



2008

Tradition of Excellence Awards



The 2008 Tradition of Excellence Recipients

(l-r) Don C. Keenan, (Plaintiff), Michael J. Bowers, (General Practice), Edward D. Tolley (Defense),
Judge Aaron Cohn (Judicial) and Section Chair, Mary A. Prebula

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By Mary A. Prebula
Section Chair



One of the great things I love about the practice of law is that no two days are alike. Every day is different, every day is a new challenge, every day brings new surprises, new clients to assist, new issues to research, new problems to resolve. The practice of law demands that a lawyer meet these challenges every day. Our profession demands that we do so zealously and passionately. The constant need for learning keeps you fresh, keeps you active, keeps you engaged. Each of these characteristics is portrayed by the members of our profession we have honored this year.

One cannot help but be inspired when reviewing the nominations for and the resumes of the recipients of the General Practice and Trial Law Section Tradition of Excellence Award winners.

All of our recipients have incredible and storied legal careers, and innumerable accomplishments. These fine lawyers are described variously as effective, professional, a lawyer's lawyer, respected by and respectful to all sides of the bar, larger than life, devoted to their family, and devoted to their profession. Thus, it is a humbling experience to be in the same room with our winners of the Tradition of Excellence Awards.

One thing that struck me was the theme throughout that lawyers make their mark by handling not just the winnable, good, popular cases, but also by taking the difficult, unpopular, sometimes losing cases—but in each case passionately representing

each client's interests. Each of these lawyers awarded by our Section have tackled difficult cases, sometimes to great success and reward, sometimes to great popularity with the public, sometimes coming under attack for taking unpopular stances. But, at all times, serving some of the great goals of our profession—to give voice to the voiceless, to protect legal rights of all parties, and to give each client access to our system of justice. They have shown their commitment to and passion for the rule of law.

Each of these fine lawyers has served the profession well. Each has been engaged in bar committee work, community service, civic activities, pro bono work, or charitable work. All have shown that part of our legal profession is service to the profession, service to the community.

Another common thread throughout is the preparation that each of these lawyers puts into his work. We can all learn from their example. Mike Bowers is reported to read every case that impacts his cases and always having the three points he must make prepared. Ed Tolley is known for "legendary" preparation and, of course, protecting the Georgia Bull Dawgs. (No favoritism, I went to UNC—Go Heels!!). Don Keenan not only prepares his cases, but prepares companies and the public to prevent childhood accidents so as to keep children safe. Judge Aaron Cohn has prepared our Georgia juvenile court system to improve and to better serve the children of this state whom he has served for over 40 years as a

Juvenile Court Judge.

I hope that the careers and accomplishments of Judge Aaron Cohn, Mike Bowers, Don Keenan, and Ed Tolley inspire each of you to greater passion for our profession as they have inspired me. As my daughter begins her law school career, I cannot be more proud that she has chosen our challenging, awesome, honorable profession and will become a member of our bar with these impressive Tradition of Excellence Award recipients who have lead and continue to lead the way.

It has been my privilege to serve as your Chair of the General Practice and Trial Law Section of the State Bar of Georgia this year and to participate in this wonderful section with these amazing attorneys. I look forward to working with our new Chair, Adam Malone as he puts in place his plans to make our Section even greater.

LETTER TO THE MEMBERSHIP

From Incoming Chairman:
Adam Malone



Adam is a principal partner of Malone Law and concentrates his practice on helping victims and families with cases involving catastrophic personal injury and wrongful death. Adam is the current Chairman of the General Practice and Trial Section of the State Bar of Georgia. He is also President of the Southern Trial Lawyers Association, an invitation-only organization of elite trial attorneys and Board Member of the Melvin M. Belli Society. He also proudly serves as an officer in the Professional Negligence Section of the American Association for Justice.

Adam is board-certified by the American Board of Professional Liability Attorneys (ABPLA) in the complex field of Medical Professional Negligence. The American Board of Professional Liability Attorneys is the official certifying body sanctioned by the American Bar Association for certification of competency in handling professional negligence cases.

Allow me to congratulate outgoing Chair Mary Prebula of Atlanta on her outstanding leadership of our Section this past year. I also welcome Pope Langdale of Valdosta as the incoming Chair-Elect and Joseph Roseborough of Atlanta as our incoming Secretary/Treasurer. Special thanks are in order for Jimmy Hurt who continues to serve as our faithful Editor of the Calendar Call. Of course, our Section would be completely ineffective without the tireless service of our Executive Director, Betty Simms. Special thanks to her as well.

My dad taught me to live a life worthy of my calling. I strive mightily to meet this aspirational goal on a daily basis. This year, I have been called to serve you, the worthy members of our beloved General Practice and Trial Section of the Georgia Bar. In turn, I am calling on you to join me in the calling to lead by renewing your commitment to service. In considering where you will focus your service, I invite you to reflect on why you became a lawyer in the first place. If we were to poll our en-

tire Section by asking what a lawyer is, we may get more than a thousand different answers. When considering this question, I have always been moved by the words attributed to famed people's lawyer Ted Koskoff that I now will share with you:

We are privileged to be members of the noblest profession. As members of the General Practice and Trial Section, we are privileged crusaders fighting to protect the rights of people. The cry of all humanity from the most distant caverns of time to the present has been the cry for justice, striving for freedom of the individual, based on individual rights – rights so essentially valid that they are endowed by the mere fact of birth as a human being. And those rights are not simply words, whether chiseled on clay tablets five thousand years ago, or written on papyrus or paper, or flashed on a computer screen. Rights can exist only if they are both recognized and enforced. We, general practice and trial lawyers, are essential to the process of both recognition and enforcement.

If you are a lawyer, you stand between the abuse of governmental power and the individual. If you are a lawyer, you stand between the abuse of corporate power and the individual. If you are a lawyer, you stand between the abuse of judicial power and the individual. And if you are a lawyer, you are the hairshirt to the smugness and complacency of society. And if you are a lawyer, you are helping to mold the rights of individuals for generations to come.

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1. *To encourage, by example, the entry of younger lawyers into the specialty of trial advocacy;*
 2. *To encourage and support the continuation of advocacy under the adversary system; and*
 3. *To fight for the preservation of trial by jury in litigated matters and to resist its abolition, modification, or usurpation by arbitrators and government tribunals which fail to preserve the basic right of a jury trial.*
-

I call on you to help our Section meet three objectives this year:

In this election year, I encourage you to take personal inventory of your level of involvement in the political process and increase it by some reasonable measure. Legislators need help recognizing the rights of those we serve so they can be protected, not eroded. If you are not a legislator and your legislator is not a lawyer, I encourage you to make every effort to become the lawyer upon whom your legislator relies now and through the 2009 General Assembly lest those remaining rights we fight to protect are subjected to further erosion.

We in the General Practice and Trial

Section hail ourselves as Georgia's largest law firm. We are here to help one another. Please remind yourself of the valuable resources we have available to you on our website located at http://www.gabar.org/sections/section_web_pages/general_practice_and_trial_law/

Attend our seminars, make use of our extensive audio cassette and videotape library, and volunteer to write an article on a subject of interest to our Section for publication in the Calendar Call this year. Support the Georgia High School Mock Trial Competition by volunteering to be a judge or juror. Contact me at adam@malonelaw.com or (770) 390-7550 if you want to get more

involved or have any suggestions at all.

In closing, as you reflect on your renewed commitment to service, I ask you to review in the pages that follow the thoughtful and impassioned remarks of those who were honored with the Tradition of Excellence Award this year along with the remarks of those who introduced them. On behalf of the Section, we once again congratulate Judge Aaron Cohn of Columbus, Edward Tolley of Athens, Michael Bowers of Atlanta, and Don Keenan of Atlanta for their lifetime of service and dedication to the recognition and enforcement of our precious rights and for their own - Tradition of Excellence!

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*Tradition of
Excellence
Award*

Introduced by
Honorable Julie E. Carnes

I have known Ed Tolley for over 30 years. We're both double-dogs. We went to undergraduate school and law school at the same time at the University of Georgia. We didn't wear our red coats though, as Judge Cohn did. He is also I guess technically a triple dog having earned an MBA at Georgia also. It was in law school that we got to know each other. Over the years, we have been in different places. I have been in Atlanta most of the time and he's been in Athens. But I've kept up with Ed and I've certainly kept up with his sparkling career. As a prosecutor in the U.S. Attorney's office and as a judge, I've heard over the years other attorneys and other judges talk with great admiration and respect for Ed. So I was pleased that recently Ed and I were able to work together again. I was chairman of the 11th Circuit Conference Committee. And one of the first people I picked to help me was Ed. Ed was a stalwart, creative and energetic member. When I was getting ready to deliver this introduction to you all, I thought I should do a little more research. I'm a detail person. I like to get all the facts. So I did my due diligence and I talked to judges and lawyers and even clients. And they were, without exception, ef-

fusive and consistent in their remarks about Ed. First, you don't even have to talk to anyone to know what an accomplished career Ed has had. You only have to look at his resume. I was astounded when I got it. It is one of the most impressive resumes that I have ever seen. It is thick with bar activities, publications, honors and awards, civic and public service activities. I could spend my whole time just reading it to you. When you do talk to people about Ed, some consistent themes emerge. First, everyone -- and I mean everyone -- describes Ed as an incredibly effective lawyer. Effective was the word that was used every time. Ed's preparation and attention to detail is apparently legendary. Over and over I would hear that no matter how complicated the case, no matter how voluminous the record, Ed would know every detail, every fact, every document.

As you all probably know, Ed has represented the University of Georgia Athletic Board for many years. He is the face and voice of the university in those kinds of proceedings. So I was honored this week to be able to speak with Coach Vince Dooley, and he was glowing with praise of Ed. He notes

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Tradition of Excellence Award

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that Ed leaves no stone unturned. His words were, "When you're in trouble, call Ed Tolley." And then he would hasten to add, "Of course, it would be unjust if you were accused of being in trouble, but if you were," Ed has read the entire manual inside and out. Apparently, according to Coach Dooley, it's more complicated than the federal tax code. And Ed would amaze even the NCAA folks with his knowledge of all the rules. Having mentioned Coach Dooley, full disclosure requires me to inform you that almost everyone, but not quite everyone, admires Ed. I decided to Google Ed's name, and something kept popping up, something called "Sting Talk," S-t-i-n-g Talk. And when you open it up, it's a chat room for Georgia Tech fans. Ed, they're not so keen on you. A couple of comments that are fit to repeat, and I'll quote, "The University of Georgia has accomplished very little, but if you look at their history and examine one thing they do well, we find they have a legend on campus, a titan who single-handedly has kept the University of Georgia programs competitive, Ed Tolley. I think we need an Ed Tolley award honoring outstanding legal maneuvering on a college campus."

In another posting, "Someone get Ed Tolley on the phone, another Mutt has been arrested."

A little sour grapes from the Bee Nation I guess.

Ed has done almost every kind of legal work a lawyer can do. He has excelled at all of it. But he is best known for his criminal defense work. The first thing every criminal lawyer has to come to grips with is the fact that he's going to lose most of his cases, and certainly Ed has lost some cases. As he once notably remarked, "We're lawyers, not magicians." What is amazing about his career is how many he has won, how many difficult cases he has won.

I understand that early in his career, the DAs in Athens decided they would test him a little bit. Ed had a

murder trial and got an acquittal, and the DA decided he would put this hot shot back on trial the very next day for another murder case. Another acquittal. Back-to-back acquittals in two murder cases. Ed was such a phenom in the courtroom that the late Judge Gaines called him King Tolley. Judge Lawton Stephens told me that Ed once got an outright acquittal in a death penalty case, which is really unheard of in a judge. He summed it up when he said Ed Tolley is simply one of the finest trial lawyers he has ever seen.

Judge William Moore in Savannah probably put it best. Judge Moore worked with Ed as a lawyer and has seen him as simply one of the finest trial lawyers he has ever seen.

And I think one other striking thing I found out, Ed has handled 19 death penalty cases and never once has his client received the death penalty. That is a truly impressive number.

But to me, more impressive than his record is that he has appeared in 19 death penalty cases because that tells you two things: number one, it tells you the high regard that judges had who appointed him to those cases; but, second, it tells you a whole lot more about Ed's character and his sense of duty to the profession. If any of you have handled one death penalty case, you know it can wreak havoc on a small law firm because it takes so much time, and to handle all of these cases at a rather modest rate instead of the more lucrative paying cases represented a tremendous financial sacrifice for him and his firm. But it represented the sense of duty that he has to the court and our legal system. In fact, every judge you ask will say, without exception, Ed Tolley is a judge's dream lawyer.

Judge Steve Jones told me with Ed you call a motion, he will take it from there. He will tell you why he's there, what he wants, what is good about his case and what is bad about his case. He knows what to focus on.

Judge Jones made one comment that every other judge echoed, which is Ed exemplifies professionalism. He is courteous and fair to opposing counsel and witnesses. One lawyer stated, "I never saw Ed Tolley throw a dirty punch." That observation might strike some of you as odd. How can you be such an exceptionally successful trial attorney as Ed is and not follow the take no prisoners, scorched-earth approach.

I think, though, that Ed illustrates as much as any lawyer I've ever known how the two traits, effectiveness and professionalism, are not inconsistent. They don't have to be at odds with each other. They can actually enhance one's performance because candor and politeness in the courtroom by Ed has been well received by juries. Judges know that you can take Ed's word to the bank. Coach Dooley noted how much respect the NCAA has for Ed and his credibility.

And this is an amazing disclosure to me: Ed is a high profile, successful defense attorney. That's the kind of person police and law enforcement don't usually like. He said amazingly the local police like and respect Ed a lot. He said that on cross-examination Ed is tough with them but he treats them with respect and courtesy, and they return the favor.

I guess one of Ed's most celebrated cases reflects his traits. You all may remember the Walter LeRoy Moody case, the one who was indicted and convicted for the bombing murder of federal judge Robert Vance in Alabama. The trial got moved to Minnesota, and it was tried by a legendary federal judge there. Ed agreed to take the case to represent Mr. Moody, which again was a very courageous act under the circumstances. Opposing Ed as prosecutor was Louis Freeh, who later went on to become a district judge in New York and then director of the FBI. Moody was convicted, which given the evidence wasn't very surprising. What was noteworthy,

though, is that, once again, Ed distinguished himself by not only his effectiveness as a lawyer. Apparently even with the amount of evidence against Moody, he gave the prosecutors a real run for their money. But by his extraordinary professionalism, he and prosecutor Louie Freeh quickly became friends, which again is very unusual in such a hotly contested and high profile case.

Judge Devitt was so impressed with both Ed and Louie and he grew so fond of both of them during this long ordeal that a few months later when he was taken sick and on his death bed, he summoned both Louie Freeh and Ed Tolley to visit him one last time.

All and all, I think that it is no accident that Ed Tolley was the first recipient of this state's professionalism award in 2002.

And beyond all the professional accolades, Ed is just plain fun.

Everybody has an Ed Tolley story to tell. And let the record reflect, Ed, out of deference to the solemnity of this occasion, I didn't tell any of them. So you owe me one.

I will say, though, that one vignette everybody mentioned was -- I had never heard this, Ed. Ed is viewed as the Omar Sharif of trial lawyers. Everybody I've talked to it's almost as if I should know, yeah, Ed is Omar Sharif. A few mentioned defense attorneys may be a little envious that they thought it never occurred to Ed to have a lot of women on the jury because no one can out charm Ed Tolley. I got the impression that Ed didn't mind that characterization at all, that if he had to choose between being known as a great trial lawyer or the Omar Sharif of trial lawyers, he might just go for Omar. I'm not clear. But he's always gotten comments on how persuasive he is with a jury.

