CALENDAR CALL
GENERAL PRACTICE AND TRIAL SECTION STATE BAR OF GEORGIA
Vol. XVI Fall/Winter 2009 No. 2

2009

# Tradition of Excellence Awards

The 2009 Tradition of Excellence Recipients

(l-r) William Q. Bird, (Plaintiff), Robert E. Hicks, (General Practice),
Judge G. Alan Blackburn (Judicial), Jonathan C. Peters, (Defense) and Section Chair, Adam Malone

# *MARK YOUR CALENDAR*


**March 11-13, 2010**

Make plans to attend...

## The General Practice and Trial Section Institute

*at the*
Amelia Island Plantation
Amelia Island, Florida

It promises to be a spectacular program -
one you won't want to miss.

Chairman Adam Malone

# CALENDAR CALL

"Georgia's Largest Law Firm"

GENERAL PRACTICE AND TRIAL SECTION STATE BAR OF GEORGIA

Vol. XVI Fall/Winter 2009 No. 2




## ARTICLES




Calendar Call is the official publication of the General Practice and Trial Section of the State Bar of Georgia. Statements and opinions expressed in the editorials and articles are not necessarily those of the Section of the Bar. Calendar Call welcomes the submission of articles on topics of interest to the Section. Submissions should be doublespaced, typewritten on letter-size paper, with the article on disk or sent via e-mail together with a bio and picture of the author and forwarded to James W. Hurt, Jr., Lewis, Stolz, Hurt, Frierson & Grayson, LLP, 279 Meigs Street, Athens, GA 30601, jhurt@lewis-stolz.com
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## Chairman's Corner

**Adam Malone**
*Section Chair*

Allow me to congratulate Pope Langdale of Valdosta as the incoming Chair of the General Practice and Trial Section. Joseph Roseborough of Atlanta is our incoming Chair-Elect and Janna Martin of Savannah is our new 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.

This is the last opportunity I have to address you as Chair. We have made much progress over the last year and each of you deserve credit for all that we have accomplished. This year we added over 300 new members to the Section and continue to draw members from all over the State who are constantly networking their ideas, concerns, referrals and expertise to make this Section truly become "Georgia's Largest Law Firm." Let me take this opportunity to showcase some this year's many meaningful accomplishments.

**Calendar Call,** the Section's full sized magazine, offers "how to" instruction, up to date articles, legislative updates and information on how they affect the General Practitioner. The magazine is published three times a year and sent out to members as well as Judges. Each magazine is published on our website.

**Audio and Videotape Library** is available at State Bar Headquarters and contains a variety of audio and videotapes on virtually all aspects of trial practice and support training. These tapes are available to all members of the Bar for a minimal fee with a half price discount for members. It continues to be popular and generate revenues for the Section. It is especially popular now that CLE and TRIAL credit hours are available for home study.

**ICLE Seminars** sponsored by the Section continue to sell-out year after year. The annual Jury Trials Seminar is always a great success and this year was exceptional because of the outstanding leadership of Steve Ozcomert and Jay Sadd. Mary A. Prebula, Immediate Past Chair, deserves special recognition and thanks for organizing and leading our "8th Annual General Practice and Trial Section Institute" at the Amelia Island Plantation in Florida. The program included a variety of topics of interest to all general practitioners and the attendance this year was higher than ever before, which is quite remarkable considering the state of the economy. We will return to the Amelia Island Plantation next year for the "9th Annual General Practice and Trial Section Institute."

**High School Mock Trial Competition** The Section is a founding member and continuing supporter of this program. This year our commitment put us in the Crystal level for the finals being held in Atlanta. Thousands of high school students have participated. Many of our Section members participate by mentoring and coaching in this most important program. Through Section dues each member is a supporter of this worthwhile endeavor.

