FIGHTING
THE GOOD FIGHT
EMPLOYMENT LAW IN THE COURTROOM

6 CLE Hours, Including
1 Ethics Hour | 1 Professionalism Hour | 5 Trial Practice Hours

Sponsored By: Institute of Continuing Legal Education
**Who are we?**

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

**How does SOLACE work?**

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

**What needs are addressed?**

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

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

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

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

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

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

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

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

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

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

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

Your comments and suggestions are always welcome.

Sincerely,
Your ICLE Staff

Jeffrey R. Davis
Executive Director, State Bar of Georgia

Tangela S. King
Director, ICLE

Rebecca A. Hall
Associate Director, ICLE
AGENDA

Presiding:
Teresa Saggese Mills, Program Chair, Secretary and Member of the Board, NELA-GA; Saggese Mills Law Firm, Macon, GA

7:30 REGISTRATION AND CONTINENTAL BREAKFAST
(All attendees must check in upon arrival. A jacket or sweater is recommended.)

8:00 WELCOME AND PROGRAM OVERVIEW
Teresa Saggese Mills, Program Chair, Secretary and Member of the Board, NELA-GA; Saggese Mills Law Firm, Macon, GA

8:15 OPENING STATEMENT: OPENING THE JURY’S MIND TO THE RIGHTNESS OF YOUR CAUSE
Moderator: Edward D. Buckley, III, Buckley Beal LLP, Atlanta, GA
Panelists:
Amanda A. Farahany, Barrett & Farahany LLP, Atlanta, GA
A. Leroy “Lee” Parks, Jr., Parks Chesin & Walbert PC, Atlanta, GA

9:00 TECHNOLOGY IN THE COURTROOM: MODERN WEAPONS OF WARFARE
Moderator: Natalie Robinson Kelly, Director, Law Practice Management Program, State Bar of Georgia, Atlanta, GA
Panelist:
William J. Cobb, Senior Assistant General Counsel, State Bar of Georgia, Atlanta, GA

9:45 WITNESS PREPARATION: READYING THE GROUND TROOPS
Moderator: Brad Dozier, Jr., Pope & Howard PC, Atlanta, GA
Panelists:
Debra Schwartz, Schwartz Rollins LLC, Atlanta, GA
Ann R. Schildhammer, Esq., Taylor English Duma LLP, Atlanta, GA

10:30 BREAK

10:40 CROSS AND DIRECT EXAMINATION: THE WAR OF THE WORDS
Moderator: Matthew C. “Matt” Billips, Orr Brown and Billips LLP, Atlanta, GA
Panelists:
Julie J. Oinonen, Williams Oinonen LLC, Atlanta, GA
Sadiqa Banks, Asst. General Counsel & HR Consultant, EngagePEO, Atlanta, GA
Tamika C. Sykes, Committee Chair, NELA-GA M.O.S.T. Committee; Sykes Law LLC, Atlanta, GA
11:25 **MOTION FOR DIRECTED VERDICT: LAUNCHING AND AVOIDING MDV MISSILES**  
*Moderator: Matthew W. Herrington*, Delong Caldwell Bridgers, Fitzpatrick & Benjamin LLC, Atlanta, GA  
*Panelists:*  
*J. Larry Stine*, Wimberly Lawson Steckel Schneider & Stine PC, Atlanta, GA  
*Kristine “Kris” Orr Brown*, Orr, Brown & Billips, LLP, Gainesville, GA  
*Jeffrey A. “Jake” Schwartz*, Jackson Lewis PC, Atlanta, GA

11:55 **LUNCH – PRESENTATION OF ADVOCACY AWARD**  
*Tamika C. Sykes*

12:20 **JURY CHARGES, CHARGE CONFERENCE, VERDICT FORM: MARCHING ORDERS FOR THE JURY**  
*Moderator: Jennifer K. “Jenn” Coalson*, Parks Chesin & Walbert PC, Atlanta, GA  
*Panelists:*  
*Sarah E. Klapman*, Law Clerk to Hon. Richard W. Story, US District Court, Northern District of Georgia, Atlanta, GA  
*Cheryl B. Legare*, Legare Attwood & Wolfe LLC, Decatur, GA  
*Patricia G. Griffith*, FordHarrison, Atlanta, GA

1:05 **BREAK**

1:15 **CLOSING ARGUMENT: BRINGING HOME THE VICTORY**  
*Moderator: J. Stephen “Steve” Mixon, Jr.*, Millar & Mixon LLC, Atlanta, GA  
*Panelists:*  
*J. Larry Stine*  
*Calvin Weis Blackburn, III*, The Blackburn Law Firm LLC, Atlanta, GA

2:00 **JUDGES’ ETHICS PANEL: BEST PRACTICES FOR WINNING THE GOOD FIGHT**  
*Moderator: Teresa Saggese Mills*, Program Chair, Secretary and Member of the Board, NELA-GA; Saggese Mills Law Firm, Macon, GA  
*Panelists:*  
*Hon. Leslie J. Abrams*, Judge, US District Court, Middle District of Georgia, Albany, GA  
*Hon. Catherine M. Salinas*, Magistrate Judge, US District Court, Northern District of Georgia, Atlanta, GA  
*Hon. J. Wade Padgett*, Judge, Superior Court, Augusta Judicial Circuit, Augusta, GA

3:00 **ADJOURN**
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Opening Statement: Opening The Jury’s Mind To The Rightness Of Your Cause

Presented By:

Moderator: Edward D. Buckley, III
Buckley Beal LLP
Atlanta, GA

Panelists:
Amanda A. Farahany
Barrett & Farahany LLP
Atlanta, GA

A. Leroy “Lee” Parks, Jr.
Parks Chesin & Walbert PC
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OPENING STATEMENT: OPENING THE JURY’S MIND TO THE RIGHTNESS OF YOUR CAUSE

BY:

A. Lee Parks, Edward D. Buckley and Amanda A. Farahany

“I want you to open the case, and when you are doing it, talk to the jury as though your client's fate depends on every word you utter. Forget that you have any one to fall back upon, and you will do justice to yourself and your client.”

Abraham Lincoln

“The opening statements of counsel are not idle talk, but may afford [a jury] the basis of deciding the case . . . Oscanyan v. Arms Co., 1881, 103 U.S. 261.”

Cutcliffe v. C.I.R., 163 F.2d 891, 892 (5th Cir. 1947)

Argument is not only a right, but a material one. It is not a mere ornamental fringe, hung upon the border of a trial. Trial, under our system, is a co-operation of minds—a grave and serious consultation over what should be done and how the end should be accomplished. The attorneys in the cause are not mere carriers to bring in materials for constructing the edifice; they have a right, as representing the parties, to suggest where every important stone should be laid, and to assign reasons, drawn from legitimate sources, in support of their suggestions. Their reasons may be good or bad, but such as they are they should be heard and considered.

Van Dyke v. Martin, 55 Ga. 466, 470–71 (1875)
INTRODUCTION

Elevate the opening statement to a place of high importance in your trial preparations. A persuasive opening statement will capture the jury’s loyalty, and prejudice jurors to arguments that run counter to the ones you made to seem so compelling in your presentation. Jurors come to the case with no frame of reference, and no strong predilections about the outcome. They are ready, even anxious, to be persuaded because it is human nature to “take sides.” In this day and age, we are quite adept at making quick decisions even on matters of considerable importance. So, how can you prepare and deliver an opening statement that will convince the jury your client is right and the defendant is wrong?

I. CRAFTING AN OPENING STATEMENT

The trial starts with the opening statement of plaintiff’s counsel. You are the first person to speak directly to the jury about the case. The first few sentences of your opening statement, if done effectively, will become the bricks and mortar from which jurors will construct the framework they will use throughout the trial to filter the evidence in ways that can ultimately result in a verdict in your client’s favor.

Take full advantage of the fact the jury’s attention span and focus will never be better than during your opening statement, and the “primacy effect” will never be more powerful than when you speak to a jury uncontaminated by the opening remarks of defense counsel. The “primacy effect” is a documented phenomenon that occurs in jury trials. Jury research tells us that 80% of jurors make up their minds as to outcome after opening statements and only about 12% change their minds during the course of the trial. The reason jurors stubbornly stick to their first impression about the case is due to the fact we tend to process information about subjects on which we have already formed
a strong opinion by giving great weight to facts that support the position and exhibit
great skepticism as to the veracity of conflicting facts.

The first step in preparing a winning opening statement is, paradoxically, to write
the closing argument. That exercise forces you to think through all the evidence, both
direct and circumstantial, and devise the deductions you will ask the jury to make from
the facts and circumstances surrounding the wrong you want the jury to make right. It
is then that your trial theme emerges, rough around the edges at first, but as you refine
and sharpen your arguments, it begins to become smoother, simpler, clearer. Through a
tight weave of logic and emotion, the theme begins to gleam like truth. That is when
those critical first sentences of your opening statement reveal themselves and your trial
presentation comes full circle. With a closing argument in hand that ties all the evidence
together to prove the defendant's liability and the substantial damages your client has
incurred, you can craft an opening statement that sets up the closing argument by laying
out the factual foundation of your case in a compelling way that will have jurors
committing to the plaintiff's side of the case before the first witness takes the stand.

The development and communication of your trial theme is not the only thing you
want to accomplish with the opening statement. There are other important
cornerstones you need to lay to insure the “primacy effect” is constantly affirmed and
stays strong enough throughout the trial to withstand the furious efforts by defense
counsel to use the alter ego of primacy, known as the “recency effect,” to turn the jury to
the dark side willing to render a defense effect. At first blush, these objectives seem

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1 The “recency effect" is based on jury research that shows the most recent plausible
explanation of why something happened in a particular manner is often the scenario
jurors, who are “on the fence,” and not completely committed to one side or the other
after opening statements, accept as true.
simple enough to accomplish. They are not. But, the skills can be learned over the course of multiple trials, some of which you will lose. It also takes strong people skills and a gift for public speaking to excel at this aspect of your craft.

In the space of less than thirty minutes, you need to:

- Capture the jurors’ interest and sell your theme in the first three minutes.
- Create a favorable impression of your client and build a rapport between you and the jurors by promising them the truth.
- Simplify the case so to embolden jurors who might be intimidated both by the setting and the task of deciding a legal case to side with you and your client because you made them feel like they understood the case.
- Use visual aids effectively by showing them to the jury sparingly. They lose their power when they are force-fed to the jurors via a constant rolling PowerPoint.
- Reveal the villain in ways that demonstrate he or she is the wrongdoer, but without so demonizing the villain that you overstate your case and lose credibility over the course of the trial.

II. Scope of Opening Statement

The law provides counsel wide latitude in choosing the content of an opening statement. The main limitation is logical; you must confine yourself to the admissible evidence in the case, but you are free to tell the jury how the various pieces of key evidence fit together to prove your case. The dividing line between a summary of the evidence and argument is often a blurry one that is highly dependent on the trial judge. Some judges believe counsel have every right to comment on the evidence, while others see such comments as improper opinions of counsel which are argumentative and must
be reserved for closing statements. The Georgia Supreme Court has traditionally given counsel great freedom in making an opening statement:

Counsel for both, preliminary to the introduction of evidence, 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. Green v. State, 172 Ga. 635, 158 S.E. 285; Sterling v. State, 89 Ga. 807, 15 S.E. 743; Metropolitan Street R. Co. v. Johnson, 90 Ga. 500, 16 S.E. 49; Herring v. State, 10 Ga.App. 88, 72 S.E. 600; Daniels v. State, 58 Ga.App. 599(3), 199 S.E. 572. 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.

The language used in the argument may be extravagant; but figurative speech is a legitimate weapon in forensic warfare if there are facts admissible in evidence upon which it may be founded. Taylor v. State, 121 Ga. 348(7), 49 S.E. 303. "What has transpired in a case from its inception to its conclusion, and the conduct of the [opposite] party or his counsel with respect to the case is the subject of legitimate comment, and the range of such comment 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." Adkins v. Flagg, 147 Ga. 136(2a), 93 S.E. 92. See also: Georgia Power Co. v. Puckett, 181 Ga. 386, 182 S.E. 384; Smith v. State, 204 Ga. 184(2), 48 S.E.2d 860.

Trial courts ‘should not restrain counsel so long as their arguments are kept within reasonable and proper bounds, and they should also be careful not to usurp the functions of the jury in accepting or in disregarding what the counsel have to say’ in their arguments to the jury. Western & A. R. Co. v. Morrison, 102 Ga. 319, 324, 29 S.E. 104, 106, 40 L.R.A. 84, 66. See Purvis v. Atlanta Northern Ry. Co., 145 Ga. 517(2), 89 S.E. 571.


I think about an opening statement as a “movie trailer” designed to interest the jury in your case to a point where they are willing to “but a ticket,” to stop feeling “put upon” by being selected to serve, and actually become interested in both the proceedings and the outcome. Interested jurors are attentive jurors and they will quickly take the side of the lawyer that sparked their interest. Engage them by introducing the cast of
characters in the proverbial movie they are about to see, pointing out the hero, the villain and the other witnesses who play important supporting roles.

The best cadence for an opening is that of a storyteller. Use short sentences devoid of any legalese fashioned with simple, but richly descriptive and understandable words. Through voice modulation, underscore important elements of the story, and infuse just the right amount of emotion in describing key incidents to keep your audience on the edge of their seats as your story unfolds.

The next step in the opening is to humanize our client. You are the medium through which the jury will “meet” your client, and that key moment requires rehearsal. The building of a bond between the client and the jury begins with that crucial moment during the opening when you introduce the jury to the plaintiff. Tell his story even though it has little to do with proving the case. Give the jury a reason to feel comradery with your client. They need to like the plaintiff because this is the first essential step in winning the war for primacy. The client must play their part and make eye contact with as many jurors who will return their gaze.

III. STRUCTURE AND CONTENT

First and foremost, make the opening statement short and concise. Anything more than thirty minutes is doing more harm than good. Depending on the factual complexity of the case, a compelling opening statement takes 15-20 minutes. If you think this is not enough time to do our client’s case justice, ask yourself how often does a person sit and listen to an unbroken dialogue of that length outside of a church sermon, or a political speech. Actors playing lawyers do very well with three minutes and that is what jurors are used to seeing in movies and television shows.
Do not waste time talking about the purpose of the opening statement or engage in overly long introductions of other lawyers or administrative personnel on your team. Do not tell your story in a purely chronological sequence. Avoid sentences that begin with “I expect the evidence to show . . .” Instead, start with the seminal incident that led to the lawsuit, and follow that with the key the facts that make up the back story. By way of example, think about how a juror would react if the first thing they heard about an age discrimination case was this:

“You met my client Sam during jury selection. He worked for the same company for 35 years, which is pretty much his whole working life. He loved his job and he made a good life for himself, his wife and their three kids. They gave him four grandchildren. He decided to keep working after he turned 65 to save money for their college education and weddings. He thought he would work for a few more years, but his company got bought out by a German conglomerate. In just 63 days after the Germans took over, Sam was fired. No reason. No warning. He was called into the Plant Manager’s office, met with a young man that said he had come all the way from Munich. He did not mince words. He told him his career was over, that the company needed fresh blood and he needed to spend more time with his grandchildren. In one minute, thirty five years of hard work and good memories went up in smoke. They had an armed security guard escort him to his car like he was a criminal. He was not permitted to even say goodbye to his co-workers, many of which he had known for decades. They were like family. That is wrong and we need your help in fixing it.”

The first visual you put up on the overhead while you talk about Sam’s career illustrates his devotion to the company. The visual is a photo of Sam’s service pins: 10 years, 20 years, 30 years, 35 years. He will be wearing his 35 year pin on the lapel of his suit coat. The last visual is a blow up of a page of the internal report prepared by auditors working for the German parent company you found in E-discovery. The report evaluated the strengths and weakness of Sam’s company. A bullet point from the “weakness” section is highlighted: “Aging management team, many of which are over 65 and would face mandatory retirement in Germany.”
IV. The “Don’ts” of Opening Statements

You can do irreversible damage to your case with a poor opening statement. Here are the things to avoid:

1. Do not argue the case. The jury doesn’t have enough information to understand the key issues at the early stage. Save your great insight as to motive and how certain pieces of circumstantial evidence prove liability until closing argument. Argument is best delivered with a tone, and an urgency that the jury is not ready to hear. They have not yet formed any allegiance to your cause. Until they do, persuade them through the simple way you tell a compelling story that creates emotions, like sympathy, in the hearts of the jurors. Jurors want to feel like they made up their own minds and will react poorly to a lawyer trying to bully them into a position before the first witness has testified.

2. Don’t get lost in the details. The opening is a “highlights reel” of the events pertinent to the case. You will lose the connection if you overload them with information, like the names of multiple witnesses which they will immediately forget. Tell your story at the macro rather than micro level.

3. Don’t water down the power of your presentation with concessions as to its unimportance. Lawyers who begin with a warning about opening statements not being evidence, as only being a “road map” to help the jury understand the “real evidence” to follow, are unnecessarily minimizing the importance of the opening statement and forfeiting a chance to win over jurors anxious to commit to your side if you give them good reason to favor your side. Don’t preface every fact you
tell them with “I believe the evidence will show.” That is only telling the jury they can tune out until a real witness shows up.

4. **Don’t exaggerate the facts.** Your credibility is the key to keeping the jury in your camp. Do not give your opposing counsel the opportunity to challenge your credibility by overstating key facts. Cases are often won and lost on razor thin differences in the presentations and performance of counsel. The usual winner is the lawyer the jury trusted the most.

V. **The Things You Want To “Do” During An Opening Statement:**

1. **Be brief and impactful.** Limit the content of the opening to the key facts of your case. Emphasize the key facts with visual aids to help the jurors retain the information. Brief is better.

2. **Communicate your theme throughout your opening.** A trial theme is not some complicated construct about why you should win. Ideally, your theme is centered on a known human weakness that jurors have experienced in their own lives or workplaces. For example, in an age case where you have evidence of multiple older workers being let go in close proximity to your client, the theme might be that “older workers like my client became expendable at the defendant company where younger managers were permitted to hire peers even though the older workers had greatly contributed to the success of the company by performing at a high level during their long career due to decades of experience.” If you have a good pretext case, the theme might be “employers don’t lie about the reason for a termination unless the real reason is discrimination.” Find a theme that plays off a known human characteristic and tie
your presentation of the evidence to that theme. Come back to it time and time again during the course of the trial and make it the centerpiece of your closing argument.

3. **Tell a story jurors can relate to and retain.** As lawyers, we are trained to pay attention to the details. But, at trial, you want to tell a powerful story not a complicated one. As lead counsel, a hard thing to do is to jettison facts from the opening that are helpful, but are not critical at this early stage in the trial. The power you gain from making your story clear, concise and brief is worth the elimination of marginal facts. So, wring your opening statement hard, two or three times, to take out the excess facts and you will significantly improve your chances of the “primacy effect” garnering you the commitment of several jurors.

4. **Humanize your client.** Jurors have to like your client to vote for your client. Tell their life story. While those facts may have nothing to do with liability, they have everything to do with the jury’s decision making process.

5. **Simple is better.** Great story tellers speak in short sentences using simple understandable but vivid words. They use their voice, including volume and tone, and body language to enhance the emotion they are trying to create. They move around, but never linger or encroach on a juror’s personal space. Such speakers demand the rapt attention of their audience. This is the kind of rapport with the jury you should aspire to in the opening statement. Realize that the intensity of such a presentation demands brevity because that kind of connection cannot be maintained over a long period of time.

6. **Finish with a strong and powerful plea for a verdict.** You must, on final time, tell the jury why the defendant is culpable and the damage your client has suffered
unjustly. At this juncture do not quantify your demand in terms of dollars. Speak in terms of lost salary, health insurance, pension and a huge sense of failure that has caused great emotional pain and suffering. Reiterate the facts that make it clear your client was the victim of a grave injustice. Then, empower the jury to remedy the wrong. Extoll their role in these proceedings and thank them in advance for doing the right. Make it clear that they have the power to make it all right by delivering justice to a deserving human being.

CONCLUSION

The opening statement is your best chance of winning the case before it officially starts with the taking of evidence. At no point in the trial do you, as counsel, have more opportunity or more responsibility. Seize the moment, put in the time to make a powerful presentation and let primacy do its magic.
EXHIBIT A

Georgia Statutes and Federal Local Rules on Opening Statements

The Official Code of Georgia (O.C.G.A.) contains the following statutes governing opening statements.

- § 9-10-180. **Time limit for arguments.** Counsel shall be limited in their arguments to two hours on a side.² Ga. L. 1924, p. 75, §§ 2, 3; Code 1933, § 81-1007; Ga. L. 1983, p. 884, § 3-4.

- § 9-10-181. **Extension of time limit for argument after application therefor.** If counsel on either side applies to the court for extension of the time prescribed for argument and states in his place or on oath . . . that he or they cannot do the case justice within the time prescribed and that it will require for that purpose additional time, stating how much additional time will be necessary, the court shall grant such extension of time as may seem reasonable and proper. Ga. L. 1924, p. 75, § 4; Code 1933, § 81-1008.

- § 9-10-182. **Number of counsel who may argue case.** Not more than two counsel for each side shall be permitted to argue any case, except by express leave of the court; and in no case shall more than one counsel be heard in conclusion. Ga. L. 1924, p. 75, § 1; Code 1933, § 81-1004.

- § 9-10-183. **Use of blackboard, models, etc., in argument.** 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

² This Code section does not declare that counsel shall have two hours [per] side for the argument of cases, but it speaks of a limitation of argument to two hours on a side. From this counsel argue that it was the intent of the legislature, by the word 'limited,' to place a ceiling upon arguments, beyond which counsel may not go except by [permission of the judge], but under which ceiling there is left a sound judicial discretion in the judges to limit arguments, depending upon the nature and character of the case being tried, etc. We are unable to construe the, 'shall be limited in their arguments to two hours on a side,' [to] mean that counsel shall not be limited to less than two hours on a side. Even though this statute directs the trial judge to allow two hours for argument to each side in the class of cases mentioned, and even though such an enforcement may tend to slow down the court's business and increase the court expense, when there may be no corresponding beneficial result, these were matters for consideration of the General Assembly as to the wisdom and expediency of the law, and are beyond the power of concern of the reviewing court, no question as to the constitutionality of the act being presented. We are concerned only with ascertaining its meaning, that is, the intention of the legislature in passing it. This, of course, must be determined from the language contained in the statute, and we think that this language will admit of no other reasonable construction than that which we have stated. **Lovett v. Sandersville R. Co.,** 199 Ga. 238, 240–41, 33 S.E.2d 905 (1945).
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. Ga. L. 1960, p. 1037, § 1; Ga. L. 1982, p. 3, § 9.

- § 9-10-184. Value of pain and suffering may be argued. In the trial of a civil action for personal injuries, counsel shall be allowed to argue the worth or monetary value of pain and suffering to the jury; provided, however, that any such argument shall conform to the evidence or reasonable deductions from the evidence in the case. Ga. L. 1960, p. 174, § 1.

- § 9-10-185. Prejudicial statements by counsel; prevention by court; rebuke of counsel and instruction to jury; mistrial. 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. Civil Code 1895, § 4419; Civil Code 1910, § 4957; Code 1933, § 81-1009.

- § 9-10-186. Opening and closing arguments. In civil actions, where the burden of proof rests with the plaintiff, the plaintiff is entitled to the opening and concluding arguments except that if the defendant introduces no evidence or admits a prima-facie case, the defendant shall be entitled to open and conclude. In civil actions for personal injuries, the defendant shall be deemed not to have admitted a prima-facie case if such defendant introduces any evidence as to the extent of damages, other than cross-examination of the plaintiff and witnesses called by the plaintiff. Code 1981, § 9-10-186, enacted by Ga. L. 1997, p. 951, § 1.

U.S. District Court, Southern District of Ga.

- L.R. 83.22. Opening Statements. Confine your opening statements to what you expect the evidence to show. It is not proper to use the opening statement to argue the case or instruct as to the law.

U.S. District Court, Northern District of Ga.

- L.R. 39.3 (B)(2). Closing Argument. (a) Unless the court permits otherwise, the merits of an action or proceeding shall not be argued by more than two (2) attorneys on each side. (b) The party bearing the burden of persuasion at trial shall be entitled to open and close the arguments to the jury. (c) If the party waives the party’s right to make an opening argument, the party’s rebuttal argument is limited to those matters argued by the opposing party in that party’s closing argument.
Technology In The Courtroom: Modern Weapons Of Warfare

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TECHNOLOGY IN THE COURTROOM: MODERN WEAPONS OF WARFARE

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Collective paper created from Technology at Trial by Natalie Robinson Kelly and Technology Related Ethics Issues by William J. Cobb.
Technology at Trial

By Natalie Robinson Kelly

For trial lawyers, the effective use of technology can mean the difference between a win or a loss in the courtroom. In order to “make” their cases, lawyers turn to technology to effectively demonstrate ideas and evidence, and to make the dissemination of information easier. This review of the latest trial technology tools ranges from basic to cutting-edge.

Before going through the specific trial tools, here is a basic list of tips for using technology in trials.

General Tips for Using Technology in Trial

1. Check courtroom and technology setup early; and keep an updated list of courtrooms and their technology status, when used frequently by the firm.
2. Use common sense and calculated steps to determine whether or not to use technology, and whether or not to go low-tech or high-tech in certain courtrooms.
3. Just because the test run ran in your environment, does not mean it will work every time in real time at the courthouse. You must prepare for as many eventualities as you can imagine.
4. Do live tests run several times before making your presentation, if at all possible.
5. Enlist help as you need from advanced litigation support personnel and consulting companies. Be sure to check references and keep control of any projects placed with them.
6. Invoke security features and functionality on any devices used for trial to make sure data is protected. As an aside, make sure that everyone on the litigation team can access any secured device or information as needed.
7. Be sure to have complete data backup solutions in place for each and every device, and do test restores from the backup mechanisms by making an extra copy of something, deleting what would be the main/original file, and then restore the copy from the backup.
8. Remember technology is a tool used to help others gain a better understanding of information being presented. If you use too many tools, or the wrong tools, you will likely have not done a good job in getting others to “see”, and cause more damage to your case than help.

9. Be prepared no matter what. You should be able to present your case with or without the use of technology. When you have accomplished this, you are truly prepared.
Cellphones/Smart Phones

As the natural descendant to the phone, the much-advanced smart phone has taken on a very prominent role in the modern courtroom. Adding contacts, calendaring and other functionality, the smart phone can work as a mini-repository of information that might be needed for the more administrative functions in court. Also, because of their potential to be distractive and disruptive (when not set to quiet vibrate or silent modes), these units are sometimes not allowed in many judges’ courtrooms. Be judicious (no pun intended) when taking your cell or smart phone to court.

Smart Phone Selection/Functionality/Tips

When searching for a smart phone device, be sure to look for service plans and phone functionality to meet your everyday work needs. Factors generally include platforms consistent with your work computers and networks; ability to integrate with network applications, mainly those that transfer contact, calendar and other work data information; data and call plans that encompass the range and areas where the device will be used; and also monthly cost. The website, www.phonedog.com, provides a great overview of plans, phone functionality and the latest deals on wireless service plans and devices. You should also check with your current phone carrier for upgrades, other devices and options.

In the courtroom, where phones are allowed, make use of the mobile functionality of web (cloud-based) practice managers and instant access to legal research. Not to mention the ability (if allowed) to text, tweet, blog or otherwise communicate from the courtroom. Check out the award-winning iPhone app for Fastcase for free research and see other trial apps below.

Tablet Computers

The iPad and its competitors are the newer mobile units to have found their way into the courtroom. While not as heavy as a laptop computer, the tablet units are very portable and require
less “fiddling” for set up and the like. Their lightweight and portability is due to the limited number of access points on the physical body of the units. There are very few, if any, USB connecting ports; and often there has to be a connector cord or cable for transmitting the unit’s display from the tablet onto another screen (projector/monitor) in the courtroom. Be sure to test any tablet presentation set up carefully, as horror stories have surfaced concerning the use of tablets for presentations. On the other hand, the sheer portability and ease of use of tablets has made them one of the more popular technology devices for trial work.

**Apps**

Whether loaded on a smart or tablet computer, apps have become extensions to the basic devices and provide access to several useful tools while practicing in the courtroom. Recently apps have been tried and tested in the courtroom in a basic form. In fact, some comprehensive apps have been built specifically for the purpose of going to trial.

Examples key of apps designed specifically for trial practice on the iPad are found in the Ultimate Litigation Bundle for $299.99 which includes TrialPad ($129.99), TranscriptPad ($89.99), and DocReviewPad ($89.99). They allow users to present PDF evidence and zoom in and out of key parts of PDFs, set libraries or folders of key documents and more as shown in this screenshot from TrialPad.
Once you open a case, you are presented with your list of evidence on the left side and the **Preview Window** on the right side. Across the top, and at the bottom, there are various tools to help annotate and present your evidence.
Additionally, newer apps like iTrial ($99.99; iOS) have been developed, but likely have not been deployed as frequently by litigators as the aforementioned apps.
iTrial is breaking new ground with each update. Simple, powerful and very easy to use. You don’t need the most expensive iPad. No subscriptions!

iTrial is our newest Trial Presentation app for iPad.
Remember to look for user reviews and ratings when trying out apps!

Because these apps are now more commonly used when perfected by iPad users who litigate, they have become a more competitive option when compared to using a trial consultant or program designed specifically for trial presentations. This shows their advancement in their applicability during trial. Typically, many litigators will shy away from unproven systems so as not to risk the outcome of their trials. Caution with their use is truly needed. However, their popularity continues to grow among trial technologists.

In addition to trial practice apps, some are available to help with Jury selection, and have been found more practical in trial use than the aforementioned trial practice apps. Apps for iPad jury selection include:

Jury Analyst ($74.99, iOS)
and iJuror (14.99; iOS).
Likewise, apps that help serve as basic reference tools during trial are finding more practical usage. Courtroom Objections, $3.99, iOS; Courtroom Evidence, $1.99, iOS; Black’s Law Dictionary, $1.99; iOS and the Legal Dictionary free; Android; Bouvier’s Law Dictionary, $.99, iOS; Fastcase, free, iPhone/iPad; DroidLaw, free (add-ons available for cost), Android. The Federal Rules, $1.49, Android.

Some interesting apps that might be found useful for litigators include:

- i-Clickr (makes phone a PowerPoint remote clicker), $9.99 with free Lite version for Windows, and Presenter Virtual Remote, $2.99, Windows; and Office Remote for Android (free, Android.)
- Presentation Timer, free, Windows.
- WebEx for iPad, free, iPad.
- Zoom app for iOS and Android, free.
- TransZilla Translator and Google Translate, both free, Android.
- 53,000+ Famous Quotes, free, Android; Forgiveness Quotes, free, Android.

Of course, this list is not exhaustive, and litigators can often find utility in apps that were not necessarily intended for non-business application. You can research many more apps for smartphones at Apple – AppStore; Google – Google Play; Microsoft – Windows Marketplace for Mobile, and BlackBerry – BlackBerry World. Be sure to look at reviews and read comments about usage from other users to help guide you to useful apps.

**Transcribers**

Most court recording is done by the court transcriptionist, and the lawyer would not normally be saddled with the burden of doing the transcription of a trial. However, for more mundane and quick needs for transcription on a personal level, lawyers can now turn to either a digital dictation device or an app or function of their smart phone. Again, the larger transcription jobs are typically already a part of the trial process.

When selecting any digital dictation equipment, it is wise to stick with the name brand units, and if shopping for an app, select those that have been proven, (look at any available comments on their shopping page) or that are tied to or a part of a larger offering, i.e. Dragon Naturally Speaking app for smart phones and the iPad.

**Laptops**

Laptops are very common in the courtroom. Laptops are used to retrieve stored information, to power and run the less complex presentations, and in some cases to serve as the main technology tool in the courtroom. Even the judges are sometimes using them during trials.
Laptops are used to store and run litigation support software as well as platform applications for presentations. Additionally, they can house practice management information like contact records, calendars and tasks lists, and serve as the unit that interfaces with the court’s network. When selecting a laptop for use in trial, it may serve you well to have a back up unit or one that is used solely for trial. The advantage of being able to house all of a case’s information on one unit lessens the interference of other information and programs on the system. Most modern day, name brand units pack enough power to be sufficient for these purposes.

A special note when using Mac machines versus PCs is that the connecting cable for VGA or HDMI presentation over a projection unit, which is most common, can sometimes give mixed results, so make sure you test your system before presenting.

**Cameras/Projectors/Monitors**

Because much of the goal in trial is to get the judge and jury to “see” your point, the technology for making visual presentations during trial is critical. Much of this technology, again due to the importance of the ability to have information “seen,” is found built into advanced courtrooms.

Below is a view of the “world’s most technologically advanced trial and appellate courtroom” at William and Mary Law School by the Center for Legal and Court Technology.
It is important to note the easy accessibility to cameras, projectors, and monitors, in this courtroom.

While local courtrooms will not likely have the amount of technology presented here, lawyers should lean toward building (depending upon case needs/budget) this layout for the court where technology is available. In other words, lawyers should make projection screens available for viewing, i.e. setting up a monitor where allowed, and having as many projections surfaces as possible strategically located during trial. There is an argument to be had for having only one large screen to direct attention to one place and have the attention directed to just one presenter.

A good digital camera or the images created via digital cameras can be displayed during trial to help with a case. Again, all of this technology will be admitted at the discretion of the judge, but even having a way to “show” what you are talking about can mean the acceptance or rejection of
your use of technology during trial. A good digital camera is generally good to have for pre-trial purposes. Check out units from major brand manufacturers.

During trial, a document presentation camera, like the very popular ELMO units make accessing images easy as virtually the image of anything may be captured and projected onto screens. These projection systems are sometimes built into the courtroom’s advanced technology setup. Without the constant need for these systems, it is more likely to not have this readily available in the litigator’s toolbox. Instead, the systems are usually available via the litigation support team or built into the courtroom as mentioned earlier. Visit www.elmousa.com for the latest digital visual presenter units from this top-tier provider. Also, check buyer’s guides and reviews at general tech information sites like www.zdnet.com, www.cdw.com, and www.cnet.com.

**Litigation Support Software**

Whether it’s Casemap or some other case management package, many firms begin with products to help them organized documents and information needed for trial. Casemap is just one litigation support product that allows users to organize facts, people and events to help “tell” the client’s story during trial. Likewise, there are standalone products for timeline creation, mind mapping for events, and even modeling for case scene and situation re-creation in the pre-trial phase of cases. Electronic discovery has also been included in this wide swath of product making the field even larger. And, programs like CaseFleet, a practice manager, may lend itself to better servicing the needs of a litigator.

Beyond the basic fact managers, timeline builders are more comprehensive products that aid in actual trial presentation and delivery. This list includes:

- CaseLogistix
- Concordance
- CTSummation Blaze
EDGE (ILS Technologies)
iCONECTnXT
ImageDepot
IPRO eReview
Lexbe
MasterFile
NextPoint

These products can be utilized by firm members or be initiated from the services of a trial presentation company or consultant. An older, but detailed comparison chart for some of these programs is available via the American Bar Association’s Legal Technology Resource Center at:


Additional Trial Technology

Some of the other technologies that may be used in trial include digital pens, scanners and whiteboards. Also audio recorder and color video printers may be found in more technologically advanced courtrooms. These tools are aids for presenting and recording trial events, and as with the other technology tools mentioned here should be used with care.

Resources exist within the Law Practice Management Program’s Resource Library to help craft a toolbox for your litigation needs. Ultimately, keep in mind that technology exists to help at trial, but as was mentioned in the opening of this paper, your case should be able to presented without technology and technology at trial should only be used to enhance what you can already present without it.
TECHNOLOGY RELATED ETHICS ISSUES

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¹ Opinions and suggestions in this paper are informal, are not binding on the Office of the General Counsel, the State Disciplinary Board or the Supreme Court of Georgia, and do not necessarily represent official positions of the Office of the General Counsel.
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I. INTRODUCTION

It will surprise no one that the rapid and thorough integration of technology, the Internet and the practice of law has outpaced straightforward application of ethics rules written earlier without a crystal ball. Clarifications, interpretations and revisions have begun to appear in recent years – though not in Georgia – with different jurisdictions sometimes reaching different conclusions. In Georgia, only the advertising rules explicitly encompass the use of electronic media. Georgia Rules of Professional Conduct (GRPC) Rules 7.1(a)(“A lawyer may advertise through all forms of public media . . .”) and 7.2(a)(4)(“. . . a lawyer may advertise services through: . . . electronic . . . communication.”). The recent explosion of lawyer-focused web sites and use of social media by lawyers and clients raises some especially challenging issues.

We should not overstate the problem, however. Most provisions of the GRPC adapt quite easily to this new environment. For example, “communication” inherently includes communication by electronic means; “writing” is writing regardless of the medium; and most GRPC statements of obligation and prohibition are not media dependent. Even so, neither explicit GRPC text nor Formal Advisory Opinions (FAO) dictate answers to some of the ethics questions created or magnified by today’s pervasive use of technology. In fact, there are no FAOs in Georgia on this subject.

This paper briefly addresses some of the most common ethics issues associated with the use of technology and the Internet in a law practice. Some are old news but still important, while others have emerged rapidly in recent years and remain without explicit interpretive guidance.
II. EMAIL, TEXTS, AND DIGITAL DOCUMENTS

A. Stop – and Think – Before You Click

Email is no longer new by any means, but it continues to present most of the same concerns it always has. Texting is not much different. Foremost among those concerns is a lawyer’s duty to protect the confidentiality of client related information. GRPC 1.6(a).

Despite or perhaps because of today’s ubiquitous preference for professional communication by email (and to a lesser extent texting), the duty of confidentiality inherently requires that when communicating through these means, just as with any means, a lawyer must be cognizant of the risks, and if necessary take protective measures. Interpreting its Model Rule from which GRPC 1.6 is derived, ABA Formal Advisory Opinion 11 (August 4, 2011) concluded:

A lawyer sending or receiving substantive communications with a client via e-mail or other electronic means ordinarily must warn the client about the risk of sending or receiving electronic communications using a computer or other device, or e-mail account, where there is a significant risk that a third party may gain access. (italics added)

As demonstrated by the near universal use of email by commercial sites, including banks, for retrieving lost usernames and passwords, email is generally quite safe and secure. However, there are a number of sources of potential risk. In general and without pretending to be comprehensive, consider first that email and texts have fundamental characteristics not shared by oral or even paper communications. One is

1 Because ABA Formal Advisory Opinions are copyrighted, they are not reproduced with these materials. However, they should be accessible via Google.
that, once created, their existence may well be permanent regardless of deletion efforts, because of such things as backup procedures, archiving and automated third party data collection. Those processes are often beyond the control or even awareness of the sender or recipient of the email or text. In addition, widespread duplication and dissemination is fast and easy. That, too, is not necessarily controllable.

The ABA opinion makes special note of the inherent increased risk of inadvertent disclosure and unintended access when the client is an employee using the employee’s work computer, particularly if the representation relates to the employment. Other noted risks include increased opportunities for third party access when using a public computer (such as a library or hotel computer), a borrowed computer, or a device available to other family members. And unsecured public and retail Wi-Fi and Wi-Fi hotspots are an increasingly ubiquitous source of risk for unauthorized disclosure.

As a practical matter, the nature and extent of reasonably necessary protective measures vary with (i) the degree the risk, (ii) the sensitivity of the information being communicated, and (iii) the difficulty and expense of applying particular protective measures. See ABA Opinion 99-413 (1999), “Protecting the Confidentiality of Unencrypted E-Mail” (concluding that, as a general proposition subject to factors like those stated above, a lawyer may ethically use unencrypted e-mail, because it affords a reasonable expectation of privacy by virtue of technological and legal protections). Encryption, or limiting or specially configuring the physical devices through which communications will occur, might nevertheless be appropriate in some circumstances. Similarly, where encryption is warranted, the type and extent that are reasonable will vary. Military grade encryption may be neither warranted nor practicable, for example,
but a lawyer may decide that an off the shelf encryption product is simple and inexpensive enough that its use is desirable, either routinely or in certain cases.\footnote{The ABA has an on-line CLE on encryption, Product Code CET13EMSOLC, and a related book, *The ABA Cybersecurity Handbook: A Resource for Attorneys, Law Firms, and Business Professionals*, Product Code 3550023.}

The now well-known NSA data collection and analysis programs, and international hackers, have obvious potential relevance here, but the uncertainties they present do not mean lawyers must routinely communicate only using methods that ensure against all interceptions and hacks (which may or may not even be possible as a practical matter). As is evident from the earlier discussion, Rule 1.6 does not require elimination of all risk of inadvertent or unauthorized disclosure. That was impossible even in the ink and paper world. Rather, the rule requires attention to the potential problem, and reasonable balancing of risks and protective measures appropriate to the parties, the subject matter and the circumstances of the representation. In certain cases, of course – perhaps defending clients accused of certain criminal or terrorist activity, for example – that balancing could call for extraordinary measures to protect client information from disclosure. In most cases, though, Rule 1.6 compliance will require less.

You can head off problems in the use of emails and texts by:

- Raising and discussing these issues with the client at the outset,
- Reaching an understanding about establishing protocols for email and text use, and
- Addressing the above in the representation agreement.
Though not traditionally applied in this context, one might argue that GRPC Rule 1.4(a)(2) at least counsels that conversation: “A lawyer shall . . . reasonably consult with the client about the means by which the client’s objectives are to be accomplished.”

B. Inadvertent Disclosure: Email and Texting

Email has made it much easier for a lawyer to inadvertently disclose protected information to inappropriate recipients. Two of the most common and most preventable sources of inadvertent disclosure are by now well known to all lawyers, Reply All and Auto-fill.

1. Reply All

No explanation of this hazard is really necessary. All of us have direct experience, whether in a work or personal environment, or both. “Reply All” is for many people the reflexive default for responding to email. For lawyers especially, that is a big mistake. It is a Rule 1.6 violation waiting all but inevitably to happen, and the danger extends beyond disclosure of confidential client information. In July 2014, for example, multiple media outlets reported that a Fulton County ADA in the Atlanta schools cheating case mistakenly used Reply All to reply “surprise, surprise” to a notification that defendant Beverly Hall was too ill to attend trial or assist her lawyers, sending the comment to dozens of lawyers and others associated with the case. The ADA was suspended without pay for three days and removed from the case. F.C.D.R. (July 10, 2014).
Do whatever you reasonably can to make “Reply" the rule and “Reply All” the exception that requires an affirmative decision. You can always resend the response to other recipients. You cannot unsend it.