And Judge Jones said, amplifying on

Ed's GQ qualities, that Ed Tolley could come in from a blinding rainstorm and not have a hair out of place.

All in all, Ed is one of those larger than life people who warm up any room they enter and make life more interesting for the rest of us. He has created the kind of life and career that those of us back at UGA in 1975 would have all loved to have had.

He has a family he loves. He's practiced in many areas of the law and achieved success in all of them. He's provided real help to every person he's represented. These are folks at the time of greatest need in their lives, and Ed has been there to make a difference in those lives. And he has been able to be of service to the university he loves so much.

So it is with great pride that I introduce my classmate and friend as one of the recipients of this year's Tradition of Excellence Award, Ed Tolley.

Remarks by **Edward D. Tolley**

I am much more accustomed to addressing 12 people or giving a lecture to a captive audience than I am at humbly accepting an award such as this, for which I am very grateful. I am very grateful to Julie Carnes who has been my friend for many years. I am a little bit moved. Joel Wooten and Julie and I all started law school together. I remember that introductory speech where the professor says, look to your right and look to your left, one of you won't be here this time next week. The guy on my right went to Harvard and the guy on my left went to Yale, so I said, well, I guess it's going to be me.

Members of the judiciary and members of the General Practice and Trial Section, most particularly my good friend John Larkins who is here today, my fellow lawyers, guests and family members, it's with all humility that I accept the Tradition of Excellence Award. I'm advised by the committee chair that I should make some acceptance remarks,

so I'll try to be brief.

In preparing these remarks, I was reminded of the words of the famous outlaw and revolutionary Pancho Villa who on his death bed in 1923 looked at the attendant and said, "Don't let it end like this. Tell them I said something important."

In 1917 Justice Benjamin Cardozo wrote that membership in the Bar is a privilege burdened with conditions. In my view those conditions are zealous representation of the client, civility to fellow counsel in the courtroom, sufficient preparation for the presentation of the client's case and at all times honesty with the court.

In our time as lawyers, we have seen an unprecedented attack on the judiciary, on the legal profession, on the right to trial by jury by politicians whose ideology apparently is the antithesis of my understanding of democracy. We have as lawyers

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Remarks by Edward D. Tolley

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too often been timid in defending the ideals of our profession and the Constitution of the United States.

When Julie, Joel and I were in law school, Professor Robert Leavel once said to our classroom that if you wish to become a great lawyer, you must be willing to take the controversial cases. Some might suggest I took that too far. I interpreted, though, Professor Leavel's remarks in a much broader sense. We as lawyers have a civic responsibility. If you ever got a chance to look at my resume, you would see that I have tried to live up to that ideal.

We also have a civic responsibility to protect the idea of trial by jury, to dissuade people from the unfair criticism of the members of the Bar and in most particularly these days our judiciary, and when called upon to do so, to serve as counsel for the damned of this society.

Great lawyers do not practice law, in my opinion, from a position of fear or a position

of being worried about criticism or political retribution. Nor should they practice just for the love of money. Lawyers in my view are honorable men and women whose word is their bond who are sworn to uphold the Constitution and the individual rights of the citizens of this country.

Great lawyers in my view have a real sense of dedication to justice. They deeply respect the judicial office. They have a demand for the highest standards of competency, and they despise the political trifling with the power of the judiciary.

In short, in my view the practice of law is missionary work which should be practiced with religious zeal for the benefit of society through the preservation of our democracy and the preservation of our system of justice.

Chief Justice Charles Evan Hughes once stated that the highest reward that can come to a lawyer is the esteem of his professional brethren. I have been fortunate enough to receive that recognition today, and for that I am truly grateful. Thank you.

Help Your Section Grow...



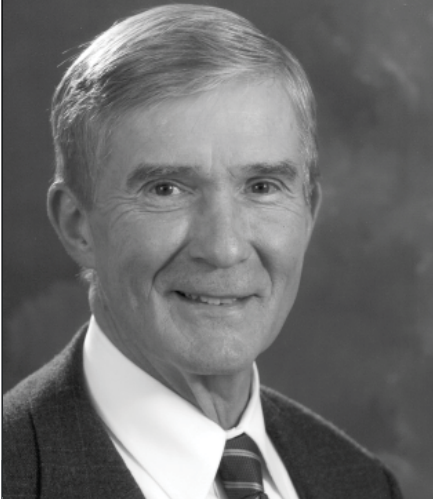
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**GENERAL
PRACTICE**

MICHAEL J. BOWERS



Introduced by
Josh Archer

*Tradition of
Excellence
Award*

Mike Bowers is my law partner, my mentor, and he's my good friend. In preparing these introductory remarks of Mike today, I decided not to go through his accomplishments and the cases that he's litigated, both famous and infamous, in his years with the attorney general's office, with Meadows, Ichter & Bowers and Balch & Bingham; but rather I wanted to talk about the traits that I see in Mike that have made him the lawyer that he is and make him a deserving recipient of this award.

Anyone who has worked with Mike knows that when he prepares an argument, no matter how complicated the case is, no matter how many weeks the trial will take, every case boils down to three essential points. Therefore, in defense to Mike, I have identified the three traits, I argue make him the lawyer he is.

The first trait is preparedness. It's not the most exciting trait, but I think it's already been referred to the introduction of Mr. Tolley. A prepared lawyer is the most important trait in our profession. Mike is the consummate professional and always prepares. Any lawyer in our office who has had the task of preparing an outline for Mike knows the futility of that. Mike never relies on what a junior lawyer

has done for him. He understands the case. He understands all the facts. He reads the briefs. He reads all the cases cited in the brief. And anyone who has worked with Mike knows he always comes up with a new issue, comes up with a new way to prepare the case to put the case in front of the court. To this day, even though he's the most senior lawyer in our office, he is the most prepared.

The second trait that Mike has is his leadership. He's a natural leader, and those leadership skills were honed at West Point and then with several years in the military before he joined the Bar. Mike is always there for our firm in the toughest cases, and not the toughest cases in terms of the complexity and the detail where the facts haven't turned out the way you thought they would, where a lawyer has maybe made a slight error. Mike is the one to roll up his sleeves and stand in court next to the lawyers in our law firm to fight for the client and for the firm.

His door is always open to all of us. The young lawyers especially. He has an enormous amount of time for us. A partner of mine pointed out about Mike, what is special about his leadership, and that is he makes

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Tradition of Excellence Award

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people feel good about themselves on an individual level, when Mike Bowers deals with you, you feel better about yourself and you come away with great confidence. And that's what he does to the lawyers he has worked with of the Bar and the lawyers he continues to work with today and the lawyers that I hope he will work with for many years to come.

The third and most important aspect of Mike that I think has made him the lawyer he is is passion. He is the most passionate lawyer in our office. Whether he's arguing in front of the Office of State Administrative

Hearings on behalf of a real estate broker who needs to get a real estate license or whether he's arguing in front of the United States Supreme Court in the voting rights case, he brings to it a singular focus and passion that is important for clients to get the justice they deserve in the courts.

Mike is excited every day he comes into work. He's passionate about the law. He often says ours is the greatest profession; he would do it for free and he hopes to do it until his last drawn breath.

He is also passionate about the organizations he's involved in. Many

people know what he did in the Attorney General's office continuing Mr. Bolton's greatest tradition in that office. Without missing a beat, he has gone into private practice and has been the leader of our law firm.

Those three things I think make up Mike Bowers: preparation, leadership and passion. And that's why I believe he is a deserving recipient of this award, and it's my pleasure on behalf of the lawyers whom he has touched and on behalf Balch & Bingham, I introduce my great friend Mike Bowers as recipient of the Tradition of Excellence Award.

Remarks by

Michael J. Bowers

Thank y'all very, very much. I am honored to be here, especially with the members of the judiciary whom I have the greatest respect for, members of the Bar who I love, both you and the Bar, and my law partners.

And I've got a bunch of them here. Josh is one of them. He is my very dear friend, as are all of my law partners, and I am thankful to them, and I am honored beyond my ability to express. I join Ed Tolley's remarks about the importance of a free and independent judiciary. The extent of this honor today is doubled by virtue of the other individuals being honored here today: Judge Cohn, Ed Tolley and Don Keenan. It makes it extra, extra special for me, and I have to tell you that. I want to thank all the folks with whom I worked at the Attorney General's office for 24 years, and for those at Balch & Bingham, without whose support I could have done nothing during the past 34 years that I have been privileged to practice this great profession.

A lot of my young partners are sitting right back there at that second table, and one of my old partners is sitting over here on the right. I'm just thankful for all of them. I cannot tell you how much I have enjoyed the practice of law for the past 34 years. I cannot think of anything else that I would want to do.

It gives one the opportunity to have something interesting and exciting to do every single day; and when you have that rare opportunity, it's the most thrilling experience I can imagine. I wouldn't do anything else. And as Josh said, I hope I can do it to my last breath.

Any success I've had or any good I've done in

large measure is a result of three individuals who helped me professionally. The first was a guy that most of you have never heard of. His name was J.M.C. Townsend. He was a judge on the Court of Appeals when I was a boy. He was my baseball coach. He was the first lawyer I ever knew, and he certainly influenced me positively. They called him Red Townsend, from up in Trion, Georgia, northwest corner of the state.

The second individual that meant so much to me was J. Ralph Beard, the dean of the law school when I was there, my constitutional law professor. To this day I remember the lessons of con law that he taught me, and he inspired me, and he will always be a hero to me.

The third individual is Arthur K. Bolton, who preceded me as attorney general. A true giant of a man, a great public servant and he, in large measure, is why for the past half century we have had little or no real corruption in state government. He was a great fellow.

I want to thank one person in particular. Throughout my 34 years, I have had the greatest support and greatest friend that any man could have, Betty Rose Bowers, my wife. My wife of 45 years, come this Sunday. 45 years. For that I am thankful. I owe her everything.

It has been an incredible journey, the practice of law, and I love it so much. And I especially want the young folks to hear this. I would do it all over again. I would start out as the junior lawyer in the Attorney General's office if I could do it all over again I would that's how much I love it. Thank you.

JUDICIAL



JUDGE AARON COHN

Introduced by
Leslie Cohn

Tradition of Excellence Award

It is indeed a very special honor for me to introduce my father, the Honorable Judge Aaron Cohn, whom you have selected as this year's recipient of the Tradition of Excellence Award. This is truly a proud moment in my father's life because this award is being presented to him by his peers in recognition of his service to his community, as well as our profession.

I would like to thank the General Practice and Trial Section of the State Bar for selecting my father for this prestigious award. I would also like to express a special thanks to my father to tell him how much it means to me personally to have been asked by him to be his presenter.

My father was born in Columbus, Georgia, March the 3rd, 1916. He was educated in the public schools of Columbus. He graduated University of Georgia, Lumpkin School of Law in 1938 and was admitted to the Bar that same year. As a student at the University of Georgia, he was vice-president of the Interfraternity Council, Blue Key Honorary Society and captain of the tennis team.

He married my mother in June of 1941, and this month my mother and father will be married 67 years.

I have two sisters. My parents have seven grandchildren and nine great grandchildren.

In 1937, prior to graduating law school, my father was commissioned a Second Lieutenant. The Army was his branch of service, and he was a cavalry officer. When the war came, he volunteered for active duty in 1940 where he was Combat Operations Officer for the 3rd United States Cavalry in General George Patton's army in four major European campaigns.

In 1978 he was cited by the city of Bettembourg, Luxembourg, for his services in the liberation of Luxembourg; and in 1982 he was honored by the United States Holocaust Commission as an official liberator of the concentration camp in Ebensee, Austria, in 1945. My father retired from the United States Army Reserve with the rank of Colonel after 27 years of service, active and inactive.

In 1946 after the war ended, my father resumed his life's ambition and began practicing law again. My father's involvement in community service in his legal career spans in excess of 60 years. Therefore, un-

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Tradition of Excellence Award

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less I am going to exceed my hourly rate for this introduction, I shall attempt to hit the highlights of community and legal service. My father always has said, you get out of community what you put into it. He has led by example. His involvement in the Columbus community is unparalleled. The number of organizations and boards that he has served on are simply too numerous for me to name.

However, I believe the position from which he derived the most satisfaction and fulfillment was when he was the Chief Voter Registrar for Muscogee County from 1960 to 1965 through the height of the civil rights movement.

My father had a very general law practice. Real estate and estate planning were his favorites. However, his life completely changed forever on January 1st of 1965 when he was appointed Juvenile Court judge of Columbus, Muscogee County, Georgia.

He is now the Chief Judge of the Juvenile Court of the Chattahoochee Judicial Circuit where he has served for more than 43 years. His service to the state has been recognized by one of our former governors, as well as the house and senate of our legislature. He has received the Distinguished Alumni Merit Award that is awarded annually to two distin-

guished alumni from the University of Georgia.

I had the distinct pleasure of practicing law with my father for approximately 30 years. My father has received in excess of 30 awards at both the local, state and national level. It would take too much time to mention them, and what I'll try to do is give you some of the highlights.

The Aaron Cohn Humanitarian Award was created for his work with abused and neglected children. The State Bar has passed a resolution recognizing his accomplishments in this state. He has received the Governor's Leadership Award. The University of Georgia has presented him with the Distinguished Service Scroll and the Bill Hartman Award. I believe that the culmination of his career was in April of 2004 when the Georgia House named the Regional Youth Detention Center in his honor. And then finally in spring of 2008 at the meeting of the Georgia Council of Juvenile Court Judges, a resolution was passed to annually recognize outstanding judges for his or her contribution to the judicial system, and the award will be designated as the Aaron Cohn Award in which he was the initial recipient.

In closing, I would like to relate a story which I feel captures the very essence of what my father has tried to

accomplish. Several weeks ago, when my father and I were going to lunch, as we approached the door to a restaurant, this gentleman came walking out the door. And as we approached this gentleman, he was big. He had tattoos running down both arms, and he was staring directly at my father.

As he approached the two of us, I'm thinking, I am 61 years old and I've got to defend my father, who is 92 years old, in a parking lot in Columbus, Georgia. When the man finally reached us, he looked down at my father and he said, "Are you Judge Cohn?"

And Daddy, who has never taken a step backwards in his life, kind of bowed his neck and said, "Yes, I am."

He then said to my father, he said, "You see that truck over there?" Daddy said, "Yeah." He said, the man said, "Well, that truck over there, it's got my name on it, and it's my truck."

He explained that years ago he was headed in the wrong direction, and that my father had given him a chance. He then reached over and bent down and he hugged my father and with a big smile on his face, he said, "Thank you for believing in me."

It is my distinct honor and privilege to introduce to you my father, the Honorable Judge Aaron Cohn.

Remarks by

Judge Aaron Cohn

Leslie, I deeply appreciate your presentation of your old dad at this time to this great group. You have done such a good job, I certainly will always keep you in my will. Seriously, I can never begin to thank this Bar enough for honoring me because I wish to particularly thank Cal Callier who is unable to be here, from Columbus, from the firm of Harp and Callier for putting my name in. And I appreciated it more than you will ever know, and I want to tell you how much I appreciate this great honor.