**Tradition of Excellence Awards** are given each year by the Section to three outstanding lawyers and one judge for their lifetime of achievement in the law and service to the public and Bar. The tradition of the award influences the lives of many lawyers and continues to inspire the Bar. The awards are presented at the Section breakfast and later celebrated at a lavish reception held in honor of the recipients at the State Bar Annual Meeting. There were many nominations this year and all were well qualified. This year the recipients were Jonathan C. Peters, Atlanta, (Defense), William Q. Bird, Atlanta, (Plaintiff), Judge G. Alan Blackburn, Atlanta, (Judicial) and Robert E. Hicks, Atlanta, (General Practice). The introduction and acceptance speeches were incredibly uplifting and inspiring.

**Bar Liaisons** We are keeping up with the American Bar Association, other Sections of the State Bar of Georgia, and the Metro Area Bar Council to keep members informed of programs of interest. Many of our Officers are highly involved in the ABA and keep us abreast of the latest happenings.

**Community Service** This Section prides itself for participating in the Seniors Fairs around the State. We do it enthusiastically. By letting the public know that lawyers are giving back to the community, we promote

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# Letter to the Membership From Incoming Chairman:

**Pope Langdale**

*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.*

I begin this year by recognizing the leadership of this Section which has preceded me, and the enormous task that lies before me in continuing that leadership and fulfilling the role as Chairman of this Section. It is my honor and privilege to congratulate outgoing Chair Adam Malone of Atlanta for his tireless effort and outstanding leadership of our Section this past year. I have had the opportunity to work closely with the last two chairs of this Section, Adam Malone and Mary A. Prebula. I have witnessed their dedication to this Section and to the practice of law and, it is with that same enthusiasm for this Section and for the practice of law, that I begin this year as your Chairman.

I would also like to welcome and give thanks for the upcoming service of Chair-elect Joseph Roseborough of Atlanta, and our incoming Secretary/Treasurer Janna Martin of Savannah. I would also like to once again give thanks to Jimmy Hurt who has been our faithful editor of the Calendar Call for it seems as long as I have been a board member of this Section. I would also like to welcome several new Board members to our Section, Nicolas J. Pieschel from Atlanta, Darren Penn of Atlanta, and Kristina Orr Brown of Gainesville, and Jay Sadd of Atlanta. Let me also thank in advance, Betty Simms, our Executive Director, without whom I am sure that this Section of the State Bar could not prosper as it does.

The General Practice and Trial Section considers itself Georgia's largest lawfirm. The reason for that is its members are as diverse as their practice area. Our Section encompasses all types of Georgia attorneys from all corners of the State. Our members represent plaintiffs, defendants, individuals, and corporations. Their practice covers domestic matters, adoptions, civil litigation, as well as criminal defense, among others. Our Board Members and Trustees are as diverse as our members, consisting of plaintiffs' attorneys, defense attorneys, corporate attorneys, employment attorneys, criminal defense attorneys and domestic attorneys. The General Practice and Trial Section is truly there to encompass all of the general trial practice attorneys in the State of Georgia, and is here to faithfully represent all of its members by providing its members with the support that they need in their practice.

I would like to encourage each of you to get involved in the General Practice and Trial Section of the State Bar. The more involved you become in this Section, the more you can contribute to others and the more you can gain from others. The collective wis-

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**Chairman's Corner** *continued from page 2*

the image of our entire profession. We send letters to the school boards around the state offering to speak to children of all ages. Our Section members are accepting speaking engagements all over the state to any group wishing to have lawyers speak on a variety of legal issues and concerns to the public.

**Law Staff** The General Practice and Trial Section and the Law Practice Management Department of the State Bar have put together a program to educate law office employees called Law Staff. The program is broken out into five segments called Law Staff I through V. The program will cover Ethics, Professionalism and Confidentiality; Administrative Systems and Technology; Bookkeeping and Accounting; Conflict Management – Dealing with the Difficult Client, Bosses and Co-Workers; and Managing Stress – Organization and Time Management. This program fills to maximum capacity and the evaluation forms submitted by the participants consistently indicate they learn a great deal from attending. The program will be repeated in Tifton, Rome, Macon and Augusta.

**Lunch and Learn** The Section sponsored the first Lunch and Learn for unemployed attorneys held at the State Bar under the leadership of Tom Stubbs of Decatur. More than forty people attended. The program was very well received and plans to repeat the program are ongoing.