This problem is a prime candidate for a software solution. If your email program allows moving “Reply All” to a drop-down list that does not include “Reply,” that would all but insure that “Reply All” is always a purposeful choice. Gmail has that feature by default. Even just moving the “Reply All” button away from the “Reply” button would help a little. In MS Outlook, implementing such a fix is not straightforward. Attachment 1 to this paper presents possible ways to do it, but this author has not tested any of them and cannot vouch for their efficacy or speak to possible problems or side effects. (The author also is not familiar with the Outlook features in MS Office 2013 or MS Office 365.)

2. Auto-fill

Bet you’ve done this, too. You think you entered, say, the client’s or opposing counsel’s e-mail address, but you were moving too fast and did not notice that auto-fill actually inserted someone else’s address because of their similarities. The resulting disclosure could be relatively benign in practical effect and voluntarily correctable depending on the recipient, but obviously it could also be disastrous. There are at least two solutions for this problem, each with its own downsides.

One is to turn off or disable the auto-fill function. That eliminates the problem by definition, but it is inconvenient, increases your expenditure of time, and increases the odds of typographical errors.
The other solution is “just” to remain at all times mindful, to pay attention, and to look and verify before you click. While the advantages of auto-fill are thereby retained, this solution does require constant mental discipline. As with any repetitive task, though, it can through sustained effort become more automatic.

C. Inadvertent Disclosure: Digital Documents

Metadata presents the greatest risk of unauthorized access/inadvertent disclosure apart from the transmission of the document. Metadata is information embedded in electronically created documents, though hidden from view during routine use. The hidden information may be embedded automatically in the background, or it can be intentionally embedded for purposes of identification, organization, tracking changes, collaboration, etc. It often includes such things as text deleted from or added to earlier drafts, dates and sequence of edits, and identification of authors, editors and recipients. A determined recipient, or sometimes even just a curious one, can expose metadata and thereby learn things the sender assumed would not be learned and under GRPC Rule 1.6 perhaps should not be learned.

Therefore, with the caveat discussed below, a lawyer should establish policies and practices designed to ensure that metadata not intended to be disclosed is not disclosed. At least one state has decided that removing metadata before distribution is obligatory under its Rule 1.6. W. Va. Ethics Op. 2009-01 (2009).

The plethora of potential issues arising from e-discovery is beyond the scope of this paper. Note, however, that disclosures required by court order or by discovery rules are explicit exceptions to the GRPC non-disclosure obligations. Rule 1.6(a)(“. . . , except for disclosures that . . . are required by these Rules or other law, or by order of the Court.”)
There are two basic approaches to this metadata problem. Some document creation/processing software includes settings or features through which creation of metadata during drafting and editing is minimized. It may well be, though, that a given program will always save some metadata regardless of those choices.

Alternatively, removing metadata after completion but before sending the document to its ultimate recipients is likely to be more comprehensive. MS Word, for example, has a function for inspecting metadata in the document and selectively removing it. In Word 2010, that function is located at File>Info>Check for Issues>Inspect document. There are many dedicated off-the-shelf programs, too, with varying capabilities.

One important caveat must be noted. In some circumstances the law may impose an affirmative obligation not to alter documents, and/or to retain at least copies in their original or “native” state. In such instances, removing metadata could constitute spoliation of evidence, which in turn could implicate GRPC Rule 8.4(a)(4)(Misconduct) ("engag[ing] in professional conduct involving dishonesty, fraud, deceit or misrepresentation"), or Rule 3.4(a)("A lawyer shall not unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value."). GRPC Rule 1.6(a) anticipates such situations, by stating the exception to the confidentiality obligation noted above, i.e., where “required by these Rules or other law, or by order of the Court.”

The overriding point, as it was with email, is to be aware of what is happening. **Think before you click.**
D. Inadvertent Disclosure: Potential Consequences

It should not be necessary to dwell on why avoiding inadvertent disclosure of confidential client information is important. This confidentiality is at the very core of the attorney-client relationship and the proper functioning of the justice system. Thus GRPC 1.6 presumptively mandates it, and the maximum punishment for violation is disbarment. As additional incentive for implementing protective measures like those suggested above, though, a brief pause may be useful to consider the ethical obligations of a lawyer who inadvertently receives confidential information, say from opposing counsel.

Simply stated, a lawyer who inadvertently receives confidential information that should not have been disclosed has only one obligation, to “promptly notify the sender.” Rule 4.4(b)(added by order of the Georgia Supreme Court November 2, 2016). Beyond that, the ethical obligation to communicate with clients, GRPC Rule 1.4(a)(2), (3) & (4), and to consult with them concerning the means by which their objectives will be pursued, Rule 1.2(a), could require the receiving lawyer to inform her client and share the information. Similarly, scenarios making it problematic for the receiving lawyer not to use the information to advance the client’s case are not hard to imagine.

However, there is no *per se* obligation in the Georgia Rules of Professional Conduct to inform the client and/or use otherwise protected information inadvertently received. For example, if the receiving lawyer already knew the information, or if it could not affect the conduct or outcome of the case, it may be difficult to then conclude that the lawyer must share the information with the client.
In short, inadvertent disclosure of information protected under GRPC Rule 1.6 can have serious consequences for the disclosing and the receiving lawyers, and for their clients. It can directly affect the conduct and even the outcome of the case itself.

**E. Email, Computer Literacy and Professional Competence**

Not every lawyer has jumped on the email bandwagon. Some use it only reluctantly or sporadically. Some are self-confessed, even proud “computer illiterates,” including a dwindling number who have never bothered to master e-mail and rely on staff for that. But the march of time – including such changes as mandatory e-filing and rules requiring attention to e-discovery – is making computer illiteracy and e-mail aversion increasingly problematic for lawyers.

At present, GRPC 1.1 (Competence) has not been interpreted to require computer literacy. Rule 1.1 begins by defining “competent representation” as requiring a “level of competence” or association with a lawyer who is “competent.” The rule then adds this: “Competence requires the *legal* knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” (italics added) The official comments seem to confirm that “skill” as used in the rule refers to traditional notions of legal skill. “To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education.” Rule 1.1 Comment [6]. As of this writing (March 16, 2017), there is a very early stage, preliminary proposal to add to that comment language similar to the following italicized phrase from a 2012 amendment to Comment [8] of the ABA Model Rule 1.1: “To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*, engage in continuing study and education . . .”
Regardless, consider an extreme hypothetical. What if a lawyer had adopted essentially no modern technology? No fax, no internet, no email, no photocopier, no computer, just a landline phone and manual typewriters. Would a client be justified in questioning that lawyer’s competence, as the term is commonly understood?

Some courts are showing intolerance of technological illiteracy as well. For example, a trial court in Pennsylvania recently denied a lawyer the opportunity to arbitrate a fee dispute, because he did not attend to his email while responsible staff was ill and unable to do so, causing him to miss a scheduling notice. Attachment 2 (Knox v. Patterson).

F. These Problems Are Not Yours Alone

Lawyers not only have to abide by the Georgia Rules of Professional Conduct, they also must try to ensure that lawyers and staff working for them do, too. A lawyer’s obligations with respect to conduct of staff are governed by GRPC Rule 5.3:

(a) a partner, and a lawyer who individually or together with other lawyers possesses managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person’s conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer . . .

Rule 5.1 states essentially the same obligations to ensure ethical conduct by a firm’s non-managerial lawyers, and by direct lawyer supervisees.
In addition, under parallel provisions in Rules 5.1(c) and 5.3(c), conduct by a subordinate lawyer or staff, respectively, can be attributed to and itself constitute an ethical violation by the managing or supervising lawyer himself. As stated in Rule 5.3(c), that liability attaches where:

1. the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
2. the lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action. 4

Establishing and enforcing clear policies to address these issues is essential. All of these responsibilities apply equally to the matters discussed in Part III, below.

III. THE INTERNET, SOCIAL MEDIA & THE CLOUD

A. The Ethics Landscape of Cyberspace

Former Assistant General Counsel Christina Petrig compiled a concise and practical overview of the ethics issues most often encountered in this brave new world. Following that, a couple of problems will be discussed in somewhat more detail.

4 The Rule 5.1(c)(2) iteration for lawyer subordinates applies where “the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.”
THE SAME RULES APPLY

All the Rules of Professional Conduct apply to things lawyers do as lawyers on social media and other Internet platforms. Pay particular attention to Rules 6.1 (confidentiality), 3.6 (trial publicity), and 7.1 through 7.5 (communications concerning a lawyer’s services/lawyer advertising). Consider your social media and other postings as billboards. Think carefully about everything you post. Then think again before it’s too late. Do not post impulsively.

NO FALSE OR MISLEADING STATEMENTS: RULE 7.1

Social media and similar postings are subject to the same rules as public communications in “old media.” Your communications cannot be false, fraudulent, deceptive or misleading. Rule 7.1(a)(1)-(5) provides an illustrative list of communications that would violate this rule. All communications must contain your name. Note that disbarment is the maximum penalty for a violation of this rule.

CONFIDENTIALITY: RULE 1.6

Georgia’s confidentiality rule is very broad: a lawyer shall maintain in confidence all information gained in the professional relationship with a client. All means all. The fact that pleadings are filed does not mean that you are free to discuss your client’s legal matter in cyberspace. Do not blog, post, tweet, etc. about your clients or their cases
unless you have informed consent from your client. Informed consent involves at the very least advising your client of what you propose to say about their matter, and how and when you propose to say it.

TRIAL PUBLICITY: RULE 3.6

Even if you have your client’s informed consent to publicly comment on a matter, remember your duties under Rule 3.6: public communications that will have a substantial likelihood of prejudicing an adjudicative proceeding are prohibited.

DISHONESTY, FRAUD, DECEIT, MISREPRESENTATION: RULE 8.4

Do not use social media or other public internet platforms to engage in communication with an opposing party. Rules 4.2 and 4.3. While you can certainly view any information that a party or witness has publically posted, never use a false identity or pretext to communicate with anyone related to a legal matter. Nor can you do this by having someone else do it for you. Rule 8.4(a)(1).

JUDGES

Judges are responsible for their social media conduct under the Judicial Canon of Ethics. It is unwise at best for judges and lawyers to communicate as “friends” on Facebook, particularly when the lawyer has a matter pending before the judge and/or regularly has cases with that judge.

As a matter of professionalism if nothing else, do not post rants about a judge. Consider the impact on the interests of your current and future clients.
BEWARE OF FORMING UNINTENDED ATTORNEY-CLIENT RELATIONSHIP

If you choose to answer questions from potential clients or participate in online forums, be careful to use cautionary language and disclaimers. Keep your answers generic and avoid specific facts. Remember also that social media communications with strangers can result in conflicts of interest. If someone is providing you with specific facts, you need to know his/her real name for your conflicts database.

BEWARE OF UNAUTHORIZED PRACTICE

Your communications online know no state line boundaries. Be clear about where you are licensed and disclaim any advice as to residents of other states.

RECOMMENDATIONS & ENDORSEMENTS: RULE 7.3(c)

Do not offer any *quid pro quo* for an endorsement or recommendation on LinkedIn, Avvo, Facebook, etc. If someone posts an endorsement or recommendation that contains inaccurate information (for example, regarding your expertise or experience), you need to either have it removed or post corrective information.

HAVE AND ENFORCE AN OFFICE POLICY ON SOCIAL MEDIA

Rules 5.1 and 5.3 impose a duty to supervise subordinate attorneys and non-attorney staff to ensure that their conduct is compatible with your professional obligations. Have a clear policy to ensure that your staff understands the ethical implications of use of social media.

CONCLUSION: DON'T LET THE INTERNET MAKE YOU STUPID OR STEAL YOUR LICENSE!
B. Privacy Does Not Exist in Social Media or the Internet In General

1. Full Control of Your Online Information Is Not Possible

While many Internet sites enable users to place some limitations on who may view or post content, the exact effect of such measures is not always easily predictable. As just one example, many web browsers have introduced an “anonymous” or “incognito” setting which disables the capture and retention of at least some information otherwise routinely preserved by the browser software in the course of using it to search the web. However, such settings typically affect only what is preserved on the user’s local computer (the one on which the web browser is installed), and have no effect at all on what information is available to the browser company or is captured by visited sites or by web bots systematically scouring the internet for personal information about you.

In addition, one can no longer ignore the fact that social media, search engines and other web sites capture for advertising and other uses huge amounts of information about anyone who uses or even just visits the sites. The recent Facebook/Cambridge Analytical disclosures shine a very bright light on that fact. Attachment 3. Web sites are “free” essentially because of advertising, which employs ever more refined targeting of ads for products and services selectively to particular individuals deemed specifically amenable to purchasing them. And the only way to accomplish that is to capture ever more, and ever more specific, information about that individual, i.e., you, the user.

If you have any doubt that this fully applies to you, personally, try this: Run the exact same Google search on your computer and on a friend’s or co-worker’s computer, and compare the results. They will not be identical.
Admonishing users to read the privacy policies of utilized and visited sites has thus become something of a mantra. But apart from learning about and using privacy settings, if available, how useful is that admonition as a practical matter? Modifying or creating exceptions to anything in a given privacy policy is not an option. All one can do is use the application’s privacy settings, if they exist. The choice as to the privacy policy itself, which always goes way beyond just settings, is simply to accept it or not, meaning use the site or avoid it altogether. Anyone who has downloaded an app to a smart phone has seen this in action, and most people just capitulate, since it’s either that or don’t use the app.

In addition, comprehending privacy policies is not a quick and simple undertaking. Virtually all applications and web sites have the equivalent of a Privacy Policy and a separate User Agreement, both of which are triggered by creating an account and often just by using a site. Using LinkedIn as an example – a “social” media variant designed for professionals and used by vast numbers of lawyers – the User Agreement states (as of March 16, 2017):

You agree that by clicking “Join Now” “Join LinkedIn”, “Sign Up” or similar, registering, accessing or using our services (including LinkedIn, SlideShare, Pulse, our related mobile apps, developer platforms, premium services, or any content or information provided as part of these services, collectively, “Services”), you are entering into a legally binding agreement . . .

This “Agreement” includes this User Agreement and the Privacy Policy, and other terms that will be displayed to you at the time you first use certain features . . . , as may be amended by LinkedIn from time to time. If you do not agree to this Agreement, do NOT click “Join Now” (or similar) and do not access or otherwise use any of our Services.
It goes on for 6 pages of mostly very small text. The Privacy Policy is 9 pages more. LinkedIn is one of the more transparent and user friendly sites in this regard. No two user agreements or privacy policies are exactly the same. And at the end of all that effort, of course, lies the reality that these provisions, along with available settings and how they function, can change at any time and often do.

2. Dangers from Posting and Removing Information

Given the above realities and those described below, it is this author’s opinion that lawyers should assume that there is no such thing as full, predictable privacy for anything the lawyer posts or even just finds on the Internet. The same is true, of course, for clients. Cases are already being reported where clients have defeated their own cases by posting on social media activities irreconcilable with claims being asserted in pending litigation. In 2013, a judge set aside one of the largest loss of consortium awards in Georgia history because of that plaintiff’s Facebook postings. Bowbliss v. Quick-Med Inc., Fulton County Superior Court File No. 10EV009640; FCDR at 1-2 (August 28, 2013). FCDR quotes one post by a plaintiff as stating that he “can not go to a gym til lawsuit over . . . due to it not looking right for me to be working out . . . and saying I have a bad arm.” Other posts apparently indicated the marriage had already become very strained. And there was this reported gem: “Judge is f[***]ing on my case . . . dee and I aren’t divorced yet because of piece of s[***] judge and case.”

5 In a California class action arising from a 2012 LinkedIn data security breach, subscribers to extra cost “premium” services alleged they were misled by LinkedIn’s privacy policies. Of some 800,000 premium subscribers, only 20,000 to 50,000 (or about 2.5% - 6%) had looked at the privacy policy and terms of service long enough to be influenced by the representations there.
Lawyers should strongly caution clients against putting anything about a pending case out on the Internet in any form. Putting that advice in writing is always a good idea. So is reminding the client from time to time.

On the flip side, removing already posted content can create big problems. Remember, first, that removal does not equal disappearance in the Internet world. Worse, taking down content can constitute spoliation of evidence. *The Katiroll Company, Inc. v. Kati Roll And Platters, Inc. et al.*, Civil Action No. 10-3620 (GEB), 2011 U.S. Dist. LEXIS 85212 (U.S.D.C., D.N.J. August 3, 2011). A lawyer who advises a client to do so can face spoliation sanctions as well, *Allied Concrete v. Lester*, 285 Va. 295 (2013), and a lawyer’s involvement in such conduct may also raise serious issues under GRPC Rules 3.3 (Candor Toward The Tribunal), 3.4 (Fairness to opposing party and counsel), 4.1 (Truthfulness In Statements to Others), 4.4 (Respect for Rights of Third Persons) and 8.4 (Misconduct)(especially subpart (a)(4)).

3. Merely Finding and Viewing On-line Information Has Ethics Implications

Another new reality is that merely viewing someone’s information on-line can have unintended consequences, such as notifying the person that you have done so. ABA Formal Opinion 466 (April 23, 2014) addresses that fact in the context of lawyers who obtain on-line information about jurors or potential jurors before and/or during trial. Its conclusions:

- Unless limited by law or court order, it is permissible so long as the lawyer does not communicate with the person directly or through another.
• Sending an access request to the person’s social media is not permitted. (That is defined as a communication (i) requesting access to information the person has not made public, and (ii) that would be the type of ex parte communication prohibited by Model Rule 3.5(b) [same rule number in the GRPC].)

• Rule 3.5(b) is not violated by the fact that the person is made aware by a network setting of internet viewing by a lawyer.

• If the information viewed reveals criminal or fraudulent misconduct, the lawyer must take reasonable remedial measures including, if necessary, disclosure to the tribunal.

C. **Self-Promotion and Self-Defense on the Internet**

1. **A Closer Look at GRPC Rule 1.6**

Unauthorized disclosure is a recurrent, central problem in both of these arenas. Rule 1.6(a) states the lawyer’s affirmative obligation:

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

Note first that the language emphasized earlier – “all information gained in the professional relationship with a client” – presumptively extends the confidentiality obligation beyond information protected by the evidentiary attorney-client privilege,
and beyond information the client has specifically identified as confidential. See Comment [5] to GRPC Rule 1.6. Common sense notions of what would be considered “confidential” are thus not reliable guides. For example, information may be confidential for Rule 1.6 purposes even though it might also be lawfully obtained by others, outside of the attorney-client relationship or discovery rules. **Your default presumption should be that if you got the information as part of representing a client, it is confidential regardless of source;** then you can think about whether one of the rule’s exceptions applies.

Second, information may be confidential because of the potential effect of disclosure, rather than because of the source of the information. If disclosure would be “embarrassing” or likely “detrimental” to the client, it is protected. Thus, though perhaps initially counterintuitive, the mere fact that information may be in the public domain in some fashion does not automatically mean it can be disclosed without client consent, if a lawyer has learned it in the course of representing the client.

### 2. Publicizing Successful Results

Whether on a lawyer’s web site, a social media post, a blog, a discussion group, a comments thread or any of the myriad opportunities for on-line promotion, letting peers and potential clients know about a lawyer’s successes has obvious value for building reputations, attracting new clients and increasing revenues. It is easy to think, why would a client object to publicizing a great outcome? It means they “won” or at least attained their goal, and if it was litigation, it is highly likely to be a matter of public record already. So what’s the problem?
The answer becomes clear when one remembers that (1) confidentiality includes an “effects test,” and (2) the audiences of public records of court proceedings are highly likely to be not only different than, but often infinitesimal in number compared to the potential recipients of the same information posted on the Internet. What if the success was acquittal of a client charged with aggravated sexual battery of a child? The truth of that result, and its existence in the “public record,” perhaps even in the news media, does not diminish the fact that for most such clients it would be both embarrassing and highly likely to be detrimental in any number of ways. Such disclosure without client informed consent would almost certainly violate the ethical obligation imposed by Rule 1.6.

Many situations will be far less black and white than that example. The simple, foolproof (if there is such a thing) solution is explicit in Rule 1.6(a) itself: disclosure is prohibited “unless the client gives informed consent.” Informed consent is a defined term which “denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” GRPC Rule 1.0(h). Always obtain informed consent before posting any information about a client’s case or matter anywhere.

What the client needs to know in order to make an informed decision will vary according to what is to be posted and where. It is impossible to list all possible considerations, but here are a few examples: Will the post be in the form of a client testimonial, or just be about the client’s case? Will the client be named or remain anonymous (beware the possibility of revealing identity from the facts)? Will it appear
on the lawyer’s web site, intended to be seen only by those who choose to explore the site? (If so, will it appear prominently on the home page? Under a testimonials tab? As part of a slide show?) Or will the post be actively disseminated via Facebook, blog, tweet, discussion group or other “push” platform? In the latter case, who is the potential audience?

In addition, think about possible unintended consequences. For example, it may not be possible to limit posted information to a lawyer’s web site, and it is likely impossible to assure that only someone browsing that web site will see it. Google and others use automated web crawlers to constantly amass, archive, package and redistribute information in various ways for various purposes. So one simple question that perhaps the client should always be asked is this: Are you comfortable with the possibility that the posted information may pop up in a Google or Yahoo! search, say by a relative or a potential employer?

All such questions interact closely with what information, exactly, a client is willing after informed consent to disclose. You will have greater protection if the client consents to the verbatim content and exact location of the posting, and to the details and context of the posting within that location to the extent that is reasonably practicable. And while Rule 1.6 does not require it, written consent signed by the client is good prophylactic practice.

The Pennsylvania Bar Association recently issues formal advisory opinion discussing at length several aspects of the ethics issues implicated in lawyers use of social media. It is appended as Attachment 4. The opinion “addresses social media profiles and websites used by lawyers for business purposes, but does not address the
issues relating to attorney advertising and marketing on social networking websites.” It is not binding even in Pennsylvania, but does provide a primer on how to think about the application of the ethics rules in this realm.

3. **Defending Yourself Against On-line Criticism By Clients: Can You? Should You?**

Web sites like AVVO and Facebook present positive opportunities for lawyers, but the reverse is also true. What can you ethically do if an unreasonable, irate client or former client attacks you on-line with false statements and accusations, apart from a defamation action? Can you respond on-line using truthful information that otherwise would be protected from disclosure by GRPC Rule 1.6, without obtaining client consent?

Rule 1.6(b)(1)(iii) states:

A lawyer may reveal information covered by paragraph (a) which the lawyer reasonably believes necessary . . . to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

An on-line attack obviously is not a criminal charge or civil claim, nor is it in a proceeding. Is it a “controversy”?

The best answer in Georgia at this time is that in these circumstances disclosure not explicitly authorized by the client is very risky. In 2014, the Georgia Supreme Court for the first time imposed discipline on a lawyer for disclosing confidential client information online, in response to negative comments about the
lawyer posted by a former client on three consumer web sites. *In the Matter of Skinner,* 295 Ga. 217 (2014)(appended at Attachment 5). That case involved an uncontested divorce with long delays, increasing client dissatisfaction, and eventually a fee dispute and change of counsel. After the former client posted “negative reviews” with unspecified content, the lawyer responded by posting the client’s name and employer, the amount paid to the lawyer, the county in which the divorce was filed, and a statement that the former client had a boyfriend. The Court had no difficulty concluding that those disclosures violated Rule 1.6, without need for any analysis or explanation.

The *Skinner* case should give lawyers great pause before disclosing any client information in response to client criticism, though it may not definitively resolve the issue in all circumstances. The unauthorized disclosures in *Skinner* were apparently so out of bounds in relation to the client reviews that the “controversy” exception of Rule 1.6 never came up. However, there is good reason to doubt that the exception will be recognized in this context if the Court does address it, not least because the legal definition of “controversy” simply does not fit online disputes like this:

A litigated question; adversary proceeding in a court of law; a civil action or suit, either at law or in equity. . . . It differs from “case,” which includes all suits, criminal as well as civil; whereas “controversy” is a civil and not a criminal proceeding.

*Black's Law Dictionary Free On-line 2d Ed.* (accessed March 16, 2017)(internal citations omitted). The few ethics decisions on point in other jurisdictions are mixed, and the summary in the *ABA Annotated Model Rules* at pp. 109-110 (2011)(quoted at appended Attachment 6) includes the statement that “[m]ere criticism of the lawyer,
however, may be insufficient to warrant disclosures in self defense, even when the criticisms appear in the press.”

For anyone willing to risk violating Rule 1.6 in these circumstances, the question still remains: Should you defend with disclosure of information about the client or case, or even defend at all? One school of thought is that, as professionals, lawyers should just accept this sort of thing as an occupational hazard and ignore it. (If it is a recurrent problem, that may well suggest that the lawyer has an actual underlying problem.) Most on-line denizens recognize by now that over-the-top criticisms are ubiquitous on the Internet, and would not expect lawyers to be immune from them. One libelous rant, this thinking goes, is therefore unlikely to drive away droves of potential clients, and if it cannot be taken down it will eventually drop off, become submerged and/or be an obvious outlier.

Others suggest that if a response is deemed essential, it should be extremely limited and disclose no client information at all. Something like, “I respectfully disagree” and/or “Confidentiality rules prevent me from responding,” but nothing more.

A non-disclosing response like the just stated examples would avoid a Rule 1.6 violation, but it is this author’s view that pragmatic considerations nevertheless counsel against responding even to false and malicious attacks, at least as a long term strategy. Even such a short, fact-free response is virtually certain to generate additional vitriol, and then what do you do? Each increment of additional content is likely to add fuel to the fire and bulk to an exchange that could easily tilt you towards the unseemly. In addition, put yourself in the position of a potential client who sees this back and forth. Might not he or she naturally wonder if this publicly played out dispute portends
undesirable conflict if the lawyer and potential client come to be at odds about the conduct or outcome of a case?

Nevertheless, the potential harm of a critical post should be weighed against the potential impact of responding or not responding on a case by case basis. You might decide, for example, that silence in the face of a critique that appears superficially credible and serious, not an over-the-top rant, would be more damaging to you than whatever fall-out a response would cause. Remember, however, that any disclosure of information covered by GRPC Rule 1.6 carries a very high risk of violating the rule no matter what.

All of the above notwithstanding, GRPC Rule 1.6 does not preclude lawyers from pursuing civil remedies for wrongful criticism or accusations posted by clients. A lawsuit is without doubt a controversy excepted from the Rule 1.6 prohibitions, and in 2014 a Georgia lawyer prevailed rather dramatically against a former client’s false representations while a client, and baseless criticisms later posted online. She obtained a substantial verdict based on fraud, libel per se, and false light invasion of privacy. *Pampattiwar v. Hinson*, 326 Ga.App. 163 (2014) (appended at Attachment 7).

Finally, a word about Better Business Bureaus. Through the ethics advice hot-line, the Office of the General Counsel has seen some instances where standard BBB practices, which apparently vary from place to place, directly conflict with lawyers’ ethical obligations to their clients. For example, the BBB may forward a client complaint to the lawyer and ask for a substantive response before the BBB decides how

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6 Of course, the lawyer’s claims must be meritorious within the meaning of GRPC Rule 3.1.
to take the complaint into account in its “scoring” of the lawyer or firm as a business. To respond as requested would certainly violate GRPC Rule 1.6, but in one instance that caused a firm to get an “F” rating on the local BBB site. If you receive such a request, this author advises a strong response pointing out the ethical obligation of confidentiality about clients and their cases, the lawyer’s refusal to breach that ethical duty, the disciplinary consequences of breach even if the lawyer was so inclined, and taking the bureau to task for even considering imposing a ratings penalty for doing what is ethically both required and right. There is at present no data regarding the effectiveness of that approach.

D. Ethical Implications Of “Cloud” Computing

Use of the “cloud” in legal practice is rapidly expanding and already commonplace. It brings significant benefits ranging from back-up unaffected by local conditions, to document and data access not confined to a particular physical computer or mobile device, to enabling easy collaboration with colleagues and clients, to use in courtroom presentations, and more. Volumes have been written on this subject, but there is no Georgia case or Formal Advisory Opinion. A Pennsylvania ethics opinion (appended as Attachment 8) thoroughly details most considerations as well as practical questions to ask and protective measures to take, though this is only one bar association’s view and of course is not binding in Georgia. Only a couple of general considerations are presented in this paper, and they assume the reader knows what the “cloud” is (hint: it’s the Internet).

The principle ethics implications of cloud computing are obvious and mirror those discussed above in other contexts, namely the risks of inadvertent disclosure of
and unauthorized access to information protected by GRPC Rule 1.6. To that we should add the pragmatic concern for the preservation and integrity of the information stored in the cloud.

Thus, before utilizing a cloud service a lawyer should make sufficient inquires to be satisfied that there will be reasonable measures in place to guard against improper disclosure, such as password and related access security, encryption, policies regarding access of employees of the service itself, policies controlling requests for access by law enforcement, and the like. Admittedly, that generic and truncated sampling begs many potential questions. As a practical matter, negligence concepts may often suggest clearer answers than the ethics rules do.

In addition to Rule 1.6 concerns, use of the cloud presents a risk of loss or corruption of files, data and information entrusted to the cloud provider. Potential causes include technological failure, business failure (provider or lawyer), response to non-payment of service fees, malware, miscreant hackers, etc., etc. Hardware, software, systems and business policies and practices all have a role in planning for such contingencies. In this context, the inherent ease of duplicating digital information can be a positive benefit if appropriately controlled. And here, too, negligence concepts may be at least as useful as ethics rules in fashioning preventive solutions, although GRPC Rules 1.16(d)(obligation to return original client file upon termination of representation) and 1.15(I)(obligation to segregate and preserve client property) cannot be ignored. The latter could apply, for example, to original documents that have intrinsic potential value to the case that is not equally true of copies.
TABLE OF CONTENTS OF APPENDED DOCUMENTS

1. Moving/Removing “Reply All” In MS Outlook
2. Loss of rights from failing to check email: *Knox v Patterson*
3. New York Times article about information Facebook captures
4. Pennsylvania Bar Association Formal Opinion on Ethical Obligations for Attorneys Using Social Media
6. ABA Model Rules Annotations concerning responding to posted client criticism
MOVING/REMOVING “REPLY ALL” IN MS OUTLOOK

CAVEAT: The following was received by the author of this CLE paper in response to
comments posted after an on-line ABA Journal article. Since my reflexive default is
Reply, I have not tried the following fixes and cannot vouch for their success or possible
side-effects.

Try this. There are also several downloadable programs that will perform this
function.

Click File tab, choose Options, and select Customize Ribbon.

Choose Respond in the right pane and click Remove.

Click New Group twice. Rename the first New Group (Custom) as "Respond
(Custom)" and the second as "Reply all (Custom)."

At the top of the left pane, click Main Tabs from "Choose commands from."

In the left pane, expand Home (Mail) and Respond.

In the right pane, select Respond (Custom).

Add the commands "Post reply," "Reply," "Forward," "Meeting,"

"IM," and "More" from left frame to Respond (Custom) in the right pane one by
one.

In the right pane, choose "Reply all (Custom)."

Add the command Reply All to "Reply all (Custom)."

Select "Reply all (Custom)" and use the Down button to move it under
"Send/Receive (IMAP/POP)."

Click OK.

You can alter the steps above to eliminate the Reply All button altogether by
creating only one New Group named Respond (Custom) that lacks the Reply All
option. In all three versions of Outlook, you can still reply to all by pressing Ctrl-
Shift-R, or by clicking Actions > Reply to All in Outlook 2003 and 2007.

Last December, CNET’s Rob Lightner described Microsoft’s free NoReplyAll add-on
for Outlook 2010 that lets the sender of a message disable the Reply to All and
Forward functions for the message. As Rob explains, the program includes a feature
that lets you disable reply all for all the messages you receive.
ATTACHMENT  2
RICHARD H. KNOX, Plaintiff v. BISHOP ANTHONY R. PATTERSON, Defendant

No. 2421

COMMON PLEAS COURT OF PHILADELPHIA COUNTY, PENNSYLVANIA


January 11, 2011, Decided
January 13, 2011, Filed

CASE SUMMARY:

PROCEDURAL POSTURE: The court set forth its opinion in support of its order denying petitioner attorney's motion open/strike judgment. Petitioner had brought a breach of contract action against defendant former client. A judgment of non pros was entered, pursuant to Pa.R.C.P. No. 1303, after petitioner failed to appear twice for arbitration.

OVERVIEW: The court noted that the first time petitioner failed to appear for the arbitration scheduled in the matter, he insisted to the court that he would be more careful and had never made a mistake in all of his years practicing law. However, a new arbitration date was set and electronic notice was sent, which petitioner claimed he did not receive because he had not checked his e-mail for over four months and his legal secretary, his wife, was temporarily disabled and had not checked his electronic communications either. The court found that petitioner's excuses lacked merit as the court had a mandatory electronic e-filing notification system, which was required of all attorneys to comply. Further, petitioner knew that his wife was temporarily disabled and could not check his electronic notices, yet he failed to ensure he checked his electronic communications somehow during that time period.

OUTCOME: The court recommended that its order denying the petition to open/strike judgment be affirmed.

LexisNexis(R) Headnotes

Civil Procedure > Judgments > Relief From Judgment > Extraordinary Circumstances
Civil Procedure > Judgments > Relief From Judgment > Motions to Vacate

[HN1] A petition to open a judgment is addressed to the equitable powers of the court and is a matter of judicial discretion. The court will only exercise this discretion when (1) the petition has been promptly filed; (2) a meritorious defense can be shown; and (3) the failure to appear can be excused.

Civil Procedure > Pretrial Judgments > Default > Entry of Default Judgments
Civil Procedure > Pretrial Judgments > Default > Relief From Default
Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

[HN2] A lower court's ruling refusing to open a default judgment will not be reversed unless there has been an error of law or a clear, manifest abuse of discretion.

Civil Procedure > Judgments > Relief From Judgment > Extraordinary Circumstances
Civil Procedure > Judgments > Relief From Judgment > Motions to Alter & Amend
Civil Procedure > Judgments > Relief From Judgment > Motions to Vacate

[HN3] A petition to open judgment must be filed within 10 days after the judgment is entered on the docket. Pa.R.C.P. No. 237.3(b).
Chapter 2

Civil Procedure > Judgments > Relief From Judgment > Extraordinary Circumstances

Civil Procedure > Judgments > Relief From Judgment > Motions to Alter & Amend
Civil Procedure > Judgments > Relief From Judgment > Motions to Vacate

[HN4] Post-trial relief may be granted if a satisfactory excuse is given. An excuse is satisfactory if it would constitute a valid ground for a continuance. Examples include illness of counsel, a party, or a witness. Lack of notice after the paper mailing of an arbitration notice has been deemed an unsatisfactory excuse for post-trial relief.

COUNSEL: [**] For Plaintiff: Mr. Richard H. Knox, Philadelphia, PA.

For Defendant: Mr. Willie Pollins, Philadelphia, PA.

JUDGES: Sandra Mazer Moss, J.

OPINION BY: Sandra Mazer Moss

OPINION

[**151] Sandra Mazer Moss, J.

The issue is whether the Petition to Open/Strike Judgment of May 24, 2010 should have been granted. For the foregoing reasons, We denied said Petition.

Facts and Procedural History

Petitioner Richard H. Knox ("Knox") is an octogenarian attorney representing himself, who on January 22, 2009 filed a Complaint alleging breach of contract against Defendant Bishop Anthony Patterson ("Patterson") for alleged non-payment of his legal fees. Knox was retained in 2008 for a matter dealing with the transfer of money from a decedent's estate. Whether Patterson was retained as a principal or an agent of the Church is disputed.

Originally, a Judgment of Non Pros was entered, pursuant to Pa. R. C. P. 1303(b)(2), when all parties failed to appear for the September 15, 2010 arbitration. This Judgment was later stricken on February 27, 2010 when Knox filed a Motion to Vacate judgment after admitting to having made a scheduling error. In that Petition Knox claimed this was the first time he made such an error in an arbitration hearing or in [**2] a regular trial case. See Knox's First Petition of Relief from Non-Pros, 09/29/09, ¶3. Moreover, Knox promised to be more careful and to not make the same [**152] error again. Id.

A new arbitration date was set for May 24, 2010. All parties were electronically noticed on March 2, 2010. Knox again failed to appear for arbitration. A second Judgment of Non Pros was entered that day. Subsequently, Knox filed a Petition to Strike/Open Judgment on June 17, 2010. While this Petition was originally granted, a subsequent reconsideration motion and oral argument led the Court on September 28, 2010 to deny Knox's Petition. Knox now appeals.

Knox originally argued that he had not received notice of the arbitration. See Knox's Second Petition of Relief from Non-Pros, 06/17/10, ¶¶ 3, 7. However, Patterson denied that Knox lacked notice and attached the electronic filing notifying the parties of the arbitration date. See Patterson Answer to Second Petition of Relief from Non-Pros, 07/07/10, ¶2, Ex. A. Subsequently, Knox argued while he has been practicing law for over fifty (50) years, he is not proficient in electronic communication and not familiar with e-mail. See Knox Supplemental Petition, Non Pros [**5] Tune To Open/Strike Judgment, 07/13/10, ¶¶ 8-10. He stated when he became aware of the second Non Pros Judgment, he had not checked his e-mail for four (4) months, despite the mandatory e-filing system in Philadelphia, of which he claims to have not been aware. See generally id. Knox's wife was his legal secretary for [**153] thirty-six (36) years and performed all the electronic work. Id. ¶ 4. However, during the relevant period, he claims she was absent from work because of a temporary disabling injury. See id. ¶¶ 5-6. Therefore, P argues he never received notice of the second arbitration on May 24, 2010. Id. ¶ 9.

1 The Court implemented the electronic filing system in 2008. It became a mandatory requirement on January 5, 2009 at 9:00 AM, pursuant to Philadelphia Local Rule No. 205.4.

Discussion

The Petition to Open/Strike Judgment of May 24, 2010 should be denied. [HN1] "A petition to open a judgment is addressed to the equitable powers of the court and is a matter of judicial discretion. Schuett v. Erie Ins. Exchange, 505 Pa. 90, 477 A.2d 471, 472 (Pa. 1984) (internal citations omitted). "The court will only exercise this discretion when (1) the petition has been promptly filed; (2) a meritorious defense can [**4] be shown; and (3) the failure to appear can be excused." Id. (first emphasis added; second emphasis original). [HN2] "A lower court's ruling refusing to open a default judgment will not be reversed unless there has been an error of law or a clear, manifest abuse of discretion." Id. (citing Bank v. Ford Motor Co., 446 Pa. 137, 285 A.2d 128, 131 (1971))."

This Court did not abuse its discretion and did not make a clear error of law. There are at least two strong reasons why this Court properly exercised its discretion...
to deny Knox's Petition. First, Knox's Petition was not timely and fails the first prong of the three part test.

[HIN3] A Petition to Open Judgment must be filed within ten days after the judgment is entered on the docket. See Pa. R.C.P. 237.3(b). The [**154] second Judgment of Non-Pros was entered and docketed May 24, 2010. Electronic notice of this judgment was given June 1, 2010. Knox filed his Petition June 17, 2010. This was seventeen days after he received electronic notice and well past the ten day deadline. Therefore, Knox's Petition was untimely. Under the conjunctive three pronged test, Knox's Petition failed the first prong.

Second, Knox failed the third prong in providing a valid excuse for [**3] his failure to appear. [HIN4] Post-trial relief may be granted if a satisfactory excuse is given. Braza v. Don Farr Moving & Storage Co., 2003 PA Super 252, 828 A.2d 1131, 1134 (Pa. Super. 2003) (citing Pa. R. C. P. 218). An excuse is satisfactory if it would constitute a valid ground for a continuance. Id. Examples include illness of counsel, a party, or a witness, etc. Id. at 1135 (internal citations omitted). Lack of notice after the paper mailing of an arbitration notice has been deemed an unsatisfactory excuse for post-trial relief. Id.

While Farr can technically be distinguished because it dealt with a mailed, hard-copy, the case is nevertheless analogous. Considering e-filing and electronic noticing is now the mandatory system in Philadelphia County, e-mail notification is analogous to the Farr paper mailing. Moreover, Knox does not allege he didn't receive the Court's email notification. Rather, he asserts lack of notice because he did not know how to retrieve this email.

Digging deeper, Knox's negligence is even more apparent. First, Knox he knew his wife (i.e. secretary) was temporarily disabled and could not check electronic [**155] notices. Knox, a very experienced attorney with an active caseload, knowing [**6] he was computer illiterate, should have ensured any important communication was discovered during her absence. First, he could have learned Philadelphia's e-filing notification system. Second, he could have hired a temporary secretary to fill the gap. Knox, however, did nothing. He just let his electronic communications pile up until his wife returned.

What makes Knox's nonfeasance more egregious is that it was the second time it happened. Moreover, he promised to be "more careful" after his first Petition to Open was granted February 27, 2010. Knox knew to expect notification of a new arbitration date. Yet he never bothered to inquire after a hard-copy notification did not arrive. At the very least, an individual embarrassed about missing an earlier arbitration date and given a second chance should have followed through on his promise to be "more careful" by taking extra precautions to appear at a second arbitration. A simple telephone call to the Court during the almost three month period from March 2, 2010 to May 24, 2010 might have avoided this whole predicament. Therefore, Knox did not provide a satisfactory excuse for missing the second arbitration date and thus fails the third [**7] prong.

Knox may or may not have a meritorious claim for the alleged non-payment of his legal fees. However, we do not [**156] have to reach that question because Petitioner has failed to satisfy two of the three required prongs.

Conclusion

For the reasons stated above, Our Order denying the Petitioner's Petition to Open/Strike Judgment of May 24, 2010 should not be disturbed.

BY THE COURT:

/ls/ Sandra Mazer Moss

Sandra Mazer Moss, J.
I Downloaded the Information That Facebook Has on Me. Yikes.

By Brian X. Chen
April 11, 2018

When I downloaded a copy of my Facebook data last week, I didn't expect to see much. My profile is sparse, I rarely post anything on the site, and I seldom click on ads. (I'm what some call a Facebook “lurker.”)

But when I opened my file, it was like opening Pandora's box.

With a few clicks, I learned that about 500 advertisers — many that I had never heard of, like Bad Dad, a motorcycle parts store, and Space Jesus, an electronica band — had my contact information, which could include my email address, phone number and full name. Facebook also had my entire phone book, including the number to ring my apartment buzzer. The social network had even kept a permanent record of the roughly 100 people I had deleted from my friends list over the last 14 years, including my exes.

