

# CALENDAR CALL

GENERAL PRACTICE AND TRIAL SECTION STATE BAR OF GEORGIA

Vol. XIX

Winter/Spring 2005

No. 1



**WINTER/SPRING 2005**

## UPCOMING EVENTS

May 20, 2005 ..... Jury Trials Seminar, Atlanta

June 8 - 12, 2005 ..... State Bar Annual Meeting  
*Westin Savannah Harbor Resort*  
*Savannah, Georgia*

June 10, 2005..... "Tradition of Excellence Awards" Breakfast  
*"Tradition of Excellence Awards" Reception*

# CALENDAR CALL

"Georgia's Largest Law Firm"

GENERAL PRACTICE AND TRIAL SECTION STATE BAR OF GEORGIA

Vol. VIx

Winter/Spring 2005

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A photo of a Spring tree in bloom taken by Betty Simms from the back walk way of her condo in Smyrna.

Calendar Call is the official publication of the General Practice and Trial Section of the State Bar of Georgia. Statements and opinions expressed in the editorials and articles are not necessarily those of the Section of the Bar. Calendar Call welcomes the submission of articles on topics of interest to the Section. Submissions should be doublespaced, typewritten on letter-size paper, with the article on disk together with a bio and picture of the author and forwarded to Elizabeth Pelypenko, The Pelypenko Law Firm, PC, 100 Galleria Parkway, Suite #1320, Atlanta, Georgia 30339-5948 or sent via e-mail to ep@pelypenkolawfirm.com. **Published by Appleby & Associates, Austell, Georgia.**

## In What Direction Will This Legislature Go?



In my last column, I noted that Georgia's general practitioners and trial lawyers have a long tradition in this state of either serving as legislators or advising those who serve as our legislators. The upcoming legislative session, while admittedly bringing a host of new faces, will undoubtedly not deviate from this tradition. The big question this year, of course, is in what direction this new legislature will forge a path?

Another way to glean what may be in store is by looking at the pre-filed legislation. This year, there are a number of pre-filed bills of great interest to general practitioners and trial lawyers.

For example, SB 3 (sponsored by Senators Preston Smith, Eric Johnson, Mitch Seabaugh, Bill Stephens,

Renee Unterman, and John Bulloch), pre-filed November 15 th, begins as follows: "(a) The General Assembly finds that there presently exists a crisis in the field of hospital and medical liability insurance. . . . (b) The General Assembly further finds that certain civil justice reforms as provided in this Act will promote predictability and improvement in the resolution of health care liability claims and thereby assist in promoting the provision of health care liability insurance by insurance providers."

Ah yes, we have all seen and heard these lines before so we know, even before delving into the actual meat of the proposed legislation, that this is a so-called "tort reform" bill. Sure enough, it contains provisions:

- Changing venue in joint and several liability cases,
- Eliminating the 45 day period for filing of professional malpractice affidavits only in health care cases,
- Requiring the contemporaneous filing of a medical authorization form in all medical malpractice cases allowing the defendants to obtain immediate access to the victim's health records,
- Entitling a defendant to costs and attorney's fees if a victim does not accept or respond to an offer of judgment within 30 days if the court's judgment finds no liability or the judgment is 25 percent less than such offer,
- Entitling a victim to costs and attorney's fee only if he/she files

a demand for judgment and the court's judgment is at least 25 percent greater than such demand,

- Encouraging "voluntary offers of assistance or expressions of benevolence regret, fault, sympathy, or apology" between health care providers and "victims of an unanticipated outcome resulting from their medical care" by rendering such inadmissible in evidence,
- Significantly changing expert credential requirements in medical malpractice cases,
- Immunizing from liability emergency medical care workers except for "willful and wanton misconduct,
- Immunizing hospitals from liability for the actions of health care professionals unless they have "an actual agency or employment relationship,"
- Eliminating joint and several liability against joint trespassers,
- Significantly changing the principles of contributory negligence, and last but certainly not least,
- Imposing a \$250,000 cap on non-economic damages in medical malpractice actions.

Soon-to-be Speaker Richardson has also stated publicly on several occasions recently that he wishes to see changes made to Georgia's Open Records Act because the law has been "abused" to "harass government officials." Happily, he identifies journalists rather than lawyers as the primary ones "abusing" Georgia's Open Records Act. I,

for one, strongly disagree with any weakening of Georgia's Open Records Act. Georgia's citizens should be able to see from the actual records just exactly what is going on in our governmental processes and bureaucracies.

Governor Perdue recently publicly proposed a "criminal justice package" including such goodies as:

- Providing equal jury strikes for prosecutors and defendants,
- Allowing prosecutors to appeal recusal motions (or denials of such motions),
- Strengthening the requirements for financial restitution by criminal defendants,

- Imposing reciprocal discovery requirements at all stages of a trial, and

- Giving the prosecution the right of rebuttal in all closing arguments.

In fact, SB 2 (sponsored by Senators William Hamrick, Eric Johnson, Bill Stephens, Mitch Seabaugh, Preston Smith, and John Bulloch) pre-filed November 15 th , already proposes giving an equal number of jury strikes to prosecutors as to criminal defendants.

Whether these bills make it into law or not, it is clear that a new legislative day is dawning in Georgia. We just do not yet know where we, as general practitioners and trial lawyers, will be at the end of the

day. I sincerely hope you heeded my advice in the last column and built a relationship, if you did not already have one, with one or more of your legislators. Now is the time to educate them about the issues of concern to you and your clients. Explain how these proposed legislative changes will directly impact on your clients and their constituents. During the upcoming legislative session, contact your legislators frequently with information to help them make decisions on legislation of importance in your practice area. Help them make decisions on legislation that will lead Georgia in the right direction.

## Mid Year Section Luncheon Highlight



Left to right: Cathy Helms, Chairman; Myles Eastwood, Chair Elect; and Judge Debra Bernes of the Georgia Court of Appeals who was the guest speaker at the Mid year Section luncheon at the Omni Hotel.



I am pleased to be the new editor of Calendar Call. It will be no easy task to take the reins over from Cal Callier, my able predecessor.

It is my goal to feature articles of interest to both general practitioners and trial lawyers that will be useful to your practices, and which I hope you will want to save for future reference. I invite our readers to send suggestions for future articles that they would find helpful, and also to submit articles for future publication that they think would be of interest to our readership. You can help make Calendar Call a more useful resource for our readers.

Elizabeth Pelypenko

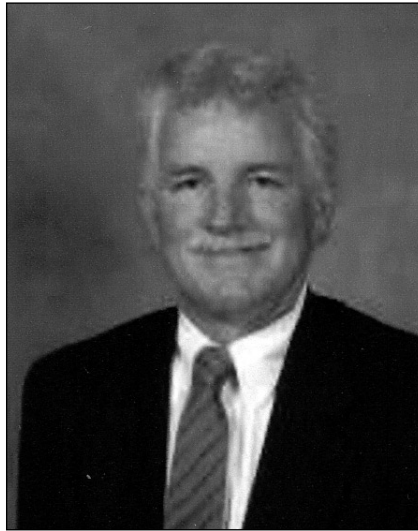
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# IP Law for the GP Lawyer

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So, you practice family law, real estate law or contract law and your best client comes to you with an intellectual property issue. What do you do? Of course, reference to an experienced intellectual property attorney is a good idea, but if you want to continue to participate in the conversations, some knowledge of the intellectual property body of law couldn't hurt. Following is a brief primer on four of the main divisions of intellectual property to get you started.

Ideas, concepts and expressions of ideas created by the human mind are protected legally as "intellectual property." Intellectual property is personal property. Its use and ownership can be transferred, in whole or in part, by the creator to another by legal mechanisms such as contracts, wills, and court decrees.

IP has various branches, i.e., patent, trademarks, copyrights and trade secrets. The various branches of IP are no exclusive. Indeed, the same concept can be covered by more than one branch of IP. For example, a computer program may be covered by both a patent and a copyright. Each of the various forms of IP provides a different scope of protection and remedies for infringement.

No successful business can afford to ignore intellectual property. This reason is simple, regardless of whether the business is interested in protecting its own IP rights, it must

*Continued on next page*

at least take precautions to avoid infringing the IP rights of others.

## **I. PATENTS**

### **A. What is a Patent?**

A patent is a grant authorized by the U.S. Constitution and issued by the U.S. Patent and Trademark Office (“USPTO”) giving the patent owner the right to exclude others from making, using, selling, offering to sell, or importing an invention within the United States for a limited time period.

In summary, there are three kinds of patents. “Utility” patents are granted to an inventor of any new and useful process, machine, article of manufacture, composition of matter, or any new and useful improvement thereof. “Design” patents are granted on any new, original, ornamental (non-functional) design for an article of manufacture. “Plant” patents are granted on any distinct and new variety of asexually reproduced plant (e.g., tree, flower, etc.).

In order for an invention to be patentable, the invention must meet the following criteria: (a) “useful” for some purpose; (b) “novel” in that it must not have been publicly known prior to filing an application for the invention, and (c) “nonobvious” over the prior art. Indeed, a publication anywhere in the world that predates the date of the invention and which describes aspects of the invention may preclude patentability of the invention. Additionally, an invention will be deemed non-patentable in the U.S. if an application is not filed within one year after the public disclosure anywhere or sale of the invention in the U.S.

### **B. What are Patent “Rights”?**

Patents should be thought of as a negative property right. A patent does not give the patent owner

the right to practice his invention, but does give the patent owner the right to exclude others from practicing the invention. The following example may help clarify this somewhat backwards concept. Assume that Inventor A invents a radio. Subsequently, Inventor B invents an antenna for the radio, and obtains a patent on the combination of elements. Although Inventor B obtained a patent for his invention, Inventor B cannot legally make, use, sell, offer to sell, or import his invention until he obtains a license from Inventor A to make, use, sell, offer to sell, or import the patented radio (without the antenna) from Inventor A.

In the past, the term of protection for utility and plant patents started from the patent issue date and lasted for 17 years from that date. With the recent changes, the term of protection for utility and plant patents filed on or after June 8, 1995 starts from the date the patent application is filed and lasts for 20 years from that date. All patents that were in force on June 8, 1995 or that issue from an application filed on or before that date, will have a term that is the greater of the 20 year terms from the application filing date or the 17 year term from the patent issue date.

Once the duration of a patent has expired, the invention is in the public domain and can be used by anyone.

### **C. How to Obtain a Patent**

The process of obtaining a patent, often referred to as “patent prosecution,” involves preparing and filing an extensive patent application and then arguing the patentability issues with the USPTO.

Generally, in the U.S., the inventor who invents first is entitled to the patent. An inventor need not wait to the point of building or demonstrating an invention, referred to as “a reduction to practice,” prior to filing an application. An inventor

may file a patent application after the invention has been mentally conceived, referred to as “conception,” provided that the invention can be described sufficiently so that somebody with ordinary skill in the art would be able to make and use the invention.

In the U.S., if more than one inventor attempts to patent a similar invention, a process called an “interference” is declared by the USPTO and an interference proceeding is held to determine who is the first inventor. In an interference proceeding, the conception date, the date of reduction to practice (if applicable), the application filing date, and the diligence with which the inventor filed an application or reduced the invention to practice are all critical issues. Accordingly, the inventor should maintain a proper logbook and, when the invention evolves to the point where an adequate description can be generated, a patent application should be timely filed. The logbook serves as evidence of the mentioned critical issues: conception, diligence, and reduction to practice.

Although an inventor can prosecute his own patent application, only individuals registered to practice before the USPTO can prosecute a patent on behalf of an inventor. However, a patent application is a highly complex document from both technical and legal vantage points and, therefore, a person unskilled at prosecuting patent applications may not obtain a patent which adequately and/or fully protects the invention.

Thus, a patent attorney should be retained for writing and prosecuting a patent application. In addition, if the invention involves sophisticated and highly complex technology, as is common in the electronics industry, it is important to select a patent attorney with the particular technological background. In a sense, the patent attorney is an “interface”



between the world of technology and the world of law.

Any information about the invention which is disclosed to the attorney is protected by the attorney-client privilege and is maintained in confidence by the attorney.

### **1. A Patentability Search**

A patent search may be performed to determine whether the invention is patentably different from prior art patents and/or other publications. A search prior to filing an application is not required, but a search may reveal a disclosure of a similar device that would render pursuit of a patent to be unwarranted. A search is much less expensive than preparing and filing a patent application and, thus, a search can save a lot of money in the long run. It is important to keep in mind that reasonable minds may differ on what a patent really teaches or discloses. A good searcher can almost always pinpoint the area, i.e., classes and subclasses, where the most pertinent art can be found.

If one or more patents that are closely related to the invention are discovered, then the patent attorney may conclude that the likelihood of obtaining a patent of worthwhile scope is not good and, therefore, may recommend terminating the process and not filing a patent application. On the other hand, a thorough search can serve to inform both the inventor and the attorney of the present state of the particular art, and searches for this reason alone are often conducted.

If the patents retrieved during the search do not disclose the invention, there is still no absolute guarantee that the invention is patentable. One reason is that the typical search is usually limited to issued U.S. patents, and does not include a search of presently pending patent applications, foreign patents, or any other nonpatent publications, which all may be used by the USPTO

examiner who later examines the application. Another reason is that the search records at the USPTO are not always accurately maintained in the public search room. Still another reason is that an examiner may interpret the teachings of a prior art document differently than the searcher or attorney.

### **2. A Provisional Application or a Utility Application**

An applicant has a choice between preparing and filing a "utility application" or a "provisional application." A utility application is the type of application that is examined by the USPTO and may eventually mature into an issued patent. Utility applications are discussed in greater detail below. A provisional application is a stepping stone to a utility application, but can not mature into an issued patent.

A provisional application requires minimum legal and formal requirements, but establishes a domestic filing date for priority purposes without triggering the start of the 20 year patent term. A provisional application requires only the filing of a detailed description of the invention which is enabling (i.e., explains how to make and use) to one of ordinary skill in the art and sets forth the best mode for carrying out the invention. In addition, the application should include drawings where necessary to promote a clear understanding of the invention. The only formalities required of a provisional application are that the application include the name(s) of the inventor(s), a cover sheet identifying it as a provisional application, and the appropriate filing fee (\$150.00 large entity/\$75.00 small entity).

Provisional applications are effective for one year after being filed, are not examined by the USPTO while on file, and are automatically abandoned after a year from the filing date. You may ask then, in light of the foregoing, what is the benefit?

During the year the provisional application is on file at the USPTO, the inventor may file a regular nonprovisional patent application and claim priority to and the benefit of the provisional application's filing date.

Thus, the provisional application provides a mechanism whereby applicants can quickly and inexpensively establish an early effective filing date for an invention described in the provisional application. Furthermore, the provisional application provides up to twelve months for the applicant to further develop the invention, assess marketability, acquire funding, or seek licenses.

### **3. Preparation of a Patent Application**

Provided that the patentability search uncovers no patents which would significantly hinder seeking a patent, the patent attorney will prepare a patent application with the close assistance of the inventor(s). The patent application contains the following sections, which are briefly described after each section heading (as noted above, only some of these sections are required in a provisional application, however the contents of such sections are the same in both a provisional application and a utility application):

#### **a) Background of the Invention**

This section identifies and describes the state of the art and/or any problem that is to be solved by the invention. This section can also describe conventional or prior art solutions to the problems and shortcomings of such solutions.

#### **b) Summary of the Invention**

The summary of the invention briefly describes the structure and operation of the invention and often parallels the broadest claims. It is used most often to emphasize the novel or useful features of the

*Continued on next page*

invention over what is disclosed in the prior art.

c) Drawings

The drawings graphically depict the structure and operation of the invention. Drawings are very important. If applicable, drawings of the invention at different conceptual levels of understanding should be included. For example, in an electronics application involving a sophisticated electronic circuit, a high level diagram and one or more low level diagrams further defining the high level diagram should be included. It may be desirable to even include an intermediate level diagram, if applicable. Software should be illustrated with flowcharts and/or state diagrams at various conceptual levels. Drawings typically include reference numerals pointing to each part, step, etc. of that which is depicted in the drawing.

d) Brief Description of the Drawings

This section provides a brief summary of each drawing to enable an observer of the application to easily understand the relationship of the figures and the architecture of the invention based upon the figures.

e) Detailed Description of the Preferred Embodiment

This section describes in detail the structure and operation of the invention. From a legal perspective, it is critical that this section satisfy the following requirements: (1) it must adequately describe the invention; (2) it must enable one of ordinary skill in the art to make and use the claimed invention; and (3) it must set forth the best mode of carrying out the claimed invention. The best mode requirement is significant when there are several ways to implement the invention or an element of the invention. It mandates that the best way of implementing or performing the

invention be specifically disclosed in the application. Typically, as this section discusses each part or step of the invention using the reference numerals included in the drawings.

f) Claims

The claims define the scope of the invention and specifically identify the protected subject matter of a patent. The claims of a patent are analogous to the legal description in a real property deed. Both precisely set forth the scope of legal protection. Also, both are arcane in nature and can be difficult to understand. However, it is important that the inventor completely understand the claims, and if he/she does not, then the patent attorney should be consulted for an interpretation of their precise meaning and scope.

g) Abstract of the Disclosure

This section essentially sets forth a one paragraph summary of the invention, emphasizing the specific features of the preferred embodiment. The Abstract of the Disclosure is generally intended for USPTO searching purposes.

**4. Examination of the Patent Application by the USPTO**

After a patent application is filed with the USPTO, the application is assigned to one of the many patent examiners at the USPTO. The examiner is in charge of determining whether the invention as claimed in the patent application is patentable over the prior art.

During the review process, the patent examiner conducts a search through the most pertinent classes and subclasses of prior art, including U.S. patents, foreign patents, and domestic as well as foreign publications. The examiner considers and evaluates the prior art in view of the claims in the application.

It is not uncommon for all of the claims of a patent application to be initially rejected. Moreover, the

examiner may make some formality objections to the claims or the format of the application. A report of the examination, referred to as an "Office Action," detailing the objections/rejections and citing prior art, is prepared by the patent examiner and is mailed to the patent attorney. The patent attorney typically sends a duplicate copy of the Office Action to the inventor upon receipt for comment. Most of the time, the examiner sets a three month deadline for filing a response to the Office Action, which can be extended for up to three additional months upon payment of extension fees.

Prior to the expiration of the time for response, it is common for the inventor and the patent attorney to confer and strategize to prepare an appropriate response, often called an "Amendment," which is eventually filed at the USPTO. The response can comprise any amendments to the application that do not introduce new subject matter the application as filed. The amendments may include changes to rejected claims, cancellation of claims, and/or addition of new claims. Also, the prior art is discussed, particularly the prior art relied upon by the examiner in making any claim rejections, and the merits of the invention in light of the prior art are usually argued in the response.

After the examiner receives the filed response, the examiner reconsiders the application and claims. Hopefully, the examiner will allow all of the claims remaining in the application after the first response by the applicant. However, it is possible that the examiner may issue another Office Action and repeat the objections/rejections, add to them, or withdraw some of them. Thus, there could be a series of Office Actions and corresponding responses.

The examiner may issue a "Final Office Action" after rejecting the claims twice based upon the same grounds. After a Final Office Action, the nature and extent of

making amendments to the claims is severely limited. No new features may be added to the claims, and only minor changes to form or language of the claims are allowed. Moreover, if objections/rejections in the Final Office Action are not overcome by argument and/or minor corrections as set forth in a subsequent response(s), then the application will go “abandoned” six months after the mailing date of the Final Office Action, unless an appeal or one of other various options are pursued.

An appeal of the Final Office Action is filed with the USPTO. If an appeal is pursued, then the Board of Patent Appeals and Interferences, which is a board at the USPTO comprising several individuals who were previously examiners, will review the examiner’s objections/rejections and approve or disapprove them. An appeal is rare and typically takes at least two years.

Returning our focus back to the examination process, if the patent examiner allows the claims of the patent application, then the applicant will receive a Notice of Allowance from the USPTO. The foregoing Notice sets a three month deadline for paying the issue fee, which period cannot be extended by statute. Approximately three to four months after the issue fee is paid, the patent will be published by the USPTO. Once published, the patent enjoys a presumption of validity, which can only be rebutted by a showing of “clear and convincing evidence” (a high legal standard) to the contrary.

#### **D. Notice to the Public of Patent Rights**

A patent owner who makes or sells patented articles should mark the articles with the word “Patent” and the patent number. Failure to mark the patented articles affects the amount of damages which are

recoverable in an infringement action in that the patent owner can only recover damages from the infringer which resulted after the infringer was actually notified of the infringement. However, notice does not affect the ability of the patent holder to obtain an injunction against an infringer.

After a patent application has been filed at the USPTO, the phrases “Patent Applied For” or “Patent Pending” can be applied to the invention or associated advertisements. These phrases have no legal effect, but only indicate that a patent has been filed at the USPTO. It is important to realize that there is no patent protection until issuance of the patent.

The marking of an article as patented that is not in fact patented is against the law and can subject the offender to a fine. Furthermore, false use of the phrases “Patent Applied For” or “Patent Pending” or their equivalent is prohibited and can be the subject of an action for false advertising.

#### **E. Infringement of Patent Rights**

Any person who without permission makes, uses, sells, offers to sell or imports a product or process that is “covered” by an issued patent is in violation of the patent rights owned by the holder or owner of that patent.

The determination of exactly what is “covered” by a patent is determined by the claims of the patent. Each claim of a patent defines a separate and exclusive right. One claim of a patent can be infringed without other claims being infringed and the infringement of one claim constitutes patent infringement.

The determination of infringement is a two step process. First, the scope, or the meaning, of the claims must be established. This first step is also often referred to as the “claim construction” step. Second,

the accused product or process is compared to the properly construed claim. Claim construction is a question of law while comparison of the accused product or process is a question of fact.

The first step, claim construction, is dictated by a large, ever changing and somewhat complex body of law that arguably all began with *Markman v. Westview Instrus., Inc.*, 52 F/3d 967 (Fed. Cir. 1995). The second step, comparison of the accused product or process to the properly construed claim is often not as clear cut as it might appear.

Even if patent protection is not desired, in some cases it may be advisable to perform a patent clearance search at the USPTO in order to determine whether a product to be marketed would infringe patented apparatuses or processes.

A clearance search is performed much the same way as a patentability search as described previously. However, when the prior art patents are reviewed, there is particular focus on the claims of the prior art patents to determine whether they claim subject matter in the proposed product. Such a search is considerably more expensive than a patentability search, primarily because of the time involved in interpreting large numbers of patent claims.

## **II. TRADEMARKS**

### **A. What is a Trademark?**

A trademark is any word, name, symbol, or device used to identify the source or origin of goods/services and to distinguish the goods/services from others. In essence, a trademark designates a particular quality and reputation, which are developed over a period of time.

A trade dress refers to the overall image of a product, including its packaging, configuration, design, or overall impression.

Trademarks are generally classi-

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fied, from strongest to weakest, as follows: arbitrary / fanciful, suggestive, descriptive, or generic. Marks which are arbitrary are the strongest of marks. Arbitrary marks are coined terms that have no descriptive meaning relative to the associated good/service. Examples of arbitrary marks would be Exxon® for petroleum products, Xerox® for copying machines, and Kodak® for cameras. Even Apple® for computers is arbitrary, because although the word “apple” has a defined meaning, that meaning is in no way related to computers. Suggestive marks suggest a quality or characteristic of the associated goods/services and can be protected, but the scope of protection is generally not as broad as for arbitrary marks. Descriptive marks merely describe the associated goods/services or characteristics and are not protected as trademarks because such descriptive terms should be available for public use. However, if a user of a descriptive mark uses the mark for a substantial period and develops “secondary meaning” in the mark so that purchasers view the mark as an indication of source or origin, then the mark can be protected as a trademark. Finally, marks which are or become generic are not accorded protection as they have become the actual names of things.

### **B. What are Trademark Rights?**

One with rights to a mark can prevent others from using similar marks on goods/services which would confuse the public as to the source or origin of the goods/services. A number of factors are considered when determining whether there is a likelihood of confusion. Among the factors are the similarity of the marks, the similarity of the goods/services, and the strength of a mark. Just as with patents, a mark may be an infringement of another without actual copying. However, if copying is proved, enhanced damages (perhaps, treble) can be received.

Moreover, although trademark laws may be used to prevent others from using confusingly similar marks, they cannot prevent others from providing or selling the same goods/services under a nonconfusing mark.

Trademark rights may have infinite duration so long as they are used properly. A trademark owner can lose his rights to a trademark if the trademark evolves into a generic name for a good/service. Examples of this phenomenon include the following generic terms which were originally trademarks: escalator, linoleum, nylon, thermos bottle, and aspirin. Trademarks can also be abandoned through failure to use the mark in association with the goods and/or services with which the mark is associated.

In order to prevent a trademark from becoming generic, many companies ensure that their trademarks are used as an adjective modifying a generic noun and sometimes use the word “brand” after every trademark for this purpose. In addition, diligent “policing” of the mark can prevent it from becoming generic. Trademarks can be “policed” by keeping a watch in the relevant industry of what marks are being used, such as on the Internet or by reviewing the “Official Gazette,” published by the United States Patent and Trade Office each Tuesday, which contains the marks that are the subject of applications for federal registration that have been allowed. Additionally, there are watch services offered by some trademark clearance search firms.

Registration of a trademark, although not mandatory, is recommended because registration can substantially expand the common law rights of a trademark owner. A trademark may be registered federally at the USPTO if used in interstate commerce. Moreover, a trademark may be registered at the registration office in any of the 50 states where used.

In general, state registrations offer only limited additional benefit. A state registration in a particular state can accord standing to sue in that state’s courts of law, pursuant to corresponding state statutes. Further, a state registration can aid in proving priority of use. However, state trademark laws, and especially the level of protection accorded trademark owners by state trademark laws, vary widely from state to state. Although the benefits of state trademark registration are limited, it is advisable to file in the state(s) where the mark is substantially used, because of the low cost usually associated with obtaining a state registration.

Federal registration of a trademark at the USPTO is strongly recommended because federal registration provides nationwide rights. Federal registration expands common law trademark rights in at least the following ways:

### **1. Nationwide Rights**

Under U.S. common law, rights extend only throughout the geographical areas where the mark has actually been used or become known. A junior party in a remote location can adopt a senior party’s mark for identical goods or services and successfully defend against an infringement claim on the basis of good faith, ignorant adoption. Under these circumstances, the junior party can even claim superior rights in his own territory and prevent the senior party from expanding use into the junior party’s territory. However, if the senior party’s mark is federally registered at the USPTO, then the good faith, ignorant adoption defense is unavailable to a junior user in an infringement suit because the junior party is on legal, constructive notice nationwide.

### **2. Federal Jurisdiction**

Federal registration at the USPTO creates federal question jurisdiction for infringement suits. Therefore, a

federal registration accords standing to institute lawsuits against parties in federal court. This can be a tremendous advantage. Trademark suits in federal courts minimize prejudice, if any, which might be experienced by a litigant who is foreign to a particular geographical region. Moreover, the outcome of federal trademark suits is more predictable than in state trademark suits because of the extensive federal case precedent which has developed over many years.

### 3. Value as Court Evidence

A federal trademark registration can be strategically useful in court. First, a certificate of federal registration is prima facie evidence in a court of law of the registrant's ownership right and exclusive right to use the mark throughout the territories of the United States. Second, the registration certificate is prima facie evidence in a court of law of the registrant's continuous use of the mark in commerce from at least as early as (1) the filing date of a "use" application or (2) the alleged use date in an "intent to use" application. Third, many court cases have held that a federal registration is presumptive evidence that the mark, even if arguably descriptive, is distinctive. The rationale for this presumption is that the mark has been determined to be registrable by the expert administrative agency, or the USPTO. This possible presumption may eliminate the need to prove secondary meaning in a court case. Finally, the right to use a registered mark may become "incontestable" in a court of law after five years of use, if proper documentation is filed at the USPTO. This incontestability eliminates important defenses from infringement actions, such as lack of distinctiveness and lack of secondary meaning.

### 4. Federal Statutory Remedies

Federal statutes prescribe recovery of profits, damages, and costs, as

well as equitable relief in the form of injunctions and seizure orders. Even treble damages and attorney's fees can be obtained in exceptional cases.

### 5. Trademark Counterfeiting

The Trademark Counterfeiting Act of 1984 creates very substantial civil and criminal penalties for the counterfeiting of federally registered trademarks.

### 6. Customs Recordation

The federal registration can be filed in the U.S. Customs Service to prevent importation of goods bearing the infringing mark into the United States.

### 7. Deterrent Effect

A federal registration is likely to be uncovered during a clearance search, which is usually performed by a junior party before adopting a new mark. Notice of the federal registration tends to deter junior parties from adopting confusingly similar marks which otherwise could be infringements.

### C. How to get Trademark Rights

Use the mark. Common law rights to a trademark are acquired through use in commerce and are generally limited to the geographical area of actual use. Furthermore, for trademark protection, the mark must be "distinctive" of a source or origin.

Although not mandatory, a trademark search is recommended prior to filing an application for registration of a proposed mark to determine whether the proposed mark can successfully be registered and used. A USPTO trademark examiner can reject registration of the mark if it is confusingly similar to other registered marks. Moreover, even if allowed by the examiner, the mark is published for opposition and trademark owners may oppose registration and/or use.

The analysis of existing trademarks is a very subjective determination, and the scope of a search can vary depending upon the circumstances. If large sums of money are intended to be invested in a proposed mark, it is advisable to perform a highly extensive search, including state and federal trademark registrations as well as common law trademarks throughout the U.S. At a minimum, trademark searches should cover at least the federal registrations at the USPTO.

Regardless of the extent of a trademark search, there is always a certain risk involved when initiating use of a trademark. One reason is that trademark rights accrue based upon use, not registration, and consequently, there may be existing trademark rights which are not readily ascertainable. Another reason results from the fact that the searching procedure is a very subjective analysis. Reasonable minds may differ as to whether marks are confusingly similar.

### 1. Preparation of a Trademark Application

A trademark applicant may file (1) a "use" application or (2) an "intent-to-use" application. Each of these applications has different filing requirements.

An intent-to-use application must include, among other things, a drawing of the mark which is intended to be used and a description of the particular goods/services in connection with which the applicant has a bona fide intention to use the mark. In a use application, there must be included, among other things, a drawing of the mark which is used, the particular goods/services in connection with which the mark is used, and allegations of the applicant's first use of the mark in connection with the goods/services. Further, in each of the foregoing applications, the applicant must sign an oath (or declaration) indicating the truth of the facts asserted in the correspond-

*Continued on next page*

ing trademark application.

Trademark applications should be filed in the name of the entity to which the goodwill of the trademark will inure. In other words, where a company is a source of goods, it is the company that will benefit from the goodwill that is built up in the trademark, not the founder.

An advantage of an intent-to-use application is that at law, constructive use is deemed to have commenced from the date of filing the application. This constructive use can be critical in some circumstances when determining priority of use.

## **2. Examination of the Trademark Application by the USPTO**

After the trademark application is filed at the USPTO, the USPTO assigns the trademark application to an examiner. The examiner performs a trademark search of trademark records to determine whether the proposed mark is confusingly similar to any marks of record.

A report, referred to as an "Official Action," is prepared by the trademark examiner and is forwarded to the attorney. The Official Action may reject the proposed trademark based upon a variety of grounds, including confusing similarity with existing mark registrations, descriptiveness of the mark, technical objections, or for a variety of other reasons. Usually, if the application is rejected, the trademark examiner sets a six month deadline for response to the Official Action.

After a rejection, the client and the attorney consult with each other and strategize in order to prepare a response, often called an "Amendment," which can include arguments and/or amendments in an attempt to achieve allowance of the trademark application. Generally, amendments to the drawing of the proposed trademark will not be permitted.

The response is filed with the

USPTO and typically the same trademark examiner reconsiders the trademark application. Hopefully, the trademark examiner will allow the trademark registration, but the examiner may repeat the rejections. If the examiner rejects the trademark once again, then the examiner may issue the rejections in a "Final Official Action." If the rejections issued in a Final Official Action are not overcome by subsequent responses within six months after the date of the Final Official Action, then the application will become "abandoned". An appeal of final rejections may be filed within the six months after the Final Official Action. In an appeal, the Trademark Trial and Appeal Board (TTAB) reviews the examiner's rejections of the trademark application. The TTAB is made up of a group of extratrademark examiners.

If the trademark application is allowed by the trademark examiner, the trademark will be published for opposition. The USPTO will inform the attorney when the trademark will be published for opposition. The trademark is published in the "Official Gazette" which is a publication of the USPTO which is regularly reviewed by trademark attorneys throughout the country. If an opposition is filed by an existing mark owner during the thirty days after publication, then an opposition proceeding, like a mini-litigation, is held before the TTAB at the USPTO to adjudicate whether registration is proper.

If no opposition to the published trademark is received by the USPTO within thirty days, then the trademark is registered. Even after registration, a mark may be cancelled through a "cancellation" proceeding initiated by another mark owner. The cancellation proceeding is also like a mini-litigation before the TTAB to adjudicate whether registration was proper. The cancellation proceeding must usually be initi-

ated by the mark owner within five years of registration. The reason is that after five years on the register, the registration becomes "incontestable" if proper documentation is filed at the USPTO.

## **D. Notice to the Public of Trademark Rights**

Federal registration entitles the registrant to use the registration symbol "®" in connection with the trademark to give notice of the registrant's trademark rights and deter others from infringing. Prior to registration, the symbols "TM" (for trademark) and "SM" (for service mark) may be used with a mark to serve as notice that the mark owner considers the mark to be proprietary. The symbols "TM" and "SM" should always be in uppercase letters with no periods, and they should never be placed in a circle like the symbol ®. Use of the symbol ® when a mark is in fact not registered is prohibited and can lead to certain legal defenses and causes of action.

## **E. Infringement of a Trademark**

Infringement of a trademark consists of a junior user's (second to use) use of a mark that creates a likelihood of confusion with a senior user's (first to use) mark. The likelihood of confusion standard is used to test infringement of: (1) federally registered marks under Lanham Act §32(a), 15 U.S.C. §1114(a); (2) unregistered marks and trade dress under Lanham Act §43(a), 15 U.S.C. §1125(a); (3) unregistered marks and trade dress under state common law; and (4) state registered marks. Trademark infringement is a form of unfair competition and likewise is a commercial tort.

In the Eleventh Circuit, the following factors are considered in determining whether there is a likelihood of confusion between two marks: (1) strength of the mark; (2) similarity between the two marks themselves

in sight, sound and meaning; (3) similarity between the goods and/or services offered in association with the two marks; (4) similarity between the retail outlets and purchasers of the goods and/or services associated with the mark; (5) the similarity of advertising media used by the parties; (6) the junior user's intent upon adoption of the mark; and (7) actual confusion. The elements of the likelihood of confusion test vary from jurisdiction to jurisdiction.

Dilution is another type of trademark infringement. Dilution occurs where the junior user, while not causing a likelihood of confusion, nevertheless "tarnishes" the image of the senior user or "blurs" the distinctiveness of the senior user's mark. A mark must be relatively strong and famous, at least among a certain target group, in order to be diluted.

Dilution by tarnishment is the use of a senior user's mark by a junior user in an environment that tarnishes the image associated with the famous mark.

Dilution by blurring is the use of a senior user's mark by a junior user, even on a product that greatly differs from the product with which the senior user uses the mark, that "dilutes" or reduces the exclusive association that the mark has with the senior user, its goods and/or services, or the image associated with it. Historically, the dilution by tarnishment argument has been more successful in the courts than the dilution by blurring argument.

Even if registration of a trademark is not desired, a trademark clearance search is always recommended prior to using a proposed mark to determine whether the proposed mark is likely to cause confusion with another's trademark. The reason is that the expense of a search is nominal compared to the problems which could arise without a search. The trademark clearance search is

performed much the same way as the trademark registration search as described previously in this document.

### III. COPYRIGHT

#### A. What is a Copyright?

A copyright is a property right which protects against the copying of "original works of authorship fixed in any tangible medium of expression." These works can include literary (including computer programs), dramatic (including associated music), musical (including associated verbiage), pantomimes and choreographic works; pictorial, graphic and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works. Copyright protection is available for both published and unpublished works. A copyright does not protect an idea, but only an author's particular expression of that idea.

#### B. What are Copyright Rights?

Copyright law gives the copyright owner the following exclusive rights: (1) Reproduction; (2) Adaptation (the right of adaptation refers to the right of preparing derivative works based upon the copyrighted work. A derivative work is a work which borrows substantially from a preexisting work); (3) Public distribution (this concept includes sale, lease, or other transfer. Except for sound recordings and computer programs, a copyright owner loses this right over a copy of the work which has been gifted or sold to another); (4) Public performance (the performance must be "public" in that it is performed in a place "open to the public" or "outside of a normal circle of a family and its social acquaintances"); and (5) Public display.

#### 1. Fair Use

"Fair use" is a defense to an allegation of copyright infringement. The defense of fair use can be asserted when a copy of a protected work is made "for purposes of criticism, comment, news reporting, teaching, scholarship, or research." In determining whether a use is fair use, the following criteria are balanced:

(a) The purpose and character of the use, including whether it is for commercial or nonprofit educational purposes;

(b) The nature of the copyrighted work;

(c) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(d) The effect of the use upon the potential market for or value of the copyrighted work.

A work created on or after January 1, 1978 is protected by copyright law for the life of the author plus 50 years. For a joint work prepared by two or more authors who did not work for hire, the copyright term lasts until 50 years after the death of the last surviving author. Further, the duration of "works made for hire" and anonymous works is 75 years from publication or 100 years from creation, whichever is shorter.

For works created prior to 1978, copyright protection was secured either on the date a work was published or on the date of registration if unpublished. Provided renewals are made, protection can extend for a term of 75 years.

#### C. How to get a Copyright

A work is protected by copyright when it becomes "fixed in any tangible medium of expression" and has sufficient "originality." A work is considered "fixed" when it is in a form which is "permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transi-

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tory duration.” Examples include a manuscript, a sculpture, a photograph, and a magnetic medium, such as a compact disc. Examples of works that are not fixed include speeches or performances that have not been written or recorded, ideas, methods, concepts, etc. Furthermore, the requirement of “originality” means that the author must have contributed more than trivial or insignificant novelty, which is a much easier standard to meet than in patent law. Examples of works with insufficient originality include standard typographic fonts, mere listings of ingredients, familiar symbols or designs, etc.

A “work made for hire” is a work generated by an employee within the scope of his employment, and in this case, the employer owns the copyright. In the situation where an independent contractor is hired to generate a particular work, the work is generally not a “work for hire” and the contractor is the owner of the work. Any ambiguity as to the relationship should be resolved with a written agreement.

### **1. Benefits of Registration**

Although registration is not generally a requirement for protection, the copyright law accords several significant advantages to those copyright owners who make the registration. These advantages include the following:

(a) Registration establishes a public record of the copyright claim;

(b) Registration is a prerequisite for bringing a suit for copyright infringement; and,

(c) If registration is made within three months after publication of the work or prior to an infringement of the work, statutory damages and attorney’s fees are available to the copyright owner. Statutory damages can range from \$500 to \$100,000 for each work infringed.

### **2. Copyright Registration Search**

Because copyright law protects against copying of works and does not accord exclusive rights, a search of existing copyrights is generally unnecessary. In fact, a search prior to creation should be avoided because it could generate an argument of copying. Copying can be proven in court by showing access to the protected work and substantial similarity.

### **3. Preparation of the Copyright Application**

In order to register for copyright protection, (1) a registration application, (2) a deposit of copies of the work, and (3) a fee are filed at the Copyright Office at the Library of Congress, Washington, D.C. There is a particular application for each of the categories of works, as noted previously. The copyright registration is intended to make basic facts concerning a copyright of public record.

The deposit requirements vary for particular works. For example, if the work is an unpublished or published computer program, the deposit requirement is one copy of a visually perceptible copy in source code of the first and last 25 pages of the program. For a program of less than 50 pages, the deposit is a copy of the entire program. If the applicant is unable or unwilling to deposit source code, he/she must state in writing that the work as deposited in an object code contains copyrightable authorship. It should be noted that a copyright registration for a computer program, in source or object code, will cover all of the copyrightable expression embodied in the computer program, including the user interface and screen displays. Furthermore, for computer programs containing trade secrets, there are a lengthy set of specific special deposit requirements designed for protecting the contained trade secrets.

### **4. Examination of the Copyright Application**

When the copyright registration application is filed at the Copyright Office, the Copyright Office will assign the registration application to a copyright examiner who will review the submission for the following three elements: (a) properly completed application; (b) nonrefundable government filing fee; and (c) nonreturnable deposit of the work being registered. As mentioned, the deposit requirements vary for particular works.

Application submissions which do not have the above-noted three elements are ordinarily returned to the applicant. Further, only a cursory review of the application is performed by the examiner to determine whether the work contains originality. If the examiner considers the work to not have sufficient originality, the application can be rejected. Within approximately 120 days after filing the copyright application, the copyright examiner will forward (1) a response asking for further information, (2) a response indicating disallowance and the reasons therefor, or (3) a Certificate of Registration, which is essentially a copy of the application with an assigned registration number, the effective date of registration, and the seal/signature of the Register of Copyrights. Further, if the Copyright Office determines that the work is not registrable, the applicant is entitled to respond.

### **D. Notice to the Public of Copyright Rights**

A copyright notice is not required on works first published on or after March 1, 1989, but is highly recommended due to significant legal incentives. A notice can prevent a defendant from claiming “innocent infringement.” If a defendant is successful in claiming innocent infringement, then there may be a reduction in damages.



Further, notice may deter potential infringers.

There are three elements in a proper copyright notice:

1. the symbol © and/or the word “copyright” or the abbreviation “copr.,” for the purpose of informing the public that the work is protected by copyright;
2. year of first publication of the work; and
3. name of the copyright owner.

The phrase “All Rights Reserved” should be placed in a copyright notice. This phrase is merely parenthetical in the U.S., but is necessary for protection under some international treaties. Also, for sound recordings, such as audiotapes and phonograph records, the symbol “P” is substituted for the word “copyright” or the symbol ©.

#### **E. Infringement of a Copyright**

One who violates any of the five exclusive rights of a copyright mentioned previously is an infringer pursuant to 17 U.S.C. §501(a). In order to prevail on a copyright infringement allegation one must prove both (1) ownership of a valid copyright; and (2) copying of the constituent elements of the work that are original. Thus, unlike trademarks, but similar to patents, in order to sue a party for copyright infringement, the would-be plaintiff must have a valid copyright registration.

The second elements may be proven in one of two ways, by evidence of direct copying or by showing that a defendant had access to the copyrighted material and that the defendant’s material is “substantially similar” to the copyrighted material. Direct copying occurs where the infringer used the copyright protected express as the model or template for the defendant’s own work. Thus, direct copying is difficult to prove and rarely alleged.

In order to successfully establish

the second method of proving “copying,” access must be proven. It cannot be arrived at through mere speculation or conjecture. The “possibility” of access or even public dissemination does not necessarily establish access.

Substantial similarity takes into consideration whether an average observer would recognize the alleged copy as having been appropriated from the copyrighted work. It must be remembered that copyright protects an expression of the idea not the idea itself. Thus, the mere existence of two identical works may not constitute copyright infringement.

A search of copyright registrations is warranted when one wishes to copy an existing work, whether or not the work has a copyright notice, so as to determine whether the work has been registered for copyright protection. A search is performed by searching the public records at the Copyright Office or by hiring a Copyright Office searcher, at a prescribed statutory rate per hour, to perform the search. A search will determine whether the existing work is registered and whether the copyright has expired. If registered, the owner will be identified so that a license may be acquired.

## **IV. TRADE SECRET**

### **A. What is a Trade Secret?**

Misappropriation of trade secrets, or technical “know-how,” is actionable under state law as a tort and as unfair competition. A trade secret is basically business information which has been maintained confidential and which has value in the industry in that the information is not generally known and would be difficult to obtain by competitors. Misappropriation means obtaining access to the confidential business information via a breach of confidence or other improper methods,

including industrial espionage, such as theft, bribery, misrepresentation, and breach of a confidentiality agreement. However, trade secrets can be obtained through proper methods, including reverse engineering and independent creation. An example of a trade secret is the famous unknown formula for Coca Cola® brand soft drink.

### **B. What are Trade Secret Rights?**

A trade secret can last for an infinite length of time, provided it does not become generally known in the trade. It should be noted that if an apparatus having trade secrets is to be patented, failure to disclose the trade secrets in the description of the patent may result in invalidating the patent for failure to provide an adequate enabling disclosure and/or the best mode of practicing the invention.

### **C. How to get a Trade Secret**

The owner of a trade secret must make reasonable efforts to maintain secrecy of the confidential information. Reasonable efforts include, for example, limiting access to the confidential information on a “need to know” basis, executing confidentiality agreements, marking information as “confidential,” and securing such information in a secure location. There is no notice requirement or recommendation regarding trade secrets.

### **D. Infringement of a Trade Secret**

Unlike infringement of a patent, only improper methods of obtaining trade secret information constitute infringement or misappropriation of a trade secret. Classic such improper methods include: (1) industrial espionage; (2) bribery; (3) misrepresentation; and (4) breach of an explicit or implied contract duty to maintain confidentiality.

# Lawyers Foundation of Georgia

The Lawyers Foundation of Georgia is dedicated to enhancing the system of justice, supporting the lawyers who serve it, and assist the community served by it.

The Foundation seeks to further those principles by improving the administration of justice and advancing the science of law. Educating the public about the law and lawyers, attracting a high caliber of individual through the mock trial program and scholarships, encouraging pro bono representation and community service by attorneys is just part of what the Lawyers Foundation of Georgia can do.

Little attention has been paid to the countless efforts lawyers devote to helping the public. Many states have responded to this prejudicial atmosphere by establishing voluntary foundations committed to improving the administration of justice, increasing public awareness and knowledge of the law, and fostering the principles of duty and service to the public.

In 1978, the State Bar established the Public Service Foundation. In 1983, the Fellows Program was born, and it became the membership program of the Georgia Bar Foundation. A fund was established which was used for a variety of programs designed to foster among the members of the State Bar the principals of duty and service to the public, improve the administration of justice and advance the science of law.

Not long after the Public Service Foundation was founded, the IOLTA Program came into being, and a guaranteed stream of funds became available. The Fellows Program became the Fellows Program of the State Bar Foundation.

In 1996, the decision was made to establish a strictly voluntary philanthropic arm of the State Bar of Georgia, the Public Service Foundation became the Lawyers Foundation of Georgia, and the Fellows Program became the membership program and the backbone of the Foundation. The goal of reactivating the Foundation was to provide the members of the State Bar of Georgia with an opportunity to contribute to a nonprofit organization which would use those funds to serve the public and the legal profession.

Members of the legal profession take great pride in the services we provide to the public as responsible citizens and true professionals. Through the Lawyers Foundation, we can build our collective capacity to do good.

The LFG has entered the next millennium prepared to advance the integrity of our profession by raising funds which will be used to improve the administration of justice, advance the science of law and perhaps most of all, uphold the principles of duty and service to the public.

The Foundation has funded many valuable programs over the years. A short list of these projects includes:

**Service Juris** - For the past five years, the LFG worked with Hands On Atlanta and Atlanta area attorneys and put together **Service Juris**, a service day for Atlanta Area Lawyers – over 700 attorneys participated this year and the program will be repeated next year.

**Wills Project** - The Wills Projects of Atlanta Volunteer Lawyers Foundation provided the expertise and materials to allow firefighters in the Atlanta area to obtain a will.

**Client Care Kit** - An information packet that was distributed to all active members of the Bar. The packet included valuable information about the attorney client relationship.

**BASICS** – Bar Association Support to Improve Correctional Service. The State Bar of Georgia is the only state which has been able to keep a Bar supported anti-recidivism program alive. 22 were started in 1978, and Georgia's is the only one to remain viable.

**Challenge Grants** - In 2000, the LFG initiated the Challenge Grant Program whereby a law-related organization would provide matching funds in support of a program. Over the last years, the Foundation has funded 15 grants, totaling \$150,000. These grants also generated at least \$150,000 in matching funds.

## Representative Challenge Grants

- Individual Rights Section and Access to Justice Committee for the Promoting Equal Justice Project
- Georgia Association of Black Women Attorneys (GABWA) for the Civil Pro Bono Project.
- Douglas County Bar Association for LRE Materials for Schools in Douglas County
- General Practice & Trial Section for a High School Mock Trial Instructional Video
- The Western Circuit Bar Association for the Adult Literacy Project of the Athens Justice Project (AJP)
- Georgia Legal Services for the High-Tech Self-Help Office (SHO) for rural southwest Georgia.
- Columbus Bar Association for the Columbus Truancy Intervention Project (TIIP)
- Augusta Bar Association for Children Enrichment. The Augusta Bar donated the proceeds of the Mulherin Plaid Charity Golf Tournament, matched by the LFG, to Children Enrichment Inc, and shelter and Child Advocacy Center
- Atlanta Volunteer Lawyers Foundation for their Advocacy in Education for Special Needs Children.
- The Georgia Indigent Defense Council and the Prosecuting Attorneys Council of Georgia received a joint grant for the funding for the Public Interest Lawyers Fund

## How to Support the Foundation

### ■ The Fellows Program

Membership in the Fellows Program is limited to three percent of the membership of the State Bar of Georgia. Fellows are selected from among the membership of the State Bar of Georgia whose public and private careers demonstrate outstanding legal abilities and a devotion to their communities. The Fellow Nomination Form is available online or by contacting the Foundation. A list of current and deceased Fellows is also available.

### ■ Memorials and Tributes

The Lawyers Foundation of Georgia's Memorials and Tributes Program is offered as a unique way to honor and remember a deceased Georgia lawyer. It is also a wonderful way to honor an individual or firm for reaching a particular milestone, such as making partner, retiring, or reaching a significant anniversary.

### ■ Sponsorships

An individual or corporation may sponsor a variety of activities for the Foundation. Please contact the Foundation's Director, Lauren Larmer Barrett, for further information about sponsorship opportunities.

### ■ Gifts of Stock

Stocks and bonds that have increased in value are an excellent vehicle for charitable gifts to the Foundation.

For more information, please contact:  
Lauren Larmer Barrett, Executive Director  
Lawyers Foundation of Georgia  
104 Marietta Street, NW, Suite 630 • Atlanta, GA 30303  
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<http://www.gabar.org/lfg.htm>

# Casemaker Is Here!

Jennifer Benton  
Resource Advisor  
Law Practice Management

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*Ms. Jennifer Benton is the Resource Advisor in the State Bar of Georgia's Law Practice Management Program, which provides extensive practice management and technology consulting to the members of the Georgia Bar. Ms. Benton received her Bachelor's of Science in Finance and Economics from Lipscomb University in Nashville, Tennessee. She also received her Master's of Business Administration from Richmond, the American International University in London, in London, England. She is a Certified Consultant and Trainer for Amicus Attorney and TimeMatters and she manages the resources available to bar members through the Law Practice Management's resource library.*

What do all firms have in common regardless of size or area of practice? The first thing that comes to mind is the bottom line. Whether out for a large profit to share with shareholders or just enough to pay the mortgage and office staff, all firms are concerned about their finances. One of the most widely watched numbers within firms and one that can grow by leaps and bounds before you know it, is expenses. Between office supplies, rent, and the always-present unexpected expense a firm can be paying out much more than they are bringing in on a regular basis. But wait, wasn't this article about legal research? Yes! It is about one of the most exciting new member benefits that the State Bar of Georgia has to offer. And it's going to help increase your bottom line by decreasing your expenses!

If you have not heard of Casemaker yet, don't worry, you soon will. Casemaker is a free legal research tool the State Bar of Georgia will offer all of its members for use at anytime. Casemaker was originally a venture between the Ohio State Bar and a company called Lawriter, Corp. They set out to create a 'library' of information that was easily searchable and affordable for attorneys in Ohio. Since then, Casemaker has developed into a Web based service with a 21 state consortium that continues to grow. The Casemaker 'web library,' as it is termed, consists of each consortium states' library, termed 'book,' as well

the Federal library.

Take a look at some of the most frequently asked questions that we have received at the State Bar of Georgia about Casemaker:

## **When will Casemaker be available for my use?**

Casemaker was rolled out for members use January 3, 2005. Visit the State Bar of Georgia's website at [www.gabar.org](http://www.gabar.org) to stay abreast of the latest news on Casemaker's arrival.

## **How do I sign into Casemaker?**

Your username will be your bar membership number and your initial password will be your last name. You will be asked to change your password upon your first login to Casemaker.

## **Where do I go to sign into Casemaker?**

There will be two ways to sign into Casemaker. First, navigate to the State Bar of Georgia's website at [www.gabar.org](http://www.gabar.org). Then you will be able to click on the link labeled 'Casemaker' and the sign-in screen will appear. Use your username and password to sign in. The second option to access Casemaker is under the 'Member Benefits' link. You will use the same username and password as the first option, but by using this method you will not only receive access to Casemaker, but will be able to do things like change your address with the Bar.

*Continued on next page*

**Will Casemaker provide for all of my legal research needs?**

This is a big question for all firms planning their budgets for years to come. After speaking with the consortium's state members and their users, we have determined that Casemaker will provide for 95% of an average firm's legal research needs and it's free! Casemaker needs to be taken into consideration when determining what legal research tools your firm will budget for.

**How do I find the information I want in Casemaker?**

You can search and browse Casemaker like most other legal research tools on the market. You will find specific instructions on how to use these functions on the State Bar's website, [www.gabar.org](http://www.gabar.org), in the user manual once the Casemaker link has been added. If you have a question that cannot be answered by the user manual, there will be an 800 number and an e-mail address available to you specifically for Casemaker Help. These will be posted under the Casemaker link as well.

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# Affordable High Tech Trials

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## I. INTRODUCTION

The advent of new technological tools such as visual presenters, "poster printers," laser pointers, enhanced opaque projectors ("under-head projectors") and laptop computers, linked with the medium of television or projectors, has revolutionized the presentation of courtroom evidence. Effective courtroom presentation to juries involved in complex trials often requires the use of these tools to illustrate a point and to assist a jury in understanding a case. Creative and appropriate use of these aids keeps the jurors attentive, simplifies complex and technical information, increases retention of counsel's key points, explains damages better, and increases the likelihood of a favorable verdict.

This paper is intended to provide you with an overview of the various aids you can use at trial to achieve success in the courtroom while also considering the cost-effectiveness of these aids. The presentation does not deal with computer generated graphics or expensive recreations. I will also share with you effective "high-tech" pre-trial and trial techniques, particularly the use of focus groups, various types of demonstrative evidence, the admissibility of such evidence, presentation tools, as well as the creation of a record.

## II. PRE-TRIAL TECHNIQUES: FOCUS GROUPS

### A. What Is a Focus Group?

A focus group is a collection of lay people gathered to hear presentation of evidence and general presentation of any aspect of a case. A focus group provides a safe and relatively inexpensive means of seeing, firsthand, how a jury will consider your case. The participants may be gathered through expertise of a trial consulting firm or by your own office, by running advertisements in the local newspaper.

### B. The Value of Focus Groups

A focus group provides counsel with an opportunity to receive feedback by having the group observe a condensed version of a trial (a "mini-trial"), the testimony of a particular witness, or presentation of a particular issue for use at trial. It also provides witnesses the opportunity for a safe "dry-run" of testifying at trial and affords insight into how their testimony will be received. In addition, it provides a preview of the potential weaknesses of the testimony that will be raised on cross-examination. It is most useful to pose even harder questions to the witnesses than you actually anticipate will be posed at trial.

*Continued on next page*

### **C. Evaluating Damages**

A focus group can help evaluate how much a case is really worth. By requesting the focus group to deliberate thoroughly, as they would in a trial situation, including reaching a "verdict" on damages, the group assists in appraising the value of the case for pre-trial settlement purposes or for determining how to present the damages issue to the jury at trial.

### **D. Client Expectations**

Focus groups have great value in allowing the client to understand problems with liability and verdict expectancy. A fresh outlook obtained through a focus group which has not been associated with the case allows both counsel and witnesses to recognize the strengths and weaknesses of arguments and testimony before the case actually goes to trial. Sometimes a client will not budge on an arbitrary figure he or she assigns to the value of their case. Such a client may feel there is no question that the defendant was responsible for the injury sustained but may not understand that damages are awarded on the basis of legal liability. A focus group may help open such a client's eyes as to issues of liability and allow the client a clearer view of the damages that can even be considered. The client will have the benefit of learning how a jury assesses injury, pain and suffering, disability and economic loss when awarding a verdict. The focus group can help put matters of money into a realistic perspective for both counsel and client.

### **E. When To Use Focus Groups & Cost**

Focus groups are generally used in cases which involve potentially large verdicts. The larger the anticipated verdict, the more extensive a focus group can be.

There is a wide range of approaches in conducting focus

groups, all of which affect the cost. Focus groups arranged by consulting firms, using the consultant's facilities, professional moderators, employing several focus groups, and sometimes conducted over several evenings, can cost over \$20,000.00. This sum may be appropriate in the right case - one where the anticipated verdict is very high and the issues are complex. Other consulting firms, which arrange focus groups at their facilities without professional moderators, cost between \$2,500.00 and \$9,000.00 depending on the number of groups participating and the post-event consultation services offered.

Some law firms handle focus groups in their own offices, employing eight to ten people during evenings. Local staffing agencies can be used as a resource to gather participants. In-house focus groups average about \$550.00 for ten participants. This expense includes postage for reminders to participants, food, staff expenses, and fees for participants.

