Friday - Saturday, August 31 - September 1, 2018

29TH ANNUAL URGENT LEGAL MATTERS INSTITUTE

12 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.
The purpose of the SOLACE program is to allow the legal community to provide help in meaningful and compassionate ways to judges, lawyers, court personnel, paralegals, legal secretaries and their families who experience loss of life or other catastrophic illness, sickness or injury.

TESTIMONIALS

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

A solo practitioner’s quadriplegic wife needed rehabilitation, and members of the Bar helped navigate discussions with their insurance company to obtain the rehabilitation she required.

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

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

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

Contact SOLACE@gabar.org for help.
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
FRIDAY, AUGUST 31, 2018

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

8:15 WELCOME AND OVERVIEW
J. Wickliffe “Wick” Cauthorn, Program Chair; Morgan & Morgan Atlanta PLLC, Atlanta, GA

8:30 MINOR SETTLEMENTS, AND NAVIGATING PROBATE COURT
Leslie H. Cushner, Taulbee Rushing Snipes Marsh & Hodgin LLC, Statesboro, GA

9:30 DUI UPDATE FROM THE DEFENSE SIDE AND THE ROLE OF PROFESSIONALISM
Adam L. Hebbard, The Law Offices of Adam L. Hebbard, Athens, GA
Additional Speaker TBD

10:30 BREAK

10:40 VOIR DIRE IN THE MODERN AGE: USING TECHNOLOGY EFFECTIVELY
H. Michael Ruppersburg, Blasingame Burch Garrard Ashley PC, Athens, GA

11:40 HANDS IN THE COOKIE JAR: WHO TO PAY AND WHO NOT TO PAY OUT OF A SETTLEMENT OR JUDGMENT (LIEN UPDATE)
Robert A. “Rob” De Metz, Jr., Morgan & Morgan Atlanta PLLC, Columbus, GA

12:40 LUNCH

1:25 ETHICS AND MALPRACTICE
[VIDEO REPLAY FROM NOVEMBER 16, 2017]
Shari L. Klevens, Dentons US LLP, Washington, D.C.
Alanna Clair, Dentons US LLP, Washington, D.C.

2:25 BUILDING A PRACTICE AND DEVELOPING CLIENTS IN 2018
Eric L. Roden, Roden Law, Savannah, GA

3:25 BREAK

3:35 DEVELOPMENTS IN FORENSIC: DEFENDING YOUR CLIENTS AGAINST BAD (AND GOOD) SCIENCE
Speaker TBD
ANTE LITEMS: WHO GETS THEM, WHO DOESN’T, AND WHY IT MATTERS
J. Wickliffe “Wick” Cauthorn, Program Chair; Morgan & Morgan Atlanta PLLC, Atlanta, GA

5:35 RECESS

6:30 RECEPTION

SATURDAY, SEPTEMBER 1, 2018

8:15 WELCOME AND OVERVIEW
J. Wickliffe “Wick” Cauthorn, Program Chair; Morgan & Morgan Atlanta PLLC, Atlanta, GA

8:20 MOTIONS IN LIMINE
Kurt G. Kastorf, The Summerville Firm LLC, Atlanta, GA

9:20 EMERGENCY GUARDIANSHIPS
Marijane E. Cauthorn, Cauthorn Nohr & Owen, Marietta, GA

10:20 BREAK

10:30 JUDGES’ PANEL ON EMERGENCY PETITIONS AND MOTIONS
Speaker TBD
Speaker TBD
Speaker TBD
Speaker TBD
Speaker TBD

12:30 ADJOURN
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Minor Settlements, And Navigating Probate Court

Presented By:

Leslie H. Cushner
Taulbee Rushing Snipes Marsh & Hodgin LLC
Statesboro, GA
Minor Settlements and Navigating the Process of Court Approval

Leslie H. Cushner
Taulbee, Rushing, Snipes, Marsh, & Hodgin, LLC
Statesboro, Georgia
Minor Settlements and Navigating the Process of Court Approval

1. Why does the law require minor settlements to be approved?

At their core, settlement agreements are contracts. Contracts entered into by minors are voidable at the election of the minor when he or she reaches the age of majority. O.C.G.A. § 13-3-20. Of course, this would result in an unworkable level of uncertainty for the parties, requiring them to wait up to eighteen years before a claim could be resolved. Thus, we turn to the minor child’s parent or guardian to settle claims on the child’s behalf. The problem with this method is that not all parents and guardians always act with the best interests of their children’s future financial health in mind or are unable to do so. Thus, Georgia law limits their ability to settle claims on behalf of their minor child without court approval. O.C.G.A. § 29-3-1, et seq.

2. What do I need to consider when I have a case involving a minor child?

In my experience, attorneys often use the term “court approval” when discussing minor settlements without really understanding what the term actually means. In reality, when many attorneys (including some with significant experience settling claims) discuss “court approval” of minor settlements, there are usually actually referring to two separate and distinct issues. The first issue is whether you need to submit the proposed settlement agreement to the court for approval. As discussed in detail below, this is a fairly simple test that requires nothing more than looking at the dollar amount being offered to the minor to settle their claims. The second issue is whether or not you need to have a conservator appointed. This issue requires a more in depth and ongoing analysis of your case. It requires you to fully explore options with your client and determine what their long and short term goals are. While this analysis is not difficult
once you become comfortable with the process, it does require a more thoughtful and strategic approach to the case.

3. **How do I know if I need to submit a proposed settlement to the court for approval?**

   Georgia law provides that a child’s natural guardian may settle a claim on his or her behalf if the gross settlement is $15,000.00 or less. O.C.G.A. §29-3-3. “Gross settlement” is defined as “the present value of all amounts paid or to be paid in settlement of the claim, including cash, medical expenses, expenses of litigation, attorney’s fees, and any amounts paid to purchase an annuity or other similar financial arrangement.” O.C.G.A. § 29-3-3(a). For example, if an insurance company offered a total of $15,000.00 to settle a minor’s claims, it would not be necessary to seek the court’s approval of the settlement. However, if the insurance company offered a total of $30,000.00, the Court approval would be required. In this analysis, it does not matter how much a client will be paying in attorney’s fees, litigation expenses, medical reimbursements or expenses, or whether they will be purchasing a structured settlement or utilizing a trust for medical expenses. All that matters in this analysis is whether the gross settlement is more or less than $15,000.00.

4. **How do I know if I need a conservator?**

   To determine whether a conservator is necessary, we must look at the net settlement. Georgia law provides that, where a gross settlement is reduced to an amount of $15,000.00 or less after payment of attorney’s fees, litigation expenses, and medical expenses, then it is generally¹ not necessary to seek the appoint a conservator. O.C.G.A. §29-3-3. For example, if a

¹ Note that there are a few relatively rare exceptions to look out for. 1) If you are dealing with a child with significant assets aside from this claim, a conservator may be needed. O.C.G.A. §29-3-1. Also, if a child does not have a natural guardian (for example, if both parents are deceased), then a conservator is required.
proposed settlement for a minor was $30,000.00 with attorney’s fees of $10,000.00 and expenses and medical reimbursements totaling $5,000.00, then the net settlement is $15,000.00 and a conservator would not be necessary. (Note that court approval would be required in this hypothetical because the gross settlement is more than $15,000.00). Conversely, if the net settlement (gross settlement proposal minus attorney’s fees, litigation expenses, medical expenses) is more than $15,000.00, then it is necessary to have a conservator appointed. For example, if a proposed settlement for a minor was $30,000.00 with attorney’s fees of $5,000.00 and litigation and medical expenses of $5,000.00, then the net settlement is $20,000.00 and a conservator would be necessary (as well as court approval).

a. **So how can I avoid the need for a conservator?**

The purchase of structured settlements and the creation of certain types of trusts may be utilized to reduce the gross settlement amount to less than $15,000.00 and bypass the need for the appointment of a conservator. O.C.G.A. § 29-3-3(f)(2) provides that when the present value of the settlement to be received by the minor after reaching the age of majority is $15,000.00 or less, then the natural guardian may seek approval of the proposed settlement from the appropriate court without having a conservator appointed. For example, if a proposed settlement for a minor was $300,000.00 with attorney’s fees of $100,000.00 and expenses and reimbursements of $25,000.00, then the net settlement would be $175,000.00 However, the client could purchase a structured settlement for $160,000.00, thereby further reducing the net settlement to $15,000.00 and eliminating the need for a conservator. The purchase of the structured settlement would allow the family to avoid the expense and hassle of having a conservator appointed, while ensuring that the minor had assets available to him after he reached
the age of majority. Thus, structured settlements can be an extraordinarily useful tool for some families. However, it is very important to have these conversations with the minor (if age appropriate) and the minor’s parents very early in the process to accurately identify the client’s goals and avoid confusion and disappointment. A potential settlement can be derailed very easily if the client does not fully understand from the outset that it may be necessary to use the majority of the funds to purchase a structured settlement, thereby tying up those funds until after the minor reaches the age of majority.

5. **If I need a conservator, who should it be?**

In most cases, the parents are the most obvious choice to be appointed conservator for the minor child. However, this is not an absolute right and Georgia law provides that the Court must decide whom to appoint as conservator based on what would best serve the interests of the minor. O.C.G.A. §29-3-7. In some cases, the parent is not equipped to perform the duties of conservator. For example, a conservator must maintain a separate bank account to hold the assets of the minor, file annual inventories of the minor’s property, and submit a plan for spending of assets to the court for approval. See O.C.G.A. § 29-3-21. Further, a conservator must acquire a bond to cover the value of the minor’s assets. O.C.G.A. §29-3-41. The ability to obtain a bond (and the cost of the bond) are determined by the proposed conservator’s credit-worthiness and may be impossible or cost-prohibitive for many parents. In those situations, it may be advisable to utilize the county conservator who will generally be able to obtain a bond at a favorable rate and perform the duties of conservator efficiently. However, before considering this option, the family does need to understand that a conservator is entitled to commission from the minor’s estate. See O.C.G.A. § 29-3-50.
Hypotheticals

Hypothetical 1: Insurance company offers a total of $15,000.00 to settle minor’s claims. Attorney’s fees are $3,000.00. Litigation expenses and medical reimbursements total $2,000.00.

- Does this proposed settlement need to be approved by the Court? NO-because the gross settlement is $15,000.00 or less.
- Does this case require the appointment of a conservator? NO-because the net settlement is $15,000.00 or less.

Hypothetical 2: Insurance company offers a total of $30,000.00 to settle minor’s claims. Attorney’s fees are $10,000.00. Litigation expenses and medical reimbursements total $5,000.00.

- Does this proposed settlement need to be approved by the Court? YES-because the gross settlement is more than $15,000.00.
- Does this case require the appointment of a conservator? NO-because the net settlement is $15,000.00 or less.

Hypothetical 3: Insurance company offers a total of $300,000.00 to settle minor’s claims. Attorney’s fees are $50,000.00. Expenses and medical reimbursements are $50,000.00.

- Does this proposed settlement need to be approved by the Court? YES-because the gross settlement is more than $15,000.00.
- Does this case require the appointment of a conservator? YES-because the net settlement is more than $15,000.00.

Hypothetical 4: Insurance company offers a total of $300,000.00 to settle minor’s claims. Attorney’s fees are $100,000.00. Litigation expenses and medical reimbursements total $25,000.00. A structured settlement is purchased for $160,000.00.

- Does this proposed settlement need to be approved by the Court? YES-Because the gross settlement is more than $15,000.00.
- Does this case require the appointment of a conservator? NO-Because the net settlement is $15,000.00 or less.
DUI Update From The Defense Side And The Role Of Professionalism

Presented By:

Adam L. Hebbard
The Law Offices of Adam L. Hebbard
Athens, GA

Additional Speaker TBD
Voir Dire In The Modern Age: Using Technology Effectively

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Shari L. Klevens
Dentons US LLP
Washington, D.C.

Alanna Clair
Dentons US LLP
Washington, D.C.
Recent Developments in Georgia Legal Malpractice Law

SHARI L. KLEVEN

ALANNA CLAIR
THE FOLLOWING PAGES INCLUDE EXCERPTS FROM GEORGIA
LEGAL MALPRACTICE LAW 2017, PUBLISHED BY ALM MEDIA
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Part I

LEGAL MALPRACTICE LAW
AND DEFENSES

Chapter 1

Legal Elements of a Claim

1-1 INTRODUCTION
Legal malpractice law is booming. Every year, more Georgia lawyers face malpractice claims or grievances filed with the State Bar. Indeed, in 2016 in Georgia, the Office of General Counsel received 2,253 grievance forms for screening and further consideration, an increase over the previous year. Of those, 231 contained allegations that, if true, would constitute violations of Georgia’s Rules of Professional Conduct. Meanwhile, although the


total dollars paid on malpractice claims, including defense costs and indemnity or settlement payments, has declined overall, payments over $1 million have experienced only a relatively negligible decline since 2007. Thus, it is critical that practitioners continue to develop an understanding of the basic elements of a legal malpractice cause of action and the steps to take to prevent or minimize liability for such claims.

Although a legal malpractice action may sound in tort or contract, the requisite elements of this claim closely track the elements of a simple negligence claim. Specifically, in Tante v. Herring, the Supreme Court of Georgia reiterated the following three elements of an action for a legal malpractice claim: (1) the employment of an attorney; (2) failure of the attorney to exercise ordinary care, skill and diligence; and (3) damages proximately caused by that failure. The first element corresponds with the existence of

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a duty of care to the plaintiff, while the second element requires a breach of that duty. The third element comprises the elements of proximate cause and damages.

1-2 DUTY

1-2:1 Generally
An attorney is not necessarily liable for every harm her or his negligence causes to a potential plaintiff. Instead, an attorney’s liability is limited to the class of people to whom the attorney owes a duty to exercise ordinary care, skill, and diligence in the performance of professional services. Typically, an attorney owes a duty to only her or his clients. Indeed, “the law is clear that to make out a case of legal malpractice, a lawyer-client relationship must exist between the plaintiff and the defendant attorney.” This proof is “essential in establishing the element of duty that is necessary to every lawsuit based upon a theory of negligence.” However, as discussed herein, there are additional circumstances that give rise to an implied attorney-client relationship or which support a duty to a non-client third party.

federal issue is: (1) necessarily raised; (2) actually disputed; (3) substantial; and (4) capable of resolution in federal court without disrupting federal-state balance. Gunn v. Minton, 133 S.Ct. 1059 (2013); see also Mercer v. Allen, No. 7:13-CV-148; 2014 WL 185252 (M.D. Ga., Jan. 15, 2014) (referring legal malpractice case to bankruptcy court because action arose in a case under title 11).


Defenses to Legal Malpractice Claims

4-1 INTRODUCTION
This chapter discusses potential defenses to legal malpractice claims. This discussion is broken into two types of defenses: (1) general defenses that focus on defeating one or more of the elements of a legal malpractice claim that a plaintiff must prove; and (2) affirmative defenses that may allow a defendant to defeat all or part of the plaintiff’s claim.

4-2 GENERAL DEFENSES

4-2:1 Elements of Claim Lacking
As with any type of claim, one method of successfully defending a malpractice claim is to defeat the plaintiff’s attempt to establish one or more of the elements of the claim. As discussed in detail in Chapter 1: Legal Elements of a Claim, the elements of a malpractice claim are: (1) an attorney-client relationship (i.e. duty), (2) breach, and (3) causation/damages. To recover on a legal malpractice claim, the plaintiff bears the burden of establishing each of these elements. A key component of defendant’s defense, therefore, should be to point out any inability by plaintiff to prove any of these elements. This section focuses on some of the strategies that one can use to negate the elements of a plaintiff’s claim.
4-2:2 Duty

An attorney cannot be held liable for malpractice unless he owes a duty of care to the plaintiff. That duty, generally speaking, arises out of the attorney-client relationship. The absence of a relationship giving rise to a duty of care is fatal to a malpractice claim.

One common standing question is whether a client in possession of a legal malpractice claim (because a duty was owed to such client by her or his attorney) can assign such a claim to a third party to whom no such duty was owed. Historically, established principles of Georgia law emphasized that because of the fiduciary relationship created by the attorney-client agreement, such contracts for legal services are not the same as conventional contracts. This suggested that malpractice claims are not assignable, which is the predominant view in most other states. However, over time, Georgia case law began to indicate a developing trend towards the assignability of malpractice claims. Recent developments have reversed that trend.

In 2008, a federal bankruptcy court held that in the unique context of a bankruptcy action, a bankruptcy debtor’s legal malpractice claim may be assigned to a court-appointed trustee for the debtor’s estate. In In re Friedman’s, Inc., the Court noted that no Georgia court...

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8. AFLAC, Inc. v. Williams, 444 S.E.2d 314, 316 (Ga. 1994). Notably, O.C.G.A. § 44-12-22 permits choses of action arising from contracts, other than those contracts subject to the Georgia Commercial Code, to be assigned.

has ruled on whether legal malpractice claims are generally assignable, but acknowledged that other states that have addressed the issue have found that malpractice claims are not assignable.\textsuperscript{10} In particular, those courts have focused on certain public policy concerns, including: “(1) the need to preserve the unique and personal nature of the attorney-client relationship; (2) the incompatibility of the assignment and the lawyer’s duty of loyalty; (3) the danger that assignment would spawn increased and unwarranted malpractice actions; and (4) the danger that assignment would discourage lawyers from representing poor, underinsured, or judgment-proof defendants.”\textsuperscript{11} The Court concluded that none of those concerns were present when a court-appointed trustee is bringing a legal malpractice claim on behalf of a debtor’s estate, reasoning:

[A] transfer by and pursuant to the Bankruptcy Code does not implicate any of the general policy concerns discussed by the cases prohibiting the assignment of legal malpractice claims. The Bankruptcy Code transfer is not a marketplace transaction. The debtors in possession did not sell the claims to an economic bidder. Rather, under the Code, a legal entity was created to stand in the shoes of the debtors in possession to be the representative of the bankruptcy estates. This is not a


merchandizing of legal malpractice claims. This is not an effort to replace a judgment-proof, uninsured defendant with a solvent defendant. To the contrary, this is a situation designed to permit an insolvent client to pursue legal malpractice claims.\textsuperscript{12}

While the court’s holding and reasoning strongly suggested that it applied only to claims brought by a court-appointed trustee on behalf of a bankruptcy debtor’s estate, the Court of Appeals of Georgia subsequently held in \textit{Villanueva v. First American Title Insurance Company}\textsuperscript{13} that “there is no per se bar to the assignment of legal malpractice claims; we pretermit whether there may be cases where the special nature of the attorney-client relationship precludes assignment.”\textsuperscript{14} Specifically, the Court of Appeals addressed whether a mortgage lender could assign its legal malpractice claim to a title insurance company involved in a real estate transaction through a closing protection letter.\textsuperscript{15} Recognizing that Georgia statute provides that a “right of action for personal torts or for injuries arising from fraud to the assignor may not be assigned,” the Court of Appeals concluded that legal malpractice claims concern

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not personal injury but “injury to property in the form of financial loss.” According to the Court of Appeals, a party may assign a tort claim concerning personal property, a malpractice claim may be assigned in situations such as that before the court.

On March 18, 2013, the Supreme Court of Georgia affirmed the Court of Appeal’s ruling in Villanueva, upholding the assignment of legal malpractice claims arising out of a closing through a lender’s subrogation rights under its lender protection letter. Through its ruling, the Supreme Court of Georgia elected to join the minority of states by holding that legal malpractice claims are not per se unassignable. In reaching its decision, the Court found that “a legal malpractice claim may be assignable under O.C.G.A. § 44-12-24 when it involves injury to property in the form of financial loss and is not based on fraud or does not involve a personal

16. Villanueva v. First Am. Title Ins. Co., 721 S.E.2d 150, 155 (Ct. App. Ga. 2012) (citing O.C.G.A. § 44-12-24) (internal citations omitted). At the time, O.C.G.A. § 44-12-24 state that “[e]xcept for those situations governed by Code Sections 11-2-210 and 11-9-406, a right of action is assignable if it involves, directly or indirectly, a right of property. A right of action for personal torts or for injuries arising from fraud to the assignor may not be assigned.”


tort.” Thus, the nature of the injury alleged, specifically whether it is a property damage claim or a personal injury claim, now dictates whether the legal malpractice claim is assignable, not the unique personal services nature of the attorney-client relationship.

Shortly after the Supreme Court of Georgia’s ruling in *Villanueva*, the Georgia Legislature amended O.C.G.A. § 44-12-24 to prohibit the assignment of legal malpractice claims.  

* * * * *

Chapter 5

Structuring a Law Firm
Under Georgia Law

5-1 INTRODUCTION
The first advice any attorney typically gives a client

20. *Villanueva v. First Am. Title Ins. Co.*, 740 S.E.2d 108, 109 (Ga. 2013). The Court distinguished between property damage claims and personal injury claims, stating that “unassignable claims for legal malpractice are only those that seek recompense for ‘personal torts.’” It explained that in the legal malpractice context, personal tort actions are those that seek recovery for “injuries done to the person” such as “physical and bodily injury, injury to the reputation, false imprisonment, malicious arrest, and injury to one’s health in contrast to injury done to the person’s property.”

starting a new business is to incorporate or otherwise formally organize the business. The same is true for law firms, because once a law firm is organized, the exposure of innocent partners is substantially reduced. Any recovery against the law firm would be limited to the assets of the law firm and not to the personal or individual assets of any innocent partner (except for those law firms organized as general partnerships).

There are various options under Georgia law for structuring a law firm partnership, including as a professional association, traditional general partnership, or a limited liability partnership. Few law firms, however, take full advantage of the protections available to them, and many fail to organize their partnerships to best protect the partnership’s and their individual partners’ assets and management. Unfortunately, by the time a problem arises, it may be too late to take corrective action. Accordingly, it is important that each law firm understands not only which arrangement is most suitable for its specific needs, but also the various pitfalls common to the maintenance of law firm partnerships, as discussed herein.22 Furthermore, it also is important that when a partnership is dissolved, the dissolving partners uphold their fiduciary duties to act in good faith.23

22. This chapter does not address any tax advantages or disadvantages associated with the structuring of a law firm. This chapter merely addresses other potential liability created by law firm structure. In many instances, there are tax implications related to firm organization that should also be considered when deciding upon an appropriate structure for a law firm.

23. Jordan v. Moses, 727 S.E.2d 460, 464 (Ga. 2012), rev’g 714 S.E.2d 262 (Ga. Ct. App. 2011). In accordance with the Supreme Court of Georgia’s ruling, the Court of Appeals of Georgia recently vacated in part and affirmed in part its 2011
5-2 GENERAL PARTNERSHIPS

Traditionally, many Georgia law firms organized themselves as general partnerships. Georgia law is not kind to general partnerships. Indeed, general partners may be jointly and severally liable for not only any partnership obligations, but also any obligation of an individual partner for actions taken while acting as a partner. At Georgia law, pursuant to the Georgia Uniform Partnership Act (“GUPA”), “all partners are jointly and severally liable for all debts, obligations, and liabilities of the partnership.” The only exception to this general liability is if the partners instead have elected a limited liability partnership, as discussed below.

In a general partnership, a partner may bind the partnership through her or his own actions taken on behalf of the partnership, even where the partner had no authority to act for the partnership in the particular matter, if the person with whom the partner was dealing had no knowledge of the fact that the partner lacked authority to act or bind. Accordingly, partners in a general partnership may be individually liable for debts or liabilities that they had no intention of undertaking. A partnership itself may also be liable for the wrongful acts or omissions of a partner acting in the ordinary course of business or with the authority of


24. For more on vicarious liability issues related to law firm structure, see Chapter 3: Liability for or in Conjunction with the Conduct of Others.


The power to dissolve a partnership always must be exercised in good faith. Where a partner does not act in good faith in dissolving a partnership, that act may give rise to a tort of wrongful dissolution. However, as the Supreme Court of Georgia recently reiterated, the tort of wrongful dissolution of a partnership does not require an attempt to appropriate the “new prosperity” of the partnership.

Chapter 7

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29. O.C.G.A. § 14-8-38.

30. *Jordan v. Moses*, 727 S.E.2d 460, 464 (Ga. 2012), rev’g 714 S.E.2d 262 (Ga. App. 2011). In accordance with the Supreme Court of Georgia’s ruling, the Court of Appeals of Georgia recently vacated in part and affirmed in part its 2011 ruling in this matter in *Moses v. Jordan*, 738 S.E.2d 297 (Ga. Ct. App. 2013). Furthermore, the issue of what happens to on-going work upon dissolution of a partnership currently is receiving a good deal of attention in the legal community. In addressing this issue, the California Court of Appeals has held that the fees from the unfinished business that began prior to dissolution belong to the dissolved partnership, not the new firm. *Jewel v. Boxer*, 156 Ca. App. 3d 171 (Cal. Ct. App. 1984).
7-1 OVERVIEW OF CONFLICTS OF INTEREST

The attorney-client relationship evolves from the idea that the attorney is a neutral, disinterested party who can thoroughly and zealously advocate on behalf of one client. Indeed, the attorney must be impartial such that her or his own personal interests are subordinate to those of the client.\(^{31}\) Thus, when issues arise related to multiple or successive representations, they call into question the attorney’s thoroughness and impartiality. In addition, when an attorney’s own interests conflict with those of the client, they threaten the attorney’s duty of loyalty, the most basic of an attorney’s duties to the client.\(^{32}\) Therefore, any potential conflict of interest must be detected, timely evaluated, and properly handled early to avoid potential malpractice liability. This chapter will address the issues inherent in multiple representation, successive representation, and other areas that may lead to conflicts.

