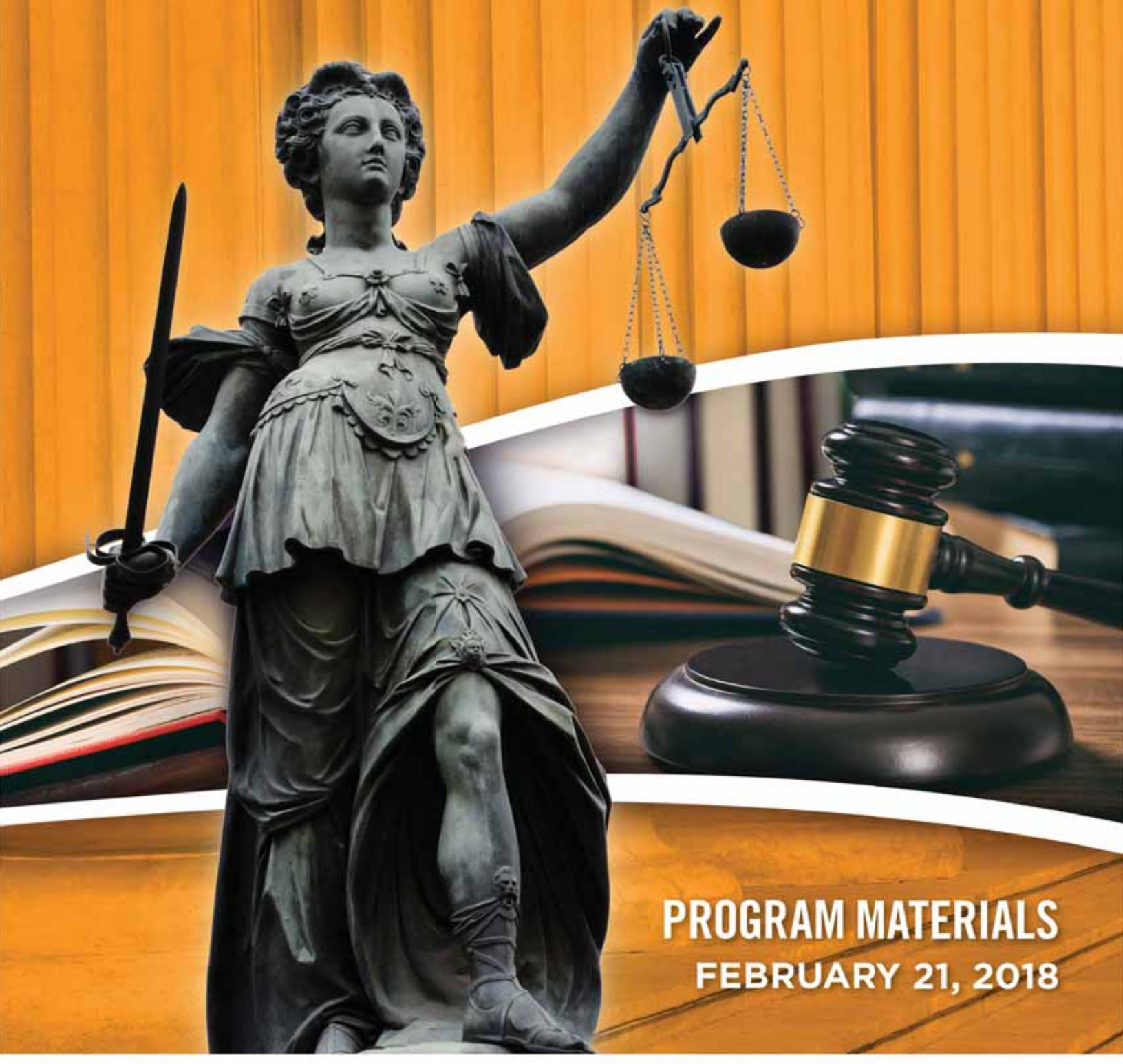
ICLE | 26TH ANNUAL PRODUCT LIABILITY SEMINAR



PROGRAM MATERIALS

FEBRUARY 21, 2018

Wednesday, February 21, 2018 **ICLE: State Bar Series**

26TH ANNUAL PRODUCT LIABILITY SEMINAR

6 CLE Hours, Including

1 Ethics Hour | 1 Professionalism Hour | 4 Trial Practice Hours

Sponsored By: **Institute of Continuing Legal Education**

Copyright © 2018 by the Institute of Continuing Legal Education of the State Bar of Georgia. All rights reserved. Printed in the United States of America. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form by any means, electronic, mechanical photocopying, recording, or otherwise, without the prior written permission of ICLE.

The Institute of Continuing Legal Education's publications are intended to provide current and accurate information on designated subject matter. They are offered as an aid to practicing attorneys to help them maintain professional competence with the understanding that the publisher is not rendering legal, accounting, or other professional advice. Attorneys should not rely solely on ICLE publications. Attorneys should research original and current sources of authority and take any other measures that are necessary and appropriate to ensure that they are in compliance with the pertinent rules of professional conduct for their jurisdiction.

ICLE gratefully acknowledges the efforts of the faculty in the preparation of this publication and the presentation of information on their designated subjects at the seminar. The opinions expressed by the faculty in their papers and presentations are their own and do not necessarily reflect the opinions of the Institute of Continuing Legal Education, its officers, or employees. The faculty is not engaged in rendering legal or other professional advice and this publication is not a substitute for the advice of an attorney. This publication was created to serve the continuing legal education needs of practicing attorneys.

ICLE does not encourage non-attorneys to use or purchase this publication in lieu of hiring a competent attorney or other professional. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional.

Although the publisher and faculty have made every effort to ensure that the information in this book was correct at press time, the publisher and faculty do not assume and hereby disclaim any liability to any party for any loss, damage, or disruption caused by errors or omissions, whether such errors or omissions result from negligence, accident, or any other cause.

The Institute of Continuing Legal Education of the State Bar of Georgia is dedicated to promoting a well organized, properly planned, and adequately supported program of continuing legal education by which members of the legal profession are afforded a means of enhancing their skills and keeping abreast of developments in the law, and engaging in the study and research of the law, so as to fulfill their responsibilities to the legal profession, the courts and the public.

Printed By:

State Bar of Georgia

INSTITUTE OF CONTINUING LEGAL EDUCATION

FOREWORD

Dear ICLE Seminar Attendee,

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

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

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

Your comments and suggestions are always welcome.

Sincerely,
Your ICLE Staff

Jeffrey R. Davis
Executive Director, State Bar of Georgia

Tangela S. King
Director, ICLE

Rebecca A. Hall
Associate Director, ICLE

AGENDA

Presiding:
Franklin P. Brannen, Jr., Program Chair, Lewis Brisbois Bisgaard & Smith LLP, Atlanta, GA

WEDNESDAY, FEBRUARY 21, 2018

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

8:15 **WELCOME AND OVERVIEW**
Franklin P. Brannen, Jr., Program Chair, Lewis Brisbois Bisgaard & Smith LLP, Atlanta, GA

8:20 **THE IMPACT OF THE TSCA AMENDMENT ON PRODUCT LIABILITY LAWSUITS**
Keith M. Kodosky, Lewis Brisbois Bisgaard & Smith LLP, Atlanta, GA

9:10 **LESSONS FROM HIP IMPLANT LITIGATION**
Scott A. Farrow, Conley Griggs Partin LLP, Atlanta, GA

10:00 **BREAK**

10:10 **ETHICS UPDATE 2018**
Paula J. Frederick, General Counsel, State Bar of Georgia, Atlanta, GA

11:10 **THE IMPACT OF RECENT U.S. SUPREME COURT PERSONAL JURISDICTION OPINIONS ON PRODUCT LIABILITY LAWSUITS IN GEORGIA**
Madison H. Kitchens, King & Spalding LLP, Atlanta, GA

12:00 **LUNCH**

12:30 **PROFESSIONALISM IN PRODUCT LIABILITY LAWSUITS**
Franklin P. Brannen, Jr., Program Chair, Lewis Brisbois Bisgaard & Smith LLP, Atlanta, GA

1:30 **BREAK**

1:40 **LITIGATION FUNDING AND PRODUCT LIABILITY LAWSUITS**
Suneel C. Gupta, Baker Donelson Bearman Caldwell & Berkowitz PC, Atlanta, GA

2:30 **RECENT DEVELOPMENTS IN BRAIN INJURY EVIDENCE**
Kristen S. Cawley, Lewis Brisbois Bisgaard & Smith LLP, Atlanta, GA

3:10 **ADJOURN**

TABLE OF CONTENTS

State Bar of Georgia
INSTITUTE OF CONTINUING LEGAL EDUCATION

STATE BAR SERIES

The Impact Of The TSCA Amendment On Product Liability Lawsuits

Presented By:

Keith M. Kodosky
Lewis Brisbois Bisgaard & Smith LLP
Atlanta, GA

State Bar of Georgia
INSTITUTE OF CONTINUING LEGAL EDUCATION

STATE BAR SERIES

Lessons From Hip Implant Litigation

Presented By:

Scott A. Farrow
Conley Griggs Partin LLP
Atlanta, GA

State Bar of Georgia
INSTITUTE OF CONTINUING LEGAL EDUCATION

STATE BAR SERIES

Ethics Update 2018

Presented By:

Paula J. Frederick
State Bar of Georgia
Atlanta, GA

State Bar of Georgia

ETHICS UPDATE 2018

Office of the General Counsel
State Bar of Georgia
104 Marietta St. NW Suite 100
Atlanta, Georgia 30303
www.gabar.org
404/527-8720 or 1/800-334-6865

The rules governing lawyer conduct are subject to constant revision. This paper describes recent changes to the Georgia Rules of Professional Conduct and other Bar Rules, trends in lawyer disciplinary investigations and prosecutions, and new advisory opinions interpreting the Rules.

Disciplinary Statistics

From 2007 through 2014 the number of Grievance requests fell, as did the number of cases in which discipline was imposed. After slight increases between 2014 and 2017 the number of requests dropped again this year, but the number of public disciplinary cases increased.

The Bar received 3105 requests for Grievance forms in the 2016-2017 Bar year. The number of Grievances actually received was 1842, a decrease from the 2253 received in the previous year. The number of cases sent to the Investigative Panel also decreased from 231 to 188.

At the end of the process the Supreme Court of Georgia and the State Disciplinary Board imposed discipline in 148 cases between June 1, 2016 and May 31, 2017, up from 130 cases the year before.

Formal Advisory Opinions

In the Fall of 2016 the Formal Advisory Opinion Board issued an opinion on the following question: *May a sole practitioner use a firm name that includes "group," "firm," or "&*

Associates"? The question is whether use of those terms in the firm name of a sole practitioner is misleading, and thus in violation of Georgia Rules of Professional Conduct 7.1 and 7.5. The Board found it misleading for a sole practitioner to use the terms "group" or "& Associates," but did not find a violation with a sole practitioner's use of the word "firm" in the firm name. Formal Advisory Opinion No. 16-3 is an opinion of the Formal Advisory Opinion Board and is binding on the requestor and the State Bar of Georgia. It is not binding on the Supreme Court of Georgia, which shall treat the opinion as persuasive authority only.

On November 3, 2011, the Supreme Court of Georgia issued an order amending the Georgia Rules of Professional Conduct. Following the November 3, 2011 amendment to the Rules, the Formal Advisory Board reviewed each existing Formal Advisory Opinion to determine the impact, if any, the amended Rules have on the opinions. The Board determined two existing opinions should be redrafted:

Formal Advisory Opinion No. 03-2 addressed whether the obligation of confidentiality described in Rule 1.6, Confidentiality of Information, applies as between jointly represented clients. The opinion was based upon Rules 1.4, 1.6, 1.7, and 1.9, which were amended in 2011. The Board decided to redraft the opinion in light of the amendments to the underlying rules, and issued the redrafted opinion as 16-1. It withdrew FAO No. 03-2.

The Board also redrafted FAO 10-2 in light of amendments to the rules. The question posed in the opinion is whether an attorney who has been appointed to serve both as legal counsel and as guardian ad litem for a child in a termination of parental rights case may advocate termination over the child's objection. FAO No. 16-2, the redrafted version of FAO No. 10-2, is pending at the Supreme Court of Georgia on the Bar's request for discretionary review.

There is currently one request pending with the Board. The question presented in Formal Advisory Opinion Request No. 16-R3 is whether a Georgia lawyer representing a client in a

commercial real estate transaction involving Georgia property must receive and disburse funds using an IOLTA account when the parties and/or their counsel agree on an alternate method of handling those funds. The Board has not yet decided whether to accept the request. Initially, the Board thought the underlying ethics issue might be best addressed by the Disciplinary Rules and Procedures Committee with an amendment to the Georgia Rules of Professional Conduct. However, based upon information provided by the requestor, the Board is considering other alternatives and will seek additional information from the requestor.

Rules Changes

On January 12, 2018 the Supreme Court of Georgia entered an order approving substantial revisions to the process for investigating and prosecuting disciplinary cases. The rules will go into effect at the start of the next Bar year, July 1, 2018. The revised process:

- Gives the Office of the General Counsel ("OGC") authority to begin an investigation upon receipt of credible information that a lawyer's conduct has violated the Rules of Professional Conduct. The current process requires the Office to receive a written grievance before beginning an investigation.
- The OGC may use investigative subpoenas during the informal screening process, with permission from the Chair of the State Disciplinary Board.
- The State Disciplinary Board may refer a lawyer for evaluation if there are signs of mental illness, cognitive impairment or addiction. A lawyer who does not cooperate with the referral may be considered for expedited action under the procedures for emergency suspension cases.
- Members of the disciplinary panels will be reimbursed for their reasonable expenses in volunteering to serve on the Panels.

- The Supreme Court will appoint a new pool of special masters to hear disciplinary cases, and they will be paid an hourly rate set by the Court.
- The entire process will operate under strict time deadlines.

These proposals should improve and streamline the process so that cases move more smoothly, and so that respondent lawyers who are impaired may be directed to treatment faster.

By order dated November 2, 2016, the Supreme Court approved revisions to Georgia Rules of Professional Conduct 1.7, 4.4 and 5.3.

- Rule 1.7 now provides an exception to the conflicts rules so that a part-time prosecutor may represent criminal defendants in courts other than those in which she has prosecutorial authority.
- Rule 4.4 now requires a lawyer who receives a document or electronically stored information inadvertently to notify the sender he has received the document. The rule does not require the recipient of the information to return the document, to stop reading the document or to destroy it.
- Rule 5.3 as it relates to suspended and disbarred lawyers working in a law office was clarified.

The Supreme Court entered an order on July 9, 2015 approving several changes to the Rules of Professional Conduct. Most of the changes are simple housekeeping amendments. The substantive amendments include:

- A change to Rule 4-403 which allows the publishing of proposed formal advisory opinions on the Bar's website as an alternative to the *Georgia Bar Journal*.
- A change to Rule 3.5 adding subpart (c) and comment 7, which prohibit communication with a juror or prospective juror after discharge of the jury under certain circumstances.

- An amendment to Rule 5.4 that allows a Georgia lawyer to provide legal services to a client while working with other lawyers or law firms practicing in and organized under the rules of jurisdictions which allow Alternative Business Structures (ABS). An ABS has lawyer and non-lawyer owners and is typically located in a foreign country. Under this rule change, a Georgia lawyer working with an ABS would not be participating in unethical fee-sharing.
- An amendment to Rule 7.3 that does away with the requirement that the Bar "certify" lawyer referral services and instead requires lawyers to use only services that meet certain requirements.
- Changes to Rule 4-213 providing that a special master may require the Bar to pay for a copy of the hearing transcript for a respondent who has demonstrated an inability to pay.

Please remember that the current version of the Georgia Rules of Professional Conduct and archived issues of the *Georgia Bar Journal* are always available on the State Bar website, www.gabar.org.

Trust Account Overdraft Notification Program

The Office of the General Counsel has operated a Trust Account Overdraft Notification Program since January 1996. The program requires banks to notify the State Bar of Georgia when a lawyer's escrow account check is presented against insufficient funds. The purpose of the program is to stop the theft of client funds by providing a mechanism for early detection of problems in the escrow account.

During the 2016-2017 year the Program received 329 overdraft notices from financial institutions. Two hundred and sixty six of those matters were dismissed when the lawyer was able to provide a satisfactory explanation for the overdraft. Others were forwarded to the Investigative

Panel for disciplinary investigation or to the Law Practice Management Program, which provided the lawyer with information about appropriate recordkeeping.

