Meeting Materials Appendix

Drafting Committee on Wage Garnishment

Salt Lake City, Utah
March 7 & 8, 2014

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Practice of Law

State Bar of Georgia

Unauthorized Practice of Law Advisory Opinion No. 2010-1

Issued by the Standing Committee on the Unlicensed Practice of Law on June 4, 2010.

QUESTION PRESENTED

Assuming no traverse has been filed by any party in a garnishment action, is the completion, execution and filing of an answer in the garnishment action by a non-attorney employee of the garnishee considered the unlicensed practice of law?

SUMMARY ANSWER

A nonlawyer who answers for a garnishee other than himself in a legal proceeding pending with a Georgia court of record is engaged in the unlicensed practice of law.

OPINION

"The summons of garnishment shall be directed to the garnishee, commanding him to file an answer stating what money or other property is subject to garnishment." O.C.G.A. § 18-4-62(a). The "answer must be filed with the court issuing the summons," and "if the garnishee fails to answer the summons, a judgment by default will be entered against the garnishee for the amount claimed by plaintiff against the defendant." Id.

The summons of garnishment form set out in O.C.G.A. § 18-4-66(2) states that the garnishee is to file an "answer in writing with the clerk of this court...." The garnishee is warned that "[s]hould you fail to answer this summons, a judgment will be rendered against you for the amount the plaintiff claims due by the defendant." Id. O.C.G.A. § 18-4-82 refers to the document prepared by the garnishee as an "answer," as does O.C.G.A. § 18-4-97(a): "The garnishee shall be entitled to his actual reasonable expenses, including attorney's fees, in making a true answer of garnishment."

A properly served garnishee is bound to file an answer with the appropriate court. If the answer is not filed, the garnishee faces a default judgment. The inescapable conclusion is that a garnishment action is a legal proceeding. That being the case, the Committee examines who is permitted to file an answer to a legal proceeding that is pending with a Georgia court.

"Georgia's citizens, of course, have a constitutionally protected right of self-representation." In re UPL Advisory Opinion 2002-1, 277 Ga. 521, 522 n.3 (2004). A party to a legal action can also be represented by a duly licensed attorney at law. Ga. Const. (1983), Art. I, Sec. 1, Para. XII. As far as corporate self-representation, "[i]n this state, only a licensed attorney is authorized to represent a corporation in a proceeding in a court of record, including any proceeding that may be transferred to a court of record from a court not of record." Eckles v. Atlanta Technology Group, 267 Ga. 801, 805 (1997). The Georgia Court of Appeals concluded "that the rationale and holding of Eckles should, and does, apply to limited liability companies." Winzer v. EHCA Dunwoody, LLC, 277 Ga. App 710, 713 (2006). See also Sterling, Winchester & Long, LLC v. Loyd, 280 Ga. App. 416, 417 (2006).

The Committee concludes that a nonlawyer who answers for a garnishee other than himself in a proceeding pending in a Georgia court of record is engaged in the unlicensed practice of law.

SUPREME COURT OF GEORGIA
Case No. S11U0028

Atlanta September 12, 2011

The Honorable Supreme Court met pursuant to adjournment.
The following order was passed.

IN RE: UPL ADVISORY OPINION NO. 2010-1

This Court granted review of UPL Advisory Opinion No. 2010-1, issued by the Standing Committee on the Unlicensed Practice of Law on June 4, 2010. With this order, we hereby approve UPL Advisory Opinion No. 2010-1 pursuant to State Bar Rule 14-9.1 (g) (4).

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.
Witness my signature and the seal of said court hereto affixed the day and year last above written.

Sue C. Fulton , Chief Deputy Clerk

NAHMIAS, Justice, concurring.

I agree with the Court that, under existing law, we must approve UPL Advisory Opinion No. 2010-1, which concludes that a nonlawyer, such as a clerical employee of a corporation, who answers for a garnishee other than himself in a legal proceeding pending with a Georgia court of record is engaged in the unlicensed practice of law. I think it is important to note, however, the suggestion made by the State Bar of Georgia in its reply brief that a new court rule, similar to Uniform Superior Court Rule 15.1, be adopted to allow nonlawyer employees and agents of corporations and other entities to file garnishment answers, in order to alleviate the negative effects this UPL opinion may have on businesses dealing with routine garnishment proceedings. I am not sure a rule change would be sufficient; a statute similar to OCGA § 18-4-61, which underlies Rule 15.1, may be required. But the State Bar and the businesses and business associations that submitted briefs raising these concerns should understand that today's decision leaves them free to seek such a remedy from the Judicial Council or the General Assembly.

