a fair amount to each of the defendants who are deserving to be held responsible and accountable for this very preventable tragedy.

I look forward to trying the case with you. Thank you for your attention.

YAMADA V. NORTHSIDE HOSPITAL ET AL.

OPENING STATEMENT

BY MR. T. MALONE:

LADIES AND GENTLEMEN OF THE JURY AND THE YAMADA FAMILY, I DO APOLOGIZE TO YOU THAT IT TOOK SO LONG TO GET YOU, BUT WE ALL TOOK TIME TO GET THE FAIREST JURY POSSIBLE FOR THIS CASE. AND IT IS A SERIOUS CASE. THIS CASE ISN'T ABOUT SPILLED COFFEE. THIS IS A SERIOUS, SERIOUS CASE TO EVERYBODY INVOLVED AND EVERYBODY HERE WAS SATISFIED THAT YOU CAN BE COMPLETELY FAIR AND IMPARTIAL ON ALL OF THE ISSUES.

I'M GOING TO ADDRESS WITH YOU WHAT THE EVIDENCE IN THIS CASE IS GOING TO SHOW AND TALK TO YOU A LITTLE BIT ABOUT THE RULES AND CONCERNS THAT YOU WOULD HAVE TO HELP GUIDE YOU THROUGH THIS LITIGATION. BEFORE I DO THAT, I WANT TO PROMISE YOU THAT WE WILL MOVE THIS CASE EFFICIENTLY AS IS HUMANLY POSSIBLE, BUT ALL THE WHILE KEEPING IN MIND THAT WE WILL NOT HURRY THROUGH ANY EVIDENCE OR ANYTHING THAT IS ESSENTIAL FOR YOU TO GET THE UNDERSTANDING THAT YOU NEED TO RENDER JUSTICE TO ALL THE PARTIES IN THIS CASE.

ONE THING I WANT TO SAY AT THE OUTSET THAT YOU WILL CERTAINLY COME TO UNDERSTAND WHEN THIS CASE IS ALL OVER, CORPORATE MEDICINE IN ATLANTA, GEORGIA, IN 2003, FAILED BROOKE YAMADA. IT FAILED BROOKE YAMADA AND RESULTED IN HER LOSING HER LIVER AT AGE FOUR MONTHS, FOUR MONTHS. THIS SYSTEM OF CORPORATE MEDICINE FAILED HER. AND THE EVIDENCE WILL SHOW YOU THAT WITHOUT ANY QUESTION WHATSOEVER. WE WILL PROVE THAT TO YOU, I RESPECTFULLY SUBMIT, BEYOND A REASONABLE DOUBT. AND I'LL APOLOGIZE TO YOU AGAIN. SOMETIMES IN THIS LITIGATION, YOU'RE GOING TO SAY TO YOURSELF WHY HAVE WE SPENT SO MUCH TIME TALKING ABOUT THE OBVIOUS? WELL, BECAUSE THE DEFENDANTS WHO ARE REPRESENTED BY GOOD LAWYERS ARE ENTITLED TO PUT UP ANY DEFENSE THAT THEY WANT TO PUT UP, ANY DEFENSE THAT THEY WANT TO PUT UP.

NOW, THE PLAINTIFFS IN THIS CASE, AS IN ANY CIVIL CASE IN AMERICA, HAVE THE BURDEN OF PROOF. WE HAVE TO PROVE OUR CASE BY THE PREPONDERANCE OF THE EVIDENCE. THE PLAINTIFFS HAVE THE BURDEN OF PROOF BY THE PREPONDERANCE OF EVIDENCE. THE PREPONDERANCE OF EVIDENCE SOUNDS LIKE IT'S GOT TO PREPONDERATE. IT'S A BIG BURDEN FOR US TO CARRY. SOME OF YOU MAY BE FAMILIAR WITH THE BURDEN OF PROOF IN A CRIMINAL CASE. WHEN OUR SYSTEM IS TRYING TO TAKE AWAY SOMEBODY'S LIFE OR THEIR FREEDOM, WE HAVE TO PROVE CASES BEYOND A REASONABLE DOUBT, NOT SO IN A CIVIL CASE, WHERE MONEY IS THE ONLY THING AT ISSUE.

AND, UNFORTUNATELY, THAT IS THE ONLY THING THAT OUR CIVIL JUSTICE SYSTEM CAN DEAL WITH IS MONEY. THERE'S NO OTHER ALTERNATIVE THAT IS AVAILABLE TO PEOPLE SEEKING REDRESS WHEN THEY HAVE BEEN WRONGED AS A RESULT OF THE CARELESSNESS OF OTHERS. MONEY IS THE STANDARD. IT'S A VERY POOR STANDARD, BUT IT'S THE BEST WE'VE GOT.

NOW, WE HAVE TO CARRY THE BURDEN OF PROOF BY A PREPONDERANCE OF THE EVIDENCE. WHAT DOES THAT MEAN? AND Y'ALL HAVE TO FORGIVE MY LESS THAN GOOD DRAWING SKILLS, BUT I DRAW FIRST FOR YOU A SET OF SCALES. AND SOME OF Y'ALL CAN REMEMBER THE BLIND LADY OF JUSTICE WITH THE SWORD IN ONE HAND AND SCALES IN THE OTHER. WELL, WE START OFF WITH SCALES EVENLY BALANCED, ALL THE PARTIES DO. AND IF WE DON'T CARRY THE BURDEN OF PROOF BY TILTING THAT SCALE JUST EVER SO SLIGHTLY -- IT DOESN'T HAVE TO BE ALL THE WAY DOWN LIKE IN A CRIMINAL CASE, BEYOND A REASONABLE DOUBT. JUST WHEN IT'S OVER WITH AND THE JUDGE WILL CHARGE YOU THE LAW IN THE CONCLUSION, IT JUST HAS TO BE A DEFINITE TILT. YOU HAVE TO RECOGNIZE A SLIGHT INCLINE. WHAT THAT COULD BE REFERRED TO IS MORE LIKELY THAN NOT.

SOME OF US CAN REMEMBER THE OLD LED GAUGES THAT JUST HAD A NEEDLE. AND IF THE GAUGE IS TIPPED OVER THIS WAY JUST EVER SO SLIGHTLY, THE GAUGE DOESN'T HAVE TO GO ALL THE WAY OVER TO ONE SIDE OR THE OTHER. SOME OF US MAY WANT TO THINK ABOUT THE LED LIGHTS ON THE STEREOS AND SPEAKERS. WE DON'T HAVE TO HAVE ALL THE LIGHTS LIT UP ON ONE SIDE, JUST A FAINT GLOW. BUT A GLOW THAT YOU CAN PERCEIVE IT ON ONE SIDE OR THE OTHER. THE SIDE THAT WE HAVE THE BURDEN OF PROOF ON IS ALL WE HAVE TO DO.

SOME OF YOU -- AND I KNOW WE HEARD A WHOLE LOT ABOUT MASCOTS AND COLLEGE CRIES AND THINGS OF THAT NATURE, BUT ANALOGIZE IT TO A FOOTBALL GAME. WE DON'T HAVE TO SCORE A TOUCHDOWN. ALL WE HAVE TO DO IS GET OVER IN THE OTHER SIDE'S TERRITORY JUST ENOUGH SO YOU CAN TELL THAT WE'RE IN THEIR TERRITORY. THAT IS ALL THAT'S REQUIRED BY THIS BURDEN OF PROOF OR PREPONDERANCE OF THE EVIDENCE.

NOW IN THIS CASE, IT'S VERY UNUSUAL. THE FACTS ARE GOING TO SHOW YOU THAT ON SEPTEMBER 30TH OF 2003, THE MIRACLE OF BIRTH OCCURRED AT NORTHSIDE HOSPITAL. THE EVIDENCE IS GOING TO SHOW YOU THAT THEY HAVE OVER 15,000 BIRTHS A YEAR AT NORTHSIDE HOSPITAL. I THINK IT WOULD BE SAFE TO SAY THEY ARE THE MECCA, IF YOU WILL, OF BABY BIRTHING IN THE SOUTHEAST. THAT THERE IS NO BETTER PLACE A YOUNG COUPLE OR EVEN AN OLDER COUPLE COULD GO TO HAVE THEIR BABY. IF YOU WANTED THE FINEST PLACE TO GO, YOU WOULD CERTAINLY HAVE NORTHSIDE HIGH ON YOUR LIST, IF NOT WAY UP ON YOUR LIST. THEY HOLD THEMSELVES OUT AS BEING 'COME TO US.' THEY EVEN GOT RECLINERS IN THE ROOMS WHERE THE MAMAS HAVE THE BABIES SO THAT THE DADDIES AND MAYBE EVEN THE GRANDDADDY SOMETIMES CAN TAKE A NAP WHILE THEY ARE THERE WITH THE MAMA. THEY ARE IN THE BABY BIRTHING BUSINESS. AND I RESPECTFULLY SUBMIT, TOO, THE EVIDENCE IS GOING TO SHOW YOU THAT

YOUNG PARENTS HAVE THE RIGHT TO EXPECT AT LEAST ORDINARY CARE FROM EVERYBODY THEY LET TOUCH THAT BABY OR TOUCH THAT MOTHER IN THAT HOSPITAL.

THE EVIDENCE IS GOING TO SHOW YOU THAT IS THE BURDEN OF THE HOSPITAL, THE DUTY OF THE HOSPITAL THROUGH THEIR POLICIES AND PROCEDURES AND THE WAY THEY KEEP THEIR RECORDS, WHATEVER THEY'RE DOING TO MAKE SURE THAT IN THOSE HALLS -- IN THOSE HALLS THAT REASONABLE CARE IS AFFORDED EVERY MOTHER AND HER BABY. JUST REASONABLE CARE IS AFFORDED EVERY MOTHER AND HER BABY.

THE EVIDENCE IS GOING TO SHOW YOU THAT WELL, PRIOR TO SEPTEMBER 30TH, WHEN LITTLE BROOKE CAME INTO THIS WORLD, THAT HER MOM WENT FOR HER PRENATAL ULTRASOUND LIKE ALL MOMS DO THIS DAY AND TIME. YOU KNOW THAT EGLESTON IS GOING TO SHOW YOU THESE ULTRASOUNDS. IT'S JUST AN AMAZING PART OF MEDICINE, AN AMAZING PART OF MEDICINE. IT'S BEEN AROUND FOR ABOUT 30 YEARS, I THINK, IN MEDICINE. BUT THEY CAN TAKE THIS ULTRASOUND AND PUT IT ON A LADY'S ABDOMEN AND NOT ONLY TELLS YOU WHAT KIND OF SEX IT IS WITH THAT BABY, BUT THEY CAN SEE THINGS THAT MIGHT BE OF CONCERN ABOUT THE BABY'S HEALTH. SOME OF THE FISHERMAN ON THE JURY WILL KNOW THAT YOU USE DEPTH SOUNDER. AND IT'S GOT A TRANSDUCER THAT TELL YOU WHETHER OR NOT THE FISH ARE UNDER THE BOAT -- OR A RADAR FOR SOME OF THE PILOTS FOR FOLKS THAT HAVE FLOWN AIRPLANES. THAT RADAR GOES OUT THERE AND BOUNCES OFF SOME RANGE AND TELL YOU HOW FAR AWAY IT IS, HOW THICK IT IS. THE SAME KIND OF PRINCIPLE, BUT THEY HAVE COME A LONG, LONG WAY WITH ULTRASOUND THAT THEY USE TO DIAGNOSE ILLNESS AND CONDITIONS.

NOW THIS MAMA WENT IN FOR A SCREENING ULTRASOUND ON MAY 12 OF '03. THE PERINATOLOGIST, WHERE THEY SENT THE MOTHER FOR THIS SPECIAL ULTRASOUND, FOUND AN AREA SUSPICIOUS OF A CYST, AN ABDOMINAL CYST. NOW THEY COULDN'T TELL THE DETAILS ABOUT IT, BUT THEY SURE COULD TELL IT WAS SOMETHING THERE THAT WE BETTER FOLLOW. WE BETTER MONITOR IT. WE BETTER FOLLOW THIS THING WHILE THIS BABY GROWS INSIDE ITS MOTHER. WELL, THEY SET HER TO COME BACK ON A REGULAR BASIS. WHILE IN THE HOSPITAL -- SHE HAD A FALSE LABOR OR CONCERN AND WENT TO THE HOSPITAL ON 5/30. ON 5/31, SHE WENT BACK AND HAD THE ULTRASOUND DONE IN THE HOSPITAL. HERE, AGAIN, WITH THE REPORTS OF THE PERINATOLOGIST -- THERE ARE REPORTS THAT THEY HAVE EACH TIME. THE REPORTS SHOW AN AREA SUSPICIOUS OF A CYST.

SHE GOES BACK ON JUNE 5TH, AN ULTRASOUND AGAIN. THE CYST IS STILL THERE. THEY'RE EVEN STARTING TO MEASURE THIS CYST AND SHOWING THAT IT'S GROWN. THEY DIDN'T TELL EXACTLY WHERE IT IS OTHER THAN IT'S IN THE RIGHT ABDOMEN. THE EVIDENCE IS GOING TO SHOW YOU ANY KIND OF CYST INSIDE THE ABDOMINAL CAVITY OF THIS BABY IS SOMETHING TO BE ALARMED ABOUT TO THE POINT OF FOLLOWING IT. BUT THE EVIDENCE IS GOING TO SHOW YOU THESE PARENTS WERE TOLD, THESE INTELLIGENT PARENTS, THESE COLLEGE GRADUATE PARENTS, A DEGREE IN COMMUNICATION, THIS MOTHER HAS, FROM THE UNIVERSITY OF GEORGIA; SHE KNOWS HOW TO COMMUNICATE. SHE KNEW THAT HER BABY HAD AN AREA OF A SUSPICIOUS CYST, BUT SHE AND HER HUSBAND -- THE EVIDENCE WILL SHOW YOU -- WERE SO HAPPY WHEN THESE HEALTHCARE PROVIDERS TOLD THEM, IT'S PROBABLY NOT ANYTHING TO WORRY ABOUT. IT CAN BE DEALT WITH AS SOON AS THE BABY IS BORN AND THEY'LL DO AN ULTRASOUND ON THE BABY. AND THEY WILL PROBABLY TELL YOU IT'S PROBABLY NOTHING TO BE CONCERNED ABOUT. BUT IF IT IS SOMETHING TO BE CONCERNED ABOUT, WE'LL TAKE CARE OF IT BEFORE THE BABY LEAVES THE HOSPITAL. THAT WAS THE PLAN. THE PLAN WAS TO FOLLOW THIS CYST THROUGHOUT THE PREGNANCY.

SO, AGAIN, ON JULY 21ST, AGAIN, AN ULTRASOUND FOLLOWING THE CYST, DOING THE REPORT. AGAIN ON AUGUST THE 18TH, ULTRASOUND REVEAL A CYST. 9/4, A SUSPICIOUS AREA OF THE CYST. ON 9/16 SHE GOES INTO THE HOSPITAL WITH SOME PRETERM LABOR, DISMISSED, COMES BACK ON 9/30, WHICH COINCIDENTLY WAS THE DAY THAT SHE HAD HER NEXT ULTRASOUND SCHEDULED WITH DR. GOMEZ, WHO IS A PERINATOLOGIST THAT PRACTICES THERE AT NORTHSIDE HOSPITAL IN THAT COMPLEX.

WELL, THE BABY IS BORN ON THE 30TH, 2:44 IN THE AFTERNOON. LATE THAT EVENING OR LATE THAT AFTERNOON, 7:00, DR. GOMEZ CALLED. SEE, HE HAD GOTTEN TO KNOW MINA VERY WELL WITH ALL THESE ULTRASOUNDS AND THEY WERE SO INVESTED IN THIS PREGNANCY. THE DOCTOR WHO CARED, WHO WAS CONCERNED WAS REPORTING TO DR. HOUSTON ON A REGULAR BASIS EVERY TIME THIS ULTRASOUND WAS DONE.