Pro Hac Vice Admission

On September 4, 2014 the Supreme Court amended the rules regarding *Pro Hac Vice* admission to revise the fee structure for admission. The applicant must pay a $75 fee to the Bar each time she applies for admission. In addition, the applicant must pay an annual fee of $200, and must pay that amount every year by January 15th if she is still admitted *pro hac vice* before any court in Georgia. The annual fee is also paid to the Bar, and a portion is transferred to the Georgia Bar Foundation to support the delivery of legal services to the poor.

The Office of the General Counsel may object to the application or request that the court impose conditions to its being granted. Among other reasons, the Bar may object to an application if the lawyer has a history of discipline in his home jurisdiction, or if the lawyer has appeared in Georgia courts so frequently that he should become a member of the bar in this state. Lawyers admitted *pro hac* agree to submit to the authority of the State Bar of Georgia and the Georgia courts. During the last Bar year the Office of the General Counsel reviewed 669 *pro hac vice* applications. Of the $289,475 collected, the Georgia Bar Foundation received $241,400.

ABA Opinions of Interest

Although Formal Advisory Opinions issued by the American Bar Association are not binding in Georgia, they provide useful advice about application of the Model Rules of Professional Conduct to a particular set of facts. The Office of the General Counsel will look to the ABA opinions for guidance where our rule is similar to the ABA Model and where there is no Georgia-specific advice. The American Bar Association has recently issued the following opinions of interest:

- Formal Opinion 479: The "Generally Known" Exception to Former-Client Confidentiality (December 15, 2017)
- Formal Opinion 478: Independent Factual Research by Judges via the Internet (December 8, 2017)
- Formal Opinion 477R: Confidentiality obligations when communicating with clients electronically (May 11 2017; revised May 22, 2017)
- Formal Opinion 476: Confidentiality Issues when Moving to Withdraw for Nonpayment of Fees in Civil Litigation (December 19, 2016)
- Formal Opinion 475: Safeguarding Fees That Are Subject to Division With Other Counsel (December 7, 2016)
- Formal Opinion 474: Whether it is appropriate to accept a referral fee for work referred because of a conflict of interest (April 21, 2016)
- Formal Opinion 473: Obligations upon receiving a subpoena for client documents or information (February 17, 2016)
- Formal Opinion 472: Communication with Person Receiving Limited-Scope Legal Services (November 30, 2015)
- Formal Opinion 471: Ethical Obligations of Lawyer to Surrender Papers and Property to Which Former Client is Entitled. (July 1, 2015)

The ABA's practice is to leave new opinions posted on the public portion of their site for about a year. After that, there is a charge if you wish to access an opinion.

Last Updated January, 2018

State Bar of Georgia
INSTITUTE OF CONTINUING LEGAL EDUCATION

STATE BAR SERIES

The Impact Of Recent U.S. Supreme Court Personal Jurisdiction Opinions On Product Liability Lawsuits In Georgia

Presented By:

Madison H. Kitchens
King & Spalding LLP
Atlanta, GA

Materials Prepared for 26th Annual Georgia Product Liability Seminar

THE IMPACT OF RECENT U.S. SUPREME COURT PERSONAL JURISDICTION OPINIONS ON PRODUCT LIABILITY LAWSUITS IN GEORGIA

Madison H. Kitchens
King & Spalding LLP

I. OVERVIEW OF PERSONAL JURISDICTION LAW

A. Brief Overview of the Personal Jurisdiction Landscape Before 2014

The doctrine of personal jurisdiction concerns the bounds of a court's power over the *parties* to a lawsuit (as opposed to its subject matter). Among other things, the doctrine examines the relationship between the forum, the parties, and the claims at issue to determine whether the court can, consistent with state law and due process, adjudicate the claims of a plaintiff and render a valid judgment against a nonresident defendant.

A plaintiff seeking to establish personal jurisdiction over a nonresident defendant "bears the initial burden of alleging in the complaint sufficient facts to make out a prima facie case of jurisdiction." *United Techs. Corp. v. Mazer*, 556 F.3d 1260, 1274 (11th Cir. 2009). A court will examine two overarching issues when resolving whether personal jurisdiction exists over a non-resident defendant: (1) whether personal jurisdiction is satisfied under the state's long-arm statute; and (2) whether the exercise of jurisdiction over the non-resident defendant would violate the Due Process Clause of the Fourteenth Amendment.[1] *See Diamond Crystal Brands, Inc. v. Food Movers Int'l, Inc.*, 593 F.3d 1249, 1257–58 (11th Cir. 2010).

---

[1] Georgia's long-arm statute permits a court to exercise personal jurisdiction over any nonresident defendant if the defendant or its agent:

> (1) *Transacts any business within this state*;
>
> (2) Commits a tortious act or omission within this state, except as to a cause of action for defamation of character arising from the act;
>
> (3) Commits a tortious injury in this state caused by an act or omission outside this state if the tort-feasor regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;
>
> (4) Owns, uses, or possesses any real property situated within this state;
>
> (5) With respect to proceedings for divorce, separate maintenance, annulment, or other domestic relations action or with respect to an independent action for support of dependents, maintains a matrimonial domicile in this state at the time of the commencement of this action or if the defendant resided in this state preceding the commencement of the action, whether cohabiting during that time

A plaintiff has the burden of demonstrating that the court has at least one of two categories of personal jurisdiction: general jurisdiction or specific jurisdiction. General jurisdiction allows a court to hear "any and all claims" against a defendant. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011). It is sometimes referred to as "all-purpose" jurisdiction. By contrast, specific jurisdiction "depends on an affiliation between the forum and the underlying controversy"—principally, "an activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation." *Id*. It is sometimes referred to as "case-linked" jurisdiction.

Initially, the doctrine of personal jurisdiction was rooted in notions of sovereignty. In the seminal case of *Pennoyer v. Neff*, 95 U.S. 714 (1878), the U.S. Supreme Court held that "[t]he authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established." *Id*. at 720. In other words, a court's jurisdictional power over litigants reached only so far as the geographic bounds of the forum. *See Shaffer v. Heitner*, 433 U.S. 186, 197 (1977) (stating that, under *Pennoyer*, "any attempt 'directly' to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power").

This cramped version of personal jurisdiction ultimately gave way to the realities of interstate commerce and technological advances in transportation and communication. In its place, the Supreme Court held in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), that a state may authorize courts within its borders to exercise personal jurisdiction over a non-resident defendant so long as the defendant has "certain minimum contacts" with the state "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Id*. at 316. Under *International Shoe*'s "minimum contacts" test and its progeny, a defendant's contacts should be such that it "should reasonably anticipate being haled" into the forum. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). Thus, over time, the Court recognized that the doctrine of personal jurisdiction "represents a restriction on judicial

---

> or not. This paragraph shall not change the residency requirement for filing an action for divorce; or
>
> (6) Has been subject to the exercise of jurisdiction of a court of this state which has resulted in an order of alimony, child custody, child support, equitable apportionment of debt, or equitable division of property if the action involves modification of such order and the moving party resides in this state or if the action involves enforcement of such order notwithstanding the domicile of the moving party.

O.C.G.A. § 9-10-91 (emphasis added). Because Georgia's long-arm statute "grants Georgia courts the unlimited authority to exercise personal jurisdiction over any nonresident who transacts any business in the State," *Innovative Clinical & Consulting Servs., LLC v. First Nat. Bank of Ames*, 279 Ga. 672, 675, 620 S.E.2d 352, 355 (2005), the state's long-arm statute will be readily satisfied where a nonresident product manufacturer sells its product within Georgia's borders. Further analysis of Georgia's long-arm statute is outside the scope of this paper.

power not as a matter of sovereignty, but as a matter of individual liberty." *Ins. Corp. of Ir. v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 702 (1982).

B. The Supreme Court's General Jurisdiction Opinion in *Daimler AG v. Bauman*

Prior to 2014, it was commonly assumed that, under the doctrine of general personal jurisdiction, any large product manufacturer could be sued in virtually any state in which it sold a substantial volume of its products, regardless of whether the plaintiff's claim arose from the defendant's forum contacts. After the Supreme Court's opinion in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), however, that assumption is no longer valid. While the opinion largely purported to be a simple application of the Court's prior general jurisdiction precedents, it has spawned a resurgence of personal jurisdiction challenges across the nation and set the stage for the Court's groundbreaking specific jurisdiction ruling last year in *Bristol-Myers Squibb v. Superior Court of California*, discussed below.

The sweeping nature of the plaintiffs' personal jurisdiction theory in *Daimler AG*, as succinctly summarized in the opinion's first sentence, suggests the extent to which general jurisdiction had become unmoored from virtually any limiting principle. *See id.* at 750 (stating that "[t]his case concerns the authority of a court in the United States to entertain a claim brought by foreign plaintiffs against a foreign defendant based on events occurring entirely outside the United States"). Specifically, twenty-two Argentinian residents filed suit in California federal court alleging that the Argentinian subsidiary (Mercedes-Benz Argentina) of a German Company (Daimler AG) collaborated with government security forces to kidnap, torture, and kill Mercedes-Benz Argentina employees. *Id*. at 751. The plaintiffs sought to hold Daimler AG vicariously liable for the acts of its Argentinian subsidiary, and sued for alleged violations of the laws of California, the United States, and Argentina. *Id*. at 751–52. The plaintiffs never argued that the California federal court had specific jurisdiction over their claims, nor did they challenge the district court's prior holding that Daimler AG's contacts with California were too sporadic to confer general jurisdiction. *Id*. at 758. Instead, the plaintiffs relied on an agency theory—ultimately endorsed by the Ninth Circuit—in which the California contacts of Daimler AG's American subsidiary, Mercedes-Benz USA, LLC, were imputed to Daimler AG. *Id*. at 759–60.

In rejecting this agency theory, the Supreme Court clarified the contours of general jurisdiction and, in so doing, significantly narrowed the number of fora in which defendants can be sued on "any and all" claims. The Court first recognized that a corporate defendant's state of incorporation and principle place of business remained the paradigmatic bases for general jurisdiction, as such state affiliations were unique, easily ascertainable, and afforded plaintiffs at least one (and often two) jurisdictions in which to sue on an all-purpose basis. *Id.* at 760. In a footnote, the Court left open the possibility that, "in an exceptional case," a defendant's operations in a different forum "may be so substantial and of such a nature as to render the corporation at home in that State." *Id*. at 761 n.19. While the Court gave no guidance as to what type and degree of forum-related activities would rise to the level of "an exceptional case"—an issue that has since flummoxed lower courts and litigants alike—the Court plainly rejected a "stream-of-commerce" theory of general jurisdiction. *See id.* at 757 ("Although the placement of a product into the stream of commerce 'may bolster an affiliation germane to specific jurisdiction,' … such contacts 'do not warrant a determination that, based on those ties, the

forum has general jurisdiction over a defendant.'"). The Court also warned against the conflation of general jurisdiction and specific jurisdiction, characterizing as "unacceptably grasping" plaintiffs' theory that general jurisdiction exists wherever a corporation engages in a "substantial, continuous, and systematic course of business" in the forum. *Id*. at 761. According to the Court, "[s]uch exorbitant exercises of all-purpose jurisdiction would scarcely permit out-of-state defendants 'to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'" *Id*. at 761–62 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)).

As courts have recognized, *Daimler AG* has made it "incredibly difficult to establish general jurisdiction [over a corporation] in a forum other than the place of incorporation or principal place of business." *Monkton Ins. Services, Ltd. v. Ritter*, 768 F.3d 429, 432 (5th Cir. 2014). Justice Sotomayor has even gone so far as to contend that, under the Supreme Court's recent personal jurisdiction decisions (in which she ordinarily is the lone dissenter), "it is virtually inconceivable that such corporations will ever be subject to general jurisdiction in any location other than their principal places of business or of incorporation." *BNSF Ry. v. Tyrrell*, 137 S. Ct. 1549, 1560 (2017) (Sotomayor, J., concurring in part and dissenting in part).

Emboldened by *Daimler AG*, product manufacturers have been increasingly successful in moving to dismiss the claims of plaintiffs who elected, for strategic reasons, to file their claims in states with no connection to their claims.[2]

C. The Supreme Court's Specific Jurisdiction Opinion in *Bristol-Myers Squibb v. Superior Court of California*

Meanwhile, the U.S. Supreme Court's watershed opinion on *specific* personal jurisdiction in *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773 (2017), is widely regarded as the most impactful product liability case decided last year. In tandem with the Court's general jurisdiction opinion in *Daimler AG*, the decision will have significant implications for where product manufacturers and other corporations can be sued and the extent to which plaintiffs residing in a forum state can join their claims with other plaintiffs who do not.

---

[2] *See, e.g., Keeley v. Pfizer Inc.*, No. 4:15CV00583 ERW, 2015 WL 3999488 (E.D. Mo. 2015) (dismissing plaintiffs' claim against pharmaceutical manufacturer filed in Missouri for lack of personal jurisdiction where the company was incorporated in Delaware and maintained its principal place of business in New York and where the plaintiffs' claim arose in Georgia). Notably, in dismissing the plaintiffs' claims, the *Keeley* court also rejected the argument that the defendant "consented" to jurisdiction in Missouri by registering to do business there and by maintaining a certified agent for service of process. *Id*. at *4. Although the courts in some states have bought into the "registered-agent-equals-consent" argument for general jurisdiction, Georgia does not appear to be one of them. *See, e.g., Orafol Ams., Inc. v. DBi Servs.*, LLC, No. 1:16-CV-3516-SCJ, 2017 WL 3473217, at *3 (N.D. Ga. July 20, 2017) ("Every company that does any business in Georgia must register with the State and maintain a registered agent. Just because a company does some small amount of business in Georgia does not mean that due process will allow that company to be sued in Georgia for acts that occurred outside the State.").

In *Bristol-Myers Squibb Co.*, 86 California plaintiffs and 592 non-resident plaintiffs from 33 other states brought consolidated suits in California state court, alleging injuries caused by the drug Plavix (a medication used to inhibit blood clotting). *Id*. at 1778. BMS moved to quash service of summons for the non-resident plaintiffs, claiming that the California Superior Court lacked general jurisdiction to hear the case because BMS is neither incorporated nor headquartered in California. Additionally, BMS argued that the court lacked specific jurisdiction over BMS because the complaint did not allege that the non-residents' injuries had occurred or been treated in California, nor did they allege that they obtained Plavix through California physicians or from any other California source. *Id*. In August 2016, California's Supreme Court held that, although there was no general jurisdiction,[3] BMS's nationwide marketing, promotion, and distribution of Plavix created a substantial nexus between the nonresident plaintiffs' claims and the company's Plavix-related contacts in California such that the exercise of specific jurisdiction would not be unreasonable. *Id*. at 1778–79.

In June 2017, the U.S. Supreme Court reversed in an 8–1 opinion, concluding that the California courts' exercise of jurisdiction over the non-resident plaintiffs' claims violated due process. In so holding, the Court rejected the California Supreme Court's "sliding scale" approach to specific jurisdiction, which posited that BMS's extensive contacts with California permitted the exercise of specific jurisdiction based on a less direct connection between the company's forum activities and plaintiffs' claims than ordinarily would be required. *Id*. at 1779. In support of its ruling, the Supreme Court noted that "BMS did not develop Plavix in California, did not create a marketing strategy for Plavix in California, and did not manufacture, label, package, or work on the regulatory approval of the product in California." *Id*. at 1778. Thus, the mere fact that the non-residents' claims were *similar* to the claims of the California plaintiffs—over whom the court indisputably did have personal jurisdiction—could not cure the fatal jurisdictional defect: that all of the conduct giving rise to the nonresidents' claims occurred in other states. *Id*. at 1782. Nor was the Court persuaded by the plaintiffs' argument that personal jurisdiction over BMS could be established through its contract with a California-based company to distribute the product. According to the Court, a defendant's relationship with a third party, without more, cannot confer personal jurisdiction because the "minimum contacts" requirement must be met as to each defendant. *Id*. at 1783.

While Justice Alito's majority opinion sought to downplay the "parade of horribles" theorized by the plaintiffs if personal jurisdiction was denied, Justice Sotomayor's dissent addressed potential implications of the Court's decision and perhaps presaged personal jurisdiction battles to come. According to Justice Sotomayor, "the Court's opinion in this case will make it profoundly difficult for plaintiffs who are injured in different States by a defendant's nationwide course of conduct to sue that defendant in a single, consolidated action." *Id*. at 1789

---

[3] The Superior Court had earlier denied BMS's motion to quash on general jurisdiction grounds, concluding that its activities in California were sufficiently extensive to subject it to the jurisdiction of California courts. California's Court of Appeal then summarily denied BMS's petition for a writ of mandamus on the same day as the Supreme Court's decision in *Daimler AG*. After the California Supreme Court transferred the matter back to the appellate court to reexamine the issue in light of *Daimler AG*, the Court of Appeal again denied the writ—this time on specific jurisdiction grounds.