Georgia House Bill 683 (AS PASSED HOUSE AND SENATE)

BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:…

SECTION 3.

Said chapter is further amended in Article 1, relating to general provisions, by adding a new Code section to read as follows:

"18-4-8….

(b) When a garnishment proceeding is filed in a court under any provision of this chapter involving an entity as garnishee, the execution and filing of a garnishee answer may be done by an entity's authorized officer or employee and shall not constitute the practice of law. If a traverse or claim is filed to such entity's garnishee answer in a court of record, an attorney shall be required to represent such entity in further garnishment proceedings.

(c) An entity's payment into court of any property, money, or other effects of the defendant, or property or money which is admitted to be subject to garnishment, may be done by an entity's authorized officer or employee and shall not constitute the practice of law."

Georgia's New Garnishment Law Relaxes Filing Rule but Poses Risks

Excerpt from commentary on website of the Society for Human Resources Management
http://www.shrm.org/LegalIssues/StateandLocalResources/Pages/GeorgiasNewGarnishmentLaw.aspx

A new Georgia law allows companies to file answers to summonses for garnishment without the use of an attorney. But Georgia companies should tread carefully and weigh the benefits and risks of doing so before deciding to handle their own garnishments….

While the new law allows companies to file their own answers, it also requires that, if a traverse (a document filed by either party contending that the company's answer is insufficient or incorrect) or claim is filed against the company's answer, an attorney must represent the company in any further proceedings. As a practical matter, this means that unless the parties take no issue with anything in the company's answer, the company will be required to retain an attorney anyway. At that point, the attorney—playing catch-up in a short window of time—may be unable to undo any improper treatment of funds or incorrect representations made in the answer….

Some observers are already questioning whether the law is unconstitutional. The Georgia Constitution guarantees individuals the right to represent themselves in legal actions, but this right does not extend to companies. The Georgia Supreme Court's adoption of the advisory opinion from the State Bar of Georgia confirmed that the prohibition on companies representing themselves applied to garnishment actions. Since the Georgia Supreme Court—and not the state legislature—is vested by the Constitution with the exclusive authority to govern the practice of law in the state, it is anticipated that the new law will be challenged on the ground that it violates the separation of powers provided by the state's Constitution.

Administrative Fees

The States vary considerably on the fees they authorize for garnishees. In my rough-and-ready survey, the most common statutory response to administrative fees is silence. This probably means no fees. But for the minority of States that discuss fees, there is considerable diversity on a number of dimensions:

1. Who pays (the debtor or creditor)?

2. For what (initial response to the garnishment writ? periodic payments? court appearances)?

3. When can it be collected?

4. How much?

Here are some representative approaches to fees:

California:	$1.50 for each payment made, from debtor.[1]
Florida:	$5 for first payment; $2 for each subsequent deduction; plus $100 for attorney fees for filing answer.
Georgia:	$50 or 10% of amount paid to court, whichever is greater (up to $100) for actual reasonable fees in answering. Can seek court order for more.
Indiana:	Greater of one-time $12 or 3% of total amount required to be deducted by garnishment.
Kansas:	$10 per 30-day period.
Louisiana:	$3 per pay period.
Maine:	$1 per check sent to creditor.
Michigan:	$6 to be paid by creditor at time of garnishment writ; $1 for non-periodic payments.
Minnesota:	Creditor pays $15, plus extra for any necessary court appearances.
Missouri:	$8 or 2% of total amount, plus reasonable expenses for court appearances.

[1] Note that when fees are collected from debtors, care must be taken to ensure that the total amount collected does not violate limits on the amounts that can be deducted.

Nevada: $5 from creditor, plus $3 per pay period (not to exceed $12/month).

New Jersey: 5% of amount withheld.

North Dakota: $25 from creditor.

Oklahoma: $10 from debtor for answering summons.

Oregon: $2 for each pay period when a deduction was made, to be collected at end of garnishment.

Rhode Island: $5 for each garnishment.

South Dakota: $15 for each garnishment, from creditor.

Tennessee: None from private employers; $5 for each deduction for government employers.

