34TH ANNUAL MEDICAL MALPRACTICE LIABILITY INSTITUTE

12.5 CLE Hours including
1.5 Ethics Hours | 1 Professionalism Hour | 6.5 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
THURSDAY
NOVEMBER 1, 2018

11:15 REGISTRATION AND LIGHT LUNCH

11:50 SEMINAR INTRODUCTION
Lee S. Atkinson, Program Co-Chair; Blasingame Burch Garrard Ashley PC, Athens
Tracy M. Baker, Program Co-Chair; Weathington McGrew PC, Atlanta
Lindsay A. Forlines, Program Co-Chair; Weathington McGrew PC, Atlanta
Evan W. Jones, Program Co-Chair; Blasingame Burch Garrard Ashley PC, Athens

12:00 MEDICAL MALPRACTICE LAW UPDATE
Kristin L. Pierson, Bendin Sumrall & Ladner LLC, Atlanta

1:00 UPDATE ON SOCIAL MEDIA, DIGITAL EVIDENCE AND TECHNOLOGY CONSIDERATIONS
Alison L. Currie, FisherBroyles LLP, Atlanta

2:00 BREAK

2:15 ATTORNEY PANEL: THE NUTS AND BOLTS OF A SUCCESSFUL AND SUSTAINABLE MEDICAL MALPRACTICE PRACTICE
Moderators:
Lee S. Atkinson
Tracy M. Baker
Lindsay A. Forlines
Evan W. Jones
Panelists:
M. Scott Bailey, Huff Powell & Bailey LLC, Atlanta, Columbus, and Gainesville
Anna B. Fretwell, Huff Powell & Bailey LLC, Atlanta, Columbus, and Gainesville
Brandon R. Taylor, Webb & Taylor LLC, Atlanta and Peachtree City
M. Paul Reynolds, Houck | Reynolds, LLC, Atlanta

3:30 PHYSICIAN PERSPECTIVE
Dr. Douglas W. Lundy, MD, MBA, Resurgens Orthopaedics, Atlanta

4:30 RECESS

7:00 Reception (7:00 p.m. to 8:00 p.m.)
Courtyard (In case of inclement weather: Salon 1.)

Reception Sponsor:
Roger Mills, ADR Service
FRIDAY
NOVEMBER 2, 2018

7:30    CONTINENTAL BREAKFAST

7:50    SEMINAR INTRODUCTION
        Lee S. Atkinson
        Tracy M. Baker
        Lindsay A. Forlines
        Evan W. Jones

8:00    PHYSICIAN PERSPECTIVE /EVIDENCE-BASED CONSIDERATIONS IN MEDICINE
        Stephen Colucciello, M.D., Professor Emergency Medicine, University of North Carolina Charlotte Campus, Charlotte, NC

9:00    THE NEW OPIATE DATABASE AND ITS LEGAL IMPLICATIONS
        Heather H. Miller, Weathington McGrew PC, Atlanta

9:45    BREAK

10:00   EVIDENTIARY PRACTICE TIPS AND POINTERS
        Ronald L. Carlson, Professor, Fuller E. Callaway Chair of Law Emeritus, School of Law, University of Georgia, Athens
        Michael S. Carlson, Deputy Chief Assistant District Attorney, Appeals and Gang Prosecution Units, Cobb County District Attorney’s Office, Marietta

11:00   HANDLING COMPLEX LITIGATION
        Josh Sacks, The Law Offices of Josh Sacks PC, Dunwoody

11:45   JUDICIAL PERSPECTIVE
        Hon. Diane E. Bessen, Chief Judge, State Court of Fulton County, Atlanta
        Hon. Benjamin W. Karpf, Judge, Chatham County Magistrate Court; Bouhan Falligant LLP, Savannah
        Hon. Michael L. Karpf, Chief Judge, Eastern Circuit Superior Court, Savannah

12:45   RECESS

1:30    GOLF TOURNAMENT

        Golfers please provide your name to an ICLE representative and email the golf pro at the resort to provide handicap/scoring information.
        Jason Hill, Head Golf Professional/ Tournament Operations

        The Golf Club of Amelia Island
        4700 Amelia Island Parkway
        Amelia Island, FL 32034
        jason@golfclubofamelia.com

        Tournament Sponsor:
        John Stanford, Atlas Settlement Group, Inc.
SATURDAY
NOVEMBER 3, 2018

7:30  CONTINENTAL BREAKFAST

7:50  SEMINAR INTRODUCTION
Lee S. Atkinson
Tracy M. Baker
Lindsay A. Forlines
Evan W. Jones

8:00  ETHICS IN LITIGATION
Brian R. Smith, The Smith Law Practice, Atlanta

9:00  SMALL AND SOLO FIRM PRACTICE
Moses Kim, The Moses Firm, LLC, Atlanta

10:00 BREAK

10:15 MEDICAL RECORDS: THE BASICS OF INTERPRETATION (AND THE DREADED EMR)
Andrea Stelk, BSN, RNC-OB, Clinical Instructor and Nurse Clinician, Northside Hospital, Atlanta

11:00 APPELLATE PRACTICE – TIPS AND PRACTICE POINTERS
J. Darren Summerville, The Summerville Firm LLC, Atlanta

12:00 Q AND A / FAREWELL

12:15 ADJOURN

Audio Visual Sponsor:
Blue Bear Solutions,
A Litigation Technology Company
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<td>34&lt;sup&gt;th&lt;/sup&gt; ANNUAL MEDICAL MALPRACTICE LIABILITY INSTITUTE</td>
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THURSDAY
NOVEMBER 1, 2018

12:00  MEDICAL MALPRACTICE LAW UPDATE

Kristin L. Pierson, Bendin Sumrall & Ladner LLC, Atlanta
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| JORDAN V. EVerson  
302 GA. 364  
(October 16, 2017) | • Parents filed suit for death of 27-year-old Son who sought medical treatment from Emergency Medicine Physician at Hospital for hallucinations and hearing voices; 2 days after being discharged with diagnosis of OCD with instructions for follow-up local mental health appointment, while en route with Father to different provider out of state, Son leapt from moving car and was struck and killed  
• Trial Court granted Hospital’s MSJs; Court of Appeals reversed | • Intervening act does not have to be wrongful or negligent  
• Test as to whether intervening act of 3rd person will render earlier act too remote depends simply upon whether concurrence of such intervening act might reasonably have been anticipated by defendant  
• Jury only has to determine if intervening act was reasonably foreseeable to defendant or if it was triggered by defendant’s conduct | Family’s decision to disregard appointment with local facility and make appoint in North Carolina, thereby requiring family to drive on interstate when Son was killed, was intervening act to break chain of causation  
Family’s actions did not have to be wrongful or negligent to act as break in chain of causation |
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| **EDOKPOLOR V. GRADY MEMORIAL HOSPITAL**  
2018 GA. APP. LEXIS 507  
(SEPTEMBER 14, 2018) | • Surviving family members sued Hospital and Nurse after Patient was given medication orally against Physician's order to give medication through feeding tube  
• Hospital moved for summary judgment, arguing that there was no genuine issue of material fact as to causation. Trial Court granted Motion | • Plaintiff cannot recover for medical malpractice, even where there is evidence of negligence, unless plaintiff establishes by preponderance of evidence that negligence either proximately caused or contributed to cause plaintiff harm  
• Plaintiff must show that purported violation or deviation is proximate cause of injuries sustained. He must prove that injuries complained of proximately resulted from such want of care or skill. Bare possibility of such result is not sufficient. There can be no recovery where there is no showing to any reasonable degree of medical certainty that injuries could have been avoided  
• Conclusory and unsupported expert affidavit insufficient to establish genuine issue of fact as to causation in medical malpractice case | • Plaintiffs relied on Expert’s Affidavit, which concluded, with little explanation, that Nurse’s actions caused Patient’s death by aspiration.  
• Expert provided no evidence that Patient aspirated when ingesting medication and offered no link between aspiration to oral ingestion of medication |
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<td>WELLSTAR KENNESTONE HOSPITAL v. ROMAN 344 GA. APP. 375 (JANUARY 30, 2018)</td>
<td>• Plaintiff sued Driver of vehicle for injuries sustained in motor vehicle accident. Plaintiff was treated in ER on day of collision&lt;br&gt;&lt;br&gt;• Driver served Hospital with Notice of Deposition of Non-Party, directing Hospital to designate Employee to testify regarding rates it charged seven categories of patients for services it provided to Plaintiff&lt;br&gt;&lt;br&gt;• Hospital filed Motion to Modify on grounds that such questioning was not reasonably calculated to lead to discovery of admissible evidence and barred by collateral source rule&lt;br&gt;&lt;br&gt;• Trial Court denied Hospital’s Motion to Modify Subpoena</td>
<td>• § 24-13-23 permits subpoenas for production of evidence, which trial court may, upon written motion, quash or modify if subpoena is unreasonable and oppressive&lt;br&gt;&lt;br&gt;• Issue is not whether information sought is relevant and admissible at trial, but whether trial court abused its discretion in denying motion to modify subpoena in light of wide latitude given to make complete discovery possible</td>
<td>• Driver would undoubtedly be precluded from introducing evidence of Hospital’s write-off of Plaintiff’s medical treatment, and Driver may also be precluded from introducing evidence at Trial of medical rates and charges of third parties&lt;br&gt;&lt;br&gt;• There is no authority to support Hospital’s contention that collateral source rule barred all discovery of the medical rates and charges of third parties, even if information is inadmissible at trial&lt;br&gt;&lt;br&gt;• Burden on Hospital was to show more than that materials would not themselves be admissible at trial and to demonstrate that discovery of materials was not in some way reasonably calculated to lead to potential discovery of admissible evidence</td>
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<td>ML HEALTHCARE SERVICES v. PUBLIX SUPER MARKETS 881 F.3D 1293 (11th Circuit) (February 7, 2018)</td>
<td>• In slip-and-fall case, Grocery Store conducted discovery of Plaintiff’s Treating Physicians and learned of involvement of 3rd party “litigation investment company” that contracts with doctors to provide medical care for injured people with tort claims who lack medical insurance—company purchases patients’ medical debt from providers at discounted rates and then later recovers full cost of medical care from subsequent settlement or judgment patents receive</td>
<td>• Evidence of collateral benefits received by plaintiff may be admissible for impeachment purposes when witness gives false evidence relating to material issue in case/</td>
<td>• District Court did not abuse its discretion in permitting evidence of ML Healthcare’s payment arrangement to be admitted for limited purpose of showing bias on part of Treating Physicians who testified in case. Evidence was relevant. Indeed, Grocery Store needed only to show that ML Healthcare's payment arrangement had &quot;any tendency&quot; to make bias more probable than it would be without evidence</td>
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<td>• District Court ruled to allow Grocery Store to introduce at Trial evidence of this relationship to show Plaintiff’s Treating Physicians were biased in their testimony</td>
<td>• Evidence of collateral benefits is not typically admissible in personal injury tort case unless that evidence serves valid evidentiary purpose other than just revealing to jury those benefits. When that occurs and evidence is admitted, trial court should instruct jury about limited purpose of evidence and, in particular, remind jury not to consider collateral payments to reduce its award of reasonable and necessary medical expenses</td>
<td>• Grocery Store does not need to be able to prove premeditated plan of deceit in order to probe potential bias. That requirement is easily satisfied here. Jury might infer that Plaintiff’s Treating Physicians were incentivized by ML Healthcare's referral and payment arrangement to provide testimony that was more favorable to Plaintiff than it otherwise would have been. If so, Jury would have found bias, which is clearly relevant consideration in evaluating witness's credibility</td>
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<td>• Proof of bias will typically be relevant. Fact that evidence also implicates collateral source rule does not render it irrelevant for impeachment purposes</td>
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<td>CANCEL V. MEDICAL CENTER OF CENTRAL GEORGIA 345 GA. APP. 215 (MARCH 15, 2018)</td>
<td><strong>4 Physicians were not rehired by Medical Center after their contracts were terminated. Physicians sued Medical Center for fraud and breach of fiduciary duty</strong>&lt;br&gt;<strong>Trial Court denied Physicians’ requests for production of notes taken during Medical Center’s review process</strong></td>
<td><strong>§ 31-7-132: Proceedings and records of review organization shall be held in confidence and shall not be subject to discovery or introduction into evidence in any civil action. No person who was in attendance at meeting of such organization shall be permitted or required to testify in any such civil action as to any evidence of other matters produced or presented during proceedings</strong>&lt;br&gt;<strong>Party may seek original documents and examine witnesses who appeared before Peer Review Committee, as long as proceedings are not asked about</strong>&lt;br&gt;<strong>Peer Review Committee is entitled to immunity for any civil or criminal proceeding unless motivated by malice</strong></td>
<td><strong>Physicians were not allowed to conduct discovery into peer review process which resulted in termination of their group’s contract</strong>&lt;br&gt;<strong>Malice exception to the immunity defense under peer review statute has no bearing on confidentiality provisions</strong></td>
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| **STEPHENS V. CASTANO-CASTANO**<br>346 GA. APP. 284<br>(MAY 29, 2018) | • Plaintiff sued Defendant for injuries following motor vehicle accident  
• Defendant argued that Trial Court erred in excluding certain questions and evidence that affected credibility and bias of Plaintiff’s Treating Physician | • As general principle, jury is entitled to consider a witness's financial interest in case  
• Intent or motive of witness is legitimate subject of inquiry, and fact that witness, in his connection with any pending litigation, is influenced by financial considerations may affect his credit and diminish weight of his testimony  
• Where relevancy or competency of evidence is doubtful, it should be admitted and its weight left to determination of jury  
• Relevant evidence may also be admitted to support an inference of bias | • Defendant should have been allowed to question Plaintiff’s Treating Physician regarding his financial interest in case, and specifically regarding his lien on any recovery Plaintiff might receive. Excluding this evidence did not serve underlying rationale of collateral source rule  
• Trial Court properly excluded inquiry into Plaintiff’s referral to Physician by her Attorney; Attorney referral to Physician, standing alone, not sufficient to affect Physician’s credibility or to show bias. At most, there is suggestion of unseemliness, which creates danger of unfair prejudice and confusion of issues before Jury |
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| **ANGLIN V. SMITH**      | • Patient filed suit against Doctor for pain and weakness suffered after back injection  
| 346 GA. APP. 456          | • Jury returned defense verdict, and Patient appealed manner in which Trial Court handled affidavit of Patient's Expert | • Duty to respond to discovery is continuing; when party knows previous discovery response is no longer true and does not amend response, party is in knowing concealment  
| (JUNE 21, 2018)           |                                                                      | • Party does not have to file motion to compel in order to obtain sanctions should they later learn answer was false or misleading  
|                           |                                                                      | • Interrogatory answer that falsely denies existence of discoverable information is worse than no response | • Trial Court’s exclusion of Affidavit was appropriate remedy for Patient’s failure to disclose same during discovery  
|                           |                                                                      |                                                                                 | • Court suggests that when work product is at issue, it is best to identify responsive document and allow Trial Court to determine applicability of work product doctrine to document |

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<td>ROBLES V. YUGUEROS</td>
<td>343 GA. APP. 377</td>
<td>October 26, 2017</td>
<td>Husband sued Plastic Surgeon and Practice after Wife died following liposuction, buttock augmentation, and abdominoplasty</td>
<td>• § 9-11-32(a)(2) does not create rule of evidence that allows any deposition taken under § 9-11-30(b)(6) to be admitted at trial in its entirety as admission against interest, but provides for admission of deposition when that admission is permitted under relevant rules of evidence; when testifying as to medical standard of care, § 24-7-702 is relevant rule of evidence</td>
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<td>• Trial Court's exclusion of Affidavit was appropriate remedy for Patient's failure to disclose same during discovery</td>
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<td>• Court suggests that when work product is at issue, it is best to identify responsive document and allow Trial Court to determine applicability of work product doctrine to document</td>
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<td>• Husband made no claim that § 30(b)(6) Witness’s medical opinion met requirement of § 24-7-702(b), choosing instead to seek admission of evidence solely on ground that it was obtained during deposition of the medical practice group's § 9-11-30(b)(6) witness</td>
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<td>• Defense Non-Party Fault Radiology Expert stated he had been practicing radiology for nearly three decades. During those years, he had read many images ordered by ER Physicians. Routinely, ER Physicians would first interpret images such as KUB and other abdominal x-rays</td>
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<td>• Husband sought to exclude Defense Radiology Non-Party Fault Expert under Rule 702 given that he admitted, “I can't speak to standard of care for an ER physician.”</td>
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<td>• Given Expert’s medical background and experience, which included reading exact type of x-ray at issue here—and doing so in collaboration with ER Physicians, Trial Court did not abuse its discretion in rejecting Husband’s contention that, because Expert was Radiologist who had never practiced emergency medicine, he was not qualified under § 24-7-702(c) to render opinions regarding ER Physician’s interpretation of Wife's KUB</td>
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<td>ALLEN V. UNITED</td>
<td>• Patient brought suit for negligence in prescribing contraindicated</td>
<td>• § 24-7-702: expert witness must (1) have actual knowledge and experience in</td>
<td>• Pharmacist was not competent to testify regarding standard of care of medical doctors, nurses, osteopathic physicians, or physicians' assistants, as these are different professions from that of pharmacist</td>
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<td>STATES 2018 U.S. DIST.</td>
<td>medications and failing to follow up on abnormal bloodwork</td>
<td>relevant area through either active practice or teaching and (2) either be in same profession as defendant whose conduct is at issue or qualify for exception to same profession requirement</td>
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<td>LEXIS 25934</td>
<td>• Patient’s only expert was Pharmacist holding Doctor of Pharmacy</td>
<td>• Georgia's evidentiary rules for physician's expert testimony are so intimately intertwined with its malpractice laws that rules must apply in Federal Tort Claims Act case for medical malpractice</td>
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<td>(FEBRUARY 16, 2018)</td>
<td>• Motion for Summary Judgment granted to Defendant</td>
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<td><strong>Parson v. DeKalb Medical Center A18A0932 (September 6, 2018)</strong></td>
<td>• Plaintiff sued Hospital following injuries due to IV infiltration • Plaintiff alleged Trial Court erred by Daubert-excluding Expert based upon several assumptions that were factually incorrect</td>
<td>• § 24-7-702: expert witness must (1) have actual knowledge and experience in relevant area through either active practice or teaching and (2) either be in same profession as defendant whose conduct is at issue or qualify for exception to same profession requirement • § 9-11-9.1 even categorizes Medical Doctors, Nurses, Pharmacists, Osteopathic Physicians, and Physicians’ Assistants as different professions</td>
<td>• Trial Court did not abuse its discretion in excluding Expert’s testimony; there was too great of a gap between unsupported opinions Expert offered and existing data in medical records • Plaintiff failed to meet her burden to establish that Expert’s assertion were supported by any reliability criteria and not speculation • Expert did not provide basis for his assumptions, which were contradicted and disproven by medical records</td>
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<td>GRAHAM V. REYNOLDS</td>
<td>§ 24-7-702 requires, at time of act or omission, that expert had actual professional knowledge and experience in area of practice or specialty in which opinion is to be given. Knowledge and experience comes from: (1) active practice for 3 of 5 years of specific procedure, condition or treatment alleged or (2) teaching of profession for 3 of 5 years of specific procedure, condition or treatment alleged</td>
<td>§ 9-11-9.1: must set forth at least one negligent act or omission claimed to exist and the factual basis for such evidence that provider’s actions showed gross negligence.</td>
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| 343 GA. APP. 274 (OCTOBER 23, 2017) | § 9-11-9.1: must set forth at least one negligent act or omission claimed to exist and the factual basis for such evidence that provider’s actions showed gross negligence. | § 51-1-29.5: no provider shall be held liable unless it is proven by clear and convincing evidence that provider’s actions showed gross negligence. | • Competency of Affiant:  
  o Cardiologist Expert Affiant was licensed physician and, as such, “part of the same profession” as Defendant-ED Physician  
  o Affiant taught electrophysiology as faculty member of state university  
  o Affiant not required to be an ED Physician to opine as to diagnosing cardiac issue  
 • Contents of Affidavit:  
  o Gross negligence standard is evidentiary standard; 9-11-9.1 is pleading standard  
  o Only one negligent act or omission must be contained in affidavit; Affiant’s statement that Defendant breached applicable SOC is enough  
  o 9-11-9.1 does not require use of term “gross negligence” |
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| ST. MARY’S HEALTH CARE SYSTEM V. ROACH 345 GA. APP. 274 (MARCH 2, 2018) | • Parents of Patient, who died as a result of aortic dissection after discharge, filed suit against Hospital for negligence alleging Hospital’s imaging interpretation system improperly provided for x-rays not to be read until next morning  
• Parents added Hospital to case with Amended Complaint and did not attach Expert Affidavit addressing claims against Hospital regarding review process for x-rays  
• Trial Court denied Hospital’s MSJ | • § 9-11-9.1 requires plaintiff to file affidavit with any action for damages alleging professional malpractice  
• Complaint’s characterization of claims as stating professional negligence or ordinary negligence does not control. Instead, where alleged negligence requires exercise of professional skill and judgment, action states professional negligence  
• If claim goes to propriety of professional decision rather than to efficacy of conduct in carrying out of decision previously made, claim sounds in professional malpractice  
• Whether complaint sounds in ordinary or professional negligence is question of law for court to decide | • Claims against Hospital were professional negligence claims  
• Evidence established that Hospital policy allowed for immediate consult with radiologist, but ED Physician exercised her judgment and decided one was not necessary  
• Only way to properly allege that Hospital was negligent is with expert testimony explaining how policy fell below standard of care. |
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| HOLMES V. LYNOS 346 GA. APP. 99 (JUNE 1, 2018) | - Patient sued Surgeon and Hospital after gynecological surgery and Patient suffered right distal ureteral injury and uterovaginal fistulas  
- Patient alleged Physician suffered from physical impairments that negatively affected his motor skills and placed patients at increased risk of complications  
- Trial Court granted Motion To Dismiss finding that (1) expert affidavit failed to specify one negligent act or omission and (2) Physician’s failure to disclose to Patient negative life factors which might adversely affect his professional performance could not serve as basis for separate claims of fraud, negligent misrepresentation, and battery | - Affidavit rule requires affidavit to include at least one specific negligent act or omission  
- Affidavit which would not satisfy evidentiary requirements for summary judgment purposes may nevertheless be sufficient to satisfy pleading standards  
- When ruling on motion to dismiss, Court must construe affidavit in plaintiff’s favor, even if unfavorable construction may be possible  
- Generally speaking, there is no duty on physicians to disclose personal life factors which might adversely affect their professional performance, and failure to disclose such cannot be basis for fraud or battery  
- However, Supreme Court has not said physician never has duty to disclose negative information about personal life to patients | - Affidavit generally alleges breach of standard of care and that the same resulted in injury to Plaintiff; it is not required that Affidavit state that Physician’s performance of procedure resulted in specific injury alleged  
- Patient put forth specific allegations concerning Physician’s physical limitations and how they could affect his performance of specific procedure  
- Court alludes to different outcome under summary judgment standard |
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<td>SISKA v. MCNEIL</td>
<td>• Patient filed pro se Complaint against Anesthesiologist on last day under statute of limitations, but without Expert Affidavit or § 9-11-9.1(b) Affidavit invoking 45-day extension</td>
<td>• Pursuant to § 9-11-9.1(a), along with any professional malpractice complaint, plaintiff must contemporaneously file expert affidavit supporting her claim or claims</td>
<td>• Trial Court erred by dismissing complaint on the basis that Plaintiff failed to fall within exception of § 9-11-9.1(b)</td>
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<td>(JUNE 20, 2018)</td>
<td>• Patient subsequently secured Attorney, who filed Amended Complaint with Expert Affidavit attached</td>
<td>• Under § 9-11-9.1(b), however, plaintiff has 45-day grace period in which to file expert affidavit if (1) complaint is filed within 10 days of expiration of statute of limitation; and (2) plaintiff's attorney files affidavit stating that expert affidavit was not filed contemporaneously with complaint because plaintiff retained attorney fewer than 90 days prior to expiration of limitation period</td>
<td>• Physician's position that it was necessary for Plaintiff to specifically recite provision of 9-11-9.1(b) in order to trigger extension provision is rejected; there is no magic language that must be used to invoke 45-day grace period. Here, combination of Plaintiff's pro se, timely Complaint, followed by her attorney's Affidavit explaining that Complaint was filed within 10 days of expiration of statute, that he was hired after that time, and that he was in the process of obtaining Expert Affidavit, which was attached to Amended Complaint also filed within 45-day grace period were sufficient to invoke protection afforded by § 9-11-9.1(b)</td>
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<td>• Trial Court dismissed Complaint</td>
<td>• Spirit and intent of Civil Practice Act require that pleadings are to be liberally construed in favor of pleader. Pro se pleadings are held to less stringent standards than pleadings drafted by lawyers</td>
<td>• That Plaintiff may have been unaware of necessity of filing any Affidavits or that her attorney initially failed to quote language of § 9-11-9.1(b) are not sufficient reasons to grant motion to dismiss because defendants were in no worse position than if plaintiff had understood language of § 9-11-9.1 and originally inserted language required by subsection (b) in complaint</td>
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<td>WENTZ V. EMORY HEALTHCARE</td>
<td>° Plaintiff appealed Dismissal With Prejudice of his claims against Hospital and 2 Nurses, as well as Dismissal of his Renewal Suit</td>
<td>° § 9-11-9.1(e): If plaintiff files an affidavit which is allegedly defective, and defendant to whom it pertains alleges, with specificity, by motion to dismiss filed on or before close of discovery, that said affidavit is defective, plaintiff's complaint shall be subject to dismissal for failure to state claim, except that plaintiff may cure alleged defect by amendment within 30 days of service of motion</td>
<td>° Because Plaintiff dismissed his original action without prejudice prior to Trial Court ruling on Hospital’s Motion To Dismiss, thereby resulting in no final adjudication on merits of original Complaint, Plaintiff’s claims are not barred by res judicata. Complaint may be renewed pursuant to § 9-2-61</td>
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<td>2018 GA. APP. LEXIS 510 (SEPTEMBER 17, 2018)</td>
<td>• With Answer, Hospital filed Motion to Dismiss based on insufficiency of Expert Affidavit</td>
<td>• Plain and ordinary meaning of § 9-11-9.1(e)—that “complaint shall be subject to dismissal”—undoubtedly provides trial court with discretion to dismiss plaintiff’s complaint for failure to state claim if he fails to amend defective affidavit within 30 days. This discretion, however, is not absolute. That is, it requires trial court to take action while case is still pending</td>
<td>• Trial Court neither extended time for filing amendment, nor did it grant Hospital’s Motion To Dismiss for failure to state claim after 30 days to amend Affidavit expired</td>
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<td>° Without amending Affidavit, Plaintiff voluntarily dismissed case without prejudice</td>
<td>° Statute does not bar plaintiff from voluntarily dismissing and refiling their complaint</td>
<td>° Once 30-day window had passed for Plaintiff to amend his Expert Affidavit, defect does not become incurable, and suit can be saved by dismissal without prejudice and refiling of action</td>
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<td>• Hospital moved to strike Dismissal Without Prejudice, arguing that because Plaintiff failed to amend Expert Affidavit within 30 days, § 9-11-9.1(e) compelled Complaint to be dismissed with prejudice</td>
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<td>° Voluntary dismissal of Complaint before Trial Court granted Hospital’s Motion To Dismiss avoided decision on merits. Therefore, Trial Court had no power to modify, change, or convert what was closed case</td>
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<td>° Plaintiff subsequently renewed action against Hospital with Amended Affidavit. Hospital filed Motion To Dismiss Renewal Complaint, arguing that new claims were barred by res judicata</td>
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| ROBERTS V. QUICK RX DRUGS, INC. 343 GA. APP. 556 (OCTOBER 30, 2017) | • Husband and Wife filed suit against Pharmacy for injuries suffered when Husband ingested improperly dispensed medication by Cashier at Pharmacy  
• Allegations included professional and simple negligence  
• Trial Court granted summary judgment to Pharmacy on professional negligence claims | • Not every suit which calls into question conduct of one who happens to be medical professional is a med mal action. We must look at substance of the action against medical professional in determining whether action is one for professional or simple negligence  
• Only when allegations of negligence against professional involve exercise of professional skill and judgment within professional’s area of expertise does claim sound in professional negligence | • Plaintiffs’ Expert admitted he did not know if counseling had been offered by Pharmacy and had no evidence to show violation of SOC in counting, filling, labelling or providing printed info with prescription. Sole criticism was that wrong medication had been dispensed. As such, there was not sufficient evidence to support professional negligence claim  
• Questions existed as to whether Cashier took any steps to confirm patient’s identity when she handed patient medication and this question was one of simple negligence |
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| CURLES V. PSYCHIATRIC SOLUTIONS, INC. 343 GA. APP. 719 (MARCH 15, 2018) | - Plaintiffs brought suit alleging professional negligence against Psychiatrist and Facility for murders committed by patient who was released from facility; Patient had history of psychotic episodes involving violent conduct and had been admitted to subject facility at least 3 times.  
- Trial Court found claim was one of medical negligence and thereby barred by statute of repose and affidavit requirement | - Medical negligence claims are those that arise out of care or treatment for benefit of patient or involve exercise of professional judgment | - Plaintiffs’ claims that Facility should have given notice of Patient’s discharge to either court who committed patient or law enforcement agencies having control over Patient did not arise out of care or treatment of Patient or involve exercise of professional judgement and, thus, sounded in ordinary negligence  
- Action was not subject to statute of repose or affidavit rule |
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| **SOUTHEASTERN PAIN SPECIALISTS V. BROWN** 303 GA. 265 (MARCH 5, 2018) | • Patient suffered catastrophic brain damage from oxygen deprivation and later died after being administered Propofol during Epidural Steroid Injection  
• Jury returned $21 million verdict against Defendants (Pain Medicine Physician, Group Practice, and Surgery Center)  
• All Parties appealed numerous aspects of Trial | • Judge presiding over civil trial should charge jury on only legal issues raised by complaint and answer, adjusted to evidence introduced at trial  
• It is question of law whether evidence is sufficient to support giving of particular charge; evidence required is only slight evidence  
• Error in charge that injects issues not raised by pleadings and evidence is presumed to be harmful | • Trial Judge erred in instructing Jury on ordinary and professional negligence, as allegations and evidence were that Physician failed to respond appropriately – exercise of medical judgment – to data from monitors  
• Instruction of ordinary negligence permitted Jury to find Physician liable based on presumption that whether and how to respond to medical data does not require medical judgment  
• Ordinary negligence instruction invited Jurors to decide liability of Physician without consideration of strictures on claims for professional malpractice, such as need for expert testimony and bar on finding liability solely using hindsight  
• General verdict made it impossible for Court to determine the basis of verdict and it cannot stand; retrial of entire case required |
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| CRUZ PICO V  | • Patient filed suit against Doctor for injuries he suffered following cervical node excision  
              | • Plaintiff did not attach Expert Affidavit but attached Affidavit from his attorney stating that Attorney had just been retained and statute of limitation would be expiring within 10 days  
              | • Defendant filed Motion To Dismiss and attached Medical Authorization Form signed by Attorney  
              | • Trial Court denied Motion | • § 9-11-9.1 provides contemporaneous affidavit filing requirement shall not apply to any case in which SOL will expire within 10 days of date of filing of complaint and because of time constraints plaintiff has alleged that affidavit of an expert could not be prepared  
              | • For extension to apply, attorney to file affidavit that attorney was not retained by plaintiff more than 90 days prior to expiration of period of limitation  
              | • If it determined that law firm or attorney on pleadings was retained within 90 days of expiration of period of limitation, complaint shall be dismissed for failure to state claim  | • Under Georgia Rules of Professional Conduct, attorneys and clients can generally agree to limit the scope of representation  
<pre><code>          |                                                                         |                                                                                   | • Medical Authorization Form signed by Attorney indicates that Client and Attorney expressly limited scope and objective of initial representation to obtaining Patient’s medical records; there is no reasonable basis to believe Attorney had been retained to file suit |
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<td>SWALLOWS V. ADAMS-PICKE T 344 GA. APP. 647 (FEBRUARY 22, 2018)</td>
<td>• Parents of Child Patient filed med mal claim against Physician and Practice alleging that Child Patient suffered left brachial plexus injury during delivery • Trial Court granted Motion for Partial Summary Judgment on Parents’ lost income and medical expenses of Child Patient based on statute of limitations</td>
<td>• § 9-3-71: Action for med mal shall be brought within 2 years after date on which injury or death arising from negligent act occurred • § 9-3-73 [Minor Exception]: Minor younger than 5 years of age has 2 years from 5th birthday to file suit • Right to recover damages for child’s medical expenses vests solely in child’s parents, while right to recover for pain and suffering vests in child</td>
<td>• There is no exception listed in statute for Parents’ claims for their Minor Child • Absent any specific exception listed in statute, Parents’ claims for Minor Child’s medical expenses and their own loss of income claims are subject to 2 year statute of limitations • Because Parents are responsible for medical expenses for their children, right to recover damages for medical expenses incurred in such treatment is vested exclusively in Minor Child’s Parents</td>
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| **MAC Dowell V. Gallant**        | • 2006-2007: Patient received treatment jointly from General Dentist and Oral Surgeon/Dentist<br><br>• 2008: Patient alleges she discovered problems with implants when she consulted 3rd Dentist<br><br>• 2010: Patient filed suit against General Dentist for improper implants, arguing statute of limitation was tolled by fraudulent concealment of his opinion that implants were improperly placed | • § 9-3-96: statute of limitation is tolled where defendant is guilty of fraud; period of limitation shall run only from time of plaintiff’s discovery of fraud, and there must be evidence that defendant intentionally withheld information as to wrongful conduct<br><br>• Statute of limitation is tolled by fraud until plaintiff either has constructive notice or actual notice of wrongful conduct  
  o Constructive notice is obtained when patient seeks medical opinion of another physician  
  o Actual notice is where second physician consulted is one who is providing services to patient jointly with defendant | • Material issues of fact remained as to whether Patient had acquired actual notice of alleged malpractice<br><br>• Patient saw 2nd Dentist following alleged malpractice but that Dentist was providing services to Plaintiff jointly with Defendant. |
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<td>POLIS V. LING 346 GA. APP. 185</td>
<td>Plaintiff filed suit on behalf of Daughter, who applied eczema cream which caused scar-like marks on legs&lt;br&gt;Trail Court granted Defendants’ Motion For Summary Judgment on grounds that claims were barred by statute of limitations</td>
<td>§ 9-3-71: Action for med mal shall be brought within 2 years after date on which injury or death arising from negligent or wrongful act or omission occurred&lt;br&gt;Law is well established that in most misdiagnosis cases, injury begins immediately when misdiagnosis is made. Thus, fact that patient does not know medical cause of her suffering does not affect applicability of § 9-3-71&lt;br&gt;Test to determine when cause of action accrued is to ascertain time when plaintiff could first have maintained her action to successful result&lt;br&gt;Supreme Court rejects argument that after initial diagnosis, doctor’s continued failure to recognize patient’s problems constitutes continuing tort</td>
<td>With respect to claims that Defendants negligently prescribed cream, relevant date is when Patient developed marks on her legs—that was date of injury&lt;br&gt;As to misdiagnosis claims, latest date on which misdiagnosis could have occurred was when Doctor told Patient marks were stretch marks typical for girls her age</td>
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| ADAMS V. MCDONALD 346 GA. APP. 464 (JUNE 21, 2018) | • Patient sued Doctor for alleged misdiagnosis of heart tumor  
• Trial Court granted Doctor’s MSJ on grounds that her claims were barred by 2 year SOL | • Generally, statute of limitations begins to run from misdiagnosis date. However, exception exists when misdiagnosed condition subsequently develops into more serious and debilitating medical condition, thus resulting in new injury which did not exist at time of original misdiagnosis  
• If plaintiff’s symptoms were symptoms of same injury that existed at time of alleged misdiagnosis, then claim is barred by statute of limitations | • There was evidence to support asymptomatic period between original misdiagnosis and Patient’s subsequent stroke. Plus, stroke resulted in brain damage which studies show was not present prior to stroke  
• There was certainly issue of fact that should be left for Jury’s determination |
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| TENET HEALTH SYSTEM V. THOMAS 304 GA. 86 (JUNE 29, 2018) | • Patient became quadriplegic after medical care at Hospital by ER Physician and Radiologist  
• Patient filed suit against Hospital for vicarious liability of these 2 Physicians  
• After 2-year statute of limitations, Trial Court granted Hospital’s Motion to Dismiss Amended Complaint for new allegations against Hospital for actions of its Nurses | • § 9-11-15(c): Relation Back Rule is based on notion that once litigation involving particular conduct or given transaction or occurrence has been instituted, parties are not entitled to protection of statute of limitations against later assertion by amendment of defenses or claims that arise out of same conduct, transaction, or occurrence as set forth in original pleading.  
• To determine relation back, Court must examine facts in original complaint and amended complaint to determine if they are close in time, place and subject matter and involve events leading up to same injury  
• Question of relation back of amendment turns on fair notice of same general fact situation from which claim arises. Strict rule of no relation back of amendment to the time of filing original complaint because of assertion of new cause of action is no longer applicable unless causes of action are not only different but arise out of wholly different facts | • Patient’s original Complaint alleged that Hospital Nurses were involved in her care and treatment at ER and that negligent acts and omissions of 2 Physicians caused her to be discharged with unstable spine that resulted in serious injury after Hospital personnel removed her cervical collar  
• New imputed liability claim in her Amended Complaint alleged that this same removal of C-collar was negligent act of Hospital Nursing Employee in violation of hospital policy. These facts occurred at same time as certain facts in original Complaint—near end of 3½ hour time frame of treatment preceding alleged injury. Thus, relevant factual allegations were quite close in time. They also occurred at exact same location, and they involved same general subject matter, i.e., negligent treatment of Patient’s unstable spine. Finally, allegations were part of same events that led up to same ultimate injury for which Patient is seeking damages  
• Fact that Patient’s Amended Complaint invoked legal theory—imputed simple negligence of Hospital Nurse who removed C-collar—that was not in original Complaint does not prevent this new claim from relating back |
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<td>EVANS v. ROCKDALE HOSPITAL 345 GA. APP. 511 (APRIL 12, 2018)</td>
<td>• Patient suffered undiagnosed ruptured brain aneurysm • Jury returned verdict that found Hospital 51% at fault, that awarded Husband post apportionment award of $33,101.95 in damages for loss of consortium, and awarded Patient $586,191.60 in damages for past medical expenses, but $0 for future medical expenses and past and future pain and suffering</td>
<td>• Question of damages is ordinarily one for jury unless damages are clearly so inadequate as to be inconsistent with preponderance of evidence • Court of Appeals has overturned verdicts where jury awarded special damages for medical expenses but virtually nothing for pain and suffering undisputedly suffered by plaintiff as result of injury</td>
<td>• Jury awarded 100% of Plaintiff’s medical expenses, and undisputed evidence shows she underwent multiple surgeries and spent months in rehab facility. It is undisputed that Plaintiff is permanently and completely disabled • Jury’s award of zero damages for pain and suffering was so clearly inadequate under evidence as to shock conscience • While Appellate Court can set aside Jury’s damage award and order new trial, in cases involving comparative negligence, new trial cannot be limited to damages and entire case must be retried</td>
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**Miscellaneous: Arbitration**

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| **Coleman v. United Health Services of Georgia**  
344 Ga. App. 682  
(FEBRUARY 23, 2018) | • Plaintiff sued for negligence relating to his care at Nursing Home  
• Plaintiff signed Advance Directive for Health Care appointing Brother-In-Law as health care agents authorized to make health care decisions for him  
• Brother-In-Law signed Plaintiff’s admission to nursing facility executing voluntary arbitration agreement  
• Facility subsequently moved to dismiss or stay lawsuit and compel arbitration  
• Trial court granted Motion | • Parties seeking arbitration bear burden of establishing that valid and enforceable arbitration agreement exists  
• § 10-6-1: Traditional principles of agency law may bind nonsignatory to arbitration agreement. This relation of principal and agent arises wherever one person, expressly or by implication, authorizes another to act for him or subsequently ratifies acts of another in his behalf  
• Execution of arbitration agreement is considered health care decision within authority of health care surrogate only when that arbitration provision is required for admission to health care facility  
• Any manifestations of implied agency or apparent authority arising only through words or acts of purported agent, and not principal, are insufficient to authorize finding that agency existed  
• Third-party beneficiary doctrine does not permit two parties to bind third—without third party’s agreement—merely by conferring benefit on third party | • As to express authority, arbitration agreement was voluntary and not precondition to admission, expedited admission, or furnishing of services. Brother-In-Law’s decision to execute arbitration agreement cannot be viewed as “a health care decision.” Advance directive, therefore, did not authorize him to sign agreement for Plaintiff  
• As to apparent authority, admissions director did not speak to Plaintiff prior to his admission or review arbitration agreement with him. And although she understood from Brother-In-Law that he had power of attorney, she did not obtain supporting documentation or confirm his authority with Patient  
• Patient was not third-party beneficiary because although he received care at Nursing Facility, arbitration provision was not part of—or required by—his admission agreement and has no bearing on Facility’s duties and obligations with respect to provision of care and treatment |
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| SKYJACK v. MOIS 346 GA. APP. 26 (MAY 31, 2018) | • Wife filed suit for wrongful death of Husband + on behalf of his Children as Representative of his Estate  
• Trial Court later allowed Bank Representative be substituted/appointed Administrator of Husband’s Estate to represent Children’s interests and as new Wrongful Death Plaintiff after Wife disappeared and Attorney was unable to locate or communicate with her  
• Attorney offered as proof that Wife was “incompetent” to serve as plaintiff: Attorney appeared as Wife’s guardian ad litem at certain juvenile court proceedings concerning her Children; Wife had been inmate in jail; and Wife received mental health treatment | • § 9-11-25(b): if party becomes incompetent, trial court may allow action to be continued by or against her representative  
• Under § 51-4-2(a), wrongful death claim may be brought by only two categories of plaintiffs: decedent's surviving spouse and, if there is no surviving spouse, decedent's children | • Record does not show that Wife had been adjudicated to be incompetent to manage her own legal affairs and appointed guardian or conservator. Further, even if Wife has become incompetent during pendency of action, record does not show that Bank Representative is her representative with authority to continue prosecuting pending claims on her behalf, notwithstanding that Bank Representative is Administrator of Husband’s estate  
• Here, it is undisputed that Wife is decedent's surviving spouse, so § 51-4-2(a) provides no authority for substitution of Bank Representative as Administrator of Husband’s estate to prosecute Wife’s wrongful death claim  
/  
• That being said, pending action consists of more than wrongful death claim—Wife has asserted claims as Representative of estate for products liability, negligence, and failure to warn. As Administrator of estate, Bank Representative is entitled to prosecute all claims of estate, and therefore is properly substituted for Wife as party-plaintiff in that capacity. But, addition of Bank Representative as party-plaintiff in that capacity is no reason to remove Wife as plaintiff as to claims that belong to her |
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<td><strong>BIBBS v. TOYOTA MOTOR COMPANY</strong>&lt;br&gt;304 GA. 68&lt;br&gt;(JUNE 18, 2018)</td>
<td>• Wife was injured in 1992 car accident that let her in coma; Husband filed personal injury suit on her behalf few months later&lt;br&gt;• Jury returned verdict for Plaintiff; Toyota paid under a high-low agreement, which excluded from release any claim for wrongful death&lt;br&gt;• 20 years later, Plaintiff died; Husband and Children filed wrongful death suit against Toyota&lt;br&gt;• Toyota filed MSJ, arguing that release in personal injury suit precluded wrongful death suit from recovering beyond funeral expenses</td>
<td>• § 51-4-2(a) provides that surviving spouse or child may recover for homicide of spouse or parent full value of life of decedent&lt;br&gt;• Statute confers right of action on survivors of decedent, but only to recover damages for injuries suffered by decedent—as measured from her perspective—not damages for separate-but-related loss sustained by survivors themselves&lt;br&gt;• Wrongful death claims are wholly derivative of personal injury claims, and thus all defenses which could have been made against decedent also bind beneficiaries when they pursue wrongful death claim</td>
<td>• Because wrongful death claim is wholly derivative of Wife’s personal injury claim, Plaintiffs can only recover those damages that Wife herself could have recovered if she had asserted claim herself&lt;br&gt;• It is undisputed that Wife fully settled her personal injury claim and released Toyota from all damages from car accident&lt;br&gt;• Wife could not recover full value of her life as measured from date of her injury. Having fully settled her personal injury suit, Wife is presumed to have recovered damages she was entitled to receive at that time. She was fully compensated for fact that she was, and would remain for rest of her life, totally and permanently disabled. She was made whole and could no longer recover for economic and non-economic damages stemming from her disability. To hold otherwise would be to allow impermissible double recovery&lt;br&gt;• Full measure of Wife’s economic damages was recoverable at time of her personal injury case, and so there are no economic damages left to recover in wrongful death. With respect to non-economic damages, on the other hand, we cannot say there is no difference in value between living in permanent coma and not living at all. Put simply, we cannot say Wife’s life in coma had zero monetary value. Whatever residual value, if any, of Wife’s life to her while she was in coma is question is properly litigated</td>
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<td>GORDON V. DENNIS</td>
<td>• Plaintiff’s Motion for New Trial was denied &lt;br&gt;• Trial Transcript was not filed until 7 months after filing deadline &lt;br&gt;• Emails and affidavits were presented showing that Court Reporter indicated she could not meet various deadlines</td>
<td>• § 5-6-48(c): trial court may, after notice and opportunity for hearing, order that appeal be dismissed where there has been unreasonable delay in filing of transcript and it is shown that delay was inexcusable and was caused by such party &lt;br&gt;• Party seeking dismissal for failure to file transcript must show that delay was unreasonable, inexcusable, and caused by appellants themselves &lt;br&gt;• Delay in excess of 30 days is prima facie unreasonable and inexcusable, but this presumption is subject to rebuttal if party comes forward with evidence to show that delay was neither unreasonable nor inexcusable &lt;br&gt;• Appellants are not accountable for delays caused by clerks of court or court reporters after transcript has been ordered properly; appellants are held accountable only for delays that they cause</td>
<td>• Because there was some evidence that delay in filing of Transcript was excusable and not caused by Appellant, Trial Court did not abuse its discretion in denying Appellee’s Motion To Dismiss Appeal &lt;br&gt;• There was some evidence that delay in filing of Transcript was caused by backlog of Court Reporter and, therefore, was excusable and not caused by Appellant</td>
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Kristin L. Pierson

**PROFESSIONAL PROFILE**

Kristin L. Pierson is a partner in the firm. She received her law degree from the Charleston School of Law in Charleston, South Carolina, where she founded the Health Law & Bioethics Society and served as its President, creating the law school’s annual Bioethics Symposium. Kristin also served as a member of the Moot Court Board and the Charleston Law Review, and she worked with the Medical University of South Carolina to establish a collaborative teaching relationship between the medical school and the law school.

Kristin received her undergraduate degree in Health Law & Bioethics from Davidson College, where she graduated Phi Beta Kappa. While at Davidson, Kristin co-founded Davidson’s Bioethics Society and started The Ethical View, a bioethics publication of the Medical Humanities Department. She served on Davidson’s Medical Humanities Advisory Council to Ethics Committees and its Human Subjects Institutional Review Board. She also sat on the Ethics Committee at Carolinas Medical Center in Charlotte, North Carolina as a consultant and conducted an extensive two-year clinical internship in the Level 1 hospital’s Trauma Intensive Care Unit and Emergency Department.

Prior to joining the firm, Kristin served as Trauma & Risk Management Research Specialist at Lake Norman Regional Medical Center in North Carolina and then as Research Coordinator at Emory University School of Medicine, where she conducted neurosurgery research on traumatically brain-injured patients at Grady Memorial Hospital under then–Chief of Neurosurgery, Dr. Odette Harris.

Kristin was born in Baton Rouge, Louisiana and moved to Atlanta in 1996. She enjoys running and cooking Louisiana Cajun and Creole favorites, like gumbo, jambalaya, and etouffé.

**PRACTICE GROUPS**

**Professional Negligence / Medical Malpractice**

Kristin represents hospitals, physician, nurses, and other allied health care professionals in medical malpractice and intentional tort lawsuits, as well as in pre-litigation medical malpractice matters.

**EDUCATION**

- Juris Doctor, 2007, Charleston School of Law
- Bachelor of Arts, 2002, Davidson College

**ADMITTED**

- Georgia, 2007
- Court of Appeals of Georgia
- Supreme Court of Georgia
- Northern District of Georgia

**MEMBERSHIPS**

- DeKalb County Bar Association
- Georgia Defense Lawyers Association
- Georgia Society for Healthcare Risk Management
- State Bar of Georgia
PUBLICATIONS

- Co-author, Amicus Curiae Brief of Georgia Defense Lawyers Association in Baker v. Wellstar in the Georgia Court of Appeals advocating for the ability of defense attorneys to communicate ex parte with a plaintiff’s treating healthcare providers (November 20, 2010)
- “Unable to Bring Expert Witnesses Live at Trial? No Grounds for a Mistrial,” The Voice, Defense Research Institute, Vol. 8, Issue 23 (June 10, 2009)

SPEAKING

- “Update on the Law”, Annual Medical Malpractice Liability seminars, Institute of Continuing Legal Education in Georgia
- Addressed Georgia licensed private detectives on best practice surveillance techniques, professionalism in litigation, and testifying at trial
- Addressed Labor & Delivery nursing staff and medical staff in hospital mock trial involving birth trauma litigation to demonstrate charting/documentation, chain of command, and electronic fetal monitoring issues common to litigation

REPRESENTATIVE CASES

- Three-week medical malpractice trial resulting in defense verdict involving allegations against PACU and medical-surgical nursing staff related to compartment syndrome following wrist surgery.
- Secured dismissal of hospital and hospital’s head of security from lawsuit involving claims of false arrest and intentional infliction of emotional distress by former employee related to patient identity fraud activities.
- Secured defense verdict for hospital and hospitalist physician following two-week trial involving claims that physician inappropriately managed massive pulmonary embolus patient’s intravenous Heparin following administration of tissue plasminogen activator (tPA) and decision not to place inferior vena cava (IVC) filter, where patient expired.
- Obtained exclusion of plaintiff’s life care planner and economist during medical malpractice trial for failure to satisfy expert qualifications and for unreliable expert analyses, resulting in inability of plaintiff’s counsel to support any claim for economic damages at trial.
- Secured dismissal of plaintiff’s appeal from a jury verdict in favor of hospital and its nursing staff which lasted over 2 years due to plaintiff’s failure to follow Georgia procedural appeals rules.
- Obtained defense verdict on behalf of hospital and it Labor and Delivery nurses in a 2-week medical malpractice/birth trauma involving allegations of: failure to insist that obstetrician come to the bedside to evaluate the patient; failure to notify obstetrician when Pitocin restarted following a deceleration in the fetal heart tones; and failure to insist that obstetrician perform Cesarean section.
- Obtained defense verdict on behalf of hospital and its emergency medicine physician in a two-week medical malpractice trial involving allegations of physicians: failure to consider vertebral artery dissection, failure to obtain a neurology consult, and failure to obtain neuroimaging studies on an 18-year-old patient who became unresponsive following an assault, who experienced a prolonged period of inadequate oxygenation prior to arrival to the Emergency Room, and who was found to be 11½ weeks pregnant. Also secured defense verdict on allegations of in utero injuries to the fetus.
1:00 UPDATE ON SOCIAL MEDIA, DIGITAL EVIDENCE AND TECHNOLOGY CONSIDERATIONS
Alison L. Currie, FisherBroyles LLP, Atlanta
ATTORNEY PANEL: THE NUTS AND BOLTS OF A SUCCESSFUL AND SUSTAINABLE MEDICAL MALPRACTICE PRACTICE

Moderators:
Lee S. Atkinson
Tracy M. Baker
Lindsay A. Forlines
Evan W. Jones

Panelists:
M. Scott Bailey, Huff Powell & Bailey LLC, Atlanta, Columbus, and Gainesville
Anna B. Fretwell, Huff Powell & Bailey LLC, Atlanta, Columbus, and Gainesville
Brandon R. Taylor, Webb & Taylor LLC, Atlanta and Peachtree City
M. Paul Reynolds, Houck | Reynolds, LLC, Atlanta
Lee Atkinson

PROFESSIONAL PROFILE
Lee is a shareholder at Blasingame, Burch, Garrard & Ashley, PC, and graduate of the University of North Carolina - Chapel Hill (BA, English) and University of Georgia (J.D.). He specializes in representing patients in medical malpractice actions, but his practices encompasses all types of catastrophic injury and wrongful death actions.
Tracy M. Baker

PROFESSIONAL PROFILE
Tracy has been defending physicians and healthcare providers against alleged professional negligence since she began practicing law in 2006. Before joining Weathington McGrew, Tracy began her legal career at the medical malpractice defense firm of Forrester & Brim in Gainesville, Georgia. There she gained considerable experience successfully representing medical professionals throughout the litigation process, including at trial and at the appellate level.

Tracy has successfully tried dozens of cases on behalf of physicians and medical providers. Tracy also represents physicians in pre-litigation claims and non-litigation matters, such as investigations by the Georgia Composite Medical Board.

PRACTICE AREAS
- Medical Malpractice Defense
- General Liability Defense

BAR & COURT ADMISSIONS
- Georgia, 2006
- Georgia Supreme Court, 2009
- Georgia Court of Appeals, 2010

EDUCATION
- Mercer University, Walter F. George School of Law, J.D., 2006
- University of Georgia, A.B.J., 2003, magna cum laude
- University of Georgia, B.A., 2003, magna cum laude

REPRESENTATIVE EXPERIENCE
- Over 10 years of experience defending medical malpractice lawsuits involving nearly every major medical specialty
- Defense of physicians, nurses and other medical providers at Atlanta-based hospital
- Defense of orthopedic surgeons at Atlanta-based orthopaedics group
- Defense of surgeons in a variety of specialties including general surgery, neurosurgery, spine surgery, and obstetrics and gynecological surgery in lawsuits, involving a wide range of catastrophic injury and death cases
- Defense of anesthesiologists, emergency medicine physicians, pediatricians and hospitalists in lawsuits involving a wide range of catastrophic injury and death cases
- Trial of dozens of professional liability actions with a defense verdict
- Appellate counsel for numerous defense clients with several published appellate decisions
- Represented physicians and other healthcare providers in peer-review proceedings and in hearings before the Composite State Board of Medical Examiners

PROFESSIONAL & COMMUNITY ACTIVITIES
- State Bar of Georgia, member
- Atlanta Bar Association, member
- Georgia Society of Healthcare Risk Managers, member
- UGA Alumni Association, member
- Touchdown Club of Atlanta, member
- HERO Foundation, member and volunteer
- ICLE, State Bar of Georgia, Medical Malpractice Liability Institute, Co-Chair (2017)
Lindsay A. Forlines

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

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

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

PRACTICE AREAS
- Medical Malpractice Defense
- General Liability Defense
- BAR & COURT ADMISSIONS
- Georgia, 2008
- Georgia Supreme Court, 2008
- Georgia Court of Appeals, 2008
- Northern District of Georgia, 2008

EDUCATION
- University of Georgia School of Law, J.D., 2008
- University of Georgia, B.A., 2003, magna cum laude

PROFESSIONAL & COMMUNITY ACTIVITIES
- State Bar of Georgia, Member
- Dekalb Bar Association, Member
- Georgia Defense Lawyers Association, Member
- City of Avondale Estates, Elected Representative (2012-2015)
- Dekalb Municipal Association, President (2013)
- Georgia Association for Women Lawyers Leadership Academy, Speaker/Panelist
- Resurgens Orthopaedic Back to Basics Conference, Speaker (2017)
- ICLE, State Bar of Georgia, Medical Malpractice Liability Institute, Co-Chair (2017)
- National High School Mock Trial Competition, volunteer judge (2017)
Evan W. Jones

SHAREHOLDER
At Blasingame, Burch, Garrard & Ashley, P.C., Athens personal injury attorney Evan W. Jones focuses primarily on catastrophic injury cases, including those resulting from medical malpractice and nursing home negligence and/or abuse. Throughout his years in practice, he has successfully obtained substantial settlements and jury verdicts on behalf of his clients, totaling nearly $55 million.

Evan grew up on St. Simons Island in Georgia. He attended the University of Georgia where he obtained his A.B. with general honors in 1988, followed by the University of Georgia Joseph Henry Lumpkin School of Law. He graduated law school with his J.D. in 1991 before going on to serve in the U.S. Army Judge Advocate General’s Corps where he gained valuable experience as a prosecutor in both military and federal courts. In the JACG, he served as trial counsel and as a Special Assistant United States Attorney for the 7th Infantry Division (Light) in Monterey, California. He also served as Trial Counsel for the 3/325th Airborne Infantry Regiment and the 173rd Airborne Brigade in Vicenza, Italy.

For a number of years, he served on the defense side of personal injury claims, representing hospitals, nursing homes, and physicians in cases involved medical malpractice claims. After defending these individuals and entities from 1995 to 2003, Evan ultimately decided to switch his practice to plaintiffs’ representation and litigation. Now, he works on behalf of injured victims who were harmed by medical institutions and professionals. His experience on both sides allows him a greater knowledge of how the process works and what tactics the defense will likely employ. He uses this knowledge to better fight for his clients’ rights.

Alongside co-counsel, Evan was instrumental in obtaining one of the largest nursing home arbitration verdicts in Georgia to this day. He also served as the lead counsel in Peterson v. Reeves, 315 Ga. App. 370 (2012), cert denied, 727 S.E. 2d 171. The case became a defining example of psychiatrists’ duties to treat mentally ill patients under the standard of care in a voluntary outpatient setting, and was even cited in courts throughout the nation, as well as in scholarly articles regarding the rights of the mentally ill.

Evan’s exceptional work has earned him recognition in numerous nationwide publications and accolades from multiple prestigious organizations, including Georgia Super Lawyers®. He is AV® Rated by Martindale-Hubbell®, the highest peer review rating available, and is listed in the Bar Register of Preeminent Lawyers. Additionally, he is a member of the Georgia Trial Lawyers Association, the Southern Trial Lawyers Association, and the American Association of Justice. Evan has also been included in the “Who’s Who” list in American Law and is frequently invited to give presentations on wrongful death cases and medical malpractice in legal seminars.

Along with his wife, Andrea, to whom he has been married for over 25 years, Evan has three children, Connor, Sarah Kate, and Jake. Connor was a member of the UGA Baseball Team, as well as a three-time member of the SEC Academic Honor Roll before being drafted by the New York Yankees as a pitcher. Evan’s daughter, Sarah Kate, is a UGA student and member of ZTA and his youngest son, Jake, is a high school student at Prince Avenue Christian and desires to become an attorney like his dad one day.

EDUCATION
• University of Georgia: A.B., 1988
• University of Georgia Joseph Henry Lumpkin School of Law: J.D., 1991
Evan W. Jones, continued

AWARDS AND ACCOLADES
• Georgia Super Lawyers®
• AV® Rated by Martindale-Hubbell®
• Listed in the Bar Register of Preeminent Lawyers
• Georgia Trial Lawyers Association
• Southern Trial Lawyers Association
• American Association of Justice
• “Who’s Who” list in American Law

PROFESSIONAL MEMBERSHIPS
• Georgia Trial Lawyers Association, “Champions” Member, Legislative Committee, Medical Malpractice Committee
• American Association for Justice, Medical Malpractice Subsection, Nursing Home Subsection
• Southern Trial Lawyers Association
• Lawyers Club of Atlanta
• Atlanta Bar Association
• Fellow, Litigation Counsel of America
• State Bar of Georgia
• Georgia Court of Appeals
• Georgia Supreme Court
• Georgia Superior Courts
• U.S. District Court for the Northern District of Georgia
• U.S. District Court for the Northern District of California
• U.S. Court of Military Appeals
M. Scott Bailey

A founding partner of Huff, Powell & Bailey, Scott has a dynamic litigation practice focusing on the defense of healthcare providers and institutions, as well as product and device manufacturers. He was formerly with Alston & Bird in Atlanta where he was a member of several national litigation teams defending clients in mass tort, multidistrict, and class action litigation. Scott has tried over 40 cases as lead counsel, all to defense or directed verdicts. Featured as an Atlanta Magazine SuperLawyers Rising Star for 2005 – 2006, Scott has been a Georgia SuperLawyer for the last eight years. He is also a charter fellow of the Litigation Counsel of America, a trial lawyer honorary society. He was recognized in 2009 as a member of the Lexis-Nexis Bar Registry of Preeminent Lawyers and is a recent invited member of the Professional Liability Defense Foundation. In 2013 he was privileged to be elected as a member of the American Board of Trial Advocates.

REPRESENTATIVE CASES/EXPERIENCE
- Participated in all phases of litigation, including extensive trial and appellate experience
- Successful resolution of numerous cases at summary judgment
- Defense verdicts in multiple cases involving death and catastrophic lifelong injuries
- Represented physicians and mid-level providers for investigations by and complaints made to the Georgia Composite Medical Board

EDUCATION
- B.A., Journalism, University of Georgia (1990)
- J.D., Georgia State University (1996)
Anna Burdeshaw Fretwell

PROFESSIONAL PROFILE
Anna has more than 18 years of experience defending physicians, hospitals, nurse midwives, nurses, and other healthcare providers and institutions against claims of malpractice and related allegations, such as those involving consent, credentialing, and billing. Anna defended her first medical malpractice case at trial in 2000 and since then has tried approximately 30 cases. She has successfully litigated several matters in the Georgia appellate courts, as well. In addition to her work handling traditional civil litigation, Anna also represents physicians and hospitals in administrative matters, including proceedings involving the State Medical Board and investigations and audits conducted by Medicare, Medicaid, and related entities.

In addition to her active litigation practice, Anna currently serves as the firm’s managing partner.

REPRESENTATIVE CASES/EXPERIENCE
- Defense verdicts in multiple cases involving catastrophic birth injuries.
- Defense verdicts in numerous cases involving death and serious lifelong post-surgical injuries, including permanent neurologic injury, extensive scarring after plastic surgery, and permanent pain.
- Extensive experience in cases involving obstetrics and gynecology, including defense of birth asphyxia, shoulder dystocia, reproductive medicine, and gynecologic surgery cases.
- Particular expertise in ophthalmology cases, including defense of more than 10 ophthalmologists throughout the state of Georgia against allegations involving LASIK, cataract surgery, macular degenerative, and retinal detachment.

EDUCATION
- B.A., Political Science, summa cum laude, University of North Carolina – Chapel Hill (1995)
- J.D., summa cum laude, University of Georgia (1998)
Brandon R. Taylor

PROFESSIONAL PROFILE
Brandon's practice focuses primarily on medical negligence, wrongful death and personal injury litigation. A mainstay of his education, experience and career has been a concentration on litigation. While in law school, he clerked with the United States Attorney's Office, helping to bring civil lawsuits against individuals and businesses defrauding the government. Since law school, he has handled hundreds of personal injury cases and works closely with Jim Webb in the areas of medical and professional negligence and personal injury. Brandon is currently a Professor of Litigation at Georgia State University College of Law.

Prior to law school, Brandon represented over 150 Georgia cities and counties, negotiating telecommunications and cable franchise agreements and advising municipalities and counties on rights-of-way management and policy.

He lives within golf-cart-distance of the Firm's office in Peachtree City.

PRACTICE AREAS
• Personal Injury
• Medical Malpractice

ADMITTED
Georgia, 2006. Admitted in all Georgia State and Superior Courts, Georgia Court of Appeals and the United States District Court for the Northern and Middle Districts.

EDUCATION
• Georgia State University College of Law - Juris Doctorate
• Georgia State University Andrew Young School of Policy Studies - Master of Public Administration
• Florida International University - Bachelor of Business Administration, Management.

MEMBERSHIPS
• Adjunct Professor of Litigation at Georgia State University College of Law
• Fayette County Bar Association
• State Bar of Georgia
• Georgia Trial Lawyers Association
• American Bar Association
• Government Affairs Committee, Fayette County Chamber of Commerce
• Vice Chairman, Fayette County Republican Party - Chairman of Rules Committee
• Coach, Georgia State University College of Trial Mock Trial Program
• Coach, Northgate High School Mock Trial Program, 2005-2008
• Coach, McIntosh High School Mock Trial Program, 2009
• National Association of Telecommunications Officers and Advisors, 2000-2004.

ACCOMPLISHMENTS
• Law Clerk, Affirmative Civil Litigation Division, United States Attorney's Office, Northern District of Georgia, 2004-2005
• National Champion and Co-"Best Advocate:" William W. Daniel National Mock Trial Competition, 2004
• Pupil, Bleckley Inn of Court, 2004-2005
• Vice President, Student Trial Lawyers Association, 2004-2005
• CALI Award Winner: Litigation, 2004
M. Paul Reynolds

PROFESSIONAL PROFILE
Paul was born in Marietta, Georgia and grew up in Atlanta graduating from Pace Academy High School in 1993. In 1997, Paul received his undergraduate degree in Political Science from the University of the South in Sewanee, TN. While at the University of the South Paul was a varsity swimmer and a member of the Sigma Alpha Epsilon fraternity.

After completing his undergraduate education, Paul relocated to Washington, DC, where he began his career as an intern for Congressman John L. Mica of the 7th district of Florida. Paul was quickly moved to legislative staff for Congressman Mica where he was responsible for national legislative issues ranging from immigration policy to welfare reform. He returned to Atlanta in 2000 to begin his legal education at Georgia State University.

Paul received his law degree, cum laude, from Georgia State University College of Law in 2003. Upon completion of law school, Paul accepted a position with a major Atlanta law firm representing clients throughout the Southeastern United States in commercial real estate matters. From there, Paul moved to a litigation focused practice where he has successfully represented clients at the trial court level in state and federal courts throughout the State of Georgia. Paul has also appeared on behalf of numerous clients before the Georgia Court of Appeals, the Georgia Supreme Court, and the Eleventh Circuit Court of Appeals.

Prior to joining Houck-Reynolds, Paul worked for one of Atlanta’s preeminent medical malpractice defense firms primarily representing physicians, hospitals, and other healthcare providers in actions alleging professional negligence. Paul has been named a Georgia SuperLawyers for 2016 and a Rising Star for 2011 to 2015.

Paul now lives near historic East Lake Golf Course with his wife, Cami, and three kids, Kate and Elliot, and Sam. In his spare time, Paul enjoys playing golf, tennis, and soccer and spending time with his wife and daughters. He also attends Holy Innocents Church in Sandy Springs.

BAR ADMISSIONS
• Georgia, 2003
• Georgia Court of Appeals
• Supreme Court of Georgia
• U.S. District Court Northern District of Georgia
• U.S. District Court Middle District of Georgia
• U.S. Court of Appeals 11th Circuit

EDUCATION
• Georgia State University College of Law, Atlanta, Georgia
  J.D. cum laude - 2003
• University of the South, Sewanee, Tennessee
  B.A. - 1997
  Major: Political Science
3:30 PHYSICIAN PERSPECTIVE
Dr. Douglas W. Lundy, MD, MBA, Resurgens Orthopaedics, Atlanta
Doug Lundy is an orthopaedic trauma surgeon at Resurgens Orthopaedics in Marietta, Georgia specializing in the care of patients with multiple injuries and complex fractures. He is co-President of Resurgens Orthopaedics; one of the largest orthopaedic practices in the country. He practices at WellStar Kennestone Hospital where he is co-Chair of the WellStar Musculoskeletal Service Line and past-Chief of Surgery. He is actively involved in many national and state surgical and orthopaedic societies. He is a Director of the American Board of Orthopaedic Surgery since 2012 and serves as President-elect and past-Chair of the Oral Examination Committee. He is the Treasurer of the Political Action Committee of the American Association of Orthopaedic Surgeons (AAOS), and previously a member of the AAOS Council on Advocacy, Communications Cabinet and as past-chairman of the AAOS Medical Liability Committee. He is the Chief Financial Officer-Elect for the Orthopaedic Trauma Association (OTA). He previously served on the OTA Board of Directors as a Member-at Large leading the effort of the OTA to produce Performance Measures with the AAOS, and also serves as chair of the OTA Health Policy Committee and was on the Board of Specialty Societies. He serves on the American Orthopaedic Association (AOA) Critical Issues Committee. He served on the American College of Surgeon’s Orthopaedic Advisory Committee and the ACS Committee on Trauma. He is a past-President of the Georgia Orthopaedic Society and formerly served as Legislative Director. He also serves as a part-time Clinical Assistant Professor of Orthopaedic Surgery, Emory University School of Medicine.

He graduated from North Georgia College and the Medical College of Georgia, and did his post-graduate training at Georgia Baptist and Vanderbilt University Medical Center. He received his Masters of Business Administration from Auburn University in 2014. He is very involved in foreign medical missions in Eastern Europe, Haiti, Asia and especially sub-Saharan Africa through the Christian Medical and Dental Association and the Pan-African Academy of Christian Surgeons. He is an Overseas Fellow of the College of Surgery of East, Central and Southern Africa, and he participates in their oral examinations. He has authored thirty-five manuscripts on orthopaedic surgery and has presented topics on orthopaedic trauma over 100 times both in the United States and abroad.

He is an alumnus of the 2010 class of Leadership Atlanta, and the 2017 class of Leadership Cobb. He was selected as one of the “Top Doctors in Atlanta” by Atlanta Magazine in 2011, 2012, 2013, 2014, 2015, 2016 and 2017. Doug is very interested in political advocacy to improve the care of injured patients. He has remained active in the Sigma Chi Fraternity at a national level where in 2011 he was given the lifetime achievement award of Significant Sig, and he assists the undergraduate chapters at Emory and North Georgia College. Doug, his wife Peggy, and their two sons reside in Mableton, Georgia.
FRIDAY
NOVEMBER 2, 2018

8:00  PHYSICIAN PERSPECTIVE /EVIDENCE-BASED CONSIDERATIONS IN MEDICINE
Stephen Colucciello, M.D., Professor Emergency Medicine, University of North Carolina Charlotte Campus, Charlotte, NC
Stephen Colucciello, M.D.

PROFESSIONAL PROFILE
Dr. Colucciello is a Professor of Emergency Medicine at University of North Carolina Medical School, Charlotte Campus and the Vice Chair of Emergency Medicine at Carolinas Medical Center.

Dr. Colucciello has attained extensive academic achievements. He was the founder and editor-in-chief of an emergency medicine journal as well as the editor or co-editor of eight emergency medicine textbooks. Dr. Colucciello is editor, author or co-author of over 200 emergency medicine publications and has given more than 300 national and international presentations. He won a national award for presentations in emergency medicine and was named one of the “Best Doctors in America” 2010. Dr. Colucciello is a past member of the American College of Emergency Physicians Clinical Policy Committee as well as Past Chair of the American College of Emergency Practitioners Clinical Policy Committee on Syncope.

His many interests include use of evidence-based algorithms to improve care and reduce medical-legal risk in the ED.
9:00  THE NEW OPIATE DATABASE AND ITS LEGAL IMPLICATIONS
Heather H. Miller, Weathington McGrew PC, Atlanta
CHANGES TO THE PRESCRIPTION DRUG MONITORING PROGRAM (PDMP):
WHAT YOU NEED TO KNOW EFFECTIVE JULY 1, 2018

Presented by: Heather Horan Miller
Partner, Weathington McGrew, PC
(404) 524-1600

HOUSE BILL 249 CREATED PDMP
MAY 4, 2017:
A BILL DESIGNED TO ADDRESS OPIOID ABUSE IN GA
IMPORTANT DATES/DEADLINES:

■ Effective July 1, 2017- Dispensers Required to Enter RX Information on all Schedule II, III, IV, V into PDMP database
■ By January 1, 2018, all Prescribers Must Be Registered in the PDMP
■ Beginning July 1, 2018- All Prescribers Required to Check PDMP Before Prescribing Schedule II opiate drugs or benzodiazepines

Checking the PDMP **Required** if:

■ You are prescribing for the 1\textsuperscript{st} time
■ Every 90 days thereafter
EXEMPTIONS:

■ NO MORE THAN 3 DAY SUPPLY/ 26 PILLS OR LESS
■ PT IN HOSPITAL/NURSING FACILITY/HOSPICE (DRUGS ADMINISTERED IN FACILITY)
■ PT HAD OUTPATIENT SURGERY/ 10 DAY SUPPLY/40 PILL MAX
■ TERMINAL ILLNESS OR CANCER TX

WHAT IS REQUIRED OF YOU NOW?

■ 1. Register at https://Georgia.pmpaware.net/login
■ 2. Determine delegate if using
■ 3. Begin checking PDMP before prescribing Schedule II drugs unless exception above applies
4. Chart that PDMP was consulted prior to prescribing and note WHO conducted the patient search.

Delegates:

- Prescriber may delegate 2 members of staff - they also must register
- If at Hospital/Surgery Center - 2 employees per shift may be delegates
What is seen when accessing PDMP?

- "My Dashboard".. First screen after logging in:
  Announcements, Your recent searches, Patient Alerts
Patient Request/Search:

- Enter patient name/info
- Can search RX fill dates
- Can check several other states (if state has entered into agreement with GA)
- Will find patient’s RX history, including who prescribed, what was prescribed, where filled.

![Patient Request Screen](image-url)
MyRX

- You can search by DEA number for summary of your RX

- What if I see that a patient is receiving prescriptions for same substance I am about to prescribe?
- What do I do if I think a patient is doctor shopping?
What if I do not use the GA PDMP?

- Does not subject you to civil/criminal penalties
- Can be disciplined by licensing board (GA Composite Medical Board)
- Penalties unknown at this time

Potential problems and Helpful Takeaways:

- Delegate issues
- EMR issues
- One more thing on your plate!
- Medical malpractice
Need assistance?

- Technical Questions re: PDMP: 1-855-5GA-4PMP
- Administrative Questions: GA Drugs and Narcotics Agency 404-656-5102
Heather Horan Miller

PROFESSIONAL PROFILE
A fourth generation attorney, Heather began her legal career in Georgia, after receiving her law degree from the University of Mississippi in 2001. Heather has a diverse litigation practice, focusing on Health Care Litigation and General Liability.

In her health care practice, Heather represents physicians, nurses, physician’s groups and hospitals in medical malpractice claims. Within the area of general liability, Heather defends property owners and management companies in premises liability claims and provides proactive counseling on a broad range of risk management issues. She has extensive experience defending property owners against lawsuits arising from criminal acts committed by third parties. In addition, Heather has experience in representing clients in products liability and automobile liability claims. She has vast experience in representing clients at mediation and has tried numerous cases throughout Georgia.

PRACTICE AREAS
• Health Care Litigation
• General Liability

BAR & COURT ADMISSIONS
• Georgia, 2001
• U.S. District Court- Northern and Middle District Courts of Georgia
• Georgia State and Superior Courts; Georgia Court of Appeals; Georgia Supreme Court
• Atlanta Bar Association
• DeKalb Bar Association

EDUCATION
• University of Mississippi, J.D., 2001
• University of Mississippi, B.S., 1997

AWARDS & RECOGNITION
• Martindale Hubbell® AV Preeminent rated
• Super Lawyer Magazine’s Georgia Super Lawyer (2017, 2018)
• Georgia Trend Magazine’s Legal Elite®, General Practice/Trial Law (2011)

PROFESSIONAL & COMMUNITY ACTIVITIES
• Georgia Society for Hospital Risk Management (GSHRM), Member
• Georgia Defense Lawyers Association, Member
• Atlanta Beltline Partnership Board (AB67)
• Junior League of Atlanta, Member
• Past Chair of the Board, Women in the Profession Section
• Member, Litigation Section, Atlanta Bar
• University of Mississippi, Bessie Young Council, member
REPRESENTATIVE EXPERIENCE
Represented a neonatologist in a jury trial in Fulton County. The physician was sued for medical negligence alleging that there was a breach of the standard of care. Plaintiff contended that physician failed to properly care for a baby born with respiratory distress syndrome and demanded $30million at trial. Jury found in favor of the Defendant physician, and a defense verdict was entered.

Represented a Urogynecologist who was sued for performing a hysterectomy and saccocolpopexy that Plaintiff claimed were not medically indicated. Several other Defendants were involved. Jury found in favor of all Defendant physicians.

Represented two Hematologists who were sued for allegedly failing to properly manage Plaintiff’s Coumadin levels. Jury found in favor of both Hematologists and a defense verdict was entered.

Represented a property management company at trial in a lawsuit by a tenant for mold exposure in the State Court of Clayton County. Obtained a directed verdict for management company during trial.

Represented a sub-contractor client in a subrogation action in a case pending in Gilmer County Superior Court. Plaintiff sought to recover amounts paid to its insured following a house fire, under the theory of negligent misrepresentation. Obtained a summary judgment for client, with the Court ruling that Plaintiff failed to meet the criteria required in order to demonstrate negligent misrepresentation in Georgia.

Represented an OB/GYN in a medical malpractice suit filed in the State Court of Fulton County. Plaintiff alleged that during a hysterectomy, a ureter injury occurred which went undetected or repaired by the defendant physician. After deliberating for less than one hour, the jury returned a verdict in favor of the physician.

Obtained summary judgment in Chatham County in a premises liability lawsuit on behalf of a client, a nationwide recycling company. The Court found that the Plaintiff assumed the risk of his actions, which warranted summary adjudication.

Obtained a Dismissal for a client, a cardiologist, in the Superior Court of Cherokee County. On behalf of the physician, it was argued that Plaintiff’s alleged battery claim was actually a medical malpractice claim, requiring an expert affidavit, pursuant to O.C.G.A. § 9-11-9.1. As Plaintiff failed to obtain an expert, and the statute of limitations had expired, the Court agreed and granted the Dismissal.
10:00  EVIDENTIARY PRACTICE TIPS AND POINTERS

*Ronald L. Carlson*, Professor, Fuller E. Callaway Chair of Law Emeritus, School of Law, University of Georgia, Athens

*Michael S. Carlson*, Deputy Chief Assistant District Attorney, Appeals and Gang Prosecution Units, Cobb County District Attorney’s Office, Marietta
Carlsons on Evidence
EVIDENTIAL PRACTICE TIPS AND POINTERS
Important Applications and Distinctions Under the Georgia and Federal Rules of Evidence
34th Annual Medical Malpractice Liability Institute
FRIDAY • NOVEMBER 2, 2018
Ritz-Carlton,
Amelia Island, Florida

Today’s Presentation
Speaker Introductions
**Carlsons on Evidence**

**Speaker Introductions**

- **Presenters**
  - **Ronald L. Carlson**
    - Fuller E. Callaway Professor Emeritus, University of Georgia School of Law
    - 15 books on evidence, trial practice and criminal procedure
    - Article cited in Advisory Committee Notes of FRE's
  - **Michael Scott Carlson**
    - Deputy Chief Assistant District Attorney, Cobb Judicial Circuit
    - Judge, Georgia Court Martial Review Panel
    - Successfully jury tried and Supreme Court argued murder cases under Georgia’ New Evidence Code

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**Carlsons on Evidence**


- “...Also participating in plaintiffs' representation was Professor Ronald Carlson of Washington University in St. Louis, Missouri....but that organization requested his participation in the litigation due to his expertise with the Federal Rules of Evidence and his trial experience...A close review of those records, his role in the litigation, and the quality and nature of his work product convinces the Court that the time claimed and expended by Prof. Carlson is reasonable for a case of this type. Defendants' contention that Prof. Carlson represented a luxury on plaintiffs' trial team which defendants should not have to pay for fails to comprehend the importance and uniqueness of Prof. Carlson's actual contribution to preparation and trial.”
Carlsons on Evidence


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Carlsons on Evidence

Important Applications and Distinctions Under the Georgia and Federal Rules of Evidence

34th Annual Medical Malpractice Liability Institute
FRIDAY • NOVEMBER 2, 2018

Today’s Program
*Presentation and Materials*
Carlsons on Evidence
Presentation and Materials

• Evidence Program Goals
  1. Further Develop “Code Wide” Approach
  2. Underscore Fundamental Principles of Interpretation
  3. Analyze and Consider Specific Applications

Carlsons on Evidence
Presentation and Materials

• Will use experience, scholarship, and mock case scenarios as a vehicle to illustrate rules and cases in context
• Consider objections
• Materials and discussion will feature New GRE and FRE authority
• Where no new GA case available, focus placed on relevant federal and related state authority
• Using actual quotes from cases
• Please hold questions until presentation is concluded
**Carlson on Evidence**
Presentation and Materials

- Remain in contact with **lawyers and judges** for key areas of interest
- Slides and discussion will contain actual **decisions**
- Sometimes only **advance citations** are available

▸ **WATCH FOR RECENT OPINIONS**
- A few slides may repeat—please follow the action

**Carlsons on Evidence**
Presentation and Materials

- We should encourage debate over what statues, rules and cases “**mean**”
- We should never argue over what statues, rules and cases “**say**”

- **Therefore we focus on:**
  1. Using **actual quotations** from cases and language from the statutes
  2. Leaving the **policy determinations** to legislatures and courts
  3. “**Content heavy**” presentations
Carlsons on Evidence
Important Applications and Distinctions Under the Georgia and Federal Rules of Evidence
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Georgia’s New Evidence Code
Fundamental Considerations

Carlsons on Evidence
Preamble; 24-1-1

• January 1, 2013
Georgia’s new evidence code goes into effect
• Numerous issues remained to be addressed

• Primary Concerns
  ➢ What are fundamental changes?
  ➢ What law would apply to new provisions?
  ➢ What are the guiding principles?
Carlsons on Evidence
Preamble; 24-1-1

• 3 Basic Types of GRE’s
  • Federalized (vast majority)
    • No prior Georgia authority but vast federal case law
  • Hybrid but leaning federal
    • No prior Georgia authority but vast federal case law
  • Carried over from former code
    • Prior Georgia authority may be conflicting and may be impacted by adoption of other rules
    • In the case of “double covered,” GASCT has expressed a preference for federalized version

Carlsons on Evidence
Preamble; 24-1-1

• 24-1-1/100’s: GENERAL PROVISIONS
• 24-2-200’s: JUDICIAL NOTICE
• 24-3-3’s: PAROL EVIDENCE
• 24-4-400’s: RELEVANT EVIDENCE AND ITS LIMITS
• 24-5-500’s: PRIVILEGES
• 24-6-600’s: WITNESSES
• 24-7-700’s: OPINIONS AND EXPERT TESTIMONY
• 24-8-800’s: HEARSAY
• 24-9-900’s: AUTHENTICATION AND IDENTIFICATION
• 24-10-1000: BEST EVIDENCE RULE
Carlsons on Evidence
4 Scenarios for Georgia’s New Evidence Rules

New Evidence Rules
- No Prior Statute
- Prior Statute Replaced
- Prior Statute Modified
- Prior Statute Repeated

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Georgia’s New Evidence Code
Philosophical Upgrades
Carlsons on Evidence
Preamble; 24-1-1; 24-4-401 to 403

• “Three rules [401, 402, and 403] provide a backdrop for Georgia's new Evidence Code...By standardizing rules concerning both the presumptive admissibility of relevant evidence and the judicial exclusion of certain otherwise admissible evidence, Rules 401, 402, and 403 overlay the entire Evidence Code, and are generally applicable to all evidence that a party seeks to present.” Chrysler Group LLC v. Walden, 303 Ga. 358 (2018)

Carlsons on Evidence
Preamble; 24-1-1; 24-4-401 to 403

• “...the Rules' pervasive bias in favor of admitting logically relevant evidence...The bias is sculpted into the key trilogy of provisions, Federal Rules of Evidence 401-03.”
Carlsons on Evidence
Preamble; 24-1-1; 24-4-401 to 403

• 24-4-402

• All relevant evidence shall be admissible, except as limited by constitutional requirements or as otherwise provided by law or by other rules, as prescribed pursuant to constitutional or statutory authority, applicable in the court in which the matter is pending. Evidence which is not relevant shall not be admissible.

Carlsons on Evidence
Preamble; 24-1-1; 24-4-401 to 403


• “All relevant evidence shall be admissible, unless constitutional or other legal authority renders it inadmissible.” Redcedar, LLC v. CML-GA Social Circle, LLC, 341 Ga. App. 110 (2017)
• “Properly construed, Rule 402 abolishes uncodified exclusionary rules of evidence.”
  

• “But the problem with Chrysler's argument is twofold: First, the ‘longstanding common law rule’ on party wealth does not apply precisely because it is a longstanding common law rule that has been abrogated by Georgia's current evidence statutes....” *Chrysler Group LLC v. Walden*, 303 Ga. 358 (2018)
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Davis Violations
Persistent Use of Improper Authority

Carlsons on Evidence
Preamble; 24-1-1

• Opponent of evidence files a motion in limine citing numerous new evidence rules that were not present in Georgia’s prior code. Proponent replies, focusing on prior Georgia authority. Opponent posits that old law deficient. Proponent responds: “I don’t see what the big deal is all about. Everybody I know has been using those motions for years.”
Carlsons on Evidence
Preamble; 24-1-1

• “Where provisions of the new Evidence Code are borrowed from the Federal Rules of Evidence, we look to decisions of the federal appellate courts construing and applying the Federal Rules, especially the decisions of the United States Supreme Court and the Eleventh Circuit.” *Kemp v. State*, 303 Ga. 385 (2018)

• Only “[w]here a provision of the new Evidence Code differs in substance from the counterpart federal rule, as interpreted by federal courts, … must [we] correspondingly presume that the General Assembly meant the Georgia provision to be different.” *Revere v. State*, 302 Ga. 44 (2017)

Carlsons on Evidence
Preamble; 24-1-1

• Modeling of New GRE’s
  • General Provisions (1’s and 100’s): FRE based
  • Judicial Notice (200’s): FRE based
  • Parol Evidence Rule (300’s): Former GRE based
  • Relevance (400’s): FRE based
  • Privileges (500’s): Former GRE based
  • Witnesses Generally (600’s): FRE based
  • Expert Witnesses (700’s): FRE based (former GRE based for criminal standard)
  • Hearsay (800’s): FRE based
  • Authentication (900’s): FRE based
  • Best Evidence (1000’s): FRE based
Carlsons on Evidence
Preamble; 24-1-1

• Georgia Supreme Court’s Resolution
  • Federalized:
    • “…look to decisions of the federal appeals courts construing and applying the Federal Rules, especially the decisions of the Eleventh Circuit.”
  • Former Georgia:
    • “…they may rely on Georgia decisions under the old Code.”
  • Original Creation:
    • “…the usual principles that inform our consideration of statutory meaning.”


Carlsons on Evidence
Preamble; 24-1-1

• “Georgia lawyers do this Court no favors — and risk obtaining reversible evidence rulings from trial courts — when they fail to recognize that we are all living in a new evidence world and are required to analyze and apply the new law. It may be hard to comprehend that, when it comes to trials and hearings held after January 1, 2013, the most pertinent precedent to cite on an evidentiary issue may be a decades-old decision of the Eleventh Circuit (or even the old Fifth Circuit), instead of a week-old unanimous decision of this Court...We trust that this shortcoming will not be repeated in future cases coming to this Court.” Davis v. State, 299 Ga. 180 (2016)
Carlsons on Evidence
Preamble; 24-1-1

• “To the extent the widow argues that the statements were admissible under the ‘necessity’ exception, she improperly relies on decisions that applied the former Evidence Code... Because the hearing on the executor's motion for summary judgment took place after January 1, 2013, however, the provisions of Georgia's new Evidence Code apply.”

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Carlsons on Evidence
Preamble; 24-1-1

• “[a]lthough the Court of Appeals recognized the applicability of the new Georgia Evidence Code, it overlooked OCGA § 24-4-401's definition of ‘relevant evidence’ and mistakenly applied a definition applicable in cases tried prior to the new Code's effective date.” *State v. Jones*, 297 Ga. 156 (2015)
Carlsons on Evidence
Preamble; 24-1-1

• “This provision [Rule 707] was carried forward from former OCGA § 24-9-67 of the old Evidence Code and does not have any equivalent provision in the federal rules, and thus it is appropriate to rely on decisions under the old Code.” Watson v. State, 303 Ga. 758 (2018)

Carlson on Evidence
Preamble; 24-1-1

• 2017 Article
  • Davis Violations Dissected: “New” Georgia Law and the Crisis in Evidence
    • Michael Scott Carlson and Ronald L. Carlson
    • IX John Marshall Law Journal 1
    • https://www.johnmarshall.edu/lawreview/current-volume/volume-9-number-1/
    • https://drive.google.com/file/d/0B1eA3aJ1Q2BjVFg1RjNLbnFDbm8/view
Proponent of evidence attempts to introduce testimony from a witness identifying a person from a surveillance video. Opponent of evidence objects, “lack of foundation and traditionally barred from evidence.” Trial judge inquires if there is further detail. Opponent rises, “We stand on our objection. That is sufficient under the new code.”
Carlsons on Evidence
24-1-1; 2; 103-106

• 24-1-1/100's
  • 24-1-1. Purpose and construction of the rules of evidence
  • 24-1-2. Applicability of the rules of evidence
  • 101. Reserved
  • 102. Reserved
  • 103. Rulings on evidence
  • 104. Preliminary questions
  • 105. Limited admissibility
  • 106. Introduction of remaining portions of writings or recorded statements

Carlsons on Evidence
24-1-103

• 24-1-103
  • (a) Error shall not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected and:

    (1) In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

    (2) In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by an offer of proof or was apparent from the context within which questions were asked.
Carlsons on Evidence
24-1-103

• “An issue that is not presented or ruled on by the trial court is not preserved for appellate review.” Anthony v. State, 302 Ga. 546 (2017)

• “Because Watkins did not object to Dr. Frist's testimony, we review Watkins's claim for plain error only.” Kemp v. State, 303 Ga. 385 (2018)

• “...objections to the admission of evidence ... are preserved only if they are timely and state the specific ground of objection, if the specific ground was not apparent from the context...” Wilson v. Attaway, 757 F.2d 1227 (11th Cir. 1985)

• “...the substance of the evidence that Williams sought to elicit from Carson was not sufficiently apparent from the discussion at trial to preserve the issue for ordinary review.” Lupoe v. State, 300 Ga. 233 (2016)
Carlson on Evidence
24-1-103

• “Motions in limine to exclude purportedly prejudicial evidence must be properly particularized so as to identify what the evidence in question is and why the opponent believes it should be excluded.”
  U.S. v. Gulley, 722 F.3d 901 (7th Cir. 2013)

• “...under the Federal Rules of Evidence, it is no longer necessary for a party to renew an objection to evidence when the district court has definitively ruled on the party’s motion in limine...Because the district court’s ruling in this case was sufficiently definitive, we will consider the merits of TBW’s position. Tampa Bay Water v. HDR Eng’g, Inc., 731 F.3d 1171 (11th Cir. 2013)

Carlsons on Evidence
24-1-103

• Particularizing Objections and Proffers
  • “Where an appellant challenges the admission of evidence, we are concerned with the sufficiency of the appellant’s objection; here, however, where the appellant challenges the exclusion of evidence, we are concerned with the sufficiency of the showing that the appellant, as proponent of the evidence, made at trial.”
Carlsons on Evidence
24-1-103

• Incorporating Rule Numbers
  • “We need not parse the exact contours of Georgiadis's argument in order to locate what he has not: the specific Federal Rule of Evidence that he contends was violated.” U.S. v. Georgiadis, 819 F.3d 4 (1st Cir. 2016)

Carlsons on Evidence
24-1-103

• “In denying the motions in limine to exclude Lewis's testimony regarding Watkins's statements, the trial court did not make any express factual findings, but we can infer from its denial of the motions that it implicitly found that Watkins's statements were made in the course of and in furtherance of a conspiracy...Kemp and Hogans have failed to show that these implicit factual findings are clearly wrong.” Kemp v. State, 303 Ga. 385 (2018)
Carlsons on Evidence
24-1-103

  • “Thus, we conclude that the trial court did not abuse its discretion in permitting *lay witnesses to give testimony identifying Glenn* as one of the people in the motel surveillance video.”
  • “By using language nearly identical to Federal Rule of Evidence 701 (a), which case law shows addressed the matter at issue, the *enactment of OCGA § 24-7-701 (a)* was a statutory modification to the admissibility of such evidence and displaced prior precedent on the matter.”

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24-2-201

*Judicial Notice*
Carlsons on Evidence  
24-2-201

• Proponent seeks to have the trial judge take judicial notice of a Google map in order to admit it into evidence. Opponent objects, "Not without someone from Google here, you don’t!"

Carlsons on Evidence  
24-2-201

• 24-2-201
  • 201. Judicial notice of adjudicative facts
  • 220. Judicial notice of legislative facts
  • 221. Judicial notice of ordinance or resolution
Carlsons on Evidence
24-2-201

• **24-2-201**

• (a) This Code section governs only judicial notice of adjudicative facts.

(b) A judicially noticed fact shall be a fact which is not subject to reasonable dispute in that it is either:

1. Generally known within the territorial jurisdiction of the court; or

2. Capable of **accurate and ready determination** by resort to sources whose accuracy cannot reasonably be questioned.

“**A judicially noticed [adjudicative] fact shall be a fact which is not subject to reasonable dispute** in that it is either: (1) Generally known within the territorial jurisdiction of the court; or (2) Capable of accurate and ready determination...” *McCoy v. State*, 341 Ga. App. 216 (2017)

“**At the hearing on the motion, the trial court noted on the record, and the parties did not dispute, that the court reporter had significant health problems during the time period in question that affected his ability to work.”* Atlantic Geoscience, Inc. v. Phoenix Development & Land Investment, LLC*, 341 Ga. App. 81 (2017)
• “This photograph was taken from Google Maps, a website that ‘is so well known and enjoys such broad use that it may have achieved a status akin to Webster's Dictionary, permitting judicial notice of the accuracy of the site itself.’... Like other courts, this Court takes judicial notice of the information displayed on Google Maps.”
  

• “We acknowledge this undisputed fact in the Supreme Court of Georgia's opinion pursuant to OCGA § 24-2-201 (b) (2)...appellate court can take ‘judicial notice of subsequent developments in cases that are a matter of public record and are relevant to the appeal.’”
  