(Sotomayor, J., dissenting). Moreover, she predicted that "[t]he effect of the Court's opinion today is to eliminate nationwide mass actions in any State other than those in which a defendant is 'essentially at home,'" which will "hand one more tool to corporate defendants determined to prevent the aggregation of individual claims, and forces injured plaintiffs to bear the burden of bringing suit in what will often be far flung jurisdictions." *Id*.

The *Bristol-Myers Squibb* decision has already spawned a flurry of personal jurisdiction challenges in both state and federal courts. Although some courts have given the Supreme Court's holdings a more far-reaching application than others, it is clear that the plaintiffs' bar will need to take *Bristol-Myers Squibb* into account when determining where to sue product manufacturers on behalf of multi-state claimants; otherwise, they may face an early dismissal of their claims.

II. CHALLENGING OUT-OF-STATE CLAIMS IN PRODUCT LIABILITY CLASS ACTIONS POST-*DAIMLER* AND *BMS*

The Supreme Court's opinions in *Daimler AG* and *Bristol-Myers Squibb* raise significant questions about the extent to which plaintiffs can bring nationwide or multi-state class claims against a product manufacturer that is not headquartered or incorporated in the forum state. This section will discuss three interrelated issues that a court may need to examine when a plaintiff brings class claims on behalf of non-residents: (1) whether the court has personal jurisdiction as to the out-of-state claims; (2) whether the forum state's law can be applied extraterritorially to the claims of the out-of-state class members; and (3) if not, whether the claims can proceed on a classwide basis notwithstanding the need to apply various states' laws.

A. Issue #1: Whether the Court Has Personal Jurisdiction Over the Claims Asserted by Out-Of-State Class Members.

After the Supreme Court's recent personal jurisdiction decisions, the easiest way for a plaintiff to fend off a personal jurisdiction challenge when bringing out-of-state class claims is to sue in one of the defendant's "paradigmatic" home jurisdictions: *i.e.*, their state of incorporation and/or principal place of business. Although this may not cure potential Article III standing or Rule 23 infirmities discussed below, it should resolve any doubts about whether the court has personal jurisdiction to hear the plaintiff's claims. *See Bristol-Myers Squibb*, 137 S. Ct. at 1780 ("A court with general jurisdiction may hear *any* claim against that defendant, even if all the incidents underlying the claim occurred in a different State." (emphasis in original)).

The personal jurisdiction calculus becomes far more complicated when suit is brought against a nonresident defendant. Obviously, the court's power to hear the case is at a nadir when neither the defendant nor the plaintiff are residents of the forum, and the suit does not "aris[e] out of or relat[e] to the defendant's contacts with the forum." *Helicopteros Nacionales de Colombia, S. A. v. Hall*, 466 U. S. 408, 414, n.8 (1984). But even in cases in which the plaintiff was injured in the forum state, *Bristol-Myers Squibb* leaves open the question whether that plaintiff can bring multi-state or nationwide claims on behalf of those who were injured in other states. *See Bristol-Myers Squibb*, 137 S. Ct. at 1789 n.4 (Sotomayor, J., dissenting) ("The Court today does not confront the question whether its opinion here would also apply to a class action in which a plaintiff injured in the forum State seeks to represent a nationwide class of plaintiffs, not all of

whom were injured there.") (citing *Devlin v. Scardelletti*, 536 U.S. 1, 9–10 (2002) ("Nonnamed class members … may be parties for some purposes and not for others")).

There are two ways in which a plaintiff injured in the forum state may seek to bring a multi-state class action. First, the plaintiff may bring claims on behalf of residents of the forum state only, and then join his claims with out-of-state named plaintiffs who represent class members injured in those other states. Alternatively, the forum-based plaintiff may seek to serve as a class representative for out-of-state class members himself. There are potential problems with both strategies, however.

Under the first approach, the claims of the out-of-state class representatives are susceptible to dismissal because none of their claims arise from, or are related to, the defendant's conduct in the forum state. For instance, in *Antoon v. Securus Techs., Inc.*, No. 5:17-CV-5008, 2017 WL 2124466 (W.D. Ark. May 15, 2017), three named plaintiffs brought class claims under the consumer protection laws of their respective states: the Arkansas Deceptive Trade Practices Act, the Georgia Fair Business Practices Act, and the Illinois Consumer Fraud and Deceptive Business Practices Act. The court dismissed the claims of the Georgia and Illinois named plaintiffs because, even though the court clearly had jurisdiction over the claims of the Arkansas named plaintiff (as his injury was sustained in the forum state), the defendant's relevant conduct as to the non-resident named plaintiffs occurred entirely outside the state of Arkansas. *Id*. at *4. The Court stated that it "[could not] imagine how it could be that … that the state of Arkansas has any interest at all in regulating the rates that [defendant] charges for purely *intra*state calls within the states of Georgia and Illinois." *Id*.

Similarly, in *Prime Healthcare Centinela, LLC v. Kimberly-Clark Corp.*, No. CV 14-8390-DMG, 2016 WL 7177532 (C.D. Cal. May 26, 2016), the court dismissed the claims of class representatives seeking to sue in California over allegedly defective surgical gowns purchased in Texas and Rhode Island. Although the court indisputably had personal jurisdiction over the claims asserted by the California named plaintiffs—because their injuries arose in the forum state—the court held that it could not exercise personal jurisdiction over the claims of plaintiffs allegedly injured in other states, notwithstanding the similarity between their alleged injuries and those of the California plaintiffs. *Id*. at *1–2. The court rejected the plaintiffs' argument that it could exercise *pendent* personal jurisdiction over the non-California claims. Under that doctrine, when a court has personal jurisdiction over a nonresident defendant as to one claim, it may exercise jurisdiction over that same defendant with respect to separate claims that form part of the same case or controversy. *Id*. at *2. The court concluded, however, that the doctrine of pendent personal jurisdiction was inapplicable "where Plaintiffs seek to piggyback personal jurisdiction over one set of Plaintiffs' claims (the non-California plaintiffs) onto claims by a different set of plaintiffs (the California plaintiffs) notwithstanding that the former do not arise from or relate to Defendants' contacts in the forum state." *Id*.; *see also Famular v. Whirlpool Corp.*, No. 16 CV 944 (VB), 2017 WL 2470844, at *7 (S.D.N.Y. June 7, 2017) (dismissing consumer product claims asserted by out-of-state class representatives against a Georgia-based defendant because "neither specific personal jurisdiction nor pendent personal jurisdiction allowed [the court] to hear plaintiffs' claims against the foreign defendant based on defendant's actions occurring solely outside the forum state").

Of course, a plaintiff injured in the forum state may attempt to sidestep this problem by seeking to bring claims on behalf of out-of-state class members himself, rather than joining his claims with those of class representatives injured in other states. This solution is superficially appealing because the court clearly has personal jurisdiction over the defendant with respect to the plaintiff's forum-based claims. Courts have generally held that a plaintiff cannot cure the jurisdictional defect in this manner, however, because "a plaintiff must secure personal jurisdiction over a defendant *with respect to each claim she asserts*." WRIGHT & MILLER, 4A FED. PRAC. & PROC. CIV. § 1069.7 (3d ed.). For instance, in *Demedicis v. CVS Health Corp.*, No. 16-cv-5973, 2017 WL 569157 (N.D. Ill. Feb. 13, 2017), an Illinois plaintiff filed suit against a health corporation and pharmacy company over allegedly misleading "Made in U.S.A." labels on vitamin products. The plaintiff sued not only for alleged violations of Illinois's consumer protection statutes, but also sought to bring class claims on behalf of non-residents for violations of analogous state consumer fraud statutes in eight other states. In granting defendants' motion to dismiss, the court held that the plaintiff "ha[d] not established personal jurisdiction over the out-of-state claims as he is the sole connection between Defendants and Illinois," and personal jurisdiction over the defendant must be established as to each claim asserted. *Id*. at *5.

Not all courts have accepted this reasoning—even after *Bristol-Myers Squibb*. For example, in *Day v. Air Methods Corp.*, No. 5:17-183-DCR, 2017 WL 4781863 (E.D. Ky. Oct. 23, 2017), the court rejected the defendant's argument that it lacked personal jurisdiction with respect to claims brought on behalf of absent class members employed by the defendant outside of the forum state (Kentucky). According to the court, the defendant's personal jurisdiction challenge missed the mark because "the inquiry for personal jurisdiction lies with the named parties of the suit asserting their various claims against the defendant, not the unnamed proposed class members." *Id*. at *1.

Courts that have reached similar conclusions have typically relied on the Supreme Court's opinion in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811 (1985), which held, among other things, that "a forum State may exercise jurisdiction over the claim of an absent class-action plaintiff, even though that plaintiff may not possess the minimum contacts with the forum which would support personal jurisdiction over a defendant." *Id*. at 811; *see also Bayshore Ford Trucks Sales, Inc. v. Ford Motor Co. (In re Ford Motor Co.)*, 471 F.3d 1233, 1245 (11th Cir. 2006) ("The granting of class certification under Rule 23 authorizes a district court to exercise personal jurisdiction over unnamed class members who otherwise might be immune to the court's power."). Indeed, as the leading class action treatise bluntly declares: "Put simply, *there is no requirement that the class action court have personal jurisdiction over absent plaintiffs*."[4] 2 NEWBERG ON CLASS ACTIONS § 6:25 (5th ed.) (emphasis in original).

Nevertheless, as discussed further below, even in cases in which the court rejects a personal jurisdiction challenge on *Shutts*-related grounds or some other basis, a defendant

---

[4] In *Shutts*, the Supreme Court held that "[b]ecause States place fewer burdens upon absent class plaintiffs than they do upon absent defendants in nonclass suits, the Due Process Clause need not and does not afford the former as much protection from state-court jurisdiction as it does the latter." 472 U.S. at 811. Instead, absent class members are entitled to "minimal procedural due process," consisting of notice; an opportunity to participate, be heard, or opt out; and adequate representation. *Id*. at 811–12.

product manufacturer may be able to defeat the claims of the out-of-state absent class members on Article III standing grounds instead.

B. Issue #2: Whether the Plaintiff Has Standing to Bring Claims Under the Laws of States Other Than the Forum, and Whether the Forum State's Law Can Be Applied Extraterritorially to Non-Resident Absent Class Members.

Even if the court resolves the personal jurisdiction question in a plaintiff's favor, the court may nevertheless lack subject-matter jurisdiction to adjudicate the out-of-state claims. If the suit is brought in federal court, for instance, the plaintiff will need to show that he possesses Article III standing not only with respect to his own claims, but also with respect to the claims brought on behalf of out-of-state class members. *See Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017) (stating that "standing is not dispensed in gross" and noting that "[a]t least one plaintiff must have standing to seek each form of relief requested in the complaint"); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) ("[A] plaintiff must demonstrate standing for each claim he seeks to press."); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000) ("[A] plaintiff must demonstrate standing separately for each form of relief sought.").

Thus, the mere fact that a plaintiff has standing to pursue claims against a product manufacturer under the laws of the forum state does not thereby confer standing to pursue claims under the laws of any of other jurisdictions in which she seeks to represent absent class members. Indeed, as the Eleventh Circuit has recognized, "a claim cannot be asserted on behalf of a class unless at least one named plaintiff has suffered the injury that gives rise to that claim." *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1280 (11th Cir. 2000). To the contrary, "[w]here … a representative plaintiff is lacking for a particular state, all claims based on that state's laws are subject to dismissal." *In re Flash Memory Antitrust Litig.*, 643 F. Supp. 2d 1133, 1164 (N.D. Cal. 2009); *In re Dairy Farmers of Am., Inc. Cheese Antitrust Litig..*, No. 9 CV 3690, 2015 WL 3988488, at *25 (N.D. Ill. June 29, 2015) (same). For this reason, a hypothetical plaintiff who files suit in Georgia for injuries sustained in Georgia may have standing to pursue claims under Georgia law, but he likely will lack standing to pursue similar relief on behalf of Illinois class members *under Illinois law*.

Alternatively, where there are no named plaintiffs except the forum plaintiff—and thus, no class representative with standing to bring claims under the laws of any other state—the forum plaintiff may seek to certify the multi-state or nationwide class by arguing that the laws of the forum state can be applied *extraterritorially* to the claims of non-resident absent class members. That said, this choice-of-law analysis cannot lead to the application of law that would offend constitutional principles of due process. *See Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981) ("For a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.").

Once again, the Supreme Court's opinion in *Shutts* is instructive. Although the court held in that case that the Kansas trial court properly asserted personal jurisdiction over the absent out-of-state class members (even though their claims had no connection to Kansas), the court separately held that the Kansas Supreme Court erred by deciding that Kansas law could be

constitutionally applied to all claims. 472 U.S. at 818. Specifically, the court noted that over 99 percent of the gas leases at issue and 97 percent of the plaintiffs in the case had no apparent connection to Kansas. *Id*. at 815. In arguing that Kansas law could apply to all claims, the plaintiffs contended, among other things, that the out-of-state absent class members had "consented" to the adjudication of their claims under Kansas law by declining to opt out of the case. The Supreme Court rejected this bootstrap argument, stating that "while a State may … assume jurisdiction over the claims of plaintiffs whose principal contacts are with other States, it may not use this assumption of jurisdiction as an added weight in the scale when considering the permissible constitutional limits on choice of substantive law." *Id*. at 821. According to the Court, "[t]he issue of personal jurisdiction over plaintiffs in a class action is entirely distinct from the question of the constitutional limitations on choice of law; the latter calculus is not altered by the fact that it may be more difficult or more burdensome to comply with the constitutional limitations because of the large number of transactions which the State proposed to adjudicate and which have little connection with the forum." *Id*. Thus, in light of Kansas's lack of legitimate state interests in adjudicating the claims of out-of-state class members, and the conflicts between Kansas law and the laws of the other states, the Court held that the application of Kansas law to every claim in the case was "arbitrary and unfair," and a violation of the Due Process Clause and the Full Faith and Credit Clause. *Id*. at 822.

In other words, a Georgia-based plaintiff seeking to sue a non-resident defendant in Georgia on behalf of a multi-state or nationwide class may be left with one of two options: (1) satisfy the court that Georgia law can be constitutionally applied to all of the out-of-state class claims (*i.e.*, by showing Georgia has sufficient contacts with the claims such that application of Georgia law would not be arbitrary or unfair); or (2) demonstrate that, even though other states' laws apply to the out-of-state claims, those laws are similar enough so as not to pose an insuperable obstacle to class certification.

Because federal courts sitting in diversity apply the forum state's choice-of-law rules, *see Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941), a Georgia federal court will look to Georgia's choice-of-law rules to determine whether Georgia law can be applied to non-resident absent class members. "Under Georgia law, choice-of-law issues in tort cases are controlled by the rule of *lex loci delicti*, which requires courts to apply the substantive law of the place where the tort or wrong occurred." *Coon v. Med. Ctr., Inc.*, 335 Ga. App. 278, 282, 780 S.E.2d 118, 122 (2015) (internal quotation marks, citation, and footnote omitted). "The general rule is that the place of wrong, the *locus delicti*, is the place where the injury sustained was suffered rather than the place where the act was committed, or, as it is sometimes more generally put, it is the place where the last event necessary to make an actor liable for an alleged tort takes place." *Id*. Usually, therefore, application of the *lex loci delicti* principle will result in the determination that the law of each state where the transaction occurred and/or where the consumer suffered harm should govern the transaction.

A plaintiff's failure to engage in this choice-of-law analysis will frequently stymie any attempt to certify out-of-state class claims. For example, in *Shepherd v. Vintage Pharm., LLC*, 310 F.R.D. 691 (N.D. Ga. 2015), the plaintiffs sought to bring a nationwide class action in Georgia federal court to certify various tort- and contract-based claims concerning allegedly defective birth control pills. Citing the *lex loci delicti* doctrine, the court declined to apply

Georgia law to the out-of-state claims, faulting the plaintiffs for their inability to "offer any analysis as to how their claims might vary depending on their state of residence." *Id*. at 699.

Although by no means dispositive, a court will be more inclined to apply one state's law to the claims of out-of-state class members when the state law in question coincides with the defendant's state of incorporation and/or principal place of business. In such circumstances, the law of the defendant's domicile may trump the interests of the states in which the absent class members were actually injured, such that the choice of its law is neither arbitrary nor unfair. It is also less likely to disturb the reasonable expectations of the defendant regarding which law will apply. By contrast, where the *only* basis to apply the forum state's law extraterritorially to the claims of out-of-state class members is the mere happenstance that the class representative sued there, the court will almost certainly conclude that the laws of various states govern the dispute.