I'm particularly happy about this occasion because I find that Juvenile Court judges, very few, have received this honor in the present era. It causes me to feel real happy to get this award because there are so many juvenile justices that feel the same way that I do, and that is that the greatness of America is because of the American family. And my son Leslie has made it appear that I'm very progressive, but I must confess that after hearing this little explanation, you can draw your own conclu-

Remarks by Judge Aaron Cohn

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sion. It goes something like this: In 1965 about that time, I shared a program in Columbus with a peanut farmer, who was a delightful man to meet. At that time I was a judge of the Juvenile Court of Muscogee County, Georgia. Later this peanut farmer became a state senator and acquired a great reputation as a state senator, and I was judge of the Juvenile Court of Muscogee County, Georgia. Well, soon the state senator became governor of, as Nathaniel Gill would say, the great empire state of the South, and I was still judge of the Juvenile Court of Muscogee County, Georgia. But in time this peanut farmer became president of the United States of America, and I was just a Judge of the Juvenile Court of Muscogee County, Georgia. Now, the kicker is he no longer has his position, but I still have mine. Seriously speaking, I always think about how our great profession is a real contribution to our community and to the cause of justice. Why? Because my priority -- and I love my profession -- is the importance of the American family of being a true and capable democracy, particularly in this day and age. The house of the law has many rooms, and I chose the room that I have wanted to really live in many years ago because that's where my heart was, and I have never regretted this decision.

You know, I am not here to give a sermon or anything, but I think it's only proper since I've spent more than half of my life dealing with youngsters who are in trouble and families who are in trouble, and we are undergoing a number of problems today. I think our great profession has a real contribution to our community and to the cause of justice. Why? Because my priority, the way I feel, is the importance of the American family. And so I wanted to live in that. We're undergoing a lot of problems today, but things are just not like it was years ago when I first went on the bench. And I know all of you have families and are proud of your families. I just thought it would be fitting to mention a few things. There was a judge by the name of Seymour Gelber who retired in Florida, and he wrote a book called "Hard-core Delinquents, Reaching Out Through the Miami Experiment." And I'm going to have to just go verbatim because I'm not taking credit for what he said, but it was so much we were on the same page.

It goes like this: "I've learned some simple

truths. Some truths that I've never been able to make our community leadership quite understand. The place to fight crime and the only place to fight crime is with a child. I don't mean the 16-year old child with 10 arrests. There is only a small chance with him. I mean the child at birth, in infancy and in preschool development. I'm talking about some kids who literally never had a caring or a helping hand placed on them. Their parents disappear at birth, and thereafter no one pays any attention to them. Some are called "failure to thrive" babies. They get stiff as boards, as an underclass, because there is no nurturing. Some die, and others survive and as the cocaine babies and other neglected children, they mature without affectation. They cannot communicate because no one talks to them. They never smile because no one smiled at them. They grow up sullen, lacking in any emotion, no conscience, no value system. They seek instant gratification, without any fear of consequences. Hurting another person brings no remorse because they have been programmed at birth to be unfeeling towards other human beings. They become dropouts, pregnant teenagers, muggers, drug addicts, alien to society and angry enough to strike out at anyone in their path.

"Don't expect a juvenile court judge to perform some miracle with this 16-year old mugger who has been totally without any resources since birth.

"We can build as many jails as we want, we can lock them up as long as we want to, we can be sure of only one thing. There will be more Ted Bundys, and there will be these other angry kids burning up the town. Maybe on Brickell Avenue and Flagler Street.

"If you want to fight crime and if you want to fight drugs and if you want to fight AIDS, you had better start with these children at the earliest possible time. Don't do it because you are a great humanitarian. Do it selfishly in your own economic self interest. The cost to our community will be devastating if you allow these children to grow up as part of the disabled underclass unable to keep a job, a permanent welfare burden, an astronomical health cost and a criminal threat to every law abiding citizen.

"The path is clear. There really is no choice.

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Remarks by Judge Aaron Cohn

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The blueprint stares you in the face. Fighting crime begins with the early years of the neglected child when there is still a chance. The longer we wait, the harder it will get. There are no assurances of success, but there is a guarantee of failure, unquestioned failure, if we try any other route."

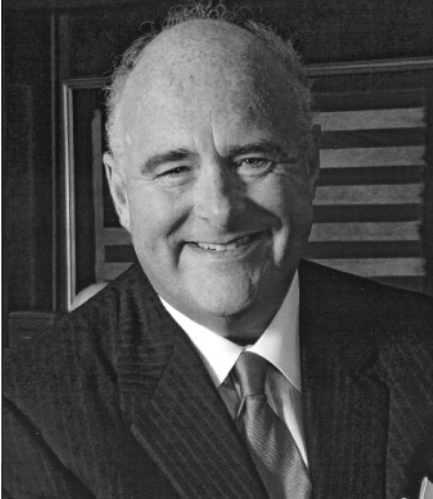
The reason I mention this is because I think it's always on the front page now, and I have a chance to talk to people who are in key positions to know exactly how important the whole group of my friends and I feel about our beloved state and our country and our community, and we feel like this is very, very much a priority. In 1967 I wrote an article for the Georgia Bar called "Juvenile Justice: a Dual Challenge," which is what those in our field must do to have a maximum effect on our mission with our children in trouble. The old doctrine of "parens patriae" as we once knew it, has been discarded and the juvenile justice system's idealistic concept of a wise old judge who had a cure for all the ills that youth suffered is no longer sufficient to satisfy the safeguards demanded. That's the way it was. There was no such thing really as due process in those days. Times

have changed, and now things are no longer that way. Thank the Lord. Since matters concerning juveniles are tried without a jury in the juvenile courts which have original jurisdiction over juveniles in Georgia, this presents a special challenge to the presiding judge. In addition to being the traditional father figure, the juvenile judge must now possess a thorough working knowledge of the due process requirements of the Constitution as interpreted by the Supreme Court. It is to this dual challenge that the judge must respond. He must be sensitive to the needs of the youngsters while considering the welfare and security of the community. He must listen to his critics in search of better avenues of approach to the problems he faces, but he must stand steadfast with his own principles when hard decisions must be made. And finally, he must always be conscious of the Constitutional rights of those before him because he knows that any judgment, however sound in concept and potential effect, could be void if procedural safeguards are not observed. In short, he must act in the knowledge that the future of the youngster involved, as well as any appel-

late court reversal based on his proceedings, truly depends upon his knowledge, his legal ability, wisdom and a great sense of fair play. Georgia now compares very favorably with other states in the United States in rehabilitating its juvenile justice program and in assisting the juvenile court judge to meet the new challenges of procedural due process, as well as discovering new approaches to old problems. Nevertheless, we as judges that are concerned with juvenile justice know we cannot rest upon any laurels we may have obtained. We must continually study and strive to meet the challenges and goals of juvenile justice. Certainly we can do no less for the children of Georgia. In conclusion, on my desk -- every day I look at it -- I have a picture of a child. I'm sure some of you have seen it before. It goes like this. It says: "Priorities: A hundred years from now it will not matter what my bank account was, the sort of house I lived in, or the kind of car I drove, but the world may be different because I was important in the life of a child". That says it all. Again, from the bottom of my heart, I thank you for this beautiful honor. May God bless you all.

PLAINTIFF

DON C. KEENAN



*Tradition of
Excellence
Award*

Introduced by
Charles Allen

It's my privilege to introduce Don Keenan who you know as a child advocate, a person I know as a friend, and law partner. Permit me to tell you some of the things you already know and some things you don't.

I'll talk about Don in parts: the lawyer, the leader, the philanthropist and the person.

First Don the Trial Lawyer:

1. His trial lawyer record speaks for itself. 131 verdicts and settlements over \$1,000,000.00, five over \$10,000,000.00 and one over \$100,000,000.00 all primarily on behalf of children. Not one single verdict reversed. I will leave you in a minute to fly to Birmingham where I expect to get Court approval for the 132nd million dollar case resolution.
2. Don currently holds record verdicts in Georgia, South Carolina, North Carolina, Texas, Kentucky, Ohio, Mississippi, Colorado and I'm sure there's a couple more.
3. He's handled cases in 42 states and five foreign countries.
4. What you don't know is that in 1973 for the first year of his night law school in Atlanta Don lived with his mother and invalid grandmother in Knoxville, Tennessee, and once a week took the Greyhound bus to Atlanta, (cost \$36.00 round trip), stayed at the downtown YMCA on Luckie Street (cost \$6.00 a night) and ate breakfast and dinner at the Krystal in the Equitable building (99 cent breakfast and dinner \$1.29). Law school on \$65.00 a week. The other four days of the week he worked two jobs in Knoxville. Twelve years later he bought the present office building on Nassau Street just one block from the now demolished YMCA.
5. Another item you may not know about Don is that he has a strict rule of spending at least one and often more nights with his children clients in their homes. It gives him passion and creates a bonding which words cannot describe.
6. He's twice been selected National Trial Lawyer of the Year and once as Masters in Trial.
7. He routinely gives between 20

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and 40 speeches to bar associations and trial lawyer groups around the country each year. Has published six legal books including the soon to be released 2nd edition of his closing argument in children damages and wrongful death cases.

The Leader:

1. The national organization the American Board of Trial Advocates is equally divided between plaintiff and defense trial lawyers. Don became its youngest member and at the unbelievable age of 35, became its youngest national president. During his tenure he led a delegation of lawyers to put on the first jury trial in Russia's history and as well Czechoslovakia.
2. The Inner Circle of Advocates is composed of 100 lawyers each receiving at least eight \$1,000,000.00 verdicts, Don became its youngest member at age 34 and its youngest president at 46.
3. Last year about this time I was privileged to be in the great hall of Ellis Island in New York City when Don received the prestigious Ellis Island Medal of Honor awarded to only 100 Americans each year, for his child advocacy work and his Irish roots.

The Philanthropist:

Fifteen years ago Don established the non-profit Keenan Kids Foundation which over the years has grown to five employees, over 200 volunteers and raises and distributes each year between a half a million and a million dollars. It has also published an Award-winning book, *365 Ways to Keep Kids Safe*, soon to be in its second edition. The Foundation has created nine separate safety projects with the Fourth of July safety project upcoming and we just celebrated the twelfth playground safety project having appeared once again on The Today Show.

In addition to the safety projects the Foundation collects weekly items of clothes for children at risk and currently has distributed over 360,000 items of clothes. Also, on our conference room table is made bologna and cheese sandwiches every week for the past 18 years and distributed to the children's shelters locally. We have now surpassed 425,000 bologna and cheese sandwiches.

We break ground in 2 weeks on the Murphy House, a new home for 23 Downs syndrome children. We raised the money and will supervise the new home construction.

Because of his child advocacy work he has appeared on all national me-

dia to include *60 Minutes*, *Larry King*, *Bill O'Reilly*, the morning shows and a repeated guest on *Oprah* where Don was given the distinction as "Person of Courage".

Because of his child advocacy work in this country the European Union asked Don several years ago to consult on a number of projects which he continues to do in Eastern Europe and parts of Africa.

Don often advocates to Congress and many State legislatures on important issues affecting children.

The Man:

This is the easy part, I can sum it up in one word "passion".

- It's passion...for kids and the law that means he has no hobbies, no activities outside the firm or the foundation.
- It's passion...that puts tears in his eyes as he understands the plight of his children.
- It's passion...that produces incredible change in children's lives.
- Its passion...that I can guarantee anyone hearing my words today that Don will never ever retire.

It is my privilege to introduce Don Keenan

Remarks by

Don C. Keenan

To the judiciary present this morning, to the General Practice Section leaders and to its members, I sincerely thank you for the privilege of this award.

When I first received the call I felt undeserving and as I walked into the Center this morning I was equally convinced that I was undeserving but having been proceeded by three of my fellow award recipients, Ed, Mike and the Judge, I am even more convinced that I am undeserving but I thank you nonetheless.

Charles spoke of my passion, which is probably

derived in part from my Irish 100% roots. As a trial lawyer it doesn't hurt having an Irish DNA and the good fight. You probably heard about the Irish fellow walking down the street when he came upon a brawl, a street fight, to which he proclaimed "is this a private fight or can anybody join in?"

I have sought out a lot of fights in my career but now I don't have to go looking, they come to me.

As a trial lawyer I know the importance of choosing the most appropriate word to describe intangibles. The word that fits me today is clearly

the word humble.

Please understand that as a wee boy I had the one dream and that was to become one of you, a lawyer. I grew up poor in a small town with only several lawyers but yet they were the beacons of righteousness. They were always there to right the wrong, lead the civic fundraising drive and to be role models for all of us. So it was fairly simple as a young boy to dream of becoming a lawyer. So therefore it is humbling for me to receive this award in particular because it comes from my peers, it comes from my friends and I want you to know that all I have ever wanted to be is you and I am proud to be among you.

Charles spoke of my roots and I need to tell you that I graduated law school and got married in the same month. I met her when I was 20 and she was 19 and she has always been my greatest supporter, friend and my rock. I rented office space, had stationary printed even before I knew the results of my bar, some would say that was over confidence others would say it was just stupid but yet the only person that was not surprised is my partner of 34 years. When I called her from a payphone minutes after knowing I passed the bar, her response was "I never doubted for a minute."

My legal career has not been without despair and burnout. I had only practiced five years when I reached my first burnout as a criminal defense lawyer. In the final year I tried four death penalty cases, two of which back to back and none received the ultimate penalty but I was spent, demoralized. At my lowest point I started practicing law with Jim Beam, Jack Daniels and Johnny Walker, three of the most miserable law partners a man could ever have. And they almost took me down. I had decided I had to leave the law heartbroken. As I tell younger lawyers however there will come a time when the road to serendipity will rise up out of the morning fog and present an entirely new and not conceived opportunity and the road will ask do you have the courage to embark upon that path.

My path came when as many of you recall the dark moments in Atlanta history with the murdered and missing children tragedy in Atlanta in the late 1970's it was these African-American mothers who reached out to me to help them because governmental officials refused to recognize the possible link between the murders and they were going to engage in civil disobedience to raise public

opinion. So my job simply was to get them out of jail and soon because the case became racially polarized, they told me, a young white lawyer, to be their public spokesperson.

I soon found myself sitting on live TV, as the sole guest of the old Phil Donahue show. His staff obviously had not debriefed Mr. Donahue because he announced to the audience "today, ladies and gentlemen, we are fortunate enough to have one of the country's leading child advocates." Shocked doesn't describe it. I looked around the stage and I was the only one sitting there and he was obviously wrong because I had never represented a child. So, within a millisecond I had to make a decision of whether to interrupt him and correct him or simply to weather the storm for a couple of minutes.

Well for an hour I spoke on behalf of these forgotten children and after the show it was clear the public perceived my role as representing the children's memories and legacy and to them I was a child advocate.

I called my office from the studio and to my additional surprise I had received over a dozen phone calls from parents around the country wanting me to represent their injured or deceased children.

I knew in an instant without any reflection that to represent children was the purpose of my life; I took to it like Labrador takes to water and through the years have never faltered in being a passionate child advocate. The road to serendipity, that you Jesus saved my life.

But as all careers will go, I reached a second burnout over 12 years ago, which was three years after the foundation was started. Up until that time the activities had been pure philanthropic. The clothing drive, the bologna and cheese sandwiches, we operated a transitional house for foster children exiting foster care who otherwise would have been dumped on the street at 18 with nothing but a "good luck kid" from the state.

But over 12 years ago after handling my 30th playground injury, I realized that I was seeing the same unthinkable, preventable children's tragedies occur time and time again.

It was Hannah Helms, the little 2 ½ year old girl who was coming down the sliding board in Gwinnett County when a huge dead tree limb cracked under its weight falling down and crushing Hannah, putting her in a coma to which she passed

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Remarks by Don C. Keenan

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after 30 days while still in a coma. We discovered that the tree limb had been ordered to be cut down 3 times over a 2 year period.

I was full of anger and despair that I was not doing anything to prevent these tragedies. Let me tell you now in complete sincerity that if I never represent another child I will be a happy man.

But the road to serendipity rose again for me and opened up the whole opportunity for me in the field of prevention. First was our playground safety program and nine other projects have followed to include the "365 Ways to Keep Kids Safe" book, which is a national best seller and soon in its second edition. We have published a monthly safety column to over 130 newspapers and children and parent magazines around the country and my life was reenergized.

Now I can say I am part of the prevention and that is simply plain cleanup.

There are those that see my role as a lawyer and safety expert as a disconnect. I was invited to dinner with Oprah and she invited several high profile friends of hers to join us and at the dinner one of them remarked, "What business do you have in talking about child safety? You are not a public health official, you are not a doctor." And before I could answer, Oprah, who is an opinionated lady jumped in and said, "here's the man who sees what happens when things are not safe. He has the absolute right, in fact the duty, to speak out on prevention".

On a different note, I also want to share with you a moment of one of my revelations and it came in 1992 when I was president of the American Board and I was invited by the State Department to take a delegation of lawyers to both Czechoslovakia later Russia, to demonstrate the civil jury trial. You may recall that the Berlin wall came down in 1989 so in 1992 these countries were just experiencing the first of what democracy really is and therefore our role was to demonstrate civil jury trial by lecturing in the law schools, speaking in the judicial training centers and ultimately putting on mock jury trials.

As most Americans going abroad, I felt I had something to tell them and it was we Americans had a true appreciation of democracy and the justice system. Of course I was naive and wrong because during the jury deliberations in Moscow where we used a diverse jury of mill workers, college

professors, plant managers, all types, a large hunk of man, a mill worker, stood up in the middle of the deliberations and through an interpreter told us "I must tell you (with his hands trembling) that for the first time I feel important. My vote counts just as much as you, Mr. Mill Manager and you Mr. Professor because for the first time in my life I get to say how things are in this community".

What a profound revelation on the importance of the jury system from a former communist worker. How often in our country do we have jurors make similar comments of appreciation? No, in our country people do anything they can to escape jury trial and if they do serve, clearly, the words appreciative do not come to mind.

The second and equally profound realization that I came to was the importance of the independence of the judiciary. You see, in Russia we were told they had what's called "telephone justice" where the judge would hear the case and at some point would receive a phone call from some anonymous unidentified source who would then tell the judge what the verdict would be. The judges were merely puppets of the politicians and were anything but independent.

Sadly I must admit that prior to my Russia experience I had no appreciation for the role of judges in our justice system, the fact that they are responsible for creating a level playing field and making sure that everything is fair. So I say with a heavy heart that to see how judges today are compensated and to see that they often become the target of relenting media attacks, it is nothing short of shameful what we do to judges.

As a young lawyer you know little about how much lawyers are compensated but as you grow older you come to the profound realization that 99 percent of our trial judges could leave the bench and assume positions that would pay double, triple or quadruple what their judicial salary. But yet without complaint they serve and they serve honorably against the backdrop of politicians cutting their pay raises and the media attacks. We as lawyers owe them more than respect; we owe them our strongest defense to do what is right for them.

I have probably visited too long but permit me one other remark. I have thanked Charles, thanked Teresa, thanked you, my peers and thanked the

judges. Permit me now to give a special thanks to the hundreds of children who have given me the privilege to represent them.

May I leave you with this story; it is the story of Daniel Stevens. Back in 1984 an obstetrician negligently delivered him causing him 14 fractures from improper forceps. It occurred in Henry County and prior to Daniel's case there had never been an obstetrical malpractice verdict in favor of a child in Georgia history but yet Daniel's case was different. His parents worked three different jobs. One job they called the "pill" job simply because it provided the money for the drugs to control his seizures. The doctors had simply given up on Daniel telling the parents that he would never talk, walk, express human emotions and that it would be best for them to institutionalize him and go on with their lives. As with so many of my parents they rise up in the face of this adversity and say no, we want something better. Well, with the help of the jury and the judge a verdict came forth, which at that time was a record verdict, giving the parents the rehabilitative tools to bring quality to Daniel's life. That was 24 years ago.

I am pleased to report that four years ago I took Daniel to his first Brave's game. He has a vocabulary of 40 to 60 words, clearly he can walk, although he will never work or live independently, he has thoughts, he has emotions and it is all because of the jury and what they did for him.

Once a year I never quite know when, I always receive a call from Daniel. He dials the number himself and our receptionist, "under penalty of death" is instructed to track me down wherever I am and make that call connected and it is always the same. It starts with "Mr. Attorney Don Keenan this is Daniel. How are you?" "Fine", I say "Daniel, how are you doin?" To which he says "are you still my lawyer?" Of course I say "Daniel, I will always be your lawyer." And then the last thing he always says is "Well, I better let you go so you can help the other children." Then I tell him I love him and he always says "I love you too."

So, ladies and gentlemen, I sincerely thank you for the privilege of this award and I think you understand why it is that I will never retire, it just doesn't get any better."

Suggestions for Mediation of the Difficult Case: Kin Representation, Surveillance, Hotheads, and other Challenges

Mary A. Prebula
Prebula & Associates LLC
3483 Satellite Blvd., N.W.
Suite 200 The Crescent Building
Duluth, Georgia 30096



Mary A. Prebula is a member of the firm Prebula & Associates in Duluth, Georgia. She practices in the areas of civil and commercial litigation, contract law, employment law, products liability, personal injury, ERISA, family law, business law, discrimination and harassment. Ms. Prebula was born in Binghamton, New York, and raised in Montrose, Pennsylvania and Goldsboro, North Carolina. She received her undergraduate degree from the University of North Carolina at Chapel Hill in 1974, her master's degree from the University of North Carolina at Greensboro in 1977, and her J.D. from Emory University in 1984. Ms. Prebula is active in the State Bar of Georgia currently serving as Chair and Board Member of the General Practice and Trial Law Section. She has also served as Co-Chair of the Women and Minorities in the Profession Committee and Co-Chair of the Committee on the Overview of the General Counsel's Office. Ms. Prebula is past President and Treasurer of the Georgia Association for Women Lawyers, and past member of its Executive Board as well as former Chair of its Judicial Selection Committee. She has also served as a member of the Board of Governors of the State Bar of Georgia from 1991 to 1995. She is a Fellow and Sustaining Member of the Lawyers Foundation of Georgia.

The difficult mediation is one where more is at play than just getting two sides diametrically opposed to each other to reach consensus. In the difficult mediation, other reasons than simply the parties do not agree may affect the outcome of the mediation. This paper offers some suggestions and rules to apply to difficult mediations, but this same advice may also be helpful in the ordinary mediation. The paper also addresses certain specific issues that arise, including kin representing kin, surveillance, hotheads, getting to the insurer and other challenges.

A.

SUGGESTED RULES FOR THE DIFFICULT MEDIATION.

1. KNOW YOUR CASE.

Rule No. 1 is to know your case.

One of the most important things you can do to make mediation successful is to know your case, including the documents, the credibility and testimony of witnesses, the weak points, the strong points. Many times counsel ask for an early mediation when they really do not know their case. Everyone knows that one fact or one unbelievable witness can turn a case. If you have not had enough discovery to learn that your client is the hothead and the jury will hate him, you may not settle a case in mediation when you really need to do so. The smoking gun document or the lack of one can make the mediation successful. It has never been my experience where you have unusual or difficult factors involved that mediation before discovery is fully developed will be successful.

2. KNOW YOUR CLIENT.

All clients are not equally appealing or believable. Know the strengths and weaknesses of your client before you get to mediation. If your client is difficult in any manner, whether they are prone to anger, use sarcasm, turn red in the face, cannot sit still, must pace, or are likely to give away everything just to settle, you must know this before you choose the mediator, the mediation setting and before you let him speak.

If you have a particularly difficult or headstrong client, work out a signal with the client that means "be quiet." Sometimes he will follow it and sometimes he will not.

3. WAIT UNTIL SOME DISCOVERY IS CONCLUDED AND YOUR CASE IS READY FOR MEDIATION.

Often, especially in agency processes such as mediation through the Equal Employment Opportunity Commission, there is a push for an early mediation before the facts of the case are developed. Many courts are now requiring mediation or mediation-like sessions before the case is even begun. Frequently, this occurs in domestic cases such as the 30-day hearing in Family Court, sometimes occurring before a party is served or an answer filed, and the requirement for mediation within 90 days of filing in other county courts. If the mediation is scheduled before the facts of the case are developed, the mediation frequently is not successful. If you add the difficult issues discussed below to the fact that the case is not ripe for mediation, you are virtually doomed not to succeed at mediation or to reach a consensus, which one of the parties wants to set aside as soon as they leave.

4. DO NOT USE THE MEDIATION AS A DISCOVERY TOOL.

Discovery should be done before the mediation. Frequently, defense counsel [sorry guys!!] ask for an early mediation and it appears that they do so in order to obtain early discovery to use in trying to gain an early advantage in the case. [It may happen that plaintiff's counsel does the same thing, but I have not seen that in my experience.] When the party that is seeking discovery through mediation obtains it, the mediation usually is over within minutes. This tactic is an improper use of mediation. Such actions make the other side reluctant to pursue further mediation or settlement attempts.

5. KNOW YOUR DOCUMENTS—AND BRING THEM TO MEDIATION.

Most cases have key documents. It seems so basic: use documents in mediation. Certainly, if you have the document that wins the case, know about it, give it to the mediator ahead of time, and use it at the mediation.

Too often lawyers are surprised by documents that are used at mediation or believe that have a great document that proves their case, but they just did not bring it today. Documents also are vital to disprove what the other side is telling the mediator, but if you do not have them, you cannot use them.

Do not forget the depositions. Normally we do not want to lug these around, but bring them on disk or on your computer. They can be indispensable in defeating an argument that is stalling a mediation or being used to attempt to prove your client's position is untenable.

6. DISCUSS SETTLEMENT WITH OPPOSING COUNSEL BEFORE MEDIATION.

Some counsel prefer to have no settlement discussions until you get to the mediation. I do not find that productive. When you begin a mediation and each party has no idea what the other side's position is, you have to spend the morning setting forth each side's settlement position. That is a waste of time and resources especially in a difficult mediation. Exchanging settlement discussions and proposals with the other side well before mediation allows each party to understand the starting points. Plan carefully because your most recent offer will generally be the highest offer you can expect to start with at mediation.

However if things change, your settlement position prior to mediation may or may not reflect your opening position at mediation. But if you plan to open with a higher number at mediation than you did in your last settlement offer, prepare opposing counsel and tell her why—explain there are new facts, new cases, new documents or you have researched a new theory that enhances the value of your case. You can do this simply by sending a letter to this effect and stating you will be prepared to advance this theory at the mediation. It facilitates the mediation so that the opposing counsel and party are not

surprised enough to walk out at the first offer you put on the table.

Bring the settlement offers—all of them even if they are off the table—to the mediation. You never know when you are going to need them. Sometimes the mediator just needs the offers to know what has already been rejected so he does not push the mediation to a direction. Sometimes the mediator just needs it as a checklist of the issues in the case.

7. PREPARE YOUR CASE AS YOU WOULD PREPARE FOR TRIAL.

One of the most significant errors made in mediation is that some lawyers do not prepare the case as if they were going to trial. While you do not necessarily have to write out your questions, you should have an outline of what each witness will say, the good points and the bad points. You should know your causes of action, your theory of the case, the case law, and what you are going to ask the jury to decide. If opposing counsel believes you are unprepared or inadequate at the mediation, even though you would be ready when trial began, that impression may lead counsel to pass on a settlement believing she could "beat you" and achieve a better result for the client at trial.

8. PREPARE A CONCISE MEDIATION STATEMENT.

In the difficult case, it is beneficial to provide a confidential written mediation statement to the mediator in sufficient time prior to the mediation for the mediator to review it. Everything in the statement should be concise. The statement should include:

a. Statement of Relevant Facts.

Keep your statement of relevant facts short and to the point. It should be paragraphs, if possible, but no more than two pages. Cite to the key documents that support your position and provide those to the mediator along with the statement. Cite to appropriate deposition testimony and provide just relevant pages of

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Wading in Sewage Sludge - Keeping Afloat Through the Federal Administrative Procedures Act

F. Edwin Hallman, Jr.,
DECKER, HALLMAN, BARBER & BRIGGS
a Professional Corporation
Attorneys at Law



F. Edwin Hallman, Jr., born Atlanta, Georgia, April 4, 1946; admitted to bar, 1971, Georgia. Preparatory education, Wake Forest University (B.A. in Political Science, 1968). Legal education, University of Georgia (J.D., 1971). Fraternities: Phi Delta Phi; Omicron Delta Kappa. Assistant Attorney General, State of Georgia, 1971-73. Partner, law firm of Christopher & Hallman, 1973-75. Regional Counsel and Chief Enforcement Attorney, Region IV, U.S. Department of Energy, 1975-79. Member: Atlanta Bar Association; American Bar Association; State Bar of Georgia (Environmental Law Section); Instructor for numerous national environmental seminars.

Prior to formation of the Firm, Mr. Hallman gained his administrative law and litigation expertise as Assistant Attorney General for the State of Georgia and Regional Counsel/Chief Enforcement Attorney for the U.S. Department of Energy. Mr. Hallman conducted several detailed investigations during his government experience and subsequently in his practice. Mr. Hallman has extensive experience with review of judicial systems at the university level, having served as the Chairman of the Honor Council at Wake Forest University and advised university officials on the implementation of honor codes and student judiciary matters. Mr. Hallman has extensive experience involving purchases and sales of real estate and businesses. In particular, Mr. Hallman has extensive experience regarding environmental law matters as they impact upon business and real estate transactions. He represents numerous entities throughout the country regarding environmental issues in various capacities, including transactional issues, state and federal regulatory matters, compliance and permitting issues under the Resource Conservation and Recovery Act and related state laws, litigation relating to determination of responsible parties for environmental problems, matters relating to the Comprehensive Environmental Response, Compensation, and Liability Act, and other corporate and general law matters. Mr. Hallman's expertise includes environmental representation regarding government contracts and impacts of government facilities upon the rights of other parties.

This article addresses one of numerous cases that our firm has handled since early 1998 dealing with damages resulting from the state and federal governments' sanctioned program whereby "sewage sludge," a mixture of human waste, household wastes and industrial wastes, is land applied to farms. The sewage sludge land application program evolved from the absolute prohibition of the long existing EPA endorsed policy

of dumping sewage sludge in the oceans and inland bodies of water.

Not only have attorneys with our firm become experts regarding the legal parameters of sewage sludge but, in addition, we have improved our social expertise by learning from personal experience that the subject of sewage sludge is not appropriate for dinner parties, cocktail parties, or wedding receptions. Notwithstanding our reluctance to discuss at any

opportunity the issues relating to the disposal of "poop" mixed with industrial wastes, we have learned during the many years of dealing with sewage sludge cases that the millions of tons of sewage sludge being put on farm lands have the potential of creating a national environmental disaster.

As was the case with one of our sewage sludge lawsuits, in an overwhelming number of cases for which

federal practice attorneys are hired, the Administrative Procedures Act (5 U.S.C.A. 701 et seq.), is the only legal mechanism whereby an aggrieved party may challenge the Federal Government in proceedings before a bureaucratic agency. The primary mountain peak that must be climbed is based upon the uniform holdings of the appellate courts and the United States Supreme Court that the federal agency is to be given great deference in any agency determination and that the courts cannot overturn any agency decision unless it is "arbitrary and capricious." See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

For over a decade, our firm has represented a farming family in rural Georgia in one of the many sewage cases handled by us. The bottom line is that we, with the help of outstanding experts, have proven that the farmers' lands were poisoned by toxic sewage sludge that was spread by the City of Augusta, Georgia. As is the case for many municipalities, Augusta disposed of sewage sludge on farm lands as a cheap method for the City to rid itself of the settled solids known as "sewage sludge" from its wastewater treatment plant. The hidden agenda is that such "municipal" sewage sludge more often than not contains industrial wastes. In Augusta, approximately sixty percent of the influent into the wastewater treatment plant is composed of industrial wastes.