There was so much that Facebook knew about me — more than I wanted to know. But after looking at the totality of what the Silicon Valley company had obtained about yours truly, I decided to try to better understand how and why my data was collected and stored. I also sought to find out how much of my data could be removed.

How Facebook collects and treats personal information was central this week when Mark Zuckerberg, the company's chief executive, answered questions in Congress about data privacy and his responsibilities to users. During his testimony, Mr. Zuckerberg repeatedly said Facebook has a tool for downloading your data that “allows people to see and take out all the information they’ve put into Facebook.” (Those who want to download their own Facebook data can use this link.)

But that’s an overstatement. Most basic information, like my birthday, could not be deleted. More important, the pieces of data that I found objectionable, like the record of people I had unfriended, could not be removed from Facebook, either.

“They don't delete anything, and that's a general policy,” said Gabriel Weinberg, the founder of DuckDuckGo, which offers internet privacy tools. He added that data was kept around to eventually help brands serve targeted ads.

Beth Gautier, a Facebook spokeswoman, put it this way: “When you delete something, we remove it so it’s not visible or accessible on Facebook.” She added: “You can also delete your account whenever you want. It may take up to 90 days to delete all backups of data on our servers.”

Digging through your Facebook files is an exercise I highly recommend if you care about how your personal information is stored and used. Here’s what I learned.

**Facebook Retains More Data Than We Think**

When you download a copy of your Facebook data, you will see a folder containing multiple subfolders and files. The most important one is the “index” file, which is essentially a raw data set of your Facebook account, where you can click through your profile, friends list, timeline and messages, among other features.

One surprising part of my index file was a section called Contact Info. This contained the 764 names and phone numbers of everyone in my iPhone’s address book. Upon closer inspection, it turned out that Facebook had stored my entire phone book because I had uploaded it when setting up Facebook’s messaging app, Messenger.

This was unsettling. I had hoped Messenger would use my contacts list to find others who were also using the app so that I could connect with them easily — and hold on to the relevant contact information only for the people who were on Messenger. Yet Facebook kept the entire list, including the phone numbers for my car mechanic, my apartment door buzzer and a pizzeria.

This felt unnecessary, though Facebook holds on to your phone book partly to keep it synchronized with your contacts list on Messenger and to help find people who newly sign up for the messaging service. I opted to turn off synchronizing and deleted all my phone book entries.

My Facebook data also revealed how little the social network forgets. For instance, in addition to recording the exact date I signed up for Facebook in 2004, there was a record of when I deactivated Facebook in October 2010, only to reactivate it four days later — something I barely remember doing.

Facebook also kept a history of each time I opened Facebook over the last two years, including which device and web browser I used. On some days, it even logged my locations, like when I was at a hospital two years ago or when I visited Tokyo last year.

Facebook keeps a log of this data as a security measure to flag suspicious logins from unknown devices or locations, similar to how banks send a fraud alert when your credit card number is used in a suspicious location. This practice seemed reasonable, so I didn’t try to purge this information.

But what bothered me was the data that I had explicitly deleted but that lingered in plain sight. On my friends list, Facebook had a record of “Removed Friends,” a dossier of the 112 people I had removed along with the date I clicked the “Unfriend” button. Why should Facebook remember the people I’ve cut off from my life?

Facebook’s explanation was dissatisfying. The company said it might use my list of deleted friends so that those people did not appear in my feed with the feature “On This Day,” which resurfaces memories from years past to help people reminisce. I’d rather have the option to delete the list of deleted friends for good.

Your Facebook account keeps a record not only of ads you have clicked on, but also of advertisers that have your contact information, which can also be viewed in your archive.

**The Ad Industry Has Eyes Everywhere**

What Facebook retained about me isn’t remotely as creepy as the sheer number of advertisers that have my information in their databases. I found this out when I clicked on the Ads section in my Facebook file, which loaded a history of the dozen ads I had clicked on while browsing the social network.

Lower down, there was a section titled “Advertisers with your contact info,” followed by a list of roughly 500 brands, the overwhelming majority of which I had never interacted with. Some brands sounded obscure and sketchy — one was called “Microphone Check,” which turned out to be a radio show. Other brands were more familiar, like Victoria’s Secret Pink, Good Eggs or AARP.

Facebook said unfamiliar advertisers might appear on the list because they might have obtained my contact information from elsewhere, compiled it into a list of people they wanted to target and uploaded that list into Facebook. Brands can upload their customer lists into a tool called Custom Audiences, which helps them find those same people’s Facebook profiles to serve them ads.

Brands can obtain your information in many different ways. Those include:

- Buying information from a data provider like Acxiom, which has amassed one of the world’s largest commercial databases on consumers. Brands can buy different types of customer data sets from a provider, like contact information for people who belong to a certain demographic, and take that information to Facebook to serve targeted ads, said Michael Priem, chief executive of Modern Impact, an advertising firm in Minneapolis.

Last month, Facebook announced that it was limiting its practice of allowing advertisers to target ads using information from third-party data brokers like Acxiom.

- Using tracking technologies like web cookies and invisible pixels that load in your web browser to collect information about your browsing activities. There are many different trackers on the web, and Facebook offers 10 different trackers to help brands harvest your information, according to Ghostery, which offers privacy tools that block ads and trackers. The advertisers can take some pieces of data that they have collected with trackers and upload them into the Custom Audiences tool to serve ads to you on Facebook.

- Getting your information in simpler ways, too. Someone you shared information with could share it with another entity. Your credit card loyalty program, for example, could share your information with a hotel chain, and that hotel chain could serve you ads on Facebook.

The upshot? Even a Facebook lurker, like myself, who has barely clicked on any digital ads can have personal information exposed to an enormous number of advertisers. This was not entirely surprising, but seeing the list of unfamiliar brands with my contact information in my Facebook file was a dose of reality.

I tried to contact some of these advertisers, like Very Important Puppets, a toymaker, to ask them about what they did with my data. They did not respond.

**What About Google?**

Let’s be clear: Facebook is just the tip of the iceberg when it comes to what information tech companies have collected on me.

Knowing this, I also downloaded copies of my Google data with a tool called Google Takeout. The data sets were exponentially larger than my Facebook data. For my personal email account alone, Google’s archive of my data measured eight gigabytes, enough to hold about 2,000 hours of music. By comparison, my Facebook data was about 650 megabytes, the equivalent of about 160 hours of music.

Here was the biggest surprise in what Google collected on me: In a folder labeled Ads, Google kept a history of many news articles I had read, like a Newsweek story about Apple employees walking into glass walls and a New York Times story about the editor of our Modern Love column. I didn’t click on ads for either of these stories, but the search giant logged them because the sites had loaded ads served by Google.

In another folder, labeled Android, Google had a record of apps I had opened on an Android phone since 2015, along with the date and time. This felt like an extraordinary level of detail.

Google did not immediately respond to a request for comment.

On a brighter note, I downloaded an archive of my LinkedIn data. The data set was less than half a megabyte and contained exactly what I had expected: spreadsheets of my LinkedIn contacts and information I had added to my profile.

Yet that offered little solace. Be warned: Once you see the vast amount of data that has been collected about you, you won’t be able to unsee it.

Brian X. Chen, our lead consumer technology reporter, writes Tech Fix, a column about solving tech problems like sluggish Wi-Fi, poor smartphone battery life and the complexity of taking your smartphone abroad. What frustrates you about your tech? Send your suggestions for future Tech Fix columns to brian.chen@nytimes.com.

A version of this article appears in print on April 12, 2018, on Page A1 of the New York edition with the headline: Remember Those Friends You Deleted Long Ago? Facebook Does
FORMAL OPINION 2014-300

ETHICAL OBLIGATIONS FOR ATTORNEYS USING SOCIAL MEDIA

I. Introduction and Summary

“Social media” or “social networking” websites permit users to join online communities where they can share information, ideas, messages, and other content using words, photographs, videos and other methods of communication. There are thousands of these websites, which vary in form and content. Most of these sites, such as Facebook, LinkedIn, and Twitter, are designed to permit users to share information about their personal and professional activities and interests. As of January 2014, an estimated 74 percent of adults age 18 and over use these sites.¹

Attorneys and clients use these websites for both business and personal reasons, and their use raises ethical concerns, both in how attorneys use the sites and in the advice attorneys provide to clients who use them. The Rules of Professional Conduct apply to all of these uses.

The issues raised by the use of social networking websites are highly fact-specific, although certain general principles apply. This Opinion reiterates the guidance provided in several previous ethics opinions in this developing area and provides a broad overview of the ethical concerns raised by social media, including the following:

1. Whether attorneys may advise clients about the content of the clients’ social networking websites, including removing or adding information.
2. Whether attorneys may connect with a client or former client on a social networking website.
3. Whether attorneys may contact a represented person through a social networking website.
4. Whether attorneys may contact an unrepresented person through a social networking website, or use a pretextual basis for viewing information on a social networking site that would otherwise be private/unavailable to the public.
5. Whether attorneys may use information on a social networking website in client-related matters.
6. Whether a client who asks to write a review of an attorney, or who writes a review of an attorney, has caused the attorney to violate any Rule of Professional Conduct.
7. Whether attorneys may comment on or respond to reviews or endorsements.
8. Whether attorneys may endorse other attorneys on a social networking website.
9. Whether attorneys may review a juror’s Internet presence.

¹ http://www.pewinternet.org/fact-sheets/social-networking-fact-sheet/
10. Whether attorneys may connect with judges on social networking websites.

This Committee concludes that:

1. Attorneys may advise clients about the content of their social networking websites, including the removal or addition of information.
2. Attorneys may connect with clients and former clients.
3. Attorneys may not contact a represented person through social networking websites.
4. Although attorneys may contact an unrepresented person through social networking websites, they may not use a pretextual basis for viewing otherwise private information on social networking websites.
5. Attorneys may use information on social networking websites in a dispute.
6. Attorneys may accept client reviews but must monitor those reviews for accuracy.
7. Attorneys may generally comment or respond to reviews or endorsements, and may solicit such endorsements.
8. Attorneys may generally endorse other attorneys on social networking websites.
9. Attorneys may review a juror’s Internet presence.
10. Attorneys may connect with judges on social networking websites provided the purpose is not to influence the judge in carrying out his or her official duties.

This Opinion addresses social media profiles and websites used by lawyers for business purposes, but does not address the issues relating to attorney advertising and marketing on social networking websites. While a social media profile that is used exclusively for personal purposes (i.e., to maintain relationships with friends and family) may not be subject to the Rules of Professional Conduct relating to advertising and soliciting, the Committee emphasizes that attorneys should be conscious that clients and others may discover those websites, and that information contained on those websites is likely to be subject to the Rules of Professional Conduct. Any social media activities or websites that promote, mention or otherwise bring attention to any law firm or to an attorney in his or her role as an attorney are subject to and must comply with the Rules.

II. **Background**

A social networking website provides a virtual community for people to share their daily activities with family, friends and the public, to share their interest in a particular topic, or to increase their circle of acquaintances. There are dating sites, friendship sites, sites with business purposes, and hybrids that offer numerous combinations of these characteristics. Facebook is currently the leading personal site, and LinkedIn is currently the leading business site. Other social networking sites include, but are not limited to, Twitter, Myspace, Google+, Instagram, AVVO, Vine, YouTube, Pinterest, BlogSpot, and Foursquare. On these sites, members create their own online “profiles,” which may include biographical data, pictures and any other information they choose to post.

Members of social networking websites often communicate with each other by making their latest thoughts public in a blog-like format or via e-mail, instant messaging, photographs, videos, voice or videoconferencing to selected members or to the public at large. These services permit members to locate and invite other members into their personal networks (to “friend” them) as well as to invite friends of friends or others.
Social networking websites have varying levels of privacy settings. Some sites allow users to restrict who may see what types of content, or to limit different information to certain defined groups, such as the “public,” “friends,” and “others.” For example, on Facebook, a user may make all posts available only to friends who have requested access. A less restrictive privacy setting allows “friends of friends” to see content posted by a specific user. A still more publicly-accessible setting allows anyone with an account to view all of a person’s posts and other items.

These are just a few of the main features of social networking websites. This Opinion does not address every feature of every social networking website, which change frequently. Instead, this Opinion gives a broad overview of the main ethical issues that lawyers may face when using social media and when advising clients who use social media.

III. Discussion

A. Pennsylvania Rules of Professional Conduct: Mandatory and Prohibited Conduct

Each of the issues raised in this Opinion implicates various Rules of Professional Conduct that affect an attorney’s responsibilities towards clients, potential clients, and other parties. Although no Pennsylvania Rule of Professional Conduct specifically addresses social networking websites, this Committee’s conclusions are based upon the existing rules. The Rules implicated by these issues include:

- Rule 1.1 ("Competence")
- Rule 1.6 ("Confidentiality of Information")
- Rule 3.3 ("Candor Toward the Tribunal")
- Rule 3.4 ("Fairness to Opposing Party and Counsel")
- Rule 3.5 ("Impartiality and Decorum of the Tribunal")
- Rule 3.6 ("Trial Publicity")
- Rule 4.1 ("Truthfulness in Statements to Others")
- Rule 4.2 ("Communication with Person Represented by Counsel")
- Rule 4.3 ("Dealing with Unrepresented Person")
- Rule 8.2 ("Statements Concerning Judges and Other Adjudicatory Officers")
- Rule 8.4 ("Misconduct")

The Rules define the requirements and limitations on an attorney’s conduct that may subject the attorney to disciplinary sanctions. While the Comments may assist an attorney in understanding or arguing the intention of the Rules, they are not enforceable in disciplinary proceedings.

B. General Rules for Attorneys Using Social Media and Advising Clients About Social Media

Lawyers must be aware of how these websites operate and the issues they raise in order to represent clients whose matters may be impacted by content posted on social media websites. Lawyers should also understand the manner in which postings are either public or private. A few Rules of
Professional Conduct are particularly important in this context and can be generally applied throughout this Opinion.

Rule 1.1 provides:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

As a general rule, in order to provide competent representation under Rule 1.1, a lawyer should advise clients about the content of their social media accounts, including privacy issues, as well as their clients’ obligation to preserve information that may be relevant to their legal disputes.

Comment [8] to Rule 1.1 further explains that, “To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology…” Thus, in order to provide competent representation in accordance with Rule 1.1, a lawyer should (1) have a basic knowledge of how social media websites work, and (2) advise clients about the issues that may arise as a result of their use of these websites.

Another Rule applicable in almost every context, and particularly relevant when social media is involved, is Rule 8.4 (“Misconduct”), which states in relevant part:

It is professional misconduct for a lawyer to:

…

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

This Rule prohibits “dishonesty, fraud, deceit or misrepresentation.” Social networking easily lends itself to dishonesty and misrepresentation because of how simple it is to create a false profile or to post information that is either inaccurate or exaggerated. This Opinion frequently refers to Rule 8.4, because its basic premise permeates much of the discussion surrounding a lawyer’s ethical use of social media.

C. Advising Clients on the Content of their Social Media Accounts

As the use of social media expands, so does its place in legal disputes. This is based on the fact that many clients seeking legal advice have at least one account on a social networking site. While an attorney is not responsible for the information posted by a client on the client’s social media profile, an attorney may and often should advise a client about the content on the client’s profile.

Against this background, this Opinion now addresses the series of questions raised above.

1. Attorneys May, Subject to Certain Limitations, Advise Clients About The Content Of Their Social Networking Websites

Tracking a client’s activity on social media may be appropriate for an attorney to remain informed about developments bearing on the client’s legal dispute. An attorney can reasonably expect that opposing counsel will monitor a client’s social media account.
For example, in a Miami, Florida case, a man received an $80,000.00 confidential settlement payment for his age discrimination claim against his former employer. However, he forfeited that settlement after his daughter posted on her Facebook page “Mama and Papa Snay won the case against Gulliver. Gulliver is now officially paying for my vacation to Europe this summer. SUCK IT.” The Facebook post violated the confidentiality agreement in the settlement and, therefore, cost the Plaintiff $80,000.00.

The Virginia State Bar Disciplinary Board suspended an attorney for five years for (1) instructing his client to delete certain damaging photographs from his Facebook account, (2) withholding the photographs from opposing counsel, and (3) withholding from the trial court the emails discussing the plan to delete the information from the client’s Facebook page. The Virginia State Bar Disciplinary Board based the suspension upon the attorney’s violations of Virginia’s rules on candor toward the tribunal, fairness to opposing counsel, and misconduct. In addition, the trial court imposed $722,000 in sanctions ($542,000 upon the lawyer and $180,000 upon his client) to compensate opposing counsel for their legal fees.

While these may appear to be extreme cases, they are indicative of the activity that occur involving social media. As a result, lawyers should be certain that their clients are aware of the ramifications of their social media actions. Lawyers should also be aware of the consequences of their own actions and instructions when dealing with a client’s social media account.

Three Rules of Professional Conduct are particularly important when addressing a lawyer’s duties relating to a client’s use of social media.

Rule 3.3 states:

(a) A lawyer shall not knowingly:
   (1) make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; …
   (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer’s client, or a witness called by the lawyer, has offered material evidence before a tribunal or in an ancillary proceeding conducted pursuant to a tribunal’s adjudicative authority, such as a deposition, and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal

2 “Girl costs father $80,000 with ‘SUCK IT’ Facebook Post, March 4, 2014: http://www.cnn.com/2014/03/02/us/facebook-post-costs-father/
3 In the Matter of Matthew B. Murray, VSB Nos. 11-070-088405 and 11-070-088422 (June 9, 2013)
4 Lester v. Allied Concrete Co., Nos. CL08-150 and CL09-223 (Charlotte, VA Circuit Court, October 21, 2011)
or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

Rule 3.4 states:

A lawyer shall not:

(a) unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value or assist another person to do any such act;

Rule 4.1 states:

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or
(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid aiding and abetting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

The Rules do not prohibit an attorney from advising clients about their social networking websites. In fact, and to the contrary, a competent lawyer should advise clients about the content that they post publicly online and how it can affect a case or other legal dispute.

The Philadelphia Bar Association Professional Guidance Committee issued Opinion 2014-5, concluding that a lawyer may advise a client to change the privacy settings on the client’s social media page but may not instruct a client to destroy any relevant content on the page. Additionally, a lawyer must respond to a discovery request with any relevant social media content posted by the client. The Committee found that changing a client’s profile to “private” simply restricts access to the content of the page but does not completely prevent the opposing party from accessing the information. This Committee agrees with and adopts the guidance provided in the Philadelphia Bar Association Opinion.

The Philadelphia Committee also cited the Commercial and Federal Litigation Section of the New York State Bar Association and its “Social Media Guidelines,” which concluded that a lawyer may advise a client about the content of the client’s social media page, to wit:

- A lawyer may advise a client as to what content may be maintained or made private on her social media account, as well as to what content may be “taken down” or removed, whether posted by the client or someone else, as long as there is no violation of common law or any statute, rule, or regulation relating to the preservation of information.
- Unless an appropriate record of the social media information or data is preserved, a party or nonparty may not delete information from a social media profile that is subject
to a duty to preserve. This duty arises when the potential for litigation or other conflicts arises.\(^5\)

In 2014 Formal Ethics Opinion 5, the North Carolina State Bar concluded that a lawyer may advise a client to remove information on social media if not spoliation or otherwise illegal.\(^6\)

This Committee agrees with and adopts these recommendations, which are consistent with Rule 3.4(a)’s prohibition against “unlawfully alter[ing], destroy[ing] or conceal[ing] a document or other material having potential evidentiary value.” Thus, a lawyer may not instruct a client to alter, destroy, or conceal any relevant information, regardless whether that information is in paper or digital form. A lawyer may, however, instruct a client to delete information that may be damaging from the client’s page, provided the conduct does not constitute spoliation or is otherwise illegal, but must take appropriate action to preserve the information in the event it is discoverable or becomes relevant to the client’s matter.

Similarly, an attorney may not advise a client to post false or misleading information on a social networking website; nor may an attorney offer evidence from a social networking website that the attorney knows is false. Rule 4.1(a) prohibits an attorney from making “a false statement of material fact or law.” If an attorney knows that information on a social networking site is false, the attorney may not present that as truthful information. It has become common practice for lawyers to advise clients to refrain from posting any information relevant to a case on any website, and to refrain from using these websites until the case concludes.

2. **Attorneys May Ethically Connect with Clients or Former Clients on Social Media**

Social media provides many opportunities for attorneys to contact and connect with clients and other relevant persons. While the mode of communication has changed, the Rules that generally address an attorney’s communications with others still apply.

There is no *per se* prohibition on an attorney connecting with a client or former client on social media. However, an attorney must continue to adhere to the Rules and maintain a professional relationship with clients. If an attorney connects with clients or former clients on social networking sites, the attorney should be aware that his posts may be viewed by clients and former clients.

Although this Committee does not recommend doing so, if an attorney uses social media to communicate with a client relating to representation of the client, the attorney should retain records of those communications containing legal advice. As outlined below, an attorney must not reveal confidential client information on social media. While the Rules do not prohibit connecting with clients on social media, social media may not be the best platform to connect with clients, particularly in light of the difficulties that often occur when individuals attempt to adjust their privacy settings.

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\(^5\) *Social Media Ethics Guidelines*, The Commercial and Federal Litigation Section of the New York State Bar Association, March 18, 2014 at 11 (footnote omitted).

3. **Attorneys May Not Ethically Contact a Represented Person Through a Social Networking Website**

Attorneys may also use social media to contact relevant persons in a conflict, but within limitations. As a general rule, if contacting a party using other forms of communication would be prohibited,\(^7\) it would also be prohibited while using social networking websites.

Rule 4.2 states:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Regardless of the method of communication, Rule 4.2 clearly states that an attorney may not communicate with a represented party without the permission of that party’s lawyer. Social networking websites increase the number of ways to connect with another person but the essence of that connection is still a communication. Contacting a represented party on social media, even without any pretext, is limited by the Rules.

The Philadelphia Bar Association Professional Guidance Committee concluded in Opinion 2009-02,\(^8\) that an attorney may not use an intermediary to access a witness’ social media profiles. The inquirer sought access to a witness’ social media account for impeachment purposes. The inquirer wanted to ask a third person, *i.e.*, “someone whose name the witness will not recognize,” to go to Facebook and Myspace and attempt to “friend” the witness to gain access to the information on the pages. The Committee found that this type of pretextual “friending” violates Rule 8.4(c), which prohibits the use of deception. The action also would violate Rule 4.1 (discussed below) because such conduct amounts to a false statement of material fact to the witness.

The San Diego County Bar Legal Ethics Committee issued similar guidance in Ethics Opinion 2011-2,\(^9\) concluding that an attorney is prohibited from making an *ex parte* “friend” request of a represented party to view the non-public portions of a social networking website. Even if the attorney clearly states his name and purpose for the request, the conduct violates the Rule against communication with a represented party. Consistent with this Opinion, this Committee also finds that “friending” a represented party violates Rule 4.2.

While it would be forbidden for a lawyer to “friend” a represented party, it would be permissible for the lawyer to access the public portions of the represented person’s social networking site, just as it would be permissible to review any other public statements the person makes. The New York State

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\(^7\) See, *e.g.*, Formal Opinion 90-142 (updated by 2005-200), in which this Committee concluded that, unless a lawyer has the consent of opposing counsel or is authorized by law to do so, in representing a client, a lawyer shall not conduct *ex parte* communications about the matter of the representation with present managerial employees of an opposing party, and with any other employee whose acts or omissions may be imputed to the corporation for purposes of civil or criminal liability.


Bar Association Committee on Professional Ethics issued Opinion 843, concluded that lawyers may access the public portions of other parties’ social media accounts for use in litigation, particularly impeachment. The Committee found that there is no deception in accessing a public website; it also cautioned, however, that a lawyer should not request additional access to the social networking website nor have someone else do so.

This Committee agrees that accessing the public portion of a represented party’s social media site does not involve an improper contact with the represented party because the page is publicly accessible under Rule 4.2. However, a request to access the represented party’s private page is a prohibited communication under Rule 4.2.

4. **Attorneys May Generally Contact an Unrepresented Person Through a Social Networking Website But May Not Use a Pretextual Basis For Viewing Otherwise Private Information**

Communication with an unrepresented party through a social networking website is governed by the same general rule that, if the contact is prohibited using other forms of communication, then it is also prohibited using social media.

Rule 4.3 states in relevant part:

(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. …

(c) When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer should make reasonable efforts to correct the misunderstanding.

Connecting with an unrepresented person through a social networking website may be ethical if the attorney clearly identifies his or her identity and purpose. Particularly when using social networking websites, an attorney may not use a pretextual basis when attempting to contact the unrepresented person. Rule 4.3(a) instructs that “a lawyer shall not state or imply that the lawyer is disinterested.” Additionally, Rule 8.4(c) (discussed above) prohibits a lawyer from using deception. For example, an attorney may not use another person’s name or online identity to contact an unrepresented person; rather, the attorney must use his or her own name and state the purpose for contacting the individual.

In Ohio, a former prosecutor was fired after he posed as a woman on a fake Facebook account in order to influence an accused killer’s alibi witnesses to change their testimony. He was fired for “unethical behavior,” which is also consistent with the Pennsylvania Rules. Contacting witnesses under false pretenses constitutes deception.

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11 Attorneys may be prohibited from contacting certain persons, despite their lack of representation. This portion of this Opinion only addresses communication and contact with persons with whom such contact is not otherwise prohibited by the Rules, statute or some other basis.

Many Ethics Committees have addressed whether an attorney may contact an unrepresented person on social media. The Kentucky Bar Association Ethics Committee\textsuperscript{13} concluded that a lawyer may access the social networking site of a third person to benefit a client within the limits of the Rules. The Committee noted that even though social networking sites are a new medium of communication, “[t]he underlying principles of fairness and honesty are the same, regardless of context.”\textsuperscript{14} The Committee found that the Rules would not permit a lawyer to communicate through social media with a represented party. But, the Rules do not prohibit social media communication with an unrepresented party provided the lawyer is not deceitful or dishonest in the communication.

As noted above, in Opinion 2009-02,\textsuperscript{15} the Philadelphia Bar Association Professional Guidance Committee concluded that an attorney may not access a witness’ social media profiles by deceptively using a third party intermediary. Use of an alias or other deceptive conduct violates the Rules as well, regardless whether it is permissible to contact a particular person.

The New Hampshire Bar Association Ethics Committee agreed with the Philadelphia Opinion in Advisory Opinion 2012-13/05,\textsuperscript{16} concluding that a lawyer may not use deception to access the private portions of an unrepresented person’s social networking account. The Committee noted, “A lawyer has a duty to investigate but also a duty to do so openly and honestly, rather than through subterfuge.”

The Oregon State Bar Legal Ethics Committee concurred with these opinions as well in Opinion 2013-189,\textsuperscript{17} concluding that a lawyer may request access to an unrepresented party’s social networking website if the lawyer is truthful and does not employ deception.

These Committees consistently conclude that a lawyer may not use deception to gain access to an unrepresented party’s page, but a lawyer may request access using his or her real name. There is, however, a split of authority among these Committees. The Philadelphia and New Hampshire Committees would further require the lawyer to state the purpose for the request, a conclusion with which this Committee agrees. These Committees found that omitting the purpose of the contact implies that the lawyer is disinterested, in violation of Rule 4.3(a).

This Committee agrees with the Philadelphia Opinion (2009-02) and concludes that a lawyer may not use deception to gain access to an unrepresented person’s social networking site. A lawyer may ethically request access to the site, however, by using the lawyer’s real name and by stating the lawyer’s purpose for the request. Omitting the purpose would imply that the lawyer is disinterested, contrary to Rule 4.3(a).

5. **Attorneys May Use Information Discovered on a Social Networking Website in a Dispute**

If a lawyer obtains information from a social networking website, that information may be used in a legal dispute provided the information was obtained ethically and consistent with other portions of

\textsuperscript{14} Id. at 2.
this Opinion. As mentioned previously, a competent lawyer has the duty to understand how social media works and how it may be used in a dispute. Because social networking websites allow users to instantaneously post information about anything the user desires in many different formats, a client’s postings on social media may potentially be used against the client’s interests. Moreover, because of the ease with which individuals can post information on social media websites, there may be an abundance of information about the user that may be discoverable if the user is ever involved in a legal dispute.

For example, in 2011, a New York court ruled against a wife’s claim for support in a matrimonial matter based upon evidence from her blog that contradicted her testimony that she was totally disabled, unable to work in any capacity, and rarely left home because she was in too much pain. The posts confirmed that the wife had started belly dancing in 2007, and the Court learned of this activity in 2009 when the husband attached the posts to his motion papers. The Court concluded that the wife’s postings were relevant and could be deemed as admissions by the wife that contradicted her claims.

Courts have, with increasing frequency, permitted information from social media sites to be used in litigation, and have granted motions to compel discovery of information on private social networking websites when the public profile shows relevant evidence may be found.

For example, in McMillen v. Hummingbird Speedway, Inc., the Court of Common Pleas of Jefferson County, Pennsylvania granted a motion to compel discovery of the private portions of a litigant’s Facebook profile after the opposing party produced evidence that the litigant may have misrepresented the extent of his injuries. In a New York case, Romano v. Steelcase Inc., the Court similarly granted a defendant’s request for access to a plaintiff’s social media accounts because the Court believed, based on the public portions of plaintiff’s account, that the information may be inconsistent with plaintiff’s claims of loss of enjoyment of life and physical injuries, thus making the social media accounts relevant.

In Largent v. Reed, a Pennsylvania Court of Common Pleas granted a discovery request for access to a personal injury plaintiff’s social media accounts. The Court engaged in a lengthy discussion of Facebook’s privacy policy and Facebook’s ability to produce subpoenaed information. The Court also ordered that plaintiff produce her login information for opposing counsel and required that she make no changes to her Facebook for thirty-five days while the defendant had access to the account.

Conversely, in McCann v. Harleysville Insurance Co., a New York court denied a defendant access to a plaintiff’s social media account because there was no evidence on the public portion of the profile to suggest that there was relevant evidence on the private portion. The court characterized this request as a “fishing expedition” that was too broad to be granted. Similarly, in Trail v. Lesko, Judge R. Stanton Wettick, Jr. of the Court of Common Pleas of Allegheny County denied a party access to a

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plaintiff’s social media accounts, concluding that, under Pa. R.Civ.P. 4011(b), the defendant did not produce any relevant evidence to support its request; therefore, granting access to the plaintiff’s Facebook account would have been needlessly intrusive.

6. **Attorneys May Generally Comment or Respond to Reviews or Endorsements, and May Solicit Such Endorsements Provided the Reviews Are Monitored for Accuracy**

Some social networking websites permit a member or other person, including clients and former clients, to recommend or endorse a fellow member’s skills or accomplishments. For example, LinkedIn allows a user to “endorse” the skills another user has listed (or for skills created by the user). A user may also request that others endorse him or her for specified skills. LinkedIn also allows a user to remove or limit endorsements. Other sites allow clients to submit reviews of an attorney’s performance during representation. Some legal-specific social networking sites focus exclusively on endorsements or recommendations, while other sites with broader purposes can incorporate recommendations and endorsements into their more relaxed format. Thus, the range of sites and the manner in which information is posted varies greatly.

Although an attorney is not responsible for the content that other persons, who are not agents of the attorney, post on the attorney’s social networking websites, an attorney (1) should monitor his or her social networking websites, (2) has a duty to verify the accuracy of any information posted, and (3) has a duty to remove or correct any inaccurate endorsements. For example, if a lawyer limits his or her practice to criminal law, and is “endorsed” for his or her expertise on appellate litigation on the attorney’s LinkedIn page, the attorney has a duty to remove or correct the inaccurate endorsement on the LinkedIn page. This obligation exists regardless of whether the information was posted by the attorney, by a client, or by a third party. In addition, an attorney may be obligated to remove endorsements or other postings posted on sites that the attorney controls that refer to skills or expertise that the attorney does not possess.

Similarly, the Rules do not prohibit an attorney from soliciting reviews from clients about the attorney’s services on an attorney’s social networking site, nor do they prohibit an attorney from posting comments by others. Although requests such as these are permissible, the attorney should monitor the information so as to verify its accuracy.

Rule 7.2 states, in relevant part:

(d) No advertisement or public communication shall contain an endorsement by a celebrity or public figure.

(e) An advertisement or public communication that contains a paid endorsement shall disclose that the endorser is being paid or otherwise compensated for his or her appearance or endorsement.

Rule 7.2(d) prohibits any endorsement by a celebrity or public figure. A lawyer may not solicit an endorsement nor accept an unsolicited endorsement from a celebrity or public figure on social

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24 In *Dwyer v. Cappell*, 2014 U.S. App. LEXIS 15361 (3d Cir. N.J. Aug. 11, 2014), the Third Circuit ruled that an attorney may include accurate quotes from judicial opinions on his website, and was not required to reprint the opinion in full.
media. Additionally, Rule 7.2(e) mandates disclosure if an endorsement is made by a paid endorser. Therefore, if a lawyer provides any type of compensation for an endorsement made on social media, the endorsement must contain a disclosure of that compensation.

Even if the endorsement is not made by a celebrity or a paid endorser, the post must still be accurate. Rule 8.4(c) is again relevant in this context. This Rule prohibits lawyers from dishonest conduct and making misrepresentations. If a client or former client writes a review of a lawyer that the lawyer knows is false or misleading, then the lawyer has an obligation to correct or remove the dishonest information within a reasonable amount of time. If the lawyer is unable to correct or remove the listing, he or she should contact the person posting the information and request that the person remove or correct the item.

The North Carolina State Bar Ethics Committee issued Formal Ethics Opinion 8, concluding that a lawyer may accept recommendations from current or former clients if the lawyer monitors the recommendations to ensure that there are no ethical rule violations. The Committee discussed recommendations in the context of LinkedIn where an attorney must accept the recommendation before it is posted. Because the lawyer must review the recommendation before it can be posted, there is a smaller risk of false or misleading communication about the lawyer’s services. The Committee also concluded that a lawyer may request a recommendation from a current or former client but limited that recommendation to the client’s level of satisfaction with the lawyer-client relationship.

This Committee agrees with the North Carolina Committee’s findings. Attorneys may request or permit clients to post positive reviews, subject to the limitations of Rule 7.2, but must monitor those reviews to ensure they are truthful and accurate.

7. **Attorneys May Comment or Respond to Online Reviews or Endorsements But May Not Reveal Confidential Client Information**

Attorneys may not disclose confidential client information without the client’s consent. This obligation of confidentiality applies regardless of the context. While the issue of disclosure of confidential client information extends beyond this Opinion, the Committee emphasizes that attorneys may not reveal such information absent client approval under Rule 1.6. Thus, an attorney may not reveal confidential information while posting celebratory statements about a successful matter, nor may the attorney respond to client or other comments by revealing information subject to the attorney-client privilege. Consequently, a lawyer’s comments on social media must maintain attorney/client confidentiality, regardless of the context, absent the client’s informed consent.

This Committee has opined, in Formal Opinion 2014-200, that lawyers may not reveal client confidential information in response to a negative online review. Confidential client information is defined as “information relating to representation,” which is generally very broad. While there are

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26 Persons with profiles on LinkedIn no longer are required to approve recommendations, but are generally notified of them by the site. This change in procedure highlights the fact that sites and their policies and procedures change rapidly, and that attorneys must be aware of their listings on such sites.
certain circumstances that would allow a lawyer to reveal confidential client information, a negative online client review is not a circumstance that invokes the self-defense exception.

As Rule 1.6 states:

(a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

(b) A lawyer shall reveal such information if necessary to comply with the duties stated in Rule 3.3.

(c) A lawyer may reveal such information to the extent that the lawyer reasonably believes necessary:

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim or disciplinary proceeding against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client.

(d) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

(e) The duty not to reveal information relating to representation of a client continues after the client-lawyer relationship has terminated.

Thus, any information that an attorney posts on social media may not violate attorney/client confidentiality.

An attorney’s communications to a client are also confidential. In *Gillard v. AIG Insurance Company*, the Pennsylvania Supreme Court ruled that the attorney-client privilege extends to communications from attorney to client. The Court held that “the attorney-client privilege operates in a two-way fashion to protect confidential client-to-attorney or attorney-to-client communications made for the purpose of obtaining or providing professional legal advice.” The court noted that communications from attorney to client come with a certain expectation of privacy. These communications only originate because of a confidential communication from the client. Therefore, even revealing information that the attorney has said to a client may be considered a confidential communication, and may not be revealed on social media or elsewhere.

Responding to a negative review can be tempting but lawyers must be careful about what they write. The Hearing Board of the Illinois Attorney Registration and Disciplinary Commission reprimanded an attorney for responding to a negative client review on the lawyer referral website AVVO. In her response, the attorney mentioned confidential client information, revealing that the client had been in a physical altercation with a co-worker. While the Commission did not prohibit an attorney from

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29 Id. at 59.
responding, in general, to a negative review on a site such as AVVO, it did prohibit revealing confidential client information in that type of reply.

The Illinois disciplinary action is consistent with this Committee’s recent Opinion and with the Pennsylvania Rules. A lawyer is not permitted to reveal confidential information about a client even if the client posts a negative review about the lawyer. Rule 1.6(d) instructs a lawyer to make “reasonable efforts to prevent the inadvertent or unauthorized disclosure of . . . information relating to the representation of a client.” This means that a lawyer must be mindful of any information that the lawyer posts pertaining to a client. While a response may not contain confidential client information, an attorney is permitted to respond to reviews or endorsements on social media. These responses must be accurate and truthful representations of the lawyer’s services.

Also relevant is Rule 3.6, which states:

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

This Rule prohibits lawyers from making extrajudicial statements through public communication during an ongoing adjudication. This encompasses a lawyer updating a social media page with information relevant to the proceeding. If a lawyer’s social media account is generally accessible publicly then any posts about an ongoing proceeding would be a public communication. Therefore, lawyers should not be posting about ongoing matters on social media when such matters would reveal confidential client information.

For example, the Supreme Court of Illinois suspended an attorney for 60 days for writing about confidential client information and client proceedings on her personal blog. The attorney revealed information that made her clients easily identifiable, sometimes even using their names. The Illinois Attorney Registration and Disciplinary Commission had argued in the matter that the attorney knew or should have known that her blog was accessible to others using the internet and that she had not made any attempts to make her blog private.

Social media creates a wider platform of communication but that wider platform does not make it appropriate for an attorney to reveal confidential client information or to make otherwise prohibited extrajudicial statements on social media.

8. Attorneys May Generally Endorse Other Attorneys on Social Networking Websites

Some social networking sites allow members to endorse other members’ skills. An attorney may endorse another attorney on a social networking website provided the endorsement is accurate and not misleading. However, celebrity endorsements are not permitted nor are endorsements by judges. As previously noted, Rule 8.4(c) prohibits an attorney from being dishonest or making

31 In Re Peshek, No. M.R. 23794 (Il. 2010); Compl., In Re Peshek, Comm. No. 09 CH 89 (Ill. 2009).
misrepresentations. Therefore, when a lawyer endorses another lawyer on social media, the endorsing lawyer must only make endorsements about skills that he knows to be true.

9. **Attorneys May Review a Juror’s Internet Presence**

The use of social networking websites can also come into play when dealing with judges and juries. A lawyer may review a juror’s social media presence but may not attempt to access the private portions of a juror’s page.

Rule 3.5 states:

- A lawyer shall not:
  - seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
  - communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;
  - communicate with a juror or prospective juror after discharge of the jury if:
    - the communication is prohibited by law or court order;
    - the juror has made known to the lawyer a desire not to communicate; or
    - the communication involves misrepresentation, coercion, duress or harassment; or
  - engage in conduct intended to disrupt a tribunal.

During jury selection and trial, an attorney may access the public portion of a juror’s social networking website but may not attempt or request to access the private portions of the website. Requesting access to the private portions of a juror’s social networking website would constitute an ex parte communication, which is expressly prohibited by Rule 3.5(b).

Rule 3.5(a) prohibits a lawyer from attempting to influence a juror or potential juror. Additionally, Rule 3.5(b) prohibits ex parte communications with those persons. Accessing the public portions of a juror’s social media profile is ethical under the Rules as discussed in other portions of this Opinion. However, any attempts to gain additional access to private portions of a juror’s social networking site would constitute an ex parte communication. Therefore, a lawyer, or a lawyer’s agent, may not request access to the private portions of a juror’s social networking site.

American Bar Association Standing Committee on Ethics and Professional Responsibility Formal Opinion 466 concluded that a lawyer may view the public portion of the social networking profile of a juror or potential juror but may not communicate directly with the juror or jury panel member. The Committee determined that a lawyer, or his agent, is not permitted to request access to the private portion of a juror’s or potential juror’s social networking website because that type of ex parte communication would violate Model Rule 3.5(b). There is no ex parte communication if the social networking website independently notifies users when the page has been viewed. Additionally, a lawyer may be required to notify the court of any evidence of juror misconduct discovered on a social networking website.
This Committee agrees with the guidance provided in ABA Formal Opinion 466, which is consistent with Rule 3.5’s prohibition regarding attempts to influence jurors, and *ex parte* communications with jurors.

### 10. Attorneys May Ethically Connect with Judges on Social Networking Websites Provided the Purpose is not to Influence the Judge

A lawyer may not ethically connect with a judge on social media if the lawyer intends to influence the judge in the performance of his or her official duties. In addition, although the Rules do not prohibit such conduct, the Committee cautions attorneys that connecting with judges may create an appearance of bias or partiality.32

Various Rules address this concern. For example, Rule 8.2 states:

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

In addition, Comment [4] to Canon 2.9 of the Code of Judicial Conduct, effective July 1, 2014, states that “A judge shall avoid comments and interactions that may be interpreted as *ex parte* communications concerning pending matters or matters that may appear before the court, including a judge who participates in electronic social media.” Thus, the Supreme Court has implicitly agreed that judges may participate in social media, but must do so with care.

Based upon this statement, this Committee believes that attorneys may connect with judges on social media websites provided the purpose is not to influence the judge, and reasonable efforts are taken to assure that there is no *ex parte* or other prohibited communication. This conclusion is consistent with Rule 3.5(a), which forbids a lawyer to “seek to influence a judge” in an unlawful way.

### IV. Conclusion

Social media is a constantly changing area of technology that lawyers keep abreast of in order to remain competent. As a general rule, any conduct that would not be permissible using other forms of communication would also not be permissible using social media. Any use of a social networking website to further a lawyer’s business purpose will be subject to the Rules of Professional Conduct.