THE PLAN ACCEPTED BY DR. HOUSTON AND FORMULATED BY DR. HOUSTON AND DR. GOMEZ WAS TO FOLLOW UP BEFORE THIS BABY LEFT THE HOSPITAL AND SEE WITH A DIRECT ULTRASOUND, AT A MINIMUM, OF THIS BABY WHETHER OR NOT THAT CYST WAS ANYTHING TO BE CONCERNED ABOUT. NOW, THE BABY IS BORN. SHE'S NOT THERE FOR HER ULTRASOUND. DR. GOMEZ, BEING A SPECIAL, SPECIAL DOCTOR, CALLS HER UP ON HER CELLPHONE AND SAYS, MINA, YOU'RE NOT HERE FOR YOUR ULTRASOUND. SHE SAYS WELL, DR. GOMEZ, I'M IN THE HOSPITAL. WE HAD THE BABY. HE SAYS, WHAT ABOUT THE CYST? OR WORDS TO THAT EFFECT. SHE SAYS, WELL, I HAVEN'T SEEN DR. WINNER YET.

THIS IS A PEDIATRICIAN THAT THEY MET WELL BEFORE SHE WAS ADMITTED TO THE HOSPITAL FOR DELIVERY WHEN THEY WENT TO THE BIG OPEN HOUSE THAT THEY HAVE, SAYING COME ON TO US YOU EXPECTANT MOTHERS AND WE WILL TAKE CARE OF YOUR BABIES. COME TO OUR OPEN HOUSE AND SEE OUR FACILITY. AND THEY GO THERE AND SAY TO DR. WINNER, WILL YOU BE OUR PEDIATRICIAN? WILL YOU TAKE CARE OF OUR BABY? YES, I'LL BE GLAD TO. WELL, IT'S A BIG PRACTICE AND WE'LL TALK SOME ABOUT THAT BEFORE WE GO RIGHT HERE. BUT THEY DIDN'T SEE DR. WINNER IN THE HOSPITAL. OTHER PARTNERS WERE COVERING FOR DR. WINNER IN THE HOSPITAL.

BUT THE NEXT DAY, THE NEXT DAY, AFTER THE BABY WAS BORN, THE EVIDENCE WILL SHOW YOU THAT ON OCTOBER THE 1ST, THE EVIDENCE WILL SHOW YOU THAT ON OCTOBER 1ST, DR. WINNER DOESN'T COME BY, BUT HIS

PARTNER, DR. SALLIE MARCUS COMES BY. AND SIGNIFICANTLY ENOUGH, THE EVIDENCE IS GOING TO SHOW YOU THE WAY THESE PEDIATRICIANS WORK - AND THEY GOT A GROUP PRACTICE AND I KNOW ONE DOCTOR CAN'T DO EVERYTHING BUT, OF COURSE, THE EVIDENCE WILL SHOW YOU THAT, BUT DR. MARCUS FIRST GOES TO THE NURSERY AND EXAMINES THE BABY. HE EXAMINES THE BABY AND THEN COMES TO THE MOTHER'S ROOM AND JUST TELLS HER HOW GOOD THE BABY IS DOING. EVERYTHING IS FINE. I THINK THE EVIDENCE WILL SHOW YOU THEY'RE NOT REALLY THERE FOR A MEDICAL MEETING WITH THE MOTHER, BUT THEY'RE THERE TO HAVE A CONVERSATION WITH THE MOTHER. MINA, AS YOU MIGHT EXPECT, HAVING JUST SPOKEN TO DR. GOMEZ THE NIGHT BEFORE -- HAVING JUST SPOKEN TO DR. GOMEZ THE NIGHT BEFORE, SAYS TO DR. MARCUS, WHAT ABOUT THE CYST? DR. MARCUS DIDN'T KNOW ANYTHING ABOUT ANY CYST AS WE NOW KNOW. MINA THOUGHT THE DOCTORS AND THE HOSPITAL ALL WERE COMMUNICATING ABOUT THIS CYST BECAUSE YOU REMEMBER, THAT WAS THE PLAN. THAT WAS THE PLAN SHE HAD BEEN ASSURED OF. SO WHEN SHE SAYS, WHAT ABOUT THE CYST, SHE'S THINKING SHE'S TALKING TO SOMEBODY THAT KNOWS ABOUT THE CYST. DR. MARCUS, WE FOUND OUT AFTER THIS LAWSUIT BEGAN, HAD NO CLUE ABOUT ANY CYST. HE DID NOT KNOW ANYTHING ABOUT A CYST, BUT SAID IN RESPONSE TO MINA SOMETHING LIKE, WE HAVE SOME MORE TESTS TO RUN. SO WHEN TAKA COMES IN AND TALKS ABOUT, DID THE PEDIATRICIAN COME BY? YES. WHAT ABOUT THE CYST? WELL, THEY'RE RUNNING SOME MORE TESTS.

SO THE NEXT DAY, NOT SURPRISING, DR. WINNER DOESN'T COME BY. DR. MARCUS DOESN'T COME BY. A THIRD DOCTOR COMES BY, A DR. SMITH. SHE ASKED DR. SMITH, WHAT ABOUT THE CYST? BECAUSE SHE HAD BEEN TOLD THERE WOULD BE MORE TESTS TO BE RUN. DR. SMITH SAID, YOU'RE A GREAT MOTHER. THE BABY IS FINE. EVERYTHING IS WONDERFUL. JUST EXACTLY THE WORDS THAT THIS YOUNG COUPLE HAD BEEN HOPING TO HEAR SINCE THE FIRST TIME THEY WERE TOLD THERE WAS A CYST IN THIS BABY. THERE WOULD BE SOME TESTS DONE AT THE HOSPITAL, PROBABLY NOTHING. BUT ONCE THOSE TESTS ARE DONE, WE'LL KNOW WHETHER OR NOT THIS IS SOMETHING TO BE CONCERNED ABOUT OR IT ISN'T.

THE EVIDENCE IS GOING TO SHOW YOU THEY LEFT DELIGHTED JUST LIKE NEW PARENTS WOULD BE WITH A HEALTHY BABY, NOTHING TO WORRY ABOUT. AND THEN THE NEXT DAY, THEY GO SEE DR. WINNER. DR. WINNER HADN'T HAD ANY CONVERSATION WITH ANYBODY ABOUT THIS BABY AND HE SEES THE BABY. THE MOTHER HAS BEEN CONVINCED THE CYST ISN'T AN ISSUE ANYMORE BECAUSE IT WAS GOING TO BE ADDRESSED BEFORE SHE LEFT THE HOSPITAL. WELL, THE BABY HAS PROBLEMS AND PROBLEMS AND PROBLEMS. SHE'S BEEN SEEN BY DIFFERENT DOCTORS, DIFFERENT DOCTORS.

LADIES AND GENTLEMEN, THE SAD, SAD THING IS YOU'RE GOING TO HAVE OUT WITH YOU A STACK OF RECORDS ABOUT THAT HIGH. AND IN THOSE RECORDS THERE WILL BE SOME VARIOUS SIGNIFICANT RECORDS. THERE'S AN ANTEPARTUM RECORD, PARTUM I GUESS IS BIRTH. ANTE IS BEFORE BIRTH. AN ANTEPARTUM RECORD KEPT BY THE WOMEN'S HEALTH CENTER. IT'S THEIR RECORD, BUT IT'S KEPT ON A FORM THAT SAYS AT THE TOP, NORTHSIDE HOSPITAL. AND THE EVIDENCE IS GOING TO SHOW YOU THAT THE REASON THAT NORTHSIDE HOSPITAL SENDS ALL THESE FORMS TO ALL THESE OBSTETRICIANS IS SO THAT THEY WILL BE IN UNIFORMITY SO THAT THE PEOPLE ON THEIR STAFF AND OTHER DOCTORS INVOLVED IN THE HOSPITAL CAN KNOW THE ANTEPARTUM RECORD WHEN THEY SEE IT. IT'S NOT DIFFERENT FROM PRACTICE TO PRACTICE. AND VERY, VERY SIGNIFICANTLY, ON THREE DIFFERENT PAGES, THREE DIFFERENT PAGES THAT APPEAR MORE THAN ONCE, SO THAT WOULD BE SIX TIMES IN THE RECORDS AT A MINIMUM. THREE DIFFERENT TIMES UNDER A BLANK THAT NORTHSIDE HAS ON THEIR FORM, RIGHT HERE. YOU'LL HAVE THE EXACT DOCUMENT OUT WITH YOU, BUT ON THE EXACT FORM, THREE PAGES, IT SAYS ABDOMINAL CYST FETUS. ABDOMINAL CYST FETUS. ABDOMINAL CYST FETUS UNDER PROBLEMS AND PLANS.

NOW, THE NURSE KNOWS WHAT ANTEPARTUM RECORDS ARE. AND ONE WOULD THINK -- AND THE EVIDENCE IS GOING TO SHOW YOU FROM THE TESTIMONY OF OUR EXPERTS AND I BELIEVE FROM THE TESTIMONY OF OTHER PEOPLE, REPRESENTING VARIOUS DEFENDANTS IN THIS CASE. LOTS OF WITNESSES ARE GOING TO COME IN AND SAY SOMEBODY DROPPED THE BALL. EVERYBODY HAS GOT WITNESSES. WE GOT WITNESSES THAT SAY EACH ONE OF THEM DROPPED THE BALL. WE GOT OBSTETRICIANS THAT SAY THE OBSTETRICIANS DROPPED THE BALL. WE GOT PEDIATRICIANS THAT SAY THE PEDIATRICIANS DROPPED THE BALL. AND NURSES -- A NURSE TO SAY THAT THE NURSING STAFF DROPPED THE BALL BECAUSE THEY DIDN'T COMMUNICATE WITH EACH OTHER ABOUT THIS PROBLEM THAT WAS IN THE NORTHSIDE HOSPITAL RECORDS.

NOW THE OB SAID, WE PUT IT IN THE RECORD. THAT'S ALL WE GOT TO DO. THE PEDIATRICIANS SAY, NOBODY TOLD US. WE DON'T HAVE TO LOOK IN THE RECORDS. AND THE NURSES SAY, WE SEE SOMETHING IN THE PROBLEM CHART OF THE MOTHER, ABDOMINAL CYST FETUS -- ABDOMINAL CYST FETUS, BUT THEY DON'T HAVE ANY DUTY, THEY SAY, TO PASS THAT ON TO THE PEDIATRICIAN WHO HAS TAKEN OVER.

WELL, LADIES AND GENTLEMEN, I DON'T NEED TO BELABOR THIS, BUT THAT'S WHAT THE EVIDENCE IS GOING TO SHOW YOU. AND I SUSPECT WE'RE GOING TO SPEND AT LEAST TWO DAYS WITH DIFFERENT PEOPLE TALKING ABOUT HOW COME IT WASN'T ANYBODY'S FAULT OR HOW COME IT WAS THE OTHER PERSON'S FAULT. AND THEN FOR ABOUT TWO DAYS OF TESTIMONY, WE'LL BE RIGHT BACK WHERE WE ARE NOW. THE OBSTETRICIANS HAD A PLAN TO FOLLOW THIS CYST. WE WERE GOING TO DEAL WITH IT BEFORE THE BABY WENT HOME FROM THE HOSPITAL. THE PEDIATRICIANS KNOW THAT THEY GET A PATIENT WHO IS BRAND NEW TO THIS WORLD, A BRAND NEW PATIENT TO THEM. AND THEY ARE DOCTORS AND THEY KNOW THAT THEY NEED TO GET A MEDICAL HISTORY ON THE BABY. THE EVIDENCE IS GOING TO SHOW YOU THAT BABIES MEDICAL HISTORIES DON'T BEGIN WHEN THE BABIES EXIT THE BIRTH CANAL. THIS DAY AND TIME, MEDICAL HISTORY GO ALL THE WAY BACK, ALL THE WAY BACK TO MAY BECAUSE THEY CAN FOLLOW IT, BUT THESE PEDIATRICIANS, THE FINE INDIVIDUALS THAT MIGHT BE CAUGHT UP IN THIS CORPORATE PRACTICE OF MEDICINE, ARE GOING TO SAY, WELL, NOBODY TOLD US. WHAT'S REALLY ASTOUNDING IS THAT ALL THREE SETS OF THESE DEFENDANTS SAY THAT IT WAS THE MOTHER'S FAULT. THEY DON'T JUST SAY IT WAS OTHER

HEALTHCARE PROVIDERS FAULT, THEY WANT TO BURDEN THIS MOTHER FOR THE REST OF HER LIFE WITH A CLAIM THAT IT WAS HER FAULT BECAUSE SHE DIDN'T TELL AGAIN AND AGAIN AND AGAIN.

THIS IS THE BOARD I WAS LOOKING FOR. YOU ASK THESE TWO DOCTORS, NOW THEY SAY SHE DIDN'T ASK THEM. AND YOU'LL HAVE TO DECIDE FOR YOURSELF WHETHER OR NOT A MOTHER, WHO IS A FIRST TIME MOTHER, AN INTELLIGENT MOM, WHO HAD BEEN TOLD ABOUT A POTENTIALLY LIFE-THREATENING CONDITION THAT CAN BE RULED OUT BEFORE THEY LEFT THE HOSPITAL, WHETHER OR NOT SHE JUST DIDN'T TELL ANYBODY. SHE KEPT IT A SECRET FROM THEM. YOU CAN BELIEVE THAT IF YOU WANT TO. THAT'S THE POSITION OF THE DEFENDANTS. SHE JUST KEPT THIS A SECRET. EVEN THOUGH THEY FORGOT DR. GOMEZ CALLED HER THE NIGHT BEFORE SHE MET DR. MARTIN. THEY WILL TELL YOU -- SOME OF THEM WILL TELL YOU THAT WHEN THE WORD "CYST", WOULD HAVE BEEN MENTIONED, THEY WOULD HAVE JUMPED ON IT LIKE NOBODY'S BUSINESS. THEY WOULD HAVE HAD A DUTY RIGHT THEN TO FOLLOW UP BECAUSE EVERYBODY KNOWS THAT AN ABDOMINAL CYST CAN BE A POTENTIALLY LIFE-THREATENING CONDITION. NOBODY FOLLOWED UP ON IT. THE BABY GOES AWAY WAY FROM THE HOSPITAL WITH NO ULTRASOUND.

MOM, ON OCTOBER 28TH, THE BABY HAD THESE FEEDING PROBLEMS. SHE HAD OTHER PROBLEMS THAT BABIES HAVE, BUT ON OCTOBER THE 28TH, HAVING BEEN TOLD THAT THERE WAS NOTHING TO WORRY ABOUT THIS CYST, SHE BRINGS IT UP AGAIN, WELL, HOPKINS, SHE SEEN -- WELL, MAYBE NOT EVERYBODY IN THE GROUP. THERE'S ABOUT SEVEN DIFFERENT PEDIATRICIANS. EVERY TIME SHE GOES, SHE SEES A DIFFERENT PEDIATRICIAN. DR. WINNER, WHO WAS GOING TO LOOK AFTER THE BABY, HE TOOK PERSONAL LEAVE. I THINK HE HAD SURGERY OF HIS OWN OR SOMETHING, BUT HE'S OUT OF THE PICTURE. SHE ASKED DR. HOPKINS ABOUT THIS CYST? WELL, I BELIEVE DR. MARCUS AND DR. SMITH THEY TESTIFY, THEY'RE GOING TO TELL YOU, WE ALL KNOW PRETTY MUCH WHAT EVERYBODY'S WITNESS IS GOING TO SAY BECAUSE WE PUT THEM UNDER OATH BEFORE THEY COME. AND I THINK THERE'S 40 OR 50 DEPOSITIONS IN THIS CASE. SO, WE PRETTY WELL KNOW WHAT WE EXPECT PEOPLE TO SAY BEFORE THEY COME. THEY SAID, IF ANYBODY MENTIONED THE WORD CYST, WE WOULD HAVE JUMPED ON IT. WE WOULD HAVE HAD A DUTY TO JUMP ON IT. IT WAS OUR OBLIGATION. BUT IT'S INDISPUTABLE THAT THE MOTHER ON OCTOBER THE 28TH, BEFORE THE BABY IS A FULL MONTH OLD, SAYS WHAT ABOUT THE CYST? DR. HOPKINS DOESN'T DO ANYTHING TO PURSUE THE CYST. HE JUST DECIDED IT WAS JUST COLIC OR HE WAS BUSY OR SOME REASON. HE'S HERE IN THE COURTROOM. HE'LL TELL YOU WHY HE DIDN'T PURSUE THIS CYST WHEN THIS MOTHER TOLD HIM ABOUT THE CYST.