In this case, the sewage sludge was proven to be acutely toxic and it is now on record in federal court that the applied sludge decimated the family's dairy herd, forcing the family out of the dairy business. During the many years since 1998, we have gone to great lengths to engage the local, state, and federal governments to address the situation. Rather than helping this family and holding the City responsible for the effects of the toxic sludge, certain government agencies went to extraordinary

lengths to cover up and obfuscate the truth. It has taken these ten years of legal battles, without any assistance from state and federal agencies, to finally get a court of law to rule that the toxic sludge was in fact the cause of the family farm's ruin.

The favorable federal court ruling resulted from a long history of hearings and appeals that had to be pursued according to the Administrative Procedures Act. This article provides an account of the many cards that are stacked overwhelmingly in the government's favor in an administrative proceeding. Perseverance and creation of a complete administrative record are the most determinative factors in an administrative battle.

5 U.S.C.A. § 706 states that a Court shall:

hold unlawful and set aside agency actions, findings, and conclusions found to be – (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; ... (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; ... (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

HISTORY

The McElmurray family members were the owners and operators of a dairy farm business established in 1938 in Hephzibah, Georgia, a small town just outside of Augusta. In the late 1970s, Augusta (the City) contacted the McElmurray family about its development of an alternative means of processing and disposing of the sewage solids, or sludge, generated from its Messerly Wastewater Treatment Plant. The City proposed to apply the sewage sludge to farm

lands, at no cost, as a form of fertilizer. The City told the McElmurrays that the sewage sludge produced at the Messerly Plant was a safe and beneficial fertilizer for agricultural land. In 1979, the McElmurrays agreed to participate in the City's land application program, based upon representations from the City that the sludge would be produced and applied as safe fertilizer in accordance with state and federal laws. The McElmurrays received sludge applications from Augusta for 11 years and over time became increasingly concerned about the impact of the sludge on their land and dairy herd.

In the mid-1980s the McElmurrays' dairy herd began dying at an alarming and unprecedented rate. The McElmurrays began to inquire about the source of the illness in their dairy herd, and after much diligent research and review by experts, the only variable that could account for the strange illness in the herd was the forage grown on the sludged farm lands. The McElmurrays obtained counsel and additional experts to investigate the sludge. Their suspicions were confirmed and the true extent of the damage was far worse than anyone could have imagined.

The McElmurrays filed suit against the City of Augusta in the Southern District of Georgia in 1998. This underlying lawsuit went before no less than five state, federal, and appellate courts before it was finally resolved in 2007 by settlement, but that is a story for another day. This article addresses a related administrative proceeding before the United States Department of Agriculture (USDA) that also involved a request for relief as a result of the effects of the toxic sewage sludge.

PROCEEDINGS BEFORE THE UNITED STATES FARM SERVICES AGENCY (FSA)

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their lands, the McElmurrays were legally and ethically prohibited from planting food-chain crops on the sludged lands. All farming operations ceased in 1999. In 2002, the USDA permitted farmers to re-adjust their base acreage and yields for subsidy payments under the Direct and Counter-Cyclical Payment program, administered by the Farm Services Agency (FSA), a division of the USDA. Although the McElmurrays were prevented from planting crops from 1999 onward, the program regulations allowed for a one-time update of base acreage if the farm in question qualified for prevented planting credits.

On January 15, 2003, the McElmurrays filed applications for prevented planting credits for approximately 1,700 acres of farm lands. The applications stated that the reason for not planting the lands was "environmental contamination." The original applications were reviewed by the local county committee of the FSA, who initially denied the applications due to uncertainty of whether "environmental contamination" was an approved reason for granting the prevented planting credits. The denial of the local committee was immediately appealed to the State FSA Committee, an appointed volunteer group of five farmers from around the state.

After a request for review, the FSA issued a memorandum, written by the Deputy Administrator for Farm Programs, holding that "environmental contamination" was an approved reason for granting the prevented planting credit applications. The applications were submitted to the State FSA Committee for final disposition.

Meanwhile, the state FSA investigators, federal employees and career bureaucrats, began to receive contacts from employees of the United States Environmental Protection Agency (EPA) and representatives of the City

of Augusta about the status of the McElmurrays' applications. It is well established that the EPA vehemently defends the sewage sludge land application program, and that there is a small group of employees within the EPA that is organized and designed to protect that program at all costs, with the ends justifying the means. This group is known as the "Biosolids Incident Response Team" (BIRT), sometimes referenced as the "Sludge Swat Team." The City of Augusta also had a clear interest in defeating the McElmurrays' applications to the USDA, because of the McElmurrays' ongoing litigation against the City. If the local or state FSA committee approved the applications, there would be concrete evidence that a federal agency had ruled that the McElmurrays' lands were contaminated by sewage sludge.

Over the course of many months, the McElmurrays presented evidence that their lands were contaminated in multiple hearings before the State FSA Committee. During discovery in the underlying lawsuit against Augusta, the McElmurrays discovered that the City of Augusta never maintained a single accurate record of the contents of the sludge put on their lands, nor did the City ever accurately quantify the amount of sludge applied or the acreage sludged. The records that did exist proved that the sludge was full of hazardous wastes. The McElmurrays hired NewFields, a strategic environmental consulting firm, to investigate their lands and the sewage records. NewFields produced reports, which were verified by affidavit, that the McElmurrays lands were conclusively contaminated by hazardous wastes, to the extent the farm could be considered a Superfund site. The McElmurrays' expert soil scientist spent hundreds of hours reconciling the City's land application records with its internal sludge analyses in an attempt to accurately quantify the heavy metals

and other contaminants dumped on the McElmurrays' farm lands.

These reports and other evidence were submitted to the FSA State Committee in support of the applications for prevented planting credits. The only evidence presented by the investigators for the FSA, in collusion with the EPA BIRT and the City of Augusta, were two letters written by EPA employees who had never analyzed any data from the McElmurray farm. The FSA investigators claimed that these letters proved that the McElmurrays' lands could not be contaminated.

Despite the efforts of the EPA, the City, and the FSA investigators, the State Committee voted, after detailed review, to approve the McElmurrays applications. Immediately after approving the applications, the State Committee was contacted by the Deputy Administrator for Farm Programs (DAFP), who directed the State Committee to reverse its decision. This directive was and is a violation of the FSA rules and regulations (the DAFP has the authority to directly overrule the State Committee, but does not have the authority to change the individual committee members votes). Despite this clear rule violation, under written protest, the State Committee did in fact change their votes on the record and the McElmurrays' applications were denied.

THE NEXT STEP - NATIONAL APPEALS DIVISION (NAD) OF THE FSA

On April 2, 2004, the McElmurrays filed their administrative appeal with the NAD of the USDA. The NAD Hearing Officer unreasonably delayed considering the matter until a hearing was held on September 2-3, 2004. Also, the hearing officer unnecessarily lengthened the hearing by wasting the entire first day by identifying, on a page-by-page basis, the

contents of the administrative record, even though both parties were willing to stipulate that the record was accurate. The McElmurrays were not permitted to have a court reporter present at the hearing. The Hearing Officer insisted that the hearing testimony would be properly preserved by using his faux-leather bound 1975 RadioShack cassette recorder, with no external microphone.

At the NAD hearing, the McElmurrays presented unrefuted evidence that their lands are contaminated in the form of expert reports, supported by affidavits, and thus qualified for the requested relief in the applications. The FSA investigators, the only witnesses for the USDA, presented the same two letters written by EPA employees that were never authenticated or verified by testimony and were presented to, and rejected by, the State Committee.

1. The Mehan Letter.

The first such letter presented by the FSA investigators, which came to be known as "The Mehan Letter," was written in response to a petition by the Center for Food Safety submitted to the EPA, calling for a complete moratorium of the land application of sewage sludge. On Christmas Eve 2003, G. Tracy Mehan, III, then Assistant Administrator of the EPA, allegedly issued this letter which contained a section entitled "Death of 300 Cattle and Farmland Contamination." The discussion in this section described the lawsuits filed by another family, the Boyce family, against the City of Augusta for its application of sewage sludge on farm lands. The Mehan Letter did not address, provide any conclusions about, or state any alleged EPA position regarding the McElmurrays' lands.

2. The Brobst Letter.

The second letter presented by the investigators was written by Robert

Brobst, a member of the infamous BIRT. The Brobst Letter was allegedly in response to specific inquiries by the FSA investigators. The Brobst Letter only addressed one constituent of concern, cadmium, while ignoring such contaminants as chlordane and mercury, proven to be in the sludge put on the McElmurray lands. Furthermore, in stunning fashion, Mr. Brobst admitted that the EPA ignored a vast majority of the data collected from the McElmurrays' lands.

It was conclusively established that the only data reviewed by the EPA and referenced in the Brobst Letter were a few metals analyses, all of which were provided by the City of Augusta, and were admittedly inaccurate. Contrary to Mr. Brobst's position, the EPA admitted that it never collected any samples from the McElmurray farm. There was no indication that the EPA or the FSA had ever evaluated any data submitted by the McElmurrays' experts, nor had it reviewed any sampling results for the numerous other listed hazardous wastes and constituents of concern that had been applied to McElmurrays' lands.

Despite the overwhelming evidence presented by the McElmurrays, that their lands were horribly contaminated, and the clearly irrelevant evidence presented by the FSA investigators, on December 3, 2004, the NAD Hearing Office issued an Appeal Determination that McElmurrays were not entitled to the requested FSA relief, based upon the alleged "determination" of the EPA, which the Hearing Officer held was binding on the USDA. The determination of the NAD Hearing Officer was based upon one paragraph in a National Appeals Division handbook, which states:

If a reviewing authority receives a request for review involving a technical determination by any Federal Agency other than FSA and NRCS, the reviewing au-

thority shall: ... accept as binding, written factual findings or technical determinations of the other Agency.

FSA Appeals Handbook, para. 71.

Amazingly, and notwithstanding the staggering volumes of evidence that food chain crops could not be grown on the McElmurray lands, the NAD Hearing Officer was convinced that he was bound to blindly accept the two letters, written by the EPA, which in no way referenced the McElmurray's applications, as binding on his decision. The Hearing Officer went so far as to write in his decision:

Appellants have presented voluminous amounts of technical determinations from apparently credible experts which indicate their land is contaminated. However persuasive Appellants' information might be, FSA is controlled by EPA's position that Appellants' land is not contaminated. I find no reason to find error in FSA's decision.

FEDERAL COURT

On January 3, 2005, the McElmurrays, after exhausting the administrative requirements, filed their Complaint in the United States District Court for the Northern District of Georgia according to the Administrative Procedures Act. The original complaint contained references to the Administrative Record from the NAD hearing below.

The defense for the USDA was assigned to the United States Attorney's Office in Atlanta. The Assistant United States Attorney (AUSA) quickly made it clear that the government had no interest whatsoever in addressing the merits of the case. The AUSA filed numerous confusing and incoherent motions, ultimately culminating in a pleading entitled

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“Response in Opposition to Motion for Entry of Default and to Strike Defendant’s Unresponsive Documents and Renewed Protective Motion to Open Default.” The McElmurrays responded to this motion, and pointed out that the government’s motion was beyond comprehension.

The case was initially assigned to a federal judge who promptly took senior status and transferred the case to an active judge. Rather than rule on the various motions before the Court, the second judge promptly ordered the parties to justify why venue was proper in the United States District Court for the Northern District of Georgia. Immediately after receiving the briefs, the case was transferred to the United States District Court for the Southern District of Georgia.

In the Southern District, the case was initially assigned to a third judge, who recused himself because of his familiarity with the McElmurray family. Once the case was in the Southern District, a new AUSA was assigned the defense for the USDA. The reassignment was a breath of fresh air. The new defense attorney for the USDA saw through the prior attempts of the government to delay the case and immediately filed the Administrative Record and an Answer. All previous motions were withdrawn, and motions were filed by the McElmurrays and the government for judgment on the record. The parties filed their briefs on March 5, 2007. The case was then assigned to a fourth federal district court judge.

The case was then reassigned again on October 4, 2007, to the fifth judge, former Chief Judge and now Senior Judge Anthony A. Alaimo. A hearing was held on January 24, 2008. For the first time in five years, the McElmurrays were permitted to plead their case in an unbiased forum. Immediately prior to oral argument, the case was reassigned to a third AUSA. At the hearing, the McElmurrays presented oral argument for over an

hour, without interruption, except for well considered questions from the Judge. The government spoke for approximately ten minutes.

In less than one month after the hearing, on February 25, 2008, Judge Alaimo issued a 45-page order completely overturning the rulings of the NAD Hearing Officer. The Court held that the actions of the USDA were entirely arbitrary and capricious, because the agency could not reasonably rely upon two unsworn, unsupported, irrelevant letters of two EPA employees, who admittedly never reviewed the McElmurrays’ applications, in ruling that the McElmurrays’ lands were not contaminated. The Court found that the NAD Hearing Officer was not bound by the lone provision of the USDA handbook, in light of the overwhelming evidence against the government and in favor of the McElmurrays’ applications. Indeed, the Court ruled that the record was clear that the only entity that ever reviewed the McElmurray petitions was the State FSA Committee, which ruled in favor of the McElmurrays, only to be illegally overruled by one unauthorized FSA supervisory employee.

This lawsuit represents the first time that a Federal Judge has held that a citizen’s lands have been contaminated by the land application of sewage sludge. Moreover, this case represents the difficulty and frustration of fighting the government through an appeal of an agency decision through the Administrative Procedures Act, and is one of the increasingly rare instances of an appellant winning that fight. The standard of deference given to federal agencies is highly favorable to the government, but is not absolute. As the Court stated in its Order, “[a]n administrative determination cannot be upheld without an articulated, rational connection between the facts before the agency and the agency’s decision.” McElmurray v. U.S. Dept. of Agri-

culture, 535 F.Supp.2d 1318, S.D.Ga., 2008.

This case highlights the factors that a lawyer should consider before agreeing to take a case that requires a protracted uphill battle through the administrative process, before the case can be heard by a federal judge. The crossing through the administrative sludge of the APA is deep and pungent, but if you persevere with the facts and law on your side, and you are lucky enough to land before a legal scholar judge such as Judge Alaimo, you can bring your client out of the sludge and, hopefully, arrive with a clean victory on the other side.

The words of Henry Wadsworth Longfellow should be considered when a lawyer first agrees to a long road commitment to a client when a claim must be made within the confines of the Administrative Procedure Act:

“Perseverance is the great element of success. If you only knock long enough and loud enough at the gate, you are sure to wake up somebody.” ■

90 -120 Days to Trial - Where Am I? Pre-trial Checklists

William P. Langdale, III
Langdale & Vallotton, LLP
1007 North Patterson Street
Valdosta, Georgia 31601



Pope graduated with his bachelor's degree from the University of North Carolina at Chapel Hill. He later received his J.D. from the University of Georgia, where he graduated cum laude and served as a Notes Editor on the Georgia Law Review, publishing one article titled "Metro Broadcasting v. FCC", 25 Ga. L. Rev. 535 (1990). In 1995, he joined his father at Langdale Vallotton, LLP in Valdosta, Georgia.

He is actively involved in the State Bar of Georgia, serving on the Board of Governors since 2004. He is a Board Member and District Representative of the General Practice and Trial Section, and was elected as the Treasurer/Secretary of the Section in 2007. On August 1, 2007, Pope Langdale was appointed to the Unlicensed Practice of Law District 2 Committee by the Supreme Court of Georgia. Pope has served on the legislative and membership committees of the Georgia Trial Lawyers Association (GTLA), to which he was recently elected as a District Vice-President.