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24-4-403
Unfair Prejudice Objection

• Prior to Proponent calling a key witness, Opponent objectes, “Judge before this witness takes the stand, opposing counsel needs to prove to the court that this testimony will not be overly prejudicial.”
Carlsons on Evidence
24-4-401 to 418

• 24-4-400’s
  • 401. “Relevant evidence” defined
  • 402. Relevant evidence generally admissible; irrelevant evidence not admissible
  • 403. Exclusion of relevant evidence on the grounds of prejudice, confusion, or waste of time
  • 404. Character evidence not admissible to prove conduct; exceptions; other crimes
  • 405. Methods of proving character
  • 406. Habit; routine practice
  • 407. Subsequent remedial measures
  • 408. Compromises and offers to compromise
  • 409. Payment of medical and similar expenses
  • 410. Inadmissibility of pleas, plea discussions, and related statements
  • 411. Liability insurance
  • 412. Complainant’s past sexual behavior not admissible in prosecutions for certain sexual offenses; exceptions
  • 413. Evidence of similar transaction crimes in sexual assault cases
  • 414. Evidence of similar transaction crimes in child molestation cases
  • 415. Evidence of similar acts in civil or administrative proceedings concerning sexual assault or child molestation
  • 416. Statements of sympathy in medical malpractice cases
  • 417. Evidence of similar acts in prosecutions for violations of Code Section 40-6-391
  • 418. Admissibility of criminal gang activity, disclosure

Carlsons on Evidence
24-4-401 to 403

401
Relevance

402
Presumptive Admissibility

403
Unfair Prejudice
Carlson on Evidence
24-4-401 to 403

• 24-4-401:
  • “Regardless of how one views the language of Rule 401, however, it is clear that the relevance standard codified therein is a liberal one.” State v. Jones, 297 Ga. 156 (2015)

• 24-4-402:
  • “All relevant evidence shall be admissible, except as limited by constitutional requirements or as otherwise provided by law or by other rules...” State v. Smith, 329 Ga. App. 646 (2014)

• 24-4-403:
  • “Rule 403 is an extraordinary remedy which should be used only sparingly since it permits the trial court to exclude concededly probative evidence.” Bradshaw v. State, 296 Ga. 650 (2015)

Carlsons on Evidence
24-4-401 to 403

• “Rule 402, allowing the admission of relevant evidence, is the ‘keystone of the Rules of Evidence.’...Unless the opponent of the proffered evidence can point to a specific rule of exclusion, or the judge exercises discretion to exclude the evidence based on countervailing concerns pursuant to [Rule] 403, relevant evidence is admissible.” Reinhart v. E.I. Dupont de Nemours, 147 N.J. 156, 164 (1996)
24-4-403

Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

“But in a criminal trial, inculpatory evidence is inherently prejudicial; ‘it is only when unfair prejudice substantially outweighs probative value that the rule permits exclusion.’” Anglin v. State, 806 S.E.2d 573 (Ga. 2017)
Carlsons on Evidence
24-4-403

• “‘These words alone were unlikely to induce the jury to return a conviction based on a generalized assessment of character.’... Accordingly, we cannot say that the derogatory terms used by Smith created a risk of unfair prejudice that substantially outweighed the recording's probative value...” Smith v. State, 302 Ga. 717(2017)

Carlsons on Evidence
24-4-401 to 403

• “The application of the [OCSA § 24-4-403] test is a matter committed principally to the discretion of the trial courts, but as we have explained before, the exclusion of evidence under [OCSA § 24-4-403] is an extraordinary remedy which should be used only sparingly. The major function of [OCSA § 24-4-403] is to exclude matter of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect.” Dixon v. State, 341 Ga. App. 255(2017)
Carlsons on Evidence
24-4-401 to 403

• “After the offering party shows that some evidence is relevant, it is the resisting party's burden to show that prejudice substantially outweighs the evidence's probative value...The resisting party likewise bears the burden of furnishing a limiting instruction once the court determines that it will admit evidence under Rule 404(b).” Gallegos v. City of Espanola, 2015 U.S. Dist. LEXIS 114444 (D.N.M. Mar. 3, 2015)

Carlsons on Evidence
24-4-401 to 403

• “There has been no showing that the evidence would confuse the issues, mislead the jury, waste time, or be cumulative of other evidence, or that the probative value of the evidence would otherwise be ‘substantially outweighed’ by its prejudicial impact.” State v. McPherson, 341 Ga. App. 871 (2017)
Carlsons on Evidence
24-4-401 to 403

• Error to Invoke Non-Textual Grounds
  • “The court excluded the evidence of the murder ‘out of an abundance of caution.’ Rule 403 provides a list of reasons authorizing a trial court to exclude otherwise admissible and relevant reasons. ‘An abundance of caution’ is not one of those enumerated grounds. Rule 404 (b) is a rule of inclusion and Rule 403 is an extraordinary exception to that inclusivity...The court’s basis for excluding the murder was thus unsound.” State v. Atkins, S18A0770 (Ga. 2018)

Carlsons on Evidence
24-4-401 to 403

• Error to Apply Former Prejudice Standard
  • “Prior to the enactment of the new evidence code, Georgia had no direct statutory equivalent to Rule 403, but case law on the issue generally required that a trial court merely balance the probative value of evidence with its prejudicial effect without requiring that the objecting party establish substantial prejudice. In stark contrast, the plain meaning of OCGA § 24-4-403’s text makes clear that the trial court may only exclude relevant evidence when its probative value is ‘substantially outweighed’ by one of the designated concerns.” Williams v. State, 328 Ga. App. 876 (2014)
Because a related criminal case is pending, a party refuses to respond to discovery or testify. Proponent seeks to introduce this fact in a civil proceeding. Opponent objects, stating that the right against self-incrimination cannot be used against a person in any context.
Carlsons on Evidence
24-5-501 to 510

- 24-5-500's
  - 501. Certain communications privileged
  - 502. Communications to clergyman privileged
  - 503. Husband and wife as witnesses for and against each other in criminal proceedings
  - 504. Law enforcement officers testifying; home address
  - 505. Party or witness privilege
  - 506. Privilege against self-incrimination; testimony of accused in criminal case
  - 507. Grant of immunity; contempt
  - 508. Qualified privilege for news gathering or dissemination
  - 509. Communications between victim of family violence or sexual assault and agents providing services to such
  - 510. Privileged communications between law enforcement officers and peer counselors

Carlsons on Evidence
24-5-506; 24-8-824

- 24-5-506
  - (a) No person who is charged in any criminal proceeding with the commission of any criminal offense shall be compellable to give evidence for or against himself or herself.

- 24-8-824
  - To make a confession admissible, it shall have been made voluntarily, without being induced by another by the slightest hope of benefit or remotest fear of injury.
Carlsons on Evidence
24-5-506; 24-8-824

• “We find unconvincing Loveless's argument that the privilege set out in the Fifth Amendment and in OCGA § 24-5-506 overrides the clear and well-settled requirement that, to be sufficient, an answer in a civil forfeiture proceeding...” Loveless v. State of Ga., 337 Ga. App. 250 (2016)

• “And if an accused in a criminal proceeding chooses to testify, he or she shall be sworn as any other witness and, with certain exceptions, may be examined and cross-examined as any other witness.” Tran v. State, 340 Ga. App. 546 (2017)

Carlsons on Evidence
24-5-506; 24-8-824

• “Anglin also argues that the warrant was improper because compelling Anglin to lift up his shirt to be photographed violated his right against self-incrimination...Assuming Anglin even preserved this ground for we previously have rejected an indistinguishable argument in another case... right against self-incrimination was not violated by requiring defendant to strip to the waist to allow police to photograph tattoos on his body.” Anglin v. State, 302 Ga. 333 (2017)
Carlsons on Evidence  
24-5-506; 24-8-824

• “It is beyond dispute that the Constitution does not protect Defendant from giving non-testimonial evidence...Federal courts have therefore held that photographing a defendant’s tattoos for display to the jury or requiring a defendant to reveal his tattoos to a jury does not run afoul of the Fifth Amendment.” United States v. Nixon, 2015 U.S. Dist. LEXIS 93628 (E.D. Mich. July 20, 2015)

• “Regardless of how the Government acquired the photo, however, the trial court could, if it so concluded, direct Defendant to display his scar to the jury, bypassing the photograph altogether.” United States v. Spencer, 2015 U.S. Dist. LEXIS 174240 (D. Minn. Dec. 11, 2015)
Carlsons on Evidence
24-6-601 to 658

• Proponent of evidence attempts to impeach Opponent’s witness with a prior inconsistent statement. Opponent objects, “Judge, this was not taken under oath, so it cannot be considered substantively. Furthermore, our witness must be confronted with the time, place, persons present, and the substance of an impeaching statement before this cross can begin.”

Carlsons on Evidence
24-6-601 to 658

• 24-6-600’s
  • 601. General rule of competency
  • 602. Lack of personal knowledge
  • 603. Oath or affirmation
  • 604. Interpreters
  • 605. Judge as witness
  • 606. Juror as witness
  • 607. Who may impeach
  • 608. Evidence of character and conduct of witness
  • 609. Impeachment by evidence of conviction of a crime
  • 610. Religious beliefs or opinions
  • 611. Mode and order of witness interrogation and presentation
  • 612. Writing used to refresh memory
  • 613. Prior statements of witnesses
  • 614. Calling and interrogation of witnesses by court
  • 615. Exclusion of witnesses
  • 616. Presence in courtroom of victim of criminal offense
Carlsons on Evidence

24-6-601's (continued)

- 620. Credibility a jury question
- 621. Impeachment by contradiction
- 622. Witness’s feelings and relationship to parties provable
- 623. Treatment of witness
- 650. State policy on hearing impaired persons
- 651. Definitions
- 652. Appointment of interpreters for hearing impaired persons interested in or witness at agency proceedings
- 653. Procedure for interrogation and taking of statements from hearing impaired persons arrested for...
- 654. Indigent hearing impaired defendants to be provided with interpreters
- 655. Waiver of right to interpreter
- 656. Replacement of interpreters unable to communicate accurately with hearing impaired persons; appointment ...
- 657. Oath of interpreters; privileged communications; taping and filming of hearing impaired persons’ testimony
- 658. Compensation of interpreters

Carlsons on Evidence

24-6-613

(a) In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time; provided, however, upon request the same shall be shown or disclosed to opposing counsel.

(b) Except as provided in Code Section 24-8-806, extrinsic evidence of a prior inconsistent statement by a witness shall not be admissible unless the witness is first afforded an opportunity to explain or deny the prior inconsistent statement and the opposite party is afforded an opportunity to interrogate the witness on the prior inconsistent statement or the interests of justice otherwise require. This subsection shall not apply to admissions of a party-opponent as set forth in paragraph (2) of subsection (d) of Code Section 24-8-801.
Carlsons on Evidence
24-6-613

• “Appellant cannot meet this test because the detective's testimony concerning Pearsall's and Zakiya's prior inconsistent statements was not hearsay. On the contrary, the detective's testimony was admissible to impeach the witnesses, or as substantive evidence.” Harvey v. State, 300 Ga. 598 (2017)

• “The failure of a witness to remember making a statement, like the witness's flat denial of the statement, may provide the foundation for calling another witness to prove that the statement was made.” Hood v. State, 299 Ga. 95 (2016)

Carlsons on Evidence
24-6-613

• “Given Gurley's inconsistent testimony at trial and her convenient memory lapses about the portions of her conversation with the police that implicated Appellant, her earlier statements were not hearsay but rather were properly admitted as prior inconsistent statements.” Thompson v. State, 2018 Ga. LEXIS 459 (June 29, 2018)
Carlsons on Evidence
24-6-613

• “F.R.E. 613(b) and subsequent case law interpreting that rule reflect that the strict sequencing procedure established in Queen Caroline's Case is now unnecessary under the Federal Rules of Evidence. Nevertheless...[i]t is equally clear, however, that Rule 613(b) does not supplant the traditional method of confronting a witness with his inconsistent statement prior to its introduction into evidence as the preferred method of proceeding.” Robinson v. State, 3 A.3d 257 (Del. 2010)

• “Rule 613(b) contains no bar, beyond foundation requirements, to extrinsic evidence of prior inconsistent statements...Rule 613, largely a relaxation of the rule in The Queens Case..., specifies the foundation which must be laid for introduction of extrinsic evidence.” U.S. v. Higa, 55 F.3d 448 (9th Cir. 1995)
Carlsons on Evidence
24-6-608

• Proponent cross-examines Opponent’s expert witness, “In your deposition, didn’t you admit to being disciplined in grad school falsifying your time sheets?” Opponent objects. Proponent then asks, “And, by the way, isn’t true that you advertise that in a divorce cases, you are every husband’s best friend, and you never work for wives?” Opponent objects and moves to strike as improper impeachment.

Carlsons on Evidence
24-6-608

• 24-6-608(b)

(b) Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness’s character for truthfulness, other than a conviction of a crime as provided in Code Section 24-6-609, or conduct indicative of the witness’s bias toward a party may not be proved by extrinsic evidence. Such instances may however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness:

(1) Concerning the witness’s character for truthfulness or untruthfulness; or

(2) Concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.
Carlsons on Evidence
24-6-608

• “As for Rule 608 (b)...with certain exceptions, ‘[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's character for truthfulness, ... may not be proved by extrinsic evidence.’...But such instances may, ‘in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness[ ] ... [c]oncerning the witness's character for truthfulness or untruthfulness[.]’” Belcher v. State, 344 Ga. App. 729, (2018)

Carlsons on Evidence
24-6-608

• “The statute also addresses the use of specific instances of conduct to attack (or support) a witness's character for truthfulness...or conduct indicative of the witness's bias toward a party’ such specific instances ‘may not be proved by extrinsic evidence.’” Gaskin v. State, 334 Ga. App. 758 (2015)
Carlsons on Evidence  
24-6-608

• “Under this Rule, we have upheld, for example, cross-examination into an attorney's disbarment...into a witness's failure to disclose a prior arrest on his bar application...and into a prior finding by an Immigration Judge that the witness's testimony in a deportation proceeding was not credible...cross-examination into a defendant's alleged acts of fraud, bribery, and embezzlement.” Hynes v. Coughlin, 79 F.3d 285 (2d Cir. 1996)

Carlsons on Evidence  
24-6-608

• “However, other hospital records prepared by a nurse and introduced without objection during the trial reflect that Mrs. Dean was in her hospital room and could have been examined by Dr. Davis, had he in fact chosen to do so on August 2, and Mrs. Dean confirmed that she did not leave her hospital room that day.” Cent. Ga. Women's Health Ctr., LLC v. Dean, 342 Ga. App. 127 (2017)
On cross, Proponent inquires of Opponent’s expert witness about the amount of her fees and whether she advertises her services. Opponent objects as prejudicial, irrelevant, and improper impeachment.
**Carlsons on Evidence**

24-6-608; 622

- **24-6-608(b):**
  - Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's character for truthfulness, other than conduct indicative of the witness's bias toward a party may not be proved by extrinsic evidence.

- **24-6-622:**
  - The state of a witness's feelings towards the parties and the witness's relationship to the parties may always be proved for the consideration of the jury.

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**Carlsons on Evidence**

24-6-608; 622

- “Bias is a term used in the ‘common law of evidence’ to describe the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party. Bias may be induced by a witness' like, dislike, or fear of a party, or by the witness' self-interest. Proof of bias is almost always relevant...”

Carlsons on Evidence  
24-6-608; 622

• “...as a general principle, the jury is entitled to consider a witness's financial interest in a case.”  

• “...evidence concerning a financial incentive in the outcome of trial may be permitted on cross-examination to show witness bias.”  

Carlsons on Evidence  
24-6-608; 622

• “Kritlow has failed to point to anything in the record supporting his pure speculation that the victim's financial status motivated her to fabricate the sexual assault. A witness may not be impeached based on a wholly immaterial matter, and the victim's financial status was wholly immaterial to the issue of [Kritlow's] guilt[.]”  
Carlsons on Evidence  
24-6-608; 622

• “The right to inquire into partiality and bias, however, is not without limits...On the record in this case, we cannot say that the trial court abused its discretion when it disallowed cross-examination of A. L. about his immigration status.” *Lucas v. State*, 303 Ga. 134 (2018)

Carlsons on Evidence  
24-6-608; 622

• Rules 401, 402, and 403 Apply  
  • “Because the common law party-wealth rule was itself a rule of relevance, and because there is no specific exclusionary rule in the new Evidence Code carrying forward the common law's general exclusionary rule for that type of evidence, Georgia courts must consider party-wealth evidence under the parameters of the new Evidence Code. This is yet another example of the ‘new evidence world’ in which we live.” *Chrysler Group LLC v. Walden*, 303 Ga. 358 (2018)
Carlsons on Evidence
24-6-608; 622

• Foundational Requirements
  • “There are similarities between bias and capacity to observe, remember, and recollect. Both are grounds for impeachment, and both may be proven by extrinsic evidence. However, before the proponent may introduce evidence under either theory, he or she must lay a foundation that establishes the legal and logical relevance of the impeaching evidence.” U.S. v. Sojfer, 47 M.J. 425 (C.A.F. 1998)
Proponent of evidence calls expert witness and begins to inquire opinion on key issue in case. Opponent objects that no ultimate issue testimony is allowed. Proponent claims that under Georgia’s New Evidence Code, the ultimate issue objection is a “thing of the past.”

- 24-7-700’s
  - 701. Lay witness opinion testimony
  - 702. Expert opinion testimony in civil actions; medical experts; pretrial hearings; precedential value of ...
  - 703. Bases of expert opinion testimony
  - 704. Ultimate issue opinion
  - 705. Disclosure of facts or data underlying expert opinion
  - 706. Court appointed experts
  - 707. Expert opinion testimony in criminal proceedings
Carlsons on Evidence  
24-7-704

• 24-7-704

• (a) Except as provided in subsection (b) of this Code section, testimony in the form of an opinion or inference otherwise admissible shall not be objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Carlsons on Evidence  
24-7-704

• “Because Rule 704 is modeled on the Federal Rules of Evidence, we interpret it by looking “to decisions of the federal appellate courts...” Eller v. State, 303 Ga. 373 (2018)

• “In addition, the testimony of an expert in the form of an opinion is not objectionable on the grounds that it embraces an ultimate issue to be decided by the trier of fact.” In the Interest of R. S. T., 345 Ga. App. 300 (2018)

• “The new Evidence Code eliminates the former ultimate issue rule ‘except as to certain expert witness testimony’ as set out in OCGA § 24-7-704 (b).” Percell v. State, 346 Ga. App. 219 (2018)
Carlsons on Evidence 24-7-704

• “…testimony in the form of an opinion or inference otherwise admissible shall not be objectionable because it embraces an ultimate issue to be decided by the trier of fact. State v. Cooper, 324 Ga. App. 32 (2013)

• “However, an expert may not merely tell the jury what result to reach and may not testify to the legal implications of conduct.” Clayton County v. Segrest, 333 Ga. App. 85 (2015)

Carlsons on Evidence 24-7-704

• “Under Federal Rule of Evidence 704, ‘an expert may testify as to his opinion on an ultimate issue of fact,’ provided that he does not ‘merely tell the jury what result to reach’ or ‘testify to the legal implications of conduct.’” U.S. v. Grzybowicz, 747 F.3d 1296 (11th Cir. 2014)

• “…to be admissible under Rule 704 an expert's opinion on an ultimate issue must be helpful to the jury and also must be based on adequately explored legal criteria.” Haney v. Mizell Memorial Hosp., 744 F.2d 1467 (11th Cir. 1984)

• “A witness may give otherwise admissible opinion testimony that affects an ultimate issue in a case unless that opinion concerns the mens rea of a criminal defendant.” U.S. v. Cowan, 2012 U.S. App. LEXIS 23687 (11th Cir. 2012)
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24-8-801
Hearsay: Self-Quotation

• Proponent asks witness, “Will you please tell us what you told my client about who is at fault?”
Opponent objects as hearsay.”
Proponent responds, “It is not hearsay is someone is quoting themselves.”
Carlsons on Evidence
24-8-801 to 24-8-826

• 24-8-800’s
  • 801. Definitions
  • 802. Hearsay rule
  • 803. Hearsay rule exceptions; availability of declarant immaterial
  • 804. Hearsay rule exceptions; declarant unavailable
  • 805. Hearsay within hearsay
  • 806. Attacking and supporting credibility of a declarant
  • 807. Residual exception
  • 820. Testimony as to child’s description of sexual contact or physical abuse
  • 821. Admissions in pleadings
  • 822. Right to have whole conversation heard
  • 823. Admissions and confessions received with care; no conviction on uncorroborated confession
  • 824. Only voluntary confessions admissible
  • 825. Confessions under spiritual exhortation, promise of secrecy, or collateral benefit admissible
  • 826. Medical reports in narrative form

• Hearsay: Classifications of Out-of-Court Statements
  ➢ Admissions (801’s): Party Opponent
  ➢ Statements (803’s): Non-party (available and not available)
  ➢ Declarations (804’s): Non-party (unavailable)
**Carlsons on Evidence**

24-8-801 to 24-8-826

*Hearsay Analysis*

1. Is the evidence **hearsay**?
2. Is the evidence admissible for a **non-hearsay purpose**?
3. Is the evidence subject to an **exemption**?
4. Is the evidence subject to an **exception**?
5. Is the evidence only admissible for a **limited purpose**?

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**Carlsons on Evidence**

24-8-801

*24-8-801*

As used in this chapter, the term:

(a) “Statement” means:
   (1) An oral or written assertion; or
   (2) Nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) “Declarant” means a person who makes a statement.

(c) “Hearsay” means a statement, **other than one made by the declarant while testifying at the trial or hearing**, offered in evidence to prove the truth of the matter asserted.
Carlsons on Evidence
24-8-801

• “Under the new Evidence Code, **hearsay is defined** as ‘a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.’ OCGA § 24-8-801(c). This provision uses **similar language to Federal Rule** of Evidence 802 (c) (2), so we properly look to federal appellate decisions when interpreting it.” Watson v. State, 303 Ga. 758(2018)

Carlsons on Evidence
24-8-801

• “The fact that past out of court statements were **made by a witness testifying at trial does not remove them from the reaches of the hearsay rule if they are offered to prove the truth of the matter asserted.” U.S. v. Lewis, 436 F.3d 939 (8th Cir. 2006)

• “...a defendant's self-serving extra-judicial declarations are inadmissible unless they fall within a hearsay exception. That is, a defendant cannot get self-serving hearsay statements into evidence without first waiving the Fifth Amendment and testifying...” Cisneros v. Paramo, 2015 U.S. Dist. LEXIS 168978 (C.D. Cal. 2015)
Carlsons on Evidence
24-8-801

• “...blanket exclusion from the hearsay rule [is] only for statements by a party-opponent, not for a party's out-of-court statements offered by the party himself.” Walker v. State, 301 Ga. 482 (2017)

• “...prior statement by that witness ‘is pure hearsay evidence, which cannot be admitted merely to corroborate the witness, or to bolster the witness's credibility...’” Silvey v. State, 335 Ga. App. 383 (2015)

Carlsons on Evidence
24-8-801

• “In the absence of such an affirmative attack, any prior statement by that witness ‘is pure hearsay evidence, which cannot be admitted merely to corroborate the witness, or to bolster the witness's credibility in the eyes of the jury.’” Silvey v. State, 335 Ga. App. 383(2015)
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24-8-803(18)
Hearsay: Leaned Treatises

• During direct examination, Proponent has expert witness identify a learned treatise as authoritative. Proponent then reads pertinent quotes from text and asks expert if she agrees. Opponent objects, “This is hearsay judge. Learned treatises are only admissible for impeachment purposes.”
Carlsons on Evidence
24-8-803(18)

• 24-8-802(18)
  • The following shall not be excluded by the hearsay rule, even though the declarant is available as a witness:
  • (18) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination, statements contained in published treatises, periodicals, or pamphlets, whether published electronically or in print, on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness, by other expert testimony, or by judicial notice. If admitted, the statements may be used for cross-examination of an expert witness and read into evidence but shall not be received as exhibits;

Carlsons on Evidence
24-8-803(18)

• “The rationale for this exception is self-evident: so long as the authority of a treatise has been sufficiently established, the factfinder should have the benefit of expert learning on a subject, even though it is hearsay.” Costantino v. David M. Herzog, M.D., P.C., 203 F.3d 164 (2nd Cir. 2000)

• “The Notes of the Advisory Committee counsel a liberal interpretation of Rule 803(18), favoring admissibility...” Allen v. Safeco Ins. Co. of America, 782 F.2d 1517 (11th Cir. 1986)
Carlsons on Evidence
24-8-803(18)

• “...Federal Rule of Evidence 803(18) exempts such statements from the rule against hearsay if: (A) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and (B) the publication is established as reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.” Lyons v. Aguinaldo, 2018 U.S. Dist. LEXIS 136938 (N.D. Ill. 2018)

Carlsons on Evidence
24-8-803(18)

• “Evidence must be authenticated or identified prior to being admitted...For a learned treatise to be admitted as documentary evidence, it must be established as a reliable authority by the testimony of the expert who relied upon it or to whose attention it was called...Not being a qualified expert, Ms. Ehret cannot establish the authority of this evidence as a learned treatise.” Banks v. U.S., 78 Fed. Cl. 603 (Fed. Cl. 2007).
Carlsons on Evidence
24-8-803(18)

• “In Georgia there is an additional barrier to the use of treatises on direct examination. The Georgia statute limits the use of learned treatises to cross-examination and impeachment.”


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24-9-901
Authentication of Social Media
Carlsons on Evidence
24-9-901

• Proponent of evidence attempts to introduce social media evidence in the form of Facebook postings from the opponent’s client. Proponent’s witness describes them of being in the same style, mentions personal information, and comes from the page of the opponent’s client. Opponent objects, arguing that authentication of social media evidence requires testimony from the webmaster.

Carlsons on Evidence
24-9-901 to 924

• 24-9-900’s
  • 901. Requirement of authentication or identification
  • 902. Self-authentication
  • 903. Subscribing witness’s testimony
  • 904. Definitions
  • 920. Authentication of Georgia state and county records
  • 921. Identification of medical bills; expert witness unnecessary
  • 922. Proof of laws, records, nonjudicial records, or books of other states, territories, or possessions;...
  • 923. Authentication of photographs, motion pictures, video recordings, and audio recordings when witness...
  • 924. Admissibility of records of Department of Driver Services; admissibility of computer transmitted records
Carlsons on Evidence
24-9-901

• 24-9-901

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

Carlsons on Evidence
24-9-901

• “Addo contends that an exhibit, purporting to be a text message from Vasile to Addo with a photo of an envelope allegedly containing a copy of the lawsuit, attached to Addo's response to appellants' first motion to set aside proves that appellants received a copy of the lawsuit via mail...Simply attaching an exhibit to a motion, however, does not prove its genuineness or authenticity.” Vasile v. Addo, 341 Ga. App. 236 (2017)
Carlsons on Evidence
24-9-901

• “Social media has been defined as forms of electronic communications . . . through which users create online communities to share information, ideas, personal messages, and other content (as videos)...Often these posts will include relevant evidence for a trial, including party admissions, inculpatory or exculpatory photos, or online communication between users. But there is a genuine concern that such evidence could be faked or forged, leading some courts to impose a high bar for the admissibility of such social media evidence.”

Parker v. State, 85 A.3d 682 (Del. 2014)

Carlsons on Evidence
24-9-901

• “Exhibits depicting online content may be authenticated by a person's testimony that he is familiar with the online content and that the exhibits are in the same format as the online content...Such testimony is sufficient to provide a rational basis for the claim that the exhibits properly represent the online content....”

U.S. v. Needham, 852 F.3d 830 (8th Cir. 2017)
“Hale testified that the picture on the Facebook page was of Appellant and confirmed that his hometown was Gary, Indiana, as listed on the page. The Facebook page included the cell phone number from which Appellant had called Hale. Hale and other witnesses testified that Appellant went by the nickname “Crown” or “Crown Hood,” and the Facebook page profile name was listed as “Patrick Crown Hood Moore.” Appellant’s Facebook page contained details about his life that were not public knowledge and made references to Appellant’s other girlfriend and his brothers. Hale also testified that the structure and style of the comments posted on the page matched the structure and style of the texts Appellant had sent Hale. Finally, Appellant admitted to Hale that the Facebook page belonged to him. Based on this direct and circumstantial evidence, we find that the Facebook page was properly authenticated.” *Moore v. State*, 295 Ga. 709 (2014)

“A fact finder could well conclude that (1) Meshach Thompson sent the text messages from the name ‘Mee$h,’ and (2) Shadrach Thompson sent the messages from the name ‘$had.’ These text messages—along with other evidence presented at trial—readily establish that Meshach Thompson engaged in a conspiracy with Shadrach Thompson and Omar Wadley to possess oxycodone with intent to distribute. The text messages were attempts to set up and negotiate the purchase of oxycodone.” *U.S. v. Thompson*, 568 Fed. Appx. 812 (11th Cir. 2014)
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24-9-902(11) ; 24-8-803(6)
Authentication of Business Records

• Proponent tenders business records with a certificate from the firm records custodian. Opponent objects, “Judge, they need a live witness to authenticate, not a piece of paper. Moreover, these contain opinions. That makes them per se inadmissible.”
Carlsons on Evidence
24-9-902(11); 24-8-803(6)

• 24-9-902(11)

The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under paragraph (6) of Code Section 24-8-803 if accompanied by a written declaration of its custodian or other qualified person certifying that the record:
(A) Was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of such matters; (B) Was kept in the course of the regularly conducted activity; and (C) Was made by the regularly conducted activity as a regular practice. A party intending to offer a record into evidence under this paragraph shall provide written notice of such intention to all adverse parties and shall make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge such record and declaration;

Carlsons on Evidence
24-9-902(11); 24-8-803(6)

• 24-8-803

• The following shall not be excluded by the hearsay rule, even though the declarant is available as a witness:
  • (6) Records of regularly conducted activity. Unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness and subject to the provisions of Chapter 7 of this title, a memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, if (A) made at or near the time of the described acts, events, conditions, opinions, or diagnoses; (B) made by, or from information transmitted by, a person with personal knowledge and a business duty to report; (C) kept in the course of a regularly conducted business activity; and (D) it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness or by certification that complies with paragraph (11) or (12) of Code Section 24-9-902 or by any other statute permitting certification.
Carlsons on Evidence
24-9-902(11); 24-8-803(6)


Carlsons on Evidence
24-9-902(11); 24-8-803(6)

• “And, as the trial court noted, the subsection specifically applicable, OCGA § 24-9-902 (11), places no such requirement on a certificate of authenticity...we must presume that the General Assembly meant that the certificate of authenticity required through the operation of OCGA §§ 24-8-803(6) and 24-9-902(11), need not be notarized or signed under a penalty of perjury.” Hayes v. State, 298 Ga. 98 (2015)
Carlsons on Evidence  
24-9-902(11); 24-8-803(6)

• “An ‘otherwise qualified witness’ may lay the foundation for records' introduction despite lacking personal knowledge of the preparation of the records, but he or she must be familiar with the creation and record keeping procedures of the organization in order to establish the records' trustworthiness.” Jones v. State, 345 Ga. App. 14 (2018)
**Carlsons on Evidence**

24-9-902(11); 24-8-803(6)

- “… the advisory committee note to the 2014 amendments plainly indicates that a blanket, unspecific objection…is not sufficient…Clearly, however, the opponent bears the burden of articulating some reason for objecting to authenticity. The rules and advisory committee notes do not expressly state that such a showing must be made in advance of trial, but a key purpose of Rule 803(6) is to relieve the proponent of the need to produce custodians as witnesses at trial. The rationale of the rule would be undermined if an opponent of a record were permitted to wait until trial to state its grounds for challenging the record.” *U.S. v. Palin*, 98 Fed. R. Evid. Serv. 704 (W.D. Va. 2015)

- “The computer-generated inspection report, which reflects the date of the incident and was printed the day after the incident, indicates the time of each inspection stop during each hourly inspection, the identity of the employee, the number and location of the sensors, and the condition of the inspected areas…The obvious purpose of the monitoring system was to contemporaneously document compliance with the store’s inspection procedure. Nothing about the computer report suggests any lack of trustworthiness, and the co-manager’s affidavit sufficiently authenticated the inspection report.” *Johnson v. All American Quality Foods, Inc.*, 340 Ga. App. 664 (2017)
Carlsons on Evidence
24-9-902(11); 24-8-803(6)

• “And those courts have held that hospital records, including medical opinions, are ... admitted under [Federal Rule of Evidence 803 (6)], which expressly permits ‘opinions’ and ‘diagnoses.’ Given this construction of Federal Rule of Evidence 803 (6), the fact that OCGA § 24-8-803 (6) is nearly identically worded, and, as previously noted, the fact that these records were made to facilitate Samuels’s treatment and not in anticipation of prosecution, the trial court did not err in admitting the hospital records under OCGA § 24-8-803 (6).” Samuels v. State, 335 Ga. App. 819 (2016)
Carlsons on Evidence
24-10-1006

• Proponent introduces a chart summarizing hospital records to assist the jury in understanding the raw notes and entries. **Opponent objects under the best evidence rule.**

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Carlsons on Evidence
24-10-1001 to 1008

• **24-10-1000’s**
  • 1001. Definitions
  • 1002. Requirement of original
  • 1003. Admissibility of duplicates
  • 1004. Admissibility of other evidence of contents of a writing, recording, or photograph
  • 1005. Public records
  • 1006. Summaries
  • 1007. Testimony or written admission of party
  • 1008. Functions of court and jury
Carlsons on Evidence
24-10-1001 to 1008

• 24-10-1006
  • The contents of otherwise admissible voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that the contents of such writings, recordings, or photographs be produced in court.

Carlsons on Evidence
24-10-1006

• Best Evidence Rule Federalized
  • “Our Supreme Court has emphasized that, when a provision of the new Evidence Code has been adopted from the Federal Rules of Evidence, we must consider the meaning of that provision by looking to ‘the decisions of the federal appeals courts construing and applying the Federal Rules, especially the decisions of the Eleventh Circuit.” Patch v. State, 337 Ga. App. 233 (2016)
Carlsons on Evidence
24-10-1006

• “Federal Rule of Evidence 1006 allows parties to use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court...To comply with this Rule, therefore, a chart summarizing evidence must be an accurate compilation of the voluminous records sought to be summarized. Moreover, the records summarized must otherwise be admissible in evidence...Thus, summary exhibits under Rule 1006 function as a surrogate for voluminous writings that are otherwise admissible.” Krakauer v. Dish Network L.L.C., 2016 U.S. Dist. LEXIS 160512 (M.D.N.C. Sept. 19, 2016)

Carlsons on Evidence
24-10-1006

• “Arguably, the requirement that the underlying records supporting that summary were made available for examination or copying, or both, by other parties at a reasonable time and place has been met. As acknowledged by D'Agnese, neither party conducted any discovery in this case. D'Agnese cannot complain that documents were not available to him if he never asked for them...However, Wells Fargo offered no evidence — and has made no argument — that the underlying records are too voluminous to be examined in court conveniently, a clear requirement under the text of the rule...This is a necessary precondition for admission of a document as a summary.” D’Agnese v. Wells Fargo Bank, N.A., 335 Ga. App. (2016)
Carlsons on Evidence
24-10-1006

• “Rule 1006 of the Federal Rules of Evidence permits a proponent to use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court... The government introduced a chart containing the information that Special Agent O'Donnell gathered during his investigation of the 11 images that rezchub61 uploaded to the boy2kid group... We find no reversible error...” U.S. v. Needham, 852 F.3d 830 (8th Cir. 2017)

Carlsons on Evidence
24-10-1006

• “...the party desiring to introduce voluminous material in summary form must make ‘[t]he originals, or duplicates, ... available for examination or copying, or both, by other parties at a reasonable time and place’...this requirement must be satisfied ‘prior to the admission of the summary’...” Tafel v. Lion Antique Cars & Invs., Inc., 297 Ga. 334 (2015)
Carlsons on Evidence
24-10-1006

• “To qualify under Evidence Rule 1006, an evidence summary must fairly represent and be taken from underlying documentary proof which is too voluminous for convenient in-court examination, and [it] must be accurate and nonprejudicial...Rule 1006 summaries can be brought into the deliberation room...”
  United States v. Whitfield, 663 Fed. Appx. 400 (6th Cir. 2016)

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Today’s Presentation
Review
Carlsons on Evidence
Review

• Evidence Program Goals
  1. Further Develop “Code Wide” Approach
  2. Underscore Fundamental Principles of Interpretation
  3. Analyze and Consider Specific Applications

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Ronald L. Carlson (Fuller E. Callaway Professor of Law, Emeritus, University of Georgia School of Law): Ron Carlson was awarded the Lifetime Achievement Award by the Georgia Trial Lawyers Association, as well as the Federal Bar Association’s highest honor, the Earl Kintner Award. The ABA recognized him with the ALI-ABA Harrison Tweed Award, their top award for CLE contributions at the national level. He has received every faculty honor presented by the law school student body at least once: the Student Bar Association Faculty Book Award for Excellence in Teaching, which is now the C. Ronald Ellington Award for Excellence in Teaching, the John C. O’Byrne Memorial Award for Significant Contributions Furthering Student-Faculty Relations and the Student Bar Association Professionalism Award. He was the first Georgia Law professor to receive the Josiah Meigs Award for Teaching Excellence from UGA. He also was awarded the 1987 Roscoe Pound Foundation’s Richard S. Jacobson Award, honoring a single national law professor for the teaching of trial advocacy. Professor Carlson was the lead and sole attorney for indigent prisoners in two significant U.S. Supreme Court appeals, Long v. District Court (establishing indigent habeas applicant’s right to transcript) and Johnson v. Bennett (prisoner freed after 34 years of confinement). He is the author of 15 books on evidence, trial practice and criminal procedure, including the book Carlson on Evidence, co-authored with son Mike Carlson, which has been cited authoritatively in over 35 Georgia appellate court opinions. Carlson regularly comments on WSB radio on high-profile Georgia criminal cases.

Michael Scott “Mike” Carlson (Deputy Chief Assistant District Attorney, Cobb Judicial Circuit; Georgia Court Martial Review Panel): Mike Carlson, who holds an “AV Preeminent” (highest possible) Martindale-Hubbell peer review rating, received his A.B degree from the University of Georgia and his J.D. degree from Washington and Lee University in 1992, where he earned, among other distinctions, the Virginia Trial Lawyers Association Award for his “excellence in demonstrating the talents and attributes of the trial advocate.” After first engaging in private practice, where he focused on civil litigation and media law, Carlson has worked as an assistant district attorney since 1997, now as a Deputy Chief Assistant District Attorney with the Cobb County District Attorney’s Office. During his career as a prosecutor, Carlson has successfully handled numerous high-profile cases and appeals, including death penalty trials. An author and frequent speaker on issues of evidence, trial practice, and criminal procedure to Georgia’s bench and bar, Carlson has served on the adjunct faculty of Atlanta’s John Marshall Law School and Emory University School of Law, and is a mentor and lecturer at the Gary Christy Memorial Trial Skills Clinic at the University Of Georgia School Of Law. In 2015, Governor Nathan Deal appointed Carlson to the Georgia Court Martial Review Panel. Among the professional awards and recognition that Carlson has received include: Faculty Medallion from the Institute of Continuing Judicial Education of Georgia for consistently outstanding presenter ratings; Prosecuting Attorneys’ Council of Georgia’s J. Roger Thompson (now Thompson-Jones) award for training beginning level prosecutors; selection as a Master in the Joseph Henry Lumpkin Inn of American Court; named by James Magazine as one of “the most influential lawyers in Georgia”; and special recognition from the District Attorneys’ Association of Georgia and the Georgia Gang Investigators Association.
11:00  HANDLING COMPLEX LITIGATION
Josh Sacks, The Law Offices of Josh Sacks PC, Dunwoody
Making Complex Medical Malpractice Cases Simple

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This article is an update to the 2017 seminar material of the same name. The structure and content remain largely the same, with additional caselaw and updated practice pointers from another year of appellate decisions and real-world case intake and trial experience in Georgia.

As we highlighted last year, it is a fairly obvious point that medical malpractice cases are inherently difficult. It is often not readily apparent whether or not there is a case in the first place. Procedural rules are more complex than conventional personal injury cases. Evidentiary rules and practice have unique and distinct applications to discovery and trial. The subject matter is dense and scientific with room for some degree of debate. The defendants are often sophisticated litigants with command of the core medical and causation issues. Jurors tend to have strong preconceived notions about medical malpractice cases. Trials usually last a while. Judges have to wade through volumes of paper. And, the stakes are high for all involved. While one or more of these phenomena might be present in any number of catastrophic injury cases, all of them collectively impact the traditional medical malpractice case.

It is the purpose of this 2018 update to continue to suggest ways in which to simplify complex medical malpractice cases – from the procedural underpinnings confronted at the filing stage to the trial of the case in front of a jury – while adding lessons learned from recent appellate decisions and the experience of another year of verdicts in Georgia. At the earliest phases of investigation, it is important to keep in mind the unique nature of medical malpractice cases in Georgia so that issues may be properly developed and framed for the ultimate goal of trial presentation. Part I of this paper will highlight strategies to employ during case intake to evaluate whether or not there is a viable medical malpractice claim. Part II will address the
procedural hurdles to anticipate during the affidavit and filing phase of the case. In Part III, the mechanics of discovery as they relate to unique medical malpractice issues will be discussed. Part IV will highlight ways in which to simplify trial presentation to maximize the impact of evidence in front of the jury.

I. Evaluating The Claim

Medical malpractice claims generally fit two broad categories: primary medical malpractice cases, where the only claims and only damages in a case are alleged to have occurred because of medical negligence; and, secondary medical malpractice claims, where there is a precipitating event caused by some independent negligence, and then subsequent allegations of malpractice during the evaluation and/or treatment phase. The approach to determining whether there is a viable malpractice claim under either scenario is largely the same; the tactical, strategic, or practical decision regarding whether to bring such a claim in the latter circumstance is beyond the scope of this paper.

For purposes of simplifying the process, a uniform, step-by-step approach is important. Step One is fleshing out critical data during the initial contact with the potential client. During this client interview phase, an overview of the potential medical claims should be obtained, to include:

- The name of the health care practitioner and/or facility where the allegedly negligent care was rendered;
- The date of the first potential breach in care;
- The underlying medical condition(s) for which the potential client was being treated;
- The specific nature of the alleged breach(es);
• The damages claimed or thought to be related to the breach(es); and

• The current condition of the potential client and the prognosis

It may also be worth asking if the person has already had the claim reviewed by other lawyers, whether those lawyers rejected the case and why, and whether the potential client already has medical records and/or films to review and evaluate.

A potential client may not be in a position to answer some of these questions; for example, he or she may not know what it is that a doctor did wrong that caused harm. Similarly, the individual may not know exactly when the alleged breach(es) occurred. Often, however, the potential client (or their family) is in a position to provide significant detail to allow a threshold degree of screening for potential medical malpractice claims. During an initial client encounter, perhaps the lawyer finds out that the doctor involved is a friend or someone he or she is not in a position to sue. Or, the alleged breaches occurred nine years ago and there is a statute of repose problem. Maybe the damages aren’t sufficient to justify the time, expense, and risk of moving forward with the investigation.

More often than not, the initial client intake provides valuable context for the nature of the claim: maybe it’s a missed cancer diagnosis and the focus will be on whether earlier detection would have changed the outcome or treatment options; or, maybe a patient went in for an appendectomy, and following the procedure, was paralyzed from the waist down so the issue is what occurred during the procedure and how it happened or what else might have contributed to the condition; perhaps a person was seen by multiple doctors at multiple facilities and there was a bad outcome, but it is unclear where along the continuum of treatment it occurred and so the chronology of care, treatment, and symptoms is the initial focus. The threshold client intake
discussion provides an opportunity to narrow the focus of the evaluation and to streamline the review.

Once the initial interview is conducted, Step Two is to gather the pertinent records. Sometimes the individual already has some or all of them. Most often, the records will need to be obtained. Years ago, obtaining medical records was a time-consuming and expensive proposition. Lawyers often asked the clients to obtain the records directly (some still do), as it is occasionally more efficient and practical to do so. In recent years, however, more and more lawyers are taking advantage of a federal law that often allows a person to obtain medical records on a disk or some other electronic format. As electronic records are more uniformly used throughout the medical profession or the ability to scan paper records to an electronic format becomes more convenient and available, requesting these records under federal law has become an important tool in the evaluation phase of a case.

The federal law in question is known as the Health Information Technology for Economic and Clinical Health (“HITECH”) Act, and it is codified at 42 U.S.C. §17935, with interpretive regulations at 45 C.F.R. 164.524. In pertinent part, the HITECH Act requires hospitals and medical providers to provide records in an electronic format (under circumstances where the records are maintained electronically or readily reproducible in electronic form, including scanning paper records to a file), upon request by the patient. 42 U.S.C. §17935(e)(1). The patient may direct that the health care provider produce the records to a designated person and location. Charges for production are limited under the federal statute to the transfer time and the cost of the media (as well as postage/mailing costs). In practical terms, the Act has revolutionized the manner in which medical records should be obtained in cases. The Act preempts Georgia’s fee schedule (theoretically unless paper records are requested, but that issue
has not been decided), so in a typical scenario where a voluminous hospital chart might have cost $1,500 under Georgia law, a HITECH Act request will generate the same production of documents on a disk for less than $50!

There is some debate about whether a law firm is authorized to request the records directly on behalf of the potential client. While the statute and regulations seem to suggest that the patient’s representative should be permitted to make such a request, the safer practice is to have the potential client sign a form HITECH Act letter directing that the records be sent to the attorney. Here is an example:

```
RE: Patient:
Patient Address:
DOB:
SSN:
Dates of Service:

REQUEST PURSUANT TO THE FEDERAL HITECH ACT

Dear Sir or Madam:

I was a patient at your facility. My personal information is above.

I am requesting copies of all my medical records for the above dates of service, including, but not limited to my complete medical chart, all imaging studies, itemized bills, photographs, and any medical records from other healthcare providers that are in your custody.

I have included a HIPAA form with this request for electronic records. I am not asking for the records in paper form; I am asking for them in an electronic format, specifically under federal law, pursuant to the HITECH Act. Please provide these medical records on a CD in a .pdf format pursuant to the requirements of the HITECH Act as set forth in 42 U.S.C. § 17935(e)(2) and 45 C.F.R. § 164.524(c) and other applicable law. Please respond within thirty (30) days, as required by law.

I would like my electronic records exported in chronological order and in color.
```
Please CERTIFY the complete medical records and send them on a CD to the following designated location:

LAW FIRM NAME
ADDRESS
PHONE
EMAIL

Sincerely,

______________________________
Patient

If a medical provider fails to comply with a valid HITECH Act request and if efforts to convince them to follow the law are unsuccessful, the local federal district court is the venue for enforcement. An action seeking enforcement of a HITECH Act request may be filed in the Court as an issue of federal law. For a very good overview of the purpose, implementation, and strategies involved in requesting records under the HITECH Act, as well as the interplay between State and Federal law in this area, the Department of Health & Human Services has a public website set up with common questions and issues. See https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/access/index.html.

Recent experience with the HITECH Act has suggested that smaller medical offices and some document production vendors do not readily produce scanned or electronically stored records in response to HITECH requests. Following up with these entities is essential; insuring that they are aware of the scope of the Act and the penalties or risks in failing to comply is also important. Most often, at least in our experience, a follow-up e-mail or phone call confirming that the request was made under the Act and that there are limits on timing and cost, will result in a re-issuing of the invoice and a proper production of the records.
Another practical issue that has developed with HITECH Act requests is their utility for non-party requests by opposing counsel. Invariably, opposing counsel sends non-party requests to a host of treating medical providers and hospitals, and, most often, some version or set of those records is already in the hands of the plaintiff’s lawyer (and perhaps the defense as well). It is not uncommon for there to be multiple productions of the same or similar health care documents in medical malpractice cases. There are at least two good practical options to address the repetitive production and provide some degree of efficiency and cost-containment. The first is to reach an agreement with opposing counsel that you will acquire the records through a HITECH Request, with a copy directly in the request sent to the defense. If that is not acceptable, then the second option – at least from the plaintiff’s perspective – is to send the non-parties a HITECH letter asking them to provide an exact copy of whatever they send in response to the non-party request, just in digital or electronic form.

With medical records in hand, Step Three in the evaluation process is the organization and review of the materials, against the backdrop and context of what the potential client has reported. Although numerous methods exist, one of the most effective organizational techniques is a chronological one. Chronological organization of a medical file allows the reviewer to retrace the care and treatment to look for the progression of the medical issues, the treatments used, the providers involved at various steps along the timeline, and the relationship between the various health care professionals in the care and treatment of the patient. Given the fact that seemingly disparate or unique medical issues may impact each other or relate in some way to the overall condition of the patient, a chronological approach provides the opportunity to more clearly look at the timing of each condition and its potential effects on the patient’s overall health status.
While experience in reviewing medical charts, medical malpractice cases, or medical issues certainly allows an efficient and generally effective evaluation of the medical records for purposes of issue-spotting and potential claims, if there is uncertainty, significant harm, or complexity with underlying co-morbidities or multiple medical providers, it is essential during the third step of the evaluation to have the case reviewed by a health care professional – either an in-house nurse or physician, or an outside consultant. The goal of the review is to filter through the materials and isolate the core questions of proper or improper medical care. This thorough vetting is important to the ultimate determination as to whether or not a valid medical malpractice claim or claims can be brought.

Within the context of reviewing the medical records, it is important to assess whether or not the records are consistent with what the potential client has reported. If there is a substantive or meaningful difference, additional scrutiny of the claim might be warranted.

If all of the above hurdles are cleared and there appears to be sufficient grounds for a medical negligence case, then Step Four is to bring in the heavy artillery: experts in the specific fields of medicine should be retained for standard of care and causation opinions. Before being retained, these experts should be screened for qualifications under Georgia’s expert witness statutes and interpretive case law. While still leaving room for some robust debate, the Georgia Supreme Court decision in Dubois v. Brantley, 297 Ga. 575, 775 S.E.2d 512 (2015), is instructive and provides guidance for expert qualifications in medical negligence cases.

The Court in Dubois tackled the question of what type of experience is required under Georgia law for a medical expert witness to testify about the standard of care. The Court analyzed the expert qualification provisions extensively. O.C.G.A. §24-7-702. One of the Court’s primary areas of focus was to provide contours to the meaning of the phrase “performing
the procedure” as part of the “knowledge and experience” requirement. *Dubois*, 297 Ga. at 581, 775 S.E.2d at 517. The Court’s explanation and resolution of the issue provides a good overview of some of the essential requirements for a standard of care expert in a medical case; however, as set out below, the test is not one that would be considered a “bright line.”

In oversimplified terms, the factual predicate of *Dubois* is as follows: Dr. Brantley performed a laparoscopic procedure to repair an umbilical hernia in Mr. Dubois. During the procedure (apparently upon insertion of a trocar to begin the procedure), Dr. Brantley allegedly punctured Mr. Dubois’ pancreas, which caused subsequent harm. Mr. Dubois’ expert witness was a practicing general surgeon who used trocars to perform abdominal procedures, but no longer performed laparoscopic umbilical hernia repairs. Instead, he used an open approach. Over the course of the prior five years, the surgeon indicated he had performed no more than one laparoscopic umbilical hernia repair. He performed other procedures laparoscopically. His opinion was that no abdominal laparoscopic procedure – for whatever purpose – should result in a trocar puncturing the pancreas, unless the pancreas is in an aberrant anatomical position.

The Georgia Supreme Court essentially narrowed the main issue regarding the qualification of the expert witness to the question of whether he was required to have performed the exact same procedure (a laparoscopic umbilical hernia repair) or whether the statute allowed him to testify on the standard of care if his professional knowledge derived from his performance of a sufficient number of other laparoscopic abdominal procedures and his frequent use of trocars. The Court held that the trial court did not abuse its discretion in allowing the expert to testify (a decision which reversed the Court of Appeals).

In explaining the reasoning for its ruling, the Court used the following colorful scientific analogy:
The difficulty with the statutory usage of ‘procedure’ concerns the level of generality at which the relevant procedure is to be defined. By way of illustration, suppose that someone pointed out a dog and asked: ‘What sort of animal is that?’ Animals can be classified at varying levels of generality, and so, you might accurately respond that the animal is a vertebrate, a mammal, or the order Carnivora, of the family Canidae, of the genus Canis, of the species Canis lupus, or of the subspecies Canis lupus familiaris. See Integrated Taxonomic Information System. More specific yet, you might identify the dog by its breed, gender, or some other distinguishing, immutable characteristic. Every one of these answers would amount to an accurate response to the question.

In the same way, a medical ‘procedure’ can be identified at varying levels of generality. Take the procedure at issue in this case. It could be accurately described just as the Court of Appeals, Dr. Brantley, and Southeast Georgia Health characterized it, as a ‘laparoscopic procedure to repair an umbilical hernia.’ Characterized in that way, the record is clear that Dr. Swartz has performed no more than one such procedure in the past five years. The procedure could, however, be characterized more generally – but just as accurately – as the surgical repair of an umbilical hernia or as an abdominal laparoscopic procedure. Under either of those characterizations, Dr. Swartz would have actual experience in performing the procedure in question, inasmuch as he regularly performed surgical procedures to repair umbilical hernias, and he regularly performs abdominal laparoscopic procedures of various sorts.

Because not all laparoscopic procedures to repair umbilical hernias are done in exactly the same way, the procedure also could be characterized more specifically than – but just as accurately as – the way in which the Court of Appeals, Dr. Brantley, and Southeast Georgia Health characterized it. Indeed, the medical literature indicates that laparoscopic surgeons use a variety of techniques to enter into the abdominal cavity, they use different points of entry to access the abdominal cavity, and they use different numbers of trocars, as well as trocars of different sort and sizes, to do so. See Fuller et al., Laparoscopic Trocar Injuries: A Report from the U.S. Food and Drug Administration Center for Devices and Radiological Health (CDRH) Systematic Technology Assessment of Medical Products (STAMPS) Committee (Nov.2003). See also Heniford & Ramshaw, “Laparoscopic Ventral Hernia Repair,” 14 Surgical Endoscopy 419, 420 (2000). With respect to laparoscopic procedures to repair umbilical hernias specifically, the literature likewise indicates variations in techniques and tools. See Rodriguez & Hinder, “Surgical Management of Umbilical Hernia,” Operative Techniques in General Surgery, Vol. 6, No. 3 at 160 (Sept.2004); Wright et al., “Is laparoscopic umbilical hernia repair with mesh a reasonable alternative to conventional repair?,” 184 Am. J. of Surgery 505, 506 (2002). And the record in this case confirms the variability of techniques and tools used in the laparoscopic repair of umbilical hernias. As a result, the ‘procedure’ in this case could be defined, one reasonably might say, as specifically as a laparoscopic procedure to repair an umbilical hernia by use of a
particular number of trocars of a certain size and design, with the primary trocar having been inserted by a specific technique at a particular site. *Dubois*, 297 Ga. 583-84, 775 S.E.2d at 518. In further analyzing the issue, the Court explained that the level of generality used to describe a procedure is not the same from case to case, but is rather flexible depending upon the nature of the standard of care allegation.

Under the fact of *Dubois*, the issue presented by the expert was whether or not the primary insertion of a trocar in an abdominal laparoscopic surgical procedure was below the standard of care where the trocar pierced the pancreas. The expert was ultimately offered only on that issue: that the defendant breached the standard of care by the insertion of the trocar to commence the laparoscopic procedure. Nothing in the record suggested that the primary insertion of a trocar in a laparoscopic umbilical repair was somehow unique or materially different than the manner in which primary trocars are inserted for other sorts of abdominal laparoscopic procedures; therefore, the trial court could have properly concluded that the expert had sufficient experience to provide the narrow standard of care opinion at issue. *Dubois*, 297 Ga. 588-89, 775 S.E.2d 521-22.

The question for someone evaluating a medical malpractice case to bring to trial is this: should I retain an expert who has performed the exact procedure performed or is it sufficient if I retain an expert familiar with the standard of care issue in the case? Obviously, the cleanest path is to retain an expert who has performed the exact same procedure. Down the road at trial, such an expert is also less susceptible to cross-examine on that core issue. In practical terms, though, it is not always possible to find a qualified expert who has performed the exact same procedure. Under those circumstances, it is critical to flesh out the precise standard of care criticism, its uniqueness to the specific procedure at issue, and the manner in which the expert would support the opinion by reference to other procedures and experience he or she has.
Here, the practice pointer to make complex medical malpractice cases simpler generally remains the same, with a caveat: try to find an expert who has performed the precise procedure at issue under similar medical circumstances, but remember that “practice setting” may be of less overall significant than the nature of the diagnosis, treatment, management, or assessment at issue. Keeping the “knowledge” and “practice” elements in mind reduces motions practice, guards against appellate issues, and generally adds credibility and value to the case. Carefully consider the Dubois opinion, the ramifications of choosing the expert, the flexibility of the standard, and the discretion of the trial court to define the contours and level of generality to be applied to the issues in the case. Also, carefully plead the standard of care issues and be sure the expert prepares an affidavit or otherwise testifies about the similarities of the procedures and techniques with which he or she is well-familiar.

II. Filing The Case

Preparing a medical malpractice case for filing involves several statutory requirements, and some practical realities. The most well-known statutory requirement is the filing of an affidavit or affidavits to support at least one breach of the standard of care that caused harm. There are other statutory requirements as well, relating to how damages or properly pled, and how certain private information is filed (a rule that applies to any case, but comes up with frequency in medical malpractice actions). The practical realities include the timing of filing of a medical malpractice case, and how such cases might be served. These concepts will be addressed in turn.

As it relates to the affidavit requirement, if a medical case does not plainly and clearly sound in simple negligence, then an affidavit is required. Under Georgia law, the filing of an affidavit in a medical malpractice case involves the interplay between O.C.G.A. §9-11-9.1 (the
affidavit requirement) and O.C.G.A. §24-7-702 (the medical expert qualification rule from the Evidence Code; highlighted and discussed in the preceding section). Reading and understanding these two statutory provisions is essential to the proper filing of a medical malpractice case.

Tracking the language of each is the best way to simplify the preparation of the affidavit. Under O.C.G.A. §9-11-9.1(a), in a medical malpractice action, “the plaintiff shall be required to file with the complaint an affidavit of an expert competent to testify, which affidavit shall set forth specifically at least one negligent act or omission claimed to exist and the factual basis for each such claim.” (emphasis supplied). Both of the emphasized portions of the statute need to be addressed in the affidavit: the expert must be competent to testify, and one negligent act or omission must be specifically provided.

For the expert competency requirements, O.C.G.A. §24-7-702 provides the roadmap in medical malpractice cases. Under subsection (e), the statute requires: “An affiant shall meet the requirements of this Code section in order to be deemed qualified to testify as an expert by means of the affidavit required under Code Section 9-11-9.1.” Therefore, to provide an affidavit of an expert competent to testify in a medical malpractice action, the criteria set forth under O.C.G.A. §24-7-702(c) need to be met. In summary form, the requirements include:

- That the expert was properly licensed to practice at the time of the act or omissions;
- That the expert has actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given. This can be shown by either:
  o The active practice of the area of specialty for at least three of the last five years with sufficient frequency to establish an appropriate level of knowledge in performing the procedure (see above), diagnosing the condition, or rendering the treatment at issue; or
- The teaching of the profession for at least three of the last five years as an employed member of the faculty of an accredited institution with sufficient frequency to establish an appropriate level of knowledge in teaching others how to perform the procedure, diagnose the condition, or render the treatment at issue.

• That the expert is a member of the same profession (except that a medical doctor and an osteopath can testify about the standard of care for each other and certain physicians with requisite experience and supervisory authority over specific midlevel providers can testify about the standards for the midlevel providers under certain circumstances as well).

O.C.G.A. §24-7-702(c).

With the competency of the medical expert set out in the affidavit, it is also mandatory to specify an act or omission that constitutes a breach of the standard of care. Pointing out a specific act or omission may be straightforward in a case – perhaps the alleged breach is that the defendant doctor missed a cancer diagnosis apparent on a radiology film on a specific date, and under the standard of care, he or she should not have missed it. In some circumstances, the breach may be less clear (and Georgia law generally does not allow a res ipsa loquitur argument for standard of care allegations). For example, perhaps a patient develops an injection site infection. The infection might happen because of a standard of care breach, or perhaps it could happen in the absence of a breach of the standard of care. Specifying the breach is important: were prophylactic antibiotics given, or was the area cleaned properly, or did the hospital staff check the area routinely enough under the applicable standard?
Caselaw following *Dubois* has provided additional contours to the expert qualification and affidavit filing issue. One such case is *Graham v. Reynolds*, 343 Ga. App. 274 (2017). In *Graham*, the plaintiffs were the surviving spouse and estate representative for a decedent who presented to the emergency room with chest pains and nausea. She had significant cardiac risk factors. The physician ordered an electrocardiogram and other procedures, diagnosed the patient with an anxiety attack, and sent her home. She continued to have symptoms.

Within hours, the patient apparently returned to the hospital. The same doctor determined that the patient was in cardiac distress and ordered her transferred to another hospital for more acute care. She died from a massive heart attack on the way to the other hospital. *Graham*, 343 Ga. App. at 275 (reciting the factual predicate for the claim). The plaintiffs brought a medical malpractice action against the emergency room physician and attached the affidavit of a cardiologist. The defense challenged the affidavit through a motion to dismiss.

The appellate court was tasked with addressing two issues: the competency of the cardiologist to testify about the care and treatment provided by the emergency room physician (at the affidavit phase) and the substance of the affidavit as it related to the heightened burden in emergency room cases. The trial court found that the expert had sufficient knowledge and experience about the issue in the case: diagnosing the urgent cardiac condition of the patient. The Court of Appeals determined that the trial court’s finding was not an abuse of discretion. In so finding, the Court was careful to point out the gatekeeping function and breadth of discretion and deference given to the trial court on the issue.

As to the second issue – the emergency department “gross negligence” standard, the Court indicated that the affidavit did not need to allege “gross negligence” using those words, but
instead needed to present a set of facts from which a jury might conclude that the breach constituted gross negligence. *Graham*, 343 Ga. App. at 279-81.

In addition to the standard of care component of the affidavit, medical causation is also an important issue to address. Applying the theme of “simplifying” medical malpractice actions, medical negligence has the same four components as other negligence actions: duty, breach, causation, damages. “Duty” is the professional medical standard of care, and the affidavit should track the statutory language to establish competency to address duty and breach, as set out above. Causation in a medical malpractice case also runs the gamut from direct (i.e. the physician lacerated the colon, which leaked and caused sepsis) to heavily scientific and statistic based (i.e. cancer was missed on radiology which delayed the diagnosis for six months, so the issue is what harm was caused by the delay). If the standard of care expert satisfies basic reliability and methodology standards and is otherwise qualified on issues of medical causation, then those opinions should be included in the affidavit for filing. If not, then an expert qualified to provide opinions about that issue should also be used.

In addition to the statutory requirements for filing an affidavit with a medical malpractice action, there are also unique pleading requirements relating to the claim for damages and prayer for relief. Unlike a traditional tort claim for injuries in which special damages are pled with specificity, medical malpractice actions have their own requirement. Under O.C.G.A. §9-11-8, if a medical malpractice claim is for more than $10,000 (which is likely close to 100% of such actions!), then “the demand for judgment shall state that the pleader ‘demands in excess of $10,000.00’ and no further monetary amount shall be stated.” O.C.G.A. §9-11-8(a)(2)(B). And, there are potential penalties ranging from striking the improper portion of the Complaint to “other sanctions, including disciplinary action . . . .” O.C.G.A. §9-11-8(a)(3). Notwithstanding
these provisions, relief in the alternative or of several different types may be demanded, so if there are mixed medical malpractice claims and simple negligence claims, alternative pleading may be used.

Another provision that comes into play in medical malpractice cases, but is not unique to them, is the redaction requirement for private information. It is not uncommon in medical cases to highlight certain information such as birthdates, or at some point in time to file medical records which may contain additional private information such as social security numbers and the like. Under O.C.G.A. §9-11-7.1(a), a filing with the Court that contains a social security number, taxpayer identification number, financial account number, or birth date shall include only:

(1) The last four digits of a social security number;
(2) The last four digits of a taxpayer identification number;
(3) The last four digits of a financial account number; and
(4) The year of an individual’s birth.

Many of the electronic filing systems in Georgia (and some case initiation forms) now require an attorney to certify that he or she has complied with this rule.

Aside from the statutory requirements for filing medical malpractice actions, there are also two practical aspects to these types of cases worth noting briefly: the timing of filing and service of process. Because of the procedural hurdles, more frequent motions practice, affidavit requirements, and pleading issues, filing medical malpractice cases close to the statute of limitations deadline generally carries greater risk than more conventional injury claims. Ideally, if at all possible, the case should be filed with sufficient time to effectuate service and receive an
Answer to the Complaint and to initial discovery (so that jurisdiction, venue, and proper party issues can be assessed before the limitations period expires).

As it relates to service of process, physicians and hospitals are often amenable to agreements acknowledging service, allowing the litigants to focus on the substantive issues and avoiding a sheriff or process server showing up at a physician’s house or office. If the attorney for a defendant is known or if there have been reasonable and professional presuit discussions, acknowledgements of service are regularly used. They save time, reduce preliminary issues, and allow the case to proceed in the normal course.

Here is the practice pointer to make complex medical cases simpler at the filing phase: hire well-qualified experts to vet the issues, track the language of the affidavit and expert statutes, and if practical and reasonable, try to establish contact with the defense lawyers to acknowledge service.

III. Discovery In Medical Malpractice Cases

Discovery in medical malpractice cases involves traditional discovery to evaluate and learn about witnesses, primary documentary evidence, contentions and issues, defenses, and the like, and case-specific discovery unique to either medical malpractice cases in general or to the facts of the specific case at hand. General discovery and case-specific discovery will be discussed below. Before turning to those issues, however, it is important to highlight a core principle to assist with navigating the complex medical case: learn the basic medicine.

In order to craft an effective discovery strategy and trial plan, it is of vital importance to understand the basic medicine involved in the case. Defendants start the case with the advantage in that regard: they presumably practice in the field regularly, and have access to their own
colleagues and others who might be inclined to support the profession by agreeing to evaluate and consider certain defenses in medical malpractice cases. Once you have an expert who has provided an affidavit, you obviously have at least a rudimentary understanding of the medical issues involved. Have the expert walk you through the procedure, diagnosis, or treatment in a practical way. Often, a personal visit to the physician's office or a hospital where the physician has privileges can lead to a very useful discussion and even an observation of the specific issues in the case. It is often easier to understand the medicine by watching someone engage in the practice of medicine or by observing a physician in person explain with anatomic models exactly what occurred than it is to glean the same information from medical journals or texts.

By having an educated understanding of the medical issues involved, a reasonable discovery strategy can be implemented. Such a strategy begins with an outline of written and oral discovery of general tort issues. These issues are similar to the issues that arise in any number of injury cases, whether based on medical malpractice, automobile accidents, product liability, or slip-and-falls. General discovery is geared toward determining the universe of information and evidence within the knowledge, possession, custody, and/or control of the defendant(s). Who are the witnesses who know something about the events? Upon whom will the defendants rely to support their defenses or to develop their factual predicate? What information do the defendants have about the injured party? What documents, photos, or videos do they have? Is there tangible evidence available?