7-2 THE INTERSECTION OF ETHICS AND MALPRACTICE

Although ethical rules are not substantive law, the Rules of Professional Conduct are relevant both to an attorney’s obligations regarding conflicts of interest and to a court’s analysis of those obligations. Indeed, violations of the disciplinary rules may result in


malpractice liability for the attorney in question just as a violation of a statute would. In Georgia, violations of the ethical rules are not sufficient on their own to support a finding of legal malpractice, but may be admissible to establish violations of the standard of due care where the ethical rule was designed for the protection of a person in the position of the injured party, such as in proving a conflict of interest. According to avoid malpractice issues, Georgia practitioners should be aware of the restrictions contained in the Rules of Professional Conduct. These issues can be quite complicated and are a constant subject of debate in the legal community. Indeed, the ABA Commission on Ethics 20/20 considered proposals from practitioners requesting a “separate regulatory regime that would address the concerns of large law firms about such issues as conflicts of interest, liability and lawyer mobility.” This chapter details several areas in which conflicts of interests may arise.

7-3 MULTIPLE REPRESENTATION

7-3-1 Conflict Creates Breach of Duty of Loyalty
Conflicts of interest most frequently arise in the


representation of multiple clients, where the interests of two current, former, or potential clients are in conflict. There are two ways a multiple representation problem may present itself: (1) the new representation may involve more than one client or (2) a law firm may already be representing an existing client in the same or a substantially related matter. In either situation, the attorney or firm must determine whether there are any potential conflicts of interest in undertaking the representation.

As discussed herein, the case law and ethical rules addressing multiple representation frequently hold lawyers accountable for errors relating to such conflicts. A conflict stemming from multiple representation is a breach of the duty of loyalty from an attorney to client, the “most basic” of an attorney’s duties.\textsuperscript{36} Indeed, “[l]oyalty is an essential element in the lawyer’s relationship to a client.”\textsuperscript{37}

\textbf{7-3:2 Multiple Representation in General}

Rule 1.7 of the Georgia Rules of Professional Conduct applies to potential multiple representation situations:

(a) A lawyer shall not represent or continue to represent a client if there is a significant risk that the lawyer’s own interests or the lawyer’s duties to another client, a former client, or a third person will materially and adversely affect the representation of the client, except as permitted in (b).

(b) If client consent is permissible a lawyer

\textsuperscript{36} \textit{Fogarty v. State}, 513 S.E.2d 493 (Ga. 1999).

\textsuperscript{37} Ga. R. Prof’l Conduct 1.7, cmt. [1].
may represent a client notwithstanding a significant risk of material and adverse effect if each affected or former client consents, preferably in writing, to the representation after:

1. consultation with the lawyer,
2. having received in writing reasonable and adequate information about the material risks of the representation, and
3. having been given the opportunity to consult with independent counsel.

(c) Client consent is not permissible if the representation:

1. is prohibited by law or these rules;
2. includes the assertion of a claim by one client against another client represented by the lawyer in the same or substantially related proceeding; or
3. involves circumstances rendering it reasonably unlikely that the lawyer will be able to provide adequate representation to one or more of the affected clients.

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

7-3:3 Application of Rule 1.7 in Georgia

7-3:3.1 Introduction
As discussed herein, under Georgia law there is a difference between conflicts caused by direct adversity
(which are not waivable) and conflicts caused by potential adversity (which are waivable). Direct conflicts are not waivable such that the attorney must not accept the representation or must terminate the representation. However, potential conflicts are governed by Rule 1.7(b) and allow for attorneys to continue representations upon informed client consent. The complicated requirements of Rule 1.7 can be broken down into four digestible inquiries. In determining the attorney’s obligations and whether a multiple representation issue exists, the attorney should examine these four issues.

7-3:3.2 Will the Representation Adversely Affect Another Client?

The provisions of Rule 1.7 were designed to protect against the potential of inadequate representation that could occur on a split of an attorney’s loyalties.38 Thus, per Rule 1.7(a), when confronted with the issue of multiple representation, an attorney must first determine whether he or she can represent each of the multiple clients. To reach that conclusion, the attorney must ask whether the simultaneous representation of another client will likely adversely affect her or his independent professional judgment on behalf of a client. Translated, the attorney should determine whether there are things that the attorney would do differently if he or she represented only one client as opposed to multiple clients.

If the answer to that inquiry is “no,” the attorney may accept the representation and no further inquiry is necessary. The restrictions of Rule 1.7(a) apply “only when the representation of one client would be directly adverse to another.”39 Thus, “[a]s a general proposition,


loyalty to a client prohibits undertaking representation directly adverse to that client without that client’s consent.”\textsuperscript{40} However, an attorney representing clients with generally adverse interests, such as competing economic or business interests (but not directly adverse legal interests), does not need consent of the respective clients to pursue the representations.\textsuperscript{41} Indeed, if there is no risk of an adverse impact on other clients, no conflict exists. However, the answer to this question must be “obvious.”\textsuperscript{42}

If the answer to the inquiry is “yes,” and there is a significant risk that the lawyer’s own interests or duties to another client will materially and adversely affect the client, the attorney must proceed to the second inquiry.

\textbf{7-3:3.3 Is the Conflict Waivable?}

As discussed above, if the conflict is direct, it cannot be waived through informed client consent. Rule 1.7(c), quoted above, details the circumstances under which a conflict is not waivable. Contrary to the understanding of some attorneys, there are some conflicts that are not waivable and to which a client cannot validly consent. One obvious example is that an attorney may not represent adverse parties in the same action, even if the parties consent. An exception to this rule comes when an

\textsuperscript{40} Ga. R. Prof’l Conduct 1.7, cmt. [3].

\textsuperscript{41} Ga. R. Prof’l Conduct 1.7, cmt. [3]; see also Anderson v. Jones, 745 S.E.2d 787, 792 (Ga. Ct. App. 2013) (explaining that evidence of a conflict of must be based on more than speculation, which does not trump direct testimony to the contrary).

attorney represents both a company and that company’s bankruptcy estate. In such a situation, there is no conflict at all. In *Thornton v. Mankovitch*, the court examined whether an attorney was conflicted out of representing the bankruptcy estate of the company he had once represented. The court concluded that there was no conflict of interest because, for all intents and purposes, the original company became “defunct” upon bankruptcy and therefore “no longer had a cognizable interest in the settlement or outcome of the [potentially conflicted] litigation.” Thus, the representation was proper. If the conflict cannot be waived, the inquiry ends because the attorney may not continue the representation.

### 7-3:3-4
**Has the Attorney Fully Advised the Clients of the Risks Related to the Conflict?**

Rule 1.7(b) governs waivable conflicts. That portion of the rule is permissive, using the phrase “may represent.” It allows representation to continue where the attorney has fully disclosed the existence and risks of a conflict and obtained informed client consent, as discussed below. Indeed, once an attorney determines that the conflict is not a direct conflict, he or she must then focus on the requirements of Rule 1.7 relating to client consent. Thus, if the conflict is not a direct conflict and may be waived, the attorney must consider the third level of inquiry: has the attorney fully disclosed the possible effect of such representation on the exercise of her or his independent professional judgment on behalf

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of each client?

As Rule 1.7 describes, an attorney seeking consent must provide in writing an analysis of the risks that may arise from the attorney continuing the representation. The written explanation always should include the implications of the multiple representation, placing emphasis on the specific risks and advantages that may be involved. At a minimum, this requires the attorney to disclose the types of things that the attorney would do differently or would possibly do differently if the attorney represented only one of the clients instead of both clients. This should specifically include a discussion of the advantages and disadvantages of separate attorneys for each client as opposed to a single attorney for both clients. Finally, the disclosure should note that the attorney is not representing the individual clients regarding each other. For the purposes of this inquiry, it is not sufficient to simply advise clients that the attorney foresees no conflict of interests and then ask the clients to consent to the multiple representation.

Courts consider these requirements very seriously. Indeed, Georgia courts have upheld punitive damages in legal malpractice cases where the attorney had impermissible conflicts of interest. An attorney in the firm, other than the one involved in the multiple representation, should review the written disclosure that is provided to the client. Clients should also be advised to obtain independent counsel for this narrow issue if necessary.

Has the Client Adequately Consented to the Representation?

Assuming full disclosure, the final requirement for a multiple representation is consent to the representation. Although the rule is permissive in stating that client consent should be obtained “preferably in writing,” the prudent attorney always will secure client consent in writing to preserve the attorney’s and the client’s interests. This consent, or waiver, may be set forth in the engagement letter to be signed by the client or in a separate conflict waiver letter signed by the client. Additionally, if a “material change” occurs in the circumstances that were the basis for the client’s informed consent to a conflict, the attorney must present those new circumstances to the client and obtain new informed consent.

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46. For more information regarding engagement letters, see Chapter 6: Internal Audit.

Building A Practice And Developing Clients In 2018

Presented By:

Eric L. Roden
Roden Law
Savannah, GA
Building a Practice & Developing Clients in 2018

BY: ERIC RODEN
RODEN LAW
SAVANNAH, GA

The Basics: What Do You Need To Call Your Practice a Law Firm?

- One Client is All You Need
- Phone Number
  - Local vs toll-free
- Mailing Address/Office
  - The Starbucks Dilemma
- Website Development
- Business Cards
- Legal Research Subscription (Lexis Nexis or Westlaw)
- Malpractice Insurance
- Firm Operating and Trust Accounts
  - Understanding basic accounting
  - Software that will save your bar license
  - Access to Financial Means Sufficient to Support the Cases You Accept
  - Conventional/SBA term loans, Lines of Credit, Co-counseling
Law Firm Management: Balancing Practicing and Managing

- What business are you in?
  - Area of Practice
    - Billable Hours vs Contingency Fees
  - Volume vs Quality
    - Can you have both?
    - It's all about striking a balance
- Choosing Your Role
  - What do you enjoy most about your average workday?
  - What tasks do you prefer to delegate?
  - What motivated you to start a law firm in the first place?
- Developing a Big Picture
  - Where do you want to be in 5, 10, 15 years?
  - How many hours a week are you willing to work in/out of office?
  - How much money do you need to make?

Client Development: Identifying Your Clients

- Who is your target client?
  - What area(s) of practice do you specialize in?
  - What types of cases do you want within those area(s)?
  - How do you tailor your message?
    - Balancing being too general and too narrow
- How do you reach your target client?
  - Advertising/Marketing vs Networking
  - Branding vs Direct Response
- What do your client’s expect?
  - Attorneys vs non-attorneys
  - Area of practice distinctions
Client Development: Servicing and Retaining Your Clients

- What staff do you need to service your clients?
  - Receptionists, case managers, paralegals, intake specialists, medical request specialists, office managers, etc.
- What can you outsource and what needs to be in-house?
- What technology exists that can make your firm a more efficient communicator with less overhead?
- Cutting costs at the expense of providing exceptional service is the most devastating mistake you can make in any business.
- Developing a network of third party providers
  - Experts, other attorneys, medical providers, court reports, etc.
- Finding ways to stay in contact and provide ongoing benefits within your practice areas.
- Create a personal bond, it's harder to fire a friend.

Client Development: Maintaining and Monetizing Client Relationships

- Never Miss an Intake
- Referrals – Don’t mess them up
- Web Testimonials
- Google and Social Media Reviews
- Accessing Companies/Organizations of Previous and Existing Clients
- Incentivizing Without Breaching Bar Rules
- Protecting Your Relationships
- Being Available
- Being Upfront
Marketing: What Are Your Goals?

- What types of cases do you want to attract?
- Do you want a stable volume to maintain your structure or do you want to grow your practice?
- What are your strengths as a person, not just as a lawyer?
  - Identify where you can build meaningful relationships with the least paths of resistance first
  - What can you uniquely offer that someone else can’t? To the potential referral source? To the client themselves?
- If you could have your ideal firm/business, what does that look like?
  - Identifying a path to get there and understanding that every decision will have an amplified effect in 10 years

Marketing: Where Do Your Start?

- Advertising/Marketing vs Networking
  - Both are expensive, which costs more?
    - Understanding front end and back end costs
    - Striking a balance for where you are in your practice
- What do you want your image to be? Is it realistic given your experience, results, age, and reputation?
- Who can you reach out to for help if marketing simply isn’t your strong suit?
  - Those who bring you cases vs those who make more able to attract them on your own
- Maintaining the course once you’ve started down it and the value of a consistent identity
- The short play vs the long play
  - Don’t trade reputation for quick recognition
  - Don’t over commit and how to avoid other mistakes I’ve made
Marketing: You have a functioning firm, now how do you evolve?

- The limits of referral based marketing
- Leveraging your increasing cash flow into more business
  - The importance of tracking each lead/new case
  - Understanding the spread on your average case acquisition cost vs average case return
  - Knowing your limits and not forgetting that once you have them, you have to service them
- Anticipate where your practice area will be in 10 years
  - Consider the potential effect of politics, automation, social trends
- Looking for outside the box opportunities and staying ahead of the trends

Questions?

How to contact me:
Eric Roden
Roden Law
333 Commercial Drive
Savannah, GA 31405
ERoden@RodenLaw.com
Cell – (912) 665 - 9325
Developments In Forensic: Defending Your Clients Against Bad (And Good) Science

Presented By:

Speaker TBD
Ante Litems: Who Gets Them, Who Doesn’t, And Why It Matters

Presented By:

J. Wickliffe “Wick” Cauthorn
Morgan & Morgan Atlanta PLLC
Atlanta, GA
Motions In Limine

Presented By:

Kurt G. Kastorf
The Summerville Firm LLC
Atlanta, GA
Handling the Deluge: Managing a Barrage of Motions in Limine

By Kurt G. Kastorf

The Summerville Firm
1226 Ponce de Leon Ave
Atlanta, GA 30306

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Introduction

The day of the deadline for pretrial motions can strike panic into the hearts of even the most stoic lawyers. Between motions in limine, Daubert, and dispositive motions, by midnight—particularly in a case involving numerous parties—an attorney may have received notice of dozens (or sometimes more than one hundred) motions, each requiring a rapid response. The majority of these will be motions in limine, which, if not necessarily by complexity, certainly by volume, pose a unique challenge. This article identifies strategies and considerations in crafting a timely and effective response.

It divides dealing with motions in limine into three stages: (1) advance preparation; (2) after-filing triage; and (3) drafting the responses.

Before turning to each stage, it is important to consider that there are two broad classes of motions in limine. The first are original motions that are carefully tailored to the facts of your case, and present creative arguments for excluding your key evidence. For example, a defendant in a products case might seek to exclude specific prior defects in the same product line as lacking in substantial similarity, and present a fact-specific motion backed by expert testimony, tailored to the your theory of the case. The second class of motions in limine are stock requests that opposing counsel uses in trial after trial and require minimal customization, such as a motion to exclude “golden rule” arguments. The two types of motions warrant different treatment.

I. Preparing In Advance

The best way to get responses done in time is to start before opposing counsel’s motions roll in.

Case-specific Motions

Preparing for original motions in limine means building research into the admissibility of evidence into your development of a theory of the case and construction of a trial notebook. By the time pretrial motions are due, you have likely spent considerable time thinking about and preparing notes detailing how you will present your theory at trial. The best way to get far ahead of the curve on preparation for motions in limine is to build into your trial notebook or case management software explanations and strategies for getting each fact properly admitted into evidence. That is, at the same time you think about which evidence or testimony you will use to prove each aspect of your legal theory at trial, also think about what live objections are available to opposing counsel and what specific evidentiary rule you will use to defend the evidence’s admissibility.

A particularly effective strategy is to begin your caselaw research at least as early as you start assembling your trial notebook. Many attorneys realize the value of beginning to sketch their opening, closing, and key witness examination outlines months or years
before trial, but do not pair that work with research into admissibility of each point they hope to prove. Instead of being caught flat-footed, for each piece of evidence that makes it into your outlines, identify and print (or organize virtually) a case supporting admissibility. This approach serves three key purposes:

1. **It alerts you well in advance to potential problems at trial**: You may be able to identify and remedy defects through additional discovery, adding expert witnesses, or simply seeking opposing counsel’s prior agreement as to the facts and genuineness of documents. Thinking in terms of admissibility flags the issue.

2. **It gives you a large head start on motions in limine**: Of particular relevance to this paper, if you have already identified the case law or logical theory supporting admissibility, you are far ahead of the game when a motion in limine shows up. Good responses both disprove the central assertions in the motion in limine and build an affirmative case for admissibility. Get the affirmative case done in advance.

3. **It sets yourself up to easily defeat live objections**: Finding a case for every piece of evidence that matters may sound like overkill; even an aggressive opposing counsel will not file a motion in limine on every bit of evidence. But you will become every judge’s best friend if you let the court know at the beginning of trial that every time you represent “what the law is” to the court, you will be prepared to hand up a specific case validating that claim. By mid-trial, the court may start instinctively looking to you, and not your empty-handed opposing counsel, for the correct rule to rely on. By building your customized caselaw library as you prepare your trial notebook, you can implement this approach seamlessly, without a monster of a research project in the days leading up to trial.

**Stock Motions**

The most efficient way to prepare in advance for stock motions in limine is to be aware of a dirty little secret: most attorneys have been relying on the same set of stock motions in limine for years or decades, with little updating. Reach out to other lawyers—at your firm, in your social network, or through legal association list serves—to see who can send you a copy of opposing counsel’s prior work. You can expect to see many of these same motions word-for-word.

There is also substantial overlap between the stock motions each firm uses, and the world of canned motions is not that large. It is probably time-inefficient to start researching and drafting responses to each such motion out there prior to facing them in a specific case. But it is an excellent idea to familiarize yourself with what exists and then begin a folder of relevant materials you find in other contexts. If you’re reading a
case for summary judgment that also has an excellent explanation of when expressions of regret are admissible, for example, save it to a motions in limine folder. The same goes for secondary sources, such as good articles in legal association magazines addressing a particular issue.

Be Ready to Call Outside Help, if Needed

Even if you are a five-tool lawyer who excels at everything, it makes sense to identify in advance a small number of other lawyers who can step up if you need “additur counsel” to help with pretrial motions and perhaps later step into an embedded counsel role at trial. If you are at a larger firm, this step might mean identifying legal writing or trial specialists, and keeping them informed about your case well before you put demands on their time. At smaller firms and solo practices, it means identifying outside attorneys with experience in an embedded counsel role.

Attorneys at smaller firms are sometimes reluctant to engage outside help, both out of fear that it will cut into the profitability of the case and an ethic that the attorney is a jack-of-all-trades that can do anything well. But bringing in embedded counsel when you are facing a filing crunch often makes excellent sense. For one thing, it maximizes comparative advantage. You may well be able to draft a stellar response to a stock motion, but your time can be even better spent preparing for trial, running a focus group, or the like. For another, outsourcing saves on overhead. Maintaining sufficient staffing in house to cover a crush of pre-trial motions creates wasted capacity when a trial is not looming. And making regular use of co-counsel agreements is a form of risk sharing; better to have a 50% share of two cases than 100% of one.

Think in advance of who you might engage in a crunch, and do not be afraid to pick up the phone.

II. Triage

Ultimately, you can only do so much in advance. The real fun cannot start until the motions arrive. The first step once you have them in hand is triage: making an initial assessment of both the significance and challenge posed by each motion in limine, and coming up with a plan to tackle them.

Let’s start the discussion of triage by noting the two worst ways to approach motions in limine:

One temptation you might have, if the motions in limine roll in at the same time as much meatier motions for summary judgment and Daubert motions, is to simply mark off a big chunk of time towards the filing deadline to address motions in limine, set the motions in limine aside without a substantive review, and then turn your full attention to your higher priority motions. The risk here is two-fold: the first concern is that you
will underestimate just how difficult the motions in limine are. There may be case-specific motions hidden under general headings that, if you lose, will expose you to a motion for directed verdict. Or there may be ones that, though less frightening, involve detail-oriented combing through the record for citations. Not identifying these challenges in advance could put you in a precarious position in the lead-up to the deadline. A second risk is that you will not notice until too late steps you could have taken to simplify your efforts. Perhaps you could have requested an affidavit from an expert or witness that would provide proper foundation for the evidence, or you could have solicited your colleagues for responses to similar motions. But those options are closed to you the night before the response is due.

The flip side is that, when faced with thirty-four motions, you may feel an overwhelming desire to just start drafting, so that you can make your task at least a bit less daunting. But that approach too can be error, because, as discussed below, taking a more thoughtful approach to the task ahead can both save you time and improve the quality of the finished product.

Now for the right approach. Assembly all of the motions and read them. Not necessarily a deep dive, but enough to figure out each of the following:

1. **Is each request stock or specific?** As discussed, some motions in limine are tailored to the facts of your case. Others are stock. Identifying each motion in limine as one or the other is one of the most important functions of triage. Stock motions take less time to answer; they are usually simpler, do not rely on extensive explanations of the record, and often can be consented to. And, if you plan in advance, you may be able to find a colleague or friend who has recently drafted a cut-and-paste quality response. The most important aspect of advance planning is simply understanding how many motions you are facing that fall into each category.

2. **Where are the hidden motions in limine?** A closely related concern is rooting out one of the Georgia bar’s most favorite tactics: hiding Easter eggs in omnibus motions in limine. Suppose opposing counsel uploads three filings. The first two are motions in limine addressing specific and important evidentiary issues. The third is titled “Omnibus Motion In Limine” and contains twenty-eight subparts. You can be forgiven for assuming that those twenty-eight motions will all be generic, but you would be mistaken. Somewhere around motion in limine #26 your opposing counsel will have hidden an additional case-specific motion regarding a critical piece of evidence. You need to find all of these at the beginning, so that you can prioritize your work order, addressing the most important issues first. Otherwise, you can find yourself addressing the thing you care about most in the hours before your response deadline, when you are tired and your time is scarce.
3. **Where there are multiple opposing parties, where do issues overlap?** If you are receiving sets of motions *in limine* from several parties, there is often substantial overlap between the issues raised in each. Charting these similarities in advance will save you drafting time, because you can produce a single response that can be cross-referenced or tweaked slightly for each opposing party. Be careful to read each request sufficiently closely, however. Often, two parties may use the same broad header for their motions, but one party’s motion will be entirely generic and the other party’s motion will include both a generic statement and a specific application warranting a tailored response. Identify these nuances and make sure you’ve noted them in a way that will trigger your recollection when you come back to that issue during drafting.

4. **Are there overarching themes raised by the motions *in limine*?** Often, several motions *in limine* will really get at the same issue. Or they will suffer from the same general defect. Two of the most recurring problems in bad motions *in limine* are over breadth and vagueness. Motions *in limine* need to object to specific evidence, not general themes. If numerous requests suffer from the same vagueness issue (or otherwise share a common identity), consider beginning your response with an introductory section that hammers this issue. There are several upsides to this approach: (1) providing a theme for the response can help make your document more accessible to the court and the clerks, who are otherwise wading through dozens of seemingly-unrelated requests with far less context about the case than you possess; (2) you will save significant drafting time if you can repeatedly refer to your background principles, rather than setting out the law on specificity eight times; (3) the final response will be less wordy, which is almost universally a good thing.

5. **Which issues can you consent to?** The triage process is your first chance to think long and hard about which of opposing counsel’s motions you can consent to. Are you really going to use that evidence at trial? Or, is there a bargain that can be struck where you consent to the thrust of the request but get opposing counsel to agree that the relief is overbroad as stated? Although its important not to give away the farm, carefully considering what evidence you actually intend to (and need to) present at trial is well worth the effort. Consenting to as many motions as feasible has two huge advantages: First, it massively reduces your workload, allowing you to spend more time on other issues. Second, it preserves your credibility with the court. Seeming reasonable makes the court take your other arguments more seriously (and often, the things you’re consenting to you have the weakest legal basis for opposing, anyhow).

6. **What information do you need to collect early in the process?** For each motion, identify whether there are any steps to be taken up front to lesson work on the back end. Could obtaining an affidavit from an expert or a witness help lay the foundation for admissibility, simplifying your drafting? Is there a colleague you
could e-mail who may have addressed a similar issue recently? Also, when you are only one part of a trial team and someone else is more familiar with discovery as to a specific issue, make sure to discuss with the correct attorneys what they actually plan to present at trial. Your co-counsel may flag for you that they only really care about a specific bit of testimony. Or, conversely, your co-counsel may identify a particular reason a bit of evidence is relevant. For example, your initial reaction to a request to exclude character evidence might be to consent because such evidence is clearly inadmissible to prove propensity. But your co-counsel may be planning on using that evidence to prove habit or absence of mistake. Use triage time to develop a list of questions to raise in a case meeting with your trial team.

At the conclusion of your read-through, you’re ready to make a plan. This might include:

1. Making a list of any tasks you need to complete in advance of drafting;
2. Making a list of questions for your trial team;
3. Calculating drafting time, taking into account the ratio of case-specific and generic motions in limine;
4. Listing the order in which you will address the motions during drafting.

With these tasks done, you can now more confidently turn your attention to dispositive motions and Daubert motions, if applicable, knowing that when you return to motions in limine, you have a thoughtful plan in place.

IV. Drafting the Responses

And finally, the main event. It is time to identify and draft responses to each motion in limine. The approach for case-specific and other novel motions in limine will vary from that for stock motions.

Case-specific Motions in Limine

Ultimately, each case-specific motion in limine requires a customized response that includes a persuasive presentation of the facts and an argument based on the best available case law. But often, the cracks in a motion in limine begin to show well before you are waist-deep in case law. Most such motions tend to suffer from a common core of defects that can be spotted quickly. This article will walk through some frequent weaknesses of novel motions in limine.