Pope is also a member of the Southern Trial Lawyers' Association (STLA), the American Association of Justice, the American Bar Association, and serves as a Fellow of the Lawyer's Foundation of Georgia, a non-profit arm of the State Bar of Georgia. He serves as special master under the Supreme Court of Georgia in lawyer discipline cases and was appointed by the Lt. Governor to serve on the committee to select the public defender for the Southern Judicial Circuit.

Pope primarily practices in the area of civil litigation, representing injured victims, as well as individuals and businesses involved in commercial litigation.

Whether you are representing the Plaintiff or the Defendant, and whether you are involved in a personal injury lawsuit, or a commercial or business dispute, being prepared and organized is the first key step in a successful outcome at trial. Although the focus of this paper is preparation beginning 3-4 months out of trial, the very best attorneys will repeatedly tell you that their preparation begins far before a Complaint or Answer is even filed, and their road map for trial begins as early as practically possible.

Early Pre-Trial Order

Some attorneys begin preparations of a Pre-Trial Order even before they

have filed a Complaint, or shortly after filing any Answer. If you will also take the time to do so, you will have the best road map that you will ever need to stay organized, stay on track, and accomplish what needs to be done, in order to be prepared to properly present the case to the jury. I have used this technique to help me stay focused and organized, and also as a tool in teaching younger associates how to step back from all the little trees that appear in the practicalities of litigation, and actually see the forest of the trial itself.

For instance, look at what a Pre-Trial Order actually asks of counsel. It asks for the facts as you believe they will be presented to the jury, the

law that will be applicable by both the court and the jury, special evidentiary issues that may come before the court, witnesses and documentary evidence. The totality of the information needed to prepare a Pre-Trial Order is exactly what will need to be gathered, determined, and known, at very early stages in litigation. It is unbelievably helpful to begin that preparation as early as possible. For areas of information that are unknown, leave them and fill in the blanks later. Perhaps most helpful, though, is the mental exercise it requires of counsel in preparing a Pre-Trial Order, to step back and think about what is needed to properly present the case to the

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90-120 Days to Trial - Where Am I?

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jury. For instance, in a Plaintiff's personal injury case, where pain and suffering is a large element of the potential recovery, who are the witnesses and what are they going to say? Who is going to testify about the way in which this injury has affected your client's life, or, from the defense side, who is going to testify or what documents will show that the Plaintiff has not been affected to the extent that he or she claims?

I cannot tell you how many times I have been involved in cases where attorneys go through the discovery process with interrogatories, requests for production of documents etc., without really realizing what is ultimately necessary in the end. It is too often that we, as attorneys, identify witnesses for the first time in Pre-Trial Orders submitted just several weeks prior to trial. Often, these are damage witnesses, family members and other people who we have realized will be necessary.

In summary, one of the best mechanisms to understand the issues, potential themes, arguments, and potential evidence needed, is to go through the exercise of preparing a rough draft Pre-Trial Order at the very early stages of the litigation. In fact, as discussed below, the rough Pre-Trial Order is the very first document which we include in the much abbreviated trial notebook, which is also prepared at early stages of litigation.

Abbreviated Trial Notebook

While the subject of this paper is a Pre-Trial Checklist, I want to comment on another useful method of trial preparation which our office utilizes. I prefer to term this an Abbreviated Trial Notebook. Attached to this paper is a generic copy of how our abbreviated trial notebook is organized. As with the Pre-Trial Order, we endeavor to create these as soon as possible after a complaint or answer is filed. By doing so, it can become very easy to have one notebook

which contains the major elements of the case, and in which to work on throughout discovery, and to make notes regarding particular aspects of the trial as you proceed along in the discovery process. For instance, once the witness list is created, as we are taking depositions, we fill in the tab by the witness with the deposition summary. As the case progresses, you can easily go back with this simple notebook and look to see exactly what that witness said. In addition, we will have places to make notes as the case proceeds through discovery, for voir dire, opening statement, closing arguments, and jury charges. It is important to note that it is not necessary in the early stages of discovery to have those items done, and you can subsequently see that in the Pre-Trial Checklist there are certain time frames for achieving each of those various tasks. What is important, however, is to have a centralized place in one notebook, where you can make notes of important points, facts, etc. that come up when deposing a witness, talking to opposing counsel, or otherwise investigating the case. Then, as you begin to get prepared for trial, all your notes are in one place where you can go back and actually begin to incorporate those important points into the various components of the trial.

Pre-Trial Checklist

While the Pre-Trial Checklist, which I have provided starts with the three to four months prior to trial, it goes without saying that the earlier the checklist is used, or the earlier any preparation is started, the better off you will be and the more prepared you will be to present your case to the jury. It also goes without saying that the entire litigation process will be made much easier with a road map which is very easy to follow. However, when you find yourself three to four months prior to trial, it is helpful to have a checklist, which

we call a Pre-Trial Checklist for you and your staff to make certain that everything has been done in a timely fashion, that when you appear at the Pre-trial Conference everything required of you has been done, and that your case is properly prepared to be presented to the jury.

I have attached a proposed Pre-Trial Checklist that we use in order to make certain that everyone working on a case has done their part, and to confirm that all the tasks have been properly completed in a timely fashion. I believe you will find the Pre-Trial Checklist to be of use to you and your staff, and something that you can use in your practice. We, as lawyers, often rely on others such as legal assistants, secretaries, office managers, paralegals, investigators, and others to help us in the preparation of our case. It is helpful for them to know what the lead attorney expects to be done and on what time basis. I think that you will find if you provide each of them with a Pre-Trial Checklist, which they can have for their file, and they can understand what is expected of them, everything can operate far more smoothly, with less tension and greater results.

I believe that the Pre-Trial Checklist is, for the most part, self-explanatory. Of course I would encourage each of you to add any items that you feel are unique to your practice and take away those that do not apply. The important point is to have a Pre-Trial Checklist and to have your entire staff operating in sync. There are a couple of items that I do feel are of use and should be addressed by Georgia attorneys. One I believe is that discovery regarding expert witnesses should be timely supplemented. I also believe that Georgia attorneys owe a duty to properly disclose on a timely basis newly discovered evidence, which includes either documentary evidence or witnesses. While I do not believe that we, as lawyers, have an obligation to do

the discovery for the other side, I do believe that when we become aware of a witness to an incident, or relevant documents which have not been previously provided and come to us later, that we owe a duty to timely supplement the discovery to make the other side aware of that information. The other side can then do as they wish with the information. For instance, they can call the witness or not call the witness to find out what that person knows. I do not believe that it is proper to identify witnesses for the first time a week before the pre-trial conference, as the parties are assimilating the Pretrial Order. This really leaves very little time for any meaningful discovery, and creates a tension between both sides and the court in scheduling whatever remaining discovery is needed.

In addition, I feel even stronger about the late disclosures of expert witnesses. In my opinion, there is simply no excuse for the disclosure of expert witnesses just weeks or days prior to the pre-trial conference. In my opinion, this type of gamesmanship is unnecessary and is not conducive to professionalism in the practice of law. That is why you will see that on our Pre-trial Checklist that we request our staff to make certain that all of the discovery is timely supplemented, including supplementation with expert witnesses. To the extent feasible, this is occurring three to four months out of trial.

As lawyers, we all have different styles and techniques which work best for us. Over the years of practicing law, we tend to gravitate toward a certain rhythm in trying jury tri-

als, building on various techniques which we have used and were successful, and modifying those that were not. Regardless of any technique that we ultimately find effective, there is hardly a substitute for being prepared, and, with almost all cases, there is simply no way to be properly prepared if you are not properly organized and if the people that you are asking to help support the case do not understand what is asked of them. I have provided the Abbreviated Trial Notebook and Pre-Trial Checklist, all which has been used by our firm to help our staff stay organized, so we, as the attorneys, can be properly prepared for trial. These are simple templates that work for us, and which can be easily modified for your use.

**IN THE SUPERIOR COURT OF LOWNDES COUNTY
STATE OF GEORGIA**

BUDDY SUE & CAROL SUE,

*

Plaintiffs,

*

Civil Action No. 06-CV-1234

*

*

v.

*

*

JOHN R. DRIVER,

*

*

Defendant.

*

TRIAL NOTEBOOK

- (1) Pre-Trial Order
- (2) Voir Dire
- (3) Opening Statement
- (4) Witness:
 - Buddy Sue
 - Carol Sue
 - John R. David
 - Witness 1.
 - Witness 2.
 - Witness 3.
 - Expert 1.
 - Expert 2.
- (5) Exhibit List
 - 1.
 - 2.
 - 3.
 - 4.
- (6) Closing Argument
- (7) Jury Charges
- (8) Jury Verdict

PRE-TRIAL CHECKLIST

(Guideposts)

120 Days Prior

- No Outstanding discovery due FROM opposing sides. If so:

Date Due

Date Due

- No Outstanding discovery due TO opposing sides. If so:

Date Due

Date Due

Date Due

continued next page

PRE-TRIAL CHECKLIST

continued

- Medical Records Updated
If not, obtaining:

Provider	Date Requested	Date Received
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

- Medical Bills Updated
If not, obtaining:

Provider	Date Requested	Date Received
_____	_____	_____
_____	_____	_____
_____	_____	_____

- Medical Bill Summary Complete

- All Damages Updated

- Lost Wages

Employer _____ Dates _____ Amount _____

Employer _____ Dates _____ Amount _____

- Economic Damages

Source _____ Amount _____

Source _____ Amount _____

- Property Damage

Property _____ Damage _____ Amount _____

Property _____ Damage _____ Amount _____

Property _____ Damage _____ Amount _____

- Update Discovery with Witnesses

- Fact Witnesses _____

PRE-TRIAL CHECKLIST

continued

Expert Witnesses

Confirm no unanswered 3rd party RPDs. If so: _____ Date Due _____

_____ Date Due _____

Identify areas of Motions-in-Limine

Issue I _____

Issue II _____

Issue III _____

Complete outline of Trial Notebook

Witness confirmation Subpoena or Cooperative?

1. _____ _____

2. _____ _____

3. _____ _____

4. _____ _____

5. _____ _____

Exhibits/Documents Identified _____

Confirm all documentary evidence needed for Exhibits

continued next page

PRE-TRIAL CHECKLIST

continued

Identify Demonstrative Aids

- Blow-up photos
- Medical Illustrations
- Discovery
- Charts
- Deposition Testimony
- Damages Summary

Identify & Schedule Evidentiary Depositions Date Location

- 1. _____
- 2. _____
- 3. _____
- 4. _____

Schedule meetings with all fact witnesses Date Location

- 1. _____
- 2. _____
- 3. _____
- 4. _____

Focus Group/Mock Trial Date Location _____

90 Days Prior

Meet with fact Witnesses Date Location

- 1. _____
- 2. _____
- 3. _____
- 4. _____

Schedule meeting with Experts Date Location

- 1. _____
- 2. _____
- 3. _____
- 4. _____

PRE-TRIAL CHECKLIST

continued

- Prepare Opening
- Prepare Closing
- Prepare Direct Examination
- Prepare Cross Examination
 - Outline of Witnesses testifying with page numbers, or deposition tabbed
 - Exhibits prepared for cross-examination
- Prepare Voir Dire
- Finalize Jury Charges
- Drafting Motions-in-Limine

45 Days Prior

- Finalizing Motions-in-Limine
- Finalizing Opening Statement
- Finalizing Pre-Trial Order
- Confirm any travel/hotel arrangements of any expert or witness

30 Days Prior

- Review Jury Pool
- Finalize Direct Examination
- Finalize Cross Examination
- All exhibits are numbered, copied & organized
- All demonstrative exhibits completed

15 Days Prior

- Finalizing Opening Statement
- Reconfirm all cooperative witnesses
- Finalize Voir Dire

Suggestions for Mediation of the Difficult Case:

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that testimony to the mediator. Bring the other documents and the entire depositions to the mediation.

b. Position Statement and Current Settlement Position.

This section should tell the mediator your settlement position. This section can help the mediator cut to the chase and move along a difficult mediation. There is no magic as to how it is laid out. List an exact figure whether you do it in one lump sum or by assigning specific values to each cause of action. Include sections on attorneys' fees and punitive damages if applicable. Cite factors that support these numbers, especially additional factors not included in the statement of facts. This format gives the mediator ammunition to advance your cause. It also gives the mediator the opportunity to pick apart your position, tell you where your weaknesses are and where your numbers will be challenged.

c. Legal Position as to Each Claim or Cause of Action.

Make this section coordinate with or parallel your settlement section above. For each cause of action or claim cite to jury decisions and reported cases with similar facts or injuries. Make sure you find cases or jury verdicts that support the dollar amounts you listed in the settlement section. This often helps the mediator convince the other side that is being difficult that you know your case, you have done your homework, you have properly valued your case, and have not just picked numbers out of the air.

d. Factors Believed to Favor Settlement.

It is helpful to give the mediator some idea of factors that may facilitate mediation. Factors that have been listed include:

- Publicity will negatively affect one of the parties.
- The litigation will be disruptive to the business of one of the parties so there is incentive in settling.
- Many other employees know

about the litigation, feel strongly for or against the company and the company needs to settle to resolve the matter.

-Additional witnesses have just come forward whose depositions need to be taken which will significantly increase the cost of the litigation.

-The Court has just granted motions to compel and more costly discovery will ensue.

-A party is facing criminal charges related to the civil case giving him incentive to settle this case.

-A default judgment as to liability or summary judgment has already been entered against one party thus leaving damages as the only issue for trial.

e. Perceived Obstacles to Settlement.

This section is extremely helpful for a mediator to know in a difficult mediation so he can be prepared for troublesome issues. Items included over the years include:

-A lawyer is a relative of a party.

-One party has expressed no interest in settlement.

-One party is at mediation solely because of a court order.

-A party refuses to acknowledge that the actions or events alleged, even if proven, do not set forth a claim and would not survive summary judgment.

-A party does not wish to set a precedent in this particular type of case.

-The other party contacted your client last night and said he was only going to mediation to run up her legal fees.

-A party will never pay any portion of attorneys' fees.

-One party has refused to properly participate in discovery so many documents are missing leaving the other side in a quandary as to whether they have enough information to settle the case.

-Motions for contempt, motions to compel, etc. are pending.

-A party believes he has made a

reasonable offer before, the other party accepted it, and he has stated he will not compromise.

f. Interests of Parties that Need to be Considered in any Settlement.

Include anything else important to be considered and used by the mediator. The most common factors listed are:

-Caps imposed by law.

-Taxes.

-Client's immediate needs.

-Influence by other parties.

-Interference by parties with interests or goals that differ from your client's.

9. CHOOSE THE RIGHT MEDIATOR FOR YOUR CASE.

Choose your mediator carefully!! If at all possible, participate in choosing the mediator. Do not just take the mediator assigned to you by a mediation group unless you have no choice. Check out the proposed mediators with your peers if you are not familiar with the mediator.

Generally, a strong mediator who knows the law involved in your case, has experience mediating such cases and is proactive, is best for settling the hard cases. It is my experience that a strong mediator has a better chance of settling a difficult case or a case with difficult counsel or parties than a mediator who just carries messages between the parties. Most likely you and opposing counsel have already conveyed messages in the form of settlement offers between the parties before you ever get to mediation, and it has not succeeded. A mediator who just facilitates the mediation is not usually successful in settling the difficult cases. You need more than that to settle a difficult case in mediation.

a. Strong, Proactive Mediators Settle Difficult Cases.