C. Issue #3: Whether Application of Multiple States' Laws Precludes Class Certification.

Lastly, even if a court determines that it has personal jurisdiction over the claims of out-of-state class members *and* that the named plaintiffs have standing to bring those claims, product manufacturers facing nationwide or multi-state claims can still argue that the classes should not be certified because the myriad choice-of-law issues would overwhelm any common questions and render the class unmanageable. *See In re Prempro*, 230 F.R.D. 555, 562 (E.D. Ark. 2005) (noting that "where multi-state plaintiffs pursue common law causes of action … the choice-of-law determination affects every aspect of class certification").

The Eleventh Circuit has commented that "[i]t goes without saying that class certification is impossible where the fifty states truly establish a large number of different legal standards governing a particular claim." *Klay v. Humana, Inc.*, 382 F.3d 1241, 1261 (11th Cir. 2004). "On the other hand, if a claim is based on a principle of law that is uniform among the states, class certification is a realistic possibility." *Id*. Accordingly, one of the most effective ways to defeat nationwide or multi-state class claims is to demonstrate that there are material differences in the state laws governing the absent class members' claims.

With respect to product-based claims specifically, numerous courts have held that "state consumer-protection laws vary considerably, and courts must respect these differences rather than apply one state's law to sales in other states with different rules." *In re St. Jude Med., Inc.*, 425 F.3d 1116, 1120 (8th Cir. 2005); *see also Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 594, 596 (9th Cir. 2012) (holding that "each class member's consumer protection claim should be governed by the consumer protection laws of the jurisdiction in which the transaction took place" and "because the law of multiple jurisdictions applies … variances in state law overwhelm common issues and preclude predominance for a single nationwide class"); *Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943, 947 (6th Cir. 2011) (striking class allegations where, "[i]n view of … plaintiffs' appropriate concession that the consumer protection laws of the affected States vary in material ways, no common legal issues favor a class-action approach to resolving this dispute."); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 741 (5th Cir. 1996) ("In a multi-state class action, variations in state law may swamp any common issues and defeat predominance."); *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1018 (7th Cir. 2002) ("State consumer-protection laws vary considerably, and courts must respect these differences rather

than apply one state's law to sales in other states with different rules."). *But see In re Max. Money Transfer Litig.*, 267 F.3d 743, 747 (7th Cir. 2001) ("[N]ationwide classes are certified routinely even though every state has its own [laws.]").

Additionally, courts have recognized that state-law conflicts similarly pervade even traditional common law tort claims.[5] *See, e.g.*, *Shepherd*, 310 F.R.D. at 699-700 (variations in state laws governing negligence and strict liability required individualized factual determinations, which precluded a finding of predominance under Rule 23(b)(3)). Defendants will be most successful arguing these issues if they are able to explain to the court how these state law variations would have a material—and in some cases, dispositive—impact on the case at hand. This could entail demonstrating that the states at issue have differing statutes of limitations, statutes of repose, or tolling doctrines; that certain states recognize tort defenses that others do not; or that fundamental questions of liability and damages vary by state.

The federal courts' increasing reluctance to certify classes that implicate numerous states' laws *on Rule 23 grounds* has largely coincided with the pronounced scrutiny accorded such multi-state claims from a personal jurisdiction standpoint.[6] Indeed, this judicial wariness of

---

[5] For instance, certain jurisdictions—such as Virginia and the District of Columbia—have a pure contributory negligence regime, in which a plaintiff cannot recover if it contributed in any way to the injury. Other states—such as Arizona, California, Louisiana, Mississippi, Missouri, New Mexico, and Rhode Island—have a pure comparative fault negligence regime, in which damages are apportioned based on the parties' respective degrees of fault. Still other states—including Arkansas, Hawaii, Maine, Massachusetts, Montana, Nevada, New Hampshire, New Jersey, North Dakota, Pennsylvania, Utah, Vermont, West Virginia, and Wyoming—have a modified comparative fault regime that apportions damages according to degree of fault unless the percentage attributed to the plaintiff exceeds a certain threshold (which percentage itself varies by state). And some states have wholly unique negligence regimes, such as South Dakota's rule that a plaintiff will be barred from any recovery for anything other than "slight" negligence.

[6] From a defendant's perspective, the main drawback of disposing of the out-of-state class claims on Rule 23 grounds is that usually this will occur much later in the litigation than a personal jurisdiction challenge (which must be raised at the outset). In some instances, however, a company defending a product liability suit should move to dismiss the out-of-state class members from the case as soon as practicable when it is clear as a matter of law that pervasive and material conflicts of law would render those claims incapable of certification. *See General Telephone Co. Of Southwest v. Falcon*, 457 U.S. 147, 160 (1982) ("Sometimes the issues are plain enough from the pleadings to determine whether the interests of absent parties are fairly encompassed within the named plaintiff's claim."). Indeed, various courts have dismissed and/or struck multi-state class allegations at the Rule 12 stage where it appeared as a matter of law that the claims could not be certified. *See, e.g.*, *Pilgrim*, 660 F.3d at 946 (affirming dismissal on the pleadings of proposed nationwide class action where the plaintiffs' allegation that the consumer protection laws of a single state should govern all class members was invalid as a matter of law); *Sanders v. Apple, Inc.*, 672 F. Supp. 2d 978, 991 (N.D. Cal. 2009) (striking class because individual questions of reliance, materiality, exposure to the alleged false advertisements, and causation "very

nationwide or multi-state class actions has taken root even in the most plaintiff-friendly class action jurisdictions. The Ninth Circuit's opinion in *In re Hyundai & Kia Fuel Economy Litigation*, No. 15-56014, __ F.3d __, 2018 WL 505343 (9th Cir. Jan. 23, 2018), provides an instructive recent example. In that case, the Ninth Circuit vacated a $210 million nationwide class action settlement after concluding that the district court abused its discretion by failing to conduct a choice-of-law analysis to ensure that common questions outweighed individual issues. The court reasoned that there were potentially significant conflicts of laws and that other states may have a strong interest in applying their own law, rather than the forum state's law. To wit, the Virginia plaintiffs challenging the California settlement showed that, whereas the Virginia Consumer Protection Act provided a minimum of $500 in statutory damages for violations of the Act—which was greater than the $353 lump-sum benefit achieved in the nationwide settlement—California's Consumer Legal Remedies Act provided no minimum damages at all and, thus, was less protective. *Id*. at *10 n.19. Additionally, the consumer protection statutes in Virginia and California had completely different standards for awarding punitive damages. *Id*. According to the Ninth Circuit, such material state-law differences could create predominant individualized issues that preclude classwide adjudication.

III. PRODUCT LIABILITY SUITS IN GEORGIA IN THE AFTERMATH OF THE SUPREME COURT'S LATEST PERSONAL JURISDICTION DECISIONS

The Supreme Court's opinions in *Daimler AG* and *Bristol-Myers Squibb* will undoubtedly have a significant impact on where product manufacturers are sued, issues of forum shopping, and the extent to which a court will be able to hear out-of-state claims. Yet, it remains to be seen how these developments will play out in Georgia. The following section will examine these issues in brief and proffer a few considerations that could dictate whether or not Georgia will see more product liability suits in the near-term.

A. Reasons Product Liability Suits in Georgia May Increase in the Wake of *Daimler AG* and *Bristol-Myers Squibb*

Given that lower courts are only beginning to grapple with the *Daimler AG* and *Bristol-Myers Squibb* decisions, any predictions concerning their effects on product liability suits in Georgia should be appropriately caveated. That said, several factors suggest that Georgia may experience a surge in product liability suits in the coming years.

First, it stands to reason that *most* states may see an uptick in product liability suits filed in their jurisdiction simply because the Supreme Court's personal jurisdiction precedents now render it substantially more difficult to aggregate out-of-state claims in a single state forum. *Cf*. *Bristol-Myers Squibb*, 137 S. Ct. at 1789 (Sotomayor, J., dissenting) ("[T]he Court's opinion in this case will make it profoundly difficult for plaintiffs who are injured in different States by a defendant's nationwide course of conduct to sue that defendant in a single, consolidated action.").

---

likely would be subject to the differing state laws that may or may not apply"). As a practical matter, however, many courts will defer ruling on these choice-of-law issues until the Rule 23 stage.

Second, and more importantly, a large number of company headquarters are based in Georgia, including 17 "*Fortune* 500" companies and 30 "*Fortune* 1000" companies. *See* http://fortune.com/fortune500/list/ . In fact, Georgia boasts more "*Fortune* 500" companies than all but ten states—New York (54), California (53), Texas (50), Illinois (36), Ohio (25), Virginia (23), New Jersey (21), Pennsylvania (21), Connecticut (18), and Minnesota (18). Given that the Supreme Court's recent decisions render nationwide class actions and multi-state mass torts increasingly suspect, we can anticipate that cases involving significant out-of-state claims will need to be brought in a product manufacturer's "home" forum to stave off a personal jurisdiction challenge. *Cf. Bristol-Myers Squibb*, 137 S. Ct. at 1783 (noting that "[o]ur decision does not prevent the California and out-of-state plaintiffs from joining together in a consolidated action in the States that have general jurisdiction over BMS").

Third, by some (admittedly non-scientific) indicators, Georgia is becoming an increasingly inhospitable jurisdiction for corporate defendants. For instance, Georgia was added to the American Tort Reform Foundation's "Judicial Hellholes" Watch List for 2017–2018. *See* ATRF, JUDICIAL HELLHOLES: 2017–2018, Dec. 5, 2017, *available at* http://www.judicialhellholes.org/wp-content/uploads/2017/12/judicial-hellholes-report-2017-2018.pdf. This marks the second year in a row that Georgia has laid claim to this dubious distinction—after not being named in any of the previous editions since the report's inception in 2002. According to the latest report, "Georgia's Supreme Court in recent years issued decisions that significantly expanded civil liability, and that troubling trend continued in 2017. Making matters worse, trial courts in the Peach State are understandably following the high court's lead as a growing list of outrageous verdicts has begun to worry many business leaders there." *Id*. at 3. Whether or not Georgia's reputation as an increasingly plaintiff-friendly jurisdiction is deserved, perception may matter more than reality as litigants assess where to sue in an uncertain post-*BMS* landscape.

B. Reasons There May Not Be a Significant Spike in Georgia-Based Mass Torts or Class Actions.

While the factors raised above may suggest that Georgia will experience a burgeoning number of product liability suits in the wake of *Daimler AG* and *BMS*, it is likely premature to expect the Supreme Court's decisions to open the floodgates of litigation in Georgia.

First, simple factors of geography and demographics will likely continue to play the most significant role in determining where product manufacturers are sued. In fact, forum size could become an even more decisive factor now that nationwide class actions are harder to certify and mass torts involving out-of-state plaintiffs are increasingly prone to dismissal on personal jurisdiction grounds. Typically, the larger the forum size, the greater the potential exposure to the defendant—and thus, the more likely that an enterprising plaintiffs' lawyer will sue there. All other things being equal, a state like California—with forty million consumers—can generate a much larger pool of potential plaintiffs than a state like Georgia, with only ten million consumers.

Second, as of this writing, Georgia is one of only twelve states in which no federal or state court has addressed the Supreme Court's opinion in *Bristol-Myers Squibb*. Moreover, the Eleventh Circuit has cited the case only once—tied for least among the federal circuits. Thus,

there is substantial uncertainty concerning whether Georgia courts will narrowly construe the holdings of *Bristol-Myers Squibb* and confine the case to its facts, or whether the opinion will receive a more sweeping application.

Third, Georgia law remains favorable to product manufacturers in many respects. To give an obvious example, Georgia law requires that "[a]ctions for injuries to the person shall be brought within two years after the right of action accrues…." O.C.G.A. § 9-3-33. By contrast, personal injury claims brought in Florida or Missouri—both top-three Judicial Hellholes—will be subject to four-year or five-year statutes of limitations, respectively. *See* Fla. Stat. § 95.11(3); Mo. Rev. Stat. § 516.120. Moreover, because personal injury class actions are difficult to certify, plaintiffs often bring class claims predicated upon alleged violations of state consumer protection statutes.[7] Yet, Georgia's primary state consumer protection statute—the Georgia Fair Business Practices Act (GFBPA)—expressly prohibits plaintiffs from bringing claims on a classwide basis. *See* O.C.G.A. § 10-1-399(a) (stating that a claimant "may bring an action individually, but not in a representative capacity"); *see also Cappuccitti v. DirecTV, Inc.*, 623 F.3d 1118, 1126 n.19 (11th Cir. 2010) ("O.C.G.A. § 10-1-399(a) authorizes private actions under the FBPA but specifically precludes a private plaintiff from bringing such a claim 'in a representative capacity.'"); *Honig v. Comcast of Ga. I, LLC*, 537 F. Supp. 2d 1277, 1289 (N.D. Ga. 2008) ("[B]y its very terms, the GFBPA prohibits consumer class actions."). Thus, assuming that courts continue to uphold the General Assembly's prohibition on GFBPA class actions,[8] plaintiffs seeking to bring class claims against a product manufacturer for violations of state consumer protection laws may continue to think twice before suing in Georgia.

---

[7] Some of the most prominent state consumer protection statutes utilized by class action plaintiffs include California's Unfair Competition Law (UCL), False Advertising Law (FAL) and Consumer Legal Remedies Act (CLRA); Illinois's Uniform Deceptive Trade Practices Act (UDPTA) and Consumer Fraud and Deceptive Business Practices Act (ICFA); New York's General Business Law (GBL); Florida's Deceptive and Unfair Trade Practices Act (FDUPTA); and Texas's Deceptive Trade Practices-Consumer Protection Act (DTPA).

[8] Some plaintiffs have attempted to challenge statutory class action prohibitions in light of the Supreme Court's opinion in *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 397, 130 S. Ct. 1431, 1436 (2010), which held that when a plaintiff sues in federal court, Rule 23 of the Federal Rules of Civil Procedure may displace a state's consumer protection law to the extent the state statute barring private class actions constitutes a procedural rule rather than a substantive right. *See also Lisk v. Lumber One Wood Preserving, LLC*, 792 F.3d 1331, 1333 (11th Cir. 2015) (holding that Alabama Deceptive Trade Practices Act's provision restricting class actions does not apply in federal court). *But see Helpling v. Rheem Mfg. Co.*, No. 1:15-cv-2247-WSD, 2016 WL 1222264, at *13 (N.D. Ga. Mar. 23, 2016) (distinguishing *Lisk* and holding that the notice requirement of Ohio's Consumer Sales Practices Act was not preempted by Rule 23).

State Bar of Georgia
INSTITUTE OF CONTINUING LEGAL EDUCATION

STATE BAR SERIES

Professionalism In Product Liability Lawsuits

Presented By:

Franklin P. Brannen, Jr.
Lewis Brisbois Bisgaard & Smith LLP
Atlanta, GA

PROFESSIONALISM IN PRODUCT LIABILITY CASES

Franklin P. Brannen, Jr.
Lewis, Brisbois, Bisgaard & Smith
Atlanta, Georgia

PROFESSIONALISM IN PRODUCT LIABILITY CASES

Franklin P. Brannen, Jr.
Lewis, Brisbois, Bisgaard & Smith
Atlanta, Georgia

TABLE OF CONTENTS

Introduction

This paper brings together in one collection Formal Advisory Opinions of the Supreme Court of Georgia and Advisory Opinions from the State Disciplinary Board that are particularly relevant to practitioners who are involved in product liability lawsuits. Each opinion in this paper contains a brief summary of the issue presented and a short answer followed by the full text of the opinion from the Supreme Court of Georgia or State Disciplinary Board. Electronic copies of these opinions along with other advisory opinions and the Georgia Rules of Professional Conduct are available on the State Bar of Georgia's website at https://www.gabar.org/barrules/handbook.cfm.

I. Interviewing Current Employees – Formal Advisory Opinion No. 87-6

Issue: Whether an attorney may ethically interview an employee of a corporation when that corporation is an opposing party in litigation.

Short Answer: An attorney may not ethically interview an employee of a corporation that is an opposing party in pending litigation without the consent of the corporation or its counsel if the employee is either an officer or director with authority to bind the corporation or an employee whose acts or omissions may be imputed to the corporation in relation to subject matter of the case.

Significant Reported Case:

While a plaintiff's attorney may not typically interview current employees of a defendant, the provisions of the Federal Employers' Liability Act (FELA) override this prohibition and allow plaintiff's counsel to interview co-workers in FELA litigation. *Norfolk Southern Railway Co. v. Thompson*, 208 Ga. App. 240, 430 S.E.2d 371 (1993).

- - - - - - - - - - - - -

Formal Advisory Opinion No. 87-6
State Bar of Georgia
Issued by the Supreme Court of Georgia
On July 12, 1989
Formal Advisory Opinion No. 87-6 (87-R2)

Ethical Propriety of a Lawyer Interviewing the Officers and Employees of an Organization When That Organization is The Opposing Party in Litigation Without Consent of Organization

An attorney may not ethically interview an employee of a corporation which is an opposing party in pending litigation without the consent of the corporation or the corporation's counsel where the employee is either:

1. an officer or director or other employee with authority to bind the corporation; or
2. an employee whose acts or omissions may be imputed to the corporation in relation to the subject matter of the case.

Correspondent asks when it is ethically proper for a lawyer to interview the officers and employees of an organization, when that organization is the opposing party in litigation, without the consent of the organization's counsel.

This question involves, among other things, an interpretation of Standard 47 of Rule 4-102 of the Rules and Regulations of the State Bar of Georgia [Georgia Code of Professional Responsibility DR 7-104 (A)(1)], and the State Bar of Georgia Proposed Rules of Professional Conduct Rule 4.2.

Standard 47 of Rule 4-102 of the Rules and Regulations of the State Bar of Georgia provides as follows:

During the course of his representation of a client, a lawyer shall not communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior written consent of the lawyer representing such other party or is authorized by law to do so. A violation of this standard may be punished by a public reprimand.1

The American Bar Association has implied that the foregoing prohibition applies only to certain employees of the organization. ABA Informal Opinion 1410 (1978) concluded that no communication with an officer or employee of a corporation with the power to commit the corporation in the particular situation may be made by opposing counsel unless he has the prior consent of the designated counsel of the corporation or unless he is authorized by law to do so.

The consensus view in other jurisdictions seems to be that an attorney may interview an employee of a corporate defendant without the consent of either the corporation or its counsel if the employee is not the person for whose acts or omissions the corporation is being sued and if the person is not an officer or director or other employee with

authority to bind the corporation. On the other hand, an attorney may not ethically interview an employee of a corporation which is an opposing party in pending litigation without the consent of the corporation or the corporation's counsel where the employee is either:

1. An officer or director or other employee with authority to bind the corporation;
2. An employee whose acts or omissions may be imputed to the corporation in relation to subject matter of the case.[2]

If the employee does not fall into either of the foregoing categories, an attorney may contact and interview the employee without the prior consent of the corporation or its counsel.

---

[1] Rule 4.2 of the Proposed Rules of Professional Conduct states as follows:
In representing a client, a lawyer shall not communicate about the subject of the representation with a party or person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the written consent of the other lawyer as to communications with a party or has the consent of the other lawyer as to communications with persons represented by another lawyer, or is authorized by law to do so.
The comment to Rule 4.2 amplifies the Rule as follows: In the case of an organization, this rule prohibits communications by lawyers concerning the matter in representation with anyone having managerial responsibility on behalf of the organization and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statements may constitute an admission on the part of the organization, when the organization is known to be represented by another lawyer. If an agent or employee of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for the purposes of this Rule.
[2] See ABA/BNA Lawyer Manual of Professional Conduct, Section 71:314-315

II. Interviewing Former Employees – Formal Advisory Opinion No. 94-3

Issue: Whether an attorney may interview former employees of an organization to obtain information relevant to litigation against that organization.

Short Answer: An attorney may properly contact and interview former employees of an organization that is represented by counsel to obtain non-privileged information relevant to litigation against the organization if the lawyer discloses his/her client and the former employee consents.

Significant Reported Case:

There was no ethical violation when plaintiff's counsel obtained a recorded statement from a former employee of the defendant. *Sanifill of Georgia, Inc. v. Roberts*, 232 Ga. App. 510, 502 S.E.2d 343 (1998).

- - - - - - - - - - - - -

Formal Advisory Opinion No. 94-3
State Bar of Georgia
Issued by the Supreme Court of Georgia
On September 9, 1994

For references to Standard of Conduct 47, please see Rule 4.2.

This opinion also discusses issues addressed by Rule 4.3.

QUESTION PRESENTED:

May a lawyer properly contact and interview former employees of an organization represented by counsel to obtain information relevant to litigation against the organization?

SUMMARY ANSWER:

A lawyer may properly contact and interview former employees of an organization that is represented by counsel to obtain non-privileged information relevant to litigation against the organization provided that: (1) the lawyer makes full disclosure as to the identity of his/her client; and (2) the former employee consents.

OPINION:

The question presented involves attempts to obtain information from former employees of an organization represented by counsel and is an aspect of the perennial problem of information control by lawyers engaged in litigation. Lawyers do not want their adversary colleagues to contact and interview employees of their client organization for the purpose of obtaining information that may be used against the organization. But a rule prohibiting such contact without consent of the organization's lawyer gives that lawyer a right of information control, a right that is easily subject to abuse. Therefore, strong policy reasons must support such a rule.

The problem is an outgrowth of the rule that a lawyer shall not communicate about the subject of the representation with a person represented by a lawyer without the prior consent of the lawyer. Standard 47, Ga. Bar Rule 4-102. This rule has been widely adopted, see, e.g., Rule 4.2, ABA MRPC, and is deemed to represent sound policy. Lawyers should not be able to contact and attempt to manipulate the clients of fellow members of the bar, especially when the lawyer's purpose in doing so is to serve his or her own self-interest in disregard of the welfare of the other lawyer's client.

This policy explains why Standard 47 applies to the employees of organization clients when those employees have the power to bind the organization by what they say or do. Formal Adv. Op. 87-6 (July 1989). The words of a former employee can provide only information, and those words cannot have a binding effect on the former employer. Since neither words nor actions of a former employee can bind the organization, the policy relied on in Formal Adv. Op. 87-6 is not applicable to former employees. When the purpose of the rule ends, the rule itself ends. Therefore, a lawyer may contact and interview the former employees of an organization to obtain non-privileged information to use against that organization in a dispute.

That, however, does not conclude the matter. Just as a rule prohibiting such contact would be an example of information control unsupported by any valid policy considerations, so the lawyer's contact and interview without informing the employee of the purpose would be an example of information control in the same category. A former employee may not wish to give information against the former employer, and since he or she is entitled not to do so, it would be unethical to use deceit and false pretenses to deny the former employee his or her right. Consequently, the former employee is entitled to know the identity of the lawyer's client, the reason for the contact, the purpose of the interview and any other information necessary under the circumstances to make the interview not misleading. A refusal of the former employee to grant the interview means only that the lawyer must resort to the normal discovery processes and witness procedures.

It follows, then, that while a lawyer may contact a former employee of an organization for the purposes of an interview, before proceeding with the interview, that lawyer must make full disclosure and obtain the consent of the former employee.

While this opinion has not dealt with the situation in which the organization is not represented by a lawyer, it is well to note two things. First, there is no rule of ethics prohibiting the contact in such a situation; second, even when there is no lawyer representing the organization, the former employee still has a right to know the reason for the contact and the purpose of the interview. Therefore, it would be unethical for a lawyer to attempt to obtain information without full disclosure. In this context as in others, a lawyer's attempt to obtain information under false pretenses or by the use of deceit is unethical.

III. Statute of Limitations – Formal Advisory Opinion No. 87-1

Issue: Are there ethical prohibitions against filing suit when the lawyer does not know whether facts exist that would constitute a cause of action, and the information needed to make that determination cannot be acquired before the expiration of the relevant statute of limitations.

Short Answer: An attorney is acting consistent with ethical guidance if he or she determines that a reasonable attorney would conclude that there is a reasonable possibility that facts supporting the cause of action can be established after the filing of the claim.

- - - - - - - - - - - - -

Formal Advisory Opinion No. 87-1
State Bar of Georgia
Issued by the Supreme Court of Georgia
On January 11, 1989

For references to Standard of Conduct 4, please see Rule 8.4(a)(4) and Comments and 3 of Rule 8.4.

For references to Standard of Conduct 44, please see Rule 1.3 and Comments 1, 2 and 3 of Rule 1.3.

For references to DR 7-102(a)(2), please see Rule 3.1(b).

For references to EC 7-4, please see Comment 2 of Rule 3.1.

For references to EC 7-5, please see Rule 1.2(d) and Comment 6 of Rule 1.2, Comment 3 of Rule 3.1.

Ethical Propriety of Filing a Lawsuit in Order to be Within the Statute of Limitations, But Before Sufficient Information is Acquired to Determine if a Legitimate Cause of Action Exists.

It is not ethically improper for an attorney to file a lawsuit before complete factual support for the claim has been established provided that the attorney determines that a reasonable attorney would conclude that there is a reasonable possibility that facts supporting the cause of action can be established after the filing of the claim; and

provided further that the attorney is not required by rules of procedure, or otherwise to represent that the cause of action has an adequate factual basis. If after filing it is discovered that the lawsuit has no merit, the attorney will dismiss the lawsuit or in the alternative withdraw.

QUESTION PRESENTED:

Are there ethical prohibitions against filing suit when the lawyer does not know whether facts exist which would constitute a cause of action, and the information needed to make that determination cannot be acquired prior to the expiration of the pertinent statute of limitations?

OPINION:

It cannot be determined from these facts whether filing of the suit would constitute a violation of O.C.G.A. § 9-15-14, or of the requirements of Yost v. Torok, 256 Ga. 92 (1986); nor is such determination within the scope of an ethical opinion. This opinion considers only whether the applicable ethical regulations proscribe filing suit in the situation described by correspondent.

There is no Standard of Conduct directly applicable. Specifically, no Standard of Conduct speaks to the situation in which the facts presented by a client suggest a cause of action, but additional facts are necessary for the attorney to make a clear assessment of the claim. Accordingly, the filing of the claim alone cannot be the basis for discipline in Georgia under the present Standards of Conduct. If, however, the attorney is required, by rules of procedure or otherwise, to represent that the cause of action has an adequate factual basis, the attorney cannot make that representation in the situation in question. To make such a representation in this situation would constitute a violation of Standard 4 and would subject the attorney to discipline.

If such a representation is required, the effect of the proscription may be to postpone the filing of the suit to beyond the date of the applicable statute of limitations. That is a matter for ethical regulation only if the delay in the investigation prior to the filing was caused by the attorney's "willful neglect" (constituting a violation of Standard 44 for which discipline is sanctioned).

The absence of Standards of Conduct does not, however, leave the lawyer without a source of guidance. The canons, ethical considerations, and directory rules are helpful in dealing with the question presented.

This guidance is found in the Georgia Code of Professional Responsibility:

DR 7-102 -- Representing a Client Within the Bounds of the Law.

(A) In his representation of a client, a lawyer shall not:

(2) knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law

DR 7-102(A)(2) creates a subjective test by use of the term "knowingly." It is violated when the attorney knows that the proposed claim is unwarranted. Such knowledge is not present in the situation in question.

EC 7-4 and EC 7-5 advise the attorney to avoid "frivolous" claims. Claims may be frivolous because the legal arguments for a cause of action are frivolous, or because factual support is clearly lacking for any cause of action. Only the second form of frivolousness is in question here. Consistent with the overall structure of the Code of Professional Responsibility, EC 7-4 creates an objective standard for the attorney which is more demanding than the subjective standard of DR 7-102(A)(2). A claim is frivolous under EC 7-4 when there is no reasonable possibility of the existence of the factual basis for the cause of action. EC 7-4 does not require complete factual support for the cause of action prior to the filing, but does require that a reasonable attorney would conclude that there is a reasonable possibility that facts supporting the claim can be established after the claim is filed. EC 7-4 permits, for example, the use of discovery to determine if the factual basis of a claim exists if there is a reasonable possibility that is does. This use is consistent with part of the purpose of discovery, i.e., to reveal facts which require dismissal of a claim.

In the situation in question, the attorney is acting consistent with ethical guidance if he or she determines that a reasonable attorney would conclude that there is a reasonable possibility that facts supporting the cause of action can be established after the filing of the claim.

IV. Discovery Abuse – Formal Advisory Opinion No. 05-10

Issue: Can an attorney who has agreed to serve as local counsel be disciplined for discovery abuses committed by in-house or other out-of-state counsel who is not a member of the State Bar of Georgia?

Short Answer: An attorney serving as local counsel can be disciplined for discovery abuses committed by out-of-state counsel when the local counsel knows of the abuse and ratifies it by his or her conduct. Knowledge includes "willful blindness."

- - - - - - - - - - - - -

FORMAL ADVISORY OPINION NO. 05-10

Approved And Issued On April 25, 2006 Pursuant To Bar Rule 4-403
By Order Of The Supreme Court Of Georgia Thereby Replacing FAO No. 98-1
Supreme Court Docket No. S06U0803

QUESTION PRESENTED:

Can a Georgia attorney, who has agreed to serve as local counsel, be disciplined for discovery abuses committed by an in-house or other out-of-state counsel who is not a member of the State Bar of Georgia?

SUMMARY ANSWER:

A Georgia attorney, serving as local counsel, can be disciplined under Rule 5.1(c) for discovery abuses committed by an out-of-state in-house counsel or other out-of-state counsel when the local counsel knows of the abuse and ratifies it by his or her conduct. Knowledge in this situation includes "willful blindness" by the local counsel. Local counsel can also be disciplined for discovery abuse committed by an out-of-state in-house counsel or other out-of-state counsel when the local counsel has supervisory authority over the out-of-state counsel also in accordance with Rule 5.1(c). Finally, the role of local counsel, as defined by the parties and understood by the court, may carry with it affirmative ethical obligations.

OPINION:

A client has asked in-house or other out-of-state counsel, who is not a member of the State Bar of Georgia, to represent him as lead counsel in a case venued in Georgia. Lead counsel associates local counsel, who is a member of the State Bar of Georgia, to assist in the handling of the case. Local counsel moves the admission of lead counsel pro hac vice, and the motion is granted. During discovery, lead counsel engages in some form of discovery abuse.

Discipline of local counsel for the discovery abuse of lead counsel would, in all cases, be limited to discovery abuse that is in violation of a particular Rule of Professional Conduct. If the discovery abuse is a violation of a Rule of Professional Conduct, for example, the destruction of documents subject to a motion to produce, Rules 5.1(c) and 3.4(a) defines local counsel's responsibility for the abuse. Because Rule 5.1(c) is entitled "Responsibilities of a Partner or Supervisory Lawyer" it may not be obvious to all attorneys that the language of this statute applies to the questions regarding ethical responsibilities between lead and local counsel. Nevertheless, the language of the Rule clearly applies and is in accord with common principals of accessory culpability:

> A lawyer shall be responsible for another lawyer's violation of the Georgia Rules of Professional Conduct if: (1) The . . . supervisory lawyer orders, or with knowledge of the specific conduct, ratifies the conduct involved; . . . .

Under this Rule the extent of local counsel's accessory culpability for lead counsel's discovery abuse is determined by the answers to two questions: (1) What constitutes knowledge of the abuse by local counsel? (2) What constitutes ratification of the violative conduct by local counsel?

Actual knowledge, of course, would always be sufficient to meet the knowledge requirement of this Rule. Consistent with the doctrine of "willful blindness" applied in other legal contexts, however, sufficient knowledge could be imputed to local counsel if he or she, suspicious that lead counsel was engaging in or was about to engage in a violation of ethical requirements, sought to avoid acquiring actual knowledge of the conduct. The doctrine of "willful blindness" applies in these circumstances because local counsel's conduct in avoiding actual knowledge displays the same level of culpability as actual knowledge.

Thus, if local counsel was suspicious that lead counsel was "engag[ing] in professional conduct involving dishonesty, fraud, deceit, or misrepresentation" in violation of Rule 8.4(a)(4), local counsel would meet the knowledge requirement of accessory culpability if he or she purposely avoided further inquiry. What would be sufficient suspicion, of course, is difficult to determine in the abstract. To avoid the risk of the effect of the doctrine of willful blindness, a prudent attorney should treat any reasonable suspicion as sufficient to prompt inquiry of the in-house or other out-of-state counsel.

What constitutes ratification is also difficult to determine in the abstract. Consistent with the definition of accessory culpability in other legal contexts, however, an attorney should avoid any conduct that does not actively oppose the violation. The specific conduct required may include withdrawal from the representation or, in some cases, disclosure of the violation to the court. Which measures are appropriate will depend upon the particular circumstances and consideration of other ethical requirements. In all circumstances, however, we would expect local counsel to remonstrate with lead counsel and to warn lead counsel of local counsel's ethical obligations under Rule 5.1(c).

Other than accessory culpability, and depending upon how the parties and the court have defined it in the particular representation, the role of local counsel itself may

include an affirmative duty to inquire into the conduct of lead counsel and other affirmative ethical obligations. This is true, for example, if the court understands the role of local counsel as carrying with it any direct supervisory authority over out-of-state in-house counsel or other out-of-state counsel. In such circumstances, Rule 5.1(c) provides:

> A lawyer shall be responsible for another lawyer's violation of Rules of Professional Conduct if: (2) the lawyer . . . has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Furthermore, at times lead and local counsel may have defined the relationship so that it is indistinguishable from that of co-counsel. In such cases the usual principles of ethical responsibility apply. Even short of this co-counsel role, however, typical acts required of local counsel such as moving of admission pro hac vice or the signing of pleadings, always carry with them affirmative ethical obligations. For example, in this, as in all circumstances, the signing of pleadings by an attorney constitutes a good faith representation regarding the pleadings and the conduct of the discovery procedure of which the pleadings are a part. 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.

Finally, there is nothing in the role of local counsel that excuses an attorney from the usual ethical requirements applicable to his or her own conduct in the representation, either individually or in conjunction with lead counsel. If local counsel engages in any unethical conduct, it is no defense to a violation that the conduct was suggested, initiated, or required by lead counsel.

Generally, Rules 1.2(a) and (d); 1.6; 3.3(a)(1) and (4); 3.3(c); 3.4(a), (b) and (f); 3.5(b); 4.1(a); 4.2(a); 4.3(a) and (b); 5.1(c); 5.3; 5.4(c); 8.4(a)(1) and (4) may apply to the conduct of local counsel depending upon the degree of local counsel's involvement in the discovery process. While all these Rules might not be applicable in a given case, taken together they cover the range of conduct that may be involved.

V. Loans for Litigation Expenses – Formal Advisory Opinion No. 05-5

Issues: Whether it is ethical for a law firm to obtain a loan to cover advances to clients for litigation expenses and what ethical considerations apply to the payment of interest on a loan to cover advances to clients for litigation expenses.

Short Answer: It is permissible to charge interest on a loan to cover advance to clients for litigation expenses if (1) the client is notified in the contingent fee contract of the maximum rate of interest the lawyer will or may charge on such advances and (2) the written statement given to the client upon conclusion of the matter reflects the interest charged on the expenses advanced in the matter.

- - - - - - - - - - - - -

Formal Advisory Opinion 05-5

STATE BAR OF GEORGIA
FORMAL ADVISORY OPINION NO. 05-5
Approved And Issued On February 13, 2007 Pursuant To Bar Rule 4-403
By Order Of The Supreme Court Of Georgia Thereby Replacing
FAO No. 92-1 Supreme Court Docket No. S06U0798

QUESTIONS PRESENTED:

1) Ethical propriety of a law firm obtaining a loan to cover advances to clients for litigation expenses;

2) Ethical considerations applicable to payment of interest charged on loan obtained by law firm to cover advances to clients for litigation expenses.

OPINION:

Correspondent law firm asks if it is ethically permissible to employ the following system for payment of certain costs and expenses in contingent fee cases. The law firm would set up a draw account with a bank, with the account secured by a note from the firm's individual lawyers. When it becomes necessary to pay court costs, deposition expenses, expert witness fees, or other out-of-pocket litigation expenses, the law firm would obtain an advance under the note. The firm would pay the interest charged by the bank as it is incurred on a monthly or quarterly basis. When a client makes a payment toward expenses incurred in his or her case, the amount of that payment would be paid to the

bank to pay down the balance owed on his or her share of expenses advanced under the note. When a case is settled or verdict paid, the firm would pay off the client's share of the money advanced on the loan. If no verdict or settlement is obtained, the firm would pay the balance owed to the bank and bill the client. Some portion of the interest costs incurred in this arrangement would be charged to the client. The contingent fee contract would specify the client's obligations to pay reasonable expenses and interest fees incurred in this arrangement.

The first issue is whether it is ethically permissible for lawyers to borrow funds for the purpose of advancing reasonable expenses on their clients' behalf. If so, we must then determine the propriety of charging clients interest to defray part of the expense of the loan.

In addressing the first issue, lawyers are generally discouraged from providing financial assistance to their clients. Rule 1.8(e) states:

A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; or

(2) a lawyer representing a client unable to pay court costs and expenses of litigation may pay those costs and expenses on behalf of the client.

Despite that general admonition, contingent fee arrangements are permitted by Rule 1.5(c), which states:

(1) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated.

(2) Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the following:

(i) the outcome of the matter; and,

(ii) if there is a recovery, showing the:

(A) remittance to the client;

(B) the method of its determination;

(C) the amount of the attorney fee; and

(D) if the attorney's fee is divided with another lawyer who is not a partner in or an associate of the lawyer's firm or law office, the amount of fee received by each and the manner in which the division is determined.

The correspondent's proposed arrangement covers only those expenses which are permitted under Rule 1.8(e). Paragraph (e) of Rule 1.8 eliminates the former requirement that the client remain ultimately liable for financial assistance provided by the lawyer and further limits permitted assistance to cover costs and expenses directly related to litigation. See Comment (4) to Rule 1.8.

The arrangement also provides that when any recovery is made on the client's behalf, the recovery would first be debited by the advances made under the note, with payment for those advances being made by the firm directly to the bank. The client thus receives only that recovery which remains after expenses have been paid. The client is informed of this in correspondent's contingent fee contract, which states that "all reasonable and necessary expenses incurred in the representation of said claims shall be deducted after division as herein provided to compensate attorney for his fee."

In the case where recovery is not obtained, however, the lawyers themselves are contractually obligated to pay the amount owed directly to the bank. Correspondent's proposed contract as outlined in the request for this opinion does not inform the client as to possible responsibility for such expenses where there is no recovery. It is the opinion of this Board that Rules 1.5(c) and 1.8(e), taken together, require that the contingent fee contract inform the client whether he is or is not responsible for these expenses, even if there is no recovery.

Although the client may remain "responsible for all or a portion of these expenses," decisions regarding the appropriate actions to be taken to deal with such liability are entirely within the discretion of the lawyers. Since this discretion has always existed, the fact that the lawyers have originally borrowed the money instead of advancing it out-of-pocket would seem to be irrelevant, and the arrangement is thus not impermissible.

The bank's involvement would be relevant, however, were it allowed to affect the attorney-client relationship, such as if the bank were made privy to clients' confidences or secrets (including client identity) or permitted to affect the lawyer's judgment in representing his or her client. See generally, Rule 1.6. Thus, the lawyer must be careful to make sure that the bank understands that its contractual arrangement can in no way affect or compromise the lawyer's obligations to his or her individual clients.

The remaining issue is whether it is ethically permissible for lawyers to charge clients interest on the expenses and costs advanced via this arrangement with the bank. As in the first issue, the fact that the expenses originated with a bank instead of the law firm itself is irrelevant, unless the relationship between lawyer and bank interferes with the relationship between lawyer and client. Assuming it does not, the question is whether lawyers should be permitted to charge their clients interest on advances.

In Advisory Opinion No. 45 (March 15, 1985, as amended November 15, 1985), the State Disciplinary Board held that a lawyer may ethically charge interest on clients' overdue bills "without a prior specific agreement with a client if notice is given to the client in advance that interest will be charged on fee bills which become delinquent after a stated period of time, but not less than 30 days." Thus, the Board found no general impropriety in charging interest on overdue bills. There is no apparent reason why advanced expenses for which a client may be responsible under a contingent fee agreement (whether they are billed to the client or deducted from a recovery) should be treated any differently. Thus, we find no ethical impropriety in charging lawful interest on such amounts advanced on the client's behalf.[1]

In approving the practice of charging interest on overdue bills, the Board held that a lawyer must comply with "all applicable law[1] . . . and ethical considerations."

The obvious intent of Rule 1.5(c) is to ensure that clients are adequately informed of all relevant aspects of contingent fee arrangements, including all factors taken into account in determining the amount of their ultimate recovery. Since any interest charged on advances could affect the ultimate recovery as much as other factors mentioned in Rule 1.5(c), it would be inconsistent to permit lawyers to charge interest on these advances without revealing the intent to do so in the fee contract. Thus, we conclude that it is permissible to charge interest on such advances only if (i) the client is notified in the contingent fee contract of the maximum rate of interest the lawyer will or may charge on such advances; and (ii) the written statement given to the client upon conclusion of the matter reflects the interest charged on the expenses advanced in the matter.

---

1. The opinion makes specific mention of O.C.G.A. 7-4-16, the Federal Truth in Lending and Fair Credit Billing Acts in Title I of the Consumer Credit Protection Act as amended (15 USC 1601 et seq.). We state no opinion as to the applicability of these acts or others to the matter at hand.

VI. Expert Witness Fees – Advisory Opinion No. 35

Issue: Whether it is proper for an attorney to pay the expert witness fees for a client if the attorney knows the client is unlikely to be able to pay the fees unless the client prevails in the action.

Short Answer: The attorney may pay the expert witness fees for a client but the client will remain ultimately responsible for the payment of the fees.

- - - - - - - - - - - - -

State Disciplinary Board
Advisory Opinion No. 35
July 15, 1983

Attorney's Responsibilities with Respect to the Payment of Witness Fees

Pursuant to the provisions of Rule 4-223 of the Rules and Regulations of the Organization and Government of the State Bar of Georgia (219 Ga. 873, as amended), the State Disciplinary Board of the State Bar of Georgia, after a proper request of such, renders its opinion concerning the proper interpretation of the Code of Professional Responsibility of the State Bar of Georgia.

Question Presented:

Attorney (A) represents Client (C), the plaintiff in a civil suit for damages. In the course of preparation for C's case, A uses the services of an expert witness (W); nothing specific is mentioned concerning compensation of W.

C has no substantial asset other than the claim that is the subject of the suit, and will be able to pay the witness fees only if he is successful in securing a recovery. By the same token, if A advances the fees to W, A will have little or no chance of being reimbursed by C, if C loses his case.

(1) Would it be proper for A to pay the costs, realizing that he might never be reimbursed by C?

(2) Would it be proper for A to say nothing and keep W waiting for payment until some recovery has been had?

(3) Generally, should the State Bar reconsider the ethical prohibition against contingency fees for expert witnesses in light of the practicalities involved?

Opinion:

Standard 58 of Bar Rule 4-102 and DR 7-109 (c) expressly prohibit payment of compensation to a witness contingent upon the outcome of a case. Standard 58 does not, however, prohibit an attorney from advancing, guaranteeing or acquiescing in the payment of expenses reasonably incurred by a witness.

Standard 32 of Bar Rule 4-102 requires that the client must remain ultimately liable for any expenses advanced or guaranteed by the attorney. Ethical Consideration 5-8 (Canon 5) explains that it is not proper for an attorney to have a financial interest in the outcome of his client's case, as such an interest might affect his independent professional judgment; thus, the client must remain ultimately liable for the expenses of litigation.

A (the attorney in the set of facts above) is not sure what he is ethically required to do in light of Standards 32 and 58. If A pays the fees to W and C loses his case, C will not be able to repay A. Is this, in fact, a violation of Standard 32?

The Board's answer to this question must be that such a situation does not violate Standard 32. While it is true that A may never be paid by C for the expenses advanced to W, C is still ultimately liable to A for his expenses. A can pursue legal remedy against C and might be reimbursed at some point in the future. Thus, A's liability to W is at most penultimate.

It should be noted that in Brown and Huseby, Inc. v. Chrietzberg, 242 Ga. 232, 248 S.E. 2d 631 (1978), the Supreme Court of Georgia held an attorney may be liable for court reporter's fees if he personally guarantees payment therefor and the reporter reasonably relies upon the attorney for their payments. The Court stated that such a holding did not force the attorney to violate Standard 32, as the client would remain ultimately liable to the attorney.

A also wonders if he can simply make W wait until the final outcome of the case, realizing that, in effect, W can only collect from C if C is successful. A fears that such a course of action (or inaction) might violate Standard 58's prohibition against contingency fees for witnesses.

The Board, once again, finds no violation of a disciplinary standard here. First, there is no actual contingency. The term contingency implies that no liability will arise without the happening of a certain event. In this case, C will have a legal obligation to pay W even if he cannot, in fact, pay him. Secondly, A might be required to pay W under the doctrine of Brown and Huseby. In either event, W will not be required to await the outcome of the case to have a claim against C and/or A for recovery of the services he has rendered.

Finally, A thinks that the prohibition against contingency fees for witnesses is impractical and ought to be reconsidered.

It should be noted that rules substantially similar to Rule 58 have met constitutional challenges (e.g. Pearson v. Association of Bar of City of New York, cert. den. 434 US 924 (1978)). The Board finds that the problem in A's case does not stem from any impracticality inherent in rule 58. Rather, A's problem arose when he failed to discuss the details of compensation with W, before he used W's services. Witnesses should know who to look to for payment for their services from the outset. An attorney's failure to appraise the witness of such details might put him in A's seemingly no-win (financial, rather than ethical) situation.

VII. Misuse of Subpoenas – Advisory Opinion No. 40

Issues: Whether it is ethical to issue a subpoena for production of documents pursuant to O.C.G.A. § 24-10-22(a) when no hearing or trial is taking place and no notice has been given to opposing counsel and whether it is ethical to issue a subpoena pursuant to O.C.G.A. § 9-11-45 when no notice of deposition has been filed and served and when no deposition has been scheduled.

Short Answer: A subpoena issued pursuant to O.C.G.A. § 24-10-22(a) should only be issued for actual hearings and trials. A subpoena issued pursuant to O.C.G.A. § 9-11-45 should only be issued for depositions that have been properly noticed and set.

- - - - - - - - - - - - -

State Disciplinary Board
Advisory Opinion No. 40
September 21, 1984

Misuse of Subpoenas

Pursuant to the provisions of Rule 4-217 of the Rules and Regulations for the Organization and Government of the State Bar of Georgia (219 Ga. 873, as amended), the State Disciplinary Board, after a proper request for such, renders its opinion concerning the proper interpretation of the Standards of Conduct of the Disciplinary Rules of the State Bar of Georgia.

Question Presented:

Whether or not it is a violation of Standard 4 of the Disciplinary Rules of the State Bar of Georgia for an attorney to issue a subpoena for the Production of Documents pursuant to O.C.G.A. § 24-10-22(a), directing the witness to appear at a lawyer's office or some other location, when in fact no hearing or trial is taking place and no notice of such subpoena is served upon opposing counsel?

Whether or not it is a violation of Standard 4 of the Disciplinary Rules of the State Bar of Georgia for an attorney to issue a subpoena pursuant to O.C.G.A. § 9-11-45 when no notice of deposition has been filed and served upon all parties and when no deposition has in fact been scheduled?

Discussion:

Disciplinary Standard 4 of the State Bar of Georgia provides as follows:

> A lawyer shall not engage in professional conduct involving dishonesty, fraud, deceit or willful misrepresentation. A violation of this Standard may be punished by disbarment.

A subpoena is a judicial writ issued in the name of the court by the clerk when attendance is required at court. (See Agnor's Georgia Evidence § 2-3). In the case of White v. Gulf States Paper, 119 Ga. App. 271, 273 (1969), it was stated that our subpoena statutes were limited only to producing documentary evidence at a hearing or trial. In the White decision, the court noted that the old Georgia Code Section 38-8 and 38-9 dealt only with the production of documentary evidence at a hearing or trial and that the new Act (1966 which constitutes our present subpoena law) did not enlarge the provisions of the repealed law to allow use of a Notice to Produce at depositions. This particular case brought about the amendment to Rule 45 of the Civil Practice Act.

O.C.G.A. § 9-11-45 provides that a subpoena shall issue for persons sought to be deposed and may command the person to produce documents. O.C.G.A. § 9-11-30(b)(1) requires notice to every other party of all depositions. Reading Rule 30 and Rule 45 together, it is obvious that before a subpoena can be issued, notice of the deposition must be given to all parties.

In consideration of the above, a subpoena issued pursuant to O.C.G.A. § 24-10-22(a) should only be issued for actual hearings and trials and should not be requested when in fact no hearing or trial has been scheduled. Likewise, a subpoena issued pursuant to Rule 45 of the Civil Practice Act should be requested and issued only for depositions which have been actually scheduled by agreement between parties or where a notice of deposition has been filed and served upon all parties, and should not be issued when no deposition has been scheduled.

The Board is concerned with the misuse of subpoenas as presented in the two situations discussed because subpoenas are court documents. Non-party witnesses would be misled by such court process into releasing confidential or privileged material without the party having a chance to contest the relevancy, confidentiality or privilege of the material contained in the file because the subpoena is sent without notice to any other party or their counsel. Notice is a concept embraced by the Civil Practice Act. There is no need for notice of a subpoena issue pursuant to O.C.G.A. § 24-10-22(a) because all parties receive notice of hearings and trials, so long as they are real hearings and real trials.

Conclusion:

In the opinion of the Board, the use of subpoenas as described herein is a willful misrepresentation to and fraud upon:

(1) The issuing court;
(2) The issuing clerk:
(3) The person or entities to whom the subpoena is directed; and,
(4) The opposing party and counsel, with the purview of Disciplinary Standard 4.

VIII. Demand Letter – Formal Advisory Opinion No. 86-4

Issue: Whether a plaintiff's attorney in a personal injury case may write a letter to an insured defendant that may contain legal advice.

Short Answer: It is ethically improper for the plaintiff's attorney in a personal injury case to write a letter to the insured defendant if that letter contains legal advice. A letter to an insured defendant may contain an offer of settlement and request the name of the insured's insurer.

- - - - - - - - - - - - -

Formal Advisory Opinion No 86-4
State Bar of Georgia
Issued by the Supreme Court of Georgia
On December 17, 1987
Formal Advisory Opinion No 86-4

This opinion relies on both Directory Rules and Standards of Conduct that bear upon matters addressed by Rule 4.2.

Ethical Propriety of the Plaintiff's Attorney in a Personal Injury Case Writing a Letter to the Insured Defendant Which May Contain Legal Advice.

It is ethically improper for the plaintiff's attorney in a personal injury case to write a letter to the insured defendant which contains legal advice. The plaintiff's lawyer can properly write a letter to the attorney for the insured and the insurer making an offer of settlement. The letter may properly request the lawyer to provide this information to the insured as well as the insurer. If the plaintiff's lawyer needs information as to the name of the insured's insurer, he or she may properly write the insured requesting this information. But the contents of the letter shall be limited to a request for the necessary information. The plaintiff's attorney may not render legal advice to the insured.

It is ethically improper for the plaintiff's attorney in a personal injury case to write a letter to the insured defendant which may contain legal advice. The problem is raised by letter to insureds notifying them of the potential liability of their insurers for failure to settle within policy limits.

It is important first to state the applicable rules of law. An insurer is normally liable only for any judgment within the policy limits. The insured is normally liable for any judgment in excess of the policy limits. An insurer has a good faith duty to the insured, however, to settle a claim within the policy limits under the "equal consideration" rule.

National Emblem Insurance Co. v. Pritchard, 140 Ga. App. 350, 231 S.E. 2d 126 (1976); United States Fidelity & Guaranty Co. v. Evans, 116 Ga. App. 93, 156 S.E. 2d 809, aff'd, 223 Ga. 789, 158 S.E. 2d 243(1967). The failure of the insurer to fulfill this good faith duty may cause the insurer to be liable for any excess judgment. State Farm Insurance Co. v. Smoot, 381 F.2d331 (5th Cir. 1967).

These legal rules make apparent the reason a plaintiff's attorney may wish to write the insured directly. The letter will lay the basis for seeking recovery against the insurer for the portion of a judgment rendered in excess of the policy limits. Attorneys for plaintiffs may also perceive an advantage in having the insurer know that the insured is fully aware of his or her rights. That is, the communication with the insured is a helpful pressure tactic.

Such a letter is impermissible, regardless of whether it is sent before or after the insured is represented by counsel. A lawyer is precluded from contacting a person represented by a lawyer as to matters relevant to the representation without the written consent of that person's lawyer. Ga. Code of Professional Responsibility, DR 7-104(A)(1), Standard 47. Georgia Advisory Opinion No. 10 (July 18,1969), held that such contact with an insured defendant is not improper if undertaken before the defendant is represented by a lawyer and before an action is filed. Opinion 10, however, was written prior to the adoption of our current Code of Professional Responsibility and Standards of Conduct and was based upon former Bar Rule 3-109 which is very similar to our current DR 7-104(A)(1) and Standard 47. Apparently there was no counterpart to DR 7-104(A)(2) and Standard 49, which now prohibit a lawyer from giving legal advice to a person who is not represented by a lawyer, other than the advice to secure counsel, whenever the interests of the recipient are or may be in conflict with the interests of the lawyer's client.

Advisory Opinion No. 10 was implicitly overruled upon the adoption of DR 7-104(A)(2) and Standard 48, and is now expressly overruled to the extent it conflicts with that Standard. Under Standard 48, a plaintiff's attorney may communicate with the unrepresented potential defendant, but is precluded from rendering legal advice.

This is consistent with ABA Informal Opinion 1034 (May 30, 1968); which held that advising the insured of the effect of the insurer's refusal to settle within policy limits constitutes "legal advice." The ABA then quotes an earlier opinion, which involved a complaint about two collection letters, but the language is nonetheless relevant and applicable.

> The adroit wording of the questioned paragraphs avoids any direct statement or advice as to what the final results of seeking the threatened remedies will be, and no lawyer would be likely to be misled by it. In each case, however, the overall effect upon lay recipients of such letters probably will be, and probably was intended by the writer to be, that they had better "pay up or else." Rather than state simply that if payment is not made as demanded, his clients will pursue all legal remedies available to them to enforce payment, the writer chooses to describe in legal terms the collection suits that will be filed and then to threaten, in addition, the proceedings [which will be pursued]. The

only purpose of threatening such additional proceedings, which would have no direct connection with actions to collect debts, appears to have been to coerce and frighten the alleged debtors. ABA Informal Opinion 1034 at 219 citing ABA Informal Opinion 734.

Under Standard 48, a lawyer may communicate by letter with an adverse unrepresented person informing him of a demand on his insurance carrier and that suit will be filed if the demand is not met by a certain date, and that he should seek counsel, but no more. Under Standard 47, no communication with a represented adverse party is written consent without permission of adverse counsel.

It is obvious that the letter to the insured is meant for the insurer. It is equally obvious that the insured has a right to information not only as to his own legal rights, but also the legal duties of the insurer to him. It is not, however, obvious that the plaintiff's attorney is the proper person to inform the insured of these rights and duties. The appropriate attorney for this purpose is the insured's attorney. The problem here, of course, is that the attorney for the insured is also the attorney for the insurer. And given the context of the representation, it seems clear that the insurer would prefer that the insured not be made aware of its duty to settle the claim in good faith.

The lawyer representing the insured and the insurer thus faces an apparent dilemma. But the dilemma is only apparent. He or she represents the insured as a client and has a duty to keep the insured fully informed by virtue of the rules of ethics. See Proposed Georgia Rules and Disciplinary Standards of Conduct, Rule 1.4; Rogers v. Robson, Masters, Ryan, Brumund & Belom, 81 Ill. 2d 201, 40 Ill. Dec. 816, 407 N.E. 2d 47 (1980). The lawyer for the insurer has a duty to inform the insured not only of any offer of settlement; See Proposed Georgia Rules and Disciplinary Standards of Professional Conduct, Rule 1.2(c), but also of the potential liability of the insurer for a bad faith refusal to accept any reasonable offer within the policy limits. Id. Rule 1.4(b).

To recognize that the plaintiff's lawyer has a right to communicate directly with the insured as to his or her rights would create new problems. Apart from the rules of ethics, to recognize that the plaintiff's lawyer has a right so to advise the insured may well create a duty on the part of the lawyer to do so. For if the lawyer can advise the adversary client for the purpose of laying a predicate for the insurer's liability for an excess judgment, but fails to do so, he or she may be liable to the client for malpractice.

The plaintiff's lawyer can properly write a letter to the attorney for the insured and the insurer making the offer of settlement. The letter may properly request the lawyer to provide this information to the insured as well as the insurer. The failure of the insured's lawyer to do so would be breach of the lawyer's duty to keep the client informed and may well subject the lawyer to liability.

If the plaintiff's lawyer needs information as to the name of the insured's insurer, he or she may properly write the insured requesting this information. But the contents of the letter shall be limited to no more than a demand, a request for the necessary information and a suggestion to seek counsel. The plaintiff's attorney may not render

legal advice to the insured. Ga. Code of Professional Responsibility, DR 7-104(A)(2) and Standard 48.

IX. Unliquidated Damages Letter – Formal Advisory Opinion 88-3

Issue: Whether an attorney may send an unliquidated damages demand letter (O.C.G.A § 51-12-14) to an unrepresented party.

Short Answer: It is ethically permissible to send an unliquidated damages demand letter to an unrepresented party if the attorney sending the notice letter informs the unrepresented party that (1) the letter is being sent to establish a claim for interest, (2) the letter does not provide legal advice, and (3) the attorney represents opposing interests in the dispute.

- - - - - - - - - - - - -

Formal Advisory Opinion No. 88-3

State Bar of Georgia
Issued by the Supreme Court of Georgia
On November 29, 1988

For references to Standard of Conduct 48, please see Rule 4.3(a) and (b).

For references to Standard of Conduct 47, please see Rule 4.2(a).

Ethical Propriety of Sending Notice Pursuant to O.C.G.A. § 51-12-14 to an Unrepresented Party.

It is ethically permissible to send the notice required by O.C.G.A. § 51-12-14 to an unrepresented party. An attorney sending the required notice, however, must do so in such a manner as to inform the unrepresented opposing party that the notice is sent merely to establish a claim for interest, that it is not to be construed as legal advice, and that the attorney sending the notice represents the opposing interests in the dispute.

Correspondent asks if it is a violation of Standard 48 of the Rules and Regulations of the State Bar of Georgia [For references to Standard of Conduct 48, see Rule 4.3(a) and (b).] for correspondent to comply with the notice requirement of O.C.G.A. § 51-12-14 by sending a demand notice to an unrepresented party. That statute requires that written notice of the demand for unliquidated damages be sent to the person "against whom the claim is made" in order to entitle the claimant to receive twelve (12) percent interest on judgments in excess of unliquidated damages.1

Standard 48 provides:

> During the course of his representation of a client a lawyer shall not give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client.

In interpreting Standard 48, Formal Opinion No. 86-4 (86-R7), concluded that it was ethically improper for a plaintiff's attorney to send a letter directly to an insured defendant which would notify the defendant about the potential liability of his or her insurer for failure to settle within policy limits. The letter would be considered "legal advice" in that plaintiff's attorney impliedly would be advising settlement within policy limits. Accord, ABA Informal Opinion 734 (June 16, 1964). The Opinion correctly focused upon the policy behind Standard 48 which is to avoid creating in an unrepresented party a false impression that the attorney is advising in accordance with the unrepresented party's interests or is neutral in the dispute. The present situation is distinguishable. Where an attorney sends a formal notice which is required by law, there is much less concern that a false impression will be created.

It is ethically permissible to send the notice required by O.C.G.A. § 51-12-14, stating specifically that it is a notice rather than advice. An attorney sending the required notice, however, must do so in such a manner as to inform the unrepresented opposing party that the notice is sent merely to establish a claim for interest, that it is not to be construed as legal advice, that the recipient may seek his independent legal advice and that the attorney sending the notice represents the opposing interests in the dispute.[2]

---

[1] The full text of O.C.G.A.§ 51-12-14 is as follows:

"Procedure for demand of unliquidated damages in tort actions; when interest may be recovered.

(a) Where a claimant has given written notice by registered or certified mail to a person against whom claim is made for unliquidated damages in a tort action and the person against whom such claim is made fails to pay such amount within 30 days from the mailing of the notice, the claimant shall be entitled to receive interest on the claimed sum if, upon trial of the case in which the claim is made, the judgment is for an amount not less than the sum claimed.

(b) The written notice referred to in subsection (a) of this Code section may be given on only one occasion and shall specify that it is being given pursuant to this Code section.

(c) The interest provided for by this Code section shall be at the rate of 12 percent per annum and shall begin to run from the thirtieth day following the date of the mailing of the written notice until the date of judgment.

(d) Evidence or discussion of interest on liquidated damages, as well as evidence of the offer, shall not be submitted to the jury. Interest shall be made a part of the judgment upon presentation of evidence to the satisfaction of the court that this Code section has been complied with and that the verdict of the jury or the award by the judge trying the case without a jury is equal to or exceeds the amount claimed in the notice.

(e) This Code section shall be known and may be cited as the "Unliquidated Damages Interest Act." (Ga. L. 1968, p. 1156, § 1, Ga. L. 1975, p. 395, § 1; Ga. L. 1981, p. 681, § 1.)"

[2] If the adverse party is represented, the statutory notice need not contain the disclaimers here described, but must be sent to the adverse party's attorney rather than the party. Standard 47.

X. Indemnifying Opposing Party - Formal Advisory Opinion No. 13-2

Issues: May a lawyer representing a plaintiff personally agree, as a condition of settlement, to indemnify the opposing party from claims by third persons to the settlement funds?

May a lawyer seek to require, as a condition of settlement, that a plaintiff's lawyer make a personal agreement to indemnify the opposing party from claims by third persons to the settlement funds?

Short Answer: A lawyer may not ethically agree, as a condition of settlement, to indemnify the opposing party from claims by third persons to the settlement funds. Such agreements violate Rule 1.8(e) of the Georgia Rules of Professional Conduct, which prohibits a lawyer from providing financial assistance to a client in connection with pending or contemplated litigation.

Further, a lawyer may not seek to require, as a condition of settlement, that a plaintiff's lawyer make a personal agreement to indemnify the opposing party from claims by third persons to the settlement funds. Such conduct violates Rule 8.4(a)(1) of the Georgia Rules of Professional Conduct, which prohibits a lawyer from knowingly inducing another lawyer to violate the Georgia Rules of Professional Conduct.

- - - - - - - - - - - - -

FORMAL ADVISORY OPINION NO. 13-2

State Bar of Georgia
Issued by the Formal Advisory Opinion Board
On October 23, 2013

Lawyers often represent clients in civil actions, such as personal injury or medical malpractice, who have incurred substantial medical bills as a result of their injuries. These lawyers are required to work diligently to obtain a fair settlement for these clients. Obtaining a settlement or judgment can sometimes take years.

The proper disbursement of settlement proceeds is a tremendous responsibility for a lawyer who receives such proceeds. Clients are often in need of funds from the settlement. Lawyers need payment for their services. And third persons such as medical providers, insurance carriers, or Medicare and Medicaid seek reimbursement of their expenses from the settlement.

Increasingly, lawyers who represent plaintiffs are being asked to personally indemnify the opposing party and counsel from claims by third persons to the settlement proceeds. Lawyers are concerned not only about whether it is ethical to enter into such an agreement but also whether it is ethical to seek to require other lawyers to enter into such an agreement.[1]

1. A lawyer may not ethically agree, as a condition of settlement, to indemnify the opposing party from claims by third persons to the settlement funds.

The first issue is governed by Rule 1.8(e) of the Georgia Rules of Professional Conduct, which provides as follows:

> "A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
>
> > 1. a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; or
> >
> > 2. a lawyer representing a client unable to pay court costs and expenses of litigation may pay those costs and expenses on behalf of the client."

Comment 4 provides further guidance:

> "Paragraph (e) eliminates the former requirement that the client remain ultimately liable for financial assistance provided by the lawyer. It further limits permitted assistance to court costs and expenses directly related to litigation. Accordingly, permitted expenses would include expenses of investigation, medical diagnostic work connected with the matter under litigation and treatment necessary for the diagnosis, and the costs of obtaining and presenting evidence. Permitted expenses would not include living expenses or medical expenses other than those listed above."

Financial assistance can take many forms. Such assistance includes gifts, loans and loan guarantees. Any type of guarantee to cover a client's debts constitutes financial assistance. Rule 1.8(e) provides narrow exceptions to the prohibition on a lawyer providing financial assistance to a client in connection with litigation. Those exceptions do not apply when a lawyer enters into a personal indemnification agreement. Because a lawyer, under Rule 1.8(e), may not provide financial assistance to a client by, for

example, paying or advancing the client's medical expenses in connection with pending or contemplated litigation, it follows that a lawyer may not agree, either voluntarily or at the insistence of the client or parties being released, to guarantee or accept ultimate responsibility for such expenses.[2]

Moreover, any insistence by a client that the lawyer accept a settlement offer containing an indemnification agreement on the part of the lawyer might require the lawyer to withdraw from the representation. The lawyer may otherwise be in violation of Rule 1.16(a)(1), which provides that "a lawyer shall ... withdraw from the representation of a client if ... the representation will result in violation of the Georgia Rules of Professional Conduct."[3]

2. A lawyer may not seek to require, as a condition of settlement, that a plaintiff's lawyer make a personal agreement to indemnify the opposing party from claims by third persons to the settlement funds.