### **F. Added Benefits of Focus Groups**

The deadline of an approaching focus group helps those working on the case to make necessary decisions regarding theory, witnesses, exhibits, proposed lines of questioning and argument, etc. In addition, the deadline creates added incentive to complete tasks that will make the case better prepared in advance of trial. Most importantly, the feedback derived from a focus group provides answers to strategy questions well in advance of trial, allowing time to adjust your case to make necessary changes that you determine will help your client's case.

## **III. TYPES OF TRIAL AIDS**

### **A. Visual Aids**

Studies have shown that written or spoken words alone are not enough to hold the attention of jurors for

very long. Seventy-five to eighty-five percent (75-85%) of what individuals learn is through what they see. Ten percent (10%) of information delivered verbally alone is remembered after three days, and twenty percent (20%) of information delivered only visually is remembered three days later. However, the combination of verbal and visual communication increases retention rates to sixty-five percent (65%). Therefore, trial lawyers must combine the mediums to maximize juror retention. If jurors can visually grasp your points by your use of visual aids in addition to hearing testimony on the subject matter, the attorney will frequently have the edge in the case.

We have found that visual aids can be helpful in direct and cross-examination of witnesses. Using an aid such as a visual presenter, which displays any demonstrative evidence, plugs into a TV and has a powerful zoom capability, we can cross-examine a witness more effectively by placing previously admitted evidence on the presenter and use the zoom capability to focus on the inconsistency found in the witnesses' prior testimony for impeachment purposes. We can also highlight the evidence supporting our witnesses' direct testimony by placing that evidence on the visual presenter and focusing on the area of the document we wish to emphasize in the testimony. The jurors and the judge can see our evidence more clearly because it is either displayed on the TV or is projected onto a large screen which is linked to the visual presenter. The one-time cost for a video presenter makes it cost-effective and within an attorney's budget.

Other advances have occurred in opaque projection. Some projectors on the market allow counsel to project text, photographs, charts, three-dimensional reconstructions, medical drawings, charts and almost any document, with no advance prepa-

ration and in ambient light with the appropriate screen. We use an "under-head" projection system that accommodates three-dimensional objects such as books, photos, and other documents. We have found that projection to a screen is preferred over the television presentation because jurors are exposed to a larger visual field. Low cost, ease of creation on a photocopier, and instant availability make this form or visual communication highly effective. Even full color photographs and charts can be projected at no additional cost.

Never underestimate the value of the flip chart for direct and especially, cross examination. With marker in hand and chart ready, key testimony can be instantly recorded before the jury's eyes. This places the proper emphasis on the testimony since the juror hears the testimony from the mouth of the witness and visualizes its importance as it is written on a chart in front of him or her. In summation, the recorded evidence on the flip chart can be shown to the jury giving them instant recall of the evidence.

"Poster printers" are also great tools counsel can bring to the court to enlarge any document, illustration, chart, or photo to a poster size at the last minute, albeit in black and white. Poster printers can also be used before trial in preparing enlarged documents. For instance, we have used a poster printer in our practice to enlarge the Annuity Mortality Table for 1949 Ultimate or to blow-up charts of medical bill summaries, jury verdict forms and even deposition testimony.

Even defense exhibits helpful to our side of the case can be enlarged at trial in minutes by use of the poster printer or handily demonstrated by use of the opaque projector. We bring the poster printer and several blank foam boards to trial. The ease and speed of this technology allows us to create blow-up

documents to present to the jury at nearly a moment's notice.

Investing in a good digital camera and video equipment allows the attorney to create blow-ups, slides or a videotape movie of the scene where the circumstances of the case took place. This equipment is also vital for day-in-the-life videos. It should be remembered that with comparatively minimal investment, even the smallest of law firms can acquire the equipment to create demonstrative evidence.

The technologies discussed above range in price between \$1,000.00 to \$6,000.00. That range, of course, is still a substantial capital investment, especially for multiple pieces of equipment and for the smaller office. However, each of these pieces of equipment will pay for itself in a very short period of time in any office with a reasonable trial schedule. Thus, the cost for most exhibit enlargements is \$15 to \$30, depending on the type of mounting and color and size of the foam board. This disbursement method is not only a substantial cost savings to the client (typical enlargement prices for example start at \$100 and go up astronomically), but add substantial value to the case presentation and enhance the probabilities of a favorable verdict. In addition, some of these technologies are available on a rental basis. Rental also provides a way for your office to try a product before making the investment to purchase.

## **B. Computers**

Many attorneys today will not consider going to trial without a lap-top computer and a printer. We have found lap-top computers to be an indispensable trial aid. Georgia Law On Disk is an instant ready reference for any legal question which might be presented in the courtroom. We have our own database which includes not only law but also quotations, forms, and

suggestions on the various subjects stored.

The Georgia Law On Disk database is a CD-rom program that allows us to answer research questions on Georgia law quickly. The database includes full text of the Georgia Constitution, statutes, rules, cases, etc. The product also provides research references to cases, Attorney General Opinions, law reviews and ALRs. The program gives us the ability to retrieve Georgia Supreme Court and Court of Appeals cases opposing counsel has cited in their memoranda at trial. Counsel can also retrieve the Code of Georgia Annotated and the Georgia Rules of Court for the particular court where the case is being tried. The program allows the user to copy portions of the retrieved document into word processing documents, thus speeding the process of writing and responding to briefs, pleadings, and trial memoranda. This program is indispensable to the trial attorney.

Another reason attorneys bring computers to trial is to allow them to quickly search and retrieve depositions, pleadings, and other important information stored in the computer. For example, the advent of the "E-Transcript" deposition transcript has revolutionized the ability to perform dramatic impeachment with prior inconsistencies. Suppose a defendant doctor testifies at trial in a medical negligence case that he was closely involved in every step of a worrisome labor being primarily handled by a nurse midwife, but when he was deposed before being added as a defendant, he testified no less than six or seven times that he was not involved in the labor in any respect, impeachment by "E-Transcript" can be devastating. By having a laptop computer connected to a television monitor or projector, the prior sworn testimony can be instantly accessed through "E-Transcript's" word search and indexing capabil-

*Continued on next page*

ity and projected before the jury. The jury is then permitted to read along to themselves as the witness reads aloud his prior inconsistent statements – every one of them.

The value of a good laptop computer at trial cannot be underestimated. Today's computer industry is replete with various software capable of incorporating all documentary, photographic, and video evidence into a single program, which permits an instant display of any item of evidence to the jury through a computer projection. The evidence is scanned or burned onto a CD for a cost ranging between 10 – 25 cents per page by using an outsourcing company and then loaded onto an external hard drive. Wreck reports, medical records, the defendant's policies and procedures, and even all photos can be scanned. We have recently begun using a program called "Sanction" for this purpose. Sanction will display documentary, photographic and video evidence, including video depositions with synchronized transcript. It is programmed to allow documents to be displayed so that the entire document can be shown while select portions are enlarged and even highlighted before the jury with quick and simple mouse clicks or key strokes. The software is less than \$500 and can be used over and over again for every case. In just two or three trials, the software has paid for itself with the money saved from enlargements and video editing.

#### **IV. TYPES OF DEMONSTRATIVE EVIDENCE**

The only limit on the various types of demonstrative evidence is counsel's imagination. Some kinds of exhibits include, but are not limited to: charts, blackboards, graphs, diagrams, etc. (with effec-

tive use of colors), tape recordings, both audio and visual, e.g. day-in-the-life videos, physical examination videos to demonstrate the extent of injuries, reenactments, video depositions, models of human anatomy, automobiles, buildings, photographs, slide presentations, and courtroom experiments. Models and charts of the human anatomy can be used in different cases repeatedly to explain the nature and extent of the injuries the client sustained. Counsel should remember that while a trial is in part a show or performance, the overuse of demonstrative evidence may draw attention away from the facts of the case.

A day in the life video can be used effectively to show a plaintiff's pain and suffering in serious injury cases. The jury can see exactly what the plaintiff's daily existence has become. The video can show the injured plaintiff undergoing different types of therapy. A doctor, therapist, or life-care planner, who has seen the tape prior to trial, can discuss the need for the therapies and the form and techniques of treatment.

#### **V. ADMISSIBILITY OF DEMONSTRATIVE EVIDENCE**

Demonstrative evidence is admissible if it assists the jury in understanding the issues in the case. However, the exhibit must not be overly prejudicial. Rather, the exhibit must be a fair and accurate portrayal of what it purports to be and must be relevant to the issues in the case. Although the judge uses discretion to decide whether the exhibit will be permitted in the jury room but use of the exhibit at trial should be allowed.

Typically, counsel can resolve the issue of what exhibits will be admit-

ted at trial by agreement. If not, the attorney seeking to use a piece of demonstrative evidence may want to seek a pre-trial ruling on its admissibility. This ruling justifies the expense of creating the exhibit and allows the attorney to better prepare for trial. For example, once an attorney knows that a particular exhibit is admissible, it can be incorporated in the opening or closing statement. Of course, another option is to offer the demonstrative aid at trial.

Non-evidentiary demonstrative aids visually convey, supplement, or summarize the witness' oral testimony or the argument of counsel. They assist in explaining an important issue to the jury as opposed to being evidence themselves and do not go into the jury room. They are a means and not an end as are evidentiary visual aids but are very important as tools used to communicate with the jury. Non-evidentiary visual aids can be used at any time as they require no evidentiary foundation. They may be used in opening or closing and while examining witnesses.

#### **VI. CREATING A RECORD**

It is important to create a record of the trial for use at a later time, e.g., appeal or a new trial. Since the purpose of a demonstrative exhibit is to present visual information to the jury, the attorney must take precautions to assure that a proper record is being created, e.g., "Plaintiff's Ex. 1," if regular exhibits are numerical. The attorney utilizing the exhibit must make sure to verbally state what exhibit is being used and what is being portrayed with the exhibit. Then, an appellate judge and law clerk can understand the transcript of the trial better.

While non-evidentiary visual aids are not exhibits, they should still be



marked to complete the record as to what was being said during witness examination, statement or argument. In addition, the marking process may validate the visual aid in the jury's mind as an official part of the process.

Counsel should photograph all oversized exhibits with a Polaroid camera. These photographs preserve the exhibits and aid the attorney in deciding which exhibits to use during closing arguments. Additionally, these photographs can be included with the transcript of the trial so that the appellate court will be able to see the exhibit that a

witness is referring to as the judge or law clerk reviews the transcript.

## VII. CONCLUSION

Use of focus groups as part of pre-trial technique can help streamline and fine-tune a case before it goes to trial. The process is aimed at discovering the value of the cases and their strengths and weaknesses. It can be either an expensive or relatively inexpensive undertaking. The type of process and resources needed must be in large part determined by the size of the anticipated verdict.

The amount of money counsel spends on demonstrative evidence need not be very much. Trial aids can be very affordable if counsel keeps in mind that the investment is made once for use in future trials. In-house productions of demonstrative evidence can be inexpensive. The ability of the law office to produce these exhibits and the needs of the case will dictate how much money to spend on preparing the exhibits. Outside professionals can prepare sophisticated exhibits for trial only when it is necessary. Demonstrative evidence should be a part of every case – and it can be affordable!