Accordingly, this Committee concludes that any information an attorney or law firm places on a social networking website must not reveal confidential client information absent the client’s consent. Competent attorneys should also be aware that their clients use social media and that what clients reveal on social media can be used in the course of a dispute. Finally, attorneys are permitted to use social media to research jurors and may connect with judges so long as they do not attempt to

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32 American Bar Association Standing Committee on Ethics and Professional Responsibility Formal Opinion 462 concluded that a judge may participate in electronic social networking, but as with all social relationships and contacts, a judge must comply with the relevant provisions of the Code of Judicial Conduct and avoid any conduct that would undermine the judge’s independence, integrity, or impartiality, or create an appearance of impropriety.
influence the outcome of a case or otherwise cause the judge to violate the governing Code of Judicial Conduct.

Social media presents a myriad of ethical issues for attorneys, and attorneys should continually update their knowledge of how social media impacts their practice in order to demonstrate competence and to be able to represent their clients effectively.

CAVEAT: THE FOREGOING OPINION IS ADVISORY ONLY AND IS NOT BINDING ON THE DISCIPLINARY BOARD OF THE SUPREME COURT OF PENNSYLVANIA OR ANY COURT. THIS OPINION CARRIES ONLY SUCH WEIGHT AS AN APPROPRIATE REVIEWING AUTHORITY MAY CHOOSE TO GIVE IT.
S14Y0661. IN THE MATTER OF MARGRETT A. SKINNER.

PER CURIAM.

The State Bar of Georgia made a formal complaint against respondent Margrett A. Skinner (State Bar No. 650748), alleging violations of Rules 1.3, 1.4, 1.6, and 1.16 of the Georgia Rules of Professional Conduct. Prior to an evidentiary hearing on the formal complaint, Skinner filed a petition for voluntary discipline, admitting that she violated Rule 1.6 by improperly disclosing confidential information about a former client, and in which she agreed to accept a Review Panel reprimand for the violation. The special master and the State Bar recommended that we accept the petition for voluntary discipline. We rejected the petition, however, noting that a Review Panel reprimand is “the mildest form of public discipline authorized . . . for the violation of Rule 1.6,” In the Matter of Skinner, 292 Ga. 640, 642 (740 SE2d 171) (2013), and noting as well that the petition and accompanying record did not “reflect the nature of the disclosures (except that they concern [unspecified] personal and confidential information) or the actual or potential harm to the
client as a result of the disclosures.” Id. at 642, n. 6. Following our rejection of the petition, the special master conducted an evidentiary hearing, and he made his report and recommendation on December 18, 2013, in which he found that Skinner violated Rules 1.4 and 1.6 but not Rules 1.3 and 1.16.¹ Neither party sought review of the report by the Review Panel, and the matter is again before this Court for decision.

In his report, the special master found that a client retained Skinner in July 2009 to represent her in an uncontested divorce, and she paid Skinner $900, including $150 for the filing fee. For six weeks, the client did not hear anything from Skinner, and after multiple attempts to contact Skinner, the client finally was able to reach Skinner again in October 2009. At that point, Skinner informed the client that Skinner had lost the paperwork that the client had given to Skinner in July. Skinner and the client then met again, and Skinner finally began to draft pleadings for the divorce. The initial drafts of the pleadings had multiple errors, and Skinner and the client exchanged several drafts and communicated by e-mail about the status of the case in October and early

¹ Joseph A. Boone was appointed as special master in this matter.
November 2009. Those communications concluded by mid-November, and Skinner and the client had no more communications until March 18, 2010, when the client reported to Skinner that her husband would not sign the divorce papers without changes. In April 2010, both the client and her husband signed the papers.

A disagreement developed about the fees and expenses of the divorce. Skinner asked the client for an additional $185 for certain travel expenses and the filing fee. In April and early May 2010, Skinner and the client exchanged several e-mails about the request for additional money. Then, on May 18, the client informed Skinner that she had hired another lawyer to complete her divorce, and she asked Skinner to deliver her file to new counsel and to refund $750. Skinner replied that she would not release the file unless she were paid. Although Skinner eventually refunded $650 to the client, Skinner never delivered the file to new counsel, contending that it only contained her “work product.” New counsel completed the divorce within three months of her engagement.

Around this time, the client posted negative reviews of Skinner on three consumer Internet pages. When Skinner learned of the negative reviews, she
posted a response on the Internet, a response that contained personal and confidential information about her former client that Skinner had obtained in the course of her representation of the client. In particular, Skinner identified the client by name, identified the employer of the client, stated how much the client had paid Skinner, identified the county in which the divorce had been filed, and stated that the client had a boyfriend. The client filed a grievance against Skinner, and in response to the grievance, Skinner said in August 2011 that she would remove her posting from the Internet. It was not removed, however, until February 2012.

The special master found that Skinner violated Rule 1.4 when she failed between July and October 2010 to keep her client reasonably informed of the status of the divorce, and the special master found that Skinner violated Rule 1.6 when she disclosed confidential information about her client on the Internet. The special master found no violation of Rules 1.3 and 1.16.² Turning to the

² About Rule 1.16, the special master reported his belief that Skinner technically violated the rule by failing to deliver the file of her client to successor counsel based on a mistaken belief that signed pleadings in the file belonged to her as “work product.” See Formal Advisory Opinion 87-5; Swift, Currie, McGhee & Hiers v. Henry, 276 Ga. 571 (581 SE2d 37) (2003). But the special master did not actually find a violation nor recommend any discipline under Rule 1.16. The special master reported that he made no such finding or recommendation because there was no clear and convincing evidence of prejudice, insofar
appropriate discipline for these violations, the special master noted that Skinner had substantial experience as a practicing lawyer — she was admitted to the Bar in 1987 — which is an aggravating circumstance. The special master also found, however, a number of mitigating circumstances, including that Skinner had no prior discipline, the absence of a dishonest or selfish motive for her improper conduct, that she refunded a substantial portion of her fee to the client even after doing work for the client, that she accepted responsibility for her misconduct by filing a petition for voluntary discipline, that she otherwise was cooperative in the disciplinary proceedings, and that she had expressed remorse for her misconduct. In addition, the special master found as mitigation that Skinner experienced a number of personal problems during her representation of the client and the subsequent time that she posted the confidential information about her client on the Internet, including colon surgery in April 2010, the diagnosis of both her mother and father with cancer (she was their primary caregiver), and the death of her father. For both violations, the special master recommended a public reprimand, with the additional condition that Skinner “be instructed to

as the client already had the documents contained in the file. As to the retention of unearned fees, the special master found the issue moot in light of the refund of $650 to the client.
take advantage of the State Bar’s Law Practice Management services and recommendations with respect to internal office procedures, client files, and case tracking procedures.”

We have reviewed carefully the record and the very detailed report of the special master, and we agree with his recommendation of a public reprimand, as well as the additional condition that Skinner be instructed to take advantage of the State Bar’s Law Practice Management services and recommendations with respect to internal office procedures, client files and case tracking procedures. See In the Matter of Adams, 291 Ga. 173 (729 SE2d 313) (2012).

Although other jurisdictions occasionally have disciplined lawyers more severely for improper disclosures of client confidences, we note that those cases involved numerous clients and violations of other rules, see Office of Lawyer Regulation v. Peshek, 334 Wis.2d 373 (798 NW2d 879 (2011) (60-day suspension), or the disclosure of especially sensitive information that posed serious harm or potential harm to the client, see In re Quillinan, 20 DB Rptr. 288 (Ore. Disp. Bd. 2006) (90-day suspension), available at www.osbar.org/_docs/dbreport/dbr20.pdf. In this case, the improper disclosure of confidential information was isolated and limited to a single client, it does not
appear that the information worked or threatened substantial harm to the interests of the client, and there are significant mitigating circumstances. Accordingly, we hereby order that Skinner receive a public reprimand in accordance with Bar Rules 4-102 (b) (3) and 4-220 (c), and we order that she consult with the Law Practice Management Program of the State Bar as set forth above and implement its suggestions in her law practice.

Public reprimand. All the Justices concur.

Decided May 19, 2014.

Public reprimand.

Paula J. Frederick, General Counsel State Bar, Jenny K. Mittelman, Assistant General Counsel State Bar, for State Bar of Georgia.

William H. Noland, for Skinner.
ATTACHMENT  6
ABA Annotations Concerning Lawyer Responsive Disclosures Under Model Rule 1.6

“A lawyer accused of wrongful conduct in connection with the representation of a client, or with complicity in a client’s wrongful conduct, need not wait until formal charges are filed. “The lawyer’s right to respond arises when an assertion of such complicity has been made. . . . [T]he defense may be established by responding directly to a third party who has made such an assertion.” Model Rule 1.6, cmt. [10]; see, e.g., In re Bryan, 61 P.3d 641 (Kan. 2003) (formal proceedings not required before disclosure in self-defense could be made under Rule 1.6(b)); Pa. Ethics Op. 96-48 (1996) (lawyer whose former clients defended against SEC fraud complaint by alleging lawyer’s lack of due diligence may discuss matter with SEC even though lawyer not named in complaint); S.C. Ethics Op. 94-23 (1994) (lawyer under investigation by Social Security Administration regarding handling of client’s disability claim may disclose client information to defend himself even though no formal grievance proceeding pending). Mere criticism of the lawyer, however, may be insufficient to warrant disclosures in self defense, even when the criticisms appear in the press. See, e.g., Louima v. City of N.Y., No. 98 CV 5083(SJ), 2004 WL 2359943 (E.D.N.Y. Oct. 5, 2004) (“mere press reports” about lawyer’s conduct do not justify disclosure of client information even if report is false and accusations unfounded); N.Y. County Ethics Op. 711 (1997) (client’s criticism of lawyer to neighbor was mere gossip and did not trigger exception to confidentiality rule); Utah Ethics Op. 05-01 (2005) (criminal defense lawyer may not voluntarily disclose client confidences to prosecutor or to court in response to claim that lawyer’s prior advice was confusing; no “controversy” between lawyer and client). But see Ariz. Ethics Op. 93-02 (1993) (interpreting “controversy” to include disagreement in public media).”


The New York State Bar Association has now joined those prohibiting rejoinder, though its rule has some different language than Georgia’s. NYSBA Ethics Opinion 1032 (October 30, 2014).
ATTACHMENT 7
In the Court of Appeals of Georgia

A13A2432. PAMPATTIWAR v. HINSON et al.

BARNES, Presiding Judge.

Vivek A. Pampattiwar hired Jan V. Hinson, Esq., and her law firm, Jan V. Hinson, P.C. (collectively, “Hinson”) to file a divorce action on his behalf. Hinson ultimately terminated the representation and brought this action against Pampattiwar, alleging, among other things, that Pampattiwar had committed fraud by intentionally misleading Hinson during his initial consultation with her, and had published statements about her and her firm on the Internet that were libelous and placed her in a false light. Pampattiwar filed a motion to dismiss for failure to state a claim for fraud, which the trial court denied. The case proceeded to trial, and the jury returned a verdict in favor of Hinson on her claims for fraud, libel per se, and false light invasion of privacy. Pampattiwar filed motions for judgment notwithstanding the verdict and for new trial, which the trial court denied. Pampattiwar now appeals,
challenging the trial court’s denial of his motions. For the reasons discussed below, we affirm.

“When we review the denial of a motion for new trial or judgment notwithstanding the verdict, we must affirm the denial if there is any evidence to support the verdict.” Wellons, Inc. v. Langboard, Inc., 315 Ga. App. 183, 187 (2) (726 SE2d 673) (2012). In making this determination, we construe the evidence and every inference arising therefrom in the light most favorable to the prevailing party. Fletcher v. C.W. Matthews Contracting Co., 322 Ga. App. 751 (746 SE2d 230) (2013). “The determinative question is not whether the verdict and the judgment of the trial were merely authorized, but . . . whether a contrary judgment was demanded.” (Citation and punctuation omitted.) Wright v. Apartment Inv. & Mgmt. Co., 315 Ga. App. 587, 588 (726 SE2d 779) (2012).

Viewed in this manner, the evidence adduced at trial showed that on July 2, 2010, Pampattiwar met for an initial consultation with Hinson about filing for a divorce. Pampattiwar told Hinson that he was currently represented by other counsel and that he had filed a separate maintenance action against his wife in Fulton County.
because both of them had lived there at the time the action was filed.\(^1\) Although the separate maintenance action remained pending, Pampattiwar told Hinson that he now desired a divorce and that both he and his wife currently resided in Gwinnett County. Pampattiwar wanted Hinson to take over the representation of his case and file a petition for divorce on his behalf. He did not inform Hinson that she would be the sixth attorney to represent him in the litigation with his wife.

During the initial consultation, Hinson repeatedly asked Pampattiwar if his wife had filed a counterclaim for divorce in the separate maintenance action. Pampattiwar insisted that a divorce counterclaim had not been filed and invited Hinson to check the online Fulton County docket. Hinson then checked the docket while Pampattiwar watched, and the docket reflected that no divorce counterclaim had been filed. Pampattiwar had documents with him relating to the Fulton County case, but Hinson did not review them as part of the initial consultation.

\(^1\)“Although an action for separate maintenance and an action for divorce both grow out of the marriage relationship and relate to the same subject matter, they have different purposes and raise different questions.” *Southworth v. Southworth*, 265 Ga. 671, 673 (3) (461 SE2d 215) (1995). An action for separate maintenance is authorized “[w]hen spouses are living separately or in a bona fide state of separation and there is no action for divorce pending.” OCGA § 19-6-10.
Hinson advised Pampattiwar that venue for the divorce would be in Gwinnett County given that both parties now lived there and that the filing of a divorce petition would abate the separate maintenance action. Hinson told Pampattiwar that she was willing to represent him in the divorce in Gwinnett County, but not in the separate maintenance action pending in Fulton County in which he already had retained counsel. Pampattiwar agreed to this arrangement, and Hinson subsequently filed a petition for divorce on his behalf in Gwinnett County.

Almost immediately after filing the divorce petition in Gwinnett County, Hinson received what she characterized as a “scathing” response from opposing counsel informing her that Pampattiwar’s wife had in fact filed a counterclaim for divorce in the separate maintenance action almost a year earlier. Hinson confronted Pampattiwar, who assured her that he had not known about the divorce counterclaim or the error on the Fulton County docket. Pampattiwar also told Hinson that the attorney who had been representing him in the Fulton County case had now withdrawn and he was currently unrepresented. Believing that Pampattiwar had simply been confused about the filing of the counterclaim, Hinson agreed to represent him in the divorce proceedings in Fulton County.
After entering an appearance in the Fulton County action, Hinson obtained a copy of Pampattiwar’s deposition that had been taken earlier in that case. It was clear from the deposition transcript that Pampattiwar knew that his wife had counterclaimed for divorce. Hinson confronted Pampattiwar with the deposition transcript and accused him of knowing about the counterclaim in their initial consultation. She accused him of “playing fast and loose with [her] bar license” and of “making a fool out of [her] in the courts in which [she] practice[d]” by having her file a divorce petition in Gwinnett County when one was already pending in Fulton County. Pampattiwar responded, “You can’t get out now. We’re on a trial calendar.”

In light of the divorce counterclaim pending in Fulton County, Hinson advised Pampattiwar that the divorce petition filed in Gwinnett County was improper and would need to be voluntarily dismissed. Pampattiwar responded that he did not want to dismiss the Gwinnett County action and instead wanted to “take [his] chances” in Gwinnett and was “willing to pay extra for that.” However, Hinson insisted that Pampattiwar agree to the dismissal or she would seek to withdraw from representing him. Pampattiwar then signed a dismissal drafted by Hinson, but he returned to her office after she left for lunch and took the document with him so that she could not file it. After another confrontation, Pampattiwar signed a new dismissal drafted by
Hinson, which she was able to file successfully. The divorce petition filed in Gwinnett County ultimately was dismissed while the divorce case proceeded in Fulton County.

Over the ensuing months, Hinson and Pampattiwar had multiple heated confrontations over billing issues and other matters relating to the Fulton County divorce case. Hinson moved to withdraw from representing Pampattiwar, but the trial court denied her motion. Hinson later filed a motion for reconsideration, which the trial court granted on the eve of arbitration that had been scheduled between Pampattiwar and his wife. However, Pampattiwar pleaded with Hinson to represent him in the arbitration that was set to commence in three days, and she acquiesced to his request.

Hinson ended her representation of Pampattiwar on September 15, 2010 after the arbitration. In October 2010, Pampattiwar contacted Hinson’s law firm because he was upset over his legal bills. Pampattiwar spoke with a paralegal at the firm and accused Hinson and her staff of being “crooks” and claimed that they had “duped” him.

In November 2010, Hinson became concerned because “the phones just stopped ringing” in her office. One of Hinson’s assistants “Googled” Hinson’s name
on the Internet and discovered a review of her law firm that had recently been posted on the website Kudzu.com under the screen name “STAREA.” The reviewer described Hinson as “a CROOK Lawyer” and an “Extremely Fraudulent Lady.” The reviewer claimed that Hinson “inflates her bills by 10 times” and had “duped 12 people in the last couple of years.” Further investigation revealed that the Internet protocol (“IP”) address used for the STAREA review matched the IP address used by Pampattiwar in several emails that he had sent to Hinson.

Hinson subsequently filed the instant action against Pampattiwar, alleging, among other things, that he had published statements about her and her firm on Kudzu.com that constituted libel per se. Hinson also alleged that Pampattiwar had committed fraud during his initial consultation with her by falsely representing that no divorce counterclaim had been filed in the Fulton County case and by encouraging her to confirm this fact on the online docket, even though Pampattiwar knew that his wife had filed a counterclaim and that the docket was inaccurate. Hinson further alleged that she detrimentally relied on Pampattiwar’s misrepresentation about the counterclaim by improperly filing a petition for divorce on his behalf in Gwinnett County, leading her to suffer professional embarrassment and humiliation.
After Hinson filed her lawsuit, an additional review was posted on Kudzu.com under the screen name “REALPOLICE.” The reviewer warned viewers not to “trust” positive reviews appearing for Hinson on Kudzu.com because she “asks her office staff to post bogus reviews everywhere on the [I]nternet.” Further investigation revealed that the Kudzu.com user accounts for STAREA and REALPOLICE had the same password, “pampa012.” As with the STAREA review, the IP address used for the REALPOLICE review matched the IP address used by Pampattiwar in his emails with Hinson. After the posting of the REALPOLICE review, Hinson amended her complaint to include a claim for false light invasion of privacy.

Pampattiwar filed a motion to dismiss Hinson’s fraud claim for failure to state a claim upon which relief could be granted, and the trial court denied the motion. The case proceeded to trial, where Hinson testified to the events as set out above. Hinson called several additional witnesses, including an information technology (“IT”) communications expert who traced the source of the two Kudzu.com reviews to the IP address associated with Pampattiwar. On her claims for fraud, libel per se, and false light invasion of privacy, Hinson did not assert that she suffered any pecuniary
loss from the misrepresentations and instead sought damages for “wounded feelings” under OCGA § 51-12-6.²

Pampattiwar moved for a directed verdict on several of Hinson’s claims, which the trial court denied. During the defense’s case-in-chief, Pampattiwar testified that he had been aware that his wife had filed a counterclaim for divorce in the separate maintenance action in Fulton County when he met for his initial consultation with Hinson. But Pampattiwar claimed that he told Hinson about the counterclaim and showed her pleadings from the Fulton County case during the initial consultation. Pampattiwar also denied posting the two reviews on Kudzu.com.

After hearing all of the evidence, the jury found in favor of Hinson and, among other things, awarded her damages for fraud, libel per se, and false light invasion of privacy using a special verdict form. Pampattiwar filed motions for judgment notwithstanding the verdict and for new trial, which the trial court denied. This appeal followed.

² OCGA § 51-12-6, entitled “Damages for injury to peace, happiness, or feelings,” provides in relevant part: “In a tort action in which the entire injury is to the peace, happiness, or feelings of the plaintiff, no measure of damages can be prescribed except the enlightened consciences of impartial jurors.”
1. Pampattiwar contends that the trial court erred in denying his motion for judgment notwithstanding the verdict on Hinson’s claim for fraud predicated on his alleged misrepresentation about the divorce counterclaim because Hinson failed to prove justifiable reliance. Hinson testified that she checked the online docket in the Fulton County action to confirm Pampattiwar’s statement that no divorce counterclaim had been filed in that action, but Pampattiwar contends that checking the docket was insufficient due diligence on her part. According to Pampattiwar, Hinson should have investigated further into what claims were being asserted in the Fulton County action before she filed the divorce petition in Gwinnett County, such as by reviewing the documents from the Fulton County action that Pampattiwar brought with him to the initial consultation. We are unpersuaded that the evidence demanded a finding in favor of Pampattiwar on the issue of reasonable reliance.

[w]hile a party must exercise reasonable diligence to protect himself against the fraud of another, he is not bound to exhaust all means at his command to ascertain the truth before relying upon the representations. Ordinarily the question whether the complaining party could have ascertained the falsity of the representations by proper diligence is for determination by the jury.


In the present case, Hinson testified that she had practiced domestic law for 16 years and had performed civil case searches on the online Fulton County docket for “hundreds” of cases. Hinson testified that based on her experience, the online docket normally would reflect that a divorce counterclaim had been filed in a domestic case in the pleadings index and in the description of the case type. According to Hinson, she relied on the online docket as confirmation of what Pampattiwar had told her about the Fulton County case because the docket “always” listed “answer and counterclaim” in the pleadings index and listed “divorce” as the case type if a divorce counterclaim had been filed, but here the docket listed the responsive pleading simply as “answer” and the case type as “separate maintenance action.” Hinson further
testified that she declined to review the documents from the Fulton County case that Pampattiwar brought with him to the initial consultation because Pampattiwar already had counsel representing him in that case and she did not want to become involved in the separate maintenance action, which she had believed would be dismissed upon the filing of the divorce petition in Gwinnett County. Hinson also noted that while clients in domestic cases are stressed and sometimes are forgetful, they do not usually forget that they are “going through a divorce,” and she does not “typically assume that a client is lying” to her about such a basic fact.

In light of this testimony, it was for the jury to determine whether Hinson exercised sufficient due diligence by checking the online docket to confirm Pampattiwar’s statement that his wife had not filed a counterclaim for divorce in the Fulton County case. “Justifiable reliance generally is a question for the jury, and jury resolution [was] necessary here.” *Catrett v. Landmark Dodge, Inc.*, 253 Ga. App. 639, 641 (1) (560 SE2d 101) (2002). The trial court therefore did not err in denying Pampattiwar’s motion for judgment notwithstanding the verdict on Hinson’s fraud claim. See *Johnson v. GAPVT Motors, Inc.*, 292 Ga. App. 79, 83 (1) (663 SE2d 779) (2008) (although the evidence would have “authorized” the jury to find that plaintiff should have discovered the alleged misrepresentation, “this conclusion was not
demanded by the evidence”) (emphasis in original). See also Catrett, 253 Ga. App. at 641 (1) (whether plaintiff reasonably relied upon defendant’s misrepresentation that the car was “new” should be submitted to the jury, where plaintiff relied upon documents reflecting that the car was “new,” but there were other documents available that referred to the car as “used”); Parks v. Howard, 197 Ga. App. 405, 407-408 (4) (398 SE2d 308) (1990) (whether plaintiff exercised due diligence by relying upon the inspection report presented by defendant, or whether plaintiff should have obtained an independent inspection report, was for the jury to resolve).

Pampattiwar’s reliance upon Isbell v. Credit Nation Lending Svc., LLC, 319 Ga. App. 19, 25-26 (2) (b) (735 SE2d 46) (2012), is unpersuasive. In Isbell, the buyers of a used truck asserted fraud claims against the seller and the seller’s financier, contending that the condition of the truck had been misrepresented to them. Id. at 19-21. The uncontroverted evidence showed that the buyers failed to obtain a vehicle history report or have their own mechanic inspect the truck even though they “were specifically warned that the vehicle may have a bent frame” and were offered an opportunity to have the truck inspected. Id. at 26 (2) (b). Consequently, we concluded that, as a matter of law, the buyers had failed to exercise due diligence to discover that the used truck had suffered frame damage in a prior automobile
accident. Id. We reasoned that the buyers’ “blind reliance on the salesman’s representations when the means of knowledge were at hand show[ed] an unjustified lack of due diligence.” (Citation and punctuation omitted.) Id.

Relying on Isbell, Pampattiwar argues that Hinson ignored the documents from the Fulton County case that he brought with him to the initial consultation and thus blindly relied on his representation that there was no divorce counterclaim “when the means of knowledge were at hand.” Notably, however, the plaintiff buyers in Isbell were put on notice that there might be a defect in the used truck that they were purchasing, but nevertheless failed to take additional steps to determine if a defect existed that were readily available to them. See Isbell, 319 Ga. App. at 26 (2) (b). But Hinson was never put on notice that a divorce counterclaim might have been filed in the Fulton Case; to the contrary, the online docket reviewed by Hinson reflected that no such counterclaim had been filed and thus appeared to confirm Pampattiwar’s representation to her. Hence, unlike in Isbell, this is not a case of “blind reliance.” Under these circumstances, it was for the jury to resolve whether Hinson should have
reviewed the documents that Pampattiwar brought to the initial consultation before filing the divorce petition in Gwinnett County.³

2. Pampattiwar also contends that the trial court erred in denying his motion for new trial on Hinson’s fraud claim because she failed to show “actual damages” resulting from the alleged misrepresentation about the divorce counterclaim. Hinson did not allege that she suffered any pecuniary losses from improperly filing the divorce petition in Gwinnett County in reliance on Pampattiwar’s misrepresentation about the counterclaim. Rather, Hinson alleged that the entire injury she suffered from the misfiling of the divorce petition was to her peace, happiness, and feelings and sought damages pursuant to OCGA § 51-12-6. According to Pampattiwar, damages for “wounded feelings” under OCGA § 51-12-6 are not “actual damages” and thus could not be recovered by Hinson for her fraud claim. We disagree.

³ Pampattiwar separately contends that the trial court erred in denying his motion to dismiss Hinson’s fraud claim for failure to state a claim upon which relief could be granted. In moving to dismiss the fraud claim, Pampattiwar argued that the element of reasonable reliance had not been pled with sufficient particularity in Hinson’s complaint. See OCGA § 9-11-9 (b). “However, the proper remedy for seeking more particularity is by motion for a more definite statement at the pleading stage or by the rules of discovery thereafter.” (Citation and punctuation omitted.) Odom v. Hughes, 293 Ga. 447, 455 (3), n. 6 (748 SE2d 839) (2013). Accordingly, the trial court committed no error in denying Pampattiwar’s motion to dismiss. See id.; Miller v. Lomax, 266 Ga. App. 93, 98 (2) (b) (596 SE2d 232) (2004).
As we have recently reiterated,

In order to recover for fraud, a plaintiff must prove that actual damages, not simply nominal damages, flowed from the fraud alleged. The expression “actual damages” is not necessarily limited to pecuniary loss, or loss of ability to earn money. General damages are those which the law presumes to flow from any tortious act, and they may be awarded on a fraud claim. Wounding a man’s feelings is as much actual damage as breaking his limbs. Injury to reputation is a personal injury, and personal injury damages can be recovered in a fraud action.

(Emphasis in original.) Kelley v. Cooper, __ Ga. App. __ (4) (c) (Case No. A13A0982, decided Nov. 22, 2013), quoting Zieve v. Hairston, 266 Ga. App. 753, 759 (2) (c) (598 SE2d 25) (2004). See also Johnson, 292 Ga. App. at 83 (1). Thus, we have held that recovery for “wounded feelings” under OCGA § 51-12-6 is permitted for fraudulent misrepresentation where, as here, the plaintiff claims that the entire injury she suffered from the misrepresentation was to her peace, happiness, or feelings. See Mallard v. Jenkins, 186 Ga. App. 167, 168 (1) (366 SE2d 775) (1988). Compare Kent v. White, 238 Ga. App. 792, 794 (1) (c) (520 SE2d 481) (1999) (plaintiff could not recover damages under OCGA § 51-12-6 for fraud because “at no point did [the plaintiff] claim that the entire injury to him was to his peace, happiness, or feelings”). It follows that the trial court did not err in determining that Hinson
could recover damages under OCGA § 51-12-6 on her fraud claim and in denying Pampattiwar’s motion for new trial.

3. As with Hinson’s fraud claim, Pampattiwar contends that the trial court erred in denying his motion for new trial on Hinson’s claim for libel per se because Hinson could not recover “wounded feelings” damages under OCGA § 51-12-6 for the alleged defamatory statements. In this regard, Pampattiwar notes that the trial court ruled before trial that Hinson could not recover punitive damages on her libel claim because she never made a written request for correction or retraction of the defamatory statements before filing her complaint. See OCGA § 51-5-11; Mathis v. Cannon, 276 Ga. 16, 28 (4) (573 SE2d 376) (2002). In light of the failure to request retraction, Pampattiwar argues that OCGA § 51-12-6 damages could not be recovered on Hinson’s libel claim because the damages awarded under that statute are in part punitive. We again disagree.

It is true that before the passage of the Tort Reform Act of 1987 (the “Act”), Ga. L. 1987, p. 915, § 6, “wounded feelings” damages awarded under OCGA § 51-12-6 were in part punitive because the statute authorized the jury to consider “circumstances relevant to deterrence of the wrongdoer.” Westview Cemetary v.
Specifically, the pre-1987 version of OCGA § 51-12-6 stated:

In a tort action in which the entire injury is to the peace, happiness, or feelings of the plaintiff, no measure of damages can be prescribed except the enlightened consciences of impartial jurors. In such a case, the \textit{worldly circumstances of the parties, the amount of bad faith in the transaction}, and all the attendant facts should be weighed; and the verdict of the jury should not be disturbed unless the court suspects bias or prejudice from its excess or its inadequacy.

(Emphasis supplied.) Because the statute allowed for consideration of all the attendant circumstances, including the “worldly circumstances of the parties” and any “bad faith in the transaction,” “the jury [was] not restricted to consideration of circumstances relevant to compensation (i.e., the extent of the injury) but [was] entitled to consider as well circumstances relevant to deterrence (i.e., any aggravated aspects of the defendant’s misconduct plus the defendant’s ‘worldly circumstances’).” \textit{Westview Cemetary}, 234 Ga. at 545 (2) (B). As such, damages under the pre-1987 version of OCGA § 51-12-6 were, “at least in part, punitive damages.” Id.

However, the 1987 Act significantly revised OCGA § 51-12-6, as our Supreme Court recently explained:
In the Act, the General Assembly . . . enacted the current version of OCGA § 51-12-6, and deleted from the pre-1987 statute the language: “the worldly circumstances of the parties, the amount of bad faith in the transaction, and all the attendant facts should be weighed.” In its place, the legislature inserted the text: “In such an action, punitive damages under Code Section 51-12-5 or Code Section 51-12-5.1 shall not be awarded.” And, the General Assembly specifically encompassed within the term “punitive damages” those damages that might be “awarded . . . in order to . . . deter a defendant.” OCGA § 51-12-5.1 (a). Thus, the General Assembly eliminated from OCGA § 51-12-6 the language that was intended to deter misconduct . . . .

_Holland v. Caviness_, 292 Ga. 332, 334-335 (737 SE2d 669) (2013). Given the elimination of the statutory language aimed at deterrence, the current version of OCGA § 51-12-6, applicable in the present case, does not contain “a punitive award provision.” Id. at 335, n.8. Consequently, Pampattiwar’s argument that OCGA § 51-12-6 damages could not be recovered for Hinson’s libel claim because of the failure to request retraction is misplaced because it is predicated on an obsolete version of the statute.

We are cognizant that the trial court charged the jury on OCGA § 51-12-6 damages using language from the Georgia pattern jury instructions, which still includes reference to the “worldly circumstances of the parties” and “the amount of
bad faith in the transaction” even though that language was deleted from the statute in 1987. See Suggested Pattern Jury Instructions, Vol. I: Civil Cases, § 66.600. Our Supreme Court has noted that “the jury should no longer be instructed using that language.” See Holland, 292 Ga. at 333, n. 3. Notably, however, in his reply brief, Pampattiwar concedes that he did not properly object to the charge at trial and expressly states that he is not claiming that the giving of the charge constituted “a substantial error . . . which was harmful as a matter of law” even absent objection. OCGA § 5-5-24 (c). Pampattiwar emphasizes that “he does not challenge any charge” on appeal and instead argues more broadly that “section 51-12-6 damages inherently incorporate punitive damages” and thus could not be awarded in this case as a matter of law in light of Hinson’s failure to seek retraction. Under these circumstances, Pampattiwar has abandoned any possible challenge to the jury charge on OCGA § 51-12-6 damages, and his broader argument regarding OCGA § 51-12-6 and retraction fails for the reasons previously discussed. The trial court therefore committed no error in denying Pampattiwar’s motion for new trial on the libel claim.

4. Lastly, Pampattiwar contends that the trial court erred in denying his motion for new trial on Hinson’s claim for “false light” invasion of privacy. Pampattiwar argues that Hinson’s false light claim was predicated on the second review on
Kudzu.com submitted under the screen name “REALPOLICE,” and he contends that it was undisputed by the parties at trial that the review was flagged and rejected by Kudzu.com for violating its internal policy guidelines before the review was ever posted for the general public to see on the Internet. Given that the second review allegedly was never posted on the Internet, Pampattiwar asserts that Hinson failed to prove that the review was distributed to the public at large and thus could not establish the essential element of publicity as a matter of law. See Williams v. Cobb County Farm Bureau, 312 Ga. App. 350, 354 (2) (b) (718 SE2d 540) (2011); Assn. Svcs., Inc. v. Smith, 249 Ga. App. 629, 633-634 (4) (549 SE2d 454) (2001). We disagree.

Although Pampattiwar asserts that it was undisputed at trial that the second Kudzu.com review was never posted on the Internet, he cites to nothing in the record to support his assertion. And the record reflects that during closing argument, counsel for Hinson in fact argued that Pampattiwar twice posted reviews to the Internet:

And this claim [of] putting this on the Internet not once, understand, not once but twice. Once wasn’t good enough. He had to do it again. Each time she saw this, each time she was subjected to seeing this on Kudzu and then having to go to Kudzu and have them take it down . . . and then to see it pop back up again, you know, that caused injury to her peace, happiness, and feelings.
Thus, from the jury’s perspective, the issue of whether the second Kudzu.com review was posted on the Internet was in dispute.

Furthermore, there was at least some evidence from which the jury could find that the second review was posted on the Internet. Business records from Kudzu.com were admitted at trial that included a screen shot of the second review and a notation that the review was “Posted: 4/19/2011.” When asked what the date beside the word “Posted” field signified on these business records, the employee who handled site operations for Kudzu.com testified that it reflects “[t]he date the review was posted. Posted meaning you can view it on Kudzu.com” When all inferences are interpreted in the light most favorable to the verdict, the jury could have inferred from the Kudzu.com business records and the employee’s testimony that the second review submitted under the user name “REALPOLICE” was posted to the Internet for the general public to see. Because there was evidence from which the jury could find that the element of publicity had been met, the trial court committed no error in denying Pampattiwar’s motion for new trial on Hinson’s claim for false light invasion of privacy.

Judgment affirmed. Miller, J. concurs. Ray, J., concurs in Divisions 1, 2, and 4, and concurs in the judgment only as to Division 3.
Chapter 2
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PENNSYLVANIA BAR ASSOCIATION COMMITTEE ON LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY

ETHICAL OBLIGATIONS FOR ATTORNEYS USING CLOUD COMPUTING/SOFTWARE AS A SERVICE WHILE FULFILLING THE DUTIES OF CONFIDENTIALITY AND PRESERVATION OF CLIENT PROPERTY

FORMAL OPINION 2011-200

1. Introduction and Summary

If an attorney uses a Smartphone or an iPhone, or uses web-based electronic mail (e-mail) such as Gmail, Yahoo!, Hotmail or AOL Mail, or uses products such as Google Docs, Microsoft Office 365 or Dropbox, the attorney is using “cloud computing.” While there are many technical ways to describe cloud computing, perhaps the best description is that cloud computing is merely “a fancy way of saying stuff’s not on your computer.”

From a more technical perspective, “cloud computing” encompasses several similar types of services under different names and brands, including: web-based e-mail, online data storage, software-as-a-service (“SaaS”), platform-as-a-service (“PaaS”), infrastructure-as-a-service (“IaaS”), Amazon Elastic Cloud Compute (“Amazon EC2”), and Google Docs.

This opinion places all such software and services under the “cloud computing” label, as each raises essentially the same ethical issues. In particular, the central question posed by “cloud computing” may be summarized as follows:

May an attorney ethically store confidential client material in “the cloud”?

In response to this question, this Committee concludes:

Yes. An attorney may ethically allow client confidential material to be stored in “the cloud” provided the attorney takes reasonable care to assure that (1) all such materials remain confidential, and (2) reasonable safeguards are employed to ensure that the data is protected from breaches, data loss and other risks.

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In recent years, technological advances have occurred that have dramatically changed the way attorneys and law firms store, retrieve and access client information. Many law firms view these...

technological advances as an opportunity to reduce costs, improve efficiency and provide better client service. Perhaps no area has seen greater changes than “cloud computing,” which refers to software and related services that store information on a remote computer, i.e., a computer or server that is not located at the law office’s physical location. Rather, the information is stored on another company’s server, or many servers, possibly all over the world, and the user’s computer becomes just a way of accessing the information.\(^2\)

The advent of “cloud computing,” as well as the use of electronic devices such as cell phones that take advantage of cloud services, has raised serious questions concerning the manner in which lawyers and law firms handle client information, and has been the subject of numerous ethical inquiries in Pennsylvania and throughout the country. The American Bar Association Commission on Ethics 20/20 has suggested changes to the Model Rules of Professional Conduct designed to remind lawyers of the need to safeguard client confidentiality when engaging in “cloud computing.”

Recent “cloud” data breaches from multiple companies, causing millions of dollars in penalties and consumer redress, have increased concerns about data security for cloud services. The Federal Trade Commission (“FTC”) has received complaints that inadequate cloud security is placing consumer data at risk, and it is currently studying the security of “cloud computing” and the efficacy of increased regulation. Moreover, the Federal Bureau of Investigations (“FBI”) warned law firms in 2010 that they were being specifically targeted by hackers who have designs on accessing the firms’ databases.

This Committee has also considered the client confidentiality implications for electronic document transmission and storage in Formal Opinions 2009-100 (“Metadata”) and 2010-200 (“Virtual Law Offices”), and an informal Opinion directly addressing “cloud computing.” Because of the importance of “cloud computing” to attorneys — and the potential impact that this technological advance may have on the practice of law — this Committee believes that it is appropriate to issue this Formal Opinion to provide guidance to Pennsylvania attorneys concerning their ethical obligations when utilizing “cloud computing.”

This Opinion also includes a section discussing the specific implications of web-based electronic mail (e-mail). With regard to web-based email, i.e., products such as Gmail, AOL Mail, Yahoo! and Hotmail, the Committee concludes that attorneys may use e-mail but that, when circumstances require, attorneys must take additional precautions to assure the confidentiality of client information transmitted electronically.

II. Background

For lawyers, “cloud computing” may be desirable because it can provide costs savings and increased efficiency in handling voluminous data. Better still, cloud service is elastic, and users can have as much or as little of a service as they want at any given time. The service is sold on demand, typically by the minute, hour or other increment. Thus, for example, with “cloud computing,” an attorney can simplify document management and control costs.

\(^2\) Id.
The benefits of using “cloud computing” may include:

- Reduced infrastructure and management;
- Cost identification and effectiveness;
- Improved work production;
- Quick, efficient communication;
- Reduction in routine tasks, enabling staff to elevate work level;
- Constant service;
- Ease of use;
- Mobility;
- Immediate access to updates; and
- Possible enhanced security.

Because “cloud computing” refers to “offsite” storage of client data, much of the control over that data and its security is left with the service provider. Further, data may be stored in other jurisdictions that have different laws and procedures concerning access to or destruction of electronic data. Lawyers using cloud services must therefore be aware of potential risks and take appropriate precautions to prevent compromising client confidentiality, i.e., attorneys must take great care to assure that any data stored offsite remains confidential and not accessible to anyone other than those persons authorized by their firms. They must also assure that the jurisdictions in which the data are physically stored do not have laws or rules that would permit a breach of confidentiality in violation of the Rules of Professional Conduct.

III. Discussion

A. Prior Pennsylvania Opinions

In Formal Opinion 2009-100, this Committee concluded that a transmitting attorney has a duty of reasonable care to remove unwanted metadata from electronic documents before sending them to an adverse or third party. Metadata is hidden information contained in an electronic document that is not ordinarily visible to the reader. The Committee also concluded, inter alia, that a receiving lawyer has a duty pursuant to RPC 4.4(b) to notify the transmitting lawyer if an inadvertent metadata disclosure occurs.

Formal Opinion 2010-200 advised that an attorney with a virtual law office “is under the same obligation to maintain client confidentiality as is the attorney in a traditional physical office.” Virtual law offices generally are law offices that do not have traditional brick and mortar facilities. Instead, client communications and file access exist entirely online. This Committee also concluded that attorneys practicing in a virtual law office need not take additional precautions beyond those utilized by traditional law offices to ensure confidentiality, because virtual law firms and many brick-and-mortar firms use electronic filing systems and incur the same or similar risks endemic to accessing electronic files remotely.

Informal Opinion 2010-060 on “cloud computing” stated that an attorney may ethically allow client confidential material to be stored in “the cloud” provided the attorney makes reasonable efforts to protect confidential electronic communications and information. Reasonable efforts
discussed include regularly backing up data, installing firewalls, and avoiding inadvertent disclosures.

B. Pennsylvania Rules of Professional Conduct

An attorney using "cloud computing" is under the same obligation to maintain client confidentiality as is the attorney who uses offline documents management. While no Pennsylvania Rule of Professional Conduct specifically addresses "cloud computing," the following rules, *inter alia*, are implicated:

- Rule 1.0 ("Terminology");
- Rule 1.1 ("Competence");
- Rule 1.4 ("Communication");
- Rule 1.6 ("Confidentiality of Information");
- Rule 1.15 ("Safekeeping Property"); and
- Rule 5.3 ("Responsibilities Regarding Nonlawyer Assistants").

Rule 1.1 ("Competence") states:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Comment [5] ("Thoroughness and Preparation") of Rule 1.1 provides further guidance about an attorney's obligations to clients that extend beyond legal skills:

Competent handling of 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. ... Competency is affected by the manner in which an attorney chooses to represent his or her client, or, as Comment [5] to Rule 1.1 succinctly puts it, an attorney's "methods and procedures." Part of a lawyer's responsibility of competency is to take reasonable steps to ensure that client data and information is maintained, organized and kept confidential when required. A lawyer has latitude in choosing how or where to store files and use software that may best accomplish these goals. However, it is important that he or she is aware that some methods, like "cloud computing," require suitable measures to protect confidential electronic communications and information. The risk of security breaches and even the complete loss of data in "cloud computing" is magnified because the security of any stored data is with the service provider. For example, in 2011, the syndicated children's show "Zodiac Island" lost an entire season's worth of episodes when a fired employee for the show's data hosting service accessed the show's content without authorization and wiped it out.³

Rule 1.15 ("Safekeeping Property") requires that client property should be "appropriately safeguarded." Client property generally includes files, information and documents, including those existing electronically. Appropriate safeguards will vary depending on the nature and sensitivity of the property. Rule 1.15 provides in relevant part:

(b) A lawyer shall hold all Rule 1.15 Funds and property separate from the lawyer's own property. Such property shall be identified and appropriately safeguarded.

Rule 1.6 ("Confidentiality of Information") states in relevant part:

(a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

(d) The duty not to reveal information relating to representation of a client continues after the client-lawyer relationship has terminated.

Comment [2] of Rule 1.6 explains the importance and some of the foundation underlying the confidential relationship that lawyers must afford to a client. It is vital for the promotion of trust, justice and social welfare that a client can reasonably believe that his or her personal information or information related to a case is kept private and protected. Comment [2] explains the nature of the confidential attorney-client relationship:

A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

Also relevant is Rule 1.0(e) defining the requisite "Informed Consent":

"Informed consent" denotes the consent by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

Rule 1.4 directs a lawyer to promptly inform the client of any decision with respect to which the client's informed consent is required. While it is not necessary to communicate every minute

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4 In previous Opinions, this Committee has noted that the intent of Rule 1.15 does not extend to the entirety of client files, information and documents, including those existing electronically. In light of the expansion of technology as a basis for storing client data, it would appear that the strictures of diligence required of counsel under Rule 1.15 are, at a minimum, analogous to the "cloud."
detail of a client’s representation, “adequate information” should be provided to the client so that the client understands the nature of the representation and “material risks” inherent in an attorney’s methods. So for example, if an attorney intends to use “cloud computing” to manage a client’s confidential information or data, it may be necessary, depending on the scope of representation and the sensitivity of the data involved, to inform the client of the nature of the attorney’s use of “cloud computing” and the advantages as well as the risks endemic to online storage and transmission.

Absent a client’s informed consent, as stated in Rule 1.6(a), confidential client information cannot be disclosed unless either it is “impliedly authorized” for the representation or enumerated among the limited exceptions in Rule 1.6(b) or Rule 1.6(c). This may mean that a third party vendor, as with “cloud computing,” could be “impliedly authorized” to handle client data provided that the information remains confidential, is kept secure, and any disclosure is confined only to necessary personnel. It also means that various safeguards should be in place so that an attorney can be reasonably certain to protect any information that is transmitted, stored, accessed, or otherwise processed through cloud services. Comment [24] to Rule 1.6(a) further clarifies an attorney’s duties and obligations:

When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer’s expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

An attorney utilizing “cloud computing” will likely encounter circumstances that require unique considerations to secure client confidentiality. For example, because a server used by a “cloud computing” provider may physically be kept in another country, an attorney must ensure that the data in the server is protected by privacy laws that reasonably mirror those of the United States. Also, there may be situations in which the provider’s ability to protect the information is compromised, whether through hacking, internal impropriety, technical failures, bankruptcy, or other circumstances. While some of these situations may also affect attorneys who use offline

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5 The exceptions covered in Rule 1.6(b) and (c) are not implicated in “cloud computing.” Generally, they cover compliance with Rule 3.3 (“Candor Toward the Tribunal”), the prevention of serious bodily harm, criminal and fraudulent acts, proceedings concerning the lawyer’s representation of the client, legal advice sought for Rule compliance, and the sale of a law practice.
storage, an attorney using "cloud computing" services may need to take special steps to satisfy his or her obligation under Rules 1.0, 1.6 and 1.15.\footnote{Advisable steps for an attorney to take reasonable care to meet his or her obligations for Professional Conduct are outlined below.}

Rule 5.3 ("Responsibilities Regarding Nonlawyer Assistants") states:

- With respect to a nonlawyer employed or retained by or associated with a lawyer:
  - (a) A partner and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person’s conduct is compatible with the professional obligations of the lawyer.
  - (b) A lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer; and
  - (c) A lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
    - (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
    - (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and in either case knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

At its essence, “cloud computing” can be seen as an online form of outsourcing subject to Rule 5.1 and Rule 5.3 governing the supervision of those who are associated with an attorney. Therefore, a lawyer must ensure that tasks are delegated to competent people and organizations. This means that any service provider who handles client information needs to be able to limit authorized access to the data to only necessary personnel, ensure that the information is backed up, reasonably available to the attorney, and reasonably safe from unauthorized intrusion.

It is also important that the vendor understands, embraces, and is obligated to conform to the professional responsibilities required of lawyers, including a specific agreement to comply with all ethical guidelines, as outlined below. Attorneys may also need a written service agreement that can be enforced on the provider to protect the client’s interests. In some circumstances, a client may need to be advised of the outsourcing or use of a service provider and the identification of the provider. A lawyer may also need an agreement or written disclosure with the client to outline the nature of the cloud services used, and its impact upon the client’s matter.

C. Obligations of Reasonable Care for Pennsylvania/Factors to Consider
In the context of “cloud computing,” an attorney must take reasonable care to make sure that the conduct of the cloud computing service provider conforms to the rules to which the attorney himself is subject. Because the operation is outside of an attorney’s direct control, some of the steps taken to ensure reasonable care are different from those applicable to traditional information storage.

While the measures necessary to protect confidential information will vary based upon the technology and infrastructure of each office — and this Committee acknowledges that the advances in technology make it difficult, if not impossible to provide specific standards that will apply to every attorney — there are common procedures and safeguards that attorneys should employ.

These various safeguards also apply to traditional law offices. Competency extends beyond protecting client information and confidentiality; it also includes a lawyer’s ability to reliably access and provide information relevant to a client’s case when needed. This is essential for attorneys regardless of whether data is stored onsite or offsite with a cloud service provider. However, since cloud services are under the provider’s control, using “the cloud” to store data electronically could have unwanted consequences, such as interruptions in service or data loss. There are numerous examples of these types of events. Amazon EC2 has experienced outages in the past few years, leaving a portion of users without service for hours at a time. Google has also had multiple service outages, as have other providers. Digital Railroad, a photo archiving service, collapsed financially and simply shut down. These types of risks should alert anyone contemplating using cloud services to select a suitable provider, take reasonable precautions to back up data and ensure its accessibility when the user needs it.

Thus, the standard of reasonable care for “cloud computing” may include:

- Backing up data to allow the firm to restore data that has been lost, corrupted, or accidentally deleted;
- Installing a firewall to limit access to the firm’s network;
- Limiting information that is provided to others to what is required, needed, or requested;
- Avoiding inadvertent disclosure of information;
- Verifying the identity of individuals to whom the attorney provides confidential information;
- Refusing to disclose confidential information to unauthorized individuals (including family members and friends) without client permission;
- Protecting electronic records containing confidential data, including backups, by encrypting the confidential data;
- Implementing electronic audit trail procedures to monitor who is accessing the data;
• Creating plans to address security breaches, including the identification of persons to be notified about any known or suspected security breach involving confidential data;

• Ensuring the provider:
  ○ explicitly agrees that it has no ownership or security interest in the data;
  ○ has an enforceable obligation to preserve security;
  ○ will notify the lawyer if requested to produce data to a third party, and provide the lawyer with the ability to respond to the request before the provider produces the requested information;
  ○ has technology built to withstand a reasonably foreseeable attempt to infiltrate data, including penetration testing;
  ○ includes in its “Terms of Service” or “Service Level Agreement” an agreement about how confidential client information will be handled;
  ○ provides the firm with right to audit the provider’s security procedures and to obtain copies of any security audits performed;
  ○ will host the firm’s data only within a specified geographic area. If by agreement, the data are hosted outside of the United States, the law firm must determine that the hosting jurisdiction has privacy laws, data security laws, and protections against unlawful search and seizure that are as rigorous as those of the United States and Pennsylvania;
  ○ provides a method of retrieving data if the lawyer terminates use of the SaaS product, the SaaS vendor goes out of business, or the service otherwise has a break in continuity; and,
  ○ provides the ability for the law firm to get data “off” of the vendor’s or third party data hosting company’s servers for the firm’s own use or in-house backup offline.

• Investigating the provider’s:
  ○ security measures, policies and recovery methods;
  ○ system for backing up data;
  ○ security of data centers and whether the storage is in multiple centers;
  ○ safeguards against disasters, including different server locations;
  ○ history, including how long the provider has been in business;
  ○ funding and stability;
  ○ policies for data retrieval upon termination of the relationship and any related charges; and,
  ○ process to comply with data that is subject to a litigation hold.

• Determining whether:
  ○ data is in non-proprietary format;
  ○ the Service Level Agreement clearly states that the attorney owns the data;
  ○ there is a 3rd party audit of security; and,
  ○ there is an uptime guarantee and whether failure results in service credits.
• Employees of the firm who use the SaaS must receive training on and are required to abide by all end-user security measures, including, but not limited to, the creation of strong passwords and the regular replacement of passwords.

• Protecting the ability to represent the client reliably by ensuring that a copy of digital data is stored onsite.\(^7\)

• Having an alternate way to connect to the internet, since cloud service is accessed through the internet.

The terms and conditions under which the “cloud computing” services are offered, \(i.e.,\) Service Level Agreements (“SLAs”), may also present obstacles to reasonable care efforts. Most SLAs are essentially “take it or leave it,”\(^8\) and often users, including lawyers, do not read the terms closely or at all. As a result, compliance with ethical mandates can be difficult. However, new competition in the “cloud computing” field is now causing vendors to consider altering terms. This can help attorneys meet their ethical obligations by facilitating an agreement with a vendor that adequately safeguards security and reliability.\(^9\)

Additional responsibilities flow from actual breaches of data. At least forty-five states, including Pennsylvania, currently have data breach notification laws and a federal law is expected. Pennsylvania’s notification law, 73 P.S. § 2303 (2011) (“Notification of Breach”), states:

(a) GENERAL RULE. — An entity that maintains, stores or manages computerized data that includes personal information shall provide notice of any breach of the security of the system following discovery of the breach of the security of the system to any resident of this Commonwealth whose unencrypted and unredacted personal information was or is reasonably believed to have been accessed and acquired by an unauthorized person. Except as provided in section 4 or in order to take any measures necessary to determine the scope of the breach and to restore the reasonable integrity of the data system, the notice shall be made without unreasonable delay. For the purpose of this section, a resident of this Commonwealth may be determined to be an individual whose principal mailing address, as reflected in the computerized data which is maintained, stored or managed by the entity, is in this Commonwealth.

(b) ENCRYPTED INFORMATION. — An entity must provide notice of the breach if encrypted information is accessed and acquired in an unencrypted form, if the security breach is linked to a breach of the security of the encryption or if the security breach involves a person with access to the encryption key.

\(^7\) This is recommended even though many vendors will claim that it is not necessary.

\(^8\) Larger providers can be especially rigid with SLAs, since standardized agreements help providers to reduce costs.

\(^9\) One caveat in an increasing field of vendors is that some upstart providers may not have staying power. Attorneys are well advised to consider the stability of any company that may handle sensitive information and the ramifications for the data in the event of bankruptcy, disruption in service or potential data breaches.
(c) VENDOR NOTIFICATION. A vendor that maintains, stores or manages computerized data on behalf of another entity shall provide notice of any breach of the security system following discovery by the vendor to the entity on whose behalf the vendor maintains, stores or manages the data. The entity shall be responsible for making the determinations and discharging any remaining duties under this act.

A June, 2010, Pew survey highlighted concerns about security for “cloud computing.” In the survey, a number of the nearly 900 internet experts surveyed agreed that it “presents security problems and further exposes private information,” and some experts even predicted that “the cloud” will eventually have a massive breach from cyber-attacks. Incident response plans should be in place before attorneys move to “the cloud,” and the plans need to be reviewed annually. Lawyers may need to consider that at least some data may be too important to risk inclusion in cloud services.

One alternative to increase security measures against data breaches could be “private clouds.” Private clouds are not hosted on the Internet, and give users completely internal security and control. Therefore, outsourcing rules do not apply to private clouds. Reasonable care standards still apply, however, as private clouds do not have impenetrable security. Another consideration might be hybrid clouds, which combine standard and private cloud functions.

D. Web-based E-mail

Web-based email (“webmail”) is a common way to communicate for individuals and businesses alike. Examples of webmail include AOL Mail, Hotmail, Gmail, and Yahoo! Mail. These services transmit and store e-mails and other files entirely online and, like other forms of “cloud computing,” are accessed through an internet browser. While pervasive, webmail carries with it risks that attorneys should be aware of and mitigate in order to stay in compliance with their ethical obligations. As with all other cloud services, reasonable care in transmitting and storing client information through webmail is appropriate.

In 1999, The ABA Standing Commission on Ethics and Professional Responsibility issued Formal Opinion No. 99-413, discussed in further detail above, and concluded that using unencrypted email is permissible. Generally, concerns about e-mail security are increasing, particularly unencrypted e-mail. Whether an attorney’s obligations should include the safeguard of encrypting emails is a matter of debate. An article entitled, “Legal Ethics in the Cloud: Avoiding the Storms,” explains:

Respected security professionals for years have compared e-mail to postcards or postcards written in pencil. Encryption is being increasingly required in areas like banking and health care. New laws in Nevada and Massachusetts (which apply to attorneys as well as others) require defined personal information to be encrypted when it is electronically transmitted. As the use of encryption grows in areas like

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these, it will become difficult for attorneys to demonstrate that confidential client data needs lesser protection.\footnote{David G. Ries, Esquire, “Legal Ethics in the Cloud: Avoiding the Storms,” course handbook, Cloud Computing 2011: Cut Through the Fluff & Tackle the Critical Stuff (June 2011) (internal citations omitted).}

The article also provides a list of nine potential e-mail risk areas, including confidentiality, authenticity, integrity, misdirection or forwarding, permanence (wanted e-mail may become lost and unwanted e-mail may remain accessible even if deleted), and malware. The article further provides guidance for protecting e-mail by stating:

In addition to complying with any legal requirements that apply, the most prudent approach to the ethical duty of protecting confidentiality is to have an express understanding with clients about the nature of communications that will be (and will not be) sent by e-mail and whether or not encryption and other security measures will be utilized.

It has now reached the point (or at least is reaching it) where most attorneys should have encryption available for use in appropriate circumstances.\footnote{Id.}

Compounding the general security concerns for e-mail is that users increasingly access webmail using unsecure or vulnerable methods such as cell phones or laptops with public wireless internet connections. Reasonable precautions are necessary to minimize the risk of unauthorized access to sensitive client information when using these devices and services, possibly including precautions such as encryption and strong password protection in the event of lost or stolen devices, or hacking.

The Committee further notes that this issue was addressed by the District of Columbia Bar in Opinion 281 (Feb. 18, 1998) ("Transmission of Confidential Information by Electronic Mail"), which concluded that, "In most circumstances, transmission of confidential information by unencrypted electronic mail does not per se violate the confidentiality rules of the legal profession. However, individual circumstances may require greater means of security."

The Committee concluded, and this Committee agrees, that the use of unencrypted electronic mail is not, by itself, a violation of the Rules of Professional Conduct, in particular Rule 1.6 ("Confidentiality of Information").

Thus, we hold that the mere use of electronic communication is not a violation of Rule 1.6 absent special factors. We recognize that as to any confidential communication, the sensitivity of the contents of the communication and/or the circumstances of the transmission may, in specific instances, dictate higher levels of security. Thus, it may be necessary in certain circumstances to use extraordinary means to protect client confidences. To give an obvious example, a lawyer representing an associate in a dispute with the associate's law firm could very easily violate Rule 1.6 by sending a fax concerning the dispute to the law firm's mail room if that message contained client confidential
information. It is reasonable to suppose that employees of the firm, other lawyer employed at the firm, indeed firm management, could very well inadvertently see such a fax and learn of its contents concerning the associate’s dispute with the law firm. Thus, what may ordinarily be permissible—the transmission of confidential information by facsimile—may not be permissible in a particularly factual context.

By the same analysis, what may ordinarily be permissible—the use of unencrypted electronic transmission—may not be acceptable in the context of a particularly heightened degree of concern or in a particular set of facts. But with that exception, we find that a lawyer takes reasonable steps to protect his client’s confidence when he uses unencrypted electronically transmitted messages.

E. Opinions From Other Ethics Committees

Other Ethics Committees have reached conclusions similar in substance to those in this Opinion. Generally, the consensus is that, while “cloud computing” is permissible, lawyers should proceed with caution because they have an ethical duty to protect sensitive client data. In service to that essential duty, and in order to meet the standard of reasonable care, other Committees have determined that attorneys must (1) include terms in any agreement with the provider that require the provider to preserve the confidentiality and security of the data, and (2) be knowledgeable about how providers will handle the data entrusted to them. Some Committees have also raised ethical concerns regarding confidentiality issues with third-party access or general electronic transmission (e.g., web-based email) and these conclusions are consistent with opinions about emergent emergent “cloud computing” technologies.

The American Bar Association Standing Committee on Ethics and Professional Responsibility has not yet issued a formal opinion on “cloud computing.” However, the ABA Commission on Ethics 20/20 Working Group on the Implications of New Technologies, published an “Issues Paper Concerning Client Confidentiality and Lawyers’ Use of Technology” (Sept. 20, 2010) and considered some of the concerns and ethical implications of using “the cloud.” The Working Group found that potential confidentiality problems involved with “cloud computing” include:

- Storage in countries with less legal protection for data;
- Unclear policies regarding data ownership;
- Failure to adequately back up data;
- Unclear policies for data breach notice;
- Insufficient encryption;
- Unclear data destruction policies;
- Bankruptcy;
- Protocol for a change of cloud providers;
- Disgruntled/dishonest insiders;
- Hackers;
- Technical failures;
- Server crashes;
- Viruses;
Data corruption;
Data destruction;
Business interruption (e.g., weather, accident, terrorism); and,
Absolute loss (i.e., natural or man-made disasters that destroy everything).

Id. The Working Group also stated, “[F]orms of technology other than ‘cloud computing’ can produce just as many confidentiality-related concerns, such as when laptops, flash drives, and smart phones are lost or stolen.” Id. Among the precautions the Commission is considering recommending are:

- Physical protection for devices (e.g., laptops) or methods for remotely deleting data from lost or stolen devices;
- Strong passwords;
- Purging data from replaced devices (e.g., computers, smart phones, and copiers with scanners);
- Safeguards against malware (e.g., virus and spyware protection);
- Firewalls to prevent unauthorized access;
- Frequent backups of data;
- Updating to operating systems with the latest security protections;
- Configuring software and network settings to minimize security risks;
- Encrypting sensitive information;
- Identifying or eliminating metadata from electronic documents; and
- Avoiding public Wi-Fi when transmitting confidential information (e.g., sending an email to a client).

Id. Additionally, the ABA Commission on Ethics 20/20 has drafted a proposal to amend, inter alia, Model Rule 1.0 (“Terminology”), Model Rule 1.1 (“Competence”), and Model Rule 1.6 (“Duty of Confidentiality”) to account for confidentiality concerns with the use of technology, in particular confidential information stored in an electronic format. Among the proposed amendments (insertions underlined, deletions struck through):

Rule 1.1 (“Competence”) Comment [6] (“Maintaining Competence”): “To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.”

Rule 1.6(c) (“Duty of Confidentiality”): “A lawyer shall make reasonable efforts to prevent the inadvertent disclosure of, or unauthorized access to, information relating to the representation of a client.”

Rule 1.6 (“Duty of Confidentiality”) Comment [16] (“Acting Competently to Preserve Confidentiality”): “Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons or entities who are participating in the representation of the client or who are subject to the lawyer’s supervision or monitoring. See Rules 1.1, 5.1, and 5.3. Factors to
be considered in determining the reasonableness of the lawyer’s efforts include the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, and the cost of employing additional safeguards. Whether a lawyer may be required to take additional steps to safeguard a client’s information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules.

In Formal Opinion No. 99-413 (March 10, 1999), the ABA Standing Committee on Ethics and Professional Responsibility determined that using e-mail for professional correspondence is acceptable. Ultimately, it concluded that unencrypted e-mail poses no greater risks than other communication modes commonly relied upon. As the Committee reasoned, “The risk of unauthorized interception and disclosure exists in every medium of communication, including e-mail. It is not, however, reasonable to require that a mode of communicating information must be avoided simply because interception is technologically possible, especially when unauthorized interception or dissemination of the information is a violation of the law.” Id.

Also relevant is ABA Formal Opinion 08-451 (August 5, 2008), which concluded that the ABA Model Rules generally allow for outsourcing of legal and non-legal support services if the outsourcing attorney ensures compliance with competency, confidentiality, and supervision. The Committee stated that an attorney has a supervisory obligation to ensure compliance with professional ethics even if the attorney’s affiliation with the other lawyer or nonlawyer is indirect. An attorney is therefore obligated to ensure that any service provider complies with confidentiality standards. The Committee advised attorneys to utilize written confidentiality agreements and to verify that the provider does not also work for an adversary.

The Alabama State Bar Office of General Council Disciplinary Commission issued Ethics Opinion 2010-02, concluding that an attorney must exercise reasonable care in storing client files, which includes becoming knowledgeable about a provider’s storage and security and ensuring that the provider will abide by a confidentiality agreement. Lawyers should stay on top of emerging technology to ensure security is safeguarded. Attorneys may also need to back up electronic data to protect against technical or physical impairment, and install firewalls and intrusion detection software.

State Bar of Arizona Ethics Opinion 09-04 (Dec. 2009) stated that an attorney should take reasonable precautions to protect the security and confidentiality of data, precautions which are satisfied when data is accessible exclusively through a Secure Sockets Layer (“SSL”) encrypted connection and at least one other password was used to protect each document on the system. The Opinion further stated, “It is important that lawyers recognize their own competence limitations regarding computer security measures and take the necessary time and energy to become competent or alternatively consult experts in the field.” Id. Also, lawyers should ensure reasonable protection through a periodic review of security as new technologies emerge.

The California State Bar Standing Committee on Professional Responsibility and Conduct concluded in its Formal Opinion 2010-179 that an attorney using public wireless connections to conduct research and send e-mails should use precautions, such as personal firewalls and encrypting files and transmissions, or else risk violating his or her confidentiality and competence obligations. Some highly sensitive matters may necessitate discussing the use of
public wireless connections with the client or in the alternative avoiding their use altogether. Appropriately secure personal connections meet a lawyer’s professional obligations. Ultimately, the Committee found that attorneys should (1) use technology in conjunction with appropriate measures to protect client confidentiality, (2) tailor such measures to each unique type of technology, and (3) stay abreast of technological advances to ensure those measures remain sufficient.

The Florida Bar Standing Committee on Professional Ethics, in Opinion 06-1 (April 10, 2006), concluded that lawyers may utilize electronic filing provided that attorneys “take reasonable precautions to ensure confidentiality of client information, particularly if the lawyer relies on third parties to convert and store paper documents to electronic records.” Id.

Illinois State Bar Association Ethics Opinion 10-01 (July 2009) stated that “[a] law firm’s use of an off-site network administrator to assist in the operation of its law practice will not violate the Illinois Rules of Professional Conduct regarding the confidentiality of client information if the law firm makes reasonable efforts to ensure the protection of confidential client information.”

The Maine Board of Overseers of the Bar Professional Ethics Commission adopted Opinion 194 (June 30, 2008) in which it stated that attorneys may use third-party electronic back-up and transcription services so long as appropriate safeguards are taken, including “reasonable efforts to prevent the disclosure of confidential information,” and at minimum an agreement with the vendor that contains “a legally enforceable obligation to maintain the confidentiality of the client data involved.” Id.

Of note, and the Maine Ethics Commission, in a footnote, suggests in Opinion 194 that the federal Health Insurance Portability and Accountability Act (“HIPAA”) Privacy and Security Rule 45 C.F.R. Subpart 164.314(a)(2) provides a good medical field example of contract requirements between medical professionals and third party service providers (“business associates”) that handle confidential patient information. SLAs that reflect these or similar requirements may be advisable for lawyers who use cloud services.

45 C.F.R. Subpart 164.314(a)(2)(i) states:

The contract between a covered entity and a business associate must provide that the business associate will:

(A) Implement administrative, physical, and technical safeguards that reasonably and appropriately protect the confidentiality, integrity, and availability of the electronic protected health information that it creates, receives, maintains, or transmits on behalf of the covered entity as required by this subpart;

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(B) Ensure that any agent, including a subcontractor, to whom it provides such information agrees to implement reasonable and appropriate safeguards to protect it;

(C) Report to the covered entity any security incident of which it becomes aware;

(D) Authorize termination of the contract by the covered entity, if the covered entity determines that the business associate has violated a material term of the contract.

Massachusetts Bar Association Ethics Opinion 05-04 (March 3, 2005) addressed ethical concerns surrounding a computer support vendor’s access to a firm’s computers containing confidential client information. The committee concluded that a lawyer may provide a third-party vendor with access to confidential client information to support and maintain a firm’s software. Clients have “impliedly authorized” lawyers to make confidential information accessible to vendors “pursuant to Rule 1.6(a) in order to permit the firm to provide representation to its clients.” Id. Lawyers must “make reasonable efforts to ensure” a vendor’s conduct comports with professional obligations. Id.

The State Bar of Nevada Standing Committee on Ethics and Professional Responsibility issued Formal Opinion No. 33 (Feb. 9, 2006) in which it stated, “an attorney may use an outside agency to store confidential information in electronic form, and on hardware located outside an attorney’s direct supervision and control, so long as the attorney observed the usual obligations applicable to such arrangements for third party storage services.” Id. Providers should, as part of the service agreement, safeguard confidentiality and prevent unauthorized access to data. The Committee determined that an attorney does not violate ethical standards by using third-party storage, even if a breach occurs, so long as he or she acts competently and reasonably in protecting information.

The New Jersey State Bar Association Advisory Committee on Professional Ethics issued Opinion 701 (April 2006) in which it concluded that, when using electronic filing systems, attorneys must safeguard client confidentiality by exercising “sound professional judgment” and reasonable care against unauthorized access, employing reasonably available technology. Id. Attorneys should obligate outside vendors, through “contract, professional standards, or otherwise,” to safeguard confidential information. Id. The Committee recognized that Internet service providers often have better security than a firm would, so information is not necessarily safer when it is stored on a firm’s local server. The Committee also noted that a strict guarantee of invulnerability is impossible in any method of file maintenance, even in paper document filing, since a burglar could conceivably break into a file room or a thief could steal mail.

The New York State Bar Association Committee on Professional Ethics concluded in Opinion 842 (Sept. 10, 2010) that the reasonable care standard for confidentiality should be maintained for online data storage and a lawyer is required to stay abreast of technology advances to ensure protection. Reasonable care may include: (1) obligating the provider to preserve confidentiality and security and to notify the attorney if served with process to produce client information, (2) making sure the provider has adequate security measures, policies, and recoverability methods.
and (3) guarding against “reasonably foreseeable” data infiltration by using available technology.

The North Carolina State Bar Ethics Committee has addressed the issue of “cloud computing” directly, and this Opinion adopts in large part the recommendations of this Committee. Proposed Formal Opinion 6 (April 21, 2011) concluded that “a law firm may use SaaS 14 if reasonable care is taken effectively to minimize the risks to the disclosure of confidential information and to the security of client information and client files.” Id. The Committee reasoned that North Carolina Rules of Professional Conduct do not require a specific mode of protection for client information or prohibit using vendors who may handle confidential information, but they do require reasonable care in determining the best method of representation while preserving client data integrity. Further, the Committee determined that lawyers “must protect against security weaknesses unique to the Internet, particularly 'end-user' vulnerabilities found in the lawyer's own law office.” Id.

The Committee’s minimum requirements for reasonable care in Proposed Formal Opinion 6 included: 15

- An agreement on how confidential client information will be handled in keeping with the lawyer’s professional responsibilities must be included in the SaaS vendor’s Terms of Service or Service Level Agreement, or in a separate agreement that states that the employees at the vendor’s data center are agents of the law firm and have a fiduciary responsibility to protect confidential client information and client property;

- The agreement with the vendor must specify that firm’s data will be hosted only within a specified geographic area. If by agreement the data is hosted outside of the United States, the law firm must determine that the hosting jurisdiction has privacy laws, data security laws, and protections against unlawful search and seizure that are as rigorous as those of the United States and the state of North Carolina;

- If the lawyer terminates use of the SaaS product, the SaaS vendor goes out of business, or the service otherwise has a break in continuity, the law firm must have a method for retrieving the data, the data must be available in a non-proprietary format that is compatible with other firm software or the firm must have access to the vendor’s software or source code, and data hosted by the vendor or third party data hosting company must be destroyed or returned promptly;

14 SaaS, as stated above, stands for Software-as-a-Service and is a type of “cloud computing.”
15 The Committee emphasized that these are minimum requirements, and, because risks constantly evolve, “due diligence and perpetual education as to the security risks of SaaS are required.” Consequently, lawyers may need security consultants to assess whether additional measures are necessary.
• The law firm must be able to get data “off” the vendor’s or third party data hosting company’s servers for lawyers’ own use or in-house backup offline; and,

• Employees of the firm who use SaaS should receive training on and be required to abide by end-user security measures including, but not limited to, the creation of strong passwords and the regular replacement of passwords.

In Opinion 99-03 (June 21, 1999), the State Bar Association of North Dakota Ethics Committee determined that attorneys are permitted to use online data backup services protected by confidential passwords. Two separate confidentiality issues that the Committee identified are, (1) transmission of data over the internet, and (2) the storage of electronic data. The Committee concluded that the transmission of data and the use of online data backup services are permissible provided that lawyers ensure adequate security, including limiting access only to authorized personnel and requiring passwords.

Vermont Bar Association Advisory Ethics Opinion 2003-03 concluded that lawyers can use third-party vendors as consultants for confidential client data-base recovery if the vendor fully understands and embraces the clearly communicated confidentiality rules. Lawyers should determine whether contractors have sufficient safety measures to protect information. A significant breach obligates a lawyer to disclose the breach to the client.

Virginia State Bar Ethics Counsel Legal Ethics Opinion 1818 (Sept. 30, 2005) stated that lawyers using third party technical assistance and support for electronic storage should adhere to Virginia Rule of Professional Conduct 1.6(b)(6), requiring “due care” in selecting the service provider and keeping the information confidential. Id.

These opinions have offered compelling rationales for concluding that using vendors for software, service, and information transmission and storage is permissible so long as attorneys meet the existing reasonable care standard under the applicable Rules of Professional Conduct, and are flexible in contemplating the steps that are required for reasonable care as technology changes.

IV. Conclusion

The use of “cloud computing,” and electronic devices such as cell phones that take advantage of cloud services, is a growing trend in many industries, including law. Firms may be eager to capitalize on cloud services in an effort to promote mobility, flexibility, organization and efficiency, reduce costs, and enable lawyers to focus more on legal, rather than technical and

\[1^{6}\] Virginia Rule of Professional Conduct 1.6(b) states in relevant part:

To the extent a lawyer reasonably believes necessary, the lawyer may reveal:

(6) information to an outside agency necessary for statistical, bookkeeping, accounting, data processing, printing, or other similar office management purposes, provided the lawyer exercises due care in the selection of the agency, advises the agency that the information must be kept confidential and reasonably believes that the information will be kept confidential.
administrative, issues. However, lawyers must be conscientious about maintaining traditional confidentiality, competence, and supervisory standards.

This Committee concludes that the Pennsylvania Rules of Professional Conduct require attorneys to make reasonable efforts to meet their obligations to ensure client confidentiality, and confirm that any third-party service provider is likewise obligated.

Accordingly, as outlined above, this Committee concludes that, under the Pennsylvania Rules of Professional Conduct an attorney may store confidential material in "the cloud." Because the need to maintain confidentiality is crucial to the attorney-client relationship, attorneys using "cloud" software or services must take appropriate measures to protect confidential electronic communications and information. In addition, attorneys may use email but must, under appropriate circumstances, take additional precautions to assure client confidentiality.

CAVEAT: THE FOREGOING OPINION IS ADVISORY ONLY AND IS NOT BINDING ON THE DISCIPLINARY BOARD OF THE SUPREME COURT OF PENNSYLVANIA OR ANY COURT. THIS OPINION CARRIES ONLY SUCH WEIGHT AS AN APPROPRIATE REVIEWING AUTHORITY MAY CHOOSE TO GIVE IT.
Natalie Robinson Kelly

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Witness Preparation: Readying The Ground Troops

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GUIDELINES FOR PLAINTIFF AND OTHER TRIAL WITNESSES

By Bradley Dozier and Debra Schwartz

1. TELL THE TRUTH. This is not just a moral rule. You must assume that the other lawyer is smart enough to know when you are not truthful and will use any false statements to impeach your credibility.

2. THINK BEFORE YOU SPEAK. Wait at least five full seconds before you begin answering the question. This allows me time to formulate any objections to the question, and gives you a little time to think through your answer.

3. BE BRIEF. ANSWER ONLY THE QUESTION YOU HAVE BEEN ASKED. The examiner is entitled to an answer to the question she asks, but only to that question. Avoid giving long, rambling answers, and be precise with your responses. The more you talk, the higher the likelihood you'll say something that's damaging to your case without you even realizing it.

4. TAKE YOUR TIME. Listen very carefully to the question and then think your way through the answer. Don't start talking until you have formed the answer in your head. Each and every word you say is being formally documented and actually means something, so don't throw words around casually like we tend to do in everyday conversation.

5. BE PRECISE. "Yes" means Yes. "No" means No. "I don't know," "I'm not sure," and "I don't remember" means something totally different and can be used against you in the case.

6. DO NOT VOLUNTEER INFORMATION. The only time you can volunteer extra information is if there is no question in your mind that it would be helpful to the case. Do not think out loud.
7. IF YOU DO NOT UNDERSTAND, DO NOT ANSWER. Say you don't understand. It is up to the examiner to frame intelligible questions. If she cannot do that, do not help her. Do not respond by asking the examiner, "Do you mean such-and-such?"

8. TESTIFY ONLY ABOUT FACTS. You "know" only what you have seen or heard or experienced firsthand. A "fact" is something you have seen, heard or experienced. There is a difference between a question which calls for information that you know and information that you believe to be true.

9. BE CAREFUL OF ABSOLUTES: "Always" and "never" can be problematic. If the other side finds exceptions, you could be made to look like a liar. Adjectives usually distort and exaggerate.

10. DO NOT GUESS. If you do not know or cannot recall something, say "I don't remember." Be as specific or as vague as your memory allows, but do NOT state anything that is contrary to your recollection or you simply do not know. It is however good to estimate time frames (use holidays or promotions as reference points). If you are asked for a date and you can recall the exact date, give it. On the other hand, if you recall the approximate date, state the approximate date.

11. NEVER EXPRESS ANGER OR ARGUE WITH THE EXAMINER. If a line of questioning is making you feel uncomfortable or angry, indicate that you would like a short recess.

12. AVOID JOKING OR SARCASM. Remember that you are under solemn oath and you will be treated very sternly if you give any indication that you are not taking your oath seriously.

13. AVOID EVEN THE MILDEST OBSCENITY OR EPITHET. Also avoid absolutely any racial or ethnic slurs or any references which could be considered derogatory.

14. DON'T ADMIT SOMETHING UNLESS YOU'RE SURE IT'S TRUE. Don't deny something unless you're sure it's false. If you're not sure about something, say you're not sure, you don't know or you can't remember.

15. DO NOT LET THE EXAMINER INTERRUPT YOU. If you are interrupted, let the examiner finish her interruption and then firmly but courteously state that you were interrupted and that you have not finished the answer to the previous question. Then proceed to complete the answer to the previous question.

16. DO NOT LET THE EXAMINER PUT WORDS IN YOUR MOUTH. Do NOT accept or adopt an examiner's summary of your prior testimony. Do NOT accept her
characterization of time, distance, personalities, events, and so forth. Rephrase the response into a sentence of your own, using your own words. If the examiner starts with a summary, be on guard. She’s probably changed your words, but with important consequences.

17. DO NOT ANSWER A COMPOUND QUESTION unless you are certain that you completely understand all parts of it. If it is too complex to be held in your mind, it is too complex and ambiguous to answer. Ask the examiner to break the question into parts.

18. REFER TO DOCUMENTS IF NECESSARY. If you are asked for information contained in a document which is NOT being used as an exhibit, answer the question only if you recall the answer. If you cannot answer the question without looking at a document which is NOT being used as an exhibit, you may answer by stating simply that you DO NOT recall. Its also ok to ask for the documents or wait for your attorney to ask.

19. STAND YOUR GROUND. Don't be afraid to politely engage opposing counsel if she pushes you or tries to lead you down a certain path. If the lawyer does this, she's usually trying to get you to say something that's damaging to your case.

20. BE POLITE AT ALL TIMES. Don't act like a jerk. You want to make a good impression on the jury and they will be watching you from the moment you enter the courtroom and even when you are in the hallway, elevator or restroom.
Preparing Challenging Clients for Trial

In every employment discrimination case that goes to trial, the Plaintiff will be a crucial, if not the key witness. No two clients are the same and no two cases are exactly alike. You will represent clients with a variety of personalities and temperaments. Unfortunately, some clients will have temperaments that may jeopardize his or her ability to provide beneficial testimony in support of his or her case. Even though there are some universal things that clients must be told to prepare them for trial in employment matters, there is no complete checklist that directs the preparation of Plaintiffs for trial. Some difficult clients present specific challenges that must be addressed. Below you will find a list of some of the most common types of challenging clients and specific advice on how to deal with the challenges these clients present to make sure they are prepared to give their best testimony. This is not an exhaustive list, and some clients may fit into one or more categories.

The Stoic “Tough Guy” Client

This type of client has a difficult time expressing emotion, which makes the client reluctant to talk about the emotional and physical effects of the company’s unlawful actions. This personality type is troublesome because these clients may have difficulty convincing a judge or jury that compensatory damages are warranted in their cases.

In many professions (e.g., law enforcement, medicine) being able to keep your emotions in check is extremely important and essential to good job performance, but being emotionally detached during testimony may do more harm than good.

**TIPS:** You have to get this person talking and let him know that it is okay to express pain. Get this client to think back on how the acts of Defendant affected his family before having him talk about himself. Help him to recollect feelings as opposed to facts.

The Unsophisticated Client

Despite your best efforts, the Unsophisticated Client has a difficult time understanding the theory of the case and the basics of why the facts in the case support a legal claim. Because of this difficulty, the client may forget to mention important facts in the case, be easily misled by opposing counsel into providing information that would be potentially harmful to their case or veer off and talk about information totally irrelevant to the claims in the case.
A client can be unsophisticated for many reasons. Perhaps, the client’s level of education or lack of life experience prevents them from understanding the basic, important information about their case. Moreover, the client may have a health issue, such as dementia, hearing problems, or memory problems that hinders the client’s ability to perform well when questioned at trial.

**TIPS:** Provide this client with a list of certain topics that have come up in the case, but are not really critical or even relevant and warn him to stay away from these topics. Make sure you reiterate over and over the important facts and issues in the case. Help the client to come up with numbered lists for critical facts. For instance, the three best facts that support his claim for race discrimination. Help this client keep his eye on the ball.

**The Emotional Egg Shell Plaintiff**

This type of plaintiff, which we learned about in our first year Torts class, was emotionally fragile and insecure prior to the bad actor’s discriminatory conduct, but the defendant’s unlawful conduct exacerbated the psychological condition. For our purposes, however, we broaden the traditional definition of an Egg Shell Plaintiff to include someone who is in an emotionally fragile state regardless of whether the condition occurred before defendant’s actions or as a result of the defendant’s actions. Regardless of the timing of the onset of the condition, this type of plaintiff is highly emotional and insecure (e.g., crying, sad disposition, depressed, overly medicated) and may have difficulty giving good testimony under pressure because they emotionally cannot handle the stress of trial.

This type of client may not be able to fully engage in the litigation process because of their emotional condition.

**TIPS:** Make sure to speak with this Plaintiff’s treating physicians and counselors before preparing this client for testimony in order to learn the client’s limitations. This witness must be prepared in short sessions at which the main facts of the case are reviewed and there is a discussion of what facts are relevant.

**The Know-It-All, Overconfident Client**

The Know-it-All Clients have never practiced law, particularly employment law, but they are quick to let you and your staff know the best strategy for winning the case. They believe they have a “slam dunk” case worth millions of dollars, and that they simply need to tell their story to convince opposing counsel, a judge or a jury that their
situation merits a substantial financial recovery.

This client believes extensive preparation for trial is unnecessary because they know their case and the best way to present it. The client’s overconfidence and arrogance distorts their judgment and prevents them from following or accepting meaningful advice from their legal counsel. In short, the client has all the answers.

A client’s overconfidence, arrogance or dominant personality may prevent the client from understanding the strengths and weaknesses of their case and prevent the client from performing at an optimal level.

**TIPS:** Stick to the facts with this client, don’t try to argue with him. This type of client needs to be taught how to listen more carefully and answer more slowly – count to 10 before answering any question. This is the type of client that might benefit from a grueling practice session of cross-examination by your partner or a third party who has no personal relationship with the client.

**The Angry Loose Cannon**

The Angry Loose Cannon Client is angry, hostile and determined to make the defendant pay for its unlawful conduct. The client’s hostility towards the defendant is so great that it clouds the client’s ability to view her case in an objective manner. Every action by the defendant or defendant’s counsel is perceived as a major slight against the client, even if there is little or no evidence to support that assertion. The client may be vengeful and consumed with the desire to “punish” the defendant at all cost.

**TIPS:** Explain to the client the need to be likeable to the jury. If the jury finds him vengeful or vindictive, he will recover nothing. Make sure you discuss with the client the essential facts in the case and explain he cannot make generalizations. This client might benefit most from videotaped practice sessions. Be sure to caution this client against erupting in response to cross-examination. Make sure to insist on frequent breaks with this client to allow him to take deep breaths and mentally regroup.
A Practical Guide to Preparing Plaintiff’s Witnesses for Testifying At Trial

Other than case selection, the key to a plaintiff prevailing in any employment discrimination lawsuit is preparation by plaintiff’s counsel at every stage of the case. At no time is preparation more important than when getting ready for calling lay witnesses at trial, whether it is the plaintiff or another fact witness. It is imperative for diligent counsel to confer with and prepare any witness whom she will call at trial prior to the witness giving testimony. Indeed, a lawyer has an ethical obligation to prepare a witness that she plans to present at trial. Allowing any witness to just go in and tell his story to the jury, without preparation, is not only malpractice, but will be the downfall of the case.

On the other hand, unethically coaching a witness can be just as problematic. There is a very real difference between adequately preparing a witness and coaching the
witness about what to say. Unfortunately, there is little guidance offered by the experts on what passes for ethical witness preparation. Generally, as long as a lawyer does not elicit false or misleading testimony, the lawyer may satisfy her advocacy and ethical obligations by doing the following:

(1) discussing the role of the witness and effective courtroom demeanor;

(2) discussing the witness's recollection and probable testimony;

(3) revealing to the witness other testimony or evidence that will be presented;

(4) discussing the applicability of law to the events in issue;

(5) reviewing the factual context into which the witness's observations or opinions will fit;

(6) reviewing documents or other physical evidence that may be introduced;

(7) discussing probable lines of cross examination that the witness should be prepared to meet; and

(8) practicing the witness’ testimony.

Bear in mind, for many witnesses, this may be their first and only experience with a legal proceeding. It is your job to do what you can to put your witness at ease. Introduce yourself and explain your role in the proceeding (if the witness is not your client, lay that out before you begin). Explain as much as necessary to demystify the process and make it less scary: what the courtroom looks like; who will be sitting at the tables; where the jury will be located; where the witness will wait prior to getting called
to testify; which member of your staff will be contacting the witness to come in to testify and when they are likely to be called. Explain that they will be sworn in, what that means, and how telling the truth is mandatory. Explain credibility and how critical it is. Explain what objections are and what they mean, and instruct them that they should stop talking once an objection is made. Tell the witness what to do if the judge asks them a question directly, and who to face when they are speaking. Inform your witness that the trier of fact will not only be listening to their testimony, but observing their facial expressions and gestures as well. Even if you think you do not need to, be sure to inform the witness that eye-rolling, sighing, and poorly timed arm crossing can come across as hostile, defensive, and unprofessional to the jury or the judge.

Explain to the witness that it is his job is to answer questions honestly. However, be sure to lay out the relevant portions of your case for the witness so that he has an understanding of what you are trying to demonstrate with his testimony and how he fits into the big picture. When a witness is provided with an overview of the case in general and their testimony in particular, they are better able to understand the overall nature and objectives of their testimony. Merely going over a witness’s testimony question by question, in the absence of an overall context, results in a confused witnesses who is unable to respond coherently during direct or cross examination. By understanding the case themes and how each element of their testimony is related to a theme, witnesses are better able be effective on the witness stand.
Make sure during the preparation that you ask the witness tough questions about himself, his employment and anything that could be harmful to your case. For example, if your witness is addressing allegations of racial discrimination, ask if he has ever been accused of any kind of discrimination or harassment, or has ever filed his own discrimination claim. Ask the witness if he has ever been arrested or ever received a DUI. If you are preparing someone who has a reputation for getting angry or upset or easily riled, inform them that the opposing side will try to bait them into precisely that behavior. Advise the witness that opposing counsel will look them up on social media, so if there is any inaccurate representation or a questionable comment, opposing counsel will no doubt question the witness about it. Ask what the witness thinks the other side will ask; this will often result in a franker understanding of what collateral issues are at play, and what your witness does not really want to tell you. Find out if your witness has now or has had in the past a personal relationship with the Plaintiff or anyone employed by the defendant Company. Ask all of your questions; the uncomfortable ones are the most important. You can warn the witness that you are about to ask uncomfortable questions, but you have to ask them. Better to learn this information during the preparation than during the middle of cross-examination at trial. If you know that you are dealing with an opposing counsel who has a difficult personality or particularly challenging cross-examination style, you should give this information to the witness, but preface it by explaining that this is simply your
perception.

Let the witness know that he is not to answer any question he doesn’t understand, even if he thinks he has a general idea of what is being asked. Do not guess. Tell him it is perfectly okay to ask that a question be repeated, or to respond with, “I don’t know.” However, “I don’t know” cannot be used as a substitute for, “I don’t want to answer that question.” Make sure to emphasize that the witness should listen carefully to the question asked, and answer that question only. If a question can be answered “yes” or “no,” the witness should do so, and then provide any necessary explanation. One of the most important instructions you should drill into the witness is that he not volunteer any information not specifically asked for by opposing counsel.

No amount of discussion can fully explain the question-and-answer process. Like anything difficult and unnatural, doing it right takes practice. The best approach is to do a dry run so the witness can experience the process firsthand. With less major witnesses, it doesn’t need to be formal or cover all possible topics, so long as it gives a clear sense of the process. However, the tougher and more realistic it is, the more helpful it will be to the witness in the long run. For the Plaintiff and other key witnesses that you will call in your case in chief, you should consider bringing in your partner or another lawyer who does not have the same close relationship with the client to do practice direct examination and cross-examination.

Of course, an attorney may not tell a witness what to say, but it is the attorney’s
role to help the witness learn to communicate effectively. Therefore it is helpful to run through weak portions of their testimony and immediately assist them in improving. We all learn better by observing our mistakes, so it is a good idea to tape the questioning with a VCR or other camera that records the practice run. Then work with the witness to re-formulate the appropriate responses and then allow the witness to answer it again. A common concern many attorneys share regarding witness preparation is that too much preparation may make a witness look stilted or rehearsed. Except in rare occasions, that is not the case: witnesses who are effectively prepared have greater confidence in their testimony, and this confidence translates to increased credibility.

In summary, witness preparation is more than a brief meeting with your witness. Effective preparation involves helping witnesses understand the courtroom environment,
hone their message and communicate clearly and convincingly. Time spent preparing your lay witnesses for trial will produce positive results at trial.
Cross And Direct Examination: The War Of The Words

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CROSS-EXAMINATION OF WITNESSES

Ways to travel the garden path
I. THEORIES OF CROSS EXAMINATION:

There are as many theories of cross-examination as there are versions of the truth. One old saying has it that there is your version, my version, and the truth. I prefer to believe that the truth has an objective existence; that it is ascertainable; and that it is the version that is most helpful to my clients' case. Any other claims are false, mere propaganda intended to sway the weak of mind.

However, the truth is often hidden behind the lies told by those who would deceive not only me, but the Court, the jury, and anyone else whose opinion may matter. Therefore, it is not as simple as merely asking a witness to describe the facts of an event, for that witness may be prepared to be less than truthful or, even worse, the witness may not yet realize where the truth can be found. It is up to us to help the witness locate the facts and bring them to the attention of those whose opinions matter.

I should be clear that this is about cross-examination. Direct examination of my client or my clients' witnesses is an entirely different process, which merely requires that they be focused on the events which are important and allowed to attest to the truth. It is the hostile or adversarial witness whose ability to tell the truth requires enhancement through cross-examination. There are many theories of how best this may be done, some of which will be discussed herein.
A. Make The Witness Spill His Guts

“Get your facts first, then you can distort them as you please.”

Mark Twain

There are many lawyers who see cross-examination, particularly in deposition, as being a process of draining the witness of all knowledge he or she may have and, either then or at trial, impeaching those aspects of the witness’ testimony which are less convenient than others, i.e. lies. There is much to be said for this method, as it prevents surprise at trial. It is time consuming, straightforward, and relies on the lawyer having a greater ability to remember what has been said than the ability of the witness. It requires dogged persistence in chasing the witness into giving clear and complete answers that cannot later be changed. An example of that kind of cross-examination, an excerpt of the deposition of Julius Dixon, is included in the materials, mainly to show how, at least in my opinion, it is a difficult path to take, although it can be fruitful.

It also requires that there be facts that are useful in impeaching the witness. There is nothing worse than using this method to cross-examine a witness and, at the end, having reviewed all of the documents, your client’s testimony, the witness’ testimony and every other fact available and coming to the conclusion that there is nothing there. You can’t show that the witness has testified falsely or that the non-
discriminatory reasons for firing or whatever he has done to the client are not what he has claimed, irrespective of whether the witness is actually telling the truth. And, don’t be fooled into believing that the mere fact that he testifies with conviction means it is true. I have had this precise situation occur and, following the deposition, found strong, direct evidence, which, if not irrefutable, was closed to it and showed that everything the witness said was a lie and that my client was telling the truth. However, because one cannot rely on such miracles, this is not my favorite form of cross-examination during discovery deposition.

B. Paving the road to Hell

“When I use a word,” Humpty Dumpty said in rather a scornful tone, ‘it means just what I choose it to mean — neither more nor less.’

‘The question is,’ said Alice, ‘whether you can make words mean so many different things.’

‘The question is,’ said Humpty Dumpty, ‘which is to be master — that’s all.”

My preferred discovery cross-examination technique is to persuade the witness that the testimony he or she is giving is helpful to the side for whom that witness is a partisan. There is nothing more satisfying than having an adverse witness lie to you, think he is helping the other side, and all the while he is killing their case.
1. **Forcing the witness to preemptively impeach herself**

Very often, where you have advance notice of what specific information a witness is going to provide, you can set that witness up to impeach the anticipated testimony, rendering that witness useless to the other side. For example, in a sexual harassment case, Defendant had a female co-worker who was prepared to say any number of derogatory things about the plaintiff. She was prepared to paint her as a foul mouthed troll who stomped through the work place tossing out vulgarities, obscenities, profanity, and a great many bad jokes.

However, Defendant had raised a Faragher/Ellerth defense, so that it had to demonstrate that it took sexually harassing behavior seriously, that it wouldn’t permit it to occur and woe betide the employee who engaged in it. I was able to use that co-worker’s effort to help their defense to destroy her credibility as a witness. In order to do so, she went through two hours of cross-examination on her work schedule, the physical layout of the facility, the number of employees, the number of employees per shift, when and for what purpose the employees would have meetings, who would be present, and everything else that could be discovered about who was where and when without tipping the witness on to what was going to happen.
The cross then switched to questions about sexual harassment policies. Were they important. Were they taken seriously. Did the harasser take them seriously. Did he participate in improper behavior. Did he permit others to do so in his presence. What would happen if someone did? The witness built him into a paragon of virtue, a God with an all-seeing eye, and lightning bolts that shot from his fingers at the merest hint of misconduct.

Her problem came when the two lines of inquiry were combined. She was forced to agree that the only time she was in the Plaintiff’s presence at work was during meetings when the harasser was also present. She agreed that the harasser would never have permitted the Plaintiff or anyone else to engage in the sort of improper behavior to which she had been primed to testify. Ultimately, as a result of that lengthy cross, she admitted that she had never seen the Plaintiff engaging in any improper behavior in the work place at any time throughout her career. At that moment, she may even have believed it to be true, despite the fact that she had previously given an affidavit attesting to the exact opposite.

It was apparent that she thought the first part of her testimony was unimportant. She thought that the second part would allow her to paint the harasser in a favorable light. In fact, her “good intentions” destroyed her only real utility she had as their witness.
2. **Forcing the witness to attest to your client’s excellence**

I never get tired of hearing compliments.

John Lithgow

A related method is using a client’s supervisor (often ex-supervisor in the case of a termination) to attest to the client’s excellence as an employee. This generally works only where the employer has a written employment evaluation or bonus system. A somewhat abbreviated version of a deposition using this method is attached.

The first step is to get the supervisor on board with the importance of truth telling in the work place and on official documents in particular. If you have a witness who you believe will try to be difficult, then over the course of the questioning, the witness can be brought along from “do you lie on official documents” to “so you would agree that when you fill out official documents, it is important to ensure that they are honest, accurate, and complete to the best of your knowledge, ability, and belief at the time you fill them out.” If there is information which, if missing, would make the document misleading, get the witness to testify to a duty to ensure that all relevant information is included. Once this has been established, there is very little the witness can do to escape.
At that point, use the evaluation or evaluations as exhibits. Take your time and establish what a wonderful, glowing report the supervisor gave on the evaluation and ask “And, as with other official documents, this was your honest, accurate, and complete opinion of my client’s work performance as of the time you filled out this evaluation, true?” Make sure that you establish all of the various places where the evaluation permits comments, so that the witness does not try to claim that the evaluation is incomplete because he or she was limited by the form.

Once you have established that the witness has such a superb opinion of your client, close it off. Establish that this evaluation contains the last factual information the witness had about your client prior to whatever event is at issue. Hopefully, the witness will agree that he would not just make up an opinion about the plaintiff in the absence of some factual information.\footnote{I once had a witness say that she would do exactly that, so be sure to ask that question. In that case, I asked the witness – who by then knew she had been trapped into giving me very helpful testimony – whether she would form an opinion about my client’s abilities without having observed her or having any other facts that would indicate that she was any less capable than as of the time of this last observation. She blurted out that she would and began testifying that, because my client had gone on a medical leave, her health might very well render her less capable. Once I began (very ponderously and obviously) exploring this potential regarded disability claim, the witness backtracked and admitted that she never shared that view with anyone, that she didn’t really know anything, and that she didn’t actually have an opinion.}
3. Memory is easily forgettable

Remember the words of Chairman Mao: 'It's always darkest before it's totally black.'

John McCain

Many cases come down to the witness’ ability to remember events and exactly how detailed and believable their memory is. In one case, *Whitfield v. Fulton County School District*, the plaintiff obtained summary judgment on liability because (a) the people who interviewed the applicants could not remember the interviews and (b) the Superintendent (who was not identified as a witness) gave no reason at all for his decision, which was admittedly the final selection decision.

During discovery, Defendant revealed that they had lost/destroyed the records relating to one of the positions for which the Plaintiff interviewed. As a result, during the discovery depositions of the interview committee members, the questioning was addressed to the committee members inability to remember events, as opposed to exploring those aspects of the recollections which had undoubtedly been created/refreshed shortly before the deposition.

They were asked the last time they interviewed anyone for any job. One witness had participated in such an interview within the past month, yet could not remember anything about the interviews other than the name of the person who was promoted. The interviews in this case had occurred nearly five years earlier. This
witness was thereby discouraged from claiming to be able to remember details of
the interview of Mr. Whitfield, as he was aware that it would look (at least)
 somewhat fishy.

The committee members were asked who interviewed for the position other
than the successful applicant. Most of them could not remember anyone other than
the Plaintiff and the successful applicant. Several of them admitted that they had a
hard time distinguishing the information about the successful applicant that had been
gleaned during the interview from the information obtained while working with the
successful applicant over the several years following the interview.

The committee members were asked the order in which the applicants were
interviewed. They did not know. They were asked the questions which were asked
during the interview. They didn’t know. Once they revealed that they didn’t know
the questions, they were asked, “Since you don’t remember the questions, is it fair
to say you don’t remember the answers?” Predictably, they agreed. With some
exceptions, they could not remember either their own individual rankings or the
rankings assigned by the committee.

Their failure to remember was not accidental. Had they been prompted with
the information that they had undoubtedly already been provided by defense counsel,
it is likely they would have given some better showing than they did. However,
because the paper file was gone and given the passage of time, the cross-examination was focused on establishing what they did not remember, in an effort to show that they did not know enough even to rebut the prima facie case.

C. The Marathon

Marathon depositions are primarily a tactic used by defense counsel, who cross-examine the plaintiff for the full 7 hours or more. It can be an effective tactic, as long as you are adequately prepared and don’t let the witness tire you out instead of the other way around. I’ve used this technique a few times, once, ironically, in a case where my client was the hiring official and was retaliated against because he refused to hire a significantly less qualified applicant to help the City Manager shore up support among a faction of the City Council.

During the deposition, she was questioned in the way a defense lawyer would cross-examine a plaintiff so as to establish that the plaintiff was not as qualified. She was asked her about every job she had had since high school, went through the entire history with each employer, her job duties, her reporting structure, and what she thought her supervisors would say about her. She reviewed the resume of the candidate the plaintiff wanted to hire and, ultimately, admitted that, “on paper”, he was more qualified than she was. Defendants were left arguing that it was her dynamic personality that caused her to be hired.
By the time of trial, she had been fired and she came across on cross-examination as depressed, with a very flat affect. Her admission that the other candidate was more qualified on paper – coupled with her complete lack of personality – made the jury angry at the Defendant for hiring her, as they had essentially destroyed her career by putting her in a position she could not perform.

Finally, in a pretext case where they are relying on multiple justifications, remember that you generally have to rebut each of the factors articulated by the Defendant. One way to do that in cases with multiple justifications, is to ask whether they would have made the same decision if one of the reasons had not been present. Do this for each reason. You should then be able to establish pretext merely by showing that some of the reasons are disputed, as the Defendant has admitted that, if those reasons weren’t present, they would have not made the same decision and those reasons are disputed.

II. GAMES PEOPLE PLAY

It is not easy to be cross-examined. I have been a witness at trial at least three times and have given a deposition once. I can see why witnesses – who aren’t familiar with the process – can easily get rattled when things get just a little off kilter.

Many lawyers use objections during your cross-examination as ways to interrupt the flow of your questioning or to signal to the witness that a particular
question or line of questioning is problematic. One way of addressing this problem in deposition, where there is no judge to appeal to can be remarkably effective: Throw a tantrum. While at first blush it sounds immature and I’m not necessarily advocating this approach in every situation, but there are times when it is the only way you can get an opposing counsel who is obviously violating the rules to stop.

A hostile argument with the opposing lawyer who is making speaking objections or who is making frivolous objections just to step on the record can throw a witness off his or her stride. By “arguing,” I don’t mean a calm and reasoned discussion between professionals; I mean a loud and angry disagreement, preferably one in which the witness gets dragged into the discussion.

I have seen several witnesses get so rattled by this kind of interplay that they completely forget their preparation and actually begin giving truthful answers without including the careful phrases that were obviously part of the deposition prep. While I don’t recommend engaging in this kind of behavior in every or even most depositions, there are some where the witness has been so thoroughly told what to say that there is no other way to actually get testimony, rather than prepared catchphrases.

You should also remember that the witness’ testimony at trial is going to be influenced by how the witness remembers you from deposition. In one case, I was
extremely friendly with the witness, as she unwittingly gave several damaging admissions. At the end of the deposition, I stopped being friendly and in a very dry tone, wrapped up by establishing in about 10-15 minutes all of the helpful information she had given me over the course of the prior couple of hours. She looked at me as if we were friends of long-standing and I had betrayed her. When she testified at trial, she was hostile and cagey and came across to the jury as someone who had something to hide.

On the other hand, in another deposition, a witness was extremely combative from the beginning. We had a very aggressive interaction during the course of the deposition, most of which was meaningless, but which resulted in about five minutes of very helpful testimony. At trial, I was very polite and deferential to her, while she seemed extremely nervous as she gave short but very damaging information. She came across as an extremely honest witness who was afraid that her employer might impose some adverse consequence as a result of her testimony.

III. CROSS EXAMINATION AT TRIAL

Most of this has been about cross-examination during deposition, as there is a lot more freedom when there is no judge or jury present. However, there are some issues specific to trial that should be addressed.
A. Calling The Other Side

One question that comes up in every trial is whether to call the opposing party for cross-examination under FRE Rule 611(c). There are some cases where it is unavoidable, such as in a case where establishing the prima facie case requires testimony from the opposing party. There are some cases where you may want to call the other party so that the first look the jury gets at them is on cross, where (one hopes) they get hammered and the jury fixes the impression of the witness as a liar before they get to testify on direct examination.

However, there are times when that can be dangerous. Generally, a party cannot call a witness just for the purpose of impeachment. When it comes to the other side’s rebuttal burden, I don’t recommend it unless it is tied into the prima facie case, as you can put yourself in a position where you’ve put in their rebuttal evidence, so that they can move for judgment as a matter of law at the close of your case, without having an opportunity to get in everything you need for impeachment.

Instead, call their witnesses for limited purposes. For example, in one case, I called the ostensible decision-maker – who I know to be a very fussy, overly precise person – for the purpose of using him to establish my prima facie case and then asking him whether, *from his own personal knowledge* (which I stressed twice) he could articulate any reason why my client had not been rehired into an adjunct
teaching position. He testified that he could not and we were done, with the evidence ending with an unrebutted prima facie case of discrimination and retaliation.

In other cases, I’ve called managers to the stand for lengthy cross-examination (and impeachment) because I’m not primarily asking them about the Defendant’s case, but putting in my client’s evidence. Whenever thinking about calling the other side’s witnesses, think about whether you must get evidence from them and then put in just as much as you need.

When you are doing these cross-examinations, make sure you listen and be prepared to go off script. I’ve had a witness who would talk all the way around a question but never answer it. During the first substantive question, he started off on a tangent and continued further from my question as he went, ultimately finishing on a completely different subject matter. Once I saw what he was doing, I sat and rehearsed my question, so that I could ask it exactly the same way. When he was finished, I asked, ‘Do you remember my question?’ After talking that long about other matters, he didn’t, at which point the jury laughed, as they realized that they didn’t remember it either. I asked him if he would like to try answering it this time and asked the same question. The third time we did this, the judge crawled all over him and we didn’t have that problem again.
In another case, involving FMLA and ADA claims, the Defendant was trying to claim that they acted out of concern for the client (when they fired him). After a long build up to establish their genuine concern, I asked the witness, “So, the best thing you thought you could do for him would be to fire him?” The jury laughed, he looked befuddled, and, after stammering, said that he thought my client could use some time off. He then agreed that knew that my client was asking for time off and that the case was about the fact that they wouldn’t give him time off.

Some facts you will have to introduce as part of your case are technical issues that the jury won’t understand, such as the number of employees, the filing of the EEOC charge, and similar issues. Try to pose these questions in a way that makes sense to the jury and that they can understand as having some relevance on liability.

For example, when establishing how many employees the Defendant has, try to ask it so that it makes a point that makes sense to the jury. For example, a reduction in force that affected one person is more suspect in a company that has 5000 employees, so ask “You claim that you terminated my client in a reduction in force, right? He was the oldest person in his unit, right? You also claim that my client was the only person terminated in this reduction in force, right? Your company has over 5000 employees, yet has a reduction in force that only affects one position, who just happens to be the oldest person in his unit, do I understand you
correctly?” The same thing when the client has filed an EEOC Charge and you have a cause determination. Ask the employer if they received the Charge, if they received the determination, and if they changed any of their policies once they were told by the federal government that they had violated federal law. This may allow you to get a cause finding into evidence to support a claim for punitive damages where you might not have been able to get it in as substantive evidence to prove discrimination.

B. Cross-examining In Your Opponent’s Case

Cross examination in your opponent’s case has fewer risks, but there are a few simple rules. First, you listen to the witness. Sometimes, a witness on direct examination will open up an avenue of cross that you might not have expected. I had a witness in a case testify that he did not know my client’s national origin (Iranian) at the point that he hired him for an adjunct position. He later testified that he asked my client about the Iran/Iraq war because he wanted an Iranian’s opinion on the issues. As that came out of his mouth, I glanced at the jury. A member of the jury was looking at me in utter amazement, with his mouth dropped open and his eyes wide.

Another witness (a Defendant) testified on direct that, after my client complained of discrimination, he wouldn’t promote him until a Court told him he
had to. The cross-examination on that issue was relatively simple, i.e., just reminding the witness (jury) what he had said on direct.

Another important (and obvious) point is to make sure that you have an outline of questions that allows you to cross-examine the witness in order to either establish an issue necessary for you to overcome directed verdict or to establish that the issue is disputed. Make sure you have outlined every fact you must have from this witness and know exactly where to go to get contrary evidence.

In a pretext case, remember that you have to rebut each of the factors articulated by the Defendant. You should have that evidence or you wouldn’t get past summary judgment, but make sure that you include in your outline everything that has been used as a reason. In cases with multiple justifications, one important thing to do is to ask whether they would have made the same decision if one of the reasons had not been present. If it is easy to forget

Finally, your outline should also include a series of questions at the end that will allow you to finish strong. Make sure that there is no wiggle room on these questions, as the last thing you want to do is to have the witness smack a question out of the park and have nothing to come back with to end on a high note.
IV. CONCLUSION

This is by no means a comprehensive exposition of cross-examination techniques, but I hope you will find it helpful. Cross can be a lot of fun, as it is your opportunity to get the truth out of an often unwilling witness. As a final example of a cross examination that took relatively little work, but turned out well, I’d suggest reading the Paula Deen deposition, which can be found at http://www.cnn.com/interactive/2013/06/entertainment/deen-deposition/. If nothing else, it is an excellent example of things to tell your client not to do.
IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION  

JACOB FARMER, ANDREW CANNON,  }
RICO ARELLANO and FORREST  }
HILL,  }
  )  
Plaintiffs,  )CIVIL ACTION FILE  
vs.  )NO: 1:10-CV-2148-ODE  
  )  
BOARD OF REGENTS OF THE  )  
UNIVERSITY SYSTEM OF GEORGIA,  )  
DR. ERROL B. DAVIS, in his  )  
official capacity; DR. EARL  )  
B. YARBROUGH, in his official  )  
capacity as President of  )  
Savannah State University;  )  
MARILYNN STACEY-SUGGS, in her  )  
individual and official  )  
capacity as Interim Athletic  )  
Director of Savannah State  )  
University,  )  
  )  
Defendants.  )  

VIDEO DEPOSITION OF  
JULIUS DIXON  

June 6, 2011  
9:30 a.m.  

Georgia Bar Association  
18 West Bay Street  
Savannah, Georgia  

Lauren E.H. Boxx, RPR, CCR-B-2394  

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scholarship and having these files complete are
totally separate.

Q Okay. So, for example, Forrest Hill even if
you didn't have those documents you could have offered
him a scholarship, right, sent him a Letter of Intent
and offered him a scholarship?
A Yes.
Q And --
A Can I expound upon that?
Q If it's responsive to my question.
A It's relating to Mr. Hill.
Q Well, is it responsive to the question on
whether you could have offered him a scholarship?
Could you have done so?
A Yes, it's responsive. He was -- if he was
offered a scholarship by Coach Wells or John
Montgomery, I never rescinded a scholarship offer to
Mr. Hill.
Q Okay.
A So the fact --
Q Did you send him a letter on national
signing day?
A No, we did not because Mr. Montgomery
informed us that he was going to Auburn.
Q Okay. I see. What about Jacob Farmer?
A: I don't know the exact amount that I had left because I had to figure out what we had coming back, how much money was going to be dedicated to the returners, and also my plan, as I stated earlier, was to reward guys that had been with the program and were in good academic standing and kept their nose clean and --

Q: You were able to offer 13 scholarships without having to make those decisions, right?

A: Yes.

Q: Okay. And you then later -- later on you offered several more scholarships, right?

A: Right.

Q: Okay. How many more?

A: I don't know the exact number, but we ended up, I don't know, in the 20s.

Q: Okay. Did you ever call Mr. Farmer back and say, hey, we've, I've straightened this out, now I know how much money I've got, would you like to come play for Savannah State?

A: No, because on national signing day when I was surfing the MEAC website I found out that Jacob Farmer had went to Florida A & M, so I wouldn't have had any reason to contact him because he, you know, he had someplace that he was enrolled in school and
Julius Dixon - 06/06/11

1   going.
2        Q    And when was that?
3        A    A couple of days after -- I don't know.
4   Maybe a week. Shortly after the national signing day.
5        Q    Okay. Did you call Forrest Hill?
6        A    As I stated earlier, Mr. Hill was going to
7   Auburn.
8        Q    Okay.
9        A    That was out of Coach Montgomery's mouth.
10   So, once again, Auburn/Savannah State, no brainer.
11        Q    Did you send any, make any notes, prepare
12   any documents, regarding this statement that
13   Mr. Montgomery allegedly made?
14        A    Now, allegedly, if I'm not mistaken -- if I
15   was there when he made it, then that's not alleged, is
16   it?
17        Q    You're alleging it. Did you create any
18   documents, send any e-mails, any contemporaneous
19   records that would show that he did, in fact, say that
20   to you?
21        A    No.
22        Q    Okay. Can you think of any reason why
23   Mr. Montgomery would say that if it didn't happen?
24        A    It did happen.
25        Q    When did this conversation occur with
Forrest Hill?

MR. BOYER: Are you asking about a conversation with John Montgomery or with Forrest Hill?

BY MR. BILLIPS:
Q When did your conversation with John Montgomery occur?
A That Forrest Hill was going to Auburn?
Q Yeah.
A After national signing day.
Q How much after?
A I don't know specifically. Shortly, shortly after.
Q Okay. Were you intending to offer Mr. Hill a scholarship?
A I most certainly was.
Q Okay. Did you ever try to contact Mr. Hill and see if he would be interested in coming to Savannah State?
A That would have been the coach that was recruiting him, and the coach that was recruiting him informed me that he was going to Auburn so there was --
Q He said he had a scholarship to Auburn?
A He didn't say. He said he was going to
Auburn. That's what he said.

Q    Okay. And head coaches often help out with recruiting, right?
A    Amongst other things.
Q    When you've got somebody and you're trying to persuade them to accept a scholarship, come to your school, the recruiting coach will get the head coach involved, right?
A    Right.
Q    Okay. And in the case of Forrest Hill you're saying that he told Coach Montgomery, well, I'm going to go to Auburn, right?
A    I didn't say that.
Q    Okay.
A    I said Coach Montgomery told me. I have no knowledge.
Q    Okay. Coach Montgomery is not -- you're not saying that Coach Montgomery said Forrest Hill is going to Auburn. You're saying Coach Montgomery said, from whatever source, that Forrest Hill is going to Auburn?
A    The conversation was what's the latest on Forrest Hill. That was my question to Coach Montgomery.
Q    Okay.
Julius Dixon - 06/06/11

1     A     His response was he is going to Auburn.
2     Q     Okay. Did you tell Coach Montgomery, well, I would like to offer him a scholarship, give him a call?
3     A     I didn't tell Coach Montgomery that we did not, that I was rescinding whatever Robby Wells or whatever John Montgomery had offered Forrest Hill.
4     Q     Well, you knew they had verbally offered him a scholarship, right?
5     A     That's what I heard.
6     Q     Okay. You knew that at the time that you were trying to get his paperwork complete, right?
7     A     I knew that if he was coming on an official visit the chances of him having already been offered were pretty good.
8     Q     Okay. Did you send him a Letter of Intent on national signing day?
9     A     No.
10    Q     Okay. You could have, right?
11    A     No, I couldn't have.
12    Q     Why?
13    A     Because I knew that John Montgomery had said that he was going to Auburn.
14    Q     I'm sorry. I thought you said that this conversation occurred after national signing day.
Did I say that, or did you say that?

I believe you said that. Did it, or didn't it?

It did.

Okay. It was after national signing day?

It did, yes.

So it was after national signing day.

That's not the reason you didn't send a letter out on national signing day, is it, or after national signing day, right?

Right.

Okay. Do you have a reason?

I do.

Okay. Which is it this time?

It's the truth this time if you would just --

Was it the truth last time when it was because John Montgomery said he was going to Auburn?

That was true too. John Montgomery did tell us that he was going to Auburn.

But that's not the reason you didn't send out the letter, right?

The reason that I didn't send out the letter is because at that time I hadn't physically evaluated him.
Okay. How many other people did you physically evaluate before sending out the letters?

Everybody that, just about -- everybody that I dealt with specifically I physically evaluated.

You are talking about the defensive players?

I'm talking about my recruits --

Your recruits?

Because before I was interim head coach I was the defensive coordinator in charge of a recruiting area, so I had kids that I were personally responsible for.

You made offers to kids who you weren't personally responsible for, right?

I --

Yes?

I had coaches that were recruiting kids that I was not personally responsible for. And as interim head football coach that is part of my responsibility to go on my recruiting coach's evaluation of the kids.

Okay. And your recruiting coach's evaluation of Forrest Hill and Coach Wells's evaluation of Forrest Hill was that he ought to get a scholarship, right?

I can't speak for Coach Wells's evaluation.

That's what they told you, right?
A    That's what I was told.
Q    That's what they told you, right?
A    Who is they?
Q    Coach Wells, Coach Montgomery.
A    Coach Wells didn't tell me that.
Q    Coach Montgomery did?
A    Coach Montgomery told me that.
Q    Okay. And so he was the recruiting coach
who was responsible for personally evaluating Forrest
Hill?
A    Right.
Q    And Forrest Hill wasn't a defensive player,
was he?
A    No, he was not.
Q    You would not have -- just like with the
other defensive players that you offered scholarships
to, you would not have personally physically evaluated
him, right?
A    I would have personally physically evaluated
defensive players before I was the interim head
football coach. And once I became the interim head
football coach, then my duties went across all of the
lines. I was ultimately responsible for every facet.
Q    On national signing day when you sent out
Letters of Intent you sent out Letters of Intent to
1 people you had not personally physically evaluated, correct?
2 A Not every one.
3 Q Some of them, right, you had not personally physically evaluated; is that correct?
4 A That would be correct.
5 Q And all of the people that you sent out letters you had not personally physically evaluated were black, right?
6 A (No response.)
7 Q Yes? I need you to answer verbally. Were they all black?
8 A I hadn't answered yet.
9 Q Okay. Would you answer, please?
10 A Could you please restate the question?
11 Q All the people you sent out Letters of Intent to on national signing day, all of them, whether you evaluated them or not, were black?
12 A Yes.
13 Q Okay. You want to come up with another reason why you didn't offer Forrest Hill --
14 MR. BOYER: Object to the form of the question.
15 BY MR. BILLIPS:
16 Q -- a Letter of Intent on national signing
day?

   A  No.

   Q  Are you done?

   MR. BOYER: Object.

BY MR. BILLIPS:

   Q  Do you have any other reason?

   A  No.

   Q  Rico Arellano, did you offer him a scholarship?

   A  I never talked to Rico.

   Q  Okay. You knew he was somebody Coach Wells had wanted to offer a scholarship to, right?

   A  That's what I found out.

   Q  Okay. Who did you find it out from?

   A  I think his name was Ken Slats.

   Q  Okay. Are you telling me you never saw Rico Arellano's name on the board?

   A  I'm telling you I never saw, recall seeing Rico Arellano's name on that board.

   Q  Are you saying his name wasn't on the board, or you just don't remember?

   A  I'm saying that I don't recall physically seeing his name myself.

   Q  Okay. Did you ever evaluate Rico Arellano's candidacy to receive a scholarship?
ORDER

This case is before the Court for consideration of the Report and Recommendation [37-1] by Magistrate Judge John E. Dougherty recommending denial of Plaintiff’s Motion for Partial Summary Judgment [32-1]. Plaintiff has filed objections to the Report and Recommendation. After considering the entire record, the Court enters the following Order.

FACTUAL BACKGROUND

Plaintiff David Whitfield ("Whitfield") brought this race discrimination and retaliation case pursuant to Titles VI and VII of the Civil Rights Act of 1964 and the Fourteenth Amendment to the United States Constitution. Whitfield has sued the Fulton County School District ("Fulton County") based on its failure to promote Whitfield to the position of Dean of Students of Riverwood High School in the fall of 1994.

The hiring process begins when a vacancy is declared by the building level principal of a school. After the vacancy is declared, the personnel department posts the vacancy giving individuals who meet the qualifications for the position a period of time in which to apply. After
the deadline for applications has passed, a paper screening takes place for those individuals who meet the qualifications for the vacant position. From the screening, a group of candidates is selected for a committee interview. The committee which conducts the interviews is formed by an Executive Director for Fulton County. The Executive Director asks the principal who declared the vacancy to make recommendations of committee members. The committee generally includes parents, teachers, and other administrators. The Executive Director attempts to assure a good cross-section on the committee.

On the interview day, information packets are provided to members of the committee. The packets include a copy of the job description, a copy of the resumes of all of the candidates, copies of letters of recommendation, written "dos and don'ts of being on the committee," and rating sheets. The Executive Director gives the committee brief instructions concerning the interview process. Candidates come before the committee and are questioned by members of the committee. Each member of the committee ranks each of the candidates with a numerical score. After the interviews are completed, the Executive Director again reviews the responsibilities of the committee. The rating sheets are collected from committee members and scored by someone other than the Executive Director. Committee members are permitted to stay during the scoring process or may leave. No committee members are permitted to take any documentation from the interview.

After the rating sheets are scored, the top three candidates are listed in numerical order based upon their scores. The Executive Director then presents those candidates to the Associate Superintendent. The Executive Director and the Associate Superintendent then present the candidates to the Superintendent. The Superintendent has the prerogative to select one of the
ranked candidates or he can request that the process be repeated. This process was followed for all administrative positions, including the position at issue in this case. [Studevan Dep., pp. 21-26.]

Whitfield is a white male who applied for a promotion to the position of Dean of Students of Riverwood High School in the Fulton County School District in September of 1994. [Box Dep., pp. 39, 65.] At that time, Whitfield held a Masters’ Degree in Administration and Supervision and was certified by the Georgia Professional Standards Commission in Administration and Supervision. [Whitfield Dep. pp. 80-81.] Because Whitfield met at least the minimal requirements for the position, he was interviewed on October 26, 1994 by a committee composed of Leonard Box, Issac Seals, Thomas McIntyre, Wanda Yow, Russell Studevan, and possibly a parent. [Box Dep., pp. 32-33, 65; Studevan Dep., p. 22.] The documents which contained the scores awarded by the screening committee have been destroyed, lost, or misplaced. [Lavender Dep., pp. 24-25.] Issac Seals ranked Whitfield as his first choice for the position. [Seals Dep., p. 3.] Thomas McIntyre does not recall whom he selected as the best candidate and could not remember any of his scores. [McIntyre Dep., p. 13.] Wanda Yow cannot recall whom she ranked as the highest candidate. She testified that Barbara Newton interviewed well, and Yow was impressed by Newton and her letters of recommendation. Yow thought that Newton or Vivian Scruggs were her highest rated candidates. She stated that Whitfield did not interview very well. He stressed athletics more than academics. [Yow Dep., pp. 6-9.] Leonard Box’s testimony concerning the work of the committee was based on what he assumed happened rather than his actual recollection of the events. [Box Dep., p. 36.] He testified that, to his knowledge, Vivian Scruggs was rated first by the committee and Whitfield was rated second. [Box Dep., p.
36.] However, Box was confused about the ranking he had given Whitfield in an interview for another position and admitted he was uncertain about his testimony concerning the interview for this position because all of the records had been destroyed. [Box Dep., pp. 65-66.]

After the interviews, the top applicants were submitted to the Superintendent for his selection. [Studevan Dep., pp. 25-26.] Vivian Scruggs, a black female, was selected for the position of Dean of Students of Riverwood High School. [Box Dep., p. 69; Lavender Dep., p. 56.] There is no evidence in the record of why Superintendent of Schools James Fox selected Ms. Scruggs instead of Mr. Whitfield.

DISCUSSION

This Court reviews de novo those portions of the Report and Recommendation to which Plaintiff specifically objects. See 28 U.S.C. § 636(b)(1). This Court “may accept, reject, or modify, in whole or part,” the Magistrate Judge’s findings and recommendations. See id.; Fed.R.Civ.P. 72(b) and Advisory Committee Notes.

Federal Rule of Civil Procedure 56(c) provides that a district court shall grant summary judgment if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is (1) no genuine issue as to any material fact and that (2) the moving party is entitled to judgment as a matter of law.” The applicable substantive law identifies which facts are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106. S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986). An issue is genuine when the evidence is such that a reasonable jury could return a verdict for the nonmovant. Id. 477 U.S. at 249-50, 106 S.Ct. at 2510-11.
In employment discrimination cases, if there is a lack of direct evidence of discrimination, the plaintiff has the initial burden of proving a prima facie case. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct.1817, 36 L.E.2d 668 (1973). Once the plaintiff has met its burden, the burden shifts to the employer to show some legitimate non-discriminatory reason for the adverse employment action. McDonnell Douglas, 411 U.S. at 802, 93 S.Ct. at 1824. If the employer satisfies this burden, the plaintiff must then prove that the proffered reason is pretext. Id. At summary judgment, the plaintiff may succeed by persuading the court that the discriminatory reason likely motivated the employer or by showing that the employer's explanation is unworthy of credence. Haitron v. Gainesville Sun Pub'g, 9 F.3d 913, 920 (11th Cir. 1994).

[Plaintiff's may establish a prima facie violation by showing that they are members of a group protected by title VII, that they sought and were qualified for positions that [the defendant employer] was attempting to fill, that despite their qualifications they were rejected, and that after their rejection [the defendant employer] either continued to attempt to fill the positions or in fact filled the positions with [persons outside the plaintiff's protected class].

Walker v. Mortham, 158 F.3d 1177, 1186 (11th Cir. 1998) (quoting Crawford v. Western Elec. Co., 614 F.2d 1300, 1315 (5th Cir. 1980)).

Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee. If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.

Plaintiff has established a prima facie case based on the undisputed evidence. Plaintiff is a member of a protected group (white); applied and was at least minimally qualified for the position in question (Dean of Students of Riverwood High School); was rejected for the position; and after his rejection, the position was filled by a person outside his protected class (Vivian Scruggs, black female). Defendant does not dispute these facts, but argues that because this is a "reverse discrimination" case the Court should require the white Plaintiff "to make some additional showing in order to establish a prima facie case." [Def's Br. in Resp. to Pl.'s Mot. for Partial Summ. J., p. 8.] The Court declines this request. In Walker, the Eleventh Circuit expressed its disfavor for fragmenting the standards applied in Title VII cases:

We note in passing that the promulgation of differing standards of proof for different types of injury under Title VII only promotes confusion and inconsistency, a result undesirable in any context, but one which is exacerbated in Title VII jurisprudence because of the general instability that pervades this area of the law. Thus, although the court in McDonnell Douglas noted that it may be necessary to alter the requirements of the prima facie case somewhat to respond to unique fact patterns, we believe that it is generally unwise to fragment the applicable legal standards in this area.

Walker, 158 F.3d at 1185 (citation omitted). Having found that Plaintiff has established a prima facie case, the Court must determine whether Defendant has articulated a legitimate, non-discriminatory reason for the employment decision of which Plaintiff complains.

The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, non-discriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. The explanation provided must be legally sufficient to justify a judgment for the defendant.
Burdine, 450 U.S. at 254-255, 101 S. Ct. at 1094-95.

Defendant cites the following evidence as articulating a legitimate non-discriminatory reason for its failure to promote Plaintiff:

1. a description of the procedure utilized by the committee in the interviewing, rating, recommendation, and selection process (Studevan depo., pp. 22-23; Lavender depo., p. 18; Box depo., pp. 9-13, 34, 57-58); (2) testimony that the process was followed for the position sought by Plaintiff (Studevan depo., p. 26); (3) testimony that the committee had a balanced representation of members [male, female, black, white] (Studevan depo., p. 27); (4) evidence that no one individual on the committee could "skew" or "stack" the results (Studevan depo., pp. 31, 36); (5) evidence that the screening and interview process was run in a scrupulously fair manner in that every individual was treated equally (McIntyre depo., p. 9); (6) evidence that the members of the committee were interested in ensuring that the process was fair (McIntyre depo., pp. 10-11; Yow depo., p. 11); (7) evidence that Plaintiff did not interview well in that he stressed athletics more than academics rather than a balance of the two (Yow depo., p. 6; see also, McIntyre depo., p. 11); (8) evidence that Plaintiff may have been in the middle of the candidates (Yow depo., pp. 6, 9); (9) evidence that Plaintiff interviewed unsuccessfully for several positions within the Fulton County System (Lavender depo., p. 23); (10) evidence that Plaintiff was ranked "average" to "below average" in most of the screenings for such positions, although he may have been in the top three candidates in one or two screenings (Lavender depo., pp. 23-24); (11) evidence that Vivian Scruggs was one of the better candidates (Yow depo., p. 12; Box depo., pp. 35, 46); (12) evidence that Vivian Scruggs was polite, articulate, and had the appropriate amount of experience for an administrative position (McIntyre depo., p. 11); (13) evidence that Whitfield had only recently obtained the necessary certification and had no previous experience as an administrator; (14) evidence that the process produced a good candidate for the position and a good person for Riverwood High School (McIntyre depo., p. 12); (15) evidence that Vivian Scruggs had 20 years experience and a Master's Degree in Special Education (Lavender depo., p. 56); and (16) of critical importance, evidence that the committee members were all seeking to identify the best qualified candidates and did not care about race.

[Def.'s Br. in Resp. to Pl.'s Mot. for Partial Summ. J., pp. 12-13.] The Court finds that the foregoing is not evidence of a legitimate non-discriminatory reason for Defendant's action.
Defendant ignores the fact that it is the Superintendent who recommends a candidate to the Board of Education. There is no evidence in the record about the factors which the Superintendent actually considered in making his recommendation. There is evidence that the Superintendent was given a list of candidates from the screening committee. Construing the evidence in the most favorable light for Defendant, Vivian Scruggs was listed as the number one candidate on that list and Whitfield was listed as number two. However, the Superintendent was not bound by this ranking, and there is no evidence that he ever considered it. Defendant’s list of evidence includes favorable testimony about Ms. Scruggs and unfavorable testimony about Whitfield. However, most of that testimony came from one member of the committee, Ms. Yow. Also, the evidence ignores the testimony of Mr. Seals who rated Whitfield as number one. In reality, the testimony of all of the committee members is of little value. There is no evidence that the opinions expressed by the committee members were ever conveyed to the Superintendent.

The selection process, which Defendant points to as evidence of a legitimate non-discriminatory reason, does not include an opportunity for communication of such opinions from committee members to the Superintendent. The committee members assign numerical scores to the candidates, and those scores are tabulated to determine the ranking of the candidates. The names and ranks of the top three or four candidates are all that the Superintendent receives from the committee. Thus, testimony by the committee is not helpful to the Court in discerning the reasons for the Superintendent’s action.

Defendant’s list of evidence simply offers facts that could have been the reasons for Defendant’s decision. This is insufficient. In IMPACT v. Firestone, 893 F.2d 1189, 1194 (11th Cir. 1990), the court held that a defendant must proffer “evidence that asserted reasons for [the
employment action] were actually relied on" or "the reasons are not sufficient to meet defendant's rebuttal burden."

The Court concludes that Plaintiff has established a prima facie case of discrimination and that Defendant has failed to proffer a legitimate non-discriminatory reason for its failure to promote Plaintiff. Under these circumstances, Plaintiff is entitled to judgment as a matter of law.

Accordingly, Plaintiff's Motion for Partial Summary Judgment [32-1] is hereby GRANTED.

SO ORDERED, this 8th day of November, 1999.

RICHARD W. STORY
United States District Judge
Joseph Spillane  
April 27, 2018

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF GEORGIA  
STATE OF GEORGIA

DONALD MIKKO,  
PLAINTIFF,  

vs.  

CITY OF ATLANTA, GEORGIA,  
GEORGE TURNER, in his  
individual capacity, PAUL  
HOWARD, in his individual  
capacity, and SMELIA ROSS,  
in her individual capacity,  

DEFENDANTS.  

CASE NUMBER:  
1:15-CV-1045-LMM

***************

The following deposition of Joseph Spillane was taken pursuant  
to stipulations contained herein, the reading and signing of  
the deposition reserved, before Stephen Mahoney, Certified  
Court Reporter, 4921-4880-0199-0656, in the State of Georgia,  
on APRIL 27, 2018 at 55 Trinity Avenue, Suite 500, Atlanta,  
Georgia, at 9:00 a.m.

Stephen Mahoney, CVR, CCR  
US Legal Support  
1819 Peachtree St NE, Suite 220,  
Atlanta, GA 30309  
(404) 351-1465

U.S. LEGAL SUPPORT  
www.uslegalsupport.com
Joseph Spillane
April 27, 2018

Q. Okay. All right. Now let’s talk then about Don Mikko. Were you involved in hiring Mr. Mikko as the Director of the Crime Lab?

A. I was not.

Q. Okay. Were you in — were you the Major over the Crime Lab when he was hired?

A. I was not.

Q. Who was?

A. Major Darryl Tolleson.

Q. Okay. And did you — How long was Mr. Mikko there before you became his supervisor?

A. I — I can’t tell you that.

Q. Okay. Did you ever conduct an evaluation of Mr. Mikko’s performance?

A. I’m sure I did.

Q. Okay. And was your — The evaluation — the employment evaluations are written documents? Is that correct?

A. That’s correct.

Q. And as part of your obligations as a supervisor, you were required to fill these out accurately?

A. Yes, sir.

Q. Okay. And the information in there is
supposed to be truthful and complete; correct?

A. Yes, sir.

Q. And did you, in fact, fill out Mr. Mikko's performance evaluation honestly, accurately, and truthfully, to the best of your knowledge, and information, and belief at the time you filled it out?

A. Yes, sir.

MR. BILLIPS: Okay. Make sure you mark this Exhibit 2.

MS. CLARKE: Thanks.

(Plaintiff's Exhibit Number 02 was marked for identification.)

BY MR. BILLIPS:

Q. And is this an -- a Mid-cycle Review Evaluation Form for Mr. Mikko?

A. Yes.

Q. Dated April 11th, 2013?

A. Yes, sir.

Q. And did you rate Mr. Mikko or did you give him an overall rating of 4.75 out of -- I guess a total of five?

A. Yes, sir.

Q. Okay. Now you were not -- As you said, you were not the person who was responsible for hiring
Motion For Directed Verdict: Launching And Avoiding MDV Missiles

Presented By:

Moderator: Matthew W. Herrington
Delong Caldwell Bridgers Fitzpatrick & Benjamin LLC
Atlanta, GA

Panelists:
J. Larry Stine
Wimberly Lawson Steckel Schneider & Stine PC
Atlanta, GA

Kristine “Kris” Orr Brown
Orr, Brown & Billips, LLP
Gainesville, GA

Jeffrey A. “Jake” Schwartz
Jackson Lewis PC
Atlanta, GA
MOTIONS FOR DIRECTED VERDICT IN THE PLAINTIFF’S EMPLOYMENT LAW CASE

I. Rule 50 Generally

The motion for directed verdict was adopted to speed litigation and prevent unnecessary retrials by alerting parties and the court to legal insufficiencies prior to jury verdict.1 In 1991 the Rule 50 of the Federal Rules of Civil Procedure was amended to replace the traditional “Motion for Directed Verdict” (DV) and Motion for Judgment Notwithstanding the Verdict (JNOV) with the single “Motion for Judgment as a Matter of Law” (JMOL).2 This change was intended to highlight the similarity between the two types of motions and to remove the incorrect implication that the Court, in granting the motion for DV, was claiming the jury’s role for itself.3 Georgia’s Civil Practice Act still uses the more archaic terminology found at O.C.G.A. § 9-11-50, but the state rule operates largely the same as the federal rule, the most notable differences being that (1) while the federal rule allows the court 28 days to reconsider its ruling,4 the Georgia rule allows 30 days, and (2) the Georgia rule permits a motion for directed verdict only at the end of an opponent’s case in chief or at the close of the case, while the federal rule permits a motion for judgment as a matter of law at any point after “a party has been fully heard on an issue.”

Rule 50(a) provides that, if a party has been fully heard on an issue and the court finds that a claim or defense lacks a sufficient evidentiary basis to permit a reasonably jury to find for the nonmovant on that issue, that the court may enter JMOL.5 In substance, a motion under Rule 50 can be characterized as simply a motion for summary judgment made after the presentation of

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2 Fed. R. Civ. P. 50. This change in terminology did not alter the substance of the rule. See Doctor's Assocs., Inc. v. Weible, 92 F.3d 108, 111 (2nd Cir. 1996) (“Although the bottles have changed, the wine remains the same: the standard . . . is unaltered”).
3 See Advisory Committee Note to 1991 Amendment to Fed. R. Civ. P. 50(b).
4 Increased from 10 days under the 2009 amendment.
evidence at trial rather than on a purely written record. As on a Rule 56 motion for summary judgment, the court must view all evidence in the light most favorable to the non-movant and draw all factual inferences in her favor. As on summary judgment, mere speculation or a “scintilla” of evidence will not prevent entry of JMOL.

Perhaps due to the paucity of jury trials—especially in federal employment practice—Rule 50 seems to be little noticed, poorly understood, and easily forgotten. This is even truer for the plaintiff’s bar for whom Rule 50 motions may be perceived as a hurdle to overcome—with the ever-present risk of a claim failing due to a single missed proof—rather than as an opportunity. While it is indeed rare that motions for JMOL are granted, simple awareness of the rules operation can help counsel avoid inadvertent waivers, and making strategic motions under Rule 50 can preserve opportunities for a “second bite at the apple.”

II. When to Make Rule 50 Motions

As noted above, in federal courts a Rule 50 motion may be made at any point after “a party has been fully heard on an issue.” The Advisory Committee Notes to the 1991 amendment observes that “[s]uch early action is appropriate when economy and expedition will be served.”

See also Greene v. Potter, 557 F.3d 765, 768 (7th Cir. 2009) (judgment as a matter of law is

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7 See Reeves v. Sanderson Plumbing Products, Inc. (2000) 530 US 133, 150, 120 S. Ct. 2097, 2110; see also Bryan v. James E. Holmes Reg’l Med. Ctr., 33 F.3d 1318, 1333 (11th Cir. 1994) (judgment may be granted only when “there can be but one reasonable conclusion as to the proper judgment”); Smith v. United States, 894 F.2d 1549, 1552 (11th Cir. 1990) (“the moving party is entitled to a directed verdict if the nonmoving party failed to make a showing on an essential element of his case with respect to which he had the burden of proof”).
8 SEC v. Adler, 137 F.3d 1325, 1340 (11th Cir. 1998); First Union Nat’l Bank v. Benham, 423 F.3d 855, 863 (8th Cir. 2005).
9 See, e.g., McKenzie v. Lee, 259 F.3d 372, 373 (5th Cir. 2001) (affirming a jury verdict for the plaintiff in a racial discrimination action, and withdrawing and substituting its own previous opinion reported at 246 F.3d 494, in which the court had neglected the effect of the defendant’s failure to move under Rule 50 on its standard of review).
appropriate “prior to the close of a plaintiff's case-in-chief so long as it has become apparent that
the party cannot prove her case with the evidence already submitted or with that which she still
plans to submit”). In practice, such early Rule 50 motions are exceedingly rare and likely would
likely reflect several previous missed opportunities for a dispositive motion on the issue.

Typically, a plaintiff will face a defendant’s Rule 50 motion at the close of her case, and less
often a Plaintiff may move for JMOL at the close of evidence. In Georgia state courts, this
timing is mandatory.10 Courts will commonly invite such motions at the close of each party’s
case, but counsel intending to make Rule 50 motions should be prepared to assert their client’s
right to do so at the appropriate time with or without invitation.

If counsel anticipates that a single dispositive issue might dispose of all claims or defenses, it
may be appropriate to request prior to trial that the court exercise its authority under Rule 16 to
“schedule an order of trial that proceeds first with a presentation on an issue that is likely to be
dispositive.”11 In this scenario, the court may avoid a lengthy trial by deciding a single issue that
is likely to be dispositive and can be easily resolved in isolation. Such a request is certainly not
ideal, however, as dispositive issues should normally be resolved on the pleadings or at summary
judgment.

Even when JMOL on a single dispositive issue is not appropriate, Rule 50 motions may be
made on discrete issues that do not dispose of an entire claim or defense.12 This can be
particularly helpful in eliminating issues on which no bona fide controversy exists but which

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10 *Gleaton v. City of Atlanta*, 131 Ga. App. 399 (1974); *but see Anderson v. Universal C.I.T. Credit Corp.*, 134 Ga. App. 931-34 (1975) (it may be permissible to reserve the right to make a motion for DV after the case is submitted to the jury but before the verdict is rendered, or to make the motion at another time by stipulation of the parties).

11 *See Advisory Committee Note to 1991 Amendment to Fed. R. Civ. P. 50(b).*

12 *Chesapeake Paper Prods. Co. v. Stone & Webster Eng’g Corp.*, 51 F.3d 1229, 1236 (4th Cir. 1995); *Hammond v. T.J. Litle & Co.*, 82 F.3d 1166, 1172 (1st Cir. 1996) (“A party may move for judgment as a matter of law on an issue by issue basis; it does not have to be all or nothing.”)
there is a risk of juror bias, nullification, or simple misunderstanding (e.g., whether an employee-plaintiff’s medical condition qualifies as a “disability” under the ADA).

A Rule 50(a) motion for JMOL that is denied or not ruled upon must be *must be renewed* within 28 days after the return of jury verdict under Fed. R. Civ. P. 50(b). Similarly, O.C.G.A. § 9-11-50 requires that a motion for judgment notwithstanding the verdict be made with 30 days after entry of judgment or discharge of the jury. Failure to renew a Rule 50 motion will likely result in waiver, although there is some contrary authority permitting a court to rule on an unrenewed pre-verdict motion on which it reserved judgment.\(^{13}\) There is no need, however, for a party to renew an earlier made Rule 50 motion at the close of evidence; the 2006 amendment to Rule 50(b) eliminated that requirement.\(^{14}\)

Courts are split on the question of whether Rule 50 motions need or even should be made as to pure issues of law,\(^{15}\) but counsel would be foolhardy to neglect to do so in any court where the practice has not clearly been rejected. This may be accomplished by simply and briefly incorporating an argument made in a prior dispositive motion by reference.

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\(^{13}\) See *Szmaj v. AT&T*, 291 F.3d 955 (7th Cir. 2002); *Sattler v. Great Atlantic & Pacific Tea Co.*, 18 F.R.D. 271 (D. La. 1955); *Welch v. UPS*, 871 F. Supp. 2d 164, 176 (E.D.N.Y. 2012) (“Many circuits have taken a forgiving view of certain violations of the renewal requirement.”) (citing cases).

\(^{14}\) See Advisory Committee Note to 2006 Amendment to Fed. R. Civ. P. 50(b).

\(^{15}\) *Belk, Inc. v. Meyer Corp.*, 679 F.3d 146, 161 (4th Cir. 2012) (“Rule 50 is meant to preserve the judge’s power to determine evidentiary sufficiency. The rule is not concerned with ‘pure’ questions of law that are detached from the evidence, not within the domain of the jury, and only ever properly ruled upon by the judge.”); *Lexington Ins. Co. v. Horace Mann Ins. Co.*, 861 F.3d 661, 669 (7th Cir. 2017) (“as a general matter, pure questions of law ought not to be included in a Rule 50(a) motion in the first place”); *but see Ji v. Bose Corp.*, 626 F.3d 116, 128 (1st Cir. 2010) (“our rule is that even legal errors cannot be reviewed unless the challenging party restates its objection in a motion for JMOL.”).
III. Rule 50 Motions Must be Specific

As to the substance of a motion for JMOL, the primary rule to keep in mind is that *specificity is essential*.16 “Technical precision” is not required, but the motion must be sufficiently specific to “provid[e] notice to the court and opposing counsel of any deficiencies in the opposing party’s case prior to sending it to the jury.”17 This notice to the court and opposing party helps ensure that the case is resolved on the merits by creating an opportunity for the nonmovant to muster her proof.18 The nonmovant may accomplish this by eliciting the needed evidence from the opposing party’s witnesses, or even by reopening the evidence when it would not be futile.19

Courts appear to consistently hold that a written motion that does not adequately state specific grounds may be cured by oral colloquy.20 But what constitutes adequately specific

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16 Fed. R. Civ. P. 50(a)(2) (“The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.”); Humetrix, Inc. v. Gemplus S.C.A., 268 F.3d 910,923 (9th Cir. 2001); Teneyck v. Omni Shoreham Hotel, 365 F.3d 1139 (DC Cir. 2004), Gallideri-Ambrosini v. National Realty & Develop. Corp., 136 F.3d 276, 286 (2nd Cir. 1998); Mccann v. Texas City Refining, Inc., 984 F.2d 667, 672 (5th Cir. 1993); Ford v. County of Grand Traverse, 535 F.3d 483, 491-493 (6th Cir. 2008). Warfield v. Stewart, 434 F. App’x 777, 781 (11th Cir. 2011) (“By failing to articulate any reason why they were entitled to judgment as a matter of law, the Warfields raised no issues for the district court to decide.”).

17 Ford v. County of Grand Traverse, supra, 535 F.3d 483, 492 (6th Cir. 2008).

18 Crawford v. Andrew Sys., Inc., 39 F.3d 1151, 1154 (11th Cir. 1994) (because the district court ruled *sua sponte* that the evidence supporting the verdict was legally insufficient, the plaintiffs “had no notice of, and therefore no opportunity to address or cure, possible insufficiencies in the evidence.”).

19 Grand Res. of Columbus, LLC v. Prop.-Owners Ins. Co., 721 F. App’x 886, 889 (11th Cir. 2018) (“a trial ‘judge has broad discretion to reopen a case to accept additional evidence, and his decision will not be overturned absent an abuse of that discretion . . . .’”) (quoting Hibiscus Assoc.s. Ltd. v. Bd. of Trustees of Policemen & Firemen Ret. Sys. of City of Detroit, 50 F.3d 908, 917 (11th Cir. 1995)); but see Jones v. Latex Constr. Co., 460 F. App’x 842, 845 (11th Cir. 2012) (“It is well within the broad discretion of the trial court not to permit such a second bite at the apple.”) (citing Lundgren v. McDaniel, 814 F.2d 600, 607 (11th Cir. 1987)).

20 Dowell, Inc. v. Jowers, 166 F.2d 214 (5th Cir. 1948) (the court asked counsel why the verdict should be directed and counsel argued that the plaintiff had not proved allegations of negligence in complaint); Stewart v. Thigpen, 730 F.2d 1002 (5th Cir. Miss. 1984); Moran v. Raymond Corp., 484 F.2d 1008 (7th Cir. 1973) (while the better practice is for motion JMOL to be in
grounds on a Rule 50 motion is not entirely clear, and the courts have been somewhat
inconsistent on this issue. The Federal Circuit has been willing to gloss over a party’s failure to
state the basis for its renewed motion for JMOL where its pre-verdict motion had done so,21 or
where counsel’s argument over jury instructions had made the basis clear.22 Long ago, the Fourth
Circuit claimed for itself the ability to consider Rule 50 motions where the grounds were not
stated if it was “necessary to prevent a miscarriage of justice.”23 On the other hand, the Tenth
Circuit was unwilling to consider an insufficiency argument on willfulness where the appellant
had only raised insufficiency as to the underlying age discrimination claim,24 even though the
first insufficiency argument would logically encompass the other.

But what’s good for the goose is good for the gander; when a party makes a Rule 50 motion
and does not specify the grounds therefore, the nonmoving party must object on that basis or
waive the argument on appeal.25 The Eleventh Circuit has gone so far as to disallow an
insufficiency argument on appeal where the plaintiff’s lack of objection to specificity was

writing, the rule makes no such requirement, and an oral motion showing the grounds may save
written motion that is too general).
23 Virginia-Carolina Tie & Wood Co. v. Dunbar, 106 F.2d 383 (4th Cir. 1939) (“We doubtless
have the power to consider such motion even though the grounds be not stated, if in our opinion
this is necessary to prevent a miscarriage of justice”)
24 Miller v. Eby Realty Grp. LLC, 396 F.3d 1105, 1114 (10th Cir. 2005)
25 Cox v. Freeman, 321 F.2d 887 (8th Cir. 1963) (“it would be unfair and dilatory practice to
allow plaintiff to [complain about the lack of specific grounds] at appellate level after remaining
silent when trial judge makes his decision”); see also Marfia v. T.C. Ziraat Bankasi, 147 F.3d 83
(2d Cir. 1998); Howard v. Walgreen Co., 605 F.3d 1239 (11th Cir. 2010) (holding that the
district court should have been afforded the first opportunity to determine whether the grounds of
a Rule 50(b) renewed motion were the same as those raised in the pre-verdict Rule 50(a)
motion.).
prompted by the district court’s interruption of defense counsel during its Rule 50 motion and statement that it would rule following the jury verdict.26

IV. Appellate Review and Rule 50 Motions

Failure to make a timely and specific Rule 50(a) motion has two severe consequences: the party may not later make a post-verdict motion for JMOL,27 and on appeal she may not challenge the sufficiency of the evidence,28 except perhaps to prevent a “manifest miscarriage of justice.”29 Properly made pre- and post-verdict motions for JMOL, on the other hand, are reviewed de novo, applying the same legal standard as the district court.30 Of course, the issues raised in the pre- and post-verdict motions must be the same.31

A party who fails to move for judgment under Rule 50 may still move for a new trial under Rule 59, but the appellate court’s review is much less likely to result in reversal, as it will give “great deference” to the trial court’s decision and reverse only for a clear abuse of discretion.32 Despite the fact that appellate review will be much narrower, Rule 59 does at least have the

26 Webb-Edwards v. Orange County Sheriff’s Office, 525 F.3d 1013, 1030 (11th Cir. 2008) (“In general, the law ministers to the vigilant, not to those who sleep upon perceptible rights.”) (quoting United States v. Taylor, 54 F.3d 967, 972 (1st Cir. 1995)).
27 See Advisory Committee Note to 2006 Amendment to Fed. R. Civ. P. 50(b); see also Warfield v. Stewart, 434 F. App’x 777, 781 (11th Cir. 2011).
31 Freund v. Nycomed Amersham, 347 F.3d 752, 761 (9th Cir. 2003) (postverdict motion for JMOL precluded for failure to raise issue in its preverdict motion); but see Deffenbaugh-Williams v. WalMart Stores, Inc., 188 F.3d 278, 284, n. 5 (5th Cir. 1999) (“new grounds may be considered where . . . non-movant does not object”).
32 Merrick v. Paul Revere Life Ins. Co., 500 F.3d 1007, 1013 (9th Cir. 2007); Pulla v. Amoco Oil Co., 72 F.3d 648, 656 (8th Cir. 1995).
virtue of permitting the court to weigh the evidence, which it is not permitted to do under Rule 50.33

Rule 50(b) explicitly anticipates that post-verdict motions for JMOL may be framed alternatively as Rule 59 motions for new trial, and it is normally best practice to do so. If a movant makes an alternative motion for new trial, when the district court rules it must also conditionally rule on the motion for new trial and state the grounds for the conditional ruling.34 The Eleventh Circuit has strictly enforced this requirement for a conditional ruling, remanding cases prior to even considering the merits of the denial or grant of JMOL.35 The purpose of this requirement is clear: to permit all potential appellate issues to be decided at once, rather than in serial appeals.

Finally, it should be noted that failure to move under Rule 50 on the basis of evidentiary errors—rather than sufficiency of the evidence—will not prevent appellate review and granting of a new trial on the basis of the evidentiary error. While “many litigants . . . have followed the ‘better practice’ of filing postverdict motions in cases where they subsequently appealed on the basis of evidentiary errors,” such filings are not necessary.36

34 Fed. R. Civ. P. 50(c)(1).
36 Fuesting v. Zimmer, Inc., 448 F.3d 936, 941 (7th Cir. 2006) (quoting 11 Charles Alan Wright and Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 2540 (2d ed. 1995) (“A renewed motion for judgment as a matter of law under Rule 50(b) is not a condition precedent to appeal from a final judgment. If there have been errors at the trial, duly objected to, dealing with matters other than the sufficiency of the evidence, they may be raised on appeal from the judgment even though there has not been either a renewed motion for judgment as a matter of law or a motion for a new trial, although it is better practice for the parties to give the trial court an opportunity to correct its errors in the first instance.”)).
V. Practice Tips

- Shepardize significant cases and set email alerts to ensure that motions can be supplemented by the most recent authority, and to ensure that you do not miss changes in the law that might occur right before trial.

- Although the court may invite motions at the close of evidence, it is entirely possible that it may not anticipate a much less common plaintiff’s Rule 50 motion at the close of the case. If miss the opportunity to present your motion, your will lose the ability to challenge the sufficiency of the evidence on appeal.

- It is particularly important to remember to make a Rule 50 motion if jury bias is a real risk. For example, while the facts at trial virtually mandate a finding that a plaintiff is disabled by sleep apnea within the broad scope of the ADAAA, a jury could conceivably ignore that liberal standard and conclude based on “common sense” that such a condition is not a real disability. Without a proper pre-verdict Rule 50(a) motion, appeal of the error may be virtually impossible.

- Similarly, in FLSA litigation involving highly compensated employees (e.g., minimum wage claims by exotic dancers) a jury may balk at awarding a “windfall” that is technically required under the Act. Rule 50 preserves a plaintiff’s ability to correct such errors on appeal, without having to obtain a new trial.

- Courts may not extend the 28-day time limit for filing a renewed post-verdict motion under Rule 50. See Fed. R. Civ. P. 6(b)(2) (“A court must not extend the time to act under Rules 50(b) and (d) . . . ”); see also Pinion v. Dow Chem., U.S.A., 928 F.2d 1522, 1534-35 (11th Cir. 1991). If an extension is absolutely necessary, make a timely renewed motion and seek an extension only as to the supporting materials.
Jury Charges, Charge Conference, Verdict Form:
Marching Orders For The Jury

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Marching Orders for the Jury: Jury Charges, Charge Conference, and Verdict Form

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The purpose of this paper is to provide an overview of the current state of the law regarding jury instructions and verdict forms as well as practice pointers and issues to think about when preparing for your trials. It is not an exhaustive recitation of each and every rule or case and thus is not a substitute for doing your own research in any given case. Because NELA’s members spend the majority of their time in federal courts rather than Georgia’s state courts, this paper will emphasize federal practice and procedure. However, as many NELA members also handle state-law cases involving, for example, breach of contract, restrictive covenants, and trade secret litigation, where notable differences exist, I have done my best to so indicate and provide citations to relevant state authorities.

I. Jury Charges and the Charge Conference

“Perhaps the most important duty of the trial judge is the careful, accurate instruction of the jury as to the law that they must apply to the facts that they find.” Mosher v. Speedstar Division of AMCA Int’l, Inc., 979 F.2d 823, 824 (11th Cir. 1992). “The role of the appellate court, in reviewing a trial court’s jury instructions, is to assure ‘that the instructions show no tendency to confuse or to mislead the jury with respect to the applicable principles of law.’” Id. (quoting Rohner, Gehrig & Co. v. Capital City Bank, 655 F.2d 571, 580 (5th Cir. Unit B
An appellate court “will not disturb a jury’s verdict unless the charge, taken as a whole, is erroneous and prejudicial.” Id. Error alone is not enough, and in evaluating “the prejudicial effect of an incorrect statement of the law, the charge must be viewed in its entirety.” Id. at 826–27.

A. Preparing and Submitting Your Requests to Charge

1. Timing

A party may submit requests to charge “at the close of the evidence or at an earlier reasonable time that the court directs.” Fed. R. Civ. P. 51(a)(1). The Northern District of Georgia’s Local Rules require that requests be submitted “no later than 9:30 a.m. on the date the case is calendared (or specially set) for trial unless otherwise ordered by the court.” LR 51.1(A), NDGa.; accord LR 16.4(B)(22), NDGa. The Southern District of Georgia’s local rules similarly provide for the submission of proposed charges “at the opening of the trial or at such other time as the assigned Judge may direct.” LR 51.1, SDGa.

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1 The Eleventh Circuit has adopted as binding precedent all Fifth Circuit decisions issued before October 1, 1981 and all decisions issued after that date by a Unit B panel of the former Fifth Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc); *Monroe County v. U.S. Dep’t of Labor*, 690 F.2d 1359, 1363 (11th Cir. 1982).
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Many judges have standing orders or case instructions that address the timing of proposed jury instructions. Judge Batten’s instructions to parties and counsel provides:

Notwithstanding Local Rule 51.1 and unless otherwise directed by the Court, counsel shall email their proposed jury instructions in Microsoft Word format to the law clerk assigned to the case by 9:00 a.m. on the last business day before the first day of trial. Counsel should contact [Judge Batten’s Courtroom Deputy] to obtain the name and email address of the applicable law clerk.

Although requests to charge are not generally required until the time of (or shortly before) trial, you are doing yourself a disservice if you wait until the eve of trial to start preparing your proposed jury instructions. Early preparation of anticipated jury charges helps ensure that your legal theory, a case tracks the law, and a clear understanding of the legal principles governing your case can help you craft effective discovery requests and responses, prepare for depositions, and otherwise garner evidence that will ultimately be admitted to support your case at trial. Moreover, your closing argument should always be crafted with a clear understanding of the jury instructions that will be given in your case.

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2 Always check the court’s website to determine whether your judge has a standing order or case instructions, even if none have been docketed in your case. For the Northern District of Georgia, that information can be found on the Court’s website (www.gand.uscourts.gov) under the tab named “Individual Judge Instructions” or by going to the “For Attorneys” tab and then clicking on “Trial Instruction.”
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Remember that even when charges are submitted at the beginning of a trial, the evidence that is introduced may necessitate revisions to charges or additional charges, including limiting instructions about the purpose for which specific evidence was introduced and may be considered.

2. Format

You should check your local rules for specific formatting instructions. In the Northern District of Georgia, for example, proposed charges must be “numbered sequentially with each request and the citations to authorities supporting the request presented on a separate sheet of paper.” LR 51.1(A), NDGa. Although it may seem that local rules provide unnecessarily precise formatting instructions, having each charge on separate sheets is helpful as the judge’s chambers attempts to consolidate the requests into an initial draft charge. To further assist the judge and the judge’s staff in this process, consider submitting your proposed charges electronically to chambers in word processing format in addition to filing them on the docket. That is especially helpful when charges are being submitted on the first day of what is expected to be a relatively short trial, as the judge’s chambers will typically be trying to create an initial consolidated draft in an expedited manner.
3. Content

Most District Judges are inclined to give the pattern charge when there is one on point, and often there is no compelling reason to depart from the pattern charge, particularly with respect to general, non-case-specific matters such as witness credibility, burden of proof, and the difference between direct and circumstantial evidence. There are also numerous pattern jury charges regarding employment cases specifically, including charges 4.1 through 4.27 of the Eleventh Circuit’s pattern civil instructions, as well as Chapters 168, 170-175, and 179 of O’Malley’s Federal Jury Practice and Instructions.

But the pattern charges, even those promulgated by the Eleventh Circuit itself, are not sacrosanct, and there may be a need in a given case to ask for the pattern to be modified, supplemented, or even disregarded. The Eleventh Circuit has acknowledged—in an employment case no less—that our pattern charges are imperfect in some respects and might be “revisit[ed] . . . to consider whether any improvements in clarity might be warranted.” *Palmer v. Bd. of Regents of the Univ. Sys. of Ga.*, 208 F.3d 969, 975 (11th Cir. 2000); see also *United States v. Gutierrez*, 745 F.3d 463, 471 (11th Cir. 2014) (“The Pattern Instructions act only as a guide for judges when fashioning a jury charge. They do not constitute precedent . . . .”); *United States v. Richardson*, 532 F.3d 1279, 1290 (11th Cir.
2008) (questioning whether a particular pattern charge “is ever appropriate”). Most judges prefer to give a pattern charge, but you should always review the pattern charges closely to ensure that they are accurate with respect to your particular case, and if they are not, you should request any necessary alterations and object on the record to the judge’s refusal to give them.

Where there is no Eleventh Circuit pattern charge on point, look to (and be sure to cite) other legal authorities, such as other courts’ pattern charges, jury instruction guides, and governing statutes and case law. The Northern District of Georgia’s Local Rules expressly direct counsel to use the pattern charges, Devitt and Blackmar’s Federal Jury Practice an Instructions, and O’Malley’s Federal Jury Practice and Instructions “whenever possible.” LR 16.4(B)(22) & 51.1(B), NDGa. Where state law informs a case, such as when a case is in federal court under diversity jurisdiction, state pattern jury instructions may be—but do not have to be—used. See, e.g., Kozlov v. Assoc’d Wholesale Grocers, Inc., 818 F.3d 380, 390 (8th Cir. 2016) (“A federal district court presiding over a diversity case is not bound to give the jury instruction requested by the litigants, nor is the court constrained to follow the language contained in a state’s uniform instructions.”).

When crafting your own proposed jury instructions based on case law, be sure that the case law you are relying on is valid, and avoid phrasing your
requested charges in an argumentative manner. A judge is less likely to give a non-
patern charge if it sounds combative, and your case is better served by accurate,
impartial jury charges than by trying to sneak a more biased instruction into the
charge on the hopes that it will sway the jury in your favor. To this point, the mere
fact that a requested charge may quote a legal opinion does not mean that the
requested language is appropriate in a jury charge. “Appellate court opinions are
written for a purpose different from that for which jury instructions are designed.
The point of law may be controlling, but not the language.” KEVIN F. O’MALLEY

Counsel should confer regarding the submission of joint requests where the
parties can agree on some proposed charges (such as preliminary charges and
pattern “boilerplate” charges that apply in most civil cases); the parties can then
submit their own separate requests where disagreement exists. This makes the
judge’s and chambers’ job easier by sparing them the time of parsing through
separate, often lengthy, submissions trying to determine where the parties agree
and where they disagree.

Lastly, consider whether all the charges you are requesting are, in fact,
necessary in your case. As one court has noted, “[j]ury instructions tend to be long
and full of tedious boilerplate. When the judge emulates Polonius and recites
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gravely what jurors already know, their attention may wander and they could miss something that really matters. It is best to keep the instructions concise . . . ."

*United States v. Hill*, 252 F.3d 919, 923 (7th Cir. 2001).

4. Preliminary Jury Instructions

Don’t forget about preliminary instructions given to the jury at the beginning of a case, after the jury is empaneled but before opening statements, when the jurors’ attention is generally at its peak. Key aspects of an effective preliminary charge include (1) explaining the jurors to what is or is not proper evidence in the case, (2) orienting the jurors to concepts of witness credibility and their role in evaluating that, (3) outlining the burden of proof and explaining that the “beyond a reasonable doubt” standard has no application in a civil case, (4) directing jurors not to seek outside information about a case (for example, by talking to people or searching the internet), and (5) providing a road-map for the case so jurors know what to expect. These are the first substantive comments the jury will hear from the judge, and it’s important to take the opportunity to put the jurors in the right mindset before opening statements.

Below is a sample of preliminary instructions in a civil case in the Northern District of Georgia:
Members of the jury: Now that you have been sworn, I will give you some preliminary instructions to guide you in your participation in the trial.

It will be your duty to find from the evidence what the facts are. You and you alone will be the judges of the facts. You will then have to apply to those facts the law as the Court will give it to you. You must follow that law whether you agree with it or not. Nothing the Court may say or do during the course of the trial is intended to indicate, or should be taken by you as indicating, what your verdict should be.

The evidence from which you will find the facts will consist of the testimony of witnesses, documents, and other things received into the record as exhibits, and any facts that the lawyers agree to or stipulate to or that the Court may instruct you to find. Certain things are not evidence and must not be considered by you. I will list them for you now:

1. Statements, arguments, and questions by lawyers are not evidence.

2. Objections to questions are not evidence. Lawyers have an obligation to their clients to make objections when they believe evidence being offered is improper under the rules of evidence. You should not be influenced by the objection or by the court’s ruling on it. If the objection is sustained, ignore the question. If it is overruled, treat the answer like any other. If you are instructed that some item of evidence is received for a limited purpose only, you must follow that instruction.

3. Testimony that the Court has excluded or told you to disregard is not evidence and must not be considered.

4. Anything you may have seen or heard outside the courtroom is not evidence and must be disregarded. You are to decide the case solely on the evidence presented here in the courtroom.

There are two kinds of evidence: direct and circumstantial. Direct evidence is direct proof of a fact, such as testimony of an eyewitness. Circumstantial evidence is proof of facts from which you may infer or
conclude that other facts exist. I will give you further instructions on these as well as other matters at the end of the case, but keep in mind that you may consider both kinds of evidence.

It will be up to you to decide which witnesses to believe, which witnesses not to believe, and how much of any witness’s testimony to accept or reject. I will give you some guidelines for determining the credibility of witnesses at the end of the case.

As you know, this is a civil case. The Plaintiff has the burden of proving his case by what is called the preponderance of the evidence. That means the Plaintiff has to produce evidence which, considered in the light of all the facts, leads you to believe that what the Plaintiff claims is more likely true than not. To put it differently, if you were to put the Plaintiff’s and the Defendant’s evidence on opposite sides of the scales, the Plaintiff would have to make the scales tip somewhat on his side. If the Plaintiff fails to meet this burden, the verdict must be for the Defendant. Those of you who have sat on criminal cases will have heard of proof beyond a reasonable doubt. That requirement does not apply to a civil case; therefore, you should put it out of your mind.

Now, a few words about your conduct as jurors.

First, during the trial you are not to discuss the case with anyone or permit anyone to discuss it with you. Until you retire to the jury room at the end of the case to deliberate on your verdict, you simply are not to talk about this case. You may not communicate with anyone about the case on your cell phone, through e-mail, text messaging, through any blog or Web site, through an Internet chat room, or by way of any other social networking Web sites, including but not limited to Facebook, My Space, LinkedIn and YouTube.

Second, do not read or listen to anything touching on this case in any way. If anyone should try to talk to you about it, bring it to the Court’s attention promptly.

Third, do not try to do any research or make any investigation about the case on your own.
Finally, do not form any opinion until all the evidence is in. Keep an open mind until you start your deliberations at the end of the case.

If you wish, you may take notes. But if you do, leave them in the jury room when you leave at night. And remember that they are for your own personal use.

The trial will now begin. First, the Plaintiff’s attorney will make an opening statement, which is simply an outline to help you understand the evidence as it comes in. Next, the Defendant’s attorney may, but does not have to, make an opening statement. Opening statements are neither evidence nor arguments.

The Plaintiff will then present his witnesses, and counsel for the Defendant may cross-examine them. Following the Plaintiff’s case, the Defendant may present witnesses whom the Plaintiff may cross-examine. After all the evidence is in, the attorneys will present their closing arguments to summarize and interpret the evidence for you, and the Court will instruct you on the law. After that you will retire to deliberate on your verdict.

B. The Charge Conference, and Objections to Charges Given or Refused

The Federal Rules of Civil Procedure require that the Court give litigants “an opportunity to object on the record and out of the jury’s hearing before the instructions and arguments are delivered.” FED. R. CIV. P. 51(b)(2).³ Generally that will be done at the charge conference, but if a party is not informed of the Court’s decision to give or refuse to give a particular charge before that time, objections

³ Although the prevailing practice in Georgia’s federal courts is to allow objections to be made out of the jury’s presence, in civil cases the Rules require only that such objections be made out of the jury’s hearing. Cf. Fed. R. Civ. P. 30(d) (requiring, in criminal cases, that parties be given an opportunity “to object out of the jury’s hearing and, on request, out of the jury’s presence”) (emphasis added).
should be made “promptly after learning that the instruction or request will be, or has been, given or refused.” Fed. R. CIV. P. 51(c)(2)(B). The purpose of the requirement that objections be made before the charge is given is to allow the Court to correct the instructions, if necessary. See, e.g., *McDaniel v. Anheuser-Busch, Inc.*, 987 F.2d 298, 306 (5th Cir. 1993) (“A party must inform the trial court of deficiencies in the charge in such a manner that the judge can act upon the objection.”).

It is critical that objections or exceptions to charges given or refused be specific, detailed, and on the record to facilitate appellate review. Merely requesting a charge that is not given does not preserve error for appeal if no objection is made to the Court’s refusal to give it: “Without more, a pretrial request for instructions or interrogatories is ordinarily insufficient to preserve error; theories of liability and defense frequently change during the course of a trial, and a trial judge will seldom make a final decision regarding the charge until the evidence is complete.” *McDaniel*, 987 F.2d at 306. Similarly, all objectionable aspects of a charge should be raised in an objection, as should all grounds for objecting to a charge, lest an appellate court refuse to consider it. However, an error that “affects substantial rights” of a litigant may be considered on appeal
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under the plain error standard of review even if it is not properly preserved. FED. R. CIV. P. (d)(2).

It is not surprising that objection to charges given or refused is equally important in Georgia’s state courts. By statute in Georgia, “no party may complain of the giving or the failure to give an instruction to the jury unless he objects thereto before the jury returns its verdict, stating distinctly the matter to which he objects and the grounds of his objection.” O.C.G.A. § 5-5-24(a); see also O.C.G.A. § 9-11-46(a) (providing that error is preserved whenever “a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor”). With respect to the court’s failure to give charges that had been requested in writing, it is sufficient to make “a minimalist, perfunctory objection,” such as: “We object to the failure to give defendant’s request to charge No. 21, 22, 23, 25, 26, 28.” Golden Peanut Co. v. Bass, 249 Ga. App. 224, 234 (2001) (further “urg[ing] the litigants and courts of this state to [ensure] . . . that the grounds of objection, i.e., the reasons urged for the requested charge, should be placed somewhere on the record”).
C. **The Allen Charge**

When a jury is unable to reach a unanimous decision after a reasonable period of deliberation, the Court will generally give what has come to be known as an “Allen Charge,” after the Supreme Court’s decision in *Allen v. United States*, 164 U.S. 492 (1896). There, the trial court had advised a deadlocked jury to continue its deliberations, with specific instructions about examining the opinions of the other jurors and trying to reach a verdict. Affirming the conviction that followed that supplemental charge, the Supreme Court noted that “[w]hile, undoubtedly, the verdict of the jury should represent the opinion of each individual juror, it by no means follows that opinions may not be changed by conference in the jury room.” *Id.* at 502.

Below is the Eleventh Circuit’s pattern civil *Allen* charge:

Members of the jury, I’m going to ask that you continue your deliberations in an effort to reach agreement upon a verdict and dispose of this case, and I have a few additional thoughts or comments I would like for you to consider as you do so.

This is an important case. The trial has been expensive in terms of time, effort, money and emotional strain to both the Plaintiff(s) and the Defendant(s). If you should fail to agree on a verdict, the case is left open and may have to be tried again. A second trial would be costly to both sides, and there is no reason to believe that the case can be tried again, by either side, better or more exhaustively than it has been tried before you.
Any future jury would be selected in the same manner and from the source as you were chosen, and there is no reason to believe that the case could ever be submitted to a jury of people more conscientious, more impartial, or more competent to decide it or that more or clearer evidence could be produced on behalf of either side.

As stated in my previous instructions, it is your duty to consult with one another and to deliberate with a view to reaching agreement if you can do so without violence to your individual judgment. Of course, you must not surrender your honest convictions as to the weight or effect of the evidence solely because of the opinions of other jurors or for the mere purpose of returning a verdict. Each of you must decide the case for yourself, but you should do so only after consideration of the evidence with your fellow jurors.

In the course of your deliberations you should not hesitate to reexamine your own views and to change your opinion if you are convinced it is wrong. To bring your minds to a unanimous result, you must examine the questions submitted to you openly and frankly, with proper regard to the opinions of others and with a disposition to reexamine your own views.

If a substantial majority of your number are for a verdict for one party, each of you who hold a different position ought to consider whether your position is a reasonable one since it makes so little impression upon the minds of so many equally honest and conscientious fellow jurors who bear the same responsibility, serve under the same oath, and have heard the same evidence.

You may conduct your deliberations as you choose, but I suggest that you now carefully reexamine and consider all the evidence in the case bearing upon the questions before you in light of the Court’s instructions on the law. You may be as leisurely in your deliberations as the occasion may require, and you may take all the time that you may feel is necessary.

I remind you that in your deliberations you are to consider the instructions I have given to you as a whole. You should not single out any part of instruction, including this one, and ignore others.
You may now retire and continue your deliberations.

There is no dispute that a supplemental *Allen* charge is valid; the Eleventh Circuit has approved its use “on numerous occasions.” *United States v. Bush*, 727 F.3d 1308, 1320 (11th Cir. 2013). It is also used in Georgia’s state courts, albeit with some modifications. *Ratcliff v. Ratcliff*, 219 Ga. 545 (1964). However, it must not cross the line of becoming coercive; that is, the judge should not simply suggest that the holdout jurors arbitrarily abandon their beliefs for the sake of reaching a verdict. *See Lowenfield v. Phelps*, 484 U.S. 231 (1988); *Peavy v. Clemons*, 10 Ga. App. 507 (1912). An *Allen* charge may be coercive if it is given prematurely, but the timing of such a charge is within the District Court’s discretion, and the Eleventh Circuit has recognized that such a charge given “only four hours after deliberations began” was not premature. *Bush*, 727 F.3d at 1320-21. An *Allen* charge may also be coercive under the totality of the circumstances if it is perceived as being directed to one specific juror, such as after a verdict is return but upon polling of the jury it becomes clear that further deliberations are required. *United States v. Spitz*, 696 F.2d 916 (11th Cir. 1983).

D. Timing of Jury Charges

In Georgia’s state courts, the trial court “shall inform counsel of its proposed action upon the requests [to charge] prior to their [closing] arguments to the jury
but shall instruct the jury after the arguments are completed.” O.C.G.A. § 5-5-24(b). The federal rules, conversely, allow for the jury to be charged either before or after counsel’s closing arguments. See Fed. R. Civ. P. 51(b)(3).

Delivering your closing argument after the jury is already instructed might lend more credibility to your explanation of the law during closing, and if you have the chance to close last, it gives you the opportunity to be the very last thing the jury hears before going into their deliberations. One study in Washington, D.C.’s superior court and District Court identified numerous benefits of charging the jury before closing arguments, such as improving the jurors’ ability to “listen to closing arguments by counsel with a discerning ear,” making them “less likely to be swayed inappropriately by closing arguments,” and helping them “spend less time in deliberations trying to understand judges’ instructions.” O’MALLEY ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS § 7.6. Nevertheless, most judges’ practice is to charge the jury after closing arguments.

Finally, you should clarify whether a written copy of the charge (or, less frequently, a recording of the Court’s delivery of the charge) will go out with the jury as they deliberate, as this practice varies by judge.
II. Verdict Form

There are three types of verdicts that a jury may be asked to return: a general verdict, a special verdict, and a general verdict coupled with answers to written interrogatories. “A general verdict is a verdict by which the jury finds in favor of one party or the other, as opposed to resolving specific fact questions; it is a verdict by which the jury pronounces generally on all or any of the issues, either in favor of the plaintiff or in favor of the defendant.” Mason v. Ford Motor Co., 307 F.3d 1271, 1274 (11th Cir. 2002) (quotations and citations omitted) (alteration adopted).

Under Rule 49(a), “[t]he court may require a jury to return only a special verdict in the form of a special written finding on each issue of fact.” It is “a verdict by which the jury finds the facts particularly, and then submits to the court the questions of law arising on them.” Mason, 307 F.3d at 1274. “With a special verdict, the jury’s sole function is to determine the facts; the jury needs no instruction on the law because the court applies the law to the facts as found by the jury.” Id. “By confining the jury’s responsibility to a specific fact finding, the special verdict practice is said to avoid possible errors by the jury in considering questions of law and in applying the law to the facts.” O’MALLEY ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS § 8.3.
Finally, under Rule 49(b), “[t]he court may submit to the jury forms for a general verdict, together with written questions on one or more issues of fact that the jury must decide.” This tends to be the norm in federal employment jury trials and is often referred to as a “special verdict,” but as a technical matter that is inaccurate. “When Rule 49(a) [special verdicts] is employed, the jury makes specific factual findings; and the judge makes the ultimate legal conclusions based on those facts. When Rule 49(b) is employed, the jury makes specific factual findings, and the jury itself applies the law to those factual findings to issue a general verdict.” Mason, 307 F.3d at 1274. “Where the general verdict and the answers to written interrogatories are harmonious, judgment should be entered on the verdict pursuant to the provisions of Rule 58. Otherwise, Rule 49(b) makes specific provision for the course to be followed where there is inconsistency between the general verdict and the answers to interrogatories.” O’Malley et al., Federal Jury Practice and Instructions § 8.8.

The significance is not merely one of technical nomenclature. “The characterization is important: if the jury rendered inconsistent general verdicts, failure to object timely waives that inconsistency as a basis for seeking retrial; inconsistent special verdicts, on the other hand, may support a motion for a new trial even if no objection was made before the jury was discharged.” Mason, 307
F.3d at 1274. In *Mason*, the parties disagreed whether the jury’s verdicts were
general or special; the Court concluded they were general verdicts, and because the
defendant had not objected to the inconsistency in the verdicts before the jury was
discharged, it was held to have “waived the right to contest the verdicts on the
basis of alleged inconsistency.” *Id.* at 1275-76.

The more questions a jury has to answer on a verdict form, the greater the
chance of an inconsistent verdict or the resolution of one or more of the questions
in a way that is adverse to the plaintiff, if agreement can be reached at all. For that
reason, I tend to be a fan of using the most simple verdict form that is suited to a
given case. However, a detailed questionnaire can also remove a losing party’s
incentive to appeal and may help avoid a retrial in the event of a reversal on
appeal, as it may provide information necessary to adjust the jury’s verdict based
on the particular error (for example, if damages are broken out on a claim-by-claim
basis, and the appeals court determines that there was not sufficient evidence to
sustain the jury’s verdict on one, but not all, of the claims). There is no right or
wrong answer; the most important thing is to know the options available to you
and the pros and cons of each one.
Marching Orders for the Jury
Jenn Coalson
September 21, 2018

III. Conclusion

Jury charges serve as bookends of a trial: the preliminary instructions given before opening statements set the jurors in the right mindset, and the charges given after the close of evidence serve as the jurors’ marching orders as they embark upon deliberations. But by planning and drafting your jury instructions early, you ensure that you are positioning yourself for success well in advance of trial, obtaining discovery on critical issues, and crafting a legal theory that lines up with the law that will be read to the jury by the judge. There are few black and white rules governing jury instructions and verdict forms; each case will require a different approach, and certainly the content of the instructions will vary based on the subject matter involved in a particular trial. Whatever choices you make in this arena, it is critical that they are deliberate and informed.
About the Author

Jenn Coalson is a trial lawyer and partner at Parks, Chesin & Walbert in Atlanta, Georgia. Her practice focuses on a wide array of complex civil litigation, including cases involving civil rights, employment discrimination and retaliation, personal injury and wrongful death, business disputes, whistleblower protections, consumer protection, and government contract procurement. Jenn’s litigation experience includes all stages of trial preparation, trial, and appeal in both state and federal courts. She has also counseled clients through pre-trial negotiations and settlement discussions, mediation and arbitration proceedings, administrative hearings, and governmental investigations. In addition to her experience in private practice, Jenn served as a judicial law clerk to the Honorable Timothy C. Batten, Sr. in the Northern District of Georgia. She may be contacted at 404-873-8000 or jcoalson@pcwlawfirm.com.
Closing Argument: Bringing Home The Victory

Presented By:

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INTRODUCTION

- Employment discrimination cases will rarely be won or lost during the closing argument. Jurors have generally made up their minds at that juncture. The job of the attorney is to deliver a closing argument that is persuasive, motivational, and empowers the jury.
TOPICS OF DISCUSSION

- Opening Argument into Closing Argument
- Trial Theme in Closing Argument
- Story Telling and Relatable Metaphors
- Evoke Emotion
- Verdict Form and Jury Instructions
- Talk About The Money
- Empower
- Objections
- Rebuttals

I. OPENING ARGUMENT INTO CLOSING ARGUMENT

- Convincing each individual juror to support you is important and ideal, but one powerful juror can help you reach a favorable verdict by championing on your behalf during deliberations. Try to persuade, at the very least, that powerful juror.

- The opening is one of the most influential and compelling parts of trial. This is the first opportunity you can speak to the jurors to give the theme and theory of the case.
• The closing should reference the major facts and evidence you outlined during the opening. It creates a clear path that summarizes your presentation during trial.

• It is important to point out what you have proven and what your opposing counsel has failed to prove. By referring to opposing counsel’s opening statement, you can address their inconsistencies and show a lack of credibility and trustworthiness.

II. TRIAL THEME IN CLOSING ARGUMENT

• Be consistent. Your theme should be clear from your opening statement through to your closing statement.

• Your theme should be strengthened during your closing argument by reiterating and referencing facts of the case and the evidence you have presented throughout the trial.
III. STORY TELLING AND RELATABLE METAPHORS

- Transfer trial evidence through personally relatable stories to persuade jurors and motivate action.
- Stories in closings create imagery that jurors can utilize to help them understand and process evidence including damages.
- Additionally, it has the effect of personalizing you and the client with the jurors.
- Stories can move jurors emotionally. It can persuade them to take action on your behalf because they can identify with the narrative or shared experience.

IV. EVOKE EMOTION

- Any emotion you display has to be genuine.
- If there was any evidence or testimony presented that evoked an emotion - anger, sadness, excitement - discuss it with the jurors and explain your emotions - make it relatable to the jurors.
V. VERDICT FORM AND JURY INSTRUCTIONS

- If the judge allows, display the verdict form, go over each allegation and explain the evidence that supports a finding in your favor for each element or factor of each allegation.

- If using ELMO, physically check the boxes yourself which would support a finding in your client's favor. When addressing defenses, tell the jurors if they check the "yes" box, the client is denied justice. Then check the "no" box to show them what to do.

VI. TALK ABOUT THE MONEY

- Jurors need to understand that your job is to ask them to award your client monetary damages, as required under the law and the evidence presented.

- Jurors generally look for guidance about money, so talk about it. Propose specific amounts and provide direction - explain how you reached the requested sum.
  - Back Pay Calculations
  - Front Pay Calculations
  - Potential Liquidated Damages

- Compensatory damages
  - Tie the requested damages for pain, suffering, and emotional distress to a method of calculation. How many days was Plaintiff harassed or discriminated against? How many days of unemployment after an unfair termination? Quantify!
VII. EMPOWER

• Make the jurors care about the verdict – incorporate social impact.
• Your goal should not be to motivate a juror to care about your client, but to care about the verdict.
• Convince the jury that this case has a greater social importance and is more than vindication for your client.

• HOW?
  • Rules of the Road Theory
    • Talk about Defendant's actions as violations of accepted "Rules of the Road". This forces the jury to act in a non-emotional manner.
      • Company A broke the rules and rule breakers have to pay for the damages they caused.
  • Reptile Theory
    • Explain how Defendant's actions or inactions constitute an immediate threat to public safety and how a verdict for Plaintiff will reduce or address that danger.
    • Appeal to basic security and safety needs to empower jurors on a relatable level – one that is particular to them.
VIII. OBJECTIONS

• Objections during the closing presents a difficult predicament for any attorney
• Objections during closing can appear as though you are taking unfair attempts to draw away from important facts presented by opposing counsel or that you are trying to interrupt or throw counsel off.
• Regardless, stop opposing counsel from improper conduct.

Considerations:
• Motions in Limine prior to closing to limit the scope of your opponent’s argument.
• Even without a Motion in Limine, if opposing counsel refers to evidence which has been limited or excluded, address those violations to the jurors.
IX. REBUTTALS

- Always give a rebuttal.
  - Even if it appears there is nothing to rebut or the jurors look disinterested.
- Address the most important inconsistency or fallacy in opposing counsel’s closing — identify the “red herring”.
- Address damages one more time. Revisit damages during rebuttal in case it has been forgotten or obscured during opposing counsel’s closing remarks.
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Judges’ Ethics Panel: Best Practices For Winning The Good Fight

Presented By:

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Middle District of Georgia
Albany, GA

Hon. Catherine M. Salinas
Northern District of Georgia
Atlanta, GA

Hon. J. Wade Padgett
Augusta Judicial Circuit
Augusta, GA
Chapter 8
1 of 19

CODE OF PRETRIAL AND TRIAL CONDUCT

Permission to reprint Code of Pretrial and Trial Conduct in its entirety has been granted by the American College of Trial Lawyers.
Please accept this copy of the Code of Pretrial and Trial Conduct published by the American College of Trial Lawyers. The development of this Code by the Fellows of the College and its distribution to persons and institutions engaged in all aspects of the administration of justice represents an important part of the execution of the College’s mandate to improve and elevate standards of trial practice, the administration of justice and the ethics of the profession.

The American College of Trial Lawyers, founded in 1950, is composed of the best of the trial bar from the United States and Canada. Fellowship in the College is extended by invitation only, after careful investigation, to those experienced trial lawyers who have mastered the art of advocacy and whose professional careers have been marked by the highest standards of ethical conduct, professionalism, civility and collegiality. Lawyers must have a minimum of 15 years’ experience before they can be considered for Fellowship. Membership in the College cannot exceed 1% of the total lawyer population of any state or province. Fellows are carefully selected from among those who represent plaintiffs and those who represent defendants in civil cases; those who prosecute and those who defend persons accused of crime. The College is thus able to speak with a balanced voice on important issues affecting the administration of justice.

The College is confident that utilization of this Code in the course of legal proceedings in the courts and as a teaching aid at the Bar and in the nation’s law schools will represent a positive contribution to improving and elevating standards of trial practice, the administration of justice and the ethics of the profession.
Message from the Chief Justice of the United States

For more than fifty years, the American College of Trial Lawyers has promoted professionalism in the conduct of trial litigation. Its authoritative Code of Trial Conduct, first published in 1956, has served as an enduring landmark in the development of professional standards for advocates.

The College continues those efforts through the publication of its revised and enlarged Code of Pretrial and Trial Conduct. This comprehensive resource sets out aspirational principles to guide litigators in all aspects of their work as advocates of client interests. The Code looks beyond the minimum ethical requirements that every lawyer must follow and instead identifies those practices that elevate the profession and contribute to fairness in the administration of justice.

As Justice Frankfurter noted, “An attorney actively engaged in the conduct of a trial is not merely another citizen. He is an intimate and trusted and essential part of the machinery of justice, an ‘officer of the court’ in the most compelling sense.” I encourage lawyers who engage in trial work to observe and advance the principles that the College has set forth in this volume.

I commend the American College of Trial Lawyers for its leadership in defining and refining the standards of professionalism that are vital to our system of justice.

John G. Roberts, Jr.
Chief Justice of the United States
“Hold every man a debtor to his profession; from the which, as men of course do seek to receive countenance and profit, so ought they of duty to endeavor themselves, by way of amends, to be a help and ornament thereto.”

Sir Francis Bacon
AMERICAN COLLEGE OF TRIAL LAWYERS

CODE OF PRETRIAL AND TRIAL CONDUCT

Approved by the Board of Regents, June 2009

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Forward

The Legal Ethics and Professionalism Committee of the American College of Trial Lawyers (the “College”) is charged with the following mandate:

To advance, improve, and promote ethical standards and professionalism in the trial bar in all its aspects in both the United States and Canada as well as to engage in such other activities as may be directed by the Board of Regents.

All jurisdictions have codes of conduct that prescribe minimum standards for disciplinary purposes. There is no need here to duplicate such standards. This ACTL Code represents an attempt by the College to set down aspirational, rather than minimal, guidelines for trial lawyers and judges. The problem in trial practice today is not that lawyers violate the ethical rules, although some lawyers do. Most lawyers know the rules and try to comply. The real problem is the gradual corrosion of the profession’s traditional aspirations, which are:

- Honor for values such as honesty, respect and courtesy toward litigants, opposing advocates and the court;
- A distaste for meanness, sharp practice, and unnecessarily aggressive behavior;
- Engagement in public service;
- A focus on the efficient, fair preparation and trial of cases; and
- A role as agent for counseling and for the resolution of disputes.

Despite what the profession says, the profession often acts as if these values are inconsistent with effective advocacy in an adversary system of justice. The College is uniquely positioned to lead the way in changing these attitudes because it strives to offer Fellowship only to those lawyers who embody the skill and values to which they and the profession should aspire. The College cannot lead by focusing on the lowest floor of acceptable behavior.

The College sees the new code as one that can be endorsed by courts, that can be profitably used in training programs by law schools and bar organizations, and that describes the values that the Fellows of the American College of Trial Lawyers endorse and practice daily.

The new Code of Pretrial and Trial Conduct is a product that the College believes can be endorsed by courts and the profession as articulating the level of conduct to which all members of our profession should aspire. If trial lawyers practice these principles the profession will begin a process of change that benefits lawyers, litigants, and our system of justice.
Preamble

Admission to the Bar is a high honor, and those lawyers who devote their lives to presenting cases in the courts are truly privileged. Trial lawyers are officers of the court. They are entrusted with a central role in the administration of justice in our society necessary to democracy. Lawyers who engage in trial work have a special responsibility to strive for prompt, efficient, ethical, fair and just disposition of litigation. The American College of Trial Lawyers believes that, as officers of the court, trial lawyers must conduct themselves in a manner that reflects the dignity, fairness, and seriousness of purpose of the system of justice they serve. They must be role models of skill, honesty, respect, courtesy, and fairness consistent with their obligations to the client and the court.

Trial lawyers have a duty to conduct themselves so as to preserve the right to a fair trial, one of the most basic of all constitutional guarantees, while courageously, vigorously and diligently representing their clients and applying the relevant legal principles to the facts as found. Without courtesy, fairness, candor, and order in the pretrial process and in the courtroom, reason cannot prevail and constitutional rights to justice, liberty, freedom and equality under law will be jeopardized. The dignity, decorum and courtesy that have traditionally characterized the courts are not empty formalities. They are essential to an atmosphere in which justice can be done.

No client, corporate or individual, however powerful, nor any cause, civil, criminal or political, however important, is entitled to receive, nor should any lawyer render, any service or advice encouraging or inviting disrespect of the law or of the judicial office. No lawyer may sanction or invite corruption of any person exercising a public office or private trust. No lawyer may condone in any way deception or betrayal of the court, fellow members of the Bar, or the public. A lawyer advances the honor of the profession and the best interests of the client when a lawyer embodies and encourages an honest and proper respect for the law, its institutions and officers. Above all, a lawyer finds the highest honor in a deserved reputation as an officer for justice, faithful to private trust and to public duty, and as an honest person.

This Code of Pretrial and Trial Conduct ("the Code") is not intended to supplant any local rules, procedural rules, or rules of professional conduct. This Code aims to provide aspirational guidance for trial lawyers. It sets forth a standard above the ethical minimum – a standard of conduct worthy of the privileges and responsibilities conferred on those who have sworn to serve our system of justice.

This Code is intended to provide guidance for a lawyer’s professional conduct except insofar as the applicable law, code or rules of professional conduct in a particular jurisdiction require otherwise. It is an aspirational guide for trial lawyers and should not give rise to a cause of action or sanction, create a presumption that a legal duty has been breached or form the basis for disciplinary proceedings not created under the applicable law, court rules or rules of professional conduct.
CODE OF PRETRIAL AND TRIAL CONDUCT

Qualities of a Trial Lawyer

Trial lawyers are officers of the court. They are entrusted with a central role in the administration of justice in our society. Lawyers who engage in trial work have a special responsibility to strive for prompt, efficient, ethical, fair and just disposition of litigation.

Honesty, Competence and Diligence

(a) A lawyer must in all professional conduct be honest, candid and fair.

(b) A lawyer must possess and apply the legal knowledge, skill, thoroughness and preparation necessary for excellent representation.

(c) A lawyer must diligently, punctually and efficiently discharge the duties required by the representation in a manner consistent with the legitimate interests of the client.

Obligations to Clients

A lawyer must provide a client undivided allegiance, good counsel and candor; the utmost application of the lawyer’s learning, skill and industry; and the employment of all appropriate means within the law to protect and enforce legitimate interests of a client. A lawyer may never be influenced directly or indirectly by any consideration of self-interest. A lawyer has an obligation to undertake unpopular causes if necessary to ensure justice. A lawyer must maintain an appropriate professional distance in advising his or her client, in order to provide the greatest wisdom.

Employment and Withdrawal

(a) It is the right of a lawyer to accept employment in any civil case unless such employment is or would likely result in a violation of the rules of professional responsibility, a rule of court or applicable law. It is the lawyer’s right and duty to take all proper actions and steps to preserve and protect the legal merits of the client’s position and claims, and the lawyer should not decline employment in a case on the basis of the unpopularity of the client’s cause or position.

(b) The right of a person accused of a crime to be represented by competent counsel is essential to our system of justice. A lawyer should not decline such representation because of the lawyer’s personal or the community’s opinion of the guilt of the accused or heinousness of the crime. A lawyer must raise all defenses and arguments that should be asserted on the client’s behalf.

Fidelity to the Client’s Interests

A lawyer must not permit considerations of personal or organizational advancement, financial gain, favor with other persons, or other improper considerations to influence the representation of the client.
Obligations to Colleagues

A lawyer should be straightforward and courteous with colleagues. A lawyer should be cooperative with other counsel while zealously representing the client. A lawyer must be scrupulous in observing agreements with other lawyers.

Relations with Other Counsel

(a) A lawyer must be courteous and honest when dealing with opposing counsel.

(b) A lawyer should not make disparaging personal remarks or display acrimony toward opposing counsel, and must avoid demeaning or humiliating words in written and oral communication with adversaries.

(c) When practicable and consistent with the client’s legitimate interests and local custom, lawyers should agree to reasonable requests to waive procedural formalities.

(d) The lawyer, and not the client, has the discretion to determine the customary accommodations to be granted opposing counsel in all matters not directly affecting the merits of the cause or prejudicing the client’s rights.

(e) A lawyer must adhere strictly to all written or oral promises to and agreements with opposing counsel, and should adhere in good faith to all agreements implied by the circumstances or by appropriate local custom.

(f) Written communications with opposing counsel may record and confirm agreements and understandings, but must not be written to ascribe to any person a position that he or she has not taken or to create a record of events that have not occurred.

Obligations to the Court

Judges and lawyers each have obligations to the court they serve. A lawyer must be respectful, diligent, candid and punctual in all dealings with the judiciary. A lawyer has a duty to promote the dignity and independence of the judiciary, and protect it against unjust and improper criticism and attack. A judge has a corresponding obligation to respect the dignity and independence of the lawyer, who is also an officer of the court.

Communication with the Court

(a) A lawyer must always show courtesy to and respect for a presiding judge. While a lawyer may be cordial in communicating with a presiding judge in court or in chambers, the lawyer should never exhibit inappropriate familiarity. In social relations with members of the judiciary, a lawyer should take care to avoid any impropriety or appearance of impropriety. In making any communication about a judge, a lawyer should not express or imply that the lawyer has a special relationship or influence with the judge.

(b) A lawyer should never make any attempt to obtain an advantage through improper ex parte communication with a judge or the staff in the judge’s chambers. A lawyer must make every effort to avoid such communication on any substantive matter and any matter that could reasonably
be perceived as substantive, except as addressed in subpart (c) below. When a lawyer informally
communicates with a court, the highest degree of professionalism is required.

(c) If ex parte communication with the court is permitted by applicable rules of ethics and
procedure, a lawyer must diligently attempt to notify opposing parties, through their counsel if known,
unless genuine circumstances exist that would likely prejudice the client’s rights if notice were given.
When giving such notice, the lawyer should advise the opponent of the basis for seeking immediate relief
and should make reasonable efforts to accommodate the opponent’s schedule so that the party affected
may be represented.

(d) When possible, a lawyer’s communications with the court related to a pending case
should be in writing, and copies should be provided promptly to opposing counsel. When circumstances
require oral communication with the court, a lawyer must notify opposing counsel of all such
communications promptly.

Independence and Impartiality of Judicial Officers and Neutrals

(a) Judges, arbitrators, mediators and other neutrals must maintain their independence and
impartiality. They must not allow professional or personal relationships, employment prospects or other
improper considerations to influence or appear to influence the discharge of their duties.

(b) A judge must promote the dignity and proper discharge of the duties of the lawyer, who is
also an officer of the court entitled to respect and courtesy.

Obligations to the System Of Justice

A lawyer has an obligation to promote the resolution of cases with fairness, efficiency, courtesy,
and justice. As an officer of the court and as an advocate in the court, a lawyer should strive to improve
the system of justice and to maintain and to develop in others the highest standards of professional
behavior.

Devotion to the System of Public Justice

A lawyer must strive at all times to uphold the honor and dignity of the profession. Every lawyer
should contribute to the improvement of the system of justice and support those measures that enhance
the efficiency, fairness and quality of justice dispensed by the courts. A lawyer should never manifest, or
act upon, bias or prejudice toward any person based upon race, sex, religion, national origin, disability,
age, sexual orientation or socioeconomic status.

Pro Bono Publico

A lawyer should personally render public interest legal service and support organizations that
provide legal services to persons of limited means by contributing time and resources.

Settlement and Alternative Dispute Resolution

A lawyer must never be reluctant to take a meritorious case to trial if the dispute cannot otherwise
be satisfactorily resolved. However, a lawyer must provide the client with alternatives to trial when to do
so would be consistent with the client’s best interests. A lawyer should educate clients early in the legal
process about various methods of resolving disputes without trial, including mediation, arbitration, and neutral case evaluation.

**Motions and Pretrial Procedure**

A lawyer has an obligation to cooperate with opposing counsel as a colleague in the preparation of the case for trial. Zealous representation of the client is not inconsistent with a collegial relationship with opposing counsel in service to the court. Motions and pretrial practice are often sources of friction among lawyers, which contributes to unnecessary cost and lack of collegiality in litigation. The absence of respect, cooperation, and collegiality displayed by one lawyer toward another too often breeds more of the same in a downward spiral. Lawyers have an obligation to avoid such conduct and to promote a respectful, collegial relationship with opposing counsel.

**Scheduling and Granting Extensions for Pretrial Events**

(a) A lawyer should schedule pretrial events cooperatively with other counsel as soon as the event can reasonably be anticipated. Lawyers scheduling an event should respect the legitimate obligations of colleagues and avoid disputes about the timing, location and manner of conducting the event.

(b) A lawyer should seek to reschedule an event only if there is a legitimate reason for doing so and not for improper tactical reasons. A lawyer receiving a reasonable request to reschedule an event should make a sincere effort to accommodate the request unless the client’s legitimate interests would be adversely affected.

(c) Scheduling pretrial events and granting requests for extensions of time are properly within the discretion of the lawyer unless the client’s interests would be adversely affected. A lawyer should counsel the client that cooperation among lawyers on scheduling is an important part of the pretrial process and expected by the court. A lawyer should not use the client’s decision on scheduling as justification for the lawyer’s position unless the client’s legitimate interests are affected.

**Service of Process, Pleadings and Proposed Orders**

(a) The timing, manner, and place of filing, electronic filing or serving papers should never be calculated to delay, embarrass or improperly disadvantage the party being served.

(b) Unless exigent circumstances require otherwise, papers filed in a court must be promptly served upon or made available to opposing parties or counsel.

(c) Papers should not be served in a manner deliberately designed to unfairly shorten an opponent’s time for response or to take other unfair advantage of an opponent.

(d) Service must be made in a manner that affords an opposing party a fair and timely opportunity to respond, unless exigent circumstances legitimately require or applicable rules permit an ex parte application to the court or an abbreviated time for response.

**Motion Practice and Other Written Submissions to the Court**

(a) Before filing pretrial motions, lawyers should work together to resolve issues and to
identify matters not in dispute. When motions are necessary, lawyers should cooperate to facilitate the filing, service, and hearing of the motion. Orders submitted to the court must fairly and accurately reflect the requested or actual ruling of the court.

(b) In written submissions and oral presentations, a lawyer should neither engage in ridicule nor sarcasm. Neither should a lawyer ever disparage the integrity, intelligence, morals, ethics, or personal behavior of an opposing party or counsel unless such matters are directly relevant under controlling law.

(c) When documents or data are presented to the court, they must be furnished to opposing counsel in exactly the same format, including identical highlighting or other emphasis.

Pretrial Conferences

(a) A lawyer should seek to reach agreement with opposing counsel to limit the issues to be addressed before and during trial.

(b) A lawyer should determine in advance of a pretrial conference the trial judge’s custom and practices in conducting such conferences.

(c) A lawyer should satisfy all directives of the court set forth in the order setting a pretrial conference and should consult and comply with all local rules and with any specific requirements of the trial judge unless properly challenged when based upon a belief of unfair prejudice to the client.

(d) Before a pretrial conference, a lawyer should ascertain the willingness of the client (and the carrier if an insurer is involved) to participate in alternative dispute resolution.

(e) Unless unavoidable circumstances prevent it, a lawyer representing a party at a pretrial conference must be thoroughly familiar with each aspect of the case, including the pleadings, the evidence, and all potential procedural and evidentiary issues.

(f) A lawyer should alert the court as soon as practicable to scheduling conflicts of clients, experts, and witnesses.

(g) If stipulations are possible for uncontested matters, a lawyer should propose specific stipulations and work with opposing counsel to obtain an agreement in advance of the pretrial conference.

(h) In advance of a final pretrial conference, discovery should be completed, discovery responses should be supplemented, evidentiary depositions should be concluded, and settlement should be explored.

(i) Unless unavoidable circumstances prevent it, the final pretrial conference should be attended by a lawyer who will actually try the case, and, in any event, by a lawyer who is familiar with the case.

(j) At or before a final pretrial conference, a lawyer should alert the court to the need for any pretrial rulings, hearings on motions or other matters requiring action by the court in advance of trial.

(k) At the final pretrial conference, a lawyer should be prepared to advise the court of the status of settlement negotiations and the likelihood of settlement before trial.
Discovery

A lawyer must conduct discovery as a focused, efficient, and principled procedure to gather and preserve evidence in the pursuit of justice. Discourtesy, obfuscation, and gamesmanship have no proper place in this process.

Discovery Practice

(a) In discovery, as in all other professional matters, a lawyer’s conduct must be honest, courteous, and fair.

(1) A lawyer should conduct discovery efficiently to elicit relevant facts and evidence and not for an improper purpose, such as to harass, intimidate, unduly burden another party or a witness or to introduce unnecessary delay. Overly broad document requests should be avoided by focusing on clear materiality and a sense of cost/benefit.

(2) A lawyer should respond to written discovery in a reasonable manner and should not interpret requests in a strained or unduly restrictive way in an effort to avoid responding or to conceal relevant, nonprivileged information.

(3) Objections to interrogatories, requests for production, and requests for admissions must be made in good faith and must be adequately explained and limited in a manner that fairly apprises the adversary of the material in dispute and the bona fide grounds on which it is being withheld.

(4) When a discovery dispute arises, opposing lawyers must attempt to resolve the dispute by working cooperatively together. Lawyers should refrain from filing motions to compel or for court intervention unless they have genuinely tried, but failed, to resolve the dispute through all reasonable avenues of compromise and resolution.

(5) Lawyers should claim a privilege only in appropriate circumstances. They must not assert a privilege in an effort to withhold or to suppress unprivileged information or to limit or delay a response.

(6) Requests for additional time to respond to discovery should be made as far in advance of the due date as reasonably possible and should not be used for tactical or strategic reasons.

(7) Unless there are compelling reasons to deny a request for additional time to respond to discovery, an opposing lawyer should grant the request without necessitating court intervention. Compelling reasons to deny such a request exist only if the client’s legitimate interests would be materially prejudiced by the proposed delay.

(b) Depositions should be dignified, respectful proceedings for the discovery and preservation of evidence.

(1) A lawyer should limit depositions to those that are necessary to develop the claims or defenses in the pending case or to perpetuate relevant testimony.

(2) A lawyer should conduct a deposition with courtesy and decorum and must
never verbally abuse or harass the witness, engage in extended or discourteous colloquies with opposing counsel or unnecessarily prolong the deposition.

(3) During a deposition, a lawyer must assert an objection only for a legitimate purpose. Objections must never be used to obstruct questioning, to communicate improperly with the witness, to intimidate, to harass the questioner or to disrupt the search for facts or evidence germane to the case.

**Relationships with Witnesses and Litigants**

A lawyer must treat all persons involved in a case with candor, courtesy and respect for their role and rights in the legal process.

**Communicating with Nonparty Fact Witnesses**

(a) A lawyer must carefully comply with all laws and rules of professional responsibility governing communications with persons and organizations with whom the lawyer does not have an attorney-client relationship. A lawyer must be especially circumspect in communications with nonparty fact witnesses who have a relationship to another party.

(b) In dealing with a nonparty who is a fact witness or a potential fact witness, a lawyer must:

1. disclose the lawyer’s interest or role in the pending matter and avoid misleading the witness about the lawyer’s purpose or interest in the communication;
2. be truthful about the material facts and the applicable law;
3. if the nonparty has no counsel, correct any misunderstanding expressed by the nonparty;
4. treat the nonparty courteously; and
5. avoid unnecessarily embarrassing, inconveniencing or burdening the nonparty.

(c) If a lawyer is informed that a nonparty fact witness is represented by counsel in the pending matter, the lawyer must not communicate with the witness concerning the pending litigation without permission from that counsel.

(d) If communicating with a nonparty fact witness, the lawyer should be careful to avoid fostering any impression that the lawyer also represents that witness unless the lawyer does, in fact, represent the witness in compliance with the applicable rules of professional responsibility.

(e) A lawyer should not obstruct another party’s access to a nonparty fact witness or induce a nonparty fact witness to evade or ignore process.

(f) A lawyer should not issue a subpoena to a nonparty fact witness except to compel, for a proper purpose, the witness’s appearance at a deposition, hearing, or trial or to obtain necessary documents in the witness’s possession.
Access to Fact Witnesses and Evidence

(a) Subject to the applicable law and ethical principles, and to constitutional requirements in criminal matters, a lawyer may properly interview any person who is not a retained expert, because a fact witness does not “belong” to any party. A lawyer should avoid any suggestion calculated to induce any witness to suppress evidence or to deviate from the truth. However, without counseling the witness to refrain from cooperating with opposing counsel, a lawyer may advise any witness that he or she does not have a legal duty to submit to an interview or to answer questions propounded by opposing counsel, unless required to do so by judicial or legal process.

(b) A lawyer may never suppress any evidence that the lawyer or the client has a legal obligation to reveal or to produce. In the absence of such an obligation, however, it is not a lawyer’s duty to disclose any work product, evidence or the identity of any witness.

(c) A lawyer must not advise or cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of becoming unavailable as a witness.

(d) Except as provided in subparagraphs (1) and (2) below, a lawyer should not pay, offer to pay or acquiesce in the payment of compensation to a fact witness and may never offer or give any witness anything of value contingent upon the content of the witnesses’ testimony or the outcome of the case. To the extent permitted by the applicable rules of professional responsibility, a lawyer may advance, guarantee or acquiesce in the payment of:

(1) expenses reasonably incurred by a witness in attending or testifying; and

(2) reasonable compensation to a witness for the witness’s loss of time in attending or testifying;

(e) A lawyer may solicit witnesses to a particular event or transaction but not to testify to a particular version of the facts.

Relations with Consultants and Expert Witnesses

(a) In retaining an expert witness, a lawyer should respect the integrity, professional practices and procedures in the expert’s field and must never ask or encourage the expert to compromise the integrity of those practices and procedures for purposes of the particular matter for which the expert has been retained.

(b) A retained expert should be fairly and promptly compensated for all work on behalf of the client. A lawyer must never make compensation contingent in any way upon the substance of the expert’s opinions or written report or upon the outcome of the matter for which the expert has been retained.

(c) Other than as expressly permitted by governing law, a lawyer should not communicate with, or seek to communicate with, an expert witness concerning the pending litigation whom the lawyer knows to have been retained by another party, unless express permission is granted by counsel for the retaining party.
Trial

A lawyer must conduct himself or herself in trial so as to promote respect for the court and preserve the right to a fair trial. A lawyer should avoid any conduct that would undermine the fairness and impartiality of the administration of justice, and seek to preserve the dignity, decorum, justness and courtesy of the trial process.

Relations with Jurors

Lawyers and judges should be respectful of the privacy of jurors during voir dire and after a verdict. A lawyer should abstain from all acts, comments and attitudes calculated to inappropriately curry favor with any juror, such as fawning, flattery, solicitude for the juror’s comfort or convenience or the like.

Courtroom Decorum

(a) Proper decorum in the courtroom is not an empty formality. It is indispensable to the pursuit of justice at trial.

(b) In court, a lawyer should always display a courteous, dignified and respectful attitude toward the judge presiding and should promote respect for and confidence in the judicial office. The judge should be courteous and respectful to the lawyer, who is also an officer of the court.

(c) A lawyer should never engage in discourteous or acrimonious comments or exchanges with opposing counsel. Objections, requests and observations must be addressed to the court.

(d) A lawyer should advise the client and witnesses appearing in the courtroom of the kind of behavior expected and counsel them against engaging in any disrespectful, discourteous or disruptive behavior in the courtroom.

Trial Conduct

(a) A lawyer has the professional obligation to represent every client courageously, vigorously, diligently and with all the skill and knowledge the lawyer possesses. The conduct of a lawyer before the court and with other lawyers should at all times be characterized by civility. A lawyer should present all proper arguments against rulings the lawyer deems erroneous or prejudicial and ensure that a complete and accurate case record is made. In doing so, the lawyer should not be deterred by any fear of judicial displeasure.

(b) In appearing in a professional capacity before a tribunal, a lawyer must not:

(1) improperly obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value; nor should a lawyer counsel, permit or assist another person to do any such act;

(2) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law; or

(3) allude to any matter that the lawyer does not reasonably believe is relevant or will not be supported by admissible evidence, assert personal knowledge of facts in issue except when
testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.

(c) A lawyer should not interrupt or interfere with an examination or argument by opposing counsel, except to present a proper objection to the court.

(d) When a court has made an evidentiary ruling, a lawyer should not improperly circumvent that ruling, although a lawyer may seek to make a record of the excluded evidence or a review of the ruling.

(e) A lawyer must not attempt to introduce evidence or to make any argument that the lawyer knows is improper. If a lawyer has doubt about the propriety or prejudicial effect of any disclosure to the jury, the lawyer should request a ruling out of the jury’s hearing.

(f) A lawyer should never engage in acrimonious conversations or exchanges with opposing counsel in the presence of the judge or jury.

(g) Examination of jurors and of witnesses should be conducted from a suitable distance, except when handling evidence or circumstances otherwise require.

(h) Unless local custom dictates otherwise, a lawyer should rise when addressing or being addressed by the judge, except when making brief objections or incidental comments. A lawyer should be attired in a proper and dignified manner in the courtroom.

(i) A lawyer should not in argument assert as a fact any matter that is not supported by evidence.

(j) A lawyer must never knowingly misquote or mischaracterize the contents of documentary evidence, the testimony of a witness, the statements or argument of opposing counsel, or the language of a judicial decision.

(k) A lawyer should not propose a stipulation in the jury’s presence unless the lawyer knows or has reason to believe the opposing lawyer will accept it.

(l) A lawyer who receives information clearly establishing that the client has, during the representation, perpetrated a fraud on the court should immediately take the actions required by the appropriate procedural and ethical rules.

**Public Statements about Pending Litigation**

A case should be tried in the courtroom and not in the media. A lawyer should follow all rules and orders of the court concerning publicity. In the absence of a specific rule or order, a lawyer should not make any extrajudicial statement that may prejudice an adjudicative proceeding.
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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.

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