The second issue is governed by Rule 8.4(a)(1), which provides that "It shall be a violation of the Rules of Professional Conduct for a lawyer to ... violate or knowingly attempt to violate the Georgia Rules of Professional Conduct, knowingly assist or **induce another to do so**, or do so through the acts of another." (emphasis added). Comment 1 to Rule 8.4 also provides direction:

> "The prohibitions of this Rule as well as the prohibitions of Bar Rule 4-102 prevent a lawyer from attempting to violate the Georgia Rules of Professional Conduct or from knowingly aiding or abetting, or providing direct or indirect assistance or inducement to another person who violates or attempts to violate a rule of professional conduct. A lawyer may not avoid a violation of the rules by instructing a nonlawyer, who is not subject to the rules, to act where the lawyer cannot."

In light of the conclusion that plaintiff's counsel may not agree to indemnify the opposing party from claims by third parties, it is also improper for a lawyer representing a defendant to seek to require that a plaintiff's lawyer make a personal agreement to indemnify the opposing party from claims by third parties to the settlement funds. Nor can the lawyer representing the defendant avoid such a violation by instructing his client or the insurance company to propose or demand the indemnification.[4]

———————————————————————————————

1. This opinion is intended to address the ethical concerns associated with a lawyer's agreement to indemnify. This opinion does not address the legal or ethical issues involved in the disbursement of settlement funds.

2. This opinion is consistent with advisory opinions from other states holding that an agreement by a client's lawyer to guarantee a client's obligations to third parties amounts to guaranteeing financial assistance to the client, in violation of Rule 1.8(e) or its equivalent. See, e.g., Alabama State Bar Ethics Opinion RO 2011-01; Arizona State Bar Ethics Opinion 03-05; Delaware State Bar Association

Committee on Professional Ethics Opinion 2011-1; Florida Bar Staff Opinion 30310 (2011); Illinois State Bar Association Advisory Opinion 06-01 (violation of Illinois Rule 1.8(d), which is similar to Rule 1.8(e)); Indiana State Bar Association Legal Ethics Opinion No. 1 of 2005 (non-Medicare and Medicaid settlement agreement that requires counsel to indemnify opposing party from subrogation liens and third-party claims violates Indiana rules); Maine Ethics Opinion 204 (2011); Missouri Formal Advisory Opinion 125 (2008); Association of the Bar of the City of New York Committee on Professional and Judicial Ethics Formal Opinion 2010-3; Supreme Court of Ohio Opinion 2011-1; Philadelphia Bar Association Professional Guidance Committee Opinion 2011-6 (2012); South Carolina Ethics Advisory Opinion 08-07; Utah Ethics Advisory Opinion 11-01; Virginia Legal Ethics Opinion 1858 (2011); Washington State Bar Association Advisory Opinion 1736 (1997); Wisconsin Formal Opinion E-87-11 (1998).

Many of these jurisdictions also hold that an agreement to guarantee a client's obligations to third parties also violates Rule 1.7(a) or its equivalent regarding conflicts of interest. In reaching its decision, the Board does not consider it necessary to address that issue here.

3. The mere suggestion by the client that the lawyer guarantee or indemnify against claims would not require withdrawal by the lawyer, only the client's demand that the lawyer do so would require withdrawal. See Rule 1.16(a)(1) ("A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Georgia Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.").

4. This opinion is consistent with advisory opinions from other states holding that a lawyer's demand that a plaintiff's lawyer make a personal agreement to indemnify the opposing party from claims by third parties to the settlement funds violates Rule 8.4(a)(1) or its equivalent. See, e.g., Alabama State Bar Ethics Opinion RO 2011-01; Florida Bar Staff Opinion 30310 (2011); Missouri Formal Advisory Opinion 125 (2008); Association of the Bar of the City of New York Committee on Professional and Judicial Ethics Formal Opinion 2010-3; Supreme Court of Ohio Opinion 2011-1; Utah Ethics Advisory Opinion 11-01; Virginia Legal Ethics Opinion 1858 (2011)).

The second publication of this opinion appeared in the December 2013 issue of the Georgia Bar Journal, which was mailed to the members of the State Bar of Georgia on or about December 19, 2013. The opinion was filed with the Supreme Court of Georgia on January 21, 2014. No review was requested within the 20-day review period. On March 28, 2014, the Supreme Court of Georgiai issued an order declining to review the opinion on its own motion. In accordance with Rule 4-403(d), this opinion is binding only on the State Bar of Georgia and the person who requested the opinion, and not on the Supreme Court of Georgia, which shall treat the opinion as persuasive authority only.

State Bar of Georgia
INSTITUTE OF CONTINUING LEGAL EDUCATION

STATE BAR SERIES

Litigation Funding And Product Liability Lawsuits

Presented By:

Suneel C. Gupta
Baker Donelson Bearman Caldwell & Berkowitz PC
Atlanta, GA

Litigation Funding and Product Liability Lawsuits

26th Annual Products Liability Seminar

Neel Gupta

Baker Donelson Bearman Caldwell & Berkowitz, PC

I. Background

Not that many years ago, "litigation funding," in any context, was almost unheard of. To be sure, it definitely existed, but few plaintiff's product liability lawyers, and even fewer defense product liability lawyers, encountered it. But, it was around. Companies such as Advocate Capital have been around for years (I used to file collection lawsuits on their behalf more than 10 years ago). Prior to the mid-2000s, the U.S. litigation financing industry was largely limited to personal injury cases. Specialized commercial litigation funding originated around 2006, when Credit Suisse Securities founded a litigation risk strategies unit (which has since disbanded). In recent years, the commercial litigation finance market has grown significantly and is now used by companies and law firms alike as a means to finance legal claims, raise capital and eliminate risk from the balance sheet.

To date, the law of litigation finance has largely been left to the states; Congress took an interest in early 2015 when it sought information from certain litigation funders, but has not acted since. At the state level, the trend continues to move towards normalizing the use of litigation finance in commercial litigation and arbitration. In Georgia, where champerty and maintenance is still the law (OCGA § 13-8-2), the trend continues towards limiting their application to commercial funding arrangements, for example, as Delaware did in December of 2015.

These days, personal injury attorneys on both sides of the "v" likely encounter some form of litigation funding in all of their lawsuits. Whether it's plaintiff's attorneys seeking funding for medical treatment for their clients, or financial assistance in taking an expensive products case to trial, or defense attorneys seeking to discover information and potential biases, litigation funding is here to stay, and absent state-level regulation, will only continue to be more of an issue in product cases.

II. Types

a. Funding companies

Pure funding companies provide "hard money" loans to plaintiff's attorneys to fund the day to day costs of taking a case to trial. Products cases are notoriously expensive due to the number of depositions, experts, and the length of trial, and only the most successful plaintiff's attorneys can self-fund a products case through trial. Companies in this space include Bentham IMF, Advocate Capital, Harbour Funding, etc. Many of these companies are backed by hedge funds or very wealthy individuals (Peter Theil, for example, funder the Hulk Hogan v. Gawker lawsuit) and are very sophisticated and will typically only invest in "bet the company" litigation. These companies' contracts usually either come with very high interest rates, or they take a high percentage of any settlement or verdict.

b. Medical funding companies

Medical funding companies, such as Atlanta's ML Healthcare and Arizona's MedFin Manager purport to buy a plaintiff's "medical account receivable" in order to facilitate medical treatment. In these cases, the plaintiff allegedly needs treatment following an injury or accident, but cannot afford it on his own or his insurance won't pay for it. The plaintiff's attorney introduces plaintiff to the funding company and most often, acts as an intermediary, between the plaintiff and the medical provider. The funding company agrees to allow the medical procedure to go forward, and the funding company "buys" the provider's "accounts receivable" for a set percentage of the rack rate, typically around 40%. It's a great deal for the provider, who is used to getting anywhere between 15-35% for the their rack rate charges, and it enables the plaintiff to the treatment he allegedly needs following the accident. The plaintiff is on the hook for 100% of the rack rate charges, providing the funding company with a windfall on their investment, at no risk to the plaintiff's attorney.

c. Pre-settlement advance companies

Just as their name implies, these companies provide the plaintiff an advance on any anticipated settlement or verdict, typically at very high interest rates. Frequently, the plaintiff's attorney does not know about these arrangements until the mediation,

at which point their existence complicates settlement. Names here include Oasis Financial, CLF (Certified Legal Funding), Loans4Lawsuits, Peachtree Financial, Shield, Mayfield, Oasis, and Peak.

d. Litigation Cost Protection

While not exactly litigation funding, a relative newcomer and potential game-changer for the plaintiff's bar is litigation cost protection insurance. Just as its name implies, litigation cost protection is an insurance policy a plaintiff's attorney buys. If the plaintiff doesn't recover, instead of having to "eat" the costs of litigation, the insurance policy reimburses the plaintiff's attorney for his out-of-pocket expenses (experts, depositions, travel, etc.) in working up a case. Level Insurance out of Florida is one company in this space. Level charges a 7% of the amount insured, up to a $100,000 coverage cap.

III. Impact on the litigation

a. As to the Plaintiff

i. Could not bring case without funding company

It goes without saying that funding companies impact litigation. Plaintiffs argue that these arrangements enable access to justice for people who would otherwise never get their day in court. Statistics seem to bear that out: the number of cases being filed is going up, at least in federal courts. From 2006-2015, the number of cases has increased by 7.5%. *Judicial Caseload Indicators-Judicial Business 2015*, U.S. Courts (2015). How much of that can be attributed to funding companies is up for debate, but the reality is that there are more civil cases than there used to be. Regarding medical funding companies, if the plaintiff can't get treatment paid for by private insurance or Medicare/Medicaid, their incurred special damages will likely not be high enough to entice a plaintiff's lawyer to take their case.

ii. Strategic Partner

Many of the sophisticated litigation funding companies act as a strategic advisor to the plaintiff's counsel. These companies employ seasoned in-house attorneys who not only thoroughly evaluate a case before agreeing to fund it, but are also available to provide strategy and advice to the plaintiff's counsel. Questions remain as to whether this arrangement is tantamount to the unauthorized practice of law, as the

funding company attorneys are typically not licensed in every state where they are providing advice.

b. As to Defendants

Defense lawyers argue that pure litigation funding and litigation cost insurance increases the number of lawsuits that would otherwise not be filed. Regarding medical funding companies, defense attorneys argue that the funding companies encourage doctors to recommend unnecessary treatment and charge inflated prices, and act as hindrances when it comes time to settle cases, as they take hard lines in negotiations, rarely lowering the amount due from the plaintiffs. Finally, deep-pocketed product liability defendants cannot outspend their opponents and force them into settlement.

c. Discoverability of the funding arrangement

Plaintiffs typically will disclose the involvement of a funding company, especially medical funding companies (because the providers' invoices frequently list the medical funding company as the payor/"insurance company"). Plaintiffs, however, resist attempts to subpoena the funding company for any information on the case, arguing that anything sent to the funding company by the plaintiff's attorney is privileged, or is subject to the common interest doctrine. Defendants' counter to that is any privilege is waived when work product is shared with a third party. See Devon IT Inc. v. IBM Corp., 2012 WL 4748160 (E.D. Pa. Sept. 27, 2012); In re: International Oil Trading Co., LLC, 548 B.R. 825 (Bankr. S.D. Fla. 2016); Leader Techs v. Facebook, Inc., 719 F.Supp. 373 (D.Del 2010); Miller UK Ltd. v. Caterpillar, 17 F.Supp.3d 711 (N.D. Ill. 2014).

Perhaps aware of the risks in in having to produce the funding application, most funding companies are moving to a more bare-bones application, so if the application has to be produced, it won't be the treasure trove of information that defendants would hope for.

There is a groundswell among the defense bar to amend FRCP 17 which would require disclosure of funding companies as real parties in interest. Some federal courts' local rules (i.e. Northern District of California) require the disclosure of funding company involvement.

1. Medical Funding Companies

In Georgia, the case law is starting to develop around the admissibility of medical funding participation. Plaintiffs typically try to say that medical funding is a "collateral source" and is inadmissible, but courts around the state have found otherwise.

For the collateral source rule to apply, the plaintiff must have received from a benefit from a third party, or be the beneficiary of a third party's action that mitigates his loss. "[T]he collateral source rule, stated simply, is that the receipt of benefits or mitigation of loss from sources other than the defendant will not operate to diminish the plaintiff's recovery of damages." Polito v. Holland, 258 Ga. 54, (1988). Georgia courts use the term "compensatory payment" to describe a collateral source: "The collateral source rule prevents a defendant tortfeasor from presenting evidence to the jury that the plaintiff previously received compensatory payments from another source, such as the plaintiff's own insurer." Andrews v. Ford Motor Co., 310 Ga. App. 449 (2011) citing Hoeflick v. Bradley, 282 Ga. App. 123 (2006).

Bennett v. Haley, 132 Ga. App. 512 (1974) lists the following as examples of collateral sources: gratuitous medical care, continued salary or wage payments, proceeds from insurance policies, or welfare and pension benefits. The Restatement (Second) of Torts §920A, comment (c) (1979) lists the following types of covered benefits: insurance policies, employment benefits, gratuities and social legislation benefits. The common feature of the examples shown above is that they make the plaintiff financially more whole, regardless of the outcome of the lawsuit.

The public policy rationale for the collateral source rule can be found in, *inter alia*, Broda v. Dziwura, 286 Ga. 507, 508 (2010) (Emphasis added):

> In actions concerning a tort, a benefit bestowed on the injured party should not be shifted so as to create a windfall for the tortfeasor. Amalgamated Transit Union

> Local 1324 v. Roberts, 263 Ga. 405(1) (1993). If a windfall must be had, it will inure to the benefit of the injured party rather than relieve the wrongdoer of full responsibility for his wrongdoing. Id. at 407 (citing to Denton v. Con-Way Southern Express, 261 Ga. 41, 46, n. 5 (1991)). In keeping with this purpose of full responsibility, a tortfeasor cannot diminish his liability based on payments made by a non-tortfeasor. See Adkins v. Knight, 256 Ga.App. 394, 568 S.E.2d 517 (2002).

The language "[i]f a windfall must be had . . ." necessarily implies that the preferred state of the world is that there be no windfall. Although public policy would prefer that a plaintiff be fully compensated for his losses, no more and no less, the collateral source rule recognizes that in the real world, such a windfall is sometimes unavoidable. With traditional collateral sources, if the tortfeasor is required to pay less than what it takes to make the plaintiff whole because of the existence of a collateral source, the tortfeasor has received a windfall, and if the plaintiff is awarded damages that a third party has already paid, the plaintiff has received a windfall. This is a classic zero-sum game, in which one party necessarily loses when the other wins. The longstanding rule at common law is that courts prefer that the windfall, if it is to be had, fall to the plaintiff rather than the tortfeasor. See Rangel v. Anderson, 202 F.Supp.3d 1361 (S.D.Ga. 2016).

In this scenario, at least in Georgia, medical funding company payments should be admissible to show bias and reasonableness of damages. See Houston v. Publix Supermarkets, Inc., 2015 WL 4581541 (N.D. Ga. July 29, 2015).

State Bar of Georgia
INSTITUTE OF CONTINUING LEGAL EDUCATION

STATE BAR SERIES

Recent Developments In Brain Injury Evidences

Presented By:

Kristen S. Cawley
Lewis Brisbois Bisgaard & Smith LLP
Atlanta, GA

Appendix

ICLE BOARD

Name	Position	Term Expires
Carol V. Clark	Member	2019
Harold T. Daniel, Jr.	Member	2019
Laverne Lewis Gaskins	Member	2018
Allegra J. Lawrence	Member	2019
C. James McCallar, Jr.	Member	2018
Jennifer Campbell Mock	Member	2020
Patrick T. O'Connor	Member	2018
Kenneth L. Shigley	Member	2020
A. James Elliott	Emory University	2019
Buddy M. Mears	John Marshall	2019
Dean Daisy Hurst Floyd	Mercer University	2019
Cassady Vaughn Brewer	Georgia State University	2019
Carol Ellis Morgan	University of Georgia	2019
Hon. Harold David Melton	Liaison	2018
Jeffrey Reese Davis	Staff Liaison	2018
Tangela Sarita King	Staff Liaison	2018

GEORGIA MANDATORY CLE FACT SHEET

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

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

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

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

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

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

State Bar of Georgia

INSTITUTE OF CONTINUING LEGAL EDUCATION

/ICLEGA

#ICLEGA
#TUESAT2

/ICLELINKEDIN

ICLEGA.ORG