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The CCS Quarterly Newsletter is a periodic publication of Carlock, Copeland & Stair, LLP, and should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and you are urged to consult counsel concerning your own situation and any specific legal questions you have.



"Operation Quick Strike" Highlights Importance of Regulation Awareness

By: Gary Lovell and Erica Holzman

In December, the U.S. Department of Transportation's Federal Motor Carrier Safety Administration (FMCSA) shut down 52 bus companies and decommissioned 340 vehicles for multiple and serious violations of the Federal Motor Carrier Safety Regulations which caused the FMCSA to deem these motor carriers a hazard to the public. According to the U.S. Department of Transportation, the FMCSA plans to continue to vigorously investigate and uncover dangerous patterns of unsafe behavior and business practices in 2014. It is important as a motor carrier to be aware of the different regulations that affect each aspect of their business and to take care to ensure compliance. Liability can be triggered by faltering in any of the following areas.

The Cargo

The Federal Motor Carrier Safety Regulations provide for different standards or levels of care in certain factual situations. Georgia and South Carolina have mostly adopted those federal standards. Motor carriers of persons owe an even higher duty of care to their passengers than carriers of property. A carrier of passengers is one that undertakes the transportation of persons from one place to another, gratuitously or for hire. Such a carrier may be either a special or private carrier, or a public or common carrier. The duty of care owed to the passenger is much stricter than the "ordinary care" owed to the non-passenger motoring public.

In December, the USDOT's FMCSA shut down 52 bus companies and decommissioned 340 vehicles for FMCSR violations.



The Driver

Every motor carrier, and its drivers, is subject to minimum qualifications and duties under the federal regulations, as set forth in Title 49 of the Code of Federal Regulations. Every motor carrier is also required to gather and maintain certain records in

the driver's qualification file under the Federal Regulations. Upon hiring a driver, the motor carrier must investigate and document its investigation of a driver's driving violation history. The motor carrier has an ongoing annual duty to investigate the driver's motor vehicle violation record, and to keep a written record of doing so. The driver also has a duty to report timely moving violations to the motor carrier, in writing within 30 days of conviction. A motor carrier cannot permit an unqualified driver to operate a vehicle on the public highways.



The Vehicle

Every driver must perform a daily vehicle inspection before each trip and document that inspection at the end of each day's work. The report must list any deficiencies, or the absence of any. The carrier must then correct each defi-

ciency before allowing the vehicle to be operated, and document those repairs on the original inspection report. These reports must be maintained for three months. The duty of inspection extends to inspection of the load as well before each trip.



The Trip

Most motor carriers and drivers are subject to limitations on the number of hours they can be on duty or driving. Records must be kept documenting these hours. Upon being found in violation of the hours of service, a driver may be suspended from driving.

The logs may be kept in various electronic or written form, and the driver must have seven days in his possession. The rules require that the logs also be audited by the motor carrier.

The above mention just a few of the details involved in the key areas of liability for motor carriers. In 2014, take steps to learn and implement standards to address the basic regulations for a motor carrier. It is the start to protecting your business from a forced shut down by the FMCSA. For an up-to-date list of codes and regulations, we invite you to download, "2014 Motor Carrier Accident Law Primer" at <http://tinyurl.com/MotorCarrierLaw>. If you have any questions on the materials, please do not hesitate to contact author and practice group leader Gary Lovell at glovell@carlockcopeland.com or 843.266.8213.



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Case in Point



Violations of the Federal Motor Carrier Safety Regulations Can Trigger Liability in Subsequent Lawsuits

In January, a DeKalb County, Georgia jury entered a \$3,200,000 verdict against the owner of a car-hauling truck with faulty brakes. The driver of the truck was unable to stop his vehicle on the highway for traffic resulting in a four vehicle pile-up. The truck driver claimed that he "attempted to apply his brakes, but the braking system on the vehicle failed without warning."

Although the driver claimed that he bought the vehicle only three months before the accident and was not aware the brakes were faulty, the Court refused to allow the company that sold the vehicle to the driver to be included on the jury verdict form, preventing apportionment. The trucking company and driver were found to be completely liable for the accident.

Spotlight on...

WORKERS' COMPENSATION

Our firm works hand-in-hand with clients to develop policies that prevent work-related accidents and issues, while aggressively defending employers against false or inflated claims. To ensure we understand our clients' needs and operations, Carlock Copeland has developed a large workers' compensation defense practice.

The firm's extensive health care practice, which includes in-house nurse consultants, provides our practice with valuable resources. We have excellent relationships with medical providers, private investigators, and rehabilitation suppliers, whose assistance is often vital in the successful resolution of workers' compensation cases.

Our attorneys approach claims from a strategic standpoint - helping to evaluate the claims, develop an action plan, and determine whether a beneficial and economical resolution would be best achieved through continued litigation or alternative dispute resolution.

Within this practice, the firm represents employers and insurance carriers, self-insureds, group associations and third-party administrators. Our client base reflects our successful representation of these businesses and insurers.

Representative Cases include:

Chris Whitlock handled a case for a major insurance client where the claimant sustained a catastrophic back injury and a superadded psychological injury. The claimant also had a pre-existing seizure disorder and, during a stay at a mental health hospital, the claimant fell and sustained a brain hemorrhage. Claimant's counsel filed a hearing request with the State Board alleging a superadded head injury due to a slip and fall at the hospital. Chris was able to prove that the claimant was not at the hospital due to psychological reasons, but due to unrelated substance abuse and that the claimant may have had a seizure which triggered his fall. Ultimately, he was able to settle this claim very reasonably to include a MSA cost projection analysis which did not anticipate future medical treatment for the claimant's brain injury.

Lynn Olmert recently defended a claim for workers' compensation filed against a large roofing company. Claimant alleged that he sustained an injury to his back while lifting a large piece of wood while working for the Employer. Prior to involvement of defense counsel, the claim was accepted as compensable on a medical only basis, but income benefits were denied based on a termination due to insubordination. This fact was disputed, and a hearing

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at a Upcoming Seminar:

Lynn Olmert will present "Teleworking Injuries: Trends, Considerations and Best Practices for Workers' Compensation" at the Risk and Insurance Management Society's (RIMS) Education Conference for the Atlanta Chapter on February 27, 2014. The presentation will explore current situations under Georgia Law to analyze teleworking claims, provide practical pointers for preventing these claims, and discuss how to manage the claims when they occur. To register for the conference, visit the RIMS website, Atlanta.rims.org.

To learn more about this practice, contact Chris Whitlock @ 404.221.2333 or cwhitlock@carlockcopeland.com, or visit the group at www.carlockcopeland.com

was scheduled on claimant's request for income benefits. Throughout the course of discovery, claimant changed his story about the accident and contended that he was lifting with a co-worker at the time of his injury and that the co-worker dropped his end of the board that they were lifting, resulting in back injuries. The co-worker denied this claim and had no recollection of any such incident occurring. Surgery was ultimately recommended by the authorized treating physician on the basis that the lifting incident aggravated claimant's pre-existing back problems. Following additional investigation, it was discovered that on the day prior to the alleged accident, Claimant had been seen by another doctor, in the same practice, and an MRI had been ordered for claimant's back based on reports of back pain and numbness in his legs. The claimant never had that MRI done, but instead, sustained an alleged injury on the following day at work. Based on this newly discovered evidence, the decision was made to controvert the claim in its entirety. Following a lengthy hearing on all issues, the administrative law judge ruled that claimant did not sustain an injury arising out of and in the course of employment and denied the claim in its entirety.

Appeal Abandoned Due to Insufficient Statement of Issues

By: John L. Bunyan and Tyler J. Wetzel

Sapuppo v. Allstate Floridian Ins. Co. No. 13-11558, 2014 WL 43894 (11th Cir. Jan. 7, 2014)

The Eleventh Circuit affirmed the dismissal of a putative class-action complaint where the plaintiffs abandoned on appeal arguments that the district court erred in its alternative holdings that each claim failed as a matter of law.

The litigation arose out of Chapter 2007-1 of the Laws of Florida, which made state-subsidized reinsurance available to Florida insurers but required the insurers to pass the cost savings along to policyholders. Florida's Office of Insurance Regulation investigated Allstate Floridian Insurance Co. after it accepted the subsidy but also raised premiums by over 40 percent. Allstate eventually agreed to reduce its premiums after it had collected the raised premiums for 14 months. The plaintiffs filed a putative class action arguing that Allstate had violated Chapter 2007-1 and alleging claims for unjust enrichment, breach of contract, breach of fiduciary duty, and breach of the implied covenant of good faith and fair dealing.

The district court dismissed the complaint for failure to state a claim, concluding that the four claims all failed because: (1) The "filed rate doctrine" bars suits challenging the reasonableness of rates filed with a regulatory agency; and (2) the Florida legislature did not create a private right of action to enforce Chapter 2007-1. The district court also gave independent alternative grounds for dismissing each of the four claims.

The Eleventh Circuit affirmed the dismissal because the plaintiffs failed to challenge on appeal all of the grounds on which the district court based its judgment. The Court noted that the plaintiffs' Statement of the Issues section listed the only two issues on appeal as whether the district court erred in concluding that: (1) the claims were barred by the filed-rate doctrine, and (2) there was no private right of action. The plaintiffs, however, did not mention in the statement of issues the district court's alternative reasons for dismissal. The Court concluded that this failure alone resulted in abandonment of those arguments.

In any event, the Court also concluded that the plaintiffs had abandoned challenges to the district court's alternative grounds for dismissal by making only passing references to them in the statement of the case, summary of the argument, and argument sections of their brief. And while the plaintiffs made some arguments and cited authorities as to the alternative rulings in their reply brief after the defendant raised the waiver issue, the Eleventh Circuit found that those arguments came too late.

The *Sapuppo* opinion suggests that the Eleventh Circuit will scrutinize closely the statement of the issues section to determine whether arguments have been properly raised on appeal. It also highlights the difficult choice practitioners face between drafting a broad or specific statement of the issues on appeal. If the plaintiffs in *Sapuppo* had listed the issue for appeal broadly as whether the district court erred in dismissing the Complaint for failure to state a claim, then the Eleventh Circuit may not have concluded that they abandoned any argument based on their issue statement (assuming the plaintiffs actually developed arguments challenging the district court's alternative grounds for dismissal). But by drafting a more specific statement of the issues on appeal, the plaintiffs suggested they were only challenging some of the district court's grounds for dismissal. While a footnote at the end of the opinion implies that they would have lost anyway, the plaintiffs abandoned their opportunity to have their appeal decided on the merits by failing to raise arguments on appeal challenging all of the grounds for the dismissal.

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▶ Author and Appellate Practice Group Leader John Bunyan recently presented "**Procedural Pitfalls and Winning Appeals: Strategies for Success in the Appellate Courts**" to the Atlanta Bar Association's Sole Practitioner and Small Firm section in January. John will be speaking to the Cobb County Bar Association's sole practitioner and small firm section on appellate practice and professionalism on February 27 and plans to speak to other professionals around the state on appellate practice. If you would like to schedule a presentation on appellate practice for your firm or organization or to learn more about the Appellate Practice Group, contact John as indicated below.



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Firm News & Notes

WADE K. COPELAND AND PETER WERDESHEIM SELECTED AS GEORGIA TREND LEGAL ELITE

Partners **Wade K. Copeland** and **Peter Werdesheim** are recognized as two of Georgia's top attorneys in Georgia Trend's annual Legal Elite list, which appears in the magazine's December 2013 issue. Georgia Trend compiles the Legal Elite list by tallying ballots that are sent to every practicing lawyer in the state. Copeland was selected by his peers as a top attorney in Personal Injury, while Werdesheim was recognized in the General Practice/Trial Law area.

CHARLESTON ASSOCIATE PATON IS TRIPLE THREAT

Congratulations to **Laura Paris Paton** on a number of achievements this past quarter. Laura not only received an AV Preeminent Rating from Martindale-Hubbell, but was selected to serve on the Board of Directors for the

South Carolina Women Lawyers Association and to serve as the 2014 Donations Coordinator for the Cinderella Project Charleston.

ANDREW COUNTRYMAN APPOINTED TO SERVE ON PLDF LEGAL MALPRACTICE COMMITTEE

Andrew Countryman has been appointed to serve as the Co-Chair for the Professional Liability Defense Federation's Legal Malpractice Committee for the 2013-2014 term.

This will be the inaugural year for the Legal Malpractice Committee. The Committee will share expertise in the proper management of, and response to, legal malpractice claims. As co-chair, Andrew will be responsible for coordinating member participation and assisting in annual meeting seminar presentation planning.

CARLOCK, COPELAND & STAIR ELECTS FOUR NEW PARTNERS

Carlock, Copeland & Stair, LLP congratulates **Andrew W. Countryman**, **Jackson H. Daniel, III**, **Amanda K. Dudgeon**, and **Brent A. Meyer** on being selected to join the Firm's partnership.



Andrew W. Countryman practices in the Firm's Charleston, SC office and focuses his practice on defending South Carolina professionals, including doctors and health-care facilities, lawyers, architects and engineers. A portion of his practice also includes mechanic's lien law and general liability matters. Andrew is a regular speaker and author of articles related to various legal topics, including long term care defense, legal malpractice, mechanic's liens, evidence and legal ethics. In 2013 he was named a South Carolina *Rising Star* and is serving as the 2014 co-chairperson of the Professional Liability Defense Federation, Legal Malpractice Committee.



Jackson H. Daniel, III practices in the Firm's Charleston, SC office and handles a wide array of cases ranging from defending businesses against general liability and personal injury claims to representing contractors and design professionals in construction defect suits. Jack has represented clients successfully at both the trial and appellate levels, and has acquired in-depth experience defending companies, individuals and insurers in matters involving traumatic personal injury and wrongful death. He has also represented small businesses and insurers in contractual disputes. Jack was

honored on the 2012 and 2013 South Carolina *Rising Stars* lists as one of the best young lawyers in the state.



Amanda K. Dudgeon is a member of the Charleston, SC office's commercial litigation team and handles a wide variety of litigation matters, focusing her practice on advising and representing attorneys, real estate agents, accountants and other professionals. She also handles director and officer claims, general liability matters and construction defect litigation. She has tried several cases to verdict and often speaks on professional liability matters. Mandi is a Martindale-Hubbell AV Preeminent rated attorney and has been included in the South Carolina *Rising Stars* list in 2012 and 2013 as one of the best young lawyers in professional negligence defense.



Brent A. Meyer practices in the Firm's Atlanta, GA office and focuses his practice in the areas of construction litigation, general liability and premises liability. He has represented architects, engineers, surveyors, property owners and property managers during litigation. Brent represents his clients in pre-litigation negotiations, mediation, and throughout the litigation process, as well as at the appellate level. He has successfully argued dispositive motions on behalf of clients resulting in dismissal of all claims and avoiding extensive legal costs. In addition, he has assisted with multiple cases before the Georgia Court of Appeals and Supreme Court of Georgia. Brent also presents at seminars for design professionals and business owners regarding business practices to assist in reducing risk associated with litigation.

We're in this to win.

Jury Verdict for Defense in C-section Case

Gary Lovell and **Jeff Crudup** recently obtained a jury verdict on behalf of their obstetrician clients in Lexington County State Court. The case arose when a baby sustained lacerations on her cheek during a Caesarian section birth. The lacerations left several visible scars. At trial, Gary and Jeff successfully argued that the obstetrician performed the procedure within the standard of care and lacerations to babies' cheeks are a known and accepted complication of Caesarian births. After deliberating for three hours, the 12-person jury returned a defense verdict.

Defense Verdict in Condo Conversion/Asbestos Case

Joe Hoffman, **Billy Newcomb** and **Joe Kingma** represented a Real Estate Brokerage sued when a 12 story condo conversion failed. Plaintiff had purchased a portion of the building and sued the Brokerage, claiming it had known about the need for asbestos abatement. He was ultimately foreclosed on and faced a large deficiency. Plaintiff asserted he would not have bought into the building had he known of the asbestos. Plaintiff also argued that the Brokerage's dual representation of seller and buyer and the Brokerage's purchase of several floors for its own account created conflicts of interest. A former Brokerage employee testified that the Brokerage's manual required disclosure of all known facts about asbestos, and Plaintiff's expert agreed. The trial judge denied the Brokerage's motion for summary judgment, and the case went to trial on Plaintiff's fraud, negligence, breach of contract and statutory violation claims. Plaintiff also sought attorney's fees and punitive damages. While acknowledging the Brokerage had not told its client all it knew about the asbestos, the defense focused on the Brokerage's proximate cause argument. An artful timeline showed that delay in renovations due to the asbestos was only four-six months; it was other delays and the general decline in the real estate market that caused Plaintiff's losses. The jury rendered a complete defense verdict.

Defense Verdict in Disputed Liability Automobile Negligence Case

Lee Weatherly and **Kristen Thompson** represented a client in a disputed liability motor vehicle accident case filed in Charleston County State Court. Plaintiff was alleging that Defendant disregarded a red light and failed to yield the right of way to her, causing the collision. Lee and Kristen also contested the cause of Plaintiff's alleged injuries at trial as she had extensive pre-existing conditions. The jury returned a verdict for Lee, Kristen and their client, within five minutes of deliberations.

Court Applies North Carolina Law to Find Malpractice Action Time-Barred

David Overstreet and **Mike McCall** recently obtained summary judgment in a legal malpractice action that was filed in South Carolina, but arose out of a law firm's representation of a client in a North Carolina personal injury case. David and Mike argued that Plaintiff's claims against the law firm were time-barred under North Carolina's statute of repose for professional negligence cases. South Carolina does not have a comparable statute of repose, which set the stage for a dispositive choice of law dispute. They argued that the statute of repose is substantive law, that Plaintiff's claims were governed by the substantive law of North Carolina, and that the case should be dismissed. The South Carolina Court agreed and granted the law firm summary judgment.

Sprinkle and Hettinger Win for Assistant Attorney General

Shannon Sprinkle and **Lindsey Hettinger** won at the Court of Appeals for their client, a Special Assistant Attorney General. Plaintiff had successfully overturned a prior judgment against him, and then brought claims for false arrest and false imprisonment against the Assistant Attorney General. Shannon and Lindsey won a dismissal in DeKalb Superior Court, which the Court of Appeals affirmed.

Summary Judgment in Premises Liability Defense Survives Appeal

The Court of Appeals recently upheld a motion for summary judgment obtained by **Heather Miller** on behalf of their client, a local shopping mall. Plaintiff had alleged that she tripped and fell while walking her dog in a grassy area near a parking lot. Defendants argued that Plaintiff voluntarily ventured from a designated route of travel, thereby assuming the risk of her fall. A DeKalb County judge granted Defendants' motion, adopting all arguments set forth in Defendants' brief. Plaintiff appealed the trial court's decision. The Court of Appeals, with Judge Ellington presiding, upheld the grant of motion for summary judgment.

Defense Verdict in Cancer Case

Eric Frisch and **Jason Hammer** successfully defended a radiologist in DeKalb State Court against claims of failure to diagnose metastatic breast cancer. Plaintiff alleged that the radiologist failed to detect a suspicious mass on mammograms. Plaintiff developed stage IIIA breast cancer, treated with neo-adjuvant chemotherapy, radiation therapy, hormone therapy, and mastectomy with complications. Plaintiff alleged that the cancer was detectable

And we do.

on routine mammogram and that earlier detection would have avoided the mastectomy and the extent of the treatment. The jury returned a defense verdict after 1.5 hours of deliberations.

Summary Judgment in Construction Defect Action Against Framing Contractor

Patrick Norris represented a framing contractor in a construction defect action brought by the homeowner. After significant discovery, briefing, and oral arguments, the Court granted summary judgment to the contractor on statute of limitations grounds. The homeowner had engaged in repair work to the rear elevation of his home (including stripping of the stucco cladding and balcony waterproofing) more than three years prior to filing the claim against the contractor. Patrick argued that the homeowner had the opportunity and obligation to investigate the rest of the home for construction defects at the time of repair. The Court agreed, ruling that the failure to file a claim within three years from that repair work was fatal to the homeowner's claim. Patrick argued successfully that because the contractor was not involved in the repair work, he could not be subject to any "tolling" of the statute of limitations premised upon the repairs.

United States Supreme Court Denies Certiorari in Medical Malpractice Case

Gary Lovell and **Brian Spittler** obtained a denial of certiorari to the United States Supreme Court for a local General Surgeon accused of medical malpractice. Plaintiff sought certiorari to the United States Supreme Court arguing that she did not receive a fair trial in the State Court of Fulton County. The Court denied certiorari upholding a jury verdict in the Surgeon's favor.

Targeted Discovery and Motion for Summary Judgment Leads to Settlement for 10% of Plaintiff's Final Pre-Suit Offer

Lee Weatherly and **Kristen Thompson** showed how the use of discovery of fact and expert witnesses can produce effective results. After a limited number of targeted depositions of certain fact and expert witnesses, Lee and Kristen drafted a Motion for Summary Judgment in Federal Court arguing that Plaintiffs could not prove they were entitled to punitive damages in a wrongful death case involving a bicyclist. After the motion was filed, Plaintiffs agreed to a settlement amount that was ten percent of their final demand before suit was filed. This effective discovery and motions practice allowed the case to resolve satisfactorily while limiting defense costs and preventing possible excess exposure to the individual clients.

February 27 Teleworking Injuries: Trends, Considerations and Best Practices for Workers' Compensation

Lynn Olmert will present this seminar at the Risk and Insurance Management Society's (RIMS) Education Conference. The presentation will explore current situations under Georgia Law to analyze teleworking claims, provide practical pointers for preventing these claims, and discuss how to manage the claims when they occur. To register for the conference, visit the RIMS website, Atlanta.rims.org.

February 28 CLM Insurance Bad Faith, Coverage, and Fraud Conference

Carlock, Copeland & Stair is sponsoring this seminar hosted by the Claims & Litigation Management Alliance. It will bring together CLM experts and thought leaders in Insurance Bad Faith, Coverage and Fraud for an exchange of ideas spread over 12 committee panels and a presentation by a joint panel from all three committees. Continuing education credits vary by state. Register at theclm.org.

March 4 Architect & Engineer Risk Management: Lessons Learned the Past 25 Years

Kent Stair and Greg Wheeler will be presenting at the 2014 Architect & Engineer Seminar "Risk Management: Lessons Learned the Past 25 Years" hosted by Professional Liability Brokers Insurance Office of America. Join us for four hours of continuing education credit and an opportunity to network with your fellow peers. To register, email Lisa Frady, lisa.fradyl@ioausa.com or Hugh Holley, holleyh@PLBrokers.com.

April 23-25 PLUS Medical PL, Professional Risk, and Cyber Liability Symposium

Carlock, Copeland & Stair is sponsoring this seminar hosted by the Professional Liability Underwriting Society. Join us to participate in more than 13 educational sessions offering an intermediate to advanced look at the key coverage and policy issues impacting the E&O, Fiduciary Liability, Employment Practices Liability, Medical Professional Liability and Cyber Liability marketplace. Attendees will gain valuable insights and hear from industry insiders on the frontlines of the industry insurance markets. Register at plusweb.org.

May 8 Themis Advocates Group Mock Trial

Carlock, Copeland & Stair, LLP will be involved in a Mock Trial hosted by Themis Advocates Group. This wrongful death trial will be adjudicated by a Georgia Judge and will include the examination of real expert witnesses and deliberations by live jurors. There is no fee to attend this day-long event and continuing education credits vary by state. Email cwalsh@carlockcopeland.com if interested in attending.

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Publications & Presentations

Did you know that Carlock Copeland attorneys frequently write and present on topics for a variety of clients, organizations and publications? To request a presentation or article for your organization, contact Michelle Fry at mfry@carlockcopeland.com.

◆ John Bunyan presented "**Procedural Pitfalls and Winning Appeals: Strategies for Success in the Appellate Courts**" to the Atlanta Bar Association's Sole Practitioner and Small Firm section.

◆ Gary Lovell co-presented "**The Reptile Revolution: Appeal to Juror's Primitive Instincts**" at the Trucking Industry Defense Association Annual Seminar.

◆ Erica Parsons authored the www.insurancecoveragecorner.com blog post, "**First Lattes, Then Legal Precedent: Waiver Of Attorney-Client Privilege In Bad Faith Cases.**"

◆ Mandi Dudgeon participated on the "**Legal Ethics and Social Media**" panel at the Charleston Law Review's 2014 Symposium: Social Media and the Law.

◆ Dave Root authored the www.youreplawyer.com blog post, "**What's the Impact of a 'Reasonable Cause' Finding by the EEOC?**"