1. **Is it a motion in limine at all, or just dressed up as one?** Sometimes what is framed as a motion in limine is really better defined as something else, such as a motion for summary judgment or a Daubert motion. There’s not necessarily anything wrong with framing a Daubert motion as a motion in limine; the
purpose of both is a pretrial determination as to the admissibility of particular evidence. But sometimes it helps to call a spade a spade. One reason is that dispositive motions and Daubert motions do not always have the same filing deadline as a motion in limine. If you find a motion for summary judgment hiding in an omnibus motion in limine, your first order of business is to check any scheduling orders and see if opposing counsel is trying to weasel out of a timeliness objection. A second reason is that you may need to redefine the correct analytical lens for the Court. Perhaps opposing counsel is trying to get an expert kicked on relevance grounds or Rule 403, but a brief recitation of the Daubert factors will show the position to be frivolous. Sometimes winning an argument is as simple as correctly labeling that argument.

2. Is the motion sufficiently specific? The single most common defect in motions in limine is that they lack specificity. The purpose of motions in limine is to identify specific testimony and evidence that is off limits at trial. See Harvey v. State, 296 Ga. 823, 835, 770 S.E.2d 840, 850 (2015); Tollette v. State, 280 Ga. 100, 103 (2005). When opposing counsel simply tracks the language of a rule of evidence and asks the court to adopt it, you should oppose, pointing out that, while of course you have no intent of violating the rule, reaffirmation of the rules of evidence is not a valid purpose for a motion in limine. Invoking the need for specificity can become particularly important when opposing counsel files a motion in limine seeking to prohibit you from engaging in a particular approach to trial or a set of trial tactics. Point out to the court that motions in limine exclude evidence, not strategies. See, e.g. Adini v. Costco Wholesale Corp., 2017 U.S. Dist. LEXIS 55863 (Dist. Nev. 2017) (explaining why generic motions in limine to exclude “reptile theory” are meritless).

3. Are there reasons the adjudication should be deferred for trial? Related to specificity, often the proper adjudication of a motion in limine depends on the exact testimony sought to be elicited. Wherever possible (but particularly where a motion lacks in specificity), encourage the court to defer adjudication of an adverse motion in limine for trial. This approach has several advantages: (1) if the court denies the motion in limine, the issue is preserved for appeal, but if the court defers adjudication, opposing counsel will still be required to make a contemporaneous objection. See Andres v. Wilbanks, 265 Ga. 555 (1995); (2) a deferral buys you time, both to think about how to frame your questions in a manner that defeats an objection, and to do additional research; and (3) if the trial still has a possibility of settlement, it is better to have the ruling open than for the court to have already decided it against you.

4. Is the relief broader than what opposing counsel is entitled to? Often, where opposing counsel seems to have a strong argument that evidence is inadmissible for some purposes, they overplay their hand and ask that the evidence be excluded for all purposes. A typical example is a motion to exclude character
evidence, which is inadmissible for propensity but admissible both for a whole host of other purposes and as impeachment. Make sure to frame the requested relief as overbroad, both to suggest that opposing counsel is overreaching, and to blunt the impact of a granted motion on your trial strategy.

5. **Does the motion rely on the current rules of evidence?** Georgia lawyers are fond of referring to our evidence code as the “new” rules of evidence, when, in fact, it is now seven years old. One of the first things you should look at when reading a novel motion *in limine* is the dates of the Georgia cases cited. If they are from 2010 or earlier, investigate whether they are still good law. Many cases that Westlaw and Lexis will not identify as superseded nonetheless are inconsistent with Georgia’s adoption of the Federal Rules of Evidence, and you should not be afraid to point out where the logic of such cases runs contrary to the text of the modern evidence code or to case law interpreting the Federal Rules of Evidence.

6. **Does the evidentiary rule cited support the principle alleged?** It is also important to ask yourself what rule of evidence opposing counsel is relying on. Often opposing counsel will start by complaining that evidence is unfair or unreliable, then, only after drafting, attempt to backfill the motion with citations to Georgia code. Often, the resulting motion ends up weakly invoking Rule 401 (the test for relevant evidence) or Rule 403 (exclusion of prejudicial evidence). Simply reviewing the text of the rule often identifies defects in the motion, Rule 401, for example, sets an incredibly low threshold on admissibility; evidence merely must make some relevant fact somewhat more likely to be admissible. Rule 403, meanwhile, sets a high threshold for exclusion. And, it is a prohibition on evidence, not courtroom conduct. Opposing counsel may try to invoke Rule 403 as their sole authority for prohibiting you from engaging in some trial tactic or strategy. Reminding the court that “evidence” is in the text of Rule 403 may be enough to highlight the motion’s fatal lack of legal support.

7. **Do the cases cited actually support the proposition?** Finally, before beginning your own research into the relevant question, review the cases cited in the motion. Often, a relevant exception is built into the case itself, and opposing counsel has simply hoped you have not checked. Also do not underestimate the value of pointing out differences in procedural posture. The Court of Appeals’ failure to overturn a jury verdict against an abuse of discretion standard is not the same thing as the Court of Appeals concluding that such evidence ought have been excluded in the first instance. Do not let opposing counsel overstate the significance of the holding.

Again, identifying the above defects should never be your sole defense to a motion *in limine*. Ultimately, you should present a persuasive argument for the evidence’s admissibility, backed by record citations and case law. But following this checklist may put the motion in a precarious position before you have even begun your attack.
Stock Motions in Limine

The simplest way to respond to stock motions in limine is to obtain prior responses to these stock motions, drafted by yourself or others, and use them as a departure point. It is important to remember, however, that there are limits to relying on the dated writing of others:

1. **The response might not have been that good:** Even if you are drafting based on a model written by an excellent writer that you trust, recognize that the model may have been written under a deadline, drafted at the last second. It may represent that writer’s “B” writing, and not their “A+” work. Review any templates you intend to use during your triage stage, so you can identify how much additional refinement they may need.

2. **The response may be out-of-date:** Case law changes quickly, and the draft response may be out-of-date. Even where a previous response seems well crafted, you should, at a minimum, Shepardize each case cited and review any recent treatment of that authority.

3. **The response may not be quite a tailor fit:** Even where the general subject of a motion is generic, the specific relief requested may vary. And, opposing counsel may have included unique examples of inadmissible evidence specific to your case. Be careful to always review the specific relief requested and tailor the model to your needs.

Finally, this article concludes with some general guidance on some of the most frequent stock motions in limine today. Below are brief discussions of motions you can expect to see in many trials in Georgia.

1. **Golden rule:** Defense counsel routinely request that the court prohibit plaintiff’s counsel from asking the jury to place themselves in the victim’s shoes. Defense counsel is correct that such arguments are generally prohibited in Georgia, but their requested relief is often overbroad, and Plaintiff’s counsel can blunt the damage of such motions by offering an accurate explanation of Georgia law. In the classic “golden rule” argument, jurors are invited to place themselves in the victim’s place when assessing damages. Such arguments are impermissible because damages are judged according to the particular plaintiff’s circumstances, not based on the experience of individual jurors. The reasoning of the golden rule prohibition leaves some arguments fair game. One important point is that it is likely permissible for attorneys to reference the conscious of the community, because appealing to the jurors’ desire to create a safe community is acceptable. *Hines v. State*, 246 Ga. App. 835, 837 (2000). In addition, the prohibition on golden

2. **Broad objections to hearsay:** Both sides often seek the exclusion of all “hearsay” materials, often with the goal of impliedly seeking the exclusion of some specific harmful testimony. Often, the best approach is to point out that the request is vague and that a hearsay determination is necessarily contextual — admissibility cannot be determined until the court knows for what purpose the evidence is offered. Then, ask for a ruling to be deferred until trial. However, when it is clear what specific testimony opposing counsel wants excluded and you have a strong argument the evidence fits within an exception, you may wish for a timely ruling, to finally resolve the issue or for leverage in settlement negotiations.

3. **Credibility of a witness:** A motion in limine may seek to exclude either counsel or other witnesses from opining as to the veracity of others. To preserve credibility with the court, admit that counsel should neither express their personal beliefs nor ask one witness if another is lying. But note that the scope of such prohibition is, as a practical matter, quite limited, because it is entirely appropriate for counsel to highlight a conflict between competing evidence. See, e.g. Tanksley v. State, 248 Ga. App. 102, 104-105 (2001). Likewise, experts can be asked about the conclusions of another expert. Anderson v. State, 337 Ga. App. 739, 748 (2016).