It has been an honor to serve you this year and I thank you sincerely for the privilege. In closing, I ask you to reflect on the example set by our esteemed recipients of the Tradition of Excellence Award by reviewing in the pages that follow the thoughtful and impassioned remarks of those who were honored this year. On behalf of the Section, we once again congratulate Presiding Judge G. Alan Blackburn of the Georgia Court of Appeals, Jonathan C. Peters of Atlanta, William Q. Bird of Atlanta, and Robert E. Hicks 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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**Letter to the Membership** *continued from page 3*

dom, assistance and thought of many is always greater than the concerted effort of one. As attorneys, we can all learn from the successes of our colleagues, as well as the failures, and it is within that context that we should all strive to share ideas with one another, support each other, and help all of us succeed.

It is my goal as Chairman this year to make certain that our Section of the State Bar fulfills its mission in assisting its members in their practice. We will be a sponsor of a number of excellent educational seminars covering a wide range of topics. I would encourage each of you to make plans to attend those seminars. I would also encourage each of you to make use of the extensive audio cassette and videotape library. This is a service to our members and I encourage you to take advantage of it. Please do not hesitate to contact me if you have any suggestions as to how this Section may better assist you and your practice. After all, this Section should be a valuable resource to you, and your input is always appreciated.

As everyone is aware, the citizens of our state have undergone a tremendous shift in their lifestyle due to the recent economic downturn. We, as attorneys, have been less affected than others. Nevertheless, there are many members of our Section who have lost their jobs as a result of the failing economy, and I encourage each of you to reach out and help those attorneys. I would also encourage each of our members to step forward and offer their lending hand to those in their communities. You can also get involved in your community by becoming members of charitable organizations. It is with this in mind that I am going to encourage our board to engage in a public service project this year. As representatives of general trial lawyers across the State, we should pull together and offer our own collective support for those who have been less fortunate in this failing economy.

We are also quickly approaching an election year. I would remind everyone how important it is for attorneys to get involved in this process. We must fulfill our role as stewards of justice for the citizens of this State, and stand up against those attempting to erode access to our courts and the right to trial by jury. We must also stand up for the maintence of an independent judiciary. These principles are the bedrock of our civil justice system, in which we all practice.

As attorneys we should always strive to zealously represent our clients. And in that endeavor, we all strive to consistently become a more effective advocate for our clients. In order to become more effective you must set your goals high, and then work hard to reach them. I would suggest to each of you that the place to set that goal is the career achievements and honors that have been bestowed upon those who received the Tradition of Excellence Award this year. I encourage each of you to review the following pages which reveal the remarkable stories and careers of these award recipients. And, on behalf of the Section, I would like to once again congratulate Judge G. Alan Blackburn, William Q. Bird, Jonathan C. Peters, and Robert E. Hicks for having received the Tradition of Excellence Award, and most importantly, for their honorable dedication to this profession.

DEFENSE

# JONATHAN C. PETERS

*Introduced by*
**Michael Bowers**

*Tradition of Excellence Award*

I cannot tell you how honored I am to be before y'all today, first of all, just to be before you all in the presence of all these eminent members of the profession that I love so dearly but particularly for the task at hand, which is to introduce one of my dearest and one of my friends of most long-standing: Jon Peters.

Jon Peters and I have been friends for over 37 years. We met at the very beginning of the Class of 1974 at the University of Georgia Law School. The Jon Peters that I will introduce to you today is precisely the same decent, good human being that he was 37 years ago. He has grown in character, he has grown in wisdom and certainly in knowledge of our profession, but he's still the same good guy that he was when we were in law school.

His story is a remarkable and one that I am proud to relate to you. Jon grew up in east Atlanta right about where Candler Road and Memorial Drive cross and, most of you don't know where that is, but that's not far from where I grew up. His daddy was Oliver and his mama was Sarah. Oliver was a corrections officer at the Federal penitentiary in Atlanta. Sarah was the personal secretary to the commander of the Georgia State Patrol. Jon is one of five children: Oliver, Phil, Susan and Jane. I have known them all. Bill, as you remember was the Director of the GBI who very untimely died in the eighties while director of the GBI.

Jon went to Murphy High School in east Atlanta and in his senior year met Sherry McCloud, his wife of 41 years seated right back there beside him and who is also a wonderful human being. They have two children of their own and a third that they have raised and has become one of their own.

Their sons are Jonathan & Jeffrey. Jeffrey is a lawyer over in Birmingham. Jonathan is in the real estate development business in Mexico and their daughter Heather is back there with her son Jeffrey. Heather is the natural daughter of Sherry's brother and Jon and Sherry have raised her. She is a second year law student at Mercer University. A wonderful, wonderful family.

After law school Jon went into private practice, practiced a couple of years out in Decatur, then became a public defender for a couple of years and then an assistant district attorney. Then he became a judge in the Superi-

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**Tradition of Excellence Award**

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or Court of Dekalb County and served in that capacity for about 6 years. Now he had some interesting experiences. As the junior judge in Dekalb County he got the best courtroom and in talking with Carol Hunstein, our soon to be Chief Justice of the Supreme Court who was a co-worker of his as a superior court judge, she never could understand why Jon, as a junior member, was able to get the best courtroom. But when Jon left and Jim Weeks moved into that courtroom and, Jim being substantially taller than Jon, as are most people, the courtroom had to be redesigned.

Now, I talk to people from on high, from the Supreme Court of Georgia to the administrative workers Jon works with today to find out what he is like today, and as I said, he ain't changed a bit. Everyone with whom I spoke had the same thing to say, he is a wonderful human being, he is a quiet laid back guy. Everybody I talked to could not but comment on his outstanding trial ability and I know from sitting in a car with him for three hours every day for two years, he is a great story teller. Now, why were we in the car together for three hours everyday? We commuted during the second half of law school. Every morning and every evening from Stone Mountain to Athens, from Athens to Atlanta, and we got to know each other very, very well, and I'm very proud of that. The people that work with Jon say what I would expect: he is a genuine player and an inspiration to work for. For the past few years Jon has been involved primarily in medical malpractice defense, and if you notice, I hesitate when I say Jon because I knew him way back when he was called Johnny and I still refer to him as Johnny. So if I say that, I hope he won't take offense but that's just the length of friendship. One of the things I learned about Jon Peters I want to share with you, was a conversation he and I had after he asked me to do this. I said, "Jon, what has made you the good story teller that you are?" And what he told me, told me a lot more about him as a practicing attorney and someone who is very successful trying cases. He said, "I learned how to present a case to a jury bagging groceries at Cook's Food Store in east Atlanta when I was a teenager, and by being a radio operator for the state patrol when I was an undergraduate in law school." That tells you what kind of guy Jon Peters is. He is truly a man of the people. He is someone who connects very, very well with people and he is simply a superb trial attorney. I think his life philosophy, professional philosophy can be summed up in what he also told me in the past few days: "Work seriously but never take yourself seriously."

When we were in law school and first started commuting back and forth to Athens, Jon had just won a photo contest at Six Flags. Keep in mind this is 1971. He won a $5,000 photo contest at Six Flags in 1971 and, for those of you who are mine and Alan Blackburn's age, you know $5,000 in 1971 was a lot of money. He used part of that to fund law school and he used part of that to buy a white Porsche. He wouldn't drive the Porsche back and forth to law school. He parked it in our driveway in Stone Mountain for me and him to commute in my Volkswagen and my children thought that white Porsche meant that he was some kind of stud. They thought that was the greatest thing going

My friend Jon Peters is a funny, entertaining, wonderful human being. I'm an only child, never had any siblings. If I could have a brother, I would want him to be like Jon Peters, and if I was looking for me a lawyer to handle something for me personally, that was really, really tough, and keep in mind I've hired and fired about as many lawyers as anybody in the state of Georgia, I would pick Jon Peters.

I give you my friend, my dear friend, Jon Peