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State Bar of Georgia Young Lawyers Division

# THE YLD REVIEW

Volume 63, Issue 1, February 2022

Working for the Profession and the Public

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## From the President

## It's OK Not to Be OK



**Elissa Haynes**

Parts of this article may look familiar to those of you who read the December edition of the *Georgia Bar Journal*. Although I had many ideas for topics to write about for my first newsletter article as YLD president, lawyer mental health is so important to me and something I speak about often. I hope that by sharing my story, someone else may feel comfortable to share theirs or just feel a bit more at ease in knowing that they are not alone.

On a Sunday afternoon in late October, I laced up my running shoes, hopped on my Pelton Tread and took one of my favorite instructor's (Selena Samuela) World Mental Health Day Run. I had recently gotten back from a five-day work conference in Boston and my stress and anxiety were at an all-time high as I tried to work my way through a mountain of missed emails and upcoming deadlines. Running has always been my outlet and a quick run usually does wonders for my overall attitude, especially when the right music is involved. I do not know if it was the perfectly curated playlist, the instructor's raw and heart wrenching revelation about her partner's suicide, or a combination of both, that led to one of the most cathartic workouts I have ever had. The tears started to flow, and I gave myself permission to completely let go and unload all the negative energy that had been building up that week, month and year.

The practice of law is stressful and young lawyers often face unique stressors that our more experienced counterparts may not. Throw two years of a global pandemic into

the mix and things certainly did not get easier. As I began brainstorming ideas for my *Georgia Bar Journal* article, I interviewed several young lawyers spanning various areas of practice and levels of experience asking them to describe the legal profession in one word and what they viewed as the best and worst parts about practicing law.

While some had upbeat and encouraging things to say about practicing law, the majority sounded defeated, exhausted and apathetic. "Crippling," "toxic," "contentious," "hostile," "controlling" and "burnout" ranked highest among the adjectives those surveyed used to describe the practice of law. When asked about the worst parts of practicing law, many reported the non-existent work-life balance, billable hours, being at the mercy of the partner/supervisor's work schedule, dealing with disrespectful opposing counsel, and clients having unreasonable and/or unrealistic expectations. Even before the pandemic, our profession has been associated with a workaholic mentality. And unfortunately, this workaholic behavior is often incentivized by law firms in the form of lucrative bonuses, raises or promotions.

As a 10-year lawyer who is barely clinging on to the "young" in the Young Lawyers Division, I, too, have struggled with delegating work, asking others for help, managing my own stress and anxiety, and desperately trying to have some semblance of a work-life balance. These are all things that I continue to work on and like many others, I have had my share of mental breakdowns where I have repeatedly asked myself why I continue to practice law.

But with the negative comes the positive, and many of the young lawyers I spoke to had favorable things to say about our profession as well. While some viewed the

► SEE PRESIDENT, PAGE 8

The YLD Review seeks to provide a forum for the discussion of subjects pertaining to the regulation of the legal profession and improving the quality of legal services, as well as other matters of general interest to Georgia lawyers. The statements, views and opinions expressed herein are those of the authors and do not necessarily reflect those of State Bar of Georgia, its officers, Board of Governors, sections, committees or staff.

From the Co-Editor

## Sponsorship: The Key to Shattering Glass Ceilings



**LaKeisha R. Randall**

*"If you want to go fast, go alone. If you want to go far, go together." —African Proverb*

**Brand development, sponsorship and philanthropy**—while they are valuable components of a successful business, with professional development, it's critical to know how they interconnect and differ.

As CEOs of our careers, we must plan, develop, organize, implement, direct and evaluate strategies to achieve optimal success. In part, establishing a board of sponsors aids in this process.

### Sponsorship

In business, sponsors enhance a company or brand's image, increases their visibility, broadens its exposure, helps differentiate itself from competitors, aids in the development of new relationships and strengthens others—the mere alliance instills trust that may not have been garnered absent the partnership.

Similarly, a professional or career sponsor is a business ally who invests in his or her pupil and expects a return. While the nuances of each relationship vary, sponsors generally invest their time, talents, resources and contacts with their pupils.

Sponsors give advice and guidance like mentors, but they also: believe in your value or potential enough to link reputations, go out on limbs on your behalf, and have the requisite clout to be your champion. A sponsor is your advocate, supporter, coach, and cosigner. While forming sponsorship relationships is critical to the success of all professionals, research by the Center for Talent Innovation (CTI) showed women and minorities are particularly vulnerable if they do not.



Sponsors accelerate the career trajectory of pupils and generally influence three areas: pay raises, high-profile assignment distribution and promotions.

Sponsors are not simply altruistic; a sponsor sees furthering your career as an investment in his or her own career too. Like mentors, sponsors offer advice and guidance while also:

- Are in positions of authority or respect;
- Believe in your potential or see your value enough to link reputations;
- Are prepared to convince others that you deserve the job, increased level of responsibility or pay raise;
- Willingly protect you if you make a mistake. YLD

*Excerpt of LaKeisha R. Randall's essay in "Her Story: Lessons in Success From Lawyers Who Live It."*

LaKeisha R. Randall is managing partner of The Randall Firm, LLC, in Atlanta and is co-editor of The YLD Review.

From the Executive Director

## The Meaning of Mentorship



**Damon E. Elmore**

**It has been said that "mentoring is important to the present and future of the legal profession."** Without question, programs like our Transition Into Law Practice Program and the work of the Labor & Employment Law Section, or the Young Lawyers Division and its Leadership Academy, work to improve the quality of legal services. But what does it mean on a personal level? What does it mean to new and experienced lawyers and judges?

It may come as no surprise that the answer is different depending upon whom you ask. The one clear constant is that (arguably) no other professional relationship or engagement makes a difference. But I remain curious about what it means and what it looks like.

So I asked a few friends. They are women and men who carry out their legal work in different ways. They are judges, in-house counsel and trial attorneys. My "focus group" lives and works in Columbus, Macon and the metro-Atlanta area. Most have been active in the work of the Bar, but some are simply interested in making sure the message of mentorship is communicated.

As part of our discussion, I was interested in knowing:

- Is mentorship important for the legal profession (why/why not)?
- How did you find your first/earliest mentor(s)?
- Is a mentor still relevant at this point in your career?
- Why should someone be a mentor?
- What is one piece of advice for planning a career, rather than simply keeping a job?
- How did your mentor influence you?

► SEE EXECUTIVE DIRECTOR, PAGE 17

# I Want Custody!



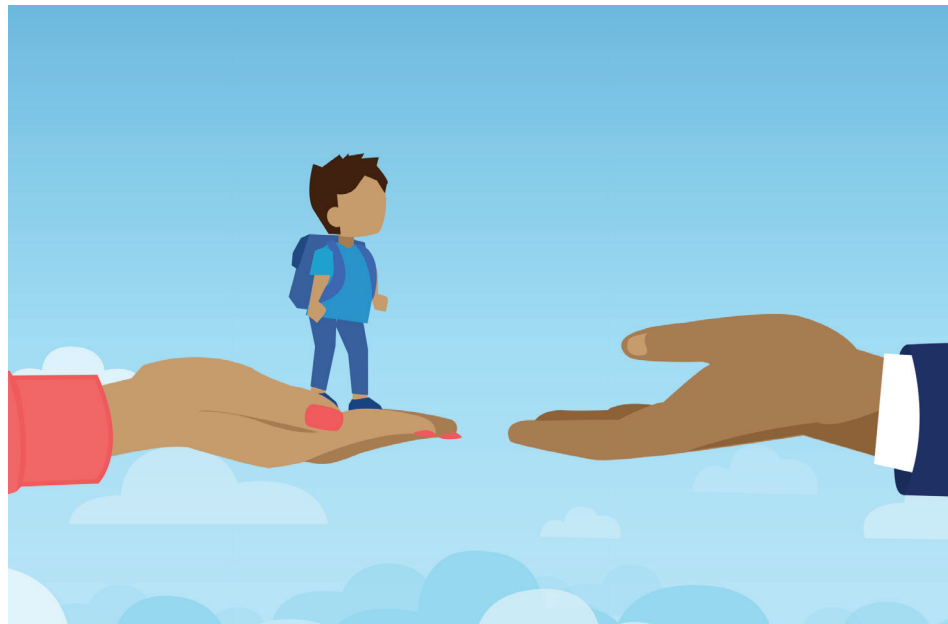
**Paul S.  
Simon**

**Custody is simple, right? One parent** has custody of the child more often than the other parent, or both parents have custody of the child for the same amount of time—only if it were that simple. Custody is actually a complicated set of rules with the standard “legalese” that readers of this publication come to expect in all areas of law with a heavy dose of practicality and reasonableness (ideally) tossed into the mix. We explore below the different types of custody, the intricacies of each type of custody and practical considerations.

## 1 Legal Custody

Legal custody is defined as “the care and control of a minor including, but not limited to, the power to make decisions regarding health care, education, extracurricular activities and religious upbringing.”<sup>1</sup> Legal custody can be either “sole” or “joint.” “Joint” legal custody is where both parents have equal rights and responsibilities for a child’s major decisions, including a child’s education, health care, extracurricular activities, and religious training.<sup>2</sup> A joint legal custody arrangement requires good-faith conferral between parents in an effort to reach an agreement upon a course of action. However, if the parents are unable to reach an agreement, one party is designated the “final decision-maker” for a particular category. For example, the parent designated as the final decision-maker for educational decisions has the right to enroll a child in Advanced Placement courses in high school if the other party will not agree.

“Sole” legal custody is where one parent has the right and responsibility to make all of a child’s major decisions without consulting with the other parent. In the Advanced Placement example, the parent with sole legal custody can choose to enroll the child in



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Advanced Placement courses without conferring with the other parent.

## 2 Physical Custody

Physical custody is exactly what it sounds like: when and how each parent spends physical time with a child.<sup>3</sup> Attorneys alternate colloquially between “visitation” and “parenting time” although the latter is the preferred vernacular. My preference is “parenting time” as “visitation” denotes a secondary status to one parent. As was explained to me by an attorney of immense stature, you visit zoo animals and parent a child. As with legal custody, physical custody is either “joint” or “sole.”

Joint physical custody is defined as physical custody being shared by the parents in such a way as to assure a child of substantially equal time and contact with both parents.<sup>4</sup> The “true” definition of joint physical custody (stay tuned) is an equal division of parenting time or an arrangement close to an equal division of parenting time. For example, a week on/week-off parenting time

arrangement is a joint physical custody arrangement which is exactly what it sounds like. Similarly, a “2/2/5/5” arrangement is also a joint physical custody arrangement which contemplates as follows:

- Parent A would have parenting time on Monday and Tuesday;
- Parent B would have parenting time on Wednesday and Thursday;
- Parent A would have parenting time on Friday, Saturday, Sunday, Monday and Tuesday;
- Parent B would have parenting time on Wednesday, Thursday, Friday, Saturday and Sunday; and
- So on and so forth.

The key to any joint physical custody arrangement is to arrive at a schedule that works for both parents but also, more importantly, for the child. For example, is the child of an age level and maturity where they would be comfortable with and thrive in a week-on/week-off arrangement provides? Does the child need to see both parents on a consistent schedule as provided



by a 2/2/5/5? Are there any medical concerns or conditions which one parent is best suited to handle? Does either parent's work schedule require considerable travel?

Sole physical custody, alternatively, provides that one parent will have "custody" of the child and the other parent will have parenting time, such that the "custodial" parent's home is the child's "home base." Typical schedules can be as liberal as the parent with parenting time seeing the child every other weekend from Thursday to Monday with an "off-week" overnight or as strict as supervised parenting time with a third-party supervising agency for a couple of days per month.

Unless filed under seal, parenting plans are available to the public. The concern often arises that the child will one day have the ability to view the parenting plan and see that one parent has sole physical custody and the other parent just has parenting time which could lead to the child feeling like the other parent did not "fight" for them or loves them less. To assuage that concern, parties will often agree to joint physical custody with a "primary" physical custodian and a "secondary" physical custodian, which is just sole physical custody in favor of the primary physical custodian with better wrapping paper. There is no such designation of "primary" and "secondary" in the Official Code of Georgia.

### 3 The "Best Interests" Standard

The court is vested with full and absolute discretion to determine the custody arrangement which is in the best interests of a child.<sup>5</sup> A jury cannot disturb the court's discretion; custody questions are left to the court itself.<sup>6</sup> In proceedings where there are no allegations of family violence, the court may consider any relevant factor, which includes 17 specifically delineated factors such as the mental and physical health of each parent, the home environment of each parent, the parenting abilities of each parent, the bond between a child and their siblings, half-siblings, and step-siblings, and any evidence of substance abuse by either parent.<sup>7</sup> In matters where there are allegations of family violence, the court shall consider

a perpetrator's history of causing physical harm, bodily injury, assault or reasonable fear of physical harm, bodily injury or assault to another person.<sup>8</sup>

The court has the authority to appoint a Guardian ad Litem (GAL). A GAL represents the best interests of a child and assists the court in reaching a decision regarding the custody arrangement which is in the best interests of a child.<sup>9</sup> The GAL is an officer of the court and is the court's witness available to testify at any hearing.<sup>10</sup> Except in certain jurisdictions and with consideration of the parents' financial circumstances, GALs charge for their work, and they have the right to recover their fees from an owing parent via court order.<sup>11</sup> GALs are incredibly useful in custody litigation and are often appointed in nearly all except the simplest custody matters and/or where the parties do not have the financial resources to pay for a GAL.

## 4 Practical Custody Considerations

Custody matters are incredibly fact specific. What works for one family may not work for another. Factors to consider in agreeing-upon or requesting a certain custody arrangement include a parent's employment, a parent's housing stability, a parent's expertise in a specific area, a parent's openness to medical/therapeutic treatment, and so on and so forth. Let's look at some examples.

### The "Classic" Scenario

The parties share joint legal custody of their child. Parent A works in sales. Parent B is a physician. The parties share joint physical custody with Parent A designated the primary physical custodian and Parent B designated the secondary physical custodian with the right to exercise parenting time every other weekend from the child's release from school on Thursday until the child's return to school on Monday. The parties alternate holiday parenting time and equally divide summer vacation parenting time. Parent A has final decision-making authority for the child's educational, medical and extracurricular activity decisions. The parents practice the same religion, and each party

has the right to practice the religious activities of their choosing during their respective time with the child.

### The "Hybrid Decision-Making" Scenario

Same fact pattern as "classic" as it concerns physical custody of the child and religious decision-making. However, in the hybrid decision-making scenario, Parent A has final decision-making authority for the child's educational and extracurricular activities. Parent B, the physician, has final decision-making authority for the child's medical decisions given their expertise in the field.

### The "Saturday Versus Sunday" Scenario

Same fact pattern as "classic" except as it concerns religious decision-making. Parent A is Jewish. Parent B is Christian. The child celebrates Easter and Christmas, attends church regularly and participates in church mission trips. The child only occasionally attends synagogue for Shabbat services but regularly attends Rosh Hashanah and Yom Kippur services. Parent A does not feel strongly about the child's religious practice, but Parent B does. The parties agree that Parent A would have the right to take the child to Rosh Hashanah and Yom Kippur services every year and to Shabbat services during his parenting time; otherwise, the child would be raised in the Christian faith.

### The "Uh-Oh" Scenario

The parents have a high-conflict relationship. They cannot agree on anything, not even the clothes the child wears to school. Despite the Guardian ad Litem's recommendation in favor of Parent B being deemed the primary physical custodian and having all final decision-making authority, Parent A is unwilling to accept that recommendation. Both parties request their own custody arrangement at the two-day final hearing. The presiding judge, given 15 hours (give or take) to learn about a parties' marriage and their parenting ability, decides the terms of the custody arrangement. Both parents are furious, which leads to further conflict and subsequent petitions to modify custody.

► SEE CUSTODY, PAGE 6

► **PRESIDENT, FROM PAGE 2**

money as the best part, most valued the ability to establish close relationships with people from all different walks of life, the intellectual stimulation, having an outlet to be creative and perhaps my favorite response—the opportunity to bring a peace of mind to those who find themselves in tough situations and to embody what it means to be “counsel.”

So, what can we, as lawyers (regardless of age), do to improve our profession and the lives of those in it? For starters, check in on your colleagues, associates, law partners and friends. I know many of us may be hesitant to speak up when we are struggling, but some are more likely to do so if someone else starts the conversation. This was the idea behind my latest initiative, #YLD-LunchandListen. In December, I asked my fellow YLD members to take another young lawyer to lunch to check in and talk about stressors, plans for the new year or anything else that was on their mind. You never know when something as simple as a lunch can be the saving grace for someone. While this initiative started as a way to help those, like myself, who find the holidays to be especially difficult, the feedback from #YLDLunchandListen has been overwhelmingly positive and I hope to keep it going throughout the next several months.

Lastly, before we can help others, we need to make sure we are taking care of our-

selves, both mentally and physically. Like they say in the pre-flight safety videos, put your own oxygen mask on before helping your children or other passengers. Do not underestimate the importance of checking in with yourself and encourage those you work with to do the same. I also urge each of you to continue educating your colleagues about available mental health resources, including the State Bar's Lawyer Assistance Program and the #UseYour6 campaign, which provides six prepaid and completely confidential clinical sessions per year with a licensed counselor.<sup>1</sup> Continue to speak up and use your voice to effectuate real change so that when those who come after us are asked to describe the practice of law, they will have far more positive things to say than negative. And most importantly, normalize the full spectrum of emotions—the good and the bad. Because sometimes, it really is OK not to be OK. We're only human, after all. *YLD*

*Elissa Haynes is a partner at Drew Eckl & Farnham, LLP, and president of the Young Lawyers Division of the State Bar of Georgia.*

**Endnote**

1. State Bar of Georgia Lawyer Assistance Program <<https://www.gabar.org/wellness/upload/Use-Your-6.pdf>>.

► **CUSTODY, FROM PAGE 5****The “Hooray” Scenario**

The parents reach an agreement on the custodial arrangement which they believe promotes their child's best interests. The formal parenting plan is filed, a copy is tucked away in a drawer at each parent's home, and it is never looked at again.

**5 Avoiding the “Uh-Oh”**

Here is something that may shock you: Divorce and custody litigation can be an incredibly challenging experience from every perspective. One does not get married anticipating divorce. You do not have a child to only see them on the weekends. For all intents and purposes, it takes two to marry and two to divorce. What needs to happen in custody litigation is for a parent to take a good, long look in the mirror, set their anger aside and focus on what is best for their child. Custody litigation can and does force introspection and self-evaluation. A parent who recognizes that from the onset and is supported by counsel who both zealously advocates for them and also presents the “macro” view from a neutral, objective perspective is best suited for a successful co-parenting relationship which, in turn, gives the child the best possibility of success and prosperity. *YLD*

*Paul S. Simon is a partner at Hedgepeth Heredia where he practices family law.*

**Endnotes**

1. O.C.G.A. § 19-9-22(1).
2. O.C.G.A. § 19-9-6(5).
3. O.C.G.A. § 19-9-22(2).
4. O.C.G.A. § 19-9-1(6).
5. O.C.G.A. § 19-9-3(a)(2).
6. *Id.*
7. *Id.* at (a)(3)(A)-(Q).
8. *Id.* at (a)(4)(B).
9. Uniform Superior Court Rule 24.9(3).
10. *Id.*
11. *Id.*

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## Meet the New YLD Team



**Hi, friends! I'm Jessica Oglesby**, the new State Bar YLD director. I'm new to the Young Lawyers Division but not new to the State Bar of Georgia. I started in the Office of the General Counsel 15 years ago and spent the last five years as clerk for the State Disciplinary Boards. Everyone who knows me knows that I have never met a stranger. So, for that reason, consider us now friends. I'm excited to expand my career with the State Bar and, as Paula Frederick would say, "be helpful" to all the young lawyers serving the profession.

When I'm not with the YLD, I spend time with my family: Corwin, Jackson (18), Kendal (15) and Kori (13). Oh, and drinking good coffee from a local coffee roastery. I'm always up for a coffee break with a new friend.



**Hi, I am Jamie Goss**, and I joined the State Bar of Georgia 2.5 years ago in the ICLE department. I'm an experienced administrative professional in customer service, production and technical support. As an energetic self-starter who takes the initiative, I get things done.

Outside of the work, I've appeared in several Atlanta theatre productions. Recent favorites include Etta Staples in "The Homecoming" (Lionheart Theatre), Carol Melkett in "Black Comedy" (MVAA at the Art Place), Celia in "Calendar Girls" (Players Guild at Sugar Hill) and Germaine in "Picaso" at the Lapin Agile (Lionheart Theatre).

I have a 5-year-old kitty cat named Binx who loves to make guest appearances in my Zoom calls.

I'm thrilled to join the YLD as the administrative assistant and excited for what this year brings. YLD

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# The Enforceability of Mandating COVID Vaccines: Can Your Company Force You to Get a Shot?



**André M.  
Board**

One question that seems to make conversations with colleagues uncomfortable: “Are you vaccinated?” Those that respond in the affirmative do so with a sense of pride. However, everyone does not believe vaccinations are necessary to protect themselves and others from COVID-19. Employers are having to consider this divide as they formulate the appropriate administrative procedure to create a safe working environment for all employees. As a result, mandatory vaccination policies and programs have become more prevalent in discussions for decision makers. The issue is whether an employer can enforce mandatory vaccination policies and whether the requirement could be successfully challenged by unvaccinated employees. The answer is simple: it depends.

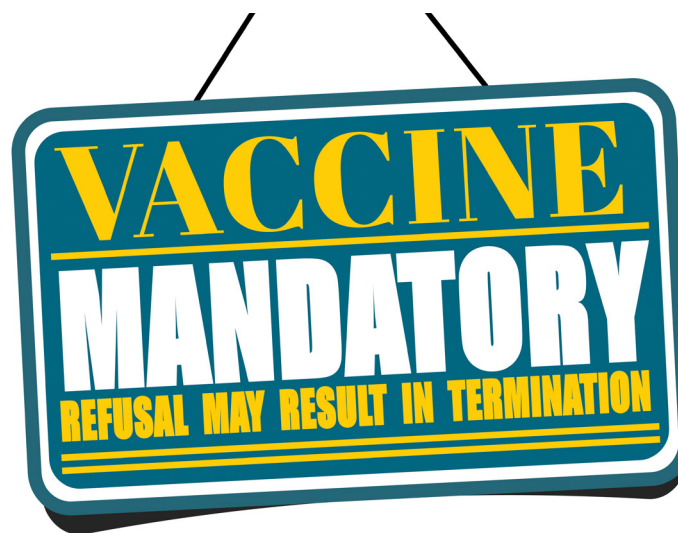
From a federal policy standpoint, President Biden has signed two executive orders: (1) mandating vaccinations for all executive branch employees and some federal contractors<sup>1</sup> and (2) mandating companies with more than 100 employees to require COVID-19 vaccinations or COVID-19 testing at least once a week.<sup>2</sup> The legality of both mandates is still in question and the former is currently being challenged by several states (including the state of Georgia).<sup>3</sup> The U.S. Equal Employment Opportunity Commission (the EEOC) has provided guidance that allows employers to require COVID-19 vaccinations. However, one must also consider the current and proposed state and local policies before making a determination to pursue any vaccination policy.

## Avenues for Mandatory Vaccination Policies Under the Americans with Disability Act

The Americans with Disabilities Act (the “ADA”) allows an employer to establish man-

datory COVID-19 vaccination policies on the basis of protecting the health or safety of individuals in the workplace.<sup>4</sup> However, such requirements must consider individuals with disabilities and provide reasonable accommodation when requested. “Under the ADA, an employer may require an individual with a disability to meet a qualification standard applied to all employees, such as a safety-related standard requiring COVID-19 vaccination, if the standard is job-related and consistent with business necessity.”<sup>5</sup> However, if the employee with a disability cannot meet a qualification standard, the employer must establish that the unvaccinated employee would be, “a direct threat due to a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.”<sup>6</sup>

An employer must make an individualized assessment of the following factors to establish whether a direct threat exists: (1) the duration of the risk; (2) the nature and severity of the potential harm;<sup>7</sup> (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm. Even if a determination is made, an employer cannot take immediate action against the employee without attempting to provide



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reasonable accommodation, absent undue hardship, that would eliminate the direct threat of an unvaccinated employee. Undue hardship can be defined as creating unnecessary difficulty or expense to an employer as a possible result of an accommodation.<sup>8</sup>

An employer may facilitate a mandatory vaccination program through a third party provider (acting as an agent on behalf of the employer). An employer cannot require a medical examination to obtain information regarding an individual’s physical or mental health and/or disability.<sup>9</sup> Administering the vaccine is not of issue to the ADA, however, the pre-vaccination screening questions would likely elicit information about a disability and must be “job related and consistent with business necessity.”<sup>10</sup> An employer must establish that an employee that refuses to answer the pre-screening questions and thus not be vaccinated, would pose a “direct threat” as discussed previously. However, a voluntary vaccination program would not need to satisfy the “job-related and consistent with business necessity” standard.<sup>11</sup>

It is also important to note that an employer must also consider other forms of discriminatory matters when deciding to implement a mandatory vaccination policy (e.g. age, pregnancy, race, gender, etc.)



### Accommodations Available to Unvaccinated Employees

Although a company can enact a mandatory vaccination policy, reasonable accommodations must be afforded to any requesting employee that is entitled to such protections.

Under Title VII of the Civil Rights Act of 1964, an employee has the right to object to a mandatory vaccination policy due to a sincerely held religious practice or observance.<sup>12</sup> For clarity this protection does not include objections based on social, political, economic or personal preferences. Reasonable accommodations must be provided to the employee unless it will cause more than a minimal cost or burden to the employer.<sup>13</sup> If an employer has an objective basis for questioning the religious nature or the sincerity of a particular belief, practice or observance, the employer would be justified in requesting additional supporting information.<sup>14</sup>

An employer may also exclude a statutorily protected employee from physically entering the workplace by allowing them to work from home, take leave under the FMLA or under the employer's policies.<sup>15</sup> An employer must also consider the employee's job duties and workplaces when determining whether an accommodation is necessary.<sup>16</sup> An employer should consult applicable Occupational Safety and Health Administration (OSHA) standards and guidance.

An employer can also offer accommodations within the workspace such as requiring masks to be worn in the building, social distancing from other coworkers or non-employees, or requiring periodic COVID-19 testing.<sup>17</sup> If accommodations cannot be reasonably afforded to a protected employee, termination may not be an automatic option. An employer will need to consider if the employee is entitled to other protections under the EEOC, or other federal, state and local authorities.

### Mandatory Vaccination Policies in Georgia

In May 2021, Gov. Brian Kemp issued an executive order not requiring people to prove their vaccination status, which indicated at that time that no Georgia agency

would require anyone to receive the vaccination.<sup>18</sup> However, the pending state challenges to the presidential vaccination mandates will determine whether state-issued vaccine policies will continue have any force and effect on its citizens.

Members of the Georgia House of Representatives have submitted proposed legislation prohibiting state or local governments from requiring vaccination, as a condition to certain actions, if the vaccine does not meet certain conditions. HB 413 would amend the code on the control of preventable diseases (Chapter 12 of Title 31 of the Official Code of Georgia Annotated) to allow state or local governments to mandate COVID-19 vaccinations if certain requirements are met.<sup>19</sup> These proposed requirements establish high thresholds to overcome. More notably, the vaccine must be evaluated for its long-term potential to cause chronic or serious adverse effects and undergo extensive clinical trials.<sup>20</sup> The pending legislation also allows for an individual to object in writing to COVID-19 vaccination for philosophical reasons.<sup>21</sup>

Private companies were unaddressed in the proposed legislation and thus, a mandatory vaccination policy may be implemented under the aforementioned federal considerations. Georgia will continue to be bound by the guidance of the EEOC, OSHA and other applicable federal employment laws while this legislation is under review. The President's vaccination mandates could supersede this proposed legislation if found to be constitutional and enforceable.<sup>22</sup>

Organizations and their employees are having to make significant considerations as the world continues to redefine the idea of "normalcy." The certainty that remains in an ever evolving vaccination saga is: a dose of wise legal counsel is the best remedy to prevent infectious illegality when considering COVID-19 vaccination policies. YLD

André M. Board is associate legal counsel for Aptean, Inc.

### Endnotes

1. See Alison Durkee, *Here's How Republican-Led States Are Trying to*

Block Biden's Employee Vaccine Mandates, *FORBES* (October 28, 2021, 11:31 a.m. EDT), <https://www.forbes.com/sites/alisondurkee/2021/10/29/heres-how-republican-led-states-are-trying-to-block-bidens-employee-vaccine-mandates/?sh=396464453541>.

2. *Id.*
3. Greg Bluestein, Georgia to challenge federal vaccine mandate in court this week, *THE ATLANTA JOURNAL-CONSTITUTION*, (Oct. 26, 2021), <https://www.ajc.com/politics/politics-blog/georgia-to-challenge-federal-vaccine-mandate-in-court-this-week/67QTE5ONQBHYBIPWLW226NJFPE/>.
4. U.S. Equal Employment Opportunity Commission, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#L> (last updated Oct. 28, 2021).
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
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18. ASSOCIATED PRESS NEWS, (Aug. 10, 2021), <https://apnews.com/article/health-georgia-coronavirus-pandemic-57cb7f3632c78ce3fd343db54e84d107>.
19. H.R. 413, 156th Gen. Assemb., (as reported by H. Comm. on Health and Human Serv., Feb. 17, 2021). <https://www.legis.ga.gov/api/legislation/document/20212022/197468>
20. *Id.*
21. *Id.*
22. See Durkee, *supra* note 1.



# Stop Filing Notices of Appeal



**Samuel E.  
Meller**

**You might be asking, well then, how do I appeal if I don't file notices of appeal? If I don't appeal, then I can't appeal! However, notices of appeal, filed alone, are dangerous. A better way of appealing, and one that is more guaranteed to work, is to file discretionary applications for appeal instead.**

This doesn't apply to you lawyers in criminal proceedings (and y'all solicitors and prosecutors have your own special rules). With the exception of probation violations, every other pre-conviction order is only appealable by interlocutory appeal. And a tip to all criminal defense lawyers practicing at the motion for new trial stage: you can file a notice of appeal after the hearing but before the written order comes out, and the notice of appeal ripens automatically once the written order gets filed. Your Superior Court clerks may not like this, and sometimes the clerks will make you file an amended notice of appeal after the written order hits the docket, but your original notice of appeal is still effective and divests the clerks of jurisdiction anyway. Smile and nod, and do what the clerks ask you to do—you're just trying to make sure you don't have to jump through the hoop of having to file permission for an out-of-time criminal appeal.

There is a fun trick in the Court of Appeals buried in O.C.G.A. § 5-6-35 (j). Let's say that you had the right for a direct appeal, for example, because the jury awards to the plaintiff \$10,000.01. However, the trial judge reduces the judgment to \$9,999.99 due to a collateral source payment. Do you file a discretionary application or a bare notice of appeal?

Trick question: even if there were no set-off, file the discretionary appeal. Because the Court of Appeals treats a discretionary application for an appeal as if it was a direct appeal if the appellant had the right to a direct appeal anyway under O.C.G.A. § 5-6-34, there

is never an advantage to filing a notice of appeal instead of a discretionary application.

In domestic actions or in actions in judgment and equity, there is always a mix. In domestic actions, some child custody, some divorce, some contempt and everything in between. How is a new lawyer supposed to know whether their order is appealable as a direct appeal or as a discretionary appeal? You're not, but you don't have to! Just file the discretionary application.

Or, to take it one step further, perhaps you're confused as to whether the order is final or not. Maybe there was a finality on some issues but not all. The partner and senior associates disagree. There is nothing that restricts you from only filing one type of appeal. You could file a notice of appeal, a discretionary application, and get a certificate of immediate review and file an interlocutory application for the same order. No one says you can't! You're guaranteed to get it right! The Court of Appeals dismisses the wrong ones as jurisdictionally incorrect without you having to do anything. And quite frankly, the standards for granting interlocutory and discretionary appeals are very similar—you really won't have to rewrite your entire application.

It does take more time to write an application as opposed to a simple notice of appeal, and time is money to your clients. However, the consequences of getting it wrong means the appeal could be shut down permanently. Furthermore, explaining to your colleagues and your clients that the Court of Appeals interpreted the order as one kind of appealable as opposed to the other kind of appealable is difficult and dangerous for a young lawyer. These kinds of things often lead to a call to one's malpractice carrier. In the best-case scenario, getting the original appeal category wrong means going back to the trial court for an application to file an out-of-time appeal.

Time is also on your side. In both interlocutory and discretionary applications, the Court of Appeals has to grant or deny the application within 30 days. So, in the ab-



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solute worst case scenario, you have lost a month of time on the appeal. This is wildly less time than all the parade of horrors that you would have to go through if you had incorrectly filed a notice of appeal instead of a discretionary application.

And in the extremely rare situation where you are genuinely confused as to which appellate court, whether Supreme Court or Court of Appeals, to file, you're in luck. Again, the Court of Appeals will do the work for you. In the case where the appeal presents constitutional issues that the Court of Appeals genuinely believes should go to the Supreme Court, it will simply transfer the matter to the Supreme Court. And if the Supreme Court thereafter disagrees, and concludes that the appeal does not present constitutional issues, it will transfer the matter back down to the Court of Appeals. And you, young lawyer, having done absolutely nothing, will have protected your clients' rights by just breaching that first hurdle of getting in the door at the Court of Appeals.

If you don't happen to have your specialty just yet, and you're doing a little bit of everything, sometimes it's best to not have to figure out the correct, on-the-nose answer every time. Sometimes, filing three different filings to make sure you get the appeal right is superior than trying (and failing) to second guess your trial judge and the Court of Appeals. Stop filing those notices of appeal. YLD

*Samuel E. Meller is a staff attorney in the Augusta-Richmond County Department of Law.*

# Oops, I Don't Think That Was Meant For Me: An Overview of an Attorney's Ethical Obligations Regarding the Inadvertent Disclosure of Privileged Documents



**Samantha Mullis**

Recently as I was reviewing a new claim file, I came across emails that the plaintiff's lawyer accidentally forwarded to the pre-suit claim adjuster. The forwarded emails contained internal firm communications regarding the attorneys' evaluation on liability, including discussions of disengaging the client because of the heavily disputed liability issues. The email chain that was forwarded went on for two pages, discussing the client's medical treatment and if a doctor would treat the client based upon the liability issues in the case. If there was a smoking gun to be found in the defense world, these emails were it.

Clearly, I recognized that the plaintiff attorney never intended for my claim adjuster nor myself to see the information in those emails. There is no dispute that such communications would have been, and possibly still are, privileged. My partners and I are familiar with the procedure for when privileged documents are produced by a party to a party through discovery, but that was not the case here. No one had dealt with privileged information being produced to a non-party (claim adjuster) prior to litigation and how that affects the documents once litigation commences.

Model Rule of Professional Conduct 4.4 (b) provides, "A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender."<sup>1</sup> In

2016 Georgia adopted Model Rule 4.4 into the Georgia Rules for Professional Conduct.

Comment [2] of Georgia Rules for Professional Conduct goes on to state that Rule 4.4 applies to instances where an email was misaddressed, or a document was accidentally included with information that was intentionally sent.<sup>2</sup> Notably, Rule 4.4 applies when a document was received by a lawyer, it does not lay out different obligations depending on the sender or the timing of the production. Rule 4.4 (b) applies to both litigated and non-litigated matters.

Lawyers who practice in federal courts should be aware of the different, and in some ways greater, protection for privileged documents under the Federal Rules of Civil Procedure. Fed. R. Civ. P. 26(b)(5)(B) states that if information that is subject to a claim of privilege is produced in discovery, the party claiming privilege may notify the receiver of the privilege claim. Once the receiver has been notified of the claim, he/she must promptly return, sequester or destroy the information and copies. The receiver cannot use or disclose the information until the privilege claim is resolved. The receiver must take reasonable steps to get the information back if the information was disclosed prior to notice of privilege. The receiver can present the information to the court under seal for determination of the privilege claim. The producing party must preserve the information until the claim is resolved.<sup>3</sup>

There are notable differences between Fed. R. Civ. P. 26 and Georgia Rule of Professional Conduct 4.4. First, Fed. R. Civ. P. 26 applies to information produced in discovery, and it requires the receiver to "return, sequester, or destroy" the information received including copies. Georgia Rule of Professional Conduct 4.4 requires the receiving party to notify the sender of the disclosure, where



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Federal Rule 26 has no such requirement. Where the Georgia Rules puts the onus on the disclosing party to take protective steps, but the Federal Rules also mandate that the receiving party take steps to protect the further disclosure of the information.

We could continue to go down the ethical and professionalism rabbit hole of "what if scenarios." A few good considerations when you receive an inadvertent disclosure are:

- Notify the sender of the information.
- Consider how you obtained the information.
- Consider what jurisdiction you are in and whether you have an obligation to return, sequester or destroy the information/documents.
- Limit further disclosure or use of the information until a court makes a ruling on a claim of privilege. YLD

*Samantha Mullis is associate general counsel at Augusta University.*

## Endnotes

1. Model Rules of Professional Conduct Rule 4.4 (b).
2. Georgia Rules of Professional Conduct Rule 4.4 (b), Comment [2].
3. Fed. R. Civ. P. 26(b)(5)(B).

# Where the Spirit Meets the Bone



**Brennan  
McElhone**

**Lucinda Williams has a record called “Down Where the Spirit Meets the Bone.”** It’s very good; I highly recommend it. The album’s title is derived from the song “Compassion,” as does this article. The worst part of being an attorney is—with scant exception, looking at you real estate attorneys—no one is ever really excited to talk with us. It would be very unusual for a client or potential client to wake up and say, “Oh boy! I get to talk to my attorney today!” Such is the nature of the industry.

I serve as the domestic violence prosecutor of the Cordele Judicial Circuit and you can trust me when I say, I’m not especially popular. If I can get my witnesses to talk to me at all, the conversation usually starts with, “I already told the officer I didn’t want to press charges.” From there, we go into the topic of this article. In every interview, deposition, meeting, direct examination, cross examination and all the other kinds of client-facing-interactions that take place in the course of a case, one of an attorney’s paramount duties is to find a way to meet that person “down where the spirit meets the bone.”

I used to go into these kinds of meetings wholly zeroed in on proving my interpretation of the case. I was the one that had poured over police reports, 911 calls, crime scene photos, bodycam footage, medical records. I was the one with the law degree. I knew what happened, obviously. My job was as simple as presenting my understanding to the jury. This method proved to be a terrible way to put together a case. As it turns out, people are more complicated than my, “When all you’ve got is a hammer, everything looks like a nail” approach.

A few months back I tried a misdemeanor or battery case. The short version is that an adult daughter was accused of beating up her elderly mom, and alcohol was involved.

The jury determined that the daughter was not guilty, and a big part of that was because once her mom, the victim, got on the stand, she said she (the mother) started it. Now, I knew that that wasn’t true. I had heard the 911 call. I had seen the bruising on the mom’s arms and back. I saw the damage to the house. And I had met with the victim, and she told me how mean her daughter could be when she was drunk. She told me she was afraid of her daughter. But she told me something else. That her daughter was doing a lot better. That she didn’t want to see her daughter lose custody of her grandbaby. And when the mom took the stand, her story was completely different than what she had told me. She would do anything to protect her grandchild. I can’t blame her.

That desire to protect her granddaughter, that’s what Lucinda is talking about. That was down where the spirit meets the bone. And I missed it.

Less poetically, what do people want most? What is their truest desire? What are they longing for? What do they want to see in the outcome of their case? Because clients, witnesses and victims will lie to you. They’ll lie without even knowing they’re lying. They’ll lie to you absolutely knowing that they’re lying. Your job as an attorney is to hear them, listen to them, be patient

with them. But all the while carefully hike down to that crossroads of the head and the heart. It’s uncomfortable. You’re a tourist of someone else’s experience. You know you’re standing there gawking, taking in the sights, worrying you’re not showing the proper respect to the gravity of where you are. Acclimate to that discomfort and do your professional duty.

Getting back to Williams, “compassion” is the magic word. The ideals of mercy, justice, even fury, are all critical in effective legal work. But compassion is the secret sauce. Too often compassion gets thrown into that category of words that equate to “being nice.” Being “soft.” That’s not what compassion is. Compassion is finding the stillness in yourself to hold someone’s troubles long enough for them to understand that you see them as more than a victim, a client, a piece of evidence or a paycheck. You see them as more than the one moment in their life that you’re employed to handle. You’re seeing them and your case will be better for it. Because when you show compassion, people will show you what they are experiencing down where the spirit meets the bone. YLD

*Brennan McElhone is the Violence Against Woman Act prosecutor for the Cordele Judicial Circuit District Attorney’s Office.*



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# Dismantling Toxic Grind Culture



**Riane N. Sharp**

## The Olympics are something I enjoy.

My mom and I particularly love watching track and field, swimming and women's gymnastics. So, it comes as no surprise that we, like many Americans, were looking forward to seeing Simone Biles (the G.O.A.T.) bring her #BlackGirlMagic to every 2020 Olympic gymnastics event. When we simultaneously received the New York Times alert that Simone withdrew from the team finals competition, I immediately wanted answers. Was she OK? And yet, once news broke that Simone withdrew in efforts to prioritize her mental health, I immediately understood. I cannot imagine the immense pressure of competing at the highest level on the world's stage, especially while not being in the right headspace.

But as attorneys, we often attempt to do just that: perform under immense pressure, while not being our best self. Whether it's meeting billable requirements, working on huge projects on expedited timelines or striving to "prove"/establish ourselves in our workplace, attorneys often find ourselves working under pressure, whether it is self-imposed or imposed by others. The pressure is often a by-product of toxic "Grind Culture."

So, what is Grind Culture? It is the notion that one must always be "on and available." It glamorizes accessibility and working hard even in unhealthy ways. It frowns upon saying "no," setting healthy boundaries and taking time off. Grind Culture promotes the idea that there is always more to do, and you are only "as good" as your latest accomplishment or task mastered. Most importantly, it values the work more than the person doing the work. *(Author's note: this is my definition. Grind Culture, like many things, may be viewed and characterized differently by others. Further, while Grind Culture can certainly in-*



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*clude all of these things, my definition is not all inclusive.)*

Simply put, Grind Culture will leave you burned out and can make you sick. It is not sustainable or healthy, which is precisely why it must be dismantled. While previous generations of attorneys (and professionals in general) may be entrenched in Grind Culture, the younger generations are choosing to work differently. Like Simone, we have the ability to prioritize our own well-being above work. We are learning to listen to our bodies both physically and mentally. We recognize that even though we are ambitious and dedicated to our work, we are also humans who have limits, deserve grace and need rest.

So, how do you dismantle toxic Grind Culture? One small decision at a time. Each day will present new challenges, so you must be intentional about how you show up in the workplace.

Here are a few suggestions.

## 1 Establish Core Values

Establish core values for how you want to integrate your work and life, and abide by those.

## 2 Create Routine

Create and follow a routine that regularly incorporates things that bring you joy and allow you to rest.

## 3 Advocate for Yourself

Advocate for yourself by communicating your bandwidth, setting reasonable timelines for your work product, delegating appropriately, taking breaks and, yes, having fun.

The overarching goal and result are a better quality of living. In our multigenerational workplaces, everyone may not understand nor respect the way you choose to work, and that is perfectly fine. A lot of people did not understand how the "twisties" affected Simone's Olympic performance either. The important thing is that you purposely work in a manner that is best for you, physically, mentally, emotionally, and spiritually. I am grateful to Simone for the audacious illustration of self-care in big moments. Let it serve as a reminder for us all that you are never too busy or under too much pressure to take care of yourself. **YLD**

Riane N. Sharp is staff attorney to the Global Supply Chain, Innovation & Commercial Team at Starbucks Corporation.



## What the YLD Has Been Up To







1. 175th Anniversary of the Supreme Court of Georgia held Dec. 1, 2021, at The Commerce Club. (L-R) Elissa Haynes, YLD president; Justice John J. Ellington, Supreme Court of Georgia; and Hannah Couch, co-chair, YLD Signature Fundraiser.
2. State Bar of Georgia Pro Bono and Public Interest Awards Reception held Dec. 2, 2021, at The Glenn Hotel Sky Lounge. (L-R) Elissa Haynes, YLD president; and Elizabeth Fite, State Bar of Georgia president.
3. YLD volunteers sorted food at the Atlanta Community Food Bank on Feb. 20. (L-R) Jessica Oglesby, YLD director; Caroline Scalf, participant, 2022 YLD Leadership Academy; Morgan Lyndall and Veronica Rogusky, co-chairs, YLD Legal Food Frenzy Committee; and James Cox, co-chair, YLD Legislative Affairs Committee.
4. YLD President Elissa Haynes and YLD Immediate Past President Bert Hummel pose outside the Nathan Deal Judicial Center with the 2022 YLD Leadership Academy class and co-chairs during their second session in February.
5. The 33rd Annual Capitol Leadership Luncheon held Feb. 2 in the Floyd Room at the James H. "Sloppy" Floyd Building. (L-R) Judge Andrew Pinson, Court of Appeals of Georgia; Justice John J. Ellington, Supreme Court of Georgia; YLD President Elissa Haynes; Chief Justice David Nahmias, Supreme Court of Georgia; Justice Verda Colvin, Supreme Court of Georgia; and Presiding Judge Sara Doyle, Court of Appeals of Georgia.
6. YLD Fall Meeting held Oct. 22-24, 2021, in Savannah, Georgia. Front row (L-R) Morgan Lyndall, co-chair, YLD Legal Food Frenzy Committee; Elissa Haynes, YLD president; Tayah Woodard; and Hannah Couch, co-chair, YLD Signature Fundraiser. Back row (L-R) Jamie McDowell, YLD Board of Directors; Kenneth Mitchell, YLD secretary; and Veronica Rogusky, co-chair, YLD Legal Food Frenzy Committee.





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## ► EXECUTIVE DIRECTOR, FROM PAGE 3

Here are some of their thoughts (condensed for brevity). As always, I am interested to know what you think and what ideas you have, too. Please share those with us (damone@gabar.org).

Presiding Judge Stephen Louis A. Dillard was appointed to the Court of Appeals of Georgia in 2010. He was in private practice in Macon prior to his appointment. Many think highly of Judge Dillard for a lot of reasons, including the way he grooms the interns and clerks who come through his office, as well as his support of so many of the initiatives of the Young Lawyers Division. He offered that “mentoring is crucial for the betterment of the legal profession.” As judges and lawyers, he believes “we have a responsibility to train, encourage and inspire students and young lawyers.” Here is why he believes that is so important: “What we do is so much more than a job, and freely sharing our knowledge and experiences will not only benefit those being mentored, but also their future clients and the profession as a whole.” I concur.

Presiding Judge Sara L. Doyle was elected to the Court of Appeals of Georgia in 2008. Prior to taking office, she was an equity partner with the national law firm of Holland & Knight LLP. I have known Judge Doyle for some time and have always appreciated her active involvement with many professional/Bar organizations. She shared that “mentorship is extremely important for the legal profession.” She explained the significance a bit more, saying “as law students, we spend three years being taught how to think, but little about the actual practice of

law or how to navigate our legal careers. Good mentors help those joining the profession to not only become more effective practitioners, but can streamline a new attorney’s understanding of what he or she wants to accomplish as a legal professional.” My sentiments exactly!

Shiriki Cavitt Jones currently serves as a commercial transactions attorney for Coyote Logistics LLC, a UPS Company. Jones also connects with law students as an adjunct professor at Emory University School of Law, teaching a corporate externship class since 2013. In June, she was elected to the State Bar’s Executive Committee. When asked if mentorship was important to the legal profession, she said “yes!” She then explained that “I believe that it really does take a village of mentors and sponsors to help build a good lawyer/legal career. A mentor is an accountability partner and a part of a mentee’s support system to help guide one through the ins and outs of practice and a great way to maneuver through potential practice minefields. The mentor/mentee relationship offers brand new exposure and perspective to each other’s ideas, methods, opinions and resolutions.” Could not agree more!

The last member of my immediate focus group was Alex Shalishali. Alex was raised in Columbus and has a focus on litigation as part of his practice. He is active with the Young Lawyers Division and is a committed mentor in that part of the state. I was curious whether he believes mentorship is still relevant at this point in his career and why should someone be a mentor. Here’s what

he shared: “Unquestionably. Despite the fact I am going into my 10th year of practice, I still regularly come across practice issues that I have never dealt with but am often able to work through them with guidance from more experienced colleagues.” And when I asked why someone should be a mentor, he explained: “For me, mentorship has always been about paying it forward. I was fortunate to have a number of great mentors throughout my life who looked out for me in ways in which I could never repay.” Facts!

The point? ... Lawyers need mentors. Whether they take on the role as originally described in “The Odyssey,” or they adapt new concepts from Sheehy and Levinson, we need a group of consistent reference points, who will help us avoid poor ethical choices, support us in the advancement of our careers, comfort us through crisis and help ensure the profession remains noble, honest and just.

### Point of Personal Privilege

Thanks to the judges and lawyers who specifically helped with the work in this article. But thanks, also, to the lawyers and law students who shared their thoughts on recent visits to Covington, Rome, at Emory’s Law School or part of the Gate City Bar Association retreat. I love talking with Georgia lawyers. Thank you all for your thoughts, too. DEE YLD

*Damon E. Elmore is the executive director of the State Bar of Georgia and was the 2005-06 YLD president.*

# When life doesn’t make sense.

The SOLACE program is designed to assist any member of the legal community (lawyers, judges, law office and court staff, law students and their families) in Georgia who suffer serious loss due to a sudden catastrophic event, injury or illness. Visit [www.gabar.org](http://www.gabar.org) for more information on SOLACE, or email [solace@gabar.org](mailto:solace@gabar.org).

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