4. **Hypothetical questions / facts not in evidence:** Opposing counsel may ask for prophylactic bans on asking hypothetical questions of expert witnesses, claiming that it may allow an expert to provide unsupportable testimony. The goal is simply to hamper your examination of a critical expert. Often the request as framed is overbroad, and a response can point that out. These motions also often rely on older Georgia cases that may well be superseded by Georgia’s adoption of an evidence code modeled on the Federal Rules of Evidence. See Toyo Tire N. Am. Mfg., Inc. v. Davis, 333 Ga. App. 211, 216 (2015) (expert could base his opinion on the information that was communicated to him); Humphrey v. Morrow, 289 Ga. 864, 872 (2011).

5. **“Send a message:”** Similarly, Defense Counsel often seek to exclude “send a message”-type arguments. And again, the best approach for Plaintiff’s Counsel is to note important caveats on that argument. Although asking a jury to send a message to the broader regulated community by awarding an oversized amount of punitive damages is impermissible, asking the jury to send a message to a particular defendant that it is responsible for the damage that it caused is acceptable. Stuckey v. N. Propane Gas Co., 874 F.3d 1563, 1575 (11th Cir. 1989).

6. **Regret, mistake, error, or apology:** A classic issue that cuts both ways, Defendants often seek to exclude apologies made before trial and Plaintiffs often
seek to exclude expressions of regret at trial. In responding to such a motion, often the best approach, if it is one you can live with, is, under the guise of consenting, make clear to the court that any prohibition should be reciprocal. E.g. if pre-trial admissions of error are inadmissible, so too are trial apologies, and vice verse. This position finds support in the text of Georgia’s apology statute, O.C.G.A. § 24-4-416.

7. **Reptile theory:** There is also an ongoing battle between the Plaintiffs’ and Defense bar over the admissibility of so-called “Reptile Theory” arguments, an approach to trial that seeks to invoke the jurors’ primal instincts of safety and self-preservation. Generally speaking, motions in limine that seek broad prohibitions on such strategies have failed because, as noted above, proper motions in limine seek to exclude evidence, not strategies. See, e.g. Adini v. Costco Wholesale Corp., 2017 U.S. Dist. LEXIS 55863 (Dist. Nev. 2017). Better-crafted motions seek to exclude various types of evidence typically associated with such presentations, such as golden rule and “send a message” arguments, and good responses to such motions address the admissibility of such evidence.

8. **Wealth or finances of any party:** When opposing counsel seeks to prohibit references to the relative wealth of any party, or to contrast the financial status of one party with that of another, it is often appropriate to consent at least in part, since the evidence is rarely relevant and you will preserve credibility with the court. However, pay attention to the specific relief requested, which may be overbroad, such as where it asks for evidence indirectly implying a party’s financial state should be excluded. Point out where such evidence may be admissible for other purposes, such as for calculating a life care plan, or where a party’s membership in an exclusive club to which a witness also belongs demonstrates their close friendship, and is relevant to bias.

**Conclusion**

The sheer volume of pretrial motions can easily overwhelm. But advance preparation, intelligent triage, and issue spotting common errors in motions in limine, can, in combination, dramatically reduce the time and effort spent in crafting effective responses. If you need help strategizing how to respond to a round of pre-trial motions, please e-mail kurt@summervillefirm.com
Emergency Guardianships

Presented By:

Marijane E. Cauthorn
Cauthorn Nohr & Owen
Marietta, GA
Judges’ Panel On Emergency Petitions And Motions

Presented By:

Speaker TBD
Speaker TBD
Speaker TBD
Speaker TBD
Speaker TBD
Speaker TBD
THE CHIEF JUSTICE’S COMMISSION ON PROFESSIONALISM  
(Founded 1989)

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

Karlise Y. Grier, Executive Director

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

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

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

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

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

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

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

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

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

Chief Justice’s Commission on Professionalism
104 Marietta Street, N.W.
Suite 104
Atlanta, Georgia 30303
(404) 225-5040
professionalism@cjcpga.org
THE MEANING OF PROFESSIONALISM

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

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

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

BACKGROUND ON THE LEGAL PROFESSIONALISM MOVEMENT IN GEORGIA

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


[Although] lawyers have tended to take the rules more seriously because of an increased fear of disciplinary prosecutions and malpractice suits, . . . [they] have also tended to look at nothing but the rules; if conduct meets the minimum standard, lawyers tend to ignore exhortations to set their standards at a higher level.\(^3\)

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

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

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

**GENERAL PURPOSE OF CLE PROFESSIONALISM CREDIT**

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

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

**DISTINCTION BETWEEN ETHICS AND PROFESSIONALISM**

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

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

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

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

**ISSUES AND TOPICS**

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

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

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

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

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

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

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

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

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

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4 Mary Ann Glendon, A Nation Under Lawyers 17 (1994)
APPENDICES

A – 2017-2018 COMMISSION MEMBERS

B – MISSION STATEMENT

C – OATH OF ADMISSION

D – A LAWYER’S CREED

E – ASPIRATIONAL STATEMENT ON PROFESSIONALISM
APPENDIX A

CHIEF JUSTICE’S COMMISSION ON PROFESSIONALISM

2017 - 2018

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*Ms. Nneka Harris-Daniel*, Atlanta

Italics denotes public member/non-lawyer
MISSION STATEMENT

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

CALLING TO TASKS

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

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

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

3. To adhere to the proposition that a social conscience and devotion to the public interest stand as essential elements of lawyer professionalism.
APPENDIX C

HISTORICAL INFORMATION ABOUT THE COMMISSION’S ROLES IN THE DEVELOPMENT OF THE CURRENT GEORGIA ATTORNEY OATH

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

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

**Attorney’s Oath**

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

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

OATH OF ADMISSION
TO THE STATE BAR OF GEORGIA

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

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

A LAWYER’S CREED

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

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

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

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

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

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

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

ASPIRATIONAL STATEMENT ON PROFESSIONALISM

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

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

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GENERAL ASPIRATIONAL IDEALS

As a lawyer, I will aspire:

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

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

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

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

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

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

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

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

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

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SPECIFIC ASPIRATIONAL IDEALS

As to clients, I will aspire:

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

(b) To fully informed client decision-making.
   As a professional, I should:
   (1) Counsel clients about all forms of dispute resolution;
   (2) Counsel clients about the value of cooperation as a means towards the productive resolution of disputes;
   (3) Maintain the sympathetic detachment that permits objective and independent advice to clients;
   (4) Communicate promptly and clearly with clients; and,
   (5) Reach clear agreements with clients concerning the nature of the representation.

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

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

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

(a) To cooperate with opposing counsel in a manner consistent with the competent representation of all parties.
   As a professional, I should:
   (1) Notify opposing counsel in a timely fashion of any cancelled appearance;
APPENDIX E

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

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

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

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

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

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

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

As a professional I should:
(1) Act with complete honesty;
(2) Know court rules and procedures;

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

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

(a) To recognize and to develop our interdependence;

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

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

As to our profession, I will aspire:

(a) To improve the practice of law.

As a professional, I should:

(1) Assist in continuing legal education efforts;
(2) Assist in organized bar activities; and,
(3) Assist law schools in the education of our future lawyers.

(b) To protect the public from incompetent or other wrongful lawyering.

As a professional, I should:

(1) Assist in bar admissions activities;
(2) Report violations of ethical regulations by fellow lawyers; and,
(3) Assist in the enforcement of the legal and ethical standards imposed upon all lawyers.

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

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

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

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As a professional, I should ensure that any advertisement of my services:
(1) is consistent with the dignity of the justice system and a learned profession;
(2) provides a beneficial service to the public by providing accurate information about the availability of legal services;
(3) educates the public about the law and legal system;
(4) provides completely honest and straightforward information about my qualifications, fees, and costs; and,
(5) does not imply that clients’ legal needs can be met only through aggressive tactics.

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

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

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

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

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Appendix
### ICLE BOARD

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

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

Excess creditable CLE hours (i.e., over 12) earned in one CY may be carried over into the next succeeding CY. Excess ethics and professionalism credits may be carried over for two years. Excess trial practice hours may be carried over for one year.

A portion of your ICLE name tag is your ATTENDANCE CONFIRMATION which indicates the program name, date, amount paid, CLE hours (including ethics, professionalism and trial practice, if any) and should be retained for your personal CLE and tax records. DO NOT SEND THIS CARD TO THE COMMISSION!

ICLE will electronically transmit computerized CLE attendance records directly into the Official State Bar Membership computer records for recording on the attendee’s Bar record. Attendees at ICLE programs need do nothing more as their attendance will be recorded in their Bar record.

Should you need CLE credit in a state other than Georgia, please inquire as to the procedure at the registration desk. ICLE does not guarantee credit in any state other than Georgia.

If you have any questions concerning attendance credit at ICLE seminars, please call: 678-529-6688