ON 11/5, HAVING BEEN TOLD BY DR. HOPKINS, YOU DON'T NEED TO SEE A PEDIATRIC GASTROENTEROLOGIST OR SOMEBODY THAT SPECIALIZES IN THE DIGESTION TRACT. SEE, MOM WAS THINKING AT THIS TIME, BECAUSE THE BABY IS NOT EATING WELL AND HAVING THIS DIGESTIVE TRACT PROBLEM, THAT WHO SHE NEEDS TO SEE IS A PEDIATRIC GASTROENTEROLOGIST. WELL, OBVIOUSLY, YOU KNOW THAT WOULD BE EVASIVE. YOU DON'T NEED TO DO THAT. SHE DOESN'T TAKE THAT ADVICE. ON HER OWN SHE GOES TO SEE DR. GLENN LEWIS.

SHE CALLS UP ANOTHER GROUP PRACTICE, A PEDIATRIC GASTROENTEROLOGIST. SHE TELLS DR. LEWIS ABOUT THE CYST. DR. LEWIS SAYS, THE EVIDENCE IS GOING TO SHOW YOU, TELL YOU WHAT YOU DO -- SHE EVEN CALLED DR. GOMEZ AND GOT HIM ON THE PHONE. AND DR. GOMEZ WAS ASKED TO TALK TO DR. LEWIS AND DR. LEWIS SAID, NO, HAVE HIM FAX THE ULTRASOUND REPORT OVER TO THE PEDIATRICIAN. THEY GOT A LENGTHY REPORT OF EVERY ONE OF THESE ULTRASOUNDS. FAX THAT OVER TO YOUR PEDIATRICIANS. THEY'LL LOOK AT THEM. AND IF THERE'S ANY REASON TO FOLLOW UP WITH THE CYST, I'M SURE THEY WILL GET BACK IN TOUCH WITH ME.

I SUSPECT DR. LEWIS WILL TELL YOU WHAT HE WOULD HAVE THOUGHT IF THEY KNEW BEFORE BIRTH THAT THERE WAS A SUSPICIOUS ABDOMINAL CYST, IT WOULD HAVE BEEN RULED OUT AT BIRTH. THAT'S PROBABLY WHY HE DIDN'T JUMP ON IT. WORSE OF ALL, CONSIDERATIONS YOU COULD IMAGINE, DR. GOMEZ FAXES THESE ULTRASOUNDS OVER TO DR. WINNER AND DR. HOPKINS AT THE DEFENDANT PEDIATRIC GROUP. DR. HOPKINS GETS THREE OF THE ULTRASOUND REPORTS, WHICH IF HE WOULD HAVE READ, HE WOULD HAVE SEEN THAT THEY FOLLOWED THIS DOCUMENTED CYST ON AT LEAST THOSE THREE ULTRASOUNDS. AND THERE WAS SOMETHING ELSE IN THERE -- WE'LL GET THE INFORMATION OUT WITH YOU, ABOUT SOME SUSPICIOUS AREAS IN THE INTESTINES, THE SIGMOID AREA OF THE COLON. BUT IT WAS THOUGHT TO BE A NORMAL VARIANT. WELL, I GUESS THE EXPLANATION WOULD BE THAT HE WAS IN A HURRY AND DIDN'T READ CAREFULLY AND HE THOUGHT THE NORMAL VARIANT APPLIED TO THE CYST. BUT YOU'LL HAVE THESE DOCUMENTS WITH YOU AND I SUBMIT TO YOU THAT GRANDCHILDREN COULD READ THESE REPORTS AND TELL THAT THAT NORMAL VARIANT DOESN'T APPLY TO THE CYST, WHICH HAD BEEN DOCUMENTED TIME AND TIME AGAIN.

BUT IF YOU'RE IN A HURRY, I GUESS YOU CAN FLIP THROUGH -- GO RIGHT THROUGH THE LAST PARAGRAPH ALMOST ON THE LAST REPORT AND MISREAD IT. SO, HE PUTS IN THE FRONT OF THE PEDIATRIC CORPORATION'S CHART SUSPICIOUS MESENTERIC CYST, NORMAL VARIANT, PRENATAL MESENTERIC CYST, NORMAL VARIANT. SO, NOW EVERY OTHER PEDIATRICIAN WHO SEES THAT IN THE PRACTICE, THEY DON'T READ THE ULTRASOUND REPORTS THEMSELVES. THEY READ DR. HOPKIN'S MISINTERPRETATION OF WHAT IT SAYS. SO NOBODY FOLLOWS UP ON THIS CYST.

NOW, ON 12/4/03, MRS. YAMADA CALLS BACK. NOW KEEP IN MIND, SHE WAS BORN ON SEPTEMBER 30TH WITH THIS CYST THAT WAS SUPPOSED TO BE FOLLOWED UP BACK THEN. SHE CALLS BACK AND SPEAKS TO ONE OF THE NURSES -- AND THEY'RE ABOUT TO LOSE THEIR PATIENCE WITH THE GROUP ALREADY BECAUSE SHE WAS THINKING NOBODY IS PAYING ATTENTION. NOBODY IS PAYING ATTENTION. BUT SHE CALLS UP AND THE NURSE SAYS LOOK, MRS. YAMADA, YOU ARE JUST A PARANOID, FIRST-TIME MOTHER. AND SHE TOLD HER HUSBAND, SHE SAID THAT'S IT. I WANT TO SEE IF WE CAN GET IN TO SEE SOMEBODY ELSE. AND IT'S NOT EASY TO SEE SOMEBODY ELSE WHEN YOU GOT A FINE, RESPECTED GROUP THAT'S BEEN CARING FOR THE BABY SINCE BIRTH.

AND THE EVIDENCE IS GOING TO BRING YOU TO THE CONCLUSION THAT IT'S NOT EASY TO GET THESE CLOSE KNIT MEDICAL FOLKS TO COME IN AND SAY THINGS WERE AS THEY WERE. YOU JUST KIND OF USE YOUR OWN COMMON

SENSE WHEN YOU HEAR SOME OF THESE PEOPLE COME IN AND TESTIFY AND TESTIFY THE WAY THEY'RE TESTIFYING. BUT ANYWAY, THEY GOT IN THROUGH A NURSE THAT I BELIEVE WAS A FEEDING NURSE THAT WORKED WITH ANOTHER PEDIATRIC PRACTICE. AND THAT NURSE WAS SO CONCERNED, SHE GOT LIKE AN IMMEDIATE APPOINTMENT -- A WORK-IN KIND OF BASIS TO SEE ANOTHER DOCTOR. THEY WENT IN TO SEE THE OTHER DOCTOR. THE OTHER DOCTOR DIDN'T HAVE ANY RECORDS. HE SAID, LET ME GET THE RECORDS AND WE'LL COME BACK FOR AN THOROUGH EVALUATION AND I'LL DO THE TYPE OF ASSESSMENT I SHOULD. THE BABY IS DOING PRETTY GOOD AT THIS TIME.

BUT BY JANUARY 22ND, WHEN SHE WAS IN TO SEE DR. FULLER, THE SECOND PEDIATRICIAN, SHE SAID WHAT ABOUT THE CYST. THAT DAY THE BABY WAS IN FULL BLOWN LIVER FAILURE. AND AN ULTRASOUND WAS DONE THAT DAY AND THEY FOUND A CHOLEDOCHAL CYST. THAT CYST HAD BEEN THERE ALL ALONE LED TO LIVER FAILURE, LED TO AN ADMISSION TO SCOTTISH RITE. ON 1/22, AN EMERGENCY ADMISSION TO SCOTTISH RITE. THE ULTRASOUND DIAGNOSIS WAS A CHOLEDOCHAL CYST. ON 1/23, A DAY LATER, THEY DID A CHOLANGIOGRAM, WHICH SHOWED THERE WAS MASSIVE LIVER IMPAIRMENT. THE BILE WAS NOT FLOWING LIKE IT SHOULD FROM THE LIVER. AND THIS IS PRETTY IMPORTANT LADIES AND GENTLEMEN. THERE'S GOING TO BE A BATTLE OF MEDICAL EXPERTS ABOUT THIS. BUT YOU'RE GOING TO LEARN A LOT ABOUT THE LIVER WHETHER YOU WANT TO OR NOT. I'M AFRAID IT'S GOING TO TAKE SOME TIME. THAT'S ONE OF THE BATTLE GROUNDS OF THIS CASE.

THIS BABY LIVED FROM SEPTEMBER 30TH TO ABOUT THE 22ND OF JANUARY WITH A FUNCTIONING LIVER. THE LIVER PRODUCES BILE. THE BILE FLOWS THROUGH DUCTS, GOES THROUGH THE GALL BLADDER, GOES INTO THE SMALL INTESTINE, AND THAT'S HOW THE DIGESTIVE PROCESS TAKES PLACE. IF THAT BILE DOESN'T FLOW, IT BACKS UP AND EFFECTIVELY POISONS THE LIVER. IT CAUSES CIRRHOSIS OR INFLAMMATION OF THE LIVER. AS LONG AS IT'S FLOWING, EVERYTHING IS OKAY. BUT WHEN IT QUILTS FLOWING, IT BACKS UP AND BAD THINGS START HAPPENING TO THE LIVER, WHICH EXPLAINS, IN PART, WHY SHE DIDN'T HAVE THESE PROFOUND SYMPTOMS THAT SHE ULTIMATELY DID WHEN THESE DUCTS VIRTUALLY HAD DISAPPEARED AND THE BILE HAD QUIT FLOWING.

AT SCOTTISH RITE, SHE UNDER WENT A KASAI PROCEDURE. A KASAI PROCEDURE IS A PROCEDURE DESIGNED TO RE-ESTABLISH BILE FLOW WHEN THE DUCTS NO LONGER WORK OR IF THE DUCTS NEVER EXISTED. THEY TAKE A PIECE OF SMALL INTESTINE AND THEY PUT IT UP IN THE BAY OF THE LIVER, AN AREA CALLED HEPATASIS, WHERE THE VEINS ARE THAT DRAIN THE BILE OR THE CONDUITS, IF YOU WILL, IN THE LIVER. AND TO DRAIN THE BILE INTO THAT AREA IT WOULD ORDINARILY GO THROUGH THE LEFT AND RIGHT HEPATIC DUCTS INTO THE HEPATICS DUCTS, BUT WHEN THOSE DUCTS AREN'T THERE, THEY PUT A PIECE OF SMALL INTESTINE UP THERE AND THAT'S WHAT CAUSES THE CONTINUITY OF THE FLOW.

AND A KASAI PROCEDURE, THE EVIDENCE IS GOING TO SHOW YOU, IT IS VERY, VERY EFFECTIVE. IF YOU CATCH THE CONDITION OF THE LIVER BEFORE IT GETS REALLY, REALLY SICK. NOW, THE SOONER, THE BETTER. ONE REASON FOR MONITORING. AND THAT'S A LOT OF WHAT THIS CASE IS ABOUT. HAD THEY DONE AN ULTRASOUND BEFORE THIS BABY LEFT THE HOSPITAL, I THINK IT IS UNQUESTIONABLE THAT EVERY DOCTOR THAT TESTIFIES, HAD THEY DONE AN ULTRASOUND BEFORE THE BABY LEFT THE HOSPITAL, EVERYBODY WOULD HAVE BEEN AWARE OF THIS CYST, WHICH WAS A CHOLEDOCHAL CYST OR A CYST INVOLVED WITH THIS BILE FLOW, THIS DUCT THAT CARRIES BILE FLOW.

THERE'S GOING TO BE A LOT OF DISPUTE AND CONFUSION. MY JOB IS GOING TO BE TO TRY TO KEEP US FOCUSED ON THE ISSUE. THERE WILL BE OTHERS THAT TRY AND GET US ALL AWAY FROM THE ISSUE. AND IT'S GOING TO BE, KEEP YOUR EYE ON THE BALL KIND OF THING. THE LIVER WAS FUNCTIONING. THE LIVER GOT SICK OVER TIME. IF IT HAD BEEN MONITORED CLOSELY, THEY WOULD HAVE INTERVENED SOONER. MONITORING BRINGS ABOUT SOONER INTERVENTION. BY THE TIME SHE HAD THE KASAI PROCEDURE, SHE WAS IN COMPLETE LIVER FAILURE OR ALMOST TOTAL LIVER FAILURE WITH NO FUNCTION AT ALL. IF THE KASAI PROCEDURE IS DONE EARLY, PEOPLE MAY NEVER NEED A LIVER TRANSPLANT. THE EARLIER IT IS, THE BETTER IT IS TO AVOID THE LIVER TRANSPLANT. STATISTICS ARE GOING TO SHOW YOU, AND THERE WILL BE TESTIMONY ABOUT IT, THAT 80 PERCENT OF THE PEOPLE THAT GET KASAI PROCEDURES GET THEM AND THEY STILL HAVE LIVER TRANSPLANTS BY AGE FIVE. BUT THAT MEANS 20 PERCENT DON'T GET LIVER TRANSPLANTS BY AGE FIVE. AND THOSE 20 PERCENT, WE SUGGEST TO YOU, INCLUDE PATIENTS WHO ARE FOLLOWED FROM BIRTH AND WHO, AT THE FIRST SIGN OF ANY LAB VALUE OR ANY SYMPTOM AT ALL, IMMEDIATELY GET THEIR KASAI PROCEDURE BEFORE THAT LIVER GETS REAL SICK.

AND WE WILL HAVE ONE OF THE FINEST PHYSICIANS IN THE COUNTRY, DR. JOEL LAVINE IS GOING TO COME HERE THURSDAY, I BELIEVE. THURSDAY HE'LL BE HERE AND HE WILL EXPLAIN TO YOU WHY, IN HIS OPINION, THAT IF THIS CHILD HAD BEEN FOLLOWED PROPERLY, HAD INTERVENTION AT AN APPROPRIATE TIME, MORE LIKELY THAN NOT, THE CHILD WOULD HAVE NEVER HAD A LIVER TRANSPLANT.

THERE WILL BE OTHERS THAT TELL YOU FROM THE DEFENSE SIDE THAT OH, WELL, FIRST OF ALL, WE WEREN'T CARELESS AT ALL. NOBODY WAS CARELESS. AND IF ANYBODY WAS CARELESS, IT WASN'T US. IT WAS THE OTHERS. AND EVEN IF WE WERE CARELESS, IT REALLY DIDN'T MAKE ANY DIFFERENCE BECAUSE SHE WAS GOING TO HAVE A LIVER TRANSPLANT. THAT'S WHAT THE DEFENSE IS GOING TO BE. WE WEREN'T CARELESS. THEY WERE, BUT THEY'LL SAY, WE WERE. BUT WE SAY WE WEREN'T. AND EVEN IF WE WERE ALL CARELESS, IT DIDN'T MAKE ANY DIFFERENCE ANYWAY. THE CHILD DIDN'T NEED TO HAVE ANY EARLIER PROCEDURES. EVEN THOUGH WE WOULD HAVE DONE AN EARLIER PROCEDURE, WE DIDN'T NEED IT BECAUSE SHE WOULD LOSE THE LIVER ANYWAY. THAT'S THE DEFENSE OF THE CASE. OTHER THAN THEY'RE GOING TO SAY, IF THE MAMA HAD DONE WHAT THE MAMA WAS SUPPOSED TO DO AND THE DADDY HAD DONE WHAT THE DADDY WAS SUPPOSED TO DO, THEN IT WOULD HAVE HAPPENED -- I GUESS THEY'RE GOING TO SAY IT WOULD HAVE HAPPENED EARLIER. I DON'T KNOW WHAT THEY'RE GOING TO SAY ON THAT. THEY BLAME THEM.

NOW THERE'S A PRINCIPLE OF LAW THAT THE JUDGE WILL GIVE YOU AT THE CONCLUSION, THAT IF YOU FIND MOM AND DAD TO BE CARELESS -- BECAUSE WE COME HERE WITH TWO CLAIMS. IF YOU FIND MOM AND DAD TO BE CARELESS, IT JUST HURTS THEIR CLAIM IF YOU FIND THAT THEIR CLAIM -- THEIR CONDUCT WOULD REDUCE WHAT THEY WOULD BE ENTITLED TO. BUT THEIR CONDUCT IS NOT ATTRIBUTABLE TO AN INNOCENT CHILD, SO IT DOESN'T EFFECT BROOKE'S RIGHT TO RECOVER AT ALL. AND I RESPECTFULLY SUBMIT AT THE END OF THE CASE THAT YOU'LL REALIZE THE EVIDENCE DOES NOT SHOW THAT MAMA AND DADDY DID ANYTHING WRONG.

IT IS THESE HEALTHCARE PROVIDERS THAT JUST LET THIS BABY FALL THROUGH THE CRACKS. NOW, WE DON'T HAVE TO SHOW YOU THAT ANY DOCTOR IS A BAD DOCTOR OR ANY DOCTOR INTENDED BAD CONSEQUENCES. THAT'S NOT A BURDEN WE UNDERTAKE NOR A BURDEN WE WOULD UNDERTAKE. NOBODY CAN PROVE THOSE KINDS OF THINGS. THE EVIDENCE WILL SHOW YOU THESE ARE GOOD, THOUGHTFUL DOCTORS CAUGHT UP IN A CORPORATE PRACTICE WHERE FOLKS JUST DIDN'T FOLLOW UP LIKE THEY SHOULD HAVE. SHE HAD A TERRIBLE TIME. THIS KASAI PROCEDURE, ALMOST FROM THE GET-GO, JUST FAILED. THE LIVER WAS SO SICK THEY COULDN'T SAVE IT, SO THEY SEND HER OVER TO EGLESTON. AND WHEN SHE GOT THERE, SHE MET DR. RENE ROMERO WHO, THROUGH ALL PROBABILITY, WILL COME TESTIFY FOR YOU.

DR. ROMERO, THE EVIDENCE WILL SHOW, DID A LOT OF THIS STUDY. DR. JOEL LAVINE IS COMING FROM SAN DIEGO TO TALK TO YOU ABOUT THESE ISSUES. AND HE HAS BEEN THE PRIMARY LIVER DOCTOR FOR THIS CHILD FOLLOWING HER CONDITION ALONG WITH DR. HEFFRON FROM EMORY. AND THE DEFENDANTS MAY WELL WANT TO SAY THAT WELL, SHE GOT A LIVER TRANSPLANT. AND SHE IS JUST GOING TO BE FINE NOW THAT SHE'S GOT A LIVER TRANSPLANT. BUT THE EVIDENCE IS GOING TO SHOW YOU WITHIN THE LAST 30 DAYS, SHE WAS BACK AT EMORY WITH POTENTIAL SIGNS OF REJECTION OR SIGNS OF POTENTIAL REJECTION AND SHE WILL FOR THE REST OF HER LIFE. WITH THOSE WHO ARE FAMILIAR WITH TRANSPLANT RECIPIENTS, THEY WILL WALK A TIGHTROPE BETWEEN ADEQUATE IMMUNOSUPPRESSANTS, KEEPING HER FROM GETTING VACCINATION FROM MUMPS, MEASLES, THINGS LIKE THAT. SHE IS BARE TO THE THINGS THAT ARE OUT THERE.

THE EVIDENCE WILL SHOW YOU THAT MOM GOES AROUND WITH HANDIWIPE AND THINGS TO LAY OUT, BUT HER WHOLE LIFE IS THAT OF A PROTECTED CHILD, EVEN THOUGH THEY TRY TO LET HER BE AS NORMAL AS THEY CAN. THE EVIDENCE WILL SHOW YOU THAT BROOKE WALKS THIS TIGHTROPE BETWEEN REJECTION OF HER LIVER AND OVER SUPPRESSION. YOU KNOW OF THE IMMUNO -- IMMUNE SYSTEM AND WHEN IT'S ALL SAID AND DONE, WE WILL SHOW YOU THAT THE EXPENSE IS TODAY JUST ASSOCIATED WITH THE CARELESSNESS OF THE DEFENDANT DOING NOTHING AT BIRTH. WE BACK THAT BECAUSE OF THE KASAI PROCEDURE, BECAUSE WE KNOW THE KASAI PROCEDURE SHOULD HAVE BEEN DONE. IT SHOULD HAVE BEEN DONE SOONER. WE ARE NOT TRYING TO BLAME THEM FOR THE COST OF THE KASAI PROCEDURE BECAUSE WE THINK IT SHOULD HAVE BEEN DONE -- IT SHOULD HAVE BEEN DONE BEFORE THIS LIVER GOT SO SICK IT COULDN'T BE SAVED. AND ALL OF THE EXPENSES TODAY ARE SOMETHING OVER \$500,000, WHICH GIVES YOU SOME WINDOW FOR THIS LITTLE CHILD THAT WAS BORN IN '03. HERE IT IS '06. SHE IS NOT QUITE YET THREE. SHE IS GOING TO HAVE LOTS OF EXPENSES THE REST OF HER LIFE, EVEN IF SHE DOESN'T UNDERGO ANOTHER TRANSPLANT. AND THE EVIDENCE IS GOING TO SHOW YOU THAT HER LIFE IS VIRTUALLY TURNED UPSIDE DOWN FROM WHAT IT WOULD HAVE BEEN HAD SHE GONE ON FROM A SUCCESSFUL KASAI PROCEDURE. SHE MAY HAVE NEVER HAD A LIVER TRANSPLANT. AND IF SHE DID HAVE ONE, IT WOULD BE AROUND AGE 20, BUT WE SAY THE EVIDENCE IS GOING TO BE CONVINCING SHE WOULDN'T HAVE HAD ONE AT ALL.

LADIES AND GENTLEMEN, WE'RE GOING TO BE HERE A LONG TIME. A LOT OF WHAT WE'RE GOING TO BE DEALING WITH IS WHOSE FAULT IS IT. AND THIS IS ONE OF THOSE CASES WHERE I THINK I'M GOING TO BE ABLE TO AGREE WITH ALL OF THE DEFENSE LAWYERS. I'LL AGREE WITH THE HOSPITAL WHEN THEY SAY IT WAS THE FAULT OF THE PEDIATRICIANS FOR NOT READING THE RECORD. IT WAS RIGHT THERE IN THE RECORD FOR THEM TO READ, PROBLEM. I WILL AGREE WITH THEM WHEN THEY SAY IT WAS THE OB RESPONSIBILITY. THEY SHOULD HAVE TOLD THE PEDIATRICIANS. I WILL AGREE WITH THEM WHEN THEY SAY THE PEDIATRICIANS SHOULD HAVE ASKED THE MOTHER SOMETHING LIKE, MRS. YAMADA, WHEN THEY WENT TO THE HOSPITAL -- MRS. YAMADA, I WANT TO GET A COMPLETE MEDICAL HISTORY ON YOUR CHILD, NOT JUST COUNT ON HER TO BRING IT UP IN CONVERSATION, BUT SAY TO HER, I WANT TO GET A COMPLETE MEDICAL HISTORY ON YOUR CHILD -- OR FOR THE OBSTETRICIANS TO SAY, WE'RE NOT GOING TO TELL THE PEDIATRICIANS AND THE HOSPITAL DOESN'T DO MUCH ABOUT COMMUNICATING TO THE PEDIATRICIANS. IT'S UP TO YOU TO BE THE ONE TO MAKE SURE THIS ULTRASOUND HAS BEEN DONE BEFORE YOU GO HOME WITH THAT BABY. AND I RESPECTFULLY SUBMIT, YOU WILL KNOW THAT THIS MOTHER WOULD HAVE SCREAMED, STOMPED, MADE SURE THEY BROUGHT HER THAT REPORT BEFORE THE SHE LEFT THE HOSPITAL HAD ANYBODY TOLD HER OR HAD ANYBODY EXERCISED THE KIND OF CARE THAT THEY WANT EVERYBODY TO BELIEVE IS EMPLOYED AT NORTHSIDE HOSPITAL BY EVERYBODY INVOLVED IN THE BIRTH AND DELIVERY AND CARING FOR THESE NEWBORNS.

WE'LL ASK YOU IN CONCLUSION TO DEAL WITH THAT VERY, VERY DIFFICULT ISSUE. AND ONLY YOU FOLKS CAN DEAL WITH IT. AND THAT'S HOW MUCH MONEY WILL BE APPROPRIATE TO COMPENSATE THIS CHILD FOR WHAT THIS CARELESSNESS HAS DONE TO HER. I'M NOT EVER GOING TO TELL YOU THAT YOU HAVE TO AWARD MILLIONS OF DOLLARS OR FIVE MILLION OR TEN MILLION OR NUMBERS LIKE THAT. THAT'S FOR Y'ALL TO DECIDE. BUT AT THE CONCLUSION, I WILL DISCUSS WITH YOU SOME QUESTIONS I HAVE ABOUT HOW OUR SOCIETY VALUES THINGS AND VALUES HEALTH. BUT ONE THING I PROMISE YOU WITHOUT QUESTION, YOU WILL KNOW AT THE CONCLUSION OF THIS EVIDENCE, IF YOU DO NOT ALREADY KNOW IT, THESE HEALTHCARE PROVIDERS, PRACTICING CORPORATE MEDICINE LIKE THEY DO, DID NOT TAKE THE TIME TO DELIVER REASONABLE CARE TO THIS INNOCENT BABY. THANK YOU VERY MUCH.

THE COURT: THE DEFENSE MAY PROCEED.

NESTLEHUTT V. OCULUS

OPENING STATEMENT BY MR. ADAM MALONE

Counsel, Mr. and Mrs. Nestlehutt, and good morning to you, ladies and gentlemen of the jury. I want to compliment you all on your vast patience yesterday. I know we took quite some time to get the jury, but it was absolutely necessary, as I know you realize, to make sure that we got, out of the crowd that was in here, the fairest of the bunch to be able to consider the issues in this case, and the fairest of the bunch for both sides in the case. And I think, although it took some time, we certainly did that. So I want to compliment you on your patience yesterday.

I want to tell you that this case is about a predictable, obvious and preventable cosmetic disaster. In order for you to understand why the disaster occurred in this case, it's going to be important for you to realize at the very beginning that the business of cosmetic surgery is completely different than all other types of medicine.

Some of the differences will jump out at you immediately. The procedures are not medically necessary. They're not necessary to save life, to save limb, to cure illness. They're totally elective. They're totally elective.

And the business, of course, is attractive to those who choose to go into that type of medical practice because there is no insurance oversight. Nobody looking over your shoulder to make sure that the procedure you recommended was actually warranted, like in other types of medicine.

There is direct financial benefit to the people who go into this type of business because patients pay cash. Insurance doesn't cover it.

So there are lots of reasons why the business of cosmetic surgery is completely different from all other types of medicine, and that's very important that you keep that at the forefront of your minds as you consider the evidence in this case.

Now, I want to make it very clear that this case is not an indictment against the business of cosmetic surgery. Of course it's not. Any physician has the right to pursue whatever specialty they want to. There is nothing wrong with pursuing this specialty. And, of course, to make money is the American way. So we don't have any criticism of the cosmetic surgery business industry in and of itself. It's only when physicians who are cosmetic surgeons violate the fundamental rule of medicine and patients are injured that we have a problem with that, and that's what this case is about.

The first rule of all medicine, for all doctors, regardless of whether they're cosmetic surgeons, heart surgeons, emergency room doctors, or any other type of physician is to first do no harm. That's an oath that they all take, and some of you have probably heard that before. It comes from Hippocrates centuries ago. All the physicians took an oath that above all else, and the first thing is to do no harm to patients, consistent with that rule, and particularly in cosmetic surgery.

When you're dealing with elective, nonmedically necessary procedures, rule number one is when there are multiple treatment options available, the cosmetic surgeon must recommend the safest option for the patient.

If he doesn't, and the patient is harmed, the cosmetic surgery business is responsible for that. Now, there are several important points to be made about this rule. Number one, there are always many different options for patients seeking cosmetic improvement. But these people come to physicians who are experts in the field, and they put their trust in them.

They look to them for the recommendations. They are thoroughly evaluated, and then they decide for themselves whether or not they were impressed with the surgeon, whether they felt like they had a bond, whether they felt like the surgeon explained things clearly. And if they feel comfortable then,

of course, they don't have any problem following these recommendations. So it's important that we realize that.

It's also important that what may be safe for one patient is not necessarily safe for another patient. All patients are different. So cosmetic surgery is not a cookie cutter business. You can't approach it with a template. In other words, it's not one size fits all. If this procedure worked for this other patient, that doesn't mean it's going to be safe for the next one that comes along.

That's why cosmetic surgeons have to pay particular attention to the physical evaluation that they perform of patients, and they have to listen very, very carefully to what the patients tell them about what the patient knows about their own past medical history, so that they can take all of that into consideration and make a reasoned and safe judgment about what would be safe for this particular patient. So they have to take all of that into consideration.

Now, let me tell you the story of what happened in this case. Let me move this out of the way. But first meet Betty Nestlehutt and her husband of over 50 years, Bruce Nestlehutt. They live on the north side of town in east Cobb County. They have been here for a very, very long time.

Bruce Nestlehutt worked for the federal government for years and years and years. He worked with the FHA. He worked with Fannie Mae. He worked with HUD and was one of their senior people when he worked for them. And then he ultimately transferred and retired from the Department of Education in 1994.

Betty has been in real estate. She's been a real estate salesperson since the early 1980s. She loves people. She loves being out with people. She loves speaking with people. She loved her job. Loves it. And she loves it because she is the people person in the relationship.

When Bruce retired from his job he decided there is no other person that I would rather spend all of my retirement time with than my beloved wife. And some wives might prefer that their husbands go spend their time somewhere else, but this is not that kind of marriage. They were meant for each other. They were made for each other. And they enjoy every moment with each other. So they became a real estate team.

His job on the team was to do all the behind the scenes stuff. He did the research. He did the computer work. He did all the paperwork. Her job on the team was to be the face of their business. Literally the face of their business and be out front, meet the people, show the houses, and try to help people realize that great American dream of home ownership, and that's how they joined together to do this in 1994, and have continued doing it even up until the present time.

So Betty had, some years ago, thought that maybe one day she might consider having some cosmetic surgery done. And that was because she had bags under her eyes that she didn't like, and lines around her mouth, but she never went through with it.

One reason, she thought she was allergic to antibiotics. Some years later she realized that there were antibiotics she could take, and when she realized that, coupled with the fact that she became aware that she lost a listing to someone who was younger, she thought that perhaps now might be the time to go in and see about having something done about these bags I don't like under my eyes and the lines around my mouth.

And so they were at their dermatologist's office. His name is Dr. Richard Detlefs, a Yale trained dermatologist. And she mentioned to him, Dr. Detlefs, somebody mentioned something to me about laser and perhaps they can do something about these bags and these lines around my mouth, is that something that you or somebody in your office can do for me? He said, Mrs. Nestlehutt, we don't do that kind of thing here. The person for eyes in this town is Dr. Chip Cole. I suggest you go see him. And so based on

that recommendation, she set up an appointment to go see Dr. Cole at the defendant business, Oculus Cosmetic.