Facilitation is helpful in difficult mediations if the mediator can help both parties discuss and formulate options, especially unexplored options, but the mediator also needs to be able to evaluate, give the parties a "reality check," and push each side

continued next page

Suggestions for Mediation of the Difficult Case:

continued from previous page

toward compromise. The most effective mediators for a difficult case are those who will, first, carefully listen to all sides and clearly communicate offers. Once the mediator understands both sides of the case, through opening and caucus, she should be able to tell each side what they believe the court or jury will do if the case goes to trial. She should be able to discuss the strong and weak points of each side of the case and how that will impact an ultimate verdict. She should be able to do this without alienating either client or lawyer. If you hear reports that the mediator cannot properly evaluate the case without alienating a party, choose another mediator. She should be able to suggest compromises that can be made and strategies that might work to move the mediation forward.

b. But Beware Mediators Who Push Their Own Agendas.

There are some mediators who will choose sides early on in a difficult mediation and try to push their opinion as to what a case is worth. Or he may pick a number that he believes is the appropriate number and push the parties toward that number. Sometimes you want this if you are confident the mediator will find your side compelling. Most of the time, you have to determine to accept the mediator's number in order to resolve the case.

c. Handle the Mediator Who Chills the Mediation.

It is not helpful for a mediator to immediately attack one side or the other. When a mediator comes into the caucus room and attacks the client or the lawyer or the case, this action can stop the mediation. When the mediator does this, the client usually takes it personally and feels attacked by the neutral. If this occurs before the client has the opportunity to express his opinion, the case often does not settle. If this happens with your client, take a break and ask the mediator to meet with you separately. Sometimes if you can just dial back the mediator, the mediation may proceed to settlement.

d. Avoid the Non-Lawyer Mediator.

I have never settled a case when the mediator was a non-lawyer, whether I agreed to that mediator or the mediator was selected by the court, the mediation center or by some other means. The only cases where I have come close to settling with a non-lawyer mediator were simple domestic cases with no custody issues. While my experience may be unique, in a difficult case, the mediator should be a lawyer.

10. PREPARE YOUR CLIENT FOR MEDIATION.

Explain the mediation process to your client. Discuss how the opening offer is not the number that you want to reach in resolving the case. Explain how the negotiations will go back and forth and the advantage of bracketing offers if necessary. Help the client understand the purpose of caucus and why it seems to take so long.

Explain the role of counsel, the role of the mediator, and the role of the clients. Discuss with your client how to behave during the mediation. Require that the client remain respectful of everyone in the mediation. This means that the client cannot make faces or blurt out comments during the presentations, but should save that for the caucus. Instruct the client to politely listen to everyone in the mediation, pay careful attention to what everyone is saying with an ear for issues that will help advance settlement.

If your client is going to speak in the joint session, help the client decide what to say and how to say it. Decide on something that will help your case, either something that allows the other side to trust your client, humanize your client, or let them see that your client will make a credible witness in front of the jury.

Explain to your client that one should be comfortable in the mediation but dress in business casual attire. If necessary, have your client show you outfits that are appropriate for the mediation.

Most importantly, you and your client should come to the mediation with the attitude that the goal is to resolve the case. Your client should be positive and should expect that the

case will be resolved.

11. DON'T GIVE YOUR CLIENT A FALSE SENSE OF HOPE.

Carefully evaluate your case. Discuss the weak points and the strong points with your client. Review recent case law and jury verdicts with your client and advise the client what to expect. Explain that mediation is a series of compromises and that your client will not get everything he wants, just like the other party will not get everything it wants. Discuss what your client can and should give up in order to achieve a final resolution of the case. Get real with numbers and determine precisely what your client's bottom line is before you attend the mediation, but make sure it is a realistic and achievable goal in the mediation.

12. MAKE AN EFFECTIVE OPENING STATEMENT.

The most effective opening statement is a short, concise statement of your case, your theories of the case, and what you desire to obtain through the mediation, not your settlement posture but your goals. If there are difficult people involved, try to keep them from speaking in the opening statement. If your client is going to alienate the other side, instruct your client not to talk in the opening. I generally prefer for my client not to talk at all in opening when there are personality difficulties. If, however, your client might be persuasive, especially to an insurer, carefully prepare what your client will say and how he will say it in the joint session.

An effective opening statement should educate the opposing party and the mediator who generally knows nothing about your case unless you have provided a mediation statement in advance. To the extent there are significant differences in the basic facts, you should briefly explain the differences. Consider whether a power point or other multi-media presentation will advance the case at mediation.

--Talk in a reasonable and calm manner.

- Do not try to argue your case as in a closing argument, save that for caucus.
- Do not attack the other side or their case in your opening statement, save that for caucus. You can point out weaknesses or why your case is stronger, but do not attack.

The familiar lines of “we are sorry for your loss” by a lawyer who has been vicious to your client followed by a complete attack on your client rings false and does not move mediation forward. Frequently, it makes mediation that much harder. The line of “I’m just doing my job” by opposing counsel similarly is an ineffective way to start mediation.

**13. ALWAYS BE PROFESSIONAL AND RESPECTFUL
[Even when Opposing Counsel or Client Is Not].**

As attorneys, we know we are on opposite sides of a case, we should be able to treat each other with respect while strongly advocating for our clients. There is no need to be rude, to yell, to holler, to use derogatory terms to refer to other counsel or the opposing party. Calling the other client or lawyer a liar might make you feel better but is non-productive. Do not sink to that level even if opposing counsel is doing so. If both of you are yelling, then no one hears anything and the mediation stalls out or craters. When dealing with disrespectful counsel, try to cut the session short and separate into caucuses immediately. If you and the lawyer are meeting separately, take a break and defuse the situation—if you can. Or try to have the mediator defuse the situation.

14. DO NOT LET YOUR CLIENT TAKE THE LEAD.

Many times when you have a difficult client, your client wants to take the lead in the mediation. While you should let the client have his say in the caucus and be the ultimate decision-maker on whether to settle, the client should not run the negotiations in the mediation.

15. PROTECT YOUR CLIENT.

It is amazing when there are difficult issues or difficult personalities involved, how often the lawyer is put in the position of having to protect the client. If your client or opposing parties are difficult, ask the mediator not to have a general session with all parties in one room—instead, go straight to caucus.

If you are in the same room, especially a small room, do not seat warring parties next to each other. While this seems so elemental, some mediators will still try to suggest this in small physical settings. If some dispute, argument or name calling does occur, get the mediator, if possible, to separate the parties as quickly as possible to avoid violence.

If the parties are prone to engage in verbal abusive arguments, do not let them address each other at the mediation. Tell your client if remarks must be made, to make them to the mediator, not to the other party.

When you have lawyers on the other side who are verbally abusive, again, try not to engage in the same tactics. You can either separate into caucus or address the mediator and not the opposing counsel.

16. SMALL COMPROMISES MAY SETTLE A CASE.

Sometimes the smallest of moves can keep a mediation moving forward. You may not be able to push an entire settlement at one time. If you have one comprehensive proposal and the other side has an entirely opposite comprehensive proposal, you are not going to win each other over by trying to solve every issue at one time. Make small moves or see what small trades you can make to move part of the mediation forward. If you can reach some small compromises, even if contingent on the whole settlement, then there may be a way to keep inching toward a total settlement.

17. DO NOT WALK OUT.

You cannot settle a case in mediation if you walk out. When one side or the other walks out over an issue in mediation, it is rare that the case is later settled. This does not mean

that, if the parties recognize they are at an impasse, that the mediation should not be concluded. This just means if things are not going totally your way in a mediation, do not just walk out but keep working until the mediator sees you have reached an impasse.

Even if the mediation does not settle the case, you want to leave the mediation on a cordial note so that negotiations can continue. Often, the parties can settle the case later because of the progress made at the mediation.

18. ULTIMATUMS OR LINES IN THE SAND RARELY SETTLE A CASE.

When a mediation is difficult, one side or the other is tempted to make an ultimatum or tell the mediator to let the other side know their last position is a “take it or leave it offer.” It has been my experience that most take it or leave it offers are left on the table. While you and your client should know what your bottom line is, there are ways to get to that other than issuing ultimatums.

19. SCHEDULE SUFFICIENT TIME FOR THE MEDIATION.

This ultimatums rule also applies to allotting sufficient time for the mediation. When your client says “if we do not have the case settled by noon, I’m out of here,” there is no need to even start the mediation. It is my experience that scheduling a half day for any mediation with any difficult issues, clients, or counsel, does not give most clients sufficient time to relax into the mediation, get used to the process and get the case resolved. Similarly, it is counterproductive to schedule two days for a mediation because the parties know the case is not going to settle the first day. Schedule one day, if the case does not settle and you are making progress, then schedule a follow-up session.

20. GIVE THE MEDIATOR THE TOOLS NEEDED TO DO HIS JOB AND ALLOW THE MEDIATOR TO DO HIS JOB.

Once you have chosen the media-

continued next page

Suggestions for Mediation of the Difficult Case:

continued from previous page

tor, unless you have some of the issues raised above, let the mediator do his job. Let him tell you what he thinks the strengths and weaknesses are in the case as he is hearing it as an objective third party. Ask if there is movement you can make that will convince the other side to meet you halfway on specific issues. Certainly, you can disagree with the mediator, but listen to what he says—he has listened to the other side. Take into your evaluation of the case what he is telling you. Provide the mediator with the evidence he can use to show or convince the other side of the merits and value of your claims. Educate the mediator and give him the authority to share sufficient information to achieve settlement.

When a case is at an impasse, consider allowing the mediator to meet with just counsel for both parties and suggest a proposal to present to both parties. If it's a reasonable proposal to both parties, have the mediator present it to both clients.

B. SPECIFIC DIFFICULT MEDIATIONS.

1. WHAT TO DO WHEN COUNSEL IS KIN OF A PARTY.

Kin representing kin often creates unique problems. The lawyer who is a relative of a party often has a difficult time being objective. If you are co-counsel with that lawyer, it makes your job more difficult. If you are opposing counsel, you may have to overcome the obstacles in the case as well as the problems created by the familial relationship of that lawyer to the opposing party.

Where you are co-counsel with a lawyer who is a relative of one of the parties, it creates special difficulty in bringing the parties to settlement agreement. When counsel is a relative of one of the parties, that lawyer can become tenacious in pursuing his client's case frequently to the point of ignoring the merits. This tenacity creates tremendous problems for mediation because the lawyer who is supposed to objectively evaluate the case has a vested interest in pursuing the case to vindicate his mother's/ father's/ sister's/ child's interests.

Usually, the lawyer who is the relative will want to do the opening statement. It has been my experience that this opening statement will be more akin to a closing argument to a jury and not an objective opening statement. If possible, the non-relative co-counsel should make the opening statement. Where the relative cannot agree to that, then as co-counsel you should try to help fashion the opening statement so that it focuses on the facts that need to be presented. If it is important for you to add facts in the general session, you just have to do that after the relative makes his statement.

Frequently, in caucus, the relative takes the lead again. Relatives' lawyers tend to draw lines in the sand and set arbitrary standards for settlement, or for the other side to meet in order to keep the mediation moving forward. While these lines get set by lawyers or clients in other cases, when the related lawyer does it, it tends to be in the nature of an emotional attachment to the relative party.

As co-counsel, you should always advise your client and the lawyer who is kin if you think that relationship is getting in the way of settling the case. You should be able to objectively advise your client as to how you evaluate the case and what should be done in the mediation, and how you believe the relatedness is affecting the mediation. This should be done either in the presence of the related counsel or after discussion of the same issues with the related counsel.

The co-counsel must keep the mediation moving forward even if relative counsel creates obstacles. Co-counsel has to be the objective one and temper any problems created by lack of objectivity on the part of relative co-counsel. Co-counsel must be the one to push the small steps necessary to make the mediation successful.

If relative counsel creates deadlocks or draws lines in the sand that are not in the client's best interests, as co-counsel talk to the mediator without the related lawyer and with or with-

out the client as is demanded by the case or the impasse that is occurring in the mediation. Similarly, it is often also productive for the non-relative co-counsel to have meetings with opposing counsel and the mediator to attempt to move toward resolution. Depending on the case, you either tell the related lawyer what you are doing or you simply slip out on a break and stop and talk as needed. Certainly, you cannot conclude any settlement without the lawyer who is kin, but separate sessions often help get beyond impasses.

If at all possible, co-counsel needs to be the one who makes the final recommendations to the client as to whether or not to make or accept settlement offers. As co-counsel you should have that heart to heart discussion with relative counsel and work these issues out before the mediation begins.

Of course, if it is one of us who is the lawyer representing one of our relatives, we will handle the case properly and objectively in all regards!

2. WHAT TO DO WITH THE HOTHEAD.

When your client is the hothead, obnoxious, argumentative or a name caller, you need to really prepare the client for the mediation. Often I suggest that the client not say anything in the opening session so as not to stop the mediation before it begins. Or, if the situation is very difficult, you must inform the mediator ahead of time to proceed directly to caucus and not have a joint session.

When the caucuses begin, you should have already addressed with the mediator that your hothead client is going to have to have the opportunity in that first caucus to tell his side of the story and vent before you can move on to constructive matters.

If the opposing party is difficult, try not to engage that party in argument during the joint session; let the mediator do it if necessary. If that party does try to engage you in argument, address your remarks to the mediator or opposing counsel in a non-argumentative fashion. Do not

engage in similar behavior. But remember that you must ultimately get the other side to compromise so you or the mediator must convince that other side in some fashion; so you may have to talk with that client at some point.

Frequently, one will see a mediation where the client is clearly in charge. The lawyer is looking to the client for signs or nods of approval from the client when he makes his statements. You can see the lawyer ask the client questions to direct him in how to handle the mediation. Instead, especially where your client is difficult, the lawyer should be the one determining how to handle the mediation and directing the negotiations. The lawyer must work this out before the mediation begins.

If the opposing client is the one attempting to take the lead, be aware of it and use it in the mediation. Instead of focusing on the law and legal issues as to why you should win, focus on the issues that matter to that opposing client. Identify through the way that client is directing the mediation what issues are his trigger points, what he can give up and try to focus your offers on those points if you can and still achieve your client's objectives.

When opposing counsel is the hot-head, it makes the mediation more tedious and harder to achieve settlement. It is often helpful to break into caucus as quickly as possible so that the comments can be directed to the mediator. However, I find that most often you still need to engage the hothead opposing counsel in order to move toward settlement. If at all possible, try to speak in a moderated tone and remain calm while zealously pushing your client's case toward settlement.

3. WHAT TO DO WITH THE INSURANCE COMPANY.

One of the most difficult aspects of settling a case is getting someone from the insurance company to the mediation with sufficient authority to settle your case, particularly, when high dollars are involved. Although most mediations require that some-

one with full settlement authority be present at the mediation, "full settlement authority" does not generally mean the same thing to the insurer as it does to you and your client. It frequently means the insurer comes with limited authority based upon their valuation of the case.

Mediations may stall when the insurance representative takes the position that she does not have enough authority to meet your client's demands. Do not be afraid to ask the insurer to call and get more authority when needed. It has been my experience that the insurer can always get more authority, particularly, if you think you are close to settling the case.

When the mediation appears to reach an impasse, ask the mediator to ask if the insurer's representative will meet with you, opposing counsel, without the lawyer for the client present. I have never had an insurance representative refuse to meet without counsel present. Frequently, it cuts through the extra layer directly to the person making the decision and allows you the opportunity to make your case unfiltered.

4. SURVEILLANCE THAT IMPACTS THE OUTCOME OF MEDIATION.

The issue with surveillance that the other party has not discovered is whether to allow the mediator to tell the other side of the nature of the evidence against it. Certainly, if surveillance helps your case or disproves certain allegations of your opponent, you are going to want the mediator to know. You may only want the mediator to say that you have proof of the subject matter of the surveillance without revealing that you have pictures and tapes and a private investigator's report.

