



GDLA NEWSLETTER

Volume 2 Issue 2

JANUARY 1996

THE PRESIDENT'S MESSAGE

By: R. Clay Porter

The Council of Superior Court Judges has requested input from the Georgia Defense Lawyers Association on jury reform legislation. The Council seeks to...

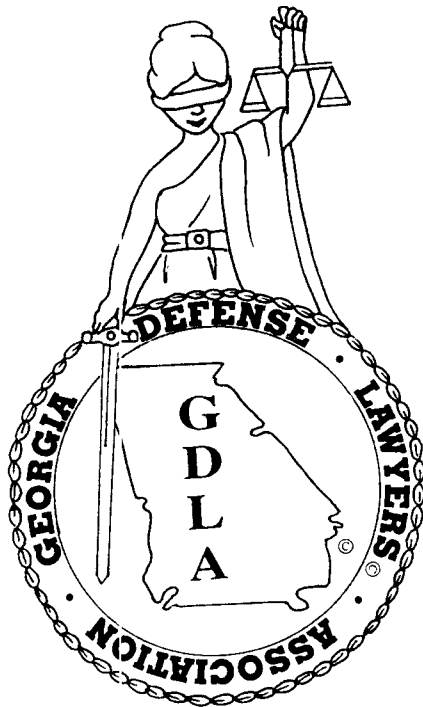
1. "...increase the number of citizens who serve on juries..."
2. "improve the system so the jurors who do serve are impressed with the efficiency as well as the fairness of the jury process."

the Council of Superior Court Judges will truly speak for the Association.

I hope everyone has made their reservations for the annual meeting in Cancun. David Hanks of Fulcher, Hagler, Reed, Hanks & Harper in Augusta is planning a first rate program. Please join us.

Lastly, I have heard big plans from George Duncan of Duncan & Mangiafico in Atlanta on the joint GTLA/GDLA seminar on professionalism and cooperation among plaintiff and defense lawyers. Emory University will play a substantial role in sponsoring and presenting the program. You will be hearing much more about the program as the plans are finalized. From what George tells me, it will be well worth attending.

See you in Cancun!



They plan to propose legislation in the upcoming session amending O.C.G.A. §§ 15-12-7, 10, 11, 40, 122, 123, 125, 141, and 163 concerning the manner in which jury lists are compiled and maintained. They also plan to propose an amendment to the Constitution allowing the General Assembly to prescribe a jury of six persons rather than twelve in any cases in the superior courts. The Council expects smaller jury panels to make jury service less burdensome and, thereby, expand participation.

The Council's request will be discussed at our winter board meeting scheduled for February 10, 1996. Please direct your comments to your regional board representative and/or to me. For more information concerning the Council's reasoning behind this legislation, please call me at (404) 816-2800 or 735-0838. Setting aside my natural defense lawyer bias for twelve-person juries, I am persuaded that this legislation would upgrade jury panels in general. However, I have heard arguments that our response to the



CALENDAR OF EVENTS

1996 Events

- Feb. 10 **Winter Board Mtg-**
Kiawah Island
- Feb. 08 **Winter Seminar**
Expert Witnesses
Macon Conference
Center, 3590 Riverside
Drive
Macon, Georgia
(Behind the Holiday
Inn at I-75 &
Arkwright Road)
- Apr. 24-2 **29th Annual Mtg -**
Cancun, Mexico
- Oct./Nov. **Fall Board Mtg -**
President's Choice
- Oct. 9-13 **DRI First Annual**
Membership Mtg -
Chicago, Illinois

1997 Events

- Apr. 24-27 **Annual Mtg-**
Ponte Vendra Golf and
Country Club, Fla.

29th ANNUAL MEETING

(April 24-28, 1996 - Cancun, Mexico)

Election of officers 1996-1997

April 27, 1996 9:00 a.m.



Airplane Reservations

If you plan on attending the above meeting, please make your reservation to protect your seats NOW. The deadline for Airlines and Hotel Reservations is Feb. 22.

The base "group" guaranteed ticket price (Atlanta-Cancun and return) is \$485.00 plus tax, passenger facility charge and/or surcharge if any, which will fluctuate from time to time, depending on when you make your reservation.