Written discovery, followed by any necessary depositions for basic issues, can be an effective way to flesh out these basic data points. In addition to interrogatories and requests for documents, requests for admission under Rule 36 are also an effective and important part of a discovery strategy. As it relates to general discovery issues, requests for admission can resolve
issues such as service, process, venue, jurisdiction, proper parties, statute of limitations, statute of repose, and the like. In the context of general discovery issues, depositions might aid in the development or provide basic evidentiary proof requirements for such things as proper corporate entities, the accuracy and completeness of documents,

To develop a strategy for case specific discovery in medical malpractice cases, it is important to keep in mind the proof requirements: duty (standard of care), breach, proximate cause, and damages. For each element of proof, it is important to know what the law mandates, what the specific issues are, and how they will be presented. For example, “duty” in a medical malpractice context begins with establishing a physician (or other health care provider)-patient relationship. Often, the relationship is obvious and will be admitted. Sometimes, defendants might take a position that the contours of the relationship are not well-defined. For example, perhaps one of the defendants was called on the phone by a treating physician, as a consultant one time, in the middle of a patient’s care, and never saw the patient. Does the physician-patient relationship extend to that consultant? Does the relationship extend beyond the phone call? What responsibilities and obligations arise from that scenario? These are case-specific and fact-specific issues. If a physician dispenses some sort of medical advice or engages in some sort of patient-specific evaluative process – by phone, in person, or otherwise – generally, a sufficient nexus exists.

Once the provider-patient relationship is established, then the issue of the proper standard of care (and alleged breaches) can be fleshed out and proven. The standard of care is what a reasonable (and qualified) provider would do under the same circumstances or similar conditions. On occasion, the standard is admitted (perhaps in cases in which causation is the primary issue. Often, the standard is subject to some degree of debate. And, the debate usually
pits expert witnesses against one another. Written and oral discovery should target standard of care contentions. Interrogatories are used to determine expert witnesses, but can also directly ask for defendants’ position on the standard of care. Requests for admission can seek to narrow the issue by asking if the defendants agree that at a minimum the standard of care requires certain things to be done or not done. And depositions – of the defendants themselves and of their expert witnesses – should provide the specifics and the bases for the defendants’ positions on these issues. The “breach” element of the claim follows the same pattern. In the context of medical malpractice cases, the parlance is usually “a breach of the standard of care” or conduct that is “below the standard of care.”

Proximate cause provides the bridge or link between “below standard care” and “damages.” Two basic questions arise under a proximate cause analysis in medical malpractice cases: was some type of harm foreseeable from the breach, and, did the harm actually occur because of the breach? Chapters in textbooks have been written about the subject of proximate cause in tort cases, and specifically in medical malpractice cases. In Georgia, it is not necessary to demonstrate that a specific harm or manner of harm was foreseeable; it is sufficient to prove that some harm was more likely than not going to occur, with the caveat that extreme, unique, or otherwise unpredictable events may fall outside the framework of the breach, such that the causal chain is either broken or not established. Both foreseeability and “but for” causation are generally required. Discovery should address proximate cause issues in medical malpractice cases in a manner that tracks these two components.

The last element of proof (and one that is occasionally overlooked because of the intensity and complexity of the medical issues in a case) is damages. Damages are usually obvious – the primary question in medical cases is whether a breach proximately caused the
harm. From a discovery standpoint, it is important to develop the extent of the harm (economic and non-economic, tangible and intangible), and to find meaningful ways to present it. There are plenty of occasions in medical negligence cases in which the defendants do not challenge the damages component of the case; instead, they focus on the breach and causation aspects of the claim. Regardless of whether the issue is challenged or not, it is important in discovery to determine the positions of the parties with respect to damages, and it is also important to make sure damages witnesses (before and after witnesses; contemporaneous fact witnesses; expert witnesses on damages) are properly identified.

The practice pointer for discovery in medical malpractice cases is this: remember the basic elements of the claim and the defenses and use the discovery process to develop and establish the proof requirements.

IV. Simplifying Trial

Trials are not simple. Medical malpractice trials are certainly not simple. But there are ways to plan and organize such cases to simplify and streamline them. For purposes of this section, four strategies for simplifying medical malpractice trials will be highlighted: the trial notebook, the organization of exhibits, the presentation of experts, and the use of technology.

One of the most effective ways of simplifying trial is by creating a comprehensive start-to-finish trial notebook. The organization and content of the notebook might be the difference between success and failure in Court. There are certainly different schools of thought on how to create and maintain a trial notebook. Here are some suggestions that have worked for this author.
The notebook should have a table of contents with tabs for each section. The table of contents should track the anticipated chronology of the trial and should include the pretrial order, pretrial motions, voir dire, opening statements, plaintiff witnesses (with depositions and any evidence to be used with the witness), defense witnesses (with depositions and any evidence to be used with the witness), stipulations, other evidence (with a chart indicating whether the evidence is admitted or denied), a listing of demonstrative aids, jury charges, and closing argument notes and themes. On a separate page should be a checklist with the essential elements of the claim listed, the witnesses and proof that are going to be used for each element, and the demonstrative aids that may be used as well. As each witness, piece of evidence, and aid is used, the list is checked off, so that once all of the elements have been checked off, there is confidence that the case has been proven and the evidence used in the manner that was planned.

As it relates to exhibits, an effective way to streamline and simplify the trial process in medical cases is to reach an agreement with opposing counsel before trial about any joint exhibits that may be used. Often, these are agreed-upon bates numbered medical charts that both parties can use freely during trial. Redact certain personal identifying information and collateral source references. Most medical malpractice trials have at least one joint exhibit of medical records.

With respect to evidence for which there is not a joint exhibit, seek agreement pretrial about admissibility, and, for the remaining exhibits/evidence, have them organized in the anticipated order of presentation of submission, marked with a blank exhibit sticker in the event one or more exhibits is not entered into evidence, and be prepared to lay the foundation and introduce the evidence during the course of the trial.
With a trial notebook and a gameplan for the use of exhibits, the manner in which expert witnesses are presented at trial is critical in medical malpractice cases. If at all possible, the expert should come live to trial. The expert should avoid medical terms that are undefined or difficult to comprehend. The expert should try to augment or supplement their testimony with visual aids and, where appropriate, should step down from the witness stand to educate the jury about the pertinent medical issues. The goal is to provide a clear, concise, and understandable summary of the key medical points – a goal that ought to apply equally to plaintiffs and defendants.

To bring all of the elements of a case together in a compelling and efficient way, current courtroom technology provides significant benefits at trial. Having an individual put in charge of the technology is essential – the person should know the material, should be able to pull it up in an instant, and should make sure the electronic presentation is seamless. Technology can be used to provide a PowerPoint presentation for opening statements and closing arguments, to show videotaped depositions or to confront a witness with written or videotaped testimony (or both) during live cross-examination, to pull up documents for the jury to see or to use with witnesses, to show demonstrative or illustrative evidence, to show recreations, simulations, or re-enactments, to show day-in-the-life videos, to present photographs, and a slew of other effective uses.

An effective way to highlight complex medical testimony in an understandable and real-world way is to have experts or witnesses identify and show actual surgical hardware, components, or other healthcare-related objects so the jury sees what the case involves. For example, if someone has a metal rod in their leg, the lawyer might bring an exemplar metal rod which the orthopedic surgeon could discuss. Perhaps the judge would give permission for the
jury to inspect it and see how it is made. Presentations with durable medical goods or other tangible evidence provide a good way to simplify more complex medical terminology and to explain to the jurors the subject matter of the trial.

The practice pointer(s) for simplifying trial presentation can be summarized this way: spend time preparing a thorough trial notebook, plan for the admission of and organize exhibits, prepare experts for live testimony, consider the effectiveness of visual and tangible exhibits, and make use of the technology available to organize and present evidence effectively for the jury.

Conclusion

Medical malpractice cases have an inherent level of complexity – procedurally and substantively – that sets them apart from other types of tort claims, or at least makes them unique in terms of evaluation, preparation, and prosecution. An effective strategy from client intake through trial is one in which processes are simplified, core elements of claims are evaluated and developed, and a consistent approach is taken to the preparation of these cases.
Josh Sacks, The Law Offices of Josh Sacks, PC, Dunwoody, Georgia. Mr. Sacks is an AV-rated trial attorney with more than 20 years of experience representing individuals and families who have suffered catastrophic loss or the wrongful death of a loved one. He specializes in cases involving complex injuries and medical issues, including brain injury, paralysis, and catastrophic damage claims arising from tractor-trailer and automobile wrecks, medical malpractice, and product defects. He has been featured in Atlanta Magazine in the Lawyers of Distinction series, and he has been voted by his peers repeatedly as a Georgia Super Lawyer and Rising Star. He has tried to verdict or settled numerous multimillion dollar cases across the spectrum of personal injury and wrongful death claims.

He has been successful in achieving numerous favorable discovery orders, including orders striking opposing expert witnesses, compelling the production of documents and information, and awarding fees and costs to his clients.

Mr. Sacks is a frequent lecturer to both attorneys, paralegals, and the medical community. He has presented seminars and has spoken on a range of topics from jury selection, trial presentation, and discovery strategies, to ethics and professionalism. He frequently assists other attorneys with complex cases, providing the resources and experience to prepare such cases for trial.

He earned his B.A. degree with honors from Amherst College, and his J.D. degree from the College of William & Mary, where the Sacks Moot Court Office bears his name.
11:45 **JUDICIAL PERSPECTIVE**

*Hon. Diane E. Bessen,* Chief Judge, State Court of Fulton County, Atlanta

*Hon. Benjamin W. Karpf,* Judge, Chatham County Magistrate Court; Bouhan Falligant LLP, Savannah

*Hon. Michael L. Karpf,* Chief Judge, Eastern Circuit Superior Court, Savannah
THE CHIEF JUSTICE’S COMMISSION ON PROFESSIONALISM  
(Founded 1989)

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

Karlise Y. Grier, Executive Director

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

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

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

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

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

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

Today, the Commission, which meets three times per year, is under the direction and management of its fourth Executive Director, attorney Karlise Yvette Grier. The Commission continues to support and advise persons locally and nationally who are interested in professionalism programming. The Chief Justice of the Supreme Court of Georgia serves as the Commission’s chair, and Chief Justice Harold D. Melton currently serves in this capacity. The Commission has twenty-two members representing practicing lawyers, the state appellate and trial courts, the federal district court, all Georgia law schools and the public. (*See Appendix A*). In addition to the Executive Director, the Commission staff includes 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 and working groups (Access to Justice, Finance and Personnel, Continuing Legal Education, Social Media/Awareness, Financial Resources, and Benham Awards Selection) in carrying out some of its duties. It also works with other state and national entities, such as the American Bar Association’s Center for Professional Responsibility and its other groups. To keep Georgia Bar members abreast of professionalism activities and issues, the Commission maintains a website at [www.cjcpga.org](http://www.cjcpga.org). The Commission also provides content for the Professionalism Page in every issue of the *Georgia Bar Journal*. In 2018, the Commission engaged in a strategic planning process. As a result of that process, the Commission decided to focus on four priority areas for the next three to five years: 1) ensuring high quality professionalism CLE programming that complies with CJCP guidelines; 2) promoting the understanding and exercise of professionalism and emphasizing its importance to the legal system; 3) promoting meaningful access to the legal system and services; and 4) ensuring that CJCP resources are used effectively, transparently and consistent with the mission.

After 29 years, the measure of effectiveness of the Commission should ultimately rest in the actions, character and demeanor of every Georgia lawyer. Because there is still work to do, the Commission will continue to lead the movement and dialogue on legal professionalism.

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THE MEANING OF PROFESSIONALISM

The three ancient learned professions were the law, medicine, and ministry. The word profession comes from the Latin *professus*, meaning to have affirmed publicly. As one legal scholar has explained, “The term evolved to describe occupations that required new entrants to take an oath professing their dedication to the ideals and practices associated with a learned calling.”¹ Many attempts have been made to define a profession in general and lawyer professionalism in particular. The most commonly cited is the definition developed by the late Dean Roscoe Pound of Harvard Law School:

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

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

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:

¹ Deborah L. Rhode, Professional Responsibility: Ethics by the Pervasive Method 39 (1994)
² Roscoe Pound, The Lawyer from Antiquity to Modern Times 5 (1953)
[Although] lawyers have tended to take the rules more seriously because of an increased fear of disciplinary prosecutions and malpractice suits, . . . [they] have also tended to look at nothing but the rules; if conduct meets the minimum standard, lawyers tend to ignore exhortations to set their standards at a higher level.\(^3\)

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

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

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

**GENERAL PURPOSE OF CLE PROFESSIONALISM CREDIT**

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

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

DISTINCTION BETWEEN ETHICS AND PROFESSIONALISM

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

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

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

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

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

ISSUES AND TOPICS

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

Specific topics that can be used as subject matter to provide context for a 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.

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 – 2018-2019 COMMISSION MEMBERS

B – MISSION STATEMENT

C – OATH OF ADMISSION

D – A LAWYER’S CREED

E – ASPIRATIONAL STATEMENT ON PROFESSIONALISM

F – SELECT PROFESSIONALISM PAGE ARTICLES
APPENDIX A

CHIEF JUSTICE’S COMMISSION ON PROFESSIONALISM

2018 - 2019

Members
The Honorable Harold D. Melton (Chair),
Atlanta
Professor Nathan S. Chapman, Athens
Professor Clark D. Cunningham, Atlanta
The Honorable J. Antonio DelCampo,
Atlanta
Mr. Gerald M. Edenfield, Statesboro
The Honorable Susan E. Edlein, Atlanta
Ms. Elizabeth L. Fite, Decatur
Ms. Rebecca Grist, Macon
Associate Dean Sheryl Harrison-Mercer,
Atlanta
Mr. Kenneth B. Hodges III, Atlanta
The Honorable Steve C. Jones, Atlanta
The Honorable Meng H. Lim, Tallapoosa
Professor Patrick E. Longan, Macon
Ms. Maria Mackay, Watkinsville
The Honorable Carla W. McMillian,
Atlanta
The Honorable Rizza O’Connor, Lyons
Ms. Claudia S. Saari, Decatur
Ms. Adwoa Gharney-Tagoe Seymour,
Atlanta
Assistant Dean Rita A. Sheffey, Atlanta
Ms. Nicki Noel Vaughan, Gainesville
Mr. R. Kyle Williams, Decatur
Dr. Monica L. Willis-Parker, Stone Mountain

Advisors
The Honorable Robert Benham, Atlanta
Ms. Jennifer M. Davis, Atlanta
Professor Roy M. Sobelson, Atlanta

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Mr. Robert Arrington, Atlanta
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Professor Nicole G. Iannarone, Atlanta
Ms. Tangela S. King, Atlanta
Ms. Michelle E. West, Atlanta
Ms. DeeDee Worley, Atlanta

Staff
Ms. Karlise Y. Grier, Atlanta
Ms. Terie Latala, Atlanta
Ms. Nneka Harris-Daniel, Atlanta

Italics denotes public member/non-lawyer
APPENDIX B

MISSION STATEMENT

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

CALLING TO TASKS

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

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

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

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

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

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

**Attorney’s Oath**

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

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

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

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

A LAWYER’S CREED

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

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

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

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

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

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

ASPIRATIONAL STATEMENT ON PROFESSIONALISM

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

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

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

GENERAL ASPIRATIONAL IDEALS

As a lawyer, I will aspire:

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

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

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

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

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

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

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

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

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

SPECIFIC ASPIRATIONAL IDEALS

As to clients, I will aspire:

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

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

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

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

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

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

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

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

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

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

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

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

(b) To model for others the respect due to our courts.  
As a professional I should:

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

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

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

(a) To recognize and to develop our interdependence;

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

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

As to our profession, I will aspire:

(a) To improve the practice of law.  
As a professional, I should:

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

(b) To protect the public from incompetent or other wrongful lawyering.  
As a professional, I should:

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

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

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

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

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

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

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

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

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

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

SELECT PROFESSIONALISM PAGE ARTICLES
The Importance of Lawyers Abandoning the Shame and Stigma of Mental Illness

One tenet of the Chief Justice's Commission on Professionalism's "A Lawyer's Creed" is "To my colleagues in the practice of law, I offer concern for your welfare." If you are aware of a colleague that may be experiencing difficulties, ask questions and offer to help them contact the Lawyer Assistance Program for help.

BY MICHELLE BARCLAY

January is the month when Robin Nash, my dear friend and lawyer colleague, godfather to my child, officiate for my brother's marriage and former director of the Barton Center at Emory University, left the world. Positive reminders of him are all around, including a child law and policy fellowship in his name, but January is a tough month.

Robin's suicide, 12 years ago, was a shock to me. As time passed and I heard stories about Robin from others who knew him and I learned more about suicide, I can see in hindsight the risk looming for him. Today, I think his death was possibly preventable.

In 2006, Robin wrote this essay about himself for Emory's website

"Robin Nash, age 53, drew his first breath, attended college and law school and now works at Emory University. He loves to travel to places like Southeast Asia and the Middle East but he always returns home to Emory and his hometown of Decatur. Robin majored in Economics and Mathematics. He began his law practice in 1980 in Decatur surviving mostly on court-appointed cases for mentally ill patients in commitment hearings. His practice expanded to working with institutionalized developmentally delayed clients, special education cases, wills and estate litigation and representing banks in the hugely interesting area of commercial real estate closings.

In 1995, he was appointed as a juvenile court judge in Dekalb County. He resigned from the bench effective December 2005. He sold most of his personal belongings, paid off his remaining debts and moved overseas to think and travel. After thinking and traveling for three months, he returned to the active world of Decatur. He was appointed director of the Barton Clinic effective April 15, 2006."

When Robin came back from traveling, he told his friends—"I can be more impactful here."—which was and is true. Robin's impact continues today through the work of young lawyers serving as Robin Nash Fellows and through the lives of the thousands of mothers, fathers, daughters and sons he touched, helping people traumatized by child abuse, neglect, addiction and crime.

He was impactful in part because he had so much empathy for others. He was
well regarded and well loved. He was a person you could count on who did extraordinary things for others—helping a student obtain a TPO in the middle of the night to stop a stalker; quietly helping a refugee family get stable and connected to services; and of course, his consistent care of his friend Vinny. Vinny was a severely disabled adult Robin befriended and with whom he had a deep connection. Because he was a lawyer, Robin was able to help Vinny obtain full access to available medical services without being institutionalized.

So why did Robin leave? He lost his battle with mental illness. He masked it well and as a private person, did not share his struggles. His friends had some insight into his struggles but it was always complicated. While a judge, Robin was known for saying things like, “I am a manager of misery” or “I manage the competition not to serve the most vulnerable families and children.” But he also said, “Talk like this is just dark humor which is a useful coping mechanism for an emotionally draining job.”

I know today that a low serotonin level in his body was dangerous for his depression and that the medications he took waxed and waned in effectiveness. I also now know that he had not slept well for days before he acted. We’d had a work meeting the day before he died where he made a long ‘to do’ list. Who makes a long ‘to do’ list when one is contemplating suicide? Plenty of people, I have learned. I saw that ‘to do’ list on his table when I was in his apartment after his death.

What could have helped? Abandoning the shame and stigma of mental illness is a good start. I have been heartened by the social movement campaign, Time to Change, designed to help people speak up about mental illness. A safety plan shared with a reasonably wide network of people can also help. Antidepressant medications can help. Recent studies about anti-depression drugs “puts to bed the controversy on anti-depressants, clearly showing that these drugs do work in lifting mood and helping most people with depression.” Science is advancing better treatments at a rapid pace. And some experts advise that directly asking whether a person has considered killing themselves can open the door to intervention and saving a life.

Before becoming a lawyer, I worked as a nurse in a variety of settings at both Grady and Emory hospitals. I saw attempted suicides. I witnessed a number of those people who were grateful they were not successful. I saw safety plans work when enough people knew about the risks. Sometimes, medicines were changed, new treatments tried and I saw people get better.

I feel like with my background I could have and should have probed Robin more. But at the time, I thought I was respecting his privacy by not asking too many questions. Today I know that a person can be fine one day and then chemicals in their brain can wildly change within 24 hours, and they’re no longer ok. I learned that not sleeping can be deadly. I have also learned that just talking about it can help a person cope.

A book that has helped me is called “Stay: A History of Suicide and the Philosophies Against It,” by Jennifer Michael Hecht. If I had a second chance, I would try to use some of the arguments in that book, such as:

None of us can truly know what we mean to other people, and none of us can know what our future self will experience. History and philosophy ask us to remember these mysteries, to look around at friends, family, humanity, at the surprises life brings—the endless possibilities that living offers—and to persevere.

Of course, first I would have just asked about his mental health with love and listened. I still wish for that chance to try.

Afterword by Chief Justice’s Commission on Professionalism Executive Director Karline Yvette Grier: One tenet of the Chief Justice’s Commission on Professionalism’s “A Lawyer’s Creed” is “Tory colleagues in the practice of law related or organizations” to help them contact the Lawyer Assistance Program for help.

Michelle and Andy Barclay are so grateful to the Emory University community for the grace and care that surrounded everyone, especially the students, when Robin died.

Michelle Barclay, J.D., has more than 20 years experience working in Georgia’s judicial branch. She is currently the division director of Communications, Children, Families, and the Courts within the Judicial Council of Georgia’s Administrative Office of the Courts. Before becoming a lawyer, she was a nurse for 10 years, specializing in ICU and trauma care. Her degrees include a Juris Doctor from Emory University School of Law, a Bachelor of Science in Nursing from Emory University and a Bachelor of Interdisciplinary Studies from Georgia State University. She is also co-founder along with her husband Andrew Barclay of the Barton Child Law and Policy Center at Emory University School of Law. She can be reached at 404-657-9299 or michelle.barclay@georgiacourts.gov.

Endnotes
Promoting a Professional Culture of Respect and Safety #MeToo

In keeping with our professionalism aspirations, I challenge you to take a proactive, preventative approach to sexual harassment and to start the discussions . . . about things we as lawyers can do to promote a professional culture of respect and safety to prevent #MeToo.

BY KARLISE Y. GRIER

“There is no doubt that Marley was dead. This must be distinctly understood, or nothing wonderful can come of the story I am going to relate.”—Excerpt from: “A Christmas Carol” by Charles Dickens.

To borrow an idea from an iconic writer: There is no doubt that #MeToo testimonials are real. This must be distinctly understood, or nothing wonderful can come of the ideas I am going to share.

I start with this statement because when I co-presented on behalf of the Chief Justice’s Commission on Professionalism at a two-hour seminar on Ethics, Professionalism and Sexual
Harassment at the University of Georgia (UGA) in March 2018, it was clear to me that men and women, young and old, question some of the testimonials of sexual harassment that have recently come to light. For the purposes of starting a discussion about preventing future #MeToo incidents in the Georgia legal profession, I ask you to assume, arguendo, that sexual harassment does occur and to further assume, arguendo, that it occurs in Georgia among lawyers and judges. Our attention and discussion must therefore turn to “How do we prevent it?” We won’t expend needless energy on “Is he telling the truth?” We won’t lament, “Why did she wait so long to come forward?”

First, I want to explain why I believe that sexual harassment in the legal profession is, in part, a professionalism issue. As Georgia lawyers, we have A Lawyer’s Creed and an Aspirational Statement on Professionalism that was approved by the Supreme Court of Georgia in 1990. One tenet of A Lawyer’s Creed states: “To my colleagues in the practice of law, I offer concern for your welfare. I will strive to make our association a professional friendship.”

Frankly, it is only a concern for the welfare of others that in many cases will prevent sexual harassment in the legal profession because of “gaps” in the law and in our ethics rules. For example, under federal law, sexual harassment is a form of sex discrimination that violates Title VII of the Civil Rights Act of 1964. Title VII applies to employers with 15 or more employees. According to a 2016 article on lawyer demographics, three out of four lawyers are working in a law firm that has two to five lawyers working for it. In Georgia, there are no state laws similar to Title VII’s statutory scheme.

There is currently nothing in Georgia’s Rules of Professional Conduct that explicitly prohibits sexual harassment of a lawyer by another lawyer. Moreover, it is my understanding that generally the Office of the General Counsel will not prosecute a lawyer for alleged lawyer-on-lawyer sexual harassment absent a misdemeanor or felony criminal conviction, involving rape, sexual assault, battery, moral turpitude and other similar criminal behavior. Other circumstances in which laws or ethics rules may not apply include sexual harassment of lawyers by clients or sexual harassment that occurs during professional events, such as bar association meetings or continuing education seminars.

Former Georgia Chief Justice Harold Clarke described the distinction between ethics and professionalism as . . . the idea that ethics is a minimum standard which is required of all lawyers while professionalism is a higher standard expected of all lawyers. Therefore, in the absence of laws and ethical rules to guide our behavior, professionalism aspirations call on Georgia lawyers to consider and implement a professional culture of respect and safety that ensures zero tolerance for behavior that gives rise to #MeToo testimonials.


Former Georgia Chief Justice Harold Clarke described the distinction between ethics and professionalism as . . . the idea that ethics is a minimum standard which is required of all lawyers while professionalism is a higher standard expected of all lawyers.
practical advice for legal employers to address or to prevent sexual harassment. Some of the suggestions included: establishing easy and inexpensive ways to detect sexual harassment, such as asking about it in anonymous employee surveys and/or exit interviews; not waiting for formal complaints before responding to known misconduct; and discussing the existence of sexual harassment openly. The federal judiciary’s working group on sexual harassment has many reforms that are currently underway, such as conducting a session on sexual harassment during the ethics training for newly appointed judges; reviewing the confidentiality provisions in several employee/law clerk handbooks to clarify that nothing in the provisions prevents the filing of a complaint; and clarifying the data that the judiciary collects about judicial misconduct complaints to add a category for any complaints filed relating to sexual misconduct. For those planning CLE or bar events, the American Bar Association Commission on Women in the Profession cautions lawyers to “be extremely careful about excessive use of alcohol in work/social settings.”

During our continuing legal education seminar at UGA, one of the presenters, Erica Mason, who serves as president of the Hispanic National Bar Association (HNBA), shared that HNBA has developed a “HNBA Conference Code of Conduct” that states in part: “The HNBA is committed to providing a friendly, safe, supportive and harassment-free environment for all conference attendees and participants. ... Anyone violating these rules may be sanctioned or expelled from the conference without a registration refund, at the discretion of HNBA Leadership.” Mason also shared that the HNBA has signs at all of its conferences that reiterate the policy and that provide clear instructions on how anyone who has been subjected to the harassment may report it. In short, you don’t have to track down a procedure or figure out what do to if you feel you have been harassed.

Overall, some of the takeaways from our sexual harassment seminar at UGA provide a good starting point for discussion about how we as lawyers should aspire to behave. Generally, our group agreed that women and men enjoy appropriate compliments on their new haircut or color, a nice dress or tie, or a general “You look nice today.” Admittedly, however, an employment lawyer might say that even this is not considered best practice.

Many of the seminar participants agreed on some practical tips, however. Think twice about running your fingers through someone’s hair or kissing a person on the check. Learn from others’ past mistakes and do not intentionally pat or “flick” someone on the buttocks even if you mean it as a joke and don’t intend for it to be offensive or inappropriate.

In our professional friendships, we want to leave room for the true fairy-tale happily ever after endings, like that of Barack and Michelle, who met at work when she was an associate at a law firm and he was a summer associate at the same firm. We also need to ensure that our attempts to prevent sexual harassment do not become excuses for failing to mentor attorneys of the opposite sex.

Finally, just because certain behaviors may have been tolerated when you were a young associate, law clerk, etc., does not mean the behavior is tolerated or accepted today. Professionalism demands that we constantly consider and re-evaluate the rules that should govern our behavior in the absence of legal or ethical mandates. Our small group at UGA did not always agree on what was inappropriate conduct or on the best way to handle a situation. We did all agree that the conversation on sexual harassment was valuable and necessary.

So in keeping with our professionalism aspirations, I challenge you to take a proactive, preventative approach to sexual harassment and to start the discussions in your law firm, corporate legal department, court system and/or bar association about things we as lawyers can do to promote a professional culture of respect and safety to prevent #MeToo.

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**Endnotes**


5. The Georgia Code of Judicial Conduct differs from the Georgia Rules of Professional Conduct in that Rule 2.3 (b) of the Code of Judicial Conduct specifically prohibits discrimination by a judge in the performance of his or her judicial duties. See https://
CHIEF JUDGE DIANE E. BESSEN  
STATE COURT of FULTON COUNTY

A graduate of Emory University and Emory School of Law, Judge Bessen was appointed to State Court of Fulton County in 2002. Prior to that, she spent six years as a part-time judge for both Fulton County Magistrate Court and City Court of Atlanta. She had been an associate with the firm of McGinn, Webb & Warner before establishing her own firm. Judge Bessen is the Recipient of the Anti-Defamation League’s Unsung Hero Award, the Atlanta Bar Association Professionalism Award and GTLA Champion of Justice Award. Since her appointment to the State Court Bench she has run unopposed.

Judge Bessen is involved in the following organizations:

- Member, Board of Governors of State Bar of Georgia (2009 – present)
- Co-Editor, Atlanta Bar Association magazine, *The Atlanta Lawyer* (2009 – Present)
- Past Chair, Judicial Section of Atlanta Bar Association
- Past Chair, E-File Committee of State Bar of Georgia
- Member, State Bar Judicial Qualifications Commission Nominating Committee
- Member, Fulton County Courts’ Joint Governance Committee
- Member, Atl/Fulton Pre-arrest Diversion Initiative (2016-2017)
- Member, Judicial Council Standing Committee on Technology
- Former Delegate of American Bar Association National Council of State Trial Judges
- Former Member, New Courts Commission, State Bar of Georgia
- Former Member, Legislative Advisory Committee, State Bar of Georgia

- Adjunct Professor, Medical Malpractice Litigation & Pre-trial Litigation Classes, Emory University School of Law (2008 – present)

- Fellow, Lawyers’ Foundation of Georgia
- Council of State Court Judges
- Lawyer’s Club of Atlanta
- North Fulton Bar Association
- Sandy Springs Bar Association
- Georgia Association of Women Lawyers
- Gate City Bar Association
- Lamar Inn of Court

She is married to criminal defense attorney, Steven K. Weiner, and they have two adult children.
Benjamin W. Karpf

Benjamin Karpf is currently a part-time Magistrate Judge in Chatham County. In May 2018, he was elected to the Superior Court of Chatham County. His term will begin on January 1, 2019. He has practiced law in Savannah with Bouhan Falligant LLP since 2011. Prior to that, he practiced with a large law firm in Washington, D.C. He attended law school at Georgetown University. He received his undergraduate degree from George Washington University and a master’s degree from Georgetown. Over the past year, Ben has been presiding by designation in Chatham County Superior Court and Juvenile Court on a regular basis.
CHIEF JUDGE MICHAEL L. KARPF

Michael L. Karpf is a native Savannahian, a graduate of Savannah High School, Armstrong State College, the University of Georgia, and UGA Law School.

In Law School, he served on the Georgia Law Review and the Georgia Journal of International and Comparative Law. He was admitted to the Bar in 1971 and was engaged in the private practice of law until 1979, when he was appointed as Judge in the Recorder’s Court of Chatham County. He served in that capacity until 1989, when he was elected a Judge of the State Court of Chatham County. He served in that position until August of 1993, when he was appointed to the Superior Courts of Georgia, Eastern Judicial Circuit, by Governor Zell Miller, where he now serves. He was appointed Chief Judge of Superior Court in Chatham County in January, 2012.

He has a Son and Daughter-In-Law and two Grandsons, who rock his world. He is a member of B’nai Brith Jacob Synagogue. Chief Judge Karpf will be retiring at the end of 2018.
SATURDAY
NOVEMBER 3, 2018

8:00 ETHICS IN LITIGATION
Brian R. Smith, The Smith Law Practice, Atlanta
HANDLING ETHICAL ISSUES THAT MAY ARISE IN LITIGATION

Brian R. Smith
The Smith Law Practice
Atlanta, Georgia

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The topic of legal ethics often brings to mind the worst lawyers in our profession and the punishment that can be meted out to them, such as suspension or disbarment. Avoiding such a fate generally involves refraining from doing things that we all know are prohibited – thou shalt not steal from your client, lie to the court, etc. But there are subtler ethical issues that can arise that can cause considerable stress for a conscientious lawyer who wishes to avoid doing anything that might violate the ethical rules in a way that would call his or her character or professionalism into question. This paper is designed to help lawyers who care about maintaining high ethical standards follow the best practices and avoid some of the trickier ethical problems that may arise in a litigation practice.

Part One — How Approach Ethical Issues Generally

Close questions regarding legal ethics cannot always be resolved based on a lawyer’s intuition alone. They involve the application of the relevant law to the facts, just like anything else. When tricky ethical questions arise, an ethical lawyer must be able to spot the issue and then apply the relevant rules with care in order to chart the proper course.

I. Know the Georgia Rules of Professional Conduct

First, as lawyers we should all make an effort to be just as familiar with the Georgia Rules of Professional Conduct (GRPC) as we are with the statutes and case law that are most pertinent to the substantive areas of the law in which we specialize. Having a good working

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1 The GRPC can be found on the State Bar’s Website; click on “Bar Rules” → “Ethics and Professionalism”, then scroll down to the section labeled “Ethics and Disciplinary Rules” and click on “Georgia Rules of Professional Conduct.” The Bar’s website also contains Formal Advisory Opinions that are instructive in interpreting the GRPC, as well as the rules regarding the Disciplinary Proceedings applicable to bar grievances, as outlined in Rule 4-201, et seq. of the State Bar Rules and Regulations. The GRPC and procedural rules are also accessible through Westlaw and most other legal research subscription databases.
knowledge of these rules and the information contained in the official comments to them will help you spot subtle ethical issues that a less informed lawyer might overlook.

When an ethical issue arises and you are assessing how to proceed, the first thing you should do is review the relevant GRPC and all the instructive Comments in detail, despite already being familiar with them generally. The Rules contain important nuances that are not always intuitive, and you will notice details when you read them with a specific question in mind that you might not if you were reviewing them generally. The State Bar also amends various portions of the GRPC from time to time, and amends the Comments with some regularity. Make sure you have parsed all relevant portions of the GRPC very carefully before deciding on a course of action in navigating a difficult situation.

II. **Recent Changes to the GRPC and Official Comments Thereto**

As stated above, the Rules and Comments are amended periodically. Subtle changes to the language of a Rule or Comment, or the addition of a new Comment, can speak volumes about how the State Bar, the Georgia Supreme Court, or any Georgia court will view the ethical propriety a particular course of action regarding which the application of a Rule might have previously been up for debate. In other words, these small changes have real world consequences in close cases, and something that might have previously been arguably proper under the Rules might now be an unambiguous violation of an ethical rule. If you have not reviewed the GRPC in detail recently, you might not be aware of the changes. Here are a few of the more pertinent changes that have been made to the Rules and Comments in the last several years.

**Rule 1.4** regarding Communication has added specific bullet points that provide greater clarity in outlining specific matters regarding which the lawyer must communicate with the
client. The Rule has also added new comments that elaborate on these bullet points, as well as providing greater clarity about the topic, generally.

Several new comments were added to Rule 1.5 regarding Fees. New comment 6 now clarifies that although a lawyer may not charge a contingent fee in a domestic relations matter “[t]his provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders.” Perhaps more pertinently, Comment 7 regarding fee divisions among lawyers in different firms now deletes the explicit analogy to Rule 5.1 (regarding a supervisory lawyer’s responsibility over a subordinate lawyer) when describing the responsibilities of co-counsel. New Comment 8 now states that the portion of the rule regarding fee divisions among lawyers in different firms “does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.”

Rule 1.6 regarding Confidentiality of Information has added a new Comment 4A, which specifically provides that “[i]nformation gained in the professional relationship includes information gained from a person (prospective client) who discusses the possibility of forming a client-lawyer relationship with respect to a matter. Even when no client-lawyer relationship ensues, the restrictions and exceptions of these Rules as to use or revelation of the information apply, e.g. Rules 1.9 and 1.10.” This new comment language may be seen as something of a substitute for the ABA’s Model Rule 1.18, dealing with prospective clients, which Georgia has chosen not to adopt. Previously, Georgia’s failure to adopt ABA Model Rule 1.18 had left Georgia lawyers with little guidance regarding their duties to former prospective clients when no active attorney-client relationship was ever created.
Rule 1.7 regarding Conflicts of Interest: General Rule has added new language in the comments. Given the importance of this Rule, all comments to it should be carefully studied and parsed. Among the recent changes, new Comment 18 provides specific instructions regarding how a lawyer representing multiple clients in the same matter must handle confidential information that one client might like to withhold from another client. “As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation.”

Rule 1.9 regarding Conflict of Interest: Former Client had previously stated that a lawyer could not take a position adverse to a former client in a matter substantially related to the previous representation unless the former client consented after consultation, but now also explicitly requires that the consent be “confirmed in writing.” GRPC 1.9(b)(2). New Comment 3 also provides additional guidance regarding what constitutes a matter being “substantially related,” and should be consulted whenever this point is at issue.

Rule 1.15(I) regarding Safekeeping of Property was amended to state that a “lawyer may disregard a third person’s claimed interest [in the case of a lien, judgment, or agreement] if the lawyer reasonably concludes that there is a valid defense to such lien, judgment, or agreement.” GRPC 1.15(I)(b). Among other things, this clearly helps a personal injury lawyer protect his client’s interest without fear of committing an ethical violation (if the position is taken in good faith) in a case where a medical provider or other third party claims to have a right to reimbursement or a claimed lien which is alleged to attach to the funds of settlement.

Rule 3.4 regarding Fairness to Opposing Party and Counsel has deleted subsection (f)(3), which had previously permitted a lawyer to “request a person other than a client to refrain from
voluntarily giving relevant information to another party” when “the lawyer reasonably believes that the person’s interests will not be adversely affected by refraining from giving such information and the request is not otherwise prohibited by law.”

Rule 4.2 regarding Communication With A Person Represented By Counsel now contains new comment language (in comment 4A) regarding exactly what agents or employees of an organization represented by counsel may not be contacted. New Comment 6A also provides for a new procedure for a lawyer to seek a Court Order when he or she is uncertain whether or not a given contact is permitted.

Rule 4.3 regarding Dealing With An Unrepresented Person has now deleted former subsection (c), which previously stated that a lawyer was prohibited from “initiat[ing] any contact with a potentially adverse party in a matter concerning personal injury or wrongful death or otherwise related to an accident or disaster involving the person to whom the contact is addressed or a relative of that person, unless the accident or disaster occurred more than 30 days prior to the contact.” The new language of Comment 2 now also clarifies that “This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person,” so long as the lawyer does not mislead the unrepresented person. GRPC 4.3.

Rule 9.2 regarding Restrictions on Filing Disciplinary Complaints now unambiguously states that “a lawyer shall not enter into an agreement containing a condition that prohibits or restricts a person from filing a disciplinary complaint, or that requires the person to request dismissal of a pending disciplinary complaint.” Previously, there had been some ambiguity regarding whether a lawyer could enter into an agreement to “settle” a potential bar grievance so
long as the conduct at issue did not arise from an alleged “misuse of funds held in a fiduciary capacity.”

III. Case Law and Other Sources of Guidance

Every year, dozens of Georgia lawyers are disbarred, suspended, or publicly reprimanded. Reading these cases as they come out is one way to stay informed regarding the manner in which the State Bar and Supreme Court approach violations sufficient to warrant public discipline. However, many of these cases involve unambiguous violations of rules that we all know should not be violated, and many others involve bad lawyers (often with serious personal, mental, or substance abuse problems) who have abandoned one client after another. Unfortunately, because close cases often result in confidential discipline or no discipline at all, there is not as much case law as there might be concerning issues about which reasonable minds might disagree. The result is that there is some case law declaring what a lawyer may not do, but very little that confirms what a lawyer may do in an ethically tricky situation without violating the Rules.

Lawyers should be aware that there are other sources of persuasive authority and commentary that address close questions. The State Bar and the Georgia Supreme Court have issued a number of Formal Advisory Opinions that explain how the Rules should be applied to certain specific situations. Like the GRPC, these can be found on the State Bar’s website. The American Bar Association also issues several Formal Opinions every year regarding the application of the Model Rules of Professional Conduct to certain situations. These are also helpful so long as you check the Model Rule being discussed to make sure that there are not substantive differences between it and the corresponding Georgia Rule. Similarly, ethics
opinions from other states and commentary from around the country can be considered for their persuasive effect so long as the rule being applied is substantively the same as the Georgia Rule.

IV. Advice From Other Lawyers

The State Bar also has an Ethics Helpline that can be reached at (404) 527-8741, or (800) 682-9806. You can call the Helpline about an ethical issue and a lawyer with the Office of General Counsel will discuss the issue with you. Questions may also be sent by email through a link on the State Bar’s website. The Office of General Counsel (as described in Part Three, below) is the arm of the State Bar tasked with the initial screening of Bar Grievances. Therefore, by calling the Helpline you will be getting advice from the same people who will eventually evaluate any possible bar complaint that could potentially be filed against you in the event that anyone were to allege that you had committed an ethical violation.

As it should be, the advice provided by the Office of General Counsel over the Helpline tends to be quite conservative. If your question shows that you are being overly concerned with something that is not a problem, they will tell you so. But if your question involves a complicated ethical question that turns on specific facts, the Office of General Counsel is not going to take the risk of telling you that it is okay to do something that might not be okay if the facts turn out to be slightly different than what you have represented to them over the telephone.

Finally, it is generally true that lawyers who talk with other lawyers about difficult ethical issues they face tend to make better decisions. Your colleagues within your firm and your friends in the profession are often some of the best resources you have, and you are doing yourself a disservice if you do not ask for their opinions because you fear how they may judge you. If the matter is serious enough, you might consider hiring counsel of your own, either to advise you regarding your choices or to provide an opinion regarding a given course of action.
Part Two — Specific Ethical Issues

In no particular order, the following is a brief analysis of the state of Georgia law regarding a few issues that arise with some frequency.

I. "Poaching" of Cases

Although a lawyer representing someone in a matter cannot contact a non-client represented by other counsel in the matter, there is no general prohibition on a client seeking a second opinion from another lawyer who is not involved in the matter. Rule 4.2 says only that “a lawyer who is representing a client in a matter shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter…” (emphasis added). Therefore, if your client happens to approach another lawyer she knows to talk about your case, and based on those talks the client decides to change counsel, there may not necessarily be anything improper about this. On the other hand, if it is the lawyer who approaches the client instead of the other way around, the lawyer’s pursuit of the client is likely a violation of Rule 7.3(d), which states “[a] lawyer shall not solicit professional employment…through direct personal contact or through live telephone contact, with a nonlawyer who has not sought advice regarding the employment of a lawyer.” Moreover, the lawyer is prohibited from making dishonest or misleading statements in an effort to entice the client. See GRPC 8.4(a)(4).

II. Clients Leaving a Firm With an Individual Lawyer Going to Another Firm

Other issues arise when a client terminates a law firm’s representation of the client in order to be represented by an individual lawyer who is leaving the firm for another firm, or to start a new firm. The client has an absolute right to the lawyer of his or her choice in this situation. Formal Advisory Opinion 97-3 speaks to this and states: “No Standard prohibits a
departing attorney from contacting those clients with whom the attorney personally worked while at the law firm. A client is not the property of a certain attorney.”

However, prior to informing the firm that the lawyer is leaving, the lawyer formerly employed by the firm should not solicit business for the new firm. Doing so without the still-current firm’s knowledge may be a breach of the lawyer’s fiduciary duty to the firm. See Tolson Firm, LLC v. Sistrunk, 338 Ga. App. 25, 789 S.E.2d 265 (2016); see also Formal Advisory Opinion 97-3:

The departing attorney may also owe certain duties to the firm which may require that the departing attorney should advise the firm of the attorney’s intention to leave the firm and the attorney’s intention to notify clients of his or her impending departure, prior to informing the clients of the situation. Specifically, the departing attorney should not engage in professional conduct which involves “dishonesty, fraud, deceit, or willful misrepresentation” with respect to the attorney’s dealings with the firm as set forth in Standard 4.” [Standard 4 has been replaced by GRPC 8.4(a)(4)]

Formal Advisory Opinion 97-3 also outlines the best practices that should be followed when a lawyer leaves a firm. The departing attorney should give notice to the firm before giving notice to the clients. Prior to the departure, the firm and the departing lawyer should work together to jointly inform clients who had significant contact with the departing lawyer that the lawyer is leaving and that the clients who worked with the departing lawyer have a choice as to whether they would like to continue the representation with the firm or with the departing lawyer.

III. Fee Disputes with Clients and Other Lawyers

Attorneys who have worked for a client and have not been paid for their services generally have a lien under O.C.G.A. § 15-19-14. In cases where a contingency fee lawyer is terminated by the client prior to the completion of the matter, and the client eventually obtains a recovery while represented by a subsequent attorney, the first attorney’s right to a fee depends on what is in the fee agreement with the client. If the fee agreement contains language regarding the
fee owed if the client terminates the lawyer’s representation (e.g. an hourly rate for work performed or the applicable contingency fee percentage of the highest offer made by the defendants) such terms are generally enforceable against the client. Morrow v. Stewart, 197 Ga. App. 689, 399 S.E.2d 280 (1990). If there is no such provision in the fee agreement, then the contingency contemplated by the agreement has failed to come to fruition and the lawyer must prove a reasonable fee based on quantum meruit. See e.g. Greer, Klosik and Daugherty v. Yetman, 269 Ga. 271, 496 S.E.2d 693 (1998).

In contingency fee cases, certain factual circumstances will present an inevitable ethical dilemma because the first lawyer’s right to a fee is against the client, not against the subsequent attorney. See King v. Lessinger, 276 Ga. App. 145, 622 S.E.2d 381 (2005). In practice, the interplay between the first lawyer’s fee agreement and the second’s may render the total fee patently unreasonable. For example, suppose a client hires Lawyer 1 under a 40% contingency fee agreement that says that Lawyer 1’s fee in the event the client terminates the relationship is the applicable contingency percentage of the highest offer made by the defendants. After a significant offer is made, the client then discharges Lawyer 1 and hires Lawyer 2 under another 40% contingency fee agreement. After significant additional litigation work has been done by Lawyer 2, the client eventually receives a recovery of only slightly more than the offer made by the defendants before the client discharged Lawyer 1. In that event, the client contractually owes Lawyer 2 40% of the recovery and owes Lawyer 1 40% of the highest offer before Lawyer 1 was discharged. Obviously, a total contingency fee of nearly 80% of the eventual recovery is bound to raise some ethical questions.

Under GRPC 1.5, a lawyer may not arrange for or collect an unreasonable fee. In the situation above, circumstances have played out in such a manner as to render the two lawyers’
facially reasonable fee agreements unreasonable in practice. The Georgia case law on this is not as developed as it might be, but King, supra, contains dicta that explains although the first lawyer’s right to recovery is against the client rather than the second lawyer, the successor lawyer has an ethical duty to ensure that the total fee is not unreasonable:

Appellants suggest that the result we have reached will encourage attorneys to lure or “poach” other attorneys’ clients late in the litigation in order to recover a full contingency fee after performing only a minimal amount of work on the matter. Several factors militate against such a consequence. First, we note that the successor attorney must bear the risk in such a case that professional and ethical guidelines may render his fee unreasonable and thus may “require reconsideration of the contingency fee arrangement.” Greer, Klosik & Daugherty, 269 Ga. at 275, 496 S.E.2d 693 (Fletcher, P.J., concurring). See also Georgia Rules of Professional Conduct, Bar Rule 4-102 (d), Rule 1.5. Because that risk exists, the successor attorney has an incentive to inform the client that the client may have to pay reasonable attorney fees to the discharged attorney for services already rendered, a fact which will help ensure that the client does not agree to a fee arrangement that over-compensates the successor attorney. See Georgia Rule of Professional Conduct 1.4. Second, the successor attorney must bear the risk that the discharged attorney will timely file an attorney's lien in the underlying litigation prior to disbursement of the judgment proceeds, delaying complete resolution of the case and potentially causing satellite litigation over fees. See OCGA § 15-19-14. Third, we are optimistic that considerations of professionalism will defer attorneys from engaging in such a course of action.

Similar “considerations of professionalism” may bear on the first lawyer’s fee when it is calculated based on something like “highest offer before discharge” rather than quantum meruit, although it could also be argued in that event that the contractual rate is reasonable (and that the client’s decision not to settle before firing the first lawyer and hiring someone else who failed to procure a significantly more favorable result was unreasonable). As referenced in King, Justice Fletcher’s special concurrence in Greer, supra, provides some general guidance regarding how attorneys’ ethical duties affect this otherwise contractual question:

And, lastly, in order to deserve the public’s confidence, the lawyer must be willing to do what is fair and equitable, even if not required by the letter of the law. As the ethical considerations state, “A lawyer should be zealous in his efforts to
avoid controversies over fees with clients and should attempt to resolve amicably any differences on the subject.” (citing former E.C. 2-23).

In practice, although Lawyer 1’s right to a recovery of his fees attaches to the client and not to Lawyer 2, the proper way to handle the scenario described above would likely involve Lawyer 1 and Lawyer 2 negotiating with each other to determine how to split the total attorneys’ fees among them without charging the client an unreasonable amount in total fees.

IV. Conflicts of Interest Attach Against Referring lawyer

Does a lawyer expecting a referral fee have the same duties regarding conflicts of interest as any other co-counsel for a client? According to the ABA, it appears the answer is yes.

Under GRPC 1.5(e)\(^2\), a referring lawyer may collect a referral fee that is out of proportion to the services performed by the referring lawyer only if the referring lawyer “assumes joint responsibility for the representation,” the client consents in writing, and the total fee is reasonable. ABA Formal Opinion 474 (published in 2016) notes that “[i]mplicit in the terms of the fee division allowed by Rule 1.5(e) is the concept that the referring lawyer who divides a legal fee has undertaken representation of the client.” Therefore, the rules governing conflicts of interest apply to the referring lawyer regardless of the level of his involvement with the case, and a lawyer cannot accept a referral fee if the lawyer could not have actively represented the client because of a conflict of interest. If the referring lawyer has a conflict of interest that the client is capable of waiving, the referring lawyer must comply with the procedure required by Rule 1.7(b) and obtain informed written consent from the client, just as if he were actively representing the client, if he is to receive a fee.

Finally, the ABA’s Opinion notes that Rule 1.5(e)’s requirement that the client shall be advised of “the share that each lawyer is to receive” is deliberately stated in the future tense.

\(^2\) GRPC 1.5(e) substantially similar to ABA Model Rule 1.5(e) for the purpose of this discussion.
“The use of the future tense envisions that the fee division agreement will precede the division of fees. Such an agreement should not be entered into toward the end of such a relationship. Instead, the division of fees must be agreed to either before or within a reasonable time after commencing the representation.”

V. Duties and Responsibilities of Local Counsel

Similarly, for ethical and professional liability purposes, “local counsel” is co-counsel, even if out-of-state counsel does the lion’s share of the work and local counsel appears in the case only to fulfill procedural requirements or ingratiate out-of-state counsel with the judge and jury. Georgia Formal Advisory Opinion 05-10 answered in the affirmative the question of whether local counsel could be disciplined for discovery abuse committed by out-of-state counsel. It is not a sufficient defense that local counsel did not have actual knowledge of the facts regarding the discovery abuse if local counsel was “willfully blind” to out-of-state counsel’s behavior and nonetheless ratified it in some way.

There is nothing in the role of local counsel that changes this basic ethical responsibility. Local counsel, if he or she signs the pleadings, must be familiar with them and investigate them to the extent required by this good faith requirement.

The same analysis would appear to apply not just to discovery abuse, but also to other types of ethical impropriety committed by out-of-state counsel, and most likely to questions of liability for professional negligence as well.

VI. Jointly Represented Clients And Sharing of Information

Georgia Formal Advisory Opinion 16-1 clarified that the obligation of confidentiality described in GRPC 1.6, Confidentiality of Information, applies as between jointly represented clients in ways that can sometimes render the joint representation impossible. If a client requests that certain information be kept confidential from another jointly represented client, the attorney
must honor the client’s request. However, honoring the client’s request will, in almost all circumstances, require the attorney to withdraw from the joint representation.

This Opinion should be read in conjunction with the recently-added Comment 18 to Georgia Rule of Professional Conduct 1.7 regarding Conflicts of Interest, which Comment states:

*Special Considerations in Common Representation*

[18] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

Application of this rule may often put the practitioner in an awkward, if not impossible, position. In the Opinion, the Board notes that one example of such a situation would involve an estate-planning attorney representing both a husband and wife, who receives a request from one of the spouses to keep relevant information confidential from the other. The Board notes that in situations such as this, a withdrawal by the attorney would have the effect of “not only ending trusted lawyer-client relationships but also essentially notifying the other client that an issue of confidentiality has arisen.”

This can be a thorny issue, and there is no single clear answer that would apply to every possible situation where jointly-represented clients are parties to information that they do not
want to share with one another. Practitioners are well-advised to proceed with caution and consult the Rules with care.

VII. **Client’s Absolute Right to the File**

If a former client asks a lawyer for his or her file, the lawyer is required to turn it over. The lawyer can ask the former client to pay the expense of copying the file, but the lawyer essentially has no recourse if the client refuses to do so – the lawyer still must turn over the file.

It has long been the established under Georgia law that documents created by an attorney belong to the client who retained him. *Swift, Currie, McGhee & Hiers v. Henry*, 276 Ga. 571, 581 S.E.2d 37 (2003). The Georgia Supreme Court has now indicated that the failure to abide by this rule, or failure to do so in a timely fashion, can have ethical consequences. See *In Re Rouse*, 297 Ga. 500, 775 S.E.2d 152 (2015)(Review Panel reprimand based partially on attorney’s failure to return the former client’s file until two months after former client requested it.)

**Part Three — What You Should Do If You Receive a Bar Complaint**

No matter how conscientiously you approach the ethical issues that arise in your practice, there is always the possibility that you will one day receive a bar grievance, most likely from a disappointed client or belligerent opponent. Although a discussion of the issues that can arise in matters where the lawyer has committed a serious ethical violation that is likely to lead to suspension or disbarment is beyond the scope of this paper, the following is a guide regarding the manner in which the disciplinary process typically unfolds in cases where the allegations of ethical misconduct are unwarranted, questionable, or minor.

1. **The Grievance**

   It could happen to any of us. One day, you’re going through your mail and you find a thick envelope from the State Bar of Georgia’s Office of the General Counsel (OGC). You open
it up to find a cover page alleging that you may have violated various Rules of Professional Conduct, followed by a narrative compiled by a former client, adversary, or other person that construes facts out of context in order to make it appear that you did something improper. What should you do?

Even if the grievance lacks merit, the process can be intimidating. Most lawyers, and especially lawyers who are careful not to violate the ethical rules, have not had reason to become familiar with manner in which attorney discipline proceedings are conducted. Furthermore, the case law concerning attorney discipline consists almost entirely of cases in which the attorney committed an ethical violation and was publically punished for it. Grievances that are dismissed by OGC or the State Bar’s Investigative Panel remain confidential, and therefore do not become part of any publically available body of precedent.

Nonetheless, the process is designed to screen out meritless grievances. If you receive a grievance that is not warranted, you may be able to end the inquiry at an early stage with an appropriate and thoughtfully composed response.

II. Responding to the Office of General Counsel

If the allegations in the grievance are without merit, your goal should be to persuade the OGC to dismiss the grievance before it goes any further. Rule 4-202(b) states:

Upon receipt of a grievance in proper form, the Office of the General Counsel shall screen it to determine whether the grievance is unjustified, frivolous, patently unfounded or fails to state facts sufficient to invoke the disciplinary jurisdiction of the State Bar of Georgia. The Office of the General Counsel shall be empowered to collect evidence and information concerning any grievance and to add the findings and results of its investigation to the file containing such grievance. The screening process may include forwarding a copy of the grievance to the respondent in order that the respondent may respond to the grievance.

Subsection (c) of the same Rule states that the OGC “shall be empowered to dismiss” grievances that do not warrant further investigation.
As quoted above, Rule 4-202 provides that the grievance may be (and, in practice, generally will be) forwarded to the accused lawyer for a response. There are several things you should keep in mind when responding.

First, the OGC has discretion to request additional replies or supplemental documentation from either the grievant or the respondent, or both. In many cases, the OGC will ask one party or the other to provide additional documents based on questions raised by the positions taken by each side. The cover page that the OGC sends to the responding lawyer calls for the response to be limited to a submission of 25 pages or less. If it is difficult to limit the response and exhibits to less than this amount, you may offer to provide the OGC with additional documents or information upon request.

In almost every case, the grievant will be given the opportunity to reply to your response and to provide any additional information that may call into question your version of events. Therefore, you should be careful not to make any statements of fact that the grievant may discredit by providing additional evidence. In some instances, the OGC will invite the grievant and respondent to go back and forth several times in responding to one another before it makes a decision on whether or not to forward the grievance to the Investigative Panel. On the other hand, many unwarranted grievances are dismissed in cases where the responding lawyer provides a thoughtful response, and the grievant has nothing to say in reply.

Finally, as with any persuasive legal argument, it is important to balance a thorough recitation of the pertinent facts with a concise focus on what is really important. This can be especially difficult, however, when you are responding to an unreasonable former client or belligerent adversary who has frustrated you for months or years, and who is now twisting the facts regarding your representation in an effort to impair your ability to continue practicing law.
Be mindful to take a step back and assess the situation as objectively as you can, and then focus your response on the facts pertinent to the applicability of the particular Rules of Professional Conduct that the grievance alleges may have been violated. Remember, the Bar does not care if your client is crazy, if you think the overall result you achieved for the client was better than most lawyers could have done, or if a belligerent opposing counsel provoked your actions. OGC’s job is to help protect the public from unethical attorney conduct by separating grievances that merit further attention from those that do not. Do not make this job more difficult by bringing up extraneous matters that do not bear upon the ethical analysis. Be as concise as you can be, but no more so. Attach and cite to supporting documents whenever appropriate.

III. Proceedings before the Investigative Panel

If the OGC determines that the grievance against you appears to state facts that may support a finding that an ethical violation has occurred, it will forward the grievance to the Investigative Panel of the State Disciplinary Board of the State Bar of Georgia, and a Notice of Investigation will be issued to you. See Rules 4-204 and 4-204.1. The Investigative Panel consists of both attorneys and lay people, all of whom volunteer their time. Under Rule 4-204, the panel will “appoint one of its members to be responsible for the investigation,” and this Investigating Member will be an attorney rather than a lay person. The OGC will simultaneously appoint a staff investigator to assist in the investigation.

At this stage, you are required to file with the Investigating Member a written response to the Notice of Investigation within 30 days, and you must verify your response under oath. Rule 4-204.3. Unlike during the screening stage before the OGC, immediate negative repercussions (e.g. interim suspension) may follow if you do not timely and adequately respond.
It is important to remember that many matters referred to the Investigative Panel are eventually dismissed before proceeding further, and many others result in relatively minor forms of discipline. Just because you have received a Notice of Investigation does not mean that you will necessarily be disbarred or suspended. You still have ample opportunity to convince the Panel to consider evidence or understand an argument that failed to carry the day during the initial screening process.

In seeking to persuade the Panel, you may communicate only with the Investigating Member, who will be communicating separately with the grievant. You may provide the Investigating Member with any evidence or argument that you believe the OGC overlooked during the initial screening, and often the Investigating Member will see things differently than the OGC’s attorney who handled the initial screening. The Investigating Member is also “authorized to issue oaths and affirmations and to issue subpoenas for the appearance of persons and for the production of things and records,” and you can suggest to the Investigating Member ways in which these powers could be used to uncover evidence that might exonerate you. See Rule 4-203(a)(10).

After the conclusion of the investigation, the Investigating Member will then issue a report on the matter at a meeting of the Panel. “If the Member’s investigation has been completed, the Investigating Member shall give an accounting of the form and substance of the investigation after which the member may recommend and the Panel shall determine either that probable cause does or does not exist.” See Rule 8 of the Internal Rules of the Investigative Panel. If the Investigating Member finds that no probable cause exists and a majority of the Panel agrees, the matter may be dismissed.
IV. Confidential Discipline and Petitions for Voluntary Discipline

Even if the matter is not dismissed, the Investigative Panel is authorized to impose confidential discipline in certain cases rather than proceeding with the process of imposing publicly reported sanctions such as disbarment, suspension, or a public reprimand. Under Rule 4-204.5, if the Investigative Panel finds that the respondent lawyer has engaged in conduct that, while not ideal, either did not violate the GRPC or constituted only a minor technical violation, it may issue “letters of instruction” advising the attorney that the conduct was improper and should be avoided in the future. Letters of instruction do not constitute a disciplinary infraction. A step above that, the Panel may issue “letters of formal admonition” or an Investigative Panel Reprimand for relatively minor violations of the GRPC. See Rule 4-205. Letters of formal admonition and Investigative Panel Reprimands, while confidential, are considered disciplinary infractions. Confidentiality is waived if the lawyer is brought up before subsequent disciplinary proceedings, and a subsequent infraction will automatically make the attorney subject to harsher punishment. See Rules 4-208 and 4-103. On the other hand, if there is no subsequent violation, the public never hears about it and the lawyer’s right to practice is not impaired.

In the event you are brought before the Investigative Panel on charges that turn out to be merited to some degree, you may want to consider filing a Petition for Voluntary Discipline requesting that the Panel administer confidential discipline. See Rule 4-203(a)(9) and Rule 9 of the Panel’s Internal Rules. The Investigating Member will then report on whether or not the Petition should be accepted, following which the Panel will vote on the Petition.

V. Should you get help?

Lawyers facing disciplinary proceedings are entitled, but not required, to have lawyers of their own. Hiring counsel is not guaranteed to change the eventual result, but it can often help.
Among the advantages of hiring counsel are, (1) the ability to hire an attorney who specializes in handling ethical complaints and is familiar with the process, (2) having an objective advocate who can see things as the fact finders will, uncolored by the emotions that inevitably arise when dealing with unreasonable former clients and belligerent adversaries, (3) the ability to offload some of the stress of having to frame a response so that you can focus on working for your existing clients, and (4) having access to unbiased advice regarding whether or not filing a Petition for Voluntary Discipline may be the best option.

VI. **Know your coverage! You may be entitled to reimbursement for the cost of hiring a bar complaint defense attorney under your errors and omissions policy.**

Many lawyers have coverage for bar complaint defense counsel included in their errors and omissions policies and do not even know it. E&O policies often have a provision allowing for a specific amount (smaller than the policy limit) to be paid to an attorney hired to handle disciplinary proceedings. The following clause is highly typical:

Disciplinary Proceedings  
The Company will reimburse the Named Insured up to $20,000 for each Insured and all Insureds in the aggregate, for attorney fees and other reasonable costs, expenses or fees (the “Disciplinary Fees”) paid to third parties (other than an Insured) resulting from any one Disciplinary Proceeding…arising out of an act or omission in the rendering of legal services by such Insured.

Policies sometimes contain additional coverage if there is no ultimate finding of wrongdoing by the lawyer. The following is also typical:

In the event of a determination of No Liability of the Insured against whom the Disciplinary Proceeding has been brought, the Company shall reimburse such Insured for Disciplinary Fees, including those in excess of the $20,000 cap set forth above, up to $100,000.

Insurance carriers often do not oversee the reimbursement of disciplinary fees in the same manner as fees incurred by defense attorneys in civil matters in which the carrier might be responsible for paying the eventual judgment. This means that you can often get the errors and
omissions carrier to reimburse you for fees paid to the ethics counsel of your choice, whether this is an insurance defense attorney or not.

In conclusion, if you ever have the misfortune of having to respond to a grievance filed with the State Bar, it is not necessarily the end of your legal career. Although the process may be unfamiliar and intimidating, there are many options at your disposal. If you have not committed a serious ethical violation, you may be able to emerge from the process without any discipline, or with no public discipline, being imposed.
9:00  SMALL AND SOLO FIRM PRACTICE
Moses Kim, The Moses Firm, LLC, Atlanta
10:15  MEDICAL RECORDS: THE BASICS OF INTERPRETATION (AND THE DREADED EMR)

Andrea Stelk, BSN, RNC-OB, Clinical Instructor and Nurse Clinician, Northside Hospital, Atlanta
Medical Records: The Basics of Interpretation (and the Dreaded EMR)

Andrea Stelk, BSN, RNC-OB, Clinical Instructor and Nurse Clinician, Northside Hospital

Discussion

- Key Pieces in Medical Records
- Inpatient Records vs Ambulatory Records
- Importance of Organization for Reviewer
- Interpretation
- Benefits of Electronic Medical Records
- “Behind the Scene” Perspective on the Challenges of EMR Systems
- Curveballs that Create Difficulties in the EMR Review Process
Key Pieces in Inpatient Records Review

- Face Sheet (Demographics, Insurance)
- Chief Complaint
- Admission Assessment (Nurse)
- Consents
- History & Physical Assessment (Physician Admission)
- Orders
- Progress and Nurses Notes
- Flow Charts (Vital Signs, Intake and Output, Pain, Neurological Assessments)
- Medication Administration
- Diagnostic Study Reports (Lab, Pathology, Radiology)

Inpatient Records Review (cont.)

- Consultations
- Care Plans (Nursing Interventions & Education)
- Ancillary & Therapy Services (Respiratory, Physical, Social Worker, Dietary)
- Monitoring Annotation (Fetal Monitoring, EKG)
- Operative or Procedural Report
- Contracted Provider Reports (Anesthesia, Surgical Assistants)
- Billing Records
- Outside Records (Ambulatory, Therapy, Hospital Records)
Key Pieces in Ambulatory Records Review

- Plan of Care and Follow Up Instructions
- Diagnostic Reports (Lab, Pathology, Radiology)
- Phone Messages & Electronic Communication
- Disability and Workers Comp
- Past Records (Previous Physicians and Hospital Admissions)
- Billing and Insurance Claims

Ambulatory Records Review (cont.)

- Intake Form (Face sheet, Demographics, Insurance)
- Medical History Form
- Flow Charts (Vitals, immunizations, assessments)
- Office Visit Notes and Annotations (Physician and Staff)
- Orders and Medication
- Consents
- Procedure Reports
Include in Medical Record Request for Successful Review:

- Fetal Heart Monitoring, EKG, and Telemetry Strips
- Special Procedure Reports, Films, and Logs
- Videotapes or Photographic Documentation of Surgical Procedures or Deliveries
- EMS Transport Records
- Emergency, Operating Room, Radiology, Pharmacy, and Specimen Logs and Reports
- Autopsy Records
- Accident and Work Site Reports
- Biomedical Equipment and Maintenance Reports
- Medical Dictation Logs

Organization Optimizes Review

- The key to finding answers is ORGANIZATION
- Chronological Order
- Same format should be used each time to keep dates and times correct
- Paper Records- Large binders and tabs
- Digital Records- Use a program that is easy to navigate and to create tabs by reviewer (Word vs Adobe)
- Once records are in order, can definitively determine if they are complete
- Upon completion, now record can be reviewed in comparison with orders, policies, protocols, clinical guidelines, medical literature review, best practices, and standards or care
Interpreting Medical Records… Where are the crucial answers?

- Patient Complaints
- Vital Signs
- Provider and Nursing Notes
- Assessments
- Results of Tests
- Orders and Medications

Interpreting Medical Records… Where are the crucial answers?

- Interventions
- What Was Done vs What Was Not Done
- Who was involved and when they got involved
- “The Big Event” - When, Why, How
- Standard of Care
Electronic Medical Record Systems...
What are the benefits?

- Efficiency
- Tracking
- Reduction in Medical Errors
- Safety Parameters
- Quality of Care
- Cost control

Electronic Medical Record Systems...
What are the benefits?

- Order Entry
- Legible Note Entry
- Communication amongst different teams or facilities
- Easy access to find what is needed in a “live environment”
- Can access easily from the “in house” archive system
The Challenges for End Users with EMR Systems

- Flawed Design and Inadequate Support
  - EMR systems are purchased by Healthcare systems that are sold on a “one product fits all” departments mentality
  - Healthcare systems’ informatics teams are not equipped to handle the build and implementation of the product
  - Medical perspective is not viewed as important as a functional aspect
  - The teams that design the build are usually not medical
  - Staff is ill informed during the training and Go-Live process
  - Format is not conducive to live environment and patient care

- Medical staff is “forced” to select answers that may not be pertinent to what is actually needed for documentation
  - Hard Stops
  - Easy check box annotation does not capture all information
  - Creates documentation fatigue; less time to complete documentation that is critical to what interventions were actually completed

- Overload
- Generational Gaps
- Time Stamps
The Challenges for End Users with EMR Systems

- Not all health provider teams have to use the same system at the same facility
- Who puts in what order set or care plan can cause confusion in future care provided
- Staff heavily rely on what was previous entered to make their current decisions
- Simple User Errors
- Resistance
- Staff at some facilities still have to use paper flow sheets and order sheets causing confusion on what they should document and where critical information needs to be captured

Why is it difficult to find essential information when reviewing EMR reports?

- The challenges discussed directly effect how the printed or digital report is produced, viewed, and interpreted
- Downtimes, paper flow sheets, optimization periods, and “work around” plans create more discrepancies
- Mix of paper documentation, duplicate records, and electronic records printed are not produced in chronological order
- The important notes and actions are scattered all throughout the records instead of one isolated area
Why is it difficult to find essential information when reviewing EMR reports?

- EMR systems are continuously changing
- Not one Healthcare System’s records look the same as another, even if they function off the same product
- Multiple EMR systems records can be in one patient’s complete record received

References


- Iyer, Patricia W., MSN, RN, LNCC. (2016) How to Analyze Medical Records: A Primer For Legal Nurse Consultants. Fort Myers, FL: The Pat Iyer Group.
Andrea Stelk is a Registered Nurse certified in Inpatient Obstetrics with over a decade of experience in Labor & Delivery, High Risk Obstetrics, Gynecology, Women’s Services, Perioperative Nursing, and Clinical Education acquired within hospital and ambulatory environments. She is a native to Atlanta, Georgia and graduated with her Bachelor in Science of Nursing from Valdosta State University. Andrea currently serves as a clinical expert and educator for standards of practice, order sets, electronic medical record systems, policy, and optimization of process and work flow for the L&D Unit at Northside Hospital in Atlanta, Georgia. Part of her current role is to review medical records for process improvement, areas of risk, educational opportunities, and provide feedback of reviews to clinical specialists, unit managers, and the Women’s Services leadership team.
11:00  APPELLATE PRACTICE – TIPS AND PRACTICE POINTERS

*J. Darren Summerville,* The Summerville Firm LLC, Atlanta
APPELLATE PRACTICE — AN OVERVIEW AND PRACTICE POINTERS

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At the risk of being obvious, practicing law has its shares of highs and lows. For most – including this lawyer – one of the undeniably most exhilarating moments is having a jury foreperson announce a favorable verdict. All the work, diligence, and effort pay off, and all is right with the legal world.

Just as impactful are the moments on the other end of the spectrum, including having a favorable result taken away, dashed on the appellate rocks. That scenario is much more likely to unfold when lawyers try (or really, work up) cases without an appellate plan in mind, or (much worse) simply segregate the “appeals part” of the case from the “trial part” of the litigation. If you subscribe to the notion that an appeal is just an extension of the trial, time to be dissuaded.

Appeals are almost always won well before trial even begins, but can be lost at just about any juncture. That sobering reality has given rise to so-called “embedded” counsel at trial, in which lawyers with particular expertise in appeals, appellate procedure, and the “law” consult before and during trial, to minimize the risk of game-changing error.

If there is any takeaway from my contributions to today’s CLE, it is this: don’t play out of position. A second, related caveat: know what your position is, before you decide whether you are comfortable there. Those overgeneralized bits of advice simply mean that in planning for and litigating appeals – as well as virtually any discretionary legal task or assignment – I believe the best work
product comes from lawyers that have a particular skill set suited for a given task. Put another way, subject matter experts tend to collect the best results. Trial lawyering is not the same as appellate lawyering – not by a longshot. Different statutes, court rules, and audiences make appellate law a foreign foray for most. This short primer on litigating cases with an appeal in mind has as base the notion that such advice is best applied and experimented upon in small doses, with revelations coming in increments, rather than leaps and bounds. So, with that, a brief primer on appeals in Georgia.

I. APPELLATE JURISDICTION – Which Court will decide your appeal?

Generally speaking, the Georgia Court of Appeals will have intermediate appellate jurisdiction over the garden-variety issues that crop up in your medical malpractice cases. That is even more so given recent

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1 Justice Kenneth Yegan of the California Court of Appeals colorfully described the difference, and gave a suggestion along the way:

[T]rial attorneys who prosecute their own appeals . . . may have “tunnel vision.” Having tried the case themselves, they become convinced of the merits of their cause. They may lose objectivity and would be well served by consulting and taking the advice of disinterested members of the bar, schooled in appellate practice.


legislative changes, which merit additional ink.

Pursuant to O.C.G.A. § 15-3-3.1, which went into effect January 1, 2017, the Georgia Court of Appeals now has appellate jurisdiction over “[a]ll equity cases, except those cases concerning proceedings in which a sentence of death was imposed or could be imposed and those cases concerning the execution of a sentence of death,” among other categories of civil cases. See Moreno v. Smith, 299 Ga. 443, 444 (2016) (quoting Williford v. Brown, 299 Ga. 15, 16 (2), n. 1 (2016). As such, appellate review of a ruling in a declaratory judgment action for coverage – once a matter for the Georgia Supreme Court – will now also reside within the Court of Appeals’ exclusive jurisdiction.

In other words, it would be worth your while to familiarize yourself with this esteemed group of judges. The Court of Appeals has fifteen judges and they are divided into five divisions. Each division, which is a panel of three judges, is headed by a presiding judge. Generally, an appeal will be decided only by a three-judge panel, that will review the record, the briefs, and the relevant law. But if that panel of three cannot agree on the outcome, the Court may be expanded to additional judges who will decide the case, though even that practice is in flux. In the past, a split decision
amongst a three-Judge panel would “cascade” to additional Judges down the line – for example, if the three Judges of Division 2 were split, the next two Divisions would also become Judges on the case. As of now, though, the Court of Appeals is transitioning into a world much like that in the Eleventh Circuit and basically every other appellate court – in the event of a 2-1 split decision, there would be no other additional Judges looped in. Instead, the decision would be final, but not precedential.

Pursuant to Article VI, Section VI, Paragraph III of the Constitution of this state, and O.C.G.A. § 15-3-3.1, the now nine-member Georgia Supreme Court retains jurisdiction over all habeas corpus cases and, more relevantly for this CLE, over all cases involving the construction of the Georgia or United States Constitutions,\(^3\) as well as certified questions and Certiorari from the Court of Appeals.

II. TYPES OF APPEALS

Now that you know where your appeal will be decided, consideration must be given as to the various types of appeals you may encounter. Some litigations are more predictable than others, culminating in a clean, certain

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\(^3\) Like the seeming vast majority of legal rules, there is an exception. The Supreme Court decides constitutional issues of first impression. The Court of Appeals may decide other constitutional issues if “well settled” in prior Supreme Court opinions.
end – a grant of summary judgment, a jury verdict, and the like. Those cases are teed up for “direct” appeals – that is, there is an appeal as a matter of right. Those situations, governed by O.C.G.A § 5-6-34, are relatively straightforward. Should an appeal lie, say, from a final judgment, an appellant need initially only file a Notice of Appeal to embrace the machinery of the appellate courts.\(^4\) And the appeal is comprehensive, as when a direct appeal is taken,

> all judgments, rulings, or orders rendered in the case which are raised on appeal and which may affect the proceedings below shall be reviewed and determined by the appellate court, without regard to the appealability of the judgment, ruling, or order standing alone and without regard to whether the judgment, ruling, or order appealed from was final or was appealable by some other express provision of law contained in this Code section, or elsewhere.

O.C.G.A. § 5-6-34(d). In slightly plainer language, a direct appeal allows a litigant to complain about any prior ruling, regardless of whether a particular order would otherwise be independently appealable.\(^5\)

Other types of orders or rulings require a bit more work in order to obtain appellate rights. For example, a litigant may want to seek an interlocutory appeal of a ruling that, while not dispositive, might be of

\(^4\) The necessary contents of a Notice of Appeal are outlined in O.C.G.A. § 5-6-37.

\(^5\) Under O.C.G.A. § 9-11-56(h), a party having summary judgment granted against it, in whole or in part, has a right to a direct appeal.
sufficient importance to warrant an appeal mid-litigation. Some types of disputes are naturally more suited to such interim review, such as the grant or denial of a Motion to Dismiss, based upon an arbitration provision, or on some claim of immunity. In such a case, the ruling does indeed impact the entire necessity of a litigation in the first place, making immediate review advisable.

But not every ruling perceived as important deserves interlocutory treatment; such an approach would overwhelm the appellate courts. So, many classes of rulings – for example, orders as to whether certain discovery should be had, or not – are almost never the subject of a successful application. Discovery orders are a common subject on that front.

Regardless of the subject matter, though, the interlocutory application process is one fraught with short time limits and quite specific rules. See generally O.C.G.A. § 5-6-34(b). After a litigant receives an adverse ruling, the process is governed by a 10-10-10 framework. First, the litigant must obtain, if the trial court is so inclined, a certificate of immediate review. That certificate must outline that the ruling, order, or judgment is “of such importance to the case that immediate review should be had.” O.C.G.A. §
5-6-34(b). If an aggrieved litigant obtains such a certificate within ten days of the complained-of ruling, then the necessary application for interlocutory review must be filed, along with supporting materials, within ten days of the Certificate. Then, an adversary would have another ten days to submit any papers in opposition. *Id.* The appellate courts act quickly on such applications, granting or denying them within 45 days of the date on which the application was filed. Key concepts here are demonstrating why your case needs to be appealed now rather than at the end of the case.

If an interlocutory application is granted, then an appellant should file a Notice of Appeal within – you guessed it – ten days, and then follow the traditional avenues afforded a direct appeal. O.C.G.A. § 5-6-34(d).

Certain other types of orders and rulings require discretionary applications, under O.C.G.A. § 5-6-35(a). These types of orders range from seemingly smaller cases – appeals involving judgments of less than $10,000, O.C.G.A. § 5-6-35(a)(6) – to potentially more weighty matters such as an appeal from an order terminating parental rights, O.C.G.A. § 5-6-35(a)(12). For such a discretionary application, the petitioner must file an Application, with supporting materials, within thirty days of the ruling complained of. The process speeds up after that, as any opposition to
discretionary treatment must be filed within a mere ten days of the original brief being filed. At that point, the appellate court must grant or deny the Discretionary Application within thirty days.

III. GETTING THE CASE TO THE APPELLATE COURTS

Whether proceeding as a direct appeal or pursuant to a successful application for interlocutory or discretionary review, there are significant hurdles to overcome well before any briefing is submitted. Make no mistake, many appeals begin and end at the trial court for failure to satisfy certain statutory prerequisites necessary to transfer jurisdiction to the appellate court.

As noted earlier, to invoke the machinery of the appellate courts, a litigant must file a notice of appeal with the trial court clerk at the appropriate time. The deadline for filing such a notice depends on the type of appeal – as noted, 30 days after entry of an appealable decision or judgment for direct appeals; and within 10 days of an order granting leave to appeal for all others. The contents of the notice of appeal are governed by O.C.G.A. § 5-6-37, and must specify, among other things, “whether or not any transcript of evidence and proceedings is to be transmitted as part of the record on appeal.” O.C.G.A. § 5-6-37.
The next procedural hurdle can more easily be overlooked or misunderstood. Once a notice of appeal is filed, the appellant is solely responsible for making arrangements with a certified court reporter to obtain, pay for, and transmit all transcripts to the trial court clerk. More specifically, if a transcript is designated to become part of the record on appeal, the appellant must cause any transcript to be prepared (at its expense), and the original filed with the clerk of the trial court within 30 days of filing the notice of appeal. O.C.G.A. §§ 5-6-41, -42. Where a transcript cannot be filed within 30 days – whether due to a voluminous trial proceeding, court reporter caseload, or the like – the appellant must request an extension of time (before the expiration of the original 30-day period) for the court reporter to file the transcript, which is typically freely granted. See O.C.G.A. §§ 5-6-39, -42. The trial court clerk will only begin the process of sending up the record after receipt of hearing transcripts.

Although an appeal will not be dismissed due to an appellant’s failure to cause a transcript to be filed within the time allowed, “the trial court may, after notice and opportunity for hearing, order that the appeal be dismissed

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6 OCGA § 5-6-42 places the burden upon the appellant, not the lower court clerk, to cause transcripts to be prepared and filed. See, e.g., State v. Hart, 246 Ga. 212, 213 (1980).
where there has been an unreasonable delay in the filing of the transcript and it is shown that the delay was inexcusable and was caused by such party.” O.C.G.A § 5-6-48. Along the same lines, the would-be Appellant is, naturally enough, responsible for satisfying the Bill of Costs for preparation of the record.

IV. DRAFTING THE BRIEF: FROM THE APPELLANT/PETITIONER

So, assume that you have successfully navigated the appellate statutes and rules and find yourself in the Court of Appeals (or, depending upon jurisdiction, the Supreme Court). What next?

Comprehensively outlining suggestions as to prosecuting appeals is well beyond the scope of this paper (after all, textbooks are devoted to the issue), but a few basic thoughts might assist. First, know the appellate court rules and adhere to them. Georgia’s courts of appeal are amongst the busiest in the country. The latest statistics, available on the Court of Appeals’ website, indicate that each Judge is responsible for disposing of approximately 200 cases per year – just about one every business day.\footnote{Those numbers have been updated to account for the expansion of the Court of Appeals’ roster of Judges from 12 to 15, as of 2016. And recently the numbers were updated to account for the additional types of cases now heard by the intermediate court. See O.C.G.A. § 15-3-3.1 (shifting original jurisdiction from the Georgia Supreme Court to the Court of}
While some of those cases are disposed of somewhat easily – an untimely petition for discretionary review, or something similar – the majority require written opinion. It does not assist to format your brief incorrectly, to abandon the protocols for record citation, or to ignore requirements as to motions or other forms of pleading. Instead, parties that know and respect the rules are appreciated.  

Second, pick and choose appeals and sub-issues carefully. The standard for review should always be considered. Broad categories of consideration exist, of course, and should shape your decision-making process. *De novo* review is the most exacting – appellate courts owe no deference to the trial court, at all, under that standard. Common appellate issues that recur under such a standard include the summary judgment

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8 As one rather important example, the Court of Appeals recently handed down a comprehensive revamping of its own Rules, including significant shifts in the way discretionary and interlocutory appeals are handled. Pragmatically, the wise practitioner would also review the rules to drive home the new formatting requirements for briefs, lest a filing be kicked back for failure to abide by the governing standards. A summary of the new Rules, including a few that become effective in December of this year, may be found at [http://www.gaappeals.us/rules2/summary.php](http://www.gaappeals.us/rules2/summary.php) (last visited October 1, 2018).
battleground. More lenient standards include *abuse of discretion*, which encompasses a wide swath of trial practice, including evidentiary rulings. Even more deferential standards exist that make appeals within such a framework quite difficult, include traditional “any evidence” or “clear legal error” standards.

The standard of review not only is the framework for decision, but should shape your enumeration of errors as well. Obviously, claims of error that fall under highly deferential standards will fail much more often than not; if your appeal can be carried under a *de novo* standard, though, your chances are markedly better.

Another thing about enumerations of error – pick and choose carefully. Dilution is a real risk, should you decide to include every conceivable claim of error. The most I’ve seen lodged in a brief (at least written by a lawyer) is an astounding *seventeen* enumerations of error, amounting to a claim that essentially every ruling the trial court ever made in a case was absolutely wrong. That sort of scattershot approach not only diminishes the overall credibility of your argument to the appellate court, but also likely impedes your ability to effectively and comprehensively prove your “better” arguments. Though no rule is etched in stone, somewhere
between one and four enumerations should be the norm.

   Also, just as importantly, know your audience. In the Georgia Court of
Appeals, the docketing notice provides key information – the three Judges
that will decide your case. And in the Georgia Supreme Court, as in the
nation’s highest Court, each case is heard by the entire roster of Justices.
So, one highly valuable task is to scour the existing caselaw for opinions
authored by your current Judges and Justices, and cite to those decisions
first and foremost (for general principles, at least).9

   And above all, remember: it’s about the writing. The vast majority of
an appellate judge’s time (and staff attorney time) is spent reading. To
stand out, your writing needs to be clear and persuasive, entertaining but
respectful. To many, writing is a chore; to a few – often appellate
specialists – writing is an art, and to be embraced. Most practitioners can
get by just knowing an appellate specialist to call on in the event a case

9 One rather colorful explanation has survived the ages. “Supposing
fishes had the gift of speech, who would listen to a fisherman’s weary
discourse on fly casting, the shape and color of the fly, the size of the
tackle, the length of the line, the merit of different rod makers, and all the
other boring stuff fishermen talk about, if the fish himself could be induced
to give his views on the most effective method of approach? For after all it
is the fish that the angler is after and all his recondite learning is but the
hopeful means to that end.” John W. Davis, “The Argument of An Appeal”
(1940), 26 A.B.A.J. 895.
goes up; for other practitioners that must undertake their own appeals, though, a few useful resources are out there.¹⁰

An example or two hopefully assists. I am a strong adherent of powerful, but readable writing that abandons many of the stale “rules” that have governed legal writing classes and CLEs for decades. Gone are words that you never heard of before law school – “heretofore,” “whereas” and all their cousins. Also cast out are staid, generic introductions: “Comes now, Appellant Joe Smith, by and through his undersigned counsel, and respectfully asks this Honorable Court to reverse. . . .” If in the first paragraph you cannot determine what this particular case is about, try again.

Instead, your writing needs to capture the reader’s attention and interest immediately. Take this example of a “first paragraph” from an actual case I handled. The underlying facts were remarkably straightforward: a plaintiff timely mailed to the local clerk for filing a Complaint, a Summons, filing fees, and checks to the local Sheriff to cover

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the costs of service. All of that happened a few days before the applicable statute of limitations was to run.

One defendant was served just after the statute, and the other never was. The litigation proceeded for almost a year when the "served" defendant moved to dismiss on statute of limitations grounds; the argument was that service was only perfected after the statute had run, and the plaintiff had not demonstrated diligence in pursuing service. For some inexplicable reason, the trial court latched onto the idea that the service fee had never been paid, and, accordingly, the efforts at service had not been diligent. The trial court, naturally enough, then dismissed and a direct appeal followed.

The first draft of the Appellant’s brief contained the following introductory paragraph, with the names changed to some of my favorite literary characters:11

Appellant, Irene Adler (“Adler”), was injured in a motor vehicle accident that occurred on August, 2010. Complaint, R-6. Suit was initiated in this matter on August 7, 2012 within the two year statute of limitations for such actions. Complaint, R-3. The Summons for Defendant, James Moriarty, was included with the Complaint and checks for filing fee and service fees delivered to the court clerk on or about August 7, 2012. R-35-36. The Sheriffs Service fee check,

11 I’ve altered the identifying information of the parties and venue, but otherwise this is word-for-word the draft introduction.
dated July 31, 2012, in the amount of $50.00 cleared associated
counsel’s bank account on or about August 23, 2012 indicating that it
was accepted by the London County Sheriff and credited to Plaintiff
for service of process. R-31. Service was returned by the Sheriff of
London County per the Sheriff’s Entry of Service on August 22, 2012,
15 days after the filing of the suit. R-19. At the hearing on
Defendants’ motion to dismiss, the Court, in a conference with the
clerk’s officer, was informed that the Plaintiff had not tendered the
sheriff’s service fee with the Complaint and filing fee at the time of the
initiation of the case. MT -10. Pursuant to Defendant’s Motion to
Dismiss, the London County Superior Court entered an Order
Granting Defendants’ Motion to Dismiss on or about August 12, 2013,
citing Plaintiff’s lack of diligence as the reason for the dismissal. R-
19-20. Thereafter, Plaintiff filed her Motion to Reconsider with
exhibits reflecting the payment of the sheriff’s service fee at the time
of the initiation of the case on August 7, 2012 along with bank records
reflecting that the sheriff’s service fee check had cleared the bank.
R-31-36. No order was entered on the Motion to Reconsider as the
appeal, in order to be timely, was filed before a hearing could be set
for the Motion. This Appeal was timely filed with the London Superior
Court Clerk on September 11, 2013. R-1-3.

There’s a lot going on here. Some of the must-edits are obvious.

- The intro does little to “grab,” as it has no underlying theme or
  prevailing story. Nor does it even explain what is glaringly obvious:
  the trial court got it wrong, and that is, in reality, the end of the inquiry.

- Stylistically, I think there are too many passive voice sentences
  (though a few are perfectly fine, for variance and readability’s sake).

- There’s too much over chronicling, which means that the Court is
  presented with a morass of dates that don’t really matter.

- Personalization is absent, with the passage focused on generic
  “Plaintiff” and “Defendant” with no personality whatsoever.

- One long paragraph is just tough on the eyes and concentration.
Even though an introduction can certainly creep up to two pages or so in the right case, it needs to be readable at the same time.

- There is a retreat to the record cite for support, when quotes and actual snippets are much more interesting and persuasive. Also, overciting without context just requires the reader to bounce back and forth between your brief and the record, which breaks focus and saps interest.

To be fair, the substance is almost all here, but the message gets lost in somewhat pedestrian writing. I like something like this a lot better:

This is about as straightforward an appeal as there one might find. The dispute here is whether the Plaintiff in the underlying litigation, Irene Adler, was diligent in attempting to serve the defendant, James Moriarty. Adler did all that Georgia law requires: filed a Complaint within the statute of limitations, attached a proper Summons to that pleading, and paid the requisite filing and service fees. As was her right, Adler elected the London County Sherriff’s Office to serve the Complaint on Adler.

And service was obtained, just 15 days after the filing of the Complaint. There is no dispute about timely filing of the Complaint, actual service, notice, or (absence of any) prejudice. For reasons that are, in a fair use of the word, impossible to understand, the trial court granted a Motion to Dismiss based upon Adler’s supposed failure to exercise diligence in serving Moriarty. So reasoning, the trial court found that Adler had not submitted the proper funds to the Sheriff’s Office for service, when the uncontradicted record establishes otherwise. Simply, the trial court just got the facts wrong. This appeal followed.

While far from perfect, this is certainly more impactful and persuasive. It’s more succinct, but actually contains the same substantive information.

There is no clutter with record cites (there will be a time and place for that,
later in the brief). And most importantly, there is a clear theme introduced early: the trial court made an inexplicable factual error that merits reversal.

Theme secured, the remainder of the brief should be easy to envision. For something more visually arresting than a sentence explaining that the service checks were in fact delivered and cashed, the brief included a PDF of the checks cut-and-pasted into the text of the argument section. If the entire argument underlying the trial court’s dismissal was that no check was sent and no fee was paid, the key “fact” is a front-and-back copy of the cashed check. After that, there was virtually nothing to be said on the issue.

Of course, this is but one example (and a cherry-picked one, at that). But, you see where I’m going. Legal writing doesn’t have to be, and shouldn’t be, pedantic and linear. Start sentences with “and” and “but”; dismiss “pursuant” as archaic; learn that transition sentences are your friend. One other global bit of advice: better writing is obtained when you practice, and read good writing yourself. Find a world-class source (preferably non-legal) and dive in every once in a while. I suspect you’ll notice a difference somewhat quickly.

V. WRITING AS THE APPELLEE
Some rules are universal, whether read through the hopeful lens of an Appellant, or from the at least marginally more comfortable view of the Appellee. Usually, the standard of review is your friend; make use of that concept. Many uncareful Appellants will cherry pick good facts, ignoring bad ones, when the standard of review requires quite the opposite.

Also critical is an understanding the nature of harmless error. Almost no trial is perfect; if I did not habitually hedge my bets, I might say no such trial is without some error. But that is not the relative hurdle, of course; an Appellant must prove harmful error to prevail. An Appellee, then, almost always has two layers of defense – that there was no error in the first place (the evidence complained of was admissible) and, even more importantly, there was no harmful error (since other evidence on that same point was admitted without objection.

And procedurally, as the Appellee, never be afraid to lead with a waiver argument as to a given enumeration of error, if available. The Court of Appeals, in particular, loves a good waiver. If there was not a proper objection below, or proffer, start with that, before reaching the substance of a given claim of error.

VI. ORAL ARGUMENT
Though not universally true, trial lawyers tend to be more comfortable arguing on their feet, rather than behind a keyboard. Hence, the temptation to request oral argument, no matter the issue on appeal, may pervade common thought. But oral argument should be carefully considered as part of the entire appellate (well, really, trial) strategy. Indeed, whether and how to request oral argument should not be a foregone conclusion. To be sure, an appellant may very well want to request oral argument, if for no reason other than to pique the judges’ interest in the case and start framing the issues on appeal. If on the other side of the “v”, however, an Plaintiff/Appellee hoping to hang on to a verdict, may want to forego oral argument (particularly if not requested by the appellant) to communicate to the panel that nothing out of the ordinary occurred, but only a regular trial.

But simply requesting oral argument will hardly ensure the entirely discretionary opportunity is granted.\(^{12}\) To the contrary, oral argument in the Court of Appeals is granted in only a fraction of cases on appeal – or about

\(^{12}\) On a practical note, if a request for an extension of time to file an initial brief is requested, it will be necessary to file a separate request for an extension to file a request for oral argument (if so desired). See Ct. Appeals R. 28(a)(2) (“A request for oral argument shall be filed within [twenty] days from the date the case is docketed in this Court. An extension of time to file brief and enumeration of errors does not extend the time to request oral argument.”).
one-third of the cases in which it is actually requested by the parties, to be more exact. Those requests that stand a better-than-average chance of being granted, however, do far more than make general overtures about the importance of the case or helpfulness to the judges.

Indeed, Court of Appeals Rule 28(a)(4), expressly provides that

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

Ct. Appeals R. 28(a)(4) (emphasis added). What that means in practice is that a request for oral argument should preview the issues on appeal in a way that grabs the court’s attention while simultaneously highlighting the ways in which the appeal has implications far beyond the facts of the case. Such macro-level considerations include, among others, issues of first impression, conflicting case law in Court of Appeals, or the application of well-settled case law to a novel set of facts. And because it only takes one judge from a panel to grant oral argument, a well-crafted request for oral argument can be just as important as a well-crafted brief.

If your oral argument request is one of the lucky minority granted, you will want to eschew traditional advocacy skills ordinarily reserved for a jury.
Indeed, emotional pleas during oral argument will not win the day and will likely distract. Rather, allow your brief to draw the judges into your story, and be prepared to discuss the strongest and weakest aspects of yours and your opposing party’s cases. Also, know the record cold. And know your panel even better. For example, an astute appellate advocate will tell you that if asked by Justice David Nahmias a question beginning, “So, are you saying that . . . ,” an affirmative answer will lead to a much more difficult follow-on question. But perhaps most challenging for advocates is recognizing when to concede points (nondispositive, of course) during oral argument to earn credibility and successively pivot back to the issues you hope will carry the day.

**CONCLUSION**

Most trial lawyers focus on winning the trial. That’s essential, but not enough. Leaving for tomorrow consideration of the likely issues to crop up on appeal will invariably make keeping a verdict more difficult, or turning around a bad trial result all the more onerous. “Plan ahead” sounds sort of trite, but it is as accurate as any other advice I have to give. Happy to
expand on any of these concepts, or others related to the appeal/trial interplay, if anyone is curious.
DARREN SUMMERVILLE –

(October 2018)

Darren graduated summa cum laude at the top of his class at Georgia State, winning every major writing award offered by the school during his three years there, winning the class wide oral argument competition, and serving as Managing Editor of the Law Review.

He started at the Bondurant Firm before shifting his focus to a more plaintiff-oriented practice, and formed The Summerville Firm in 2011.

His primary client base includes Plaintiff’s lawyers who might need assistance on unfamiliar areas of the law, a particularly nuanced briefing task, or on an appeal. He recently obtained one of the largest verdicts in the history of Georgia, winning a $128.8 million verdict in a Fannin County litigation.

He is the only lawyer in Georgia to be recognized both by the National Trial Lawyers at a Top 100 Trial Lawyer and as a Top 100 SuperLawyer in the area of appellate practice. He is the past President of the Appellate Practice Section of the State Bar of Georgia, and is also Past President of the DeKalb County Bar Association.
Appendix
# ICLE Board

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<td>2019</td>
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<td>Ms. Laverne Lewis Gaskins</td>
<td>Member</td>
<td>2021</td>
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<td>Ms. Allegra J. Lawrence</td>
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<td>Mr. C. James McCallar, Jr.</td>
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<td>Mrs. Jennifer Campbell Mock</td>
<td>Member</td>
<td>2020</td>
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<td>Mr. Brian DeVoe Rogers</td>
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<td>University of Georgia</td>
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<td>Hon. Harold David Melton</td>
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<td>Mr. Jeffrey Reese Davis</td>
<td>Staff Liaison</td>
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<td>Ms. Tangela Sarita King</td>
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