Utah: $10 for a single garnishment; $25 for a continuous one.

Wisconsin: $15 for each garnishment, paid by creditor.

Liability of Garnishee for Failure to Respond or Withhold

The States have a variety of approaches to encourage employers to respond appropriately to garnishment orders. In one sense this is a standard compliance issue where the incentive should be set at slightly greater than the cost of compliance.[2] In this situation, the cost of compliance, generally speaking, is withholding and paying the garnishment, so the incentive should be slightly more than that.[3] Given the variety of enforcement approaches in the States, it's unlikely they pay a lot of attention to enforcement theory. But even within this framework, there are a number of different ways to structure the incentives. We will have to decide how we want to approach the issue.

These are some of the issues we will need to address:

1. What should be the basic measure of the incentive?

    A. Most States say employers become liable for the amount that should have been withheld.

    B. Some States say employers become liable for the total amount of the debt claimed.

    C. Minnesota says employers become liable for 110% of the debt claimed.[4]

2. Should additional incentives be added to the basic measure of the incentive?

    A. Some States also provide that the employer is to pay the plaintiff's attorney's fees.

    B. Some States also provide that the employer is to pay court costs.

    C. Some States explicitly add interest to the amount due.

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[2] The incentive should be *more* than the cost of compliance or employers will opt to pay the incentive rather than comply. It should be *slightly more* than the cost of compliance (rather than a lot more) to avoid over-compliance, the damage from legal error, and other problems. For an absolutely wonderful little article on labor compliance, see Steven L. Willborn, *Models of Labor Enforcement: Necessary Indeterminacy, in* CREATIVE LABOUR REGULATION: INDETERMINACY AND PROTECTION IN AN UNCERTAIN WORLD 161 (Deirdre McCann *et al*., eds, Palgrave McMillan, 2014)(the article also provides an explanation of the whining tone of the paragraph in the text).

[3] In theory, the incentive should be slightly more than the cost of compliance *times the probability the failure will be detected and corrected*. In this situation, however, when the debtor has filed the garnishment action and is awaiting the money, the probability of detection and correction approaches 100%, so we do not need to add that complication.

[4] Maybe some States do pay attention to enforcement theory?

D. Some States also provide for criminal sanctions.

3. Should there be differences between the incentives for different types of garnishment – for example, for child support garnishments, debt garnishments, etc.?

4. Should distinctions be made based on the nature of the failure to comply?

   A. Arizona provides enhanced penalties for failures that are willful or the result of gross negligence.

   B. Alabama provides a greater incentive for failure to answer a garnishment summons (total amount of debt) than it does for errors in the answer (amount of that should have been withheld).

Who to Pay

There are two basic issues here: (1) Where to send the check and (2) Who the check should be made out to. The States vary considerably on both of these dimensions, so there likely would be efficiency gains from increased uniformity.

Where to Send the Check

From my rough-and-ready survey, there appear to be four answers to this question.

By far, the two most common answers to this question are (1) to the Court[5] or (2) to the creditor's attorney.[6] Most states give one of these two answers. There are about an equal number of states in each of these camps.

A few states fall into one of two other camps: (1) to the creditor directly[7] (although query whether in practice this means to the creditor's attorney) or (2) to the Sheriff.[8]

Who to Make the Check Out To?

My rough-and-ready survey provided fewer answers to this question. I expect the answer is provided more often in court rules or through local custom than in the state statutes themselves. But a few states provided explicit direction, and they varied. For example, Virginia requires that the check be sent to the Court, but be made out to the creditor's attorney. Wyoming, in contrast, wants the check to be sent to the Court and made out to the Clerk of the Court. Minnesota and Montana are two other States where I found direct answers to the question. Minnesota requires the check to be sent to the creditor's attorney but to be made out to the creditor directly. Montana requires the check to be sent to the creditor's attorney, but requires the check to be made out to the creditor or the creditor's collection agency.

[5] E.g., Alabama, Alaska, Georgia, Iowa, Massachusetts, Missouri, Nebraska, New Hampshire, Ohio, Tennessee, Virginia, Wyoming.
[6] E.g., Arkansas, Delaware, Florida, Hawaii, Illinois, Indiana, Kansas, Kentucky, Montana.
[7] E.g., Colorado, Maine, Vermont.
[8] E.g., Connecticut, Idaho, Nevada, New York.