Telephone any American Airline ticket office and give them our "Star File No. 1846AB". They will handle your request

and get you to the right number to make your reservation. Flight 1741 leaves Atlanta at 8:45 a.m.; Flight 1887 leaves Atlanta at 10:48 a.m. Both on April 24, 1996. Our reservations are split between those two flights.

On the way down, both flights go through Dallas and arrive at Cancun at 12:39 p.m. and 2:24 p.m.

YOU PICK UP TWO HOURS GOING DOWN AND LOSE TWO HOURS COMING HOME.

The members that take Flight 1741 at 8:45 a.m. will return on Flight 355 from Cancun to Dallas and Flight 1142 from Dallas to Atlanta, arriving at 8:31 p.m.

The members that take Flight 1887 at 10:48 a.m. will return on Flight 2192 from Cancun to Miami and on Flight 1658 from Miami to Atlanta, arriving at 9:17 p.m.

HOTEL RESERVATION

Call Omni Reservation Center at 1-800-843-6664. Tell them the name of our group (GDLA) and that you want reservations at the Omni Cancun Hotel and Villas from Wednesday, April 24, 1996, to Sunday, April 28, 1996.

Our contract rates are \$80.00 single/double and \$120.00 for triple. (These rates are good for two days before and two days after should any of you want to go early or stay later.) They will tell you where to send your one night deposit, plus tax.

Please drop a note or card to Willis J. Richardson, Jr. when you make your reservation so that he can keep a record.

**FROM THE EXECUTIVE VICE
PRESIDENT: DAVID HANKS**

One of the Georgia Defense Lawyers Association speakers at its 1996 meeting is, Mr. David L. Grumbine. Mr. Grumbine is Senior Counsel of the

Whirlpool corporation. His company has been in the forefront of working out alternative billing methods and dealing with the other issues concerning relationships between corporate clients and outside defense counsel. Mr. Grumbine is much in demand. He has an article that will be appearing in the ABA JOURNAL and he will be speaking to the Corporate Section at the ABA Convention.

Following a process of proposals, interviews, etc. with firms around the country, one of the three firms which was selected to be lead counsel nationally in the defense of suits against Whirlpool Corporation was Nall, Miller, Owens Hocutt & Howard. We appreciate Sandy Owens' assistance in helping make this very timely and helpful program possible.

We look forward not only to a great time in the sun in Cancun but also to a program dealing with a topic which is regularly present in the thoughts and discussions of defense attorneys. Please join us for this annual meeting. You will be glad you did.

MINUTES OF BOARD MEETING

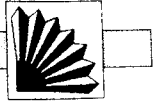
11/04/95



Meeting called to order
by president Clay Porter.

Those in attendance were:

Drew Hill
Bob Travis
Wilson Smith
Greg Melton
Charlie Goetz
Ken Moorman
David Hanks
Neal Dickert
Wiley Wasden
Joe Chambless
Clay Porter
Willis "Dick" Richardson
Hendley Napier
Bill Pinson



M.G. "Salty" Forbes
M.D. "Mac" McLendon
Steve Kyle
George Duncan
David Whitworth

President Porter called for discussion and reports on the following:

OLD BUSINESS

There was no old business outstanding other than the approval of the minutes of the last meeting. Previous minutes were approved without change.

SECRETARY-TREASURER REPORT

Joe Chambless reported on the financial status of the association. Total revenue received since October 1, 1994 through September 30, 1995 was \$51,295.00. Balance in the checking account as of November 1, 1995 was \$43,714.92. Balance in the Smith Barney Money Market account was \$1423.87 as of September 30, 1995. All bills which have been presented and approved have been paid.

Total membership was 430 as of October 27, 1995. Sixty four members have not paid and the Executive Secretary has or is sending out reminders to the delinquent members. Of the total membership, 16 are exempt from dues, 13 pay the \$90.00 rate and 401 pay the regular membership rate of \$125.00.

EXECUTIVE SECRETARY REPLACEMENT

Due to the increasing responsibility and workload of Greg Spicer in his law practice, he previously notified the association that he will need to be replaced in the relatively near future. Joe Chambless has been in contact with two applicants for that position. Motion was made and carried that Joe Chambless interview applicants for that position and to report his recommendations to the board at it's February meeting. Joe will have Greg prepare a job description that

Greg feels will represent the duties he has been fulfilling and Greg will be asked to sit in on interviews. Salary for that position will be revisited at the appropriate time as this is not a full time position and the newsletter is now being handled by Salty Forbes rather than by the Executive Secretary.

EXPERT DATA BANK

Steve Kyle, Vice President and Committee Chairman, reported that he needs more input from the membership on experts. At the current time, there are approximately 1000 names in the data bank but there are a great number of specialties which are not accounted for and which are needed. His office gets approximately 10 to 15 inquiries each month for expert information. He encouraged each board member to make a concerted effort to have attorneys in the members office submit expert data to Steve's office. The upcoming newsletter will again give a reminder to the membership and will include the data form to be used.

TRIAL ACADEMY

George Duncan, Vice President and Co-Chairman, reported that the trial academy has been scheduled on November 30 - December 2, 1995 at Callaway Gardens. He noted that attendance was down a little last year but the committee has budgeted for 40 students. This academy continues to be first class and the reports from the attendees have been excellent. The committee again expects approval of at least 18 hours of CLE credit, including trial, ethics and professionalism points. There will be 10-11 faculty members again this year and the charge for each attendee is expected to remain at \$240.00. He encouraged each board member to encourage their young associates to attend. The video portion of the academy will be eliminated this year.

WINTER CLE

Neal Dickert, Committee Chairman, reported that the winter CLE seminar will be on February 8, 1996 at the Holiday Inn Conference Center in Macon. His committee is discussing possible topics and asks that any suggestions for subject matter be relayed to him as soon as possible.

JOINT GDLA AND GTLA CONFERENCE

George Duncan reported that there has been a good bit of discussion and good headway in scheduling a conference with GDLA and GTLA membership and the judiciary to discuss and create dialogue about the atmosphere of the practice of law, lack of cooperation and the hostility that sometimes exists between the plaintiff and defense bars, the perceived reasons for any such hostility, and what suggestions might be made that would create a higher level of professionalism in the litigation areas.

It is likely that the conference will be at Emory University or possibly at a location where video facilities exist. The format has not yet been set, but would likely include presentations by each bar and by members of the judiciary, followed by break-out sessions of small groups and then reconvening for closure. While the plans are still being firmed up, the anticipated date for this full day conference may be in late May or early June, 1996.

AMICUS CURIAE AND LEGISLATIVE

Hank Scrudder, Committee Chairman, was unable to be at the board meeting but reported to Clay Porter that no amicus' issues are on the forefront at this time.

There is a bill to be introduced by the legislature at the next session dealing



with the overcharging by medical providers for copying and providing of medical records. Some of the highlights of the bill would limit the costs to \$10.00 plus \$.25 per written page, postage for mailing and actual costs for reproducing non-paper items, such as x-rays.

Motion was made and passed that the GDLA will support such a bill and Clay will pass that position on to Hank Scudder.

LAW JOURNAL

Rick Rominger, Committee Chairman, verbally reported to Clay Porter that work is already underway on the Law Journal.

MEMBERSHIP

Dick Richardson, Committee Chairman, reported that he had three applications for membership: Bicknese Karsten (Hutton and Williams), Leslie Stewart Sullivan (Goodman, McGuffey, Aust and Lindsey) and Michael J. Hannon, III (Love and Willingham). He has conducted the appropriate investigation as required by the by-laws and that each applicant meets the requirements of membership. On motion and approval, the applications were approved.

The following members have been delinquent in dues for 2 years and have been dropped from membership in accordance with the bylaws:

James B. Hiers, Jr.
Christopher J. Ranlig
Raymond G. Chadwick, Jr.
David E. Hudson
Marjorie T. Rogers
Theodore T. Carellas
Eric T. Johnson
Richard T. Gieryn, Jr.
John I. Harper
Donald M. Fain
C. Scott Greene

It was noted with appropriate feeling that the association lost two members and friends with the passing of Burt DeRieux and Andrew B. Robertson.

NEWSLETTER



Salty Forbes has undertaken the responsibility to publish the newsletter. He reports that the first edition has been sent to the membership. He request that members send articles for publication, and specifically ask for a workman's compensation article for the upcoming edition to be published. The articles would need to reach him before the end of November in order to meet the next edition.

He reported that inquiry has been made by at least one nonprofessional organization as to whether the association would permit advertising in the newsletter. After discussion, a motion was made and carried that nonprofessional advertising will be permitted and that the committee is given discretion in the selection of such advertisers and the charges to be made.

Motion was made and carried that a copy of the newsletter be sent to the officers of the GDLA'S counterparts in Alabama, Florida and South Carolina.

ANNUAL SPRING MEETING

Dick Richardson reported that the annual meeting in 1996 will be in Cancun, Mexico on April 24-28 in the Omni Hotel. Those who plan to attend should be making their airlines reservations now. American Airlines has blocked off airline seats for the trip and there will be two flights. **When you make the reservations with American Airlines or any other airlines, Dick requests that you please let him know as the Association will have to pay a fee on each seat which is cancelled.** Airline tickets are \$485.00 plus tax. Hotel reservations will need to be made by March and information will be

forthcoming well in advance for making reservations.

David Hanks, Executive Vice President, is in charge of the program and has lined up the national legal counsel for Whirlpool Corporation as the featured speaker. His topic will be on the economics of the legal practice now and in the future from the standpoint of corporate clients. Changes in the defense practice between attorneys and their corporate clients, including specialized fee arrangements, will be discussed. The topic is hot news and it's impact can be significant on the defense practice.

ICLE credits will be provided but the specific areas of practice for those credits are yet to be confirmed.

David ask that a concerted effort be made to encourage members to attend this important meeting.

ANNUAL MEETINGS IN 1997 AND 1998

April 24-27, 1997 - Ponte Vendra Golf and Country Club, Fla

April 23-26, 1998 - Cloister at Sea Island

REGIONAL DRI MEETING

Salty Forbes, State representative to DRI, reported on the Southeast Regional DRI meeting held in Savannah. The meeting was hosted by GDLA on June 20, 1995 and was the first Southeast meeting. Representatives from the GDLA and from our counterparts from Alabama and Florida were in attendance. The method of determining and selecting nominations for the Southeast Regional DRI Director was finalized, as well as the length of service and manner of rotation between the state organizations.

DRI has proposed that GDLA members who are not DRI members can join DRI for 1/2 the membership fee.



GDLA will waive its first year membership dues for new members of DRI who apply for and are accepted as members of GDLA. After discussion, the board declined this proposed arrangement.

On motion made and carried, the Treasurer was instructed to reimburse Salty for the \$210.00 expense he incurred in providing a hospitality room for those who attended the Regional DRI meeting.

Salty reported that the first Annual Membership Meeting of DRI will be held in Chicago on October 9-13, 1996.

BUDGET FOR 1996

The budget for 1996 as presented by the Secretary-Treasurer was approved.

NO FURTHER BUSINESS BEING BROUGHT BEFORE THE BOARD, THE MEETING WAS ADJOURNED AT 11:50 A.M.

THE DEFENSE RESEARCH AND TRIAL LAWYERS ASSOCIATION

FREE MEMBERSHIP

DRI is offering a Free Membership in DRI for one year to anyone who is currently not a member of DRI or GDLA but who joins the GDLA and meets DRI qualifications. This free membership period extends until April 1, 1996. All benefits of DRI membership are included. (For example, an attorney practicing less than five years who gains DRI membership will receive a certificate to attend any DRI seminar - a \$400.00 plus value).

Once a new member joins GDLA, the name(s) of the individual(s) will be sent to Sandie Swieca Schmidt at the DRI headquarters in Chicago. Sandie will then forward the standard membership packet to those individuals along with a membership application to be completed.

HALF-PRICE MEMBERSHIP

DRI is offering a Half-Price

Membership for one year to all current members of GDLA who qualify but are not yet members of DRI. THIS HALF-PRICE MEMBERSHIP PERIOD ALSO EXTENDS TO APRIL 1, 1996.

DRI FIRST ANNUAL MEETING

Every member will have the opportunity to actively participate in the NEW DRI! This is the first Annual Meeting of all members. Every defense lawyer will benefit by being in Chicago in October of 1996. Plan on it!

- Up to 14 hours of "Bread and Butter" CLE programming Planned
- Business and Organization Meetings for All DRI Committees
- Regional Meetings and Workshops for National, State and Local Defense Bar Leaders
- Nominations for DRI Board of Directors and Officers



RECENT MATTERS OF POTENTIAL INTEREST

EFFECTIVE USE OF MOTIONS IN LIMINE: By: Morton G. Forbes
John A. Foster

I. WHAT IS A MOTION IN LIMINE

Motions in Limine, which evolved outside the mandates of the Civil practice Act, invite the Court's determination as to admissibility of evidence preliminary to its introduction. Pierce v. State, 173 Ga. App. 551, 327 S.E.2d 531 (1985); Harley Davidson Motor Company v. Daniels, 244 Ga. 284, 260 S.E.2d 20 (1979). The term refers to "any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered." Loose v. United States, 469 U.S. 38, 40 n. 2, 105 S.Ct. 460, 83 L.Ed.2d 443 (1984).

The first reference to a "Motion in

Limine" in Georgia Law is found in Butts v. Davis, 126 Ga. App. 311, 190 S.E.2d 595 (1972). That was a personal injury case in which an employee and his employer were named as defendants. One theory of recovery set out in the Complaint was negligent entrustment. The Complaint alleged the employee had no valid driver's license and the employer knew it. The employer Defendant admitted in its answer that the employee was within the scope of his employment at the time of the incident and "then presented a written document described as a motion in limine' asking the court 'in advance of the trial to restrict and prohibit the Plaintiff from bringing in any evidence that the Defendant . . . did not have a valid Georgia operator's license, since this fact would not and could not constitute the proximate cause.'" The motion had not been addressed in the trial court until the Plaintiff offered evidence concerning the lack of a driver's license, and apparently, the trial judge granted the Motion in Limine and the Court of Appeals affirmed holding that the absence of a proper driver's license by an employee is not admissible on the question of negligence. The definition of, or the purpose of, or the procedure of Motions in Limine was not discussed. The first case in Georgia law to attempt to define the purpose and procedure of Motions in Limine was Harley Davidson Motor Co., Inc. v. Daniel, 149 Ga. App. 120, 253 S.E.2d 783 (1979). That was a products liability case against Harley Davidson. Harley filed a Motion in Limine to prohibit the introduction of evidence concerning a prior recall campaign of Harley products. The trial court denied the Motion in Limine and when Plaintiff offered the evidence concerning the recall campaign, Harley did not object. The Court of Appeals held that Harley had not preserved the record and could not appeal the denial of the Motion in Limine because it had not objected when the evidence was offered. However, the Supreme Court granted certiorari and effectively reversed the Court of Appeals holding on this issue Harley Davidson

Motor Company v. Daniels, 244 Ga. 284, 260 S.E.2d 20 (1979). The Supreme Court held that the trial court had properly denied the Motion in Limine (an issue which the Court of Appeals did not reach), but then stated "we . . . disapprove of the Court of Appeals ruling that an objection is necessary at trial to preserve the denial of the Motion in Limine for appeal." This aspect of Harley Davidson will be discussed in more detail in Section V below.

The Harley Davidson cases are significant because they were the first cases to attempt to define the purpose and procedure of Motions in Limine in Georgia. The Court of Appeals said the following:

"A Motion in Limine is a necessary adjunct to the trial courts inherent power to admit and exclude evidence. The trial court may issue protective orders against prejudicial questions or statements which could be uttered before a jury and thereby prevent a fair and impartial jury trial. Burrus v. Silhavy, 155 Ind. App. 558, 293 N.E.2d 794, 797 (1973)." The Supreme Court, quoting a Texas case, in a footnote, said the following:

The purpose in filing a Motion in Limine to suppress evidence or to instruct opposing counsel not to offer it is to prevent the asking of prejudicial questions and the making of prejudicial statements in the presence of the jury with respect to matters which have no proper bearing on the issues in the case or on the rights of the parties to the suit. It is the prejudicial effect of the questions asked or statements made in connection with the offer of the evidence, not the prejudicial effect of the evidence itself, which the Motion in Limine is intended to reach. Bridges v. City of Richardson, 133 Tex. 292, 354 S.W.2d 366, 367 (1962).

The Supreme Court also said, "a Motion in Limine is similar in purpose and function to a preliminary ruling on the evidence at a pre-trial conference. Code Ann. §81A-116(5) [O.C.G.A. §9-11-6] . . . the Order, like a Pre-trial Order, controls the subsequent course of the action, unless modified at trial to prevent manifest injustice." In Gosnell v. Waldrip, 158 Ga. App. 685, 282 S.E.2d 168 (1981), the Court of Appeals said that a Motion in Limine sustained at or during the trial amounts to a mere modification of the Pre-trial Order originally issued under Code Ann. §81A-116 (O.C.G.A. §9-11-16).

Motions in Limine are effective vehicles for the furtherance of judicial economy. In Wiggins v. State, 249 Ga. 302, 290 S.E.2d 427 (1982), the Court of Appeals said that judicial economy sometimes can be served by challenges to the admissibility of evidence being presented by way of Motions in Limine rather than at the time of offer as evidence. That case involved a Motion in Limine to suppress the results of a radar speed detection device and the Appeals Court held that the trial court had discretion to hear the motion pre-trial or to reserve ruling on the admissibility of the evidence until it is offered as evidence during trial. Clearly, in many instances, judicial economy will be served if the Court and the parties can agree on what evidence will be admissible and what issues are to be tried before the trial actually begins.

The Supreme Court also discussed the purpose of Motions in Limine in State v. Johnston, 249 Ga. 413, 291 S.E.2d 543 (1982). The Court said that a Motion in Limine is a pre-trial motion which may be used in two ways:

- (i) where the movant seeks not a final ruling on the admissibility of evidence, but only to prevent the mention of it by anyone during the trial until its admissibility can be determined during the course of trial outside the presence of the jury; or
- (ii) where the movant seeks a ruling on

the admissibility of the evidence prior to trial.

Elaborating, the Court said that the trial court has an absolute right to refuse to decide the admissibility of evidence which is allegedly violative of some rule of evidence. If the trial court decides to rule on the admissibility of the evidence before the trial, that ruling constitutes a ruling similar to a preliminary ruling on evidence at a pre-trial conference and it controls the subsequent course of action unless it is modified to prevent manifest injustice.

II. WHAT DOES 'IN LIMINE' MEAN

Ballentine's Law Dictionary defines it to mean "on the threshold; at the outset." Black's Law Dictionary defines 'in limine' to mean "on or at the threshold; at the very beginning; preliminarily."

III. HOW ANTICIPATORY OBJECTIONS WERE HANDLED BEFORE THE ADVENT OF MOTIONS IN LIMINE

Anticipatory objections were discussed in Georgia case law prior to the advent of Motions in Limine. The case of Sides v. State, 213 Ga. 482, 99 S.E.2d 884 (1957) illustrates the need for a procedural mechanism whereby rulings on the admissibility of specific evidence can be obtained prior to trial. In Sides, the Defendant was being prosecuted for rape. The State called as a witness a girl whom the Defendant had subsequently picked up in his car. The defense lawyer anticipated what she was going to testify to and objected to her being allowed to be called as a witness on the grounds that the transaction she would testify to occurred subsequent to the one at issue and was not similar as to motive scheme or intent. The trial judge overruled defense counsel's anticipatory objection. The witness was qualified outside of the presence of the jury. The witness testified and the Defendant did not object. The Defendant was convicted.



On appeal, the Court of Appeals said:

the objections made by counsel for the Defendant, as to the facts which he anticipated the witness would testify, which objections were made before the witness was even qualified or sought to be examined, were premature and could not be considered as objections to her testimony subsequently given. Until testimony was actually elicited or sought to be elicited from the witness, no valid objection to either her testimony or the questions asked her could be made.

Clearly, some procedural device was needed whereby the admissibility of evidence could be addressed outside the presence of the jury and a ruling could be obtained from the trial court which would govern the subsequent conduct of the trial, and whereby, further objections would not be necessary in order to perfect and preserve the record.

IV. WHEN MUST A MOTION IN LIMINE BE MADE

Walton v. Datry, 185 Ga. App. 88: 363 S.E.2d 295 held that a motion in limine may either be in writing or may be made orally at the time of trial and that the court was disinclined to apply O.C.G.A. §9-11-6(d) to motions in Limine. Section 9-11-6 requires that a written motion be served not later than five (5) days before the time specified for a hearing. The court in Walton went on to say "this would have a negative effect on written motions, for to apply the Code Section strictly would penalize one who submits a written motion rather than an oral one which has no time requirement. However, the court held that since no harm was shown, there was no cause for reversal. Until our Appellate Courts clarify the issue, it would seem best that if you are going to file a written motion in limine, you file it more than five (5) days before trial. Otherwise, it would be best to make it

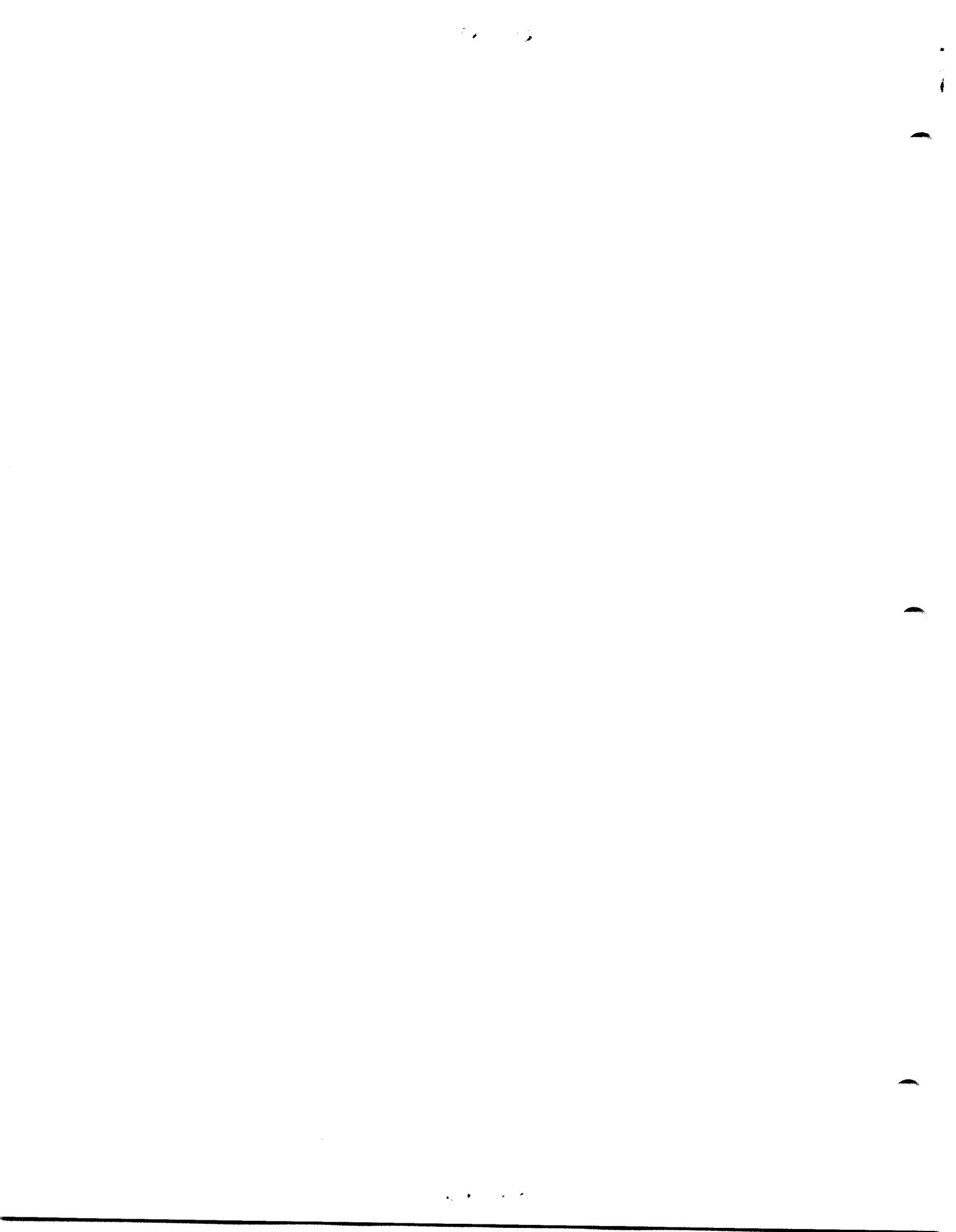
Order shall be made by Motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or Order sought.

..." Under Gosnell, a Motion in Limine which is oral and not in writing can be properly considered if it is made at trial."

To Be Continued....

MESSAGE FROM THE EDITOR

Remember this is your newsletter and I need all of the help that I can get to make this a successful newsletter and I invite each and every one of you to send me articles or suggestions.



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