So come with me back to October 20th of 2005, and you will enter into a beautiful, gorgeous cosmetic office over in the healthcare complex near Northside Hospital and St. Joseph's on Johnson Ferry Road, and you will see what Betty saw when she walked in. A wonderful, pleasant staff. A very clean and impressive office with waterfalls and nice decorations. And a very attentive staff who handed her some forms to fill out. She filled them out, and then she was taken in the back where she met for the first time Dr. Cole, who had come so highly recommended to her.

She sat down in a chair and Dr. Cole asked her what can I do for you? She explains to him, Dr. Cole, I'm here because I have concerns about bags under my eyes and lines around my mouth.

Now, Dr. Cole then proceeds to explain to her what can be done cosmetically for her to take care of those two issues that she's concerned about. She will take the stand, and she will explain to you what he did. He stood behind her, they looked in a mirror. He said, you know, we can, we can take care of the bags and we can take care of the lines, but I think if we only treat those, in the end you won't be as pleased with the result as you would if we did some other things, too.

And let me explain what I'm talking about. In order to get the result that you're looking for, I believe that we should, we should do full face, carbon dioxide laser resurfacing. I believe that we should do a browlift. I believe that we should do a mid facelift. And I believe that we should do a lower facelift. And with all of those recommendations, he explains to her, in his way of explaining it, how that's to be done.

For the browlift, two small incisions are made in the top of the hairline up here, hidden in the hair. And he explains to her, we go in with an endoscope and we just simply lift this part back so that it takes care of those wrinkles in the front.

For the mid facelift, we make an incision in the hairline here so it's hidden in the hair. We go in with an endoscope and we simply lift this skin and pull it back like that, so it takes care of the eye portion.

And for the lower facelift, we make an incision in a natural fold so if there is a scar it will be hidden, around this way, and we come around here, and then we simply lift back like this facelift, and then we trim the excess skin off, and that takes care of all the wrinkles.

It takes care of the lines that you're concerned about.

And by the way, we can do an eyelid procedure, too. And that simply involved making an incision, removing some fat, and sewing it back up.

And she says, well, Dr. Cole, while that sounds so impressive, but I don't want to be out of work more than a month. That sounds like an awful lot. He says, oh, you won't have any problem. Most people can wear makeup after two weeks, and you'll be back to work in a month. No problem at all.

He gives her an estimate. He gives her some information sheets. Her husband is there with her on this visit, and he hears the explanation and the recommendations that were given by Dr. Cole that day.

And I'm going to tell you, they were very, very impressed with Dr. Cole. And the fact of the matter is, when he takes the stand in this case, I think you're going to be very impressed with him, too. He's charming. He's very smooth. He comes across as knowledgeable. And how could he not be all those things? He has to, in order to make money he has to sell those services, so you would expect him to make patients feel comfortable. To be able to explain the procedures in a way that wouldn't scare patients away. And make them feel like he's their guy, and that they shouldn't go anywhere else, but they should stay with him.

So I think when he testifies you will see immediately, if not too long after he gets started, why Mr. and Mrs. Nestlehutt felt so very comfortable with him, and with what his recommendations were.

Now, Mrs. Nestlehutt, some digital photographs were taken with their fancy camera, to show what she looks like now, and then they digitally enhanced those photographs to show what she could expect to look like after undergoing these procedures. And those aren't given to her that day, but they are sent to her a few days later while she's still thinking about whether she wants to go through with these recommendations or not.

And just let me show you. There is a number of these photographs, but here are two of them. This is what she looked like then, on October 20th of 2005, and this is what she was told she could expect to look like.

Now, it says down here simulation only, actual results may vary. She was very much aware that actual results could vary. But she also believed that she had every right to expect that it would turn out looking something like this.

And let me make this very clear at this point. This case is not about someone complaining over an imperfect result. These folks didn't expect perfection. They expected a doctor who would be careful and recommend only those procedures which would be safe for her.

This is not a case about -- what was the word they used yesterday -- buyer's remorse. This is not buyer's remorse. This is not a situation where the eye didn't turn out exactly like she thought, or the chin didn't turn out exactly like she thought, so she's upset about that and decided to file a lawsuit. That's not what this case is about at all.

When, in fact, the eye didn't turn out the way she expected, and there was a chin implant placed that had to be taken out because her chin implant wasn't correct. We are not here about those things. That's not what this case is about.

Ladies and gentlemen, this case is about this. It's about this. This is what happened to Betty Nestlehutt. This is a picture taken of her almost five months after the surgery, and I'm going to show you some more pictures in a few minutes where you can -- and this is about as bad as it got before these open, nonhealing wounds finally started to close, but I'm going to show you some pictures, and you'll be able to follow the progression of how the skin on her face and her cheeks and her temples literally died over time, and her face literally fell off. That's what this case is about. This is the disaster that I'm talking about.

And so -- let me put this down. You'll see that enough.

She comes back to Dr. Cole in November for a second visit, for a second evaluation. She hadn't made up her mind completely. She had gotten these wonderful photographs, and they really tipped her over the edge, and she was pretty much confident that she was going to have the procedure.

And her husband said, you know, honey, I don't think you need anything, but you've worked so hard, and if you think you want it, then I support you. I am comfortable with the recommendations of Dr. Cole, and I'm comfortable with Dr. Cole. We have read every single thing he gave us. It doesn't seem like there is very much risk associated with this. And plus, we are in the hands of the best cosmetic surgeon in town.

That's what his promotional materials say that he gave her. He's one of the top ten cosmetic surgeons in the country, as reported by Harper's Bazaar magazine. Their dermatologist had recommended him that way, and so they felt very, very comfortable.

But this is not a rush to decision situation for these people. She came back a second time. And at that visit she explains some more things to him. They ask more questions, and she is there at this visit alone.

At this visit she wants to be sure that she tells Dr. Cole and his staff everything that they need to know so that they can determine whether or not this procedure, or these procedures, or this combination of procedures would be safe for her.

Among the things that she told them was that a dermatologist some years ago had told her that she had one third less oil glands than normal. She told that to them so that they could take that information and do with it what careful doctors would do with information like that.

After she gave that information and completed that consultation visit, she decided she wanted to schedule surgery. That's when Dr. Cole's office, Oculus Cosmetic, mailed her some more information forms, a presurgical information booklet, and those consent forms that we see every time we go to the doctor for anything. But they showed up in the mail, and they were asked to read this, pages were flagged, sign here, sign here, and enclosed in the self-addressed stamped envelope and send back to us, and we will call you with the date your surgery has been scheduled.

They did exactly what they were asked to do. That presurgical information booklet will be introduced in evidence. You will see where Mr. and Mr. Nestlehutt read every page. They put stars beside certain things in there.

But no one from the defendant company ever sat down with either of these people and went over those forms with them, explained any of the risks, and they certainly never explained that she was at greater risk than other patients might be because of who she is, because of her skin type, because of the thinness of her skin, and because of her prior preexisting medical condition.

Now, one other important fact. Before surgery the defendant tells her, go to your primary care physician, have him do a physical, and see if we can't get you medical clearance for surgery. That was a good, safe, smart thing to do.

Only problem with that is, she was sent -- she did what she was asked to do. Labs were taken, and Mrs. Nestlehutt had had her thyroid removed back in the 1970s, so she's been on medication to replace thyroid hormone for many, many years. And her TSH level, which is important and it's related to the thyroid medication, was too low, meaning that her thyroid hormones were too high, and you'll hear this from the medical witnesses in this case.

But those lab reports were sent by Dr. Small, who was the primary care physician, to the defendant. They were made a part of his medical record. And the handwriting of Dr. Small is on those lab reports, and it shows that her TSH level is too low. It says too hot. So they recheck her a couple of weeks later. We are in mid December now, 2005. And Dr. Small had decreased her medication, okay, to try and get this in the safe zone.

So he rechecks her and it's still not right, and that lab report is sent to the defendant. And based on that lab report, Dr. Small recommends, must postpone surgery. The surgery had been scheduled for the end of December. Okay? So postpone surgery, which is scheduled for the end of December.

They do postpone surgery, but she goes back to Dr. Small again and they take more labs. Dr. Small had adjusted her medication after the second lab. All right. So she comes back for the third time where more labs are drawn and they're watching this hormone level for her thyroid, TSH.

Now her TSH level was very, very high, so she was what they call hypothyroid. Hypothyroidism, you'll learn, like oil glands, in the absence of sufficient oil glands, can contribute to all sorts of wound healing problems. Can make it more difficult for people to heal after surgery, and so she's now hypothyroid.

Dr. Small says, and writes on the note, and you'll see it: She's medically clear for surgery, however, it is up to the surgeon to determine whether to proceed with surgery for surgical outcome.

He put the ball right in the lap of the defendant to make the decision, based on everything that the surgeon knows about what he does. His assessment of this lady and her skin type. The history that she gave him about one third less oil glands than normal. And the fact that her thyroid medication is too low and the hormone is way too high, what with all information that this defendant had before he decided to take this lady to surgery, and perform all of these procedures in combination with one another. And you've seen the disaster that occurred.

Now, why was this lawsuit brought? This lawsuit was brought because the defendant denies responsibility. He denies responsibility for what happened to this lady. Though he will admit to you, if he tells you the same thing he told me in his deposition, that if she hadn't of had these procedures done, if he hadn't put that laser on her cheeks and on her temples, this would not have happened to her. He admits that. His hand did this to her, but he denies responsibility for causing it.

You may wonder, after we've been here all week, what we spent so much time here talking about. But, ladies and gentlemen, the defendant has the right to put up whatever defense they want to, and you'll have to listen very carefully to the evidence that we bring you, and the evidence that they bring you and decide. Isn't it just as simple as what we are saying, this lady was not a proper candidate for these combined procedures, and what he did to her is what caused this.

Now, how do we prove the case? And the judge just told you, as the party bringing the lawsuit, we have the responsibility of proving what we say. We are going to do that. The law requires a preponderance of the evidence. Yesterday we discussed that a little bit, and that simply means that at the end of the case and on every question that you're asked to decide, you must determine whether we are more likely right than wrong.

It is not beyond a reasonable doubt. You can have plenty of doubt, and even if you believe we are only more likely right than wrong, the law is going to require you to decide that question in our favor.

Now, another way to look at this, if more likely right than wrong is a little bit confusing, even if you don't like football, everybody's seen a football field. The case starts out on the 50 yard line. The scales are evenly balanced between both sides right now. You all said that you're not leaning one way or the other. It is dead even.

So if we are on a football field and the football is at the 50 yard line, in order for us to prevail on any question in this case, we must simply move the ball over the 50. That is what our burden of proof is. That is all the law requires of us.

Now, let me make this pledge to you. The evidence is going to be very strong in this case. We believe that we are going to be not only deep in the other side's territory, we'll be in the end zone. We think we are going to prove this case far beyond the legal standard required of us, but you have to decide the issues in this case based on the definition that the judge gives you about what the standard of proof is, and so I think it's important right now for you to understand what that is.

Now, who will we bring to you to prove our case? We are going to bring to you the people who were actually involved with Betty Nestlehutt's post-operative care. The people who looked at her with their own eyes. The people who put their hands on her and had the responsibility of making treatment decisions for her. Those are the people we are going to bring to you.

We are bringing the people who are called treating physicians. People who know what they know because they had the responsibility of taking care of her.

The other side will bring you opinion witnesses that were retained for purposes of litigation, to defend the defendant's conduct in this case. They are not bringing you any of the treating physicians. They are bringing you people that were hired after the lawsuit was filed and were provided with the information. The information that they base their opinions on is the information that the lawyers on this side and the defendant wanted to give to them.

Now, we are going to bring to you our primary witness this morning is Dr. Seth Yellin. Dr. Yellin is the chief of facial plastic and reconstructive surgery at Emory University. He became involved in Mrs. Nestlehutt's care eight months after this surgery.

Eight months afterwards because during the first few months she was going back to Dr. Detlefs, and Dr. Detlefs was working very hard to make sure she didn't have something real bad that wasn't related to the surgery, like an infection, you know, or some other bizarre issue going on with her. He looked at her to rule out all of those nonsurgical causes, and that's exactly what he did. He ruled out all nonsurgical causes. This picture you saw was not caused by an infection, and the defendants agree and they'll admit that. There is no evidence of any infection causing this.

Dr. Detlefs was the doctor involved, and he's the one that ruled that out, together with some help with another dermatopathologist, a skin microscope doctor, who looks at things under microscopes to make sure that bad things aren't happening, that can be treated with medication. So together with their help, they rule out all nonsurgical causes.

She also is sent by Dr. Cole to another dermatologist named Dr. Brody. Dr. Brody saw her and he said, well, I think you've got delayed wound healing syndrome, and he does some things for her that don't help, but don't necessarily make it worse, but he doesn't look to find out what caused all this. He's not looking to find out the answer to that question.

But because he wasn't able to really help her, and because you'll hear about their children, Reverend Mark Nestlehutt is their son. He's in St. Michaels, Maryland. He won't be here at trial, but you'll hear about him. And Dawn Klempf is their daughter, who lives here in town, and she got very involved because she was very concerned about the way her mother looked, and the fact that things were getting worse and not better during this several month period follow the surgery.

She began researching issues like burn, and burns and burn treatment because the doctors were saying you've been burned by this laser. That's what's happened to you. And because of that, she read up on hyperbaric oxygen therapy that works for burn victims or victims that have wounds that won't heal.

And so Mrs. Nestlehutt goes to the hyperbaric oxygen therapy people. Dr. Helen Gelly became her doctor there. Dr. Gelly, and her records will be out with you, and you'll get to see those, but she says you've been burned by the laser. We think you'll be able to benefit from hyperbaric oxygen therapy, and we think you need at least 35 treatments, and the Nestlehutts will tell you what that was like and what that involved.

But it essentially involved getting in a tank, and the whole ordeal is about three hours, but the time in the tank is less than that. And they put you as if you're going down in a submarine under intense pressure with oxygen to try and get reperfusion to these blood vessels that have been so badly damaged by the surgery.

And after 35 treatments, all summer long, started in May ended at the end of July, these nonhealing wounds finally started to close up, but she was left with grotesque, marked, permanent dark purple scars on both sides of her face and in her temple segment. And she's gotten pretty good at being able to camouflage all that with makeup.

But when she testifies at the end of the day, because it's very embarrassing to her, she's going to be here with the makeup, but at the end of the day the judge has arranged for her to be able to go in a room back there, take off the makeup, come out here and show you what her face really looks like underneath the makeup. So you'll have a chance to see that.

But after the hyperbaric treatment, she then goes, the daughter, Dawn, calls Emory and says, I want my mother to see the best plastic surgeon that you have because my mother has these terrible purple scars, and I want to see if somebody can do something about it. This is how she's introduced to Dr. Yellin.

Dr. Yellin sees her. He takes history from her, that means he asks her what have you been through? Tell me about this. She explains it to him. She explains the procedures that the defendant did on her. And he knew right away, after doing his physical exam, putting his hands on her, closely inspecting her skin.

Ma'am, you're 71 years old. Your skin is too thin for combined laser resurfacing and facelift. Lasers, by design, are intended to vaporize human tissue. That's what they are designed to do. And when that happens it damages the blood vessels on the surface on purpose.

And when they do the facelift -- Betty didn't even know this, because Dr. Cole said we make an incision here, and we lift this back and we trim off the excess skin. But they literally go in and they slice through the underlying tissue, dividing blood vessels, lifting tissue which stretches blood vessels and damages blood supply from below the surface.

So this combined lasering on the cheeks and on the temples injures the blood supply from above and injures the blood supply from below, and we'll have diagrams and pictures to show you, and Dr. Yellin will explain this, and I think he'll do a very good job making it very clear to you how this happens.