5. MULTI-PARTY MEDIATION.

Multi-party mediation can often be difficult just because of the challenge in getting numerous folks on the same page. When you have more than three sets of attorneys and clients, the issue with caucuses and conveying settlement offers creates unique difficulties.

When one set of lawyers is representing numerous parties, it is often difficult to even get an offer from that side past the first one or two exploratory offers. Occasionally, it is possible to get the mediator to get this group of defendants to select or elect a spokesperson to facilitate mediation. It is helpful to broach this topic through the mediator before the mediation session begins and, perhaps, all of the parties do not need to attend if there is one person there with authority.

6. THREATS AND VIOLENCE AT MEDIATION.

Threats and violence have impacted mediation. If threats occur during the mediation, you must let the mediator know, demand a meeting with opposing counsel and try to stop the threats immediately. Depending on the nature of the threats, other actions might have to be taken as well.

When the threat of violence or violence itself occurs at the mediation, the only option is to separate everyone and halt the mediation. If possible, the mediator should halt the process and separate the offenders from the victims. You must be careful not to put yourself in a dangerous situation as well. If the situation is bad enough, you must, of course, call the police to take appropriate action. You should also get the mediator to document the threats or violence for future use in your case. ■

Handling Uninsured Motorist Claims

Recent Developments and Pitfalls for the Unwary

Stephen Ozcomert

Stephen M. Ozcomert, P.C.,
215 North McDonough Street
Decatur, Georgia 30030



Stephen Ozcomert is a 1991 graduate of the Emory University School of Law. He is a sole practitioner in Decatur, GA exclusively representing the victims of other's negligence in personal injury cases as well as cases stemming from professional negligence. He has tried dozens of cases to verdict and has been a frequent lecturer in CLE programs. Steve has lectured or run programs on trial techniques and other topics for the GTLA, ICLE of Georgia, and the American Bar Association's Tort Trial and Insurance Practice Section. Steve is AV rated, listed on the 2008 Super Lawyers, and is active in the GTLA serving as a Vice President and as a member of the Board of Trustees for the General Practice and Trial Section of the State Bar. Contact and other biographical information may be found at www.ozcomert.com

UM Claims is a common occurrence for the Plaintiff's lawyer who handles personal injury cases. There are, however, a number of procedural pitfalls and recent developments in this area of the law. The goals of this paper are first to discuss the cases of *Thurman v. State Farm*, *Toomer v. Allstate*, and *Allstate v. Thompson* and how they should affect your practice. Then, I wish to cover a few of the other potential pitfalls for the unwary in handling UM claims.

Generally speaking, O.C.G.A. §33-7-11(b)(1)(D)(ii) allows an insurance company to take an offset against any UM claim the amount of liability insurance available to compensate the Plaintiff. Thus, if the Plaintiff has \$25k in UM benefits and the Defendant has a \$25k policy, then you ordinarily do not get to access the UM coverage. This is true under the code section unless the liability coverage is reduced "**by reason of payment of other claims or otherwise**" to an amount less than the amount of UM coverage available. Payment of other claims means other claimants from the same incident. What was not known until *Thurman* and its progeny is what the "or otherwise" meant, if anything.

Thurman, et al. v. State Farm Mutual Insurance Company 278 Ga. 162, 598 S.E. 2d 448 (2004) is a case that every Plaintiff's lawyer should know. In that case, Thurman was a federal postal carrier whose medical bills and lost wages had been paid by her

federal worker's compensation carrier under the Federal Employees Compensation Act (FECA) and from the post office's health benefits provider under the Federal Employees Health Benefits Act (FEHBA). They had a strong lien on any recovery under 5 U.S.C.A. § 8132. Significantly, this lien preempts state law and thus is not subject to any reduction under the Georgia statute and public policy favoring complete compensation.

There was a \$100,000 liability policy and \$75,000 in UM benefits from State Farm. However, since Thurman had to pay the liens and only netted \$60,887.87 from the liability coverage, Thurman alleged that the liability coverage was "otherwise" reduced to a level less than the UM coverage available to her. Therefore, she argued she should get the \$14,112.13 difference between what she recovered and the \$75,000 UM coverage available. The trial court granted summary judgment to State Farm and the Court of Appeals affirmed. However, the Supreme Court granted cert. and reversed holding that since the federal lien was not subject to the Georgia public policy which favors complete compensation, that Georgia law should try to mitigate the damage caused by the application of the mandatory nature of this lien. Therefore, they decided that this situation fit within the "or otherwise" language of O.C.G.A. §33-7-11(b)(1)(D)(ii) and Thurman was able to collect the \$14k from State Farm.

Obviously, *Thurman* has the potential to change everything with respect to handling any sort of serious personal injury claims with UM coverage and inadequate liability limits. The question is: how broad an effect will the *Thurman* holding have? This was partially answered by *Toomer*.

Toomer v. Allstate Insurance Company, 2008 WL 2440039 (Ga. app.) was decided on June 18, 2008. In this case, Allstate filed a motion to dismiss *Toomer's* case since the available liability coverage was equal to the amount of *Toomer's* UM coverage and thus, under O.C.G.A. §33-7-11(b)(1)(D)(ii) there should be no UM exposure. The trial court granted Allstate's motion to dismiss and *Toomer* appealed. The Court of Appeals reversed. The Court of Appeals held that because *Toomer's* medical bills were paid by Medicare, and since Medicare has a federal lien on the proceeds not subject to Georgia's complete compensation rule, that the liability coverage was "otherwise" reduced by whatever amount *Toomer* had to repay Medicare holding that the *Thurman* case controlled. Allstate argued that *Toomer's* situation was different since it was Medicare and not FEHBA and since *Toomer* was not a federal employee as *Thurman* was. The Court decided that these were distinctions that did not make any difference. Also, Allstate argued that there was no proof that *Toomer* had to pay Medicare as there was in *Thurman* where FEHBA was paid directly out of settlement. The Court stated that since it was a motion to dismiss the amount of payment was one to be determined by a trier of fact. Thus, in its first opportunity to address the *Thurman* holding, the Court of Appeals broadened its application to Medicare and repeated the justification that it was a lien not subject to the complete compensation rule.

From the *Toomer* expansion of *Thurman*, it seems that this principal may have broad effect and all Plaintiff's attorneys should consider whether it may apply in cases involving other liens on the recovery. It seems a cer-

tainty that Medicaid liens will similarly be held to "otherwise" reduce the available liability coverage. Also, hospital and medical provider liens may well fall under this principle as some trial courts have already held. This is true because despite being liens based in state law, they are not subject to the complete compensation rule. ERISA liens present a closer question, to me, as they are heavily plan language dependant and the default rule in the 11th Circuit is that the complete compensation rule does apply unless specifically addressed to the contrary in the plan language. Still, under the right plan language and facts, pursuing *Thurman* applicability may be a fruitful endeavor. Workers' compensation liens will certainly not fall under *Thurman* as they are state liens subject to the complete compensation rule by statute. Also, if the Plaintiff has been "completely compensated" by the liability coverage, then there can be no valid UM claim for obvious reasons.

There is a change to the Georgia UM legislation about to go into effect that will change the nature of UM coverage. Starting on January 1, 2009, UM Coverage may stack on top of liability coverage. However, the stacking element of the coverage may be declined by the insured. Thus, if the UM coverage is stacking, the *Thurman* case becomes moot. What may also happen is that if this area of the law is still unsettled, there may be available to the defense the argument that the Plaintiff chose not to have staking UM coverage and thus why should Plaintiff get benefit of stacking when Plaintiff rejected that coverage?

Another recent case of which Plaintiff's lawyers must be aware is that of *Allstate Insurance Company v. Thompson, et al.*, 291 Ga.App. 465, 662 S.E.2d 164 (2008). *Thompson* presents a pitfall for the unwary practitioner.

The facts are that Mr. and Mrs. Thompson were rear ended. Mr. Thompson was seriously injured and Mrs. Thompson was very modestly injured to the point that her attorney indicated that her claims were "not

worth pursuing." However, they sued the tortfeasor for their injuries and for Mrs. Thompson's loss of consortium. The tortfeasor had \$100,000 in liability limits and the Thompsons had \$175,000 in UM applicable to the collision. The liability insurer tendered its \$100,000 ostensibly for the injuries of Mr. Thompson and the Thompsons signed a limited liability release. Significantly, Mrs. Thompson signed the release "individually and as wife of" Mr. Thompson.

Allstate then filed a motion for summary judgment contending that since wife signed the release, some portion of the money must have gone for wife's claim. Thus, the liability limits were not exhausted which is a condition precedent to obtaining coverage for the UM coverage. Thus, since some of the money must have gone to wife, husband could not make a claim against his UM carrier, Allstate. The attorney for the Thompsons submitted an affidavit explaining to the trial court that the wife's injury claim was nominal and not worth pursuing and that the money was paid for husband's claim. Trial court denied Allstate's motion, but the Court of Appeals reversed.

The Court of Appeals said the attorney's affidavit was parole evidence and could not be considered. Thus, since some of the money must have gone for wife's claims, husband was estopped from pursuing his UM claim. While I understand that this case may be headed to the Georgia Supreme Court, it presents a cautionary tale. Be very careful about limited liability release language—especially with married clients. Be sure that the liability limits are expressly exhausted for any client for whom you wish to get underinsured motorist (UM) benefits. I recently received a limited liability release where the \$25,000 limits were paid to the husband, there was a separate release for wife and a separate check for \$1. If you are inclined to resolve the loss of consortium for a nominal sum as most liability insurers request, this seems an appropriate so-

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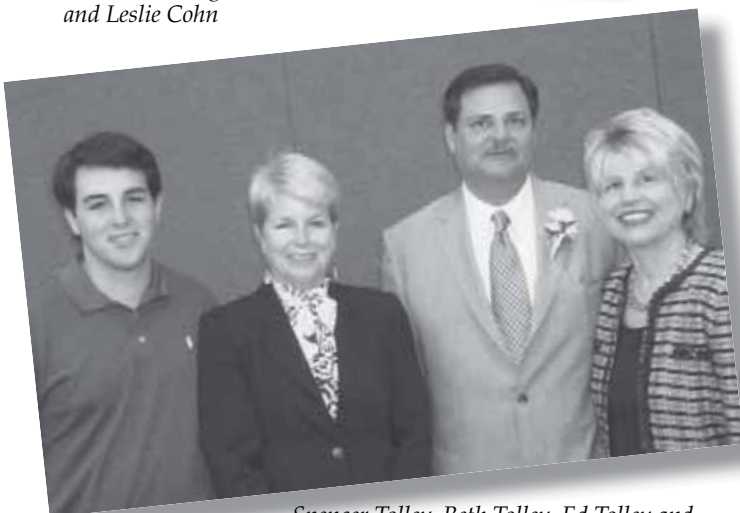
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Don Keenan, Teresa Keenan with Tom and Carol Chambers.



Grace Tate with her father Lester.

Handling Uninsured Motorist Claims

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lution. It is an open question whether this case would have been decided differently had wife not had a bodily injury claim (no matter how small) and was signing only for purposes of the loss of consortium. While it seems unlikely that a loss of consortium claim alone would render the limits not exhausted, why take the risk?

While on the topic of releases, never, ever, have your client execute a general release if you want to pursue UIM coverage. O.C.G.A. §33-7-11(a) states that UM insurers are only obligated to pay money Plaintiff is legally entitled to recover from the Defendant. See, *Darby v. Mathis*, 212 Ga.App. 444, 441 S.E. 2d 905 (1994). Always use a limited liability release under O.C.G.A. §33-24-41.1. Of course, there are pitfalls here too as exemplified by *Thompson*. However, be careful of the language. I recently had a lawyer send me a limited liability release which stated that my client was to indemnify the defendant from any and every claim that might ever be asserted against the Defendant by reason of the collision including subrogation claims by my client's UM insurer! As I was not in favor of my client having to return the money the liability carrier was paying, I objected to this language and the other attorney agreed. Always, always, read release language carefully before agreeing to it. You do not want to earn the highly undesirable title of "Defendant."

Another potential pitfall are contractual notice requirements contained in many UM policies. Always, always, do your best to obtain all UM coverage as soon as you can and put the carriers on notice of the potential claim. For an instructive case, see *Manzi v. Cotton States Mutual Insurance Company*, 243 Ga.App. 277, 531 S.E.2d 164 (2000). There the Court of Appeals upheld a sixty day notice provision where the contract called for the insured to provide notice of the incident with particulars within sixty days as a condition of coverage. Thus, even though they did not know that the liable party was uninsured until much later, the failure to provide

the contractual notice was fatal to the UM claim. Similarly, a thirty day notice provision on John Doe hit and run case was upheld in *Flamm v. Doe*, 167 Ga.App. 587, 307 S.E.2d 105 (1983). This will apply not only to the named insured under UM coverage, but to anyone in the vehicle who claims UM coverage.

Counsel should find ALL potential UM policies as soon as possible for several obvious reasons. These short time limits on notice provisions creates a pitfall that must be avoided. (It also provides a good reason why folks ought to seek counsel sooner rather than later.) However, it also puts counsel on notice to act quickly to find ALL potential UM coverage and provide notice of the claim as soon as possible. This also makes practical sense. UM coverages are usually stacking. You can add the policies together and see if the combined limits exceed the amount of liability coverage available. *Horace Mann Ins. Corp. v. Mercer*, 257 Ga. app. 278, 570 S.E. 2d 589 (2002). Therefore, if you have multiple insurance policies your client can access, you want to get them all as soon as you can both to put them on notice and to determine what limits you have to work with.

Another pitfall for the unwary is serving the known uninsured Defendant. If your Defendant cannot be found, you can serve the Defendant by publication. However, under O.C.G.A. §33-7-11(e), the Plaintiff still "shall have a continuing duty to exercise diligence in attempting to locate the owner or driver against whom the claim exists, but such obligation of diligence shall not extend beyond a period of 12 months following service upon the owner or driver by publication...." Ain't that grand! Naturally, no one knows (nor wants to find out) what the exact nature of the diligence that needs to be demonstrated is. Is it sufficient to demonstrate that the Defendant has left the country? Does asking a skip tracer to do a quick search once per month suffice? No one knows for sure, but this certainly makes me think that if the Defendant

is ever found that one may wish to dismiss, refile and then perfect service quickly in order to avoid any issues under this code section (assuming you still have a dismissal available).

The last UM pitfalls I want to mention are elementary for sure. However, some Defense attorneys love to lie in the weeds on these issues. The Plaintiff has the obligation to prove that the Defendant is uninsured or under insured in order to prevail at trial. Also if the UM carrier answers in its own name, the Plaintiff must prove the UM policy at trial. Now, if the Defendant is John Doe, the lack of insurance is presumed and does not need to be proven. If not, you need to prove these issues. I find it most expedient to handle these matters via request for admissions. Normally, this will suffice or at least the Defense attorney will agree to not raise these issues once they know you know. I once had a Sharon Ware attorney respond to my Request for Admission that State Farm had "insufficient information to admit or deny" the admission regarding the existence of UM coverage with State Farm. I called him up and pointedly asked if State Farm did not know who did? He hemmed and hawed until I told him I knew I had to prove the policy and would notice some depositions of State Farm folks if I needed to. He said that since I knew I had to prove the policy, he would admit the matter. In other words, he wanted to lie in the weeds even in the face of the RFA as that was apparently his favorite way of winning at trial. Stay on top of such tactics.

Lastly, if, for any reason, you do not have a copy of Jenkins and Miller's fine book, *Georgia Automobile Insurance Law* published by Thomson West in your library, buy it immediately. It will answer 99.9% of any questions you have about this technical area of the law. I find it invaluable. ■

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Winburn, Lewis & Stolz, LLP
279 Meigs Street
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