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# (Only) The Plain Meaning of “Tort Reform”

Roger C. Wilson



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“Tort reform” legislation now has been enacted by the Georgia Legislature and Georgia courts soon will begin the complex process of construing and applying the new law. One matter of contention almost certainly will be the issue of what general interpretive approaches are to be used in that process of construction and application. This is particularly so given some of the apparent incongruities among different provisions of the new law. Defendants likely will seek to ford such difficulties by arguing that the legislation should be construed “broadly” and “remedially” in order to effectuate legislative concerns and policies that will be said to underlie the enactment of the legislation. In opposition to such contentions, plaintiffs likely will argue that the sole or primary interpretive guide must be the plain, ordinary meaning of the statutory language (to the extent that exists in a given circumstance), rather than some more ethereal notions of legislative purpose or goals. Such a controversy arises not infrequently with the application of broad statutory schemes, such as the Georgia legislation, especially those enacted in response to purported acute public policy concerns (purported “litigation crises”, “liability crises”, and so on). A recent opinion by the Fifth Circuit U.S. Court of Appeals, involving a statutory scheme analogous to the Georgia legislation in these respects, seems to provide

some useful guidance on this issue.

The opinion, *Moss, et al. v. Merck, et al.*, 381 F.3d 501(5th Cir. 2004), involved the federal Vaccine Act. That Act, which places restrictions on tort litigation involving injuries caused by vaccines, was adopted by Congress avowedly in order to ensure an adequate national vaccine supply (put otherwise, in order to prevent a vaccine-shortage crisis thought to be threatened by having vaccine manufacturers subject to regular tort liability for injuries caused by their vaccines). The same issue of interpretive approach described above has arisen regarding the Vaccine Act: Defendants (even those who did not manufacture vaccines) have argued for a broad application of the Act to protect them from liability, based on those larger legislative concerns underlying the Act; plaintiffs, on the other hand, have argued that the Act must be applied precisely in accordance with the regular meaning of its terms, and that the Act’s scope should not be stretched beyond those terms even in order to effectuate any underlying legislative purposes. The issue was presented in *Moss*, a Texas federal court tort action in which damages are sought based on injuries caused by vaccines to a child and indirectly to the parents. The trial court accepted the defense argument that the Act should be broadly applied—including to defendants

that did not manufacture vaccines but instead only developed and manufactured a component of the vaccines—in order to maximally effectuate the legislative purposes and concerns underlying the Act. The Fifth Circuit disagreed and reversed, holding that instead the terms of the Act must be applied strictly in accordance with their ordinary meaning.

The injuries involved in *Moss* are alleged to have been caused by mercury contained in a preservative called Thimerosal, developed by Eli Lilly and Company, which was used in a number of infant and childhood vaccines. The preservative consisted of nearly half mercury by weight and was long used in infant and childhood vaccines. As the number of vaccinations mandated for infants and young children increased in recent years, so did the amount of mercury that those children received from the Thimerosal contained in those vaccines; correspondingly, so did the incidence of autism-related diagnoses in young children. The symptoms of mercury poisoning are quite similar to the symptoms of autism-related disorders. When the confluence of these circumstances began to be recognized, Thimerosal then was removed from vaccines at the suggestion of the medical community. Litigation, such as *Moss*, ensued in which parents of children diagnosed with autism-type disorders sued the vaccine manufacturers as well as other defendants, including Lilly, seeking damages for the direct harm suffered by their children and also for harm (such as loss of consortium or loss of services) suffered by the parents as a result of the injuries to their children.

The Vaccine Act restricts in various ways regular tort claims for a vaccine-caused injury when asserted by or for persons who received a vaccine and against

vaccine manufacturers or administrators. Two primary issues in *Moss* were whether these restrictions also should be construed to extend to claims against Eli Lilly and generally to claims for loss of consortium asserted by parents, who did not themselves “receive” any vaccination. The plaintiffs argued that the Act does not apply to claims against Lilly because Lilly was not a manufacturer of vaccines, and that the Act did not apply to the parents’ loss of consortium claims because those parents did not receive the vaccinations. Lilly, on the other hand argued that the Act should be broadly construed to apply to such claims, in order best to give effect to its important underlying legislative policies, by restricting all claims involving vaccine-related injuries, against all defendants involved in the vaccine manufacturing process, even if such defendants did not actually manufacture the vaccines. The trial court in *Moss* sided with Lilly and ruled that the Act should be deemed to apply to all the claims involved.

The Fifth Circuit reversed and ruled that the statutory language, construed solely in accordance with its ordinary meaning, must govern and must not be displaced by extraneous considerations such as underlying legislative policies:

Because Thimerosal is not a vaccine, its producers are not vaccine manufacturers as that term is defined in the Vaccine Act, 42 U.S.C. § 300aa-33(3), so they are not entitled to the protections of the Act’s restriction on the filing of suits.

[381 F.3d at 503 (footnote omitted).]

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The Vaccine Act does not apply to all vaccine-related lawsuits[,] but only those brought against a “vaccine administrator or manufacturer.” §300aa-11(a)(2)(A). The Act

defines “vaccine manufacturer” as “any corporation, organization, or institution, whether public or private ... which manufactures, imports, processes, or distributes under its label any vaccine set forth in the Vaccine Injury Table.” § 300aa-33(3). Still, the statute does not define the term “vaccine,” requiring us to ascertain the meaning of that word through ordinary principles of statutory construction. In the absence of a controlling definition, we interpret statutes according to their plain, ordinary meaning.

Under the plain meaning of the Vaccine Act, Eli Lilly is not a vaccine manufacturer, so the *Mosses* are not barred from suing it. It is settled that Thimerosal, when used as a preservative, is a component of a vaccine . . . . Nonetheless, its status as a vaccine component no more makes Thimerosal a “vaccine” than does the inclusion of a piston under the hood of an automobile make that object an “engine.”

381 F.3d at 503-4 (footnotes and citations omitted).

The Fifth Circuit rejected the defendants’ arguments proposing a resort to underlying statutory purposes as a justification for varying the explicit statutory terms:

[B]ut the lack of statutory ambiguity does not stop the [defendants] from arguing that a literal application of the regulatory scheme “will thwart the intent and purpose of the Act, and interfere with its operation.” Because the Vaccine Act was motivated by a desire to unburden vaccine manufacturers from the costs and risks of tort litigation, the argument goes, the Act should be construed as barring those claims as well.

We disagree. If it is indeed the case that loss-of-consortium claims frustrate this complex federal regime, Congress can enact

*Continued on next page*

a change. For all we know, this possibility was considered, and a conscious decision was made not to regulate consortium claims. Either way, it is not for this court to decide what Congress should have done, but only to apply a statute that on its face has nothing to say about consortium claims. Because the Vaccine Act neither provides a mechanism for their recovery on a loss of consortium suit, nor openly bars their right to pursue remedies afforded by state tort law, the Mosses may pursue their claims.

381 F.3d at 505 (footnotes omitted).

The Vaccine Act is similar to the Georgia "tort reform" legislation in that both were purportedly adopted in order to prevent or diminish perceived threats to certain public and private interests supposed to exist from the respective "pre-reform" litigation environments. Consequently, the Fifth Circuit's Moss opinion should provide persuasive guidance, at least from the standpoints of logic and judicial policy, when similar issues of construction arise under the Georgia legislation. But in addition to this contextual similarity, the Moss opinion is based on principles of statutory construction that have long been followed in Georgia courts. For example, Georgia courts adhere to the long-standing rule that a trial court must give effect, if possible, to every clause and word of a statute. E.g., *Cherokee Warehouses v. Babb Lumber Co.*, 244 Ga. App. 197, 198, 535 S.E.2d 254, 255 (2001); see also *Culpepper v. Irwin Mortgage Corp.*, 253 F.3d 1234, 1329 (11th Cir. 2001). Similarly, unambiguous statutory language must be given its plain meaning, absent a clearly expressed legislative intent to contrary. E.g., *Georgia Public Service Commission v. Alltel Georgia Communications Corp.*, 227 Ga. App. 382, 385, 489 S.E.2d 350,

353 (1997) ("golden rule of statutory construction" requires court to follow literal language of statute unless it produces "contradiction, absurdity, or such an inconvenience as to insure that the legislature meant something else"); *Johnson v. Comcar Inds., Inc.*, 252 Ga. App. 625, 626, 556 S.E.2d 148, 150 (2001) (where statutory language is susceptible of only one meaning, courts must follow that meaning unless to do so would produce contradiction or absurdity); see also *United States v. Phipps*, 81 F.3d 1056, 1059-60 (11th Cir. 1996); *St. Laurent, II v. Ambrose*, 991 F.2d 672, 678 (11th Cir. 1993).

It is not to be presumed that the legislature intended for any part of a statute to be without meaning. *Brown v. Liberty County*, 271 Ga. 634, 634-5, 522 S.E.2d 466, 466 (1999). A Georgia court must not disregard any words of a statute unless failure to do so would lead to an absurdity manifestly not intended by legislature. *Georgia Lottery Corp. v. Sumner*, 242 Ga. App. 758, 760, 529 S.E.2d 925, 927 (2000). Statutes must be construed so as to make all their parts harmonize and to give sensible and intelligent effect to all parts thereof, and so as not to render any part thereof mere surplusage. *Brown*, 271 Ga. at 635, 522 S.E.2d at 466; *Cherokee Warehouses*, 244 Ga. App. at 198, 535 S.E.2d at 255 (2001); see also *Tug Allie-B, Inc. v. United States*, 273 F.2d 936, 944 (11th Cir. 2001); *Vollrath v. Collins*, 272 Ga. 601, 603-4, 533 F.2d 57, 59 (2000). Related to this rule, a Georgia court will not ascribe to the legislature an intention to adopt a statute containing inconsistent or contradictory provisions. *Vollrath*, 272 Ga. at 603-4, 533 F.2d at 59 (2000). And recently the United States Supreme Court reiterated the "cardinal principle of statutory construction" that statutes must be so construed, if at all possible, that no clause, sentence,

or word shall be superfluous, void, or insignificant. *TRW, Inc. v. Andrews*, 534 U.S. 19, 122 S.Ct. 441, 449 (2001).

Because of the substantial similarities between the underlying legislative contexts, the Fifth Circuit opinion in Moss must be viewed as providing at the least useful guidance for the resolution of any corresponding issues of construction that arise in the construction of the Georgia "tort reform" legislation. Moreover, because the principles of statutory construction relied upon in Moss have long existed in Georgia law, the Moss opinion should be even more persuasive when similar issues arise in connection with the new Georgia "tort reform" legislation.

Ga. Senate Bill 3, the final embodiment of that legislation, became effective on 6 February 2005. The text of the final bill may be accessed by Internet at [http://www.legis.state.ga.us/legisl/2005\\_06/fulltext/sb3.htm](http://www.legis.state.ga.us/legisl/2005_06/fulltext/sb3.htm).

National Vaccine Injury Compensation Act, 42 USC § 300aa-1 et seq. 42 USC § 300aa-11(a).

# Victims' Rights in Georgia: Considerations When Advocating for Victims of Violent Crimes

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## Introduction

More than 25 million Americans fall victim to violent crime each year and while not all crimes are reported, over 36,000 violent crimes were recorded in Georgia in 2002.

In response, the victims of these violent crimes have begun to aggressively pursue civil actions in retribution and for emotional closure over the last few years. Six of the ten largest verdicts nationwide in 2000 were in crime victim civil cases, according to Lawyers Weekly USA.

There are many considerations for attorneys who serve as advocates for victims in these cases and other victims' rights proceedings. Victims' suits against individual perpetrators are gaining stature, and more and more support groups and organizations are cropping up to assist victims of violent crime. When considering pursuit of a civil cause of action, attorney advocates should strongly consider discovery costs, shifting burdens of proof, working with prosecutors and police agencies, the parties to the various actions, and the availability and applicability of expert testimony.

## Victims' Rights Suits Gaining Stature

The Georgia criminal case against Marcus Dixon received national attention. Dixon was the high-school

athlete sentenced to jail, in a case of first impression, under sentencing guidelines attached to a child molestation law. The Georgia Supreme Court eventually released Dixon from that sentence based on legislative intent, but Dixon was only able to immediately leave prison because of time served on a related conviction.

Some of the press coverage brought attention to a civil suit filed by the victim against the Floyd County School District based on the school's failure to protect her. The suit noted Dixon's prior similar conduct and past behavior to support her contentions. In addition to the attention brought by this lawsuit, a victims' rights organization held a rally following Dixon's release to remember the victim in the case that was attended by more than 100 people.

The Dixon case is important because it highlights some of the complex issues that lawyers handling these cases must often consider – minors, sex, rape, public and private facilities, third-party defendants, race, parental responsibility, privacy, local and national press coverage and victims' rights policies. Were the results in the Dixon criminal case appropriate? Should a civil case go forward? What about the future – are colleges extending him scholarships to be considered on notice of his past behavior?

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### **Victims' Rights Support and Organizations**

Before ever filing a civil case against a perpetrator, victims can tap into an extensive emotional and financial support network.

The Georgia legislature established the Victims Bill of Rights in 1995. The law reflects ever-growing public support for victims. Under the law, victims and their families have the right to be notified regarding the prosecution and sentencing of the accused. "Victim compensation" can be collected if the crime is reported within 72 hours. Eligible expenses include medical, counseling, funeral, crime scene clean-up and lost wages, to a maximum of \$25,000.

The 20th anniversary of the national Crime Victims Week occurred in late spring 2004. A program of the Department of Justice (DOJ), the Week remembers victims as part of the federal Victims of Crime Act of 1984 (VOCA). Also under VOCA, the DOJ administers the Crime Victims Fund. The dollars for the Fund come from federal criminals, not taxpayers. Each year, millions of dollars are deposited into the Fund from criminal fines, forfeited bail bonds, penalty fees and special assessments collected by the U.S. Attorneys' Offices, U.S. Courts, the Federal Bureau of Prisons and other federal agencies. For example, more than \$776 million was deposited in 2000.

Because of the high-level of violent crime, extensive public and private monies are also spent on local victim service organizations and programs. The Crime Victims' Advocacy Council serves five metropolitan Atlanta counties, including holding an annual memorial service for victims. Various cities and counties in Georgia sponsor homicide survivor support groups. Various private groups, such as the National Center for Victims of Crime and Helping Other People Endure (HOPE), operate to assist victims.

### **Civil Causes of Action**

Rape was perhaps the earliest and is possibly the most well known application of victims' rights suits. Wrongful death suits for murder, however, are a quickly growing trend. Parents and/or children of murdered individuals, such as Nicole Brown in the O.J. Simpson case or Lacey Peterson's family in their claims against Scott Peterson for the death of their daughter and her unborn child, have captured national headlines. In Georgia, perhaps one of the most publicized cases involved the civil suit and subsequent criminal prosecution of James Watson for the death of his wife, Beverly Watson.

All of these cases exemplify the current trend of these types of civil actions being pursued prior to, simultaneously with or in some cases subsequent to the criminal proceeding. In some instances, for a variety of reasons, it is only the civil case that is ever filed. Prosecutors often must exercise their discretion not to pursue a case they believe either lacks merit or would be difficult to obtain a conviction.

Civil lawsuits can be filed for a variety of crimes, however. These include murder, rape / sexual assault, assault / battery, child abuse, domestic / family violence, DUI, vehicular homicide, hit and run, and serious injury by vehicle.

### **Discovery, Burden of Proof and Working with Prosecutors and Police Agencies**

Discovery in victims' rights cases is not unlike investigations conducted in any other type of civil litigation. The burden of proof is on the plaintiff to prove their cases, but the standard of that proof is different than that in a criminal case.

In most victims' rights cases where a crime is involved, attorneys reach out to prosecutors, police detectives and investigators handling the related criminal case. Opening dialogue and the ability to gain valuable

information can be based on the relationships an attorney already has or new ones that are developed in the handling of each case.

The assistance that attorneys handling these types of cases receive from prosecutors and police officials is often based entirely on preconceived notions of attorneys in general, or perhaps, a reputation that has preceded the particular attorney. Understandably, some law enforcement officials and prosecutors are secretive, while others will literally open their files to the victim or their families.

Attorneys working on these cases regularly will notice a level of assistance that varies venue by venue. Some jurisdictions have territorial cops and prosecutors, while the leadership or atmosphere of other areas has created a more congenial working environment.

While no trend of "openness" from prosecutors has followed the growing number of cases over the last few years, those law enforcement professionals with experience dealing with victim or family requests are generally more helpful. In addition, once a detective or prosecutor experiences receiving valuable information obtained from discovery or the public record created in a private case, they become more welcoming to joint efforts.

### **The Advocacy and Public Policy of Victims' Rights Cases**

There are a number of advocacy and public policy issues to consider regarding victims' rights cases. For example, many times a victim or the victim's family is not satisfied or feels let down by the criminal justice system. This may occur when prosecutors charged with pursuing a case may not believe there is enough evidence to meet the standard of proof necessary to obtain a criminal conviction or when law enforcement simply can't dedicate the resources necessary to obtain evidence.

Even when criminal charges can't be brought for lack of evidence, however, civil cases can nonetheless be filed. Providing additional information obtained in discovery or independent investigations to prosecutors is one of the main reasons cited by victims and their families to file victims' rights suits. Private investigations and discovery obtained in these civil suits may uncover key information or compensate for limited or overworked state resources.

Encouraging media coverage may also result in leads or tips helpful to prosecutors and law enforcement. Sometimes this media pressure helps reverse a decision not to prosecute a perpetrator.

There are a number of other reasons how victims' rights cases can serve as a trial tactic to impact any criminal case. A civil suit can serve to reduce or limit a perpetrator's financial resources to mount a high-cost, high-profile criminal defense with or without victory.

The information revealed in these civil cases also has a tendency to drive a wedge between perpetrators and their family or friends who may have been reluctant to share pertinent information with law enforcement investigators.

The added pressure of sworn, albeit sometimes reluctant, deposition testimony can prove helpful to law enforcement or prosecution officials. Sworn testimony later proven to be lies can become convincing evidence of guilt or complicity.

Lawyers handling these types of cases have to remain aware that victims' rights suits are emotionally driven cases, as compared to tort suits where someone simply fell in a grocery or a suit sounding in contract, for example. Attorneys handling these cases are affording victims and their families a way to punish a perpetrator or provide emotional closure. Many victims want to force the perpetrator to

understand what pain he or she has inflicted on them or their loved ones.

It is important to conclude a discussion on the advocacy and public policy of victims' rights cases, that public opinion sometimes voiced against trial lawyers should not be confused with feelings regarding victims' rights suits. The circumstances and violent nature of some of the crimes associated with these types of lawsuits persuade. These suits are each filed by an innocent victim: who was stabbed while sleeping in his own home; who was raped in the mall parking lot while returning to her car after holiday shopping; or whose child was abducted as she walked home from school.

Victim's rights do not conflict with civil rights. For years the media has been filled with stories of violations of the rights of an accused. Now, at long last, it appears that a movement is afoot to speak out for the victim. Certainly, there are reasons to sympathize with a "downtrodden" perpetrator, but not to the point of preventing justice.

### **Parties to Actions**

The obvious defendants in victims' rights cases are the perpetrators of the crimes themselves. Advocates handling these cases, however, must look beyond "what actually happened" and "who did it" to determine "why was this done" and "how was it allowed to be done" to determine whether other defendants should be brought into the action.

Individuals who covertly contributed to the crime or act can be joined. For example, the guy who provided the gun to the perpetrator, distracted security personnel or kept information secret should be named as a defendant.

From the perspective of the recoverability of monetary awards

for their clients, attorneys may be more interested in the owners and managers of property. These types of actions have long been known as "premises liability" cases. When analyzed on a case-by-case basis, monetary contributions by these non-active participants for the conduct of third parties to their premises become obvious. Did a property owner or manager facilitate the violent crime? Should the property owner or manager have taken some reasonable action that would have likely prevented the crime?

In Georgia, an "owner or occupier of land" is liable for damages caused to "invitees" on his or her property. Court precedent is developing a body of law that holds an ever larger number of non-active, but negligent, parties liable. Commercial property owners and managers cannot represent an apartment complex, mall or office building to be a 'safe and secure' facility when it is not or does not exist. Prior violent acts on a property can put an owner or manager "on notice" and require a reasonable response to make the property more secure.

Neither Georgia nor any other state will hold a property owner or manager simply because an unfortunate, injury-producing event has occurred on their property. Property owners are not insurers of their invitees' or licensees' safety, but they must reasonably respond to dangerous situations or conditions they know or reasonably should have known exist.

Diligent property owners and managers will constantly reevaluate their safety and security systems and procedures. They will respond to changing conditions on their premises. Some of these changes will include review and, if necessary, a reasonable alteration of lighting conditions, landscaping, ingress and egress procedures, locking and

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securing hardware and procedures, hiring procedures, physical security systems and procedures, and even representations the property owner/ manager is conveying in advertising.

The creative analysis of each case will continue to identify other potential parties to victims' rights lawsuits. In South Carolina, one plaintiff was able to successfully penetrate the homeowner's coverage for an international shooting when the shooter purposefully shot at and killed the victim, but only intended to scare him. The insurance company paid for the shooting homeowner's negligence.

### **Expert Testimony**

Be it an assault, a robbery or even an accident victim hurt by a drunk driver, a victims' rights case typically requires expert testimony. The use of expert witnesses in victims' rights suits may consist of safety and / or security experts and medical experts, including medical experts skilled in the psychological impact on the victim.

Intentional infliction of emotional distress is not a main cause of action. It can be used, however, to bolster a case with respect to damages, particularly with respect to elements of damages under assault, rape, wrongful death and other violent crime claims. Victims are often unable to work, sometimes as a result of the physical injuries they received, but just as often because of

the emotional impact and scars they received themselves or after the loss of a loved one. Psychiatrists, psychologists, licensed clinical social workers, rape crisis counselors and a variety of other professionals can testify on various aspects of a client's post-traumatic stress syndrome or the 'after-effects' of trauma.

In determining the reasonableness of a commercial property owner or managers' actions, security and safety experts can offer an expert evaluation of the status of the property from a safety/security standpoint. In addition and equally important, these experts can provide a wealth of statistical knowledge and data and the import of that information to your case.

For example, comparing the rate of violent crime in Georgia in 2002, which was 458.8 per 100,000, to that occurring at an apartment complex in certain areas of Atlanta, which may be extrapolated to the apartment complex population may result in an alarming ratio of violent crime rate applicable to the complex' population. The use of these types of statistical data can significantly impact jury reaction to a particular course of events or to a particular defendant.

### **More Information**

The future of victims' rights advocacy and related civil suits appears positive. As previously mentioned, the Georgia Bill of Rights sets forth basic protections for victims of

crime and has achieved a great deal in relieving the emotional trauma of victims.

According to the National Center for Victims of Crime, all states now have similar laws. On a national level, the U.S. Senate passed similar legislation in April 2004 that is pending before the U.S. House of Representatives. The legislation supports victims by providing the right to reasonable protection from the alleged offender; to be notified of any public proceedings; not to be excluded from such proceedings; to be notified of the escape or release of the accused; to be heard at any public proceeding involving release, plea, sentencing, reprieve or pardon; to confer with the government attorney in the case; and to full and timely restitution from the convicted offender. The proposed legislation also provides additional funding for prosecutors nationwide.

Lawyers advocating in these types of cases can find additional information in a variety of places. In Georgia, lawyers can contact the Criminal Justice Coordinating Council or Prosecuting Attorneys' Council of Georgia for more information. These groups hold annual conferences in the state. For national information, including seminars on litigating victims' rights suits, contact the National Crime Victims Bar Association and the Association of Trial Lawyers of America (ATLA) Inadequate Security Litigation Group.



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