But he told her, you were not a candidate for these procedures. This cannot be safely done on every patient. And you are the type of patient where this was simply too dangerous to do on you. It could not be done safely, and the reason why you have these purple scars is because you have intense vascular or blood vessel damage and changes in your skin, and it's due to the simultaneous lasering of these sections and lifting of these sections in the thin skin temple area and in the cheek area. That's why this happened to you.

And so the Nestlehutts had already been thinking about investigating this further by talking to a lawyer. Soon after that meeting with Dr. Yellin, a couple of months later, they called me. I sent out a request for the records to the defendant. And we got a copy of his official medical record that you'll have in this case. And we evaluated that record, and we sent it to Dr. Yellin, and said, Dr. Yellin, would you please review this record and look at it from the same -- the information from the same perspective that the defendant had before he took this lady to surgery, and tell us whether or not this company and this physician violated the standard of care this patient had a right to expect by what's documented in the medical record and by what information he had available to him at the time.

This case is not about Monday morning quarterbacking where somebody looks at the score and everything's been done and you look back and say, okay, well where are the mistakes? He's looking at it with the same information that Dr. Cole had at the time.

He's got these digital photographs where he can examine her skin. And he's got the information and the history about the one third less oil glands, and the problem with the thyroid medication, which literally set her up for this predictable outcome, which was obvious in the immediate post-operative period when she didn't heal in two weeks like they said. When their own note says they can't put on makeup because she needs more time to heal. And then three weeks later they put on makeup, but they avoid an area because it's not yet fully healed.

And Dr. Yellin will explain to you what was going on during that time. This lady never had normal healing like what could be expected if you do this procedure on a patient who is safe to do it on.

What was going on with her was her body was having trouble healing all of this damage done. She grew back some of the, what you'll hear called epithelium, or surface layer of the skin. But it has to be integrated and it has to stick, and it has to grow in together with the other layers of the skin. And because her skin, her facial skin had been damaged so badly in the cheeks and in the temple areas, when they applied that makeup to this badly damaged skin, it started a cascade of problems. It was an additional insult to skin that was already struggling to survive.

And three days later -- she only left that makeup on for just a few hours, and they put it on her. And then they sold her the makeup that they said was safe to use, but she only had that one application

that they applied. She took it off a few hours later, and three days later she comes back to Dr. Cole saying something is happening with my skin.

Something is not right. I'm not sure what it is. Could it be related to the makeup? And they say, no, this could not be related to the makeup. We don't know what's wrong with you, but we'll watch it real close and we'll keep following you.

And meanwhile the cascade had already begun, and her skin is dying and literally falls off over the next several months, and then she starts the terrible process of trying to get these wounds under control. And if it wasn't for the devotion and care that her husband gave her by essentially becoming her full time nurse, and how careful he was with the rubber gloves and the wound cleaning and the treatments, this lady might have gotten an infection that could kill her, you know, and it's just a miracle that she didn't get an infection. It is a literal miracle.

And you'll see a short video clip, and they'll explain to you how long this took, and how many times a day they had to go through it. But we've edited it down to about six minutes, so that you can get an idea of understanding what they had to go through. But we'll put the whole one hour long video in evidence, and y'all can watch it in the jury room if you want to, but we are going to show you the six minute clip, and we think that's enough for you to get the idea of what they had to go through.

All right. So that is what this case is about, and their defense that -- we expect they are going to bring you Dr. Alster, a doctor from Washington, DC, who is a dermatologist. Dr. Alster has never seen Ms. Nestlehutt. Never met Ms. Nestlehutt. Never put her hands on Ms. Nestlehutt. Never had the responsibility for making treatment decisions for her.

But her opinion is going to be Dr. Cole didn't do anything wrong. This lady just had a severe dermatitis reaction that's unpredictable, and it happens with a very small percentage of people due to the makeup.

This is a lady who had been wearing makeup for over 50 years of her life and never had any allergic reaction or bad thing happen to her skin. But now all of a sudden a retained, paid opinion witness for the defense will come and explain to you on their behalf that this didn't have anything to do with anything Dr. Cole did, and it was perfectly safe for this lady, who she's never met.

They'll also bring you, we expect, a Dr. William Silver, Billy Silver. Listen carefully to what he has to say. If he tells you the same thing he told me in his deposition, he'll admit to you that patients that are over the age of 70 are at an increased risk for severe vascular damage by having combined laser resurfacing and facelifting done. That's what this case is about. And he agreed with us when I asked him that in his deposition, but I still expect them to bring him before you. In fact, frankly, don't know what he's going to say, if he says something any different than what he's already sworn to in his deposition.

So let me wrap up my opening statement by showing you and going quickly through some photographs so that you can understand the progression of what happened to Ms. Nestlehutt in this case, and what the condition of her skin is now.

Your Honor, can we dim the lights just a little bit so we can do this?

Here's the simulation photographs.

This is what she looked like the first day after surgery. January 31st was the surgery. This is what she looked like. Their note says this is normal healing.

This is nine days, ten days after surgery. This is what she looked like. Their note says normal healing.

And critical to their defense is your acceptance of their position that this lady had fully and completely and normally healed before they put on this makeup.

That's what she looked like with the makeup on, on February 20th. Looks great with all that makeup that was professionally applied. You can't see a single thing about the condition of her skin underneath it, but that's the way she looked. And at that moment Ms. Nestlehutt was very pleased with the way she looked three weeks out from surgery, even though she was one week beyond when they told her she could expect to wear makeup.

This is three days later when she comes in saying something has happened. Something is wrong with my face. And this is the defendant's Polaroid. The other one was a Polaroid photograph. And by the way, this is the one, one copy of a Polaroid photograph that Dr. Alster relies on to say defendant didn't do anything wrong. This lady just had a bizarre reaction, and basically it's her fault. It's her own body that did this to her, based on that one photograph.

March 14th. This is the wrap that she had to wear to try and hold her face on and keep the pads on and medication. More Polaroids from the defendant's file showing progression and the worsening symptoms, though they continued to say in their record this is normal healing. Normal healing.

March 28th, you could see it's progressing very badly. Things are really starting to happen with her. Her face is starting to fall off.

April 19th.

April 25th.

May the 3rd.

May the 9th. This is after hyperbaric treatment.

May the 16th.

May the 17th.

May the 19th.

May the 22nd.

This lady could not leave her house. She couldn't go to the grocery store. This is what she had to wear on her face in order to try and keep these wounds from becoming infected, and to try and get them to heal instead of continuing to get worse.

May the 23rd.

May the 26th.

June 1st.

June 4th.

June 5th.

Now we are starting to see, after hyperbaric treatment, that these wounds are starting to close from the outside in, but you can see the start of this marked dark purple scarring that happened to her.

June 20th.

July 5th.

July 9th.

July 11th.

July 16th.

July 29th.

August the 3rd.

And this is the defendant's digital photograph, when she followed up in his office. These pictures are in his record. More digital photographs from the defendant.

August 4th.

September 4th.

November 7th.

This is a year out from when, over a year out from when she first met Dr. Cole and became a customer of defendant Oculus.

December the 1st. More than a year after surgery.

In June of 2007.

In February of this year. And that's the last photograph that we have in this slide presentation, but you'll get to see what she looks like today. You'll get to see.

And so what can be done about it? Well, some people have told her we can put a laser on your face and try and fade that purple scarring on your face. The defendants say, and Dr. Alster says, oh, that's all she's got to do and it will go away.

This lady is terrified of lasers. She's scared to death, and she'll look you in the eye and tell you that she is very concerned, and that no one will guarantee her that if she lets somebody else put a laser on her face to try and make these scars fade, that nothing bad will happen to her. She learned her lesson. She's not willing to do something that's not medically necessary anymore.

Ladies and gentlemen, that will be the evidence in this case, and at the end of the case we believe that we will have proven our case, and we will have proven that she deserves to be compensated, and I will talk to you about how you might value the losses and the disfigurement in this case. But in the end, it's going to be totally up to the 12 of you to come up with an appropriate and just number that she deserves to be fully compensated for what happened to her, what she went through, and what she faces for the remaining years of her life.

Thank you very much for your attention.

APPORTIONMENT ISSUES IN MEDICAL MALPRACTICE CASES

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APPORTIONMENT OF DAMAGES – AN UPDATE ON THE LAW

By Eric J. Frisch¹

Copeland, Stair, Kingma & Lovell, LLP

It has been 14 years since the Georgia General Assembly passed Senate Bill 3, known as the “Tort Reform” bill of 2005. Apportionment of damages remains as one of the longest lasting parts of the bill. It also continues to be one of the more challenging laws to understand for jurists and advocates when assessing their cases. In this article, we take a quick look at the law and then we will look at recent cases.

I. THE MOVE FROM PURE JOINT AND SEVERAL LIABILITY TO SEVERAL LIABILITY

The General Assembly attempted to change how multiple tortfeasors are held liable for an indivisible injury by moving from a “pure” joint and several liability scheme to an apportionment scheme. This is most evident in the changes to Section 51-12-31. As we all know, under the “pure” joint and several liability scheme, the plaintiff decided which of several defendants it wanted to sue for an injury. The defendant or defendants named were each 100% liable for the jury's verdict, regardless of who was more at fault as compared between them. In exchange for shifting the risk of loss from the plaintiff to the defendant, the General Assembly granted a defendant the right to seek contribution from other potential tortfeasors.

Now, through a combination of Section 51-12-31 and 51-12-33, the General Assembly has shifted the risk of loss from the defendants to the plaintiff. Under Section 51-12-31, when multiple tortfeasors are sued, the plaintiff may recover only from the defendant or defendants liable for the injury and the jury “may” specify the damages to be recovered from each defendant. No matter what, individual judgments are entered against multiple defendants.

In exchange for (potentially) limiting a tortfeasor's liability to their proportional share, the tortfeasor gives up their former right to seek contribution from others. This makes mathematical sense – under a “pure” joint and several liability scheme, a tortfeasor that felt they overpaid could sue their co-tortfeasor for contribution. Under the apportionment scheme, there is no need for a separate contribution action – the jury determines in the primary action who pays what and in what percent. While the tortfeasor bearing the biggest share of the verdict may feel deep down that they overpaid, their argument is likely to fall on deaf ears because the jury's verdict is likely to be considered *res judicata* on the issue of their comparative share of the liability.

¹ Portions of this paper are adopted from an article originally published in the Georgia Bar Journal by Eric J. Frisch and Joseph Hoffman. Many thanks and credit to Joe for all of his contributions and work. Also thanks to Darshan Patel for updating the cases and helping to prepare this paper.

Together with Section 51-12-31, the General Assembly expressed its intent in Section 51-12-33 that a tortfeasor should only bear the risk of loss related to the injury it causes by empowering the jury to determine the comparative fault of everyone who contributed to the alleged damages. The General Assembly made this clear in subsection (e), which allows apportionment to a non-party even if that non-party could not be joined or would be immune from suit.

II. THE RECENT CASES

Since 2005, the statutory apportionment scheme has been affirmed as constitutional. More recent appellate decisions have focused on when and how juries should apportion. Here are some highlights of recent cases:

A. Apportionment Applies When There is Only One Defendant

A defendant may apportion fault to a nonparty even when it is the sole defendant in a case. Alston and Bird LLP v. Hatcher Management Holdings, LLC, 336 Ga.App. 527 (2016). In Hatcher Management, the plaintiff sued a law firm for legal malpractice and breach of fiduciary duty. The law firm filed a notice of nonparty fault, seeking to apportion damages among multiple nonparties. Plaintiff moved to strike the notice, arguing, in part, that apportionment of damages was available only under Subsection (b) and then only in cases brought against multiple defendants. The trial court agreed and struck the apportionment notice. On appeal, the Court of Appeals held that, to the extent that the firm could prove that the nonparties identified in its apportionment notice breached a legal duty in tort that they owed the Plaintiff, the trier of fact should be permitted to assign fault to the nonparties.

B. Apportionment and Derivative Liability

It seems settled that an employer cannot ask the jury to apportion damages to one of its employees when the employee is not named as a party. Trabue v. Atlanta Women's Specialists, LLC, 349 Ga.App. 223 (2019). In Trabue, the plaintiff sued one physician and the practice group. The allegations against the practice group were based solely on vicarious liability and plaintiff claimed that more than one physician in the group was negligent. The practice group asked the trial court to have the jury apportion damages between itself, the named defendant physician, and the non-party employee physician. The trial court denied the request and the case resulted in a verdict for the plaintiff.

Defendants then moved for a new trial on apportionment, arguing the trial court erred by not including the non-party employed physician on the verdict form. The trial court granted a new trial on apportionment. The Court of Appeals reversed, reaffirming the rule that “where

a party's liability is solely vicarious, that party and the actively-negligent tortfeasor are regarded as a single tortfeasor." Id. at 231-232 (citing PN Express, Inc. v. Zegel, 304 Ga.App. 672 (2010)).

The Court also rejected the argument that the employer was seeking apportionment between parties, i.e., between itself and the non-named employee as one defendant and the named physician as the other defendant because the employer was actually trying to put a non-party on the verdict form. Id. In so doing, the employer failed to give statutory notice and therefore waived apportionment. Id. This last part seems like dicta in light of the main holding, but also seems to hold the door open ever so slightly for apportionment between co-employees if the employer is not named.

Likewise, the apportionment scheme does not supersede the rule that an employer cannot be held liable for negligent hiring, training, and supervision when *respondeat superior* is admitted. See e.g., Hospital Authority of Valdosta/Lowndes County v. Fender, 342 Ga.App. 13 (2017). Stated differently, if the employer admits the facts necessary to prove vicarious liability, then there is no apportionment between the employer and employee consistent with PN Express and Trabue.

C. Joint and Several Liability May Still Exist

The Georgia Supreme Court has held that the jury can hold tortfeasors "acting in concert" jointly and severally liable and that the jury is not required to apportion fault among individuals involved in a "civil conspiracy." The Court went to great lengths to limit the rule only to cases in which there is "mutual agency" and a "joint enterprise" to accomplish an "unlawful act" and not to cases in which fault can readily be apportioned.

In FDIC v. Loudermilk, 2019 Ga. LEXIS 184 (March 13, 2019), the FDIC sued the former officers and directors of a bank it took over. The officers and directors required the trial court instruct the jury on apportion of damages under Section 51-12-33. The trial court denied the request. The jury found some of the officers and directors liable for pecuniary harm – approving bad loans – and awarded damages jointly and severally. The officers and directors appealed, claiming that apportionment was required because the allegations included an injury to "person or property" and that apportionment abrogated joint and several liability completely. The case was certified to the Georgia Supreme Court.

The Court held that apportionment does apply to pecuniary loss. In addition, the Court held that the apportionment statute did not abrogate joint and several liability per se, which is consistent with precedent. The Court held that joint and several liability applies to a limited class of cases in which there is evidence of "concerted action" or, what is commonly known as a "civil conspiracy" under Georgia law.

Importantly, the Court wrote that the apportionment statute “reveals a different analytical touchstone for damages analysis: whether fault is divisible.” (emphasis in original). The Court went on to write that “the pertinent inquiry is therefore whether fault is capable of division.” If it is, then apportionment applies. In a limited class of cases in which there is a “common design” and “mutual understanding . . . positively or tacitly” to accomplish an unlawful design, then joint and several liability might be appropriate.

D. Apportionment Applies in Default

In cases of default and unliquidated damages, the factfinder is still responsible for apportioning damages in appropriate cases. I.A. Group, Ltd. Co. v. RMNANDCO, Inc., 336 Ga.App. 461 (2016). This is true even though the defaulting party’s liability is established by the default itself. Id. In RMNANDCO, the Court of Appeals held that the statutory mandate is to direct the factfinder to consider the fault of all persons or entities who contributed to the damages. Id. While the admission of liability by default prevents the defendant from “offering any defenses that would defeat the right of recovery,” assessment of fault for purposes of apportioning damages does not go to liability. Id.

E. The Party Seeking Apportionment Must Show a “Rational Basis”

It is considered the defendant’s burden (or, more precisely, the burden of the party seeking apportionment) to establish a “basis” for apportionment and the jury’s role to assign fault. Stewart Ausband Enterprises, Inc. v. Holden, 349 Ga.App. 395 (2019). This has been construed to mean that the defendant has the same burden as proving an affirmative defense. Johnson Street Properties, LLC v. Clure, 302 Ga. 51 (2017). There does seem to be some difference between the amount of proof required at the summary judgment stage as opposed to at trial, but this makes sense in light of the different rules governing each situation. Johnson, *supra*.

CONCLUSION

To our knowledge, there are no new legislative efforts aimed at apportionment. Of the more recent cases, the issue in the Loudermilk case probably forecasts the next wave of appellate decisions related to apportionment. It can be expected that more plaintiffs will claim “joint enterprise” or “civil conspiracy” to avoid apportionment and get joint and several liability. It is also anticipated that proving such concerted action will remain as difficult as it has been historically.

The take-home messages remain:

- (1) Apportionment applies even if the plaintiff is not at fault;

- (2) Apportionment applies when there are multiple individual defendants;
- (3) Employers cannot apportion with their employees; and
- (4) Defendants bear the burden of establishing a “rational basis” for apportionment and identifying the non-parties for those purposes.

APPENDIX

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ICLE BOARD

NAME	POSITION	TERM EXPIRES
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GEORGIA MANDATORY CLE FACT SHEET

Every “active” attorney in Georgia must attend 12 “approved” CLE hours of instruction annually, with one of the CLE hours being in the area of legal ethics and one of the CLE hours being in the area of professionalism. Furthermore, any attorney who appears as sole or lead counsel in the Superior or State Courts of Georgia in any contested civil case or in the trial of a criminal case in 1990 or in any subsequent calendar year, must complete for such year a minimum of three hours of continuing legal education activity in the area of trial practice. These trial practice hours are included in, and not in addition to, the 12 hour requirement. ICLE is an “accredited” provider of “approved” CLE instruction.

Excess creditable CLE hours (i.e., over 12) earned in one CY may be carried over into the next succeeding CY. Excess ethics and professionalism credits may be carried over for two years. Excess trial practice hours may be carried over for one year. A portion of your ICLE name tag is your **ATTENDANCE CONFIRMATION** which indicates the program name, date, amount paid, CLE hours (including ethics, professionalism and trial practice, if any) and should be retained for your personal CLE and tax records. **DO NOT SEND THIS CARD TO THE COMMISSION!**

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CHIEF JUSTICE'S COMMISSION ON PROFESSIONALISM



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 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 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 ("Commission"), 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 Elliott 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 Lawyer's Creed* and the *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 (f/k/a 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. At one time, this program had been 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 in the past it has been 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 and nationally who are interested in professionalism programming. The Chief Justice of the Supreme Court of Georgia serves as

the Commission's chair, and Chief Justice Harold D. Melton 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 Shamilla Jordan (Administrative Specialist). 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 and working groups (Access to Justice, Finance and Personnel, Continuing Legal Education, Social Media/Awareness, Financial Resources, and 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, the Commission maintains a website at www.cjcpga.org. The Commission also provides content for the Professionalism Page in every issue of the *Georgia Bar Journal*. In 2018, the Commission engaged in a strategic planning process. As a result of that process, the Commission decided to focus on four priority areas for the next three to five years: 1) ensuring high quality professionalism CLE programming that complies with CJCP guidelines; 2) promoting the understanding and exercise of professionalism and emphasizing its importance to the legal system; 3) promoting meaningful access to the legal system and services; and 4) ensuring that CJCP resources are used effectively, transparently and consistent with the mission.

After 30 years, the measure of effectiveness of the Commission should ultimately rest in the actions, character and demeanor of every Georgia lawyer. Because there is still work to do, the Commission will continue to lead the movement and dialogue on legal professionalism.

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CHIEF JUSTICE’S COMMISSION ON PROFESSIONALISM



PROFESSIONALISM AND GEORGIA’S LEGAL PROFESSION

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.”¹ 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.

¹ DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVERSIVE METHOD 39 (1994)

² ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 5 (1953)

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.³

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

³ AMERICAN BAR ASSOCIATION COMMISSION ON PROFESSIONALISM, " . . . IN THE SPIRIT OF PUBLIC SERVICE:" A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM, (1986) p.7, [HTTPS://WWW.AMERICANBAR.ORG/CONTENT/DAM/ABA/ADMINISTRATIVE/PROFESSIONAL_RESPONSIBILITY/PROFESSIONALISM_MIGRATED/STANLEY_COMMISSION_REPORT.PDF](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/professionalism_migrated/stanley_commission_report.pdf) (LAST VISITED ON AUGUST 5, 2019).

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 Supreme Court of Georgia 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 Supreme Court of Georgia:

“. . . 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 Supreme Court of Georgia 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 may be utilized to frame discussions and remind lawyers about the basic tenets of our profession.

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

Honorable Harold D. Melton
Chief Justice
Supreme Court of Georgia



Karlise Y. Grier
Executive Director

Shamilla Jordan
Administrative Specialist

APPENDICES

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APPENDIX A

CHIEF JUSTICE'S COMMISSION ON PROFESSIONALISM

Honorable Harold D. Melton
Chief Justice
Supreme Court of Georgia



Karlise Y. Grier
Executive Director

Shamilla Jordan
Administrative Specialist

CHIEF JUSTICE'S COMMISSION ON PROFESSIONALISM 2019-2020

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Names in italics denotes public member/non-lawyer

APPENDIX B

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.

* * * * *

APPENDIX C

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 movement 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 judgment. 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.

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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;

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- (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.

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- (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;
 - (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.

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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.

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.

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APPENDIX F

**SELECT
PROFESSIONALISM PAGE
ARTICLES**

Honoring Georgia's Lawyers

I sincerely hope the Commission on Professionalism's work will honor Georgia's lawyers for what they do each day and will help each lawyer to become consummate professionals while they do the tireless and often thankless work of representing clients.

BY KARLISE Y. GRIER

In June of 2018, I was shaken to the core when I learned of the death of attorney Antonio Mari. I did not personally know Mari, a family law attorney who was murdered by a client's ex-husband. I had, however, as a former family law attorney of almost 18 years, personally experienced the dynamics that caused his death: enmity, anger, retribution and a myriad of other vitriolic emotions directed at you as a lawyer (by opposing parties or clients) because you are striving to do your job to the best of your ability. I wanted to take a moment in this article to pay tribute to Mari and to honor the thousands of other Georgia lawyers who are just like him, men and women who toil in the trenches every day—putting their clients interests above their own personal well-being—as they strive to provide exemplary service and excellent representation. I also wanted to commend the wonderful professionalism example set by the Bartow County Bar Association, which stepped up in the midst of this horrible tragedy to divide up and take Mari's cases and to help close down his law practice.¹



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According to the *Daily Report*, Mari was afraid of the pro se opposing party who ultimately killed him.² Nevertheless, Mari fulfilled his legal obligations to his client and obtained a final divorce decree for the client less than two hours before his client's ex-husband shot him to death. This balance of client interests versus personal interests is not always played out as dramatically as in Mari's case, but it is always there. Do you go to your child's soccer practice or do you first finish the brief that is due tomorrow? Do you take time to go for a walk or a run or do you take that early morning meeting with a client who can't take time off from their work as an hourly employee? Do you tell the pro bono client you are meeting with they have to leave your office and reschedule (knowing they most likely won't) because they reek of cigarette smoke and you have asthma? Do you file a motion to withdraw well in advance of trial or do you take the chance the client will pay you "in installments" as promised, knowing the client really needs a lawyer in this custody battle?

Each day, Georgia lawyers are called upon to make choices, large and small, that force them to balance their personal well-being against the interests of their clients. Striking the "correct" balance is at the heart of what we call "professionalism."³ One of the first quotes I came across when I started as executive director of the Chief Justice's Commission on Professionalism was from Karl N. Llewellyn, a jurisprudential scholar who taught at Yale, Columbia and the University of Chicago Law Schools. Prof. Llewellyn cautioned his students:

The lawyer is a [person] of many conflicts. More than anyone else in our society, he [or she] must contend with competing claims on his [or her] 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

I hope that, under my stewardship, the Chief Justice's Commission on Professionalism will honor Georgia's lawyers by ensuring CLE providers offer outstanding programming regarding professionalism concepts that give lawyers the opportunity to discuss the challenges (and sometimes joys) of practicing law. I look forward to continuing to recognize the amazing community service work of lawyers and judges at the Justice Robert Benham Awards for Community Service. I hope that the Commission's convocations, such as the 2018 Convocation on Professionalism and the Global Community, will continue to explore cutting-edge issues in the legal profession. I hope the Commission's work will help to embolden lawyers to stand courageously for the rule of law in our country and to provide guidance to lawyers on how to do so thoughtfully and with integrity. I look forward to the Commission's continued partnership with the State Bar of Georgia Committee on Professionalism and with Georgia's law schools as we strive to introduce law students to professionalism concepts during the Law School Orientations on Professionalism.

Too often, I think our profession focuses on the "bad" things for which lawyers may be known. I truly believe most lawyers are good, hard working men and women who want to do the best job they can for their clients in return for fair payment for their work. During my stewardship as executive director of the Commission, it is my goal to focus on and cultivate the good and the goodness in our profession that often happens without notice or comment. I am eager to help us all (myself included) grow to be the best professionals we can be. I sincerely hope the Commission's work will honor Georgia's lawyers for what they do each day and will help each lawyer to become consummate professionals while they do the tireless and often thankless work of representing clients. ●



Karlise Y. Grier

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Chief Justice's Commission
on Professionalism
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Endnotes

1. See R. Robin McDonald, *Cartersville Attorney Gunned Down by Client's Ex-Husband*, *Daily Report*, June 22, 2018, at 1, <https://www.law.com/dailyreportonline/2018/06/21/cartersville-attorney-gunned-down-by-clients-ex-husband/> (last visited June 22, 2018).
2. See *Id.*
3. To learn more about how Georgia defines professionalism, see *A Lawyer's Creed* and the *Aspirational Statement on Professionalism* at: <http://cjcpga.org/lawyers-creed/> (last visited August 10, 2018).
4. Mary Ann Glendon, *A Nation Under Lawyers* 17 (1994).

The Importance of Lawyers Abandoning the Shame and Stigma of Mental Illness

One tenet of the Chief Justice's Commission on Professionalism's "A Lawyer's Creed" is "To my colleagues in the practice of law, I offer concern for your welfare." If you are aware of a colleague that may be experiencing difficulties, ask questions and offer to help them contact the Lawyer Assistance Program for help.

BY MICHELLE BARCLAY

January is the month when Robin Nash, my dear friend and lawyer colleague, godfather to my child, officiate for my brother's marriage and former director of the Barton Center at Emory University, left the world. Positive reminders of him are all around, including a child law and policy fellowship in his name, but January is a tough month.

Robin's suicide, 12 years ago, was a shock to me. As time passed and I heard stories about Robin from others who knew him and I learned more about suicide, I can see in hindsight the risk looming for him. Today, I think his death was possibly preventable.

In 2006, Robin wrote this essay about himself for Emory's website

"Robin Nash, age 53, drew his first breath, attended college and law school and now works at Emory University. He loves to travel to places like Southeast Asia and the Middle East but he always returns home to Emory and his hometown of Decatur. Robin majored in Economics and Mathematics. He began his law practice in 1980 in Decatur surviving mostly on court appointed cases for mentally ill patients in commitment hearings.

His practice expanded to working with institutionalized developmentally delayed clients, special education cases, wills and estate litigation and representing banks in the hugely interesting area of commercial real estate closings.

In 1995, he was appointed as a juvenile court judge in DeKalb County. He resigned from the bench effective December 2005. He sold most of his personal belongings, paid off his remaining debts and moved overseas to think and travel. After thinking and traveling for three months, he returned to the active world of Decatur. He was appointed director of the Barton Clinic effective April 15, 2006."

When Robin came back from traveling, he told his friends—"I can be more impactful here."—which was and is true. Robin's impact continues today through the work of young lawyers serving as Robin Nash Fellows and through the lives of the thousands of mothers, fathers, daughters and sons he touched, helping people traumatized by child abuse, neglect, addiction and crime.

He was impactful in part because he had so much empathy for others. He was

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well regarded and well loved. He was a person you could count on who did extraordinary things for others—helping a student obtain a TPO in the middle of the night to stop a stalker; quietly helping a refugee family get stable and connected to services; and of course, his consistent care of his friend Vinny. Vinny was a severely disabled adult Robin befriended and with whom he had a deep connection. Because he was a lawyer, Robin was able to help Vinny obtain full access to available medical services without being institutionalized.

So why did Robin leave? He lost his battle with mental illness. He masked it well and as a private person, did not share his struggles. His friends had some insight into his struggles but it was always complicated. While a judge, Robin was known for saying things like, “I am a manager of misery” or “I manage the competition not to serve the most vulnerable families and children.” But he also said, “Talk like this is just dark humor which is a useful coping mechanism for an emotionally draining job.”

I know today that a low serotonin level in his body was dangerous for his depression and that the medications he took waxed and waned in effectiveness. I also now know that he had not slept well for days before he acted. We’d had a work meeting the day before he died where he made a long ‘to do’ list. Who makes a long ‘to do’ list when one is contemplating suicide? Plenty of people, I have learned. I saw that ‘to do’ list on his table when I was in his apartment after his death.

What could have helped? Abandoning the shame and stigma of mental illness is a good start. I have been heartened by the social movement campaign, Time to Change,¹ designed to help people speak up about mental illness. A safety plan shared with a reasonably wide network of people can also help. Antidepressant medications can help. Recent studies about anti-depression drugs “puts to bed the controversy on anti-depressants, clearly showing that these drugs do work in lifting mood and helping most people with depression.”² Science is advancing better treatments at a rapid pace. And some experts advise that directly asking whether a

person has considered killing themselves can open the door to intervention and saving a life.

Before becoming a lawyer, I worked as a nurse in a variety of settings at both Grady and Emory hospitals. I saw attempted suicides. I witnessed a number of those people who were grateful they were not successful. I saw safety plans work when enough people knew about the risks. Sometimes, medicines were changed, new treatments tried and I saw people get better.

I feel like with my background I could have and should have probed Robin more. But at the time, I thought I was respecting his privacy by not asking too many questions. Today I know that a person can be fine one day and then chemicals in their brain can wildly change within 24 hours, and they’re no longer ok. I learned that not sleeping can be deadly. I have also learned that just talking about it can help a person cope.

A book that has helped me is called “Stay: A History of Suicide and the Philosophies Against It,” by Jennifer Michael Hecht.³ If I had a second chance, I would try to use some of the arguments in that book, such as:

None of us can truly know what we mean to other people, and none of us can know what our future self will experience. History and philosophy ask us to remember these mysteries, to look around at friends, family, humanity, at the surprises life brings—the endless possibilities that living offers—and to persevere.

Of course, first I would have just asked about his mental health with love and listened. I still wish for that chance to try. ●

Afterword by Chief Justice’s Commission on Professionalism Executive Director Karlise Yvette Grier: One tenet of the Chief Justice’s Commission on Professionalism’s “A Lawyer’s Creed”⁴ is “To my colleagues in the practice of law, I offer concern for your welfare.” If you are aware of a colleague that may be experiencing difficulties, ask questions and offer to help them contact the Lawyer Assistance Program⁵ for help.

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Michelle and Andy Barclay are so grateful to the Emory University community for the grace and care that surrounded everyone, especially the students, when Robin died.

Michelle Barclay, J.D., has more than 20 years experience working in Georgia’s judicial branch. She is currently the division director of Communications, Children, Families, and the Courts within the Judicial Council of Georgia’s Administrative Office of the Courts. Before becoming a lawyer, she was a nurse for 10 years, specializing in ICU and trauma care. Her degrees include a Juris Doctor from Emory University School of Law, a Bachelor of Science in Nursing from Emory University and a Bachelor of Interdisciplinary Studies from Georgia State University. She is also co-founder along with her husband Andrew Barclay of the Barton Child Law and Policy Center at Emory University School of Law. She can be reached at 404-657-9219 or michelle.barclay@georgiacourts.gov.

Endnotes

1. <https://twitter.com/TimetoChange>.
2. See <http://www.bbc.com/news/health-43143889> (last viewed April 2, 2018).
3. See, e.g., <https://www.amazon.com/Stay-History-Suicide-Philosophies-Against/dp/0300186088> (last viewed April 2, 2018).
4. <https://www.gabar.org/aboutthebar/lawrelatedorganizations/cjcp/lawyers-creed.cfm>.
5. <https://www.gabar.org/committeesprogramssections/programs/lap/index.cfm>.

Promoting a Professional Culture of Respect and Safety #MeToo

In keeping with our professionalism aspirations, I challenge you to take a proactive, preventative approach to sexual harassment and to start the discussions . . . about things we as lawyers can do to promote a professional culture of respect and safety to prevent #MeToo.

BY KARLISE Y. GRIER

"There is no doubt that Marley was dead. This must be distinctly understood, or nothing wonderful can come of the story I am going to relate."—Excerpt from: "A Christmas Carol" by Charles Dickens.

To borrow an idea from an iconic writer: There is no doubt that #MeToo testimonials are real. This must be distinctly understood, or nothing wonderful can come of the ideas I am going to share.

I start with this statement because when I co-presented on behalf of the Chief Justice's Commission on Professionalism at a two-hour seminar on Ethics, Professionalism and Sexual



Harassment at the University of Georgia (UGA) in March 2018, it was clear to me that men and women, young and old, question some of the testimonials of sexual harassment that have recently come to light. For the purposes of starting a discussion about preventing future #MeToo incidents in the Georgia legal profession, I ask you to assume, *arguendo*, that sexual harassment does occur and to further assume, *arguendo*, that it occurs in Georgia among lawyers and judges.¹ Our attention and discussion must therefore turn to “How do we prevent it?” We won’t expend needless energy on “Is he telling the truth?” We won’t lament, “Why did she wait so long to come forward?”

First, I want to explain why I believe that sexual harassment in the legal profession is, in part, a professionalism issue. As Georgia lawyers, we have A Lawyer’s Creed and an Aspirational Statement on Professionalism that was approved by the Supreme Court of Georgia in 1990.² One tenet of A Lawyer’s Creed states: “To my colleagues in the practice of law, I offer concern for your welfare. I will strive to make our association a professional friendship.”

Frankly, it is only a concern for the welfare of others that in many cases will prevent sexual harassment in the legal profession because of “gaps” in the law and in our ethics rules. For example, under federal law, sexual harassment is a form of sex discrimination that violates Title VII of the Civil Rights Act of 1964. Title VII applies to employers with 15 or more employees.³ According to a 2016 article on lawyer demographics, three out of four lawyers are working in a law firm that has two to five lawyers working for it.⁴ In Georgia, there are no state laws similar to Title VII’s statutory scheme.

There is currently nothing in Georgia’s Rules of Professional Conduct that explicitly prohibits sexual harassment of a lawyer by another lawyer.⁵ Moreover, it is my understanding that generally the Office of the General Counsel will not

prosecute a lawyer for alleged lawyer-on-lawyer sexual harassment absent a misdemeanor or felony criminal conviction, involving rape, sexual assault, battery, moral turpitude and other similar criminal behavior.⁶ Other circumstances in which laws or ethics rules may not apply include sexual harassment of lawyers by clients or sexual harassment that occurs during professional events, such as bar association meetings or continuing education seminars.⁷

Former Georgia Chief Justice Harold Clarke described the distinction between ethics and professionalism as . . . the idea that ethics is a minimum standard which is required of all lawyers while professionalism is a higher standard expected of all lawyers. Therefore, in the absence of laws and ethical rules to guide our behavior, professionalism aspirations call on Georgia lawyers to consider and implement a professional culture of respect and safety that ensures zero tolerance for behavior that gives rise to #MeToo testimonials.⁸

The American Bar Association Commission on Women in the Profession recently published a book titled “Zero Tolerance: Best Practices for Combating Sex-Based Harassment in the Legal Profession.” The book provides some

Former Georgia Chief Justice Harold Clarke described the distinction between ethics and professionalism as . . . the idea that ethics is a minimum standard which is required of all lawyers while professionalism is a higher standard expected of all lawyers.

practical advice for legal employers to address or to prevent sexual harassment.⁹ Some of the suggestions included: establishing easy and inexpensive ways to detect sexual harassment, such as asking about it in anonymous employee surveys and/or exit interviews; not waiting for formal complaints before responding to known misconduct; and discussing the existence of sexual harassment openly.¹⁰ The federal judiciary's working group on sexual harassment has many reforms that are currently underway, such as conducting a session on sexual harassment during the ethics training for newly appointed judges; reviewing the confidentiality provisions in several employee/law clerk handbooks to clarify that nothing in the provisions prevents the filing of a complaint; and clarifying the data that the judiciary collects about judicial misconduct complaints to add a category for any complaints filed relating to sexual misconduct.¹¹ For those planning CLE or bar events, the American Bar Association Commission on Women in the Profession cautions lawyers to "be extremely careful about excessive use of alcohol in work/social settings."¹²

During our continuing legal education seminar at UGA, one of the presenters, Erica Mason, who serves as president of the Hispanic National Bar Association (HNBA), shared that HNBA has developed a "HNBA Conference Code of Conduct" that states in part: "The HNBA is committed to providing a friendly, safe, supportive and harassment-free environment for all conference attendees and participants . . . Anyone violating these rules may be sanctioned or expelled from the conference without a registration refund, at the discretion of HNBA Leadership."¹³ Mason also shared that the HNBA has signs at all of its conferences that reiterate the policy and that provide clear instructions on how anyone who has been subjected to the harassment may report it. In short, you don't have to track down a procedure or figure out what to do if you feel you have been harassed.

Overall, some of the takeaways from our sexual harassment seminar at UGA provide a good starting point for discussion about how we as lawyers should aspire

to behave. Generally, our group agreed that women and men enjoy appropriate compliments on their new haircut or color, a nice dress or tie, or a general "You look nice today." Admittedly, however, an employment lawyer might say that even this is not considered best practice.

Many of the seminar participants agreed on some practical tips, however. Think twice about running your fingers through someone's hair or kissing a person on the cheek. Learn from others' past mistakes and do not intentionally pat or "flick" someone on the buttocks even if you mean it as a joke and don't intend for it to be offensive or inappropriate.¹⁴

In our professional friendships, we want to leave room for the true fairy-tale happily ever after endings, like that of Barack and Michelle, who met at work when she was an associate at a law firm and he was a summer associate at the same firm.¹⁵ We also need to ensure that our attempts to prevent sexual harassment do not become excuses for failing to mentor attorneys of the opposite sex.

Finally, just because certain behaviors may have been tolerated when you were a young associate, law clerk, etc., does not mean the behavior is tolerated or accepted today. Professionalism demands that we constantly consider and re-evaluate the rules that should govern our behavior in the absence of legal or ethical mandates. Our small group at UGA did not always agree on what was inappropriate conduct or on the best way to handle a situation. We did all agree that the conversation on sexual harassment was valuable and necessary.

So in keeping with our professionalism aspirations, I challenge you to take a proactive, preventative approach to sexual harassment and to start the discussions in your law firm, corporate legal department, court system and/or bar association about things we as lawyers can do to promote a professional culture of respect and safety to prevent #MeToo. ●



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Endnotes

1. See, e.g., In the Matter of James L. Brooks, S94Y1159 (Ga. 1994) and The Washington Post, *Wet T-Shirt Lawyers* (December 23, 1983), The Washington Post, https://www.washingtonpost.com/archive/politics/1983/12/23/wet-t-shirt-lawyers/c46ac2e6-2827-49a7-9041-f00ac5f21753/?utm_term=.bf1ec57a8b95 (Last visited May 31, 2018). For a more recent articles on sexual harassment in the legal profession, see generally, Vanessa Romo, *Federal Judge Retires in the Wake of Sexual Harassment Allegations* (December 18, 2017), NPR, The Two-Way Breaking News, <https://www.npr.org/sections/thetwo-way/2017/12/18/571677955/federal-judge-retires-in-the-wake-of-sexual-harassment-allegations> (Last visited May 31, 2018) and The Young Lawyer Editorial Board of The American Lawyer, *YL Board: This is What Sexual Harassment in the Legal Industry Looks Like* (February 28, 2018), The American Lawyer, Commentary, <https://www.law.com/americanlawyer/2018/02/28/yl-board-this-is-what-sexual-harassment-in-the-legal-industry-looks-like/> (Last visited May 31, 2018).
2. See State Bar of Georgia, *Lawyer's Creed and Aspirational Statement on Professionalism*, <https://www.gabar.org/aboutthebar/lawrelatedorganizations/cjcp/lawyers-creed.cfm> (Last visited May 31, 2018).
3. U.S. Equal Employment Opportunity Commission, About EEOC, Publications, *Facts About Sexual Harassment*, <https://www.eeoc.gov/eeoc/publications/fs-sex.cfm> (Last visited May 31, 2018).
4. Brandon Gaille, *30 Mind-Boggling Lawyer Demographics*, BrandonGaille.com, <https://brandongaille.com/30-mind-boggling-lawyer-demographics/>, February 8, 2016 (viewed on April 26, 2018). See also American Bar Association 2013 Lawyer Demographics Data, https://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/lawyer_demographics_2013.authcheckdam.pdf (viewed on April 26, 2018).
5. The Georgia Code of Judicial Conduct differs from the Georgia Rules of Professional Conduct in that Rule 2.3 (b) of the Code of Judicial Conduct specifically prohibits discrimination by a judge in the performance of his or her judicial duties. See <https://www.judicialbranch.org/rules-of-professional-conduct>

Convocation on Professionalism and the Global Community

The purpose of the Convocation was to model professionalism while discussing a high-conflict issue and to demonstrate the ways in which attorneys have implemented “A Lawyer’s Creed” and the “Aspirational Statement” in their work with the global community.

BY LESLIE E. STEWART



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Supreme Court of Georgia Chief Justice Harold D. Melton

On Nov. 30, 2018, the Chief Justice’s Commission on Professionalism (the Commission) held its Convocation on Professionalism (the Convocation) at Atlanta’s Porsche Experience Center. This year, the Convocation theme was Professionalism and the Global Community, which focused on the professionalism values of competence, civility, character, and commitment to the rule of law and the public good. The purpose of the Convocation was to model professionalism while discussing a high-conflict issue and to demonstrate the ways in which attorneys have implemented “A Lawyer’s Creed” and the “Aspirational Statement” in their work with the global community. The event, which was sponsored by Squire Patton Boggs, Miller & Martin PLLC and Alston & Bird LLP, was well-received by the attendees. The speakers included an array of notables and dignitaries with ties to Georgia, beginning with Supreme Court of Georgia Chief Justice Harold D. Melton, who urged the attendees to demonstrate professionalism through service to their community, a key element of “A Lawyer’s Creed” and the “Aspirational Statement.”

The first panel, "Overview of the Global Community in Georgia," was facilitated by Javier Díaz de León, Consul General of Mexico. Two judges, Hon. Meng H. Lim, Tallapoosa Circuit Superior Court, and Hon. Dax E. Lopez, DeKalb County State Court, spoke movingly about how their judicial careers have been influenced by their experiences of straddling two cultures. Abby Turano, deputy commissioner for International Relations, Georgia Department of Economic Development, explained how and why Georgia welcomes foreign businesses to Georgia.

The second panel, "A View from General Counsels of Companies Doing International Business," was moderated by Shelby S. Guilbert Jr. from King & Spalding. The panelists, including Angus M. Haig, senior vice president and general counsel for Cox Automotive, and Ricardo Nuñez, senior vice president and general counsel for Schweitzer-Mauduit International, described their challenges and how core values affect their roles as international general counsels. Audrey Boone Tillman, executive vice president and general counsel for AFLAC, portrayed the challenges and successes of being a woman of color supervising attorneys in Japan. Joseph Folz, vice president, general counsel and secretary for Porsche Cars North America, shared his experiences working for a German-based company.

The third panel, "The Business Pros and Cons of Developing a Formal Working Relationship with an International Lawyer or Law Firm," was facilitated by Petrina A. McDaniel from Squire Patton Boggs. Tricia "CK" Hoffer, principal at The CK Hoffer Firm, regaled the attendees with her vivid descriptions of being threatened by automatic gunfire as a result of a cultural miscalculation while she represented an un-named government. Therese Pritchard, from Bryan Cave and Robert Tritt, Dentons US LLP, discussed the necessity of retaining competent local counsel in international cases.

The Convocation's keynote speaker, Randolph "Randy" Evans, U.S. Ambassador to Luxembourg, described his humble beginnings in Georgia and how the values instilled in him by his family continue to influence the way in which he deals with his professional duties—of treating each person with respect and dignity.

After lunch, the next panel, "What Lawyers Need to Know about Labor Trafficking," focused on the darker side of doing business in the global community. The moderator, Hon. Richard Story, judge, U.S. District Court, Northern District of Georgia, oversaw a lively discussion between Norm Brothers, senior vice president and general counsel for UPS; Susan Coppedge, former U.S. Ambassador-at-Large, the Office to Monitor and Combat Trafficking in Persons, and senior advisor to the Secretary of State (Ret.); and Jay Doyle of Lewis Brisbois Bisgaard & Smith LLP. This panel focused on the way in which government and private business have collaborated to combat the scourge of human trafficking.

The attendees were then treated to a presentation on "An Overview of Professionalism in Immigration Cases" by James McHenry, director of the Executive Office for Immigration Review at the Department of Justice, who unpacked the complex hearing procedures surrounding this timely topic.

The second afternoon panel, "Emerging Issues and Pro Bono Opportunities for Attorneys as a Result of Changes in Immigration Laws," was moderated by Phil Sandick from Alston & Bird. The panelists were Audra Dial from Kilpatrick Townsend & Stockton, Jorge Andres Gavilanes from Kuck Baxter, Monica Khant, executive director of the Georgia Asylum and Immigration Network, and Willis Linton Miller from The Latin American Association. During this panel, the speakers touched on the need for pro bono assistance on these important cases due to an upsurge in work and the conse-

quent burnout on the part of those working full time in this area.

The final panel of the day, "Ethics, Regulatory and Procedural Issues in International Practice," was facilitated by Shelby R. Grubbs, from Miller & Martin. Along with Paula Frederick, general counsel of the State Bar of Georgia and Ben Greer Jr., retired partner at Alston & Bird, the presenters discussed the competing ethical standards that attorneys must negotiate in international work and the necessity of adhering to Georgia standards regardless of cultural or ethical differences.

The Convocation offered a marvelous opportunity for in-person attendees to learn about how the principles of professionalism impact our legal work in the global community. Commission member Hon. Carla McMillian, Court of Appeals of Georgia, tweeted throughout the day at @cjcpga in English and Spanish with the help of Commission member Maria F. Mackay, a Georgia certified interpreter who provided Spanish interpretations of the proceedings for McMillian to tweet. Commission advisor Jennifer Davis and Commission liaison Dee Dee Worley provided invaluable "behind the scenes" staff assistance for the event throughout the day. The Commission staff was grateful for the support of the Commission members and other Convocation contributors and planners who provided invaluable assistance for this immensely successful Convocation. More information about the Convocation and other upcoming Commission events, including the 20th Annual Justice Robert Benham Awards for Community Service, is available on the Commission's website at www.cjcpga.org. ●



Leslie E. Stewart is a child welfare attorney and has served as a Supreme Court Fellow on Georgia's Cold Case project since March 2009 and is also a contractor with the Chief Justice's Commission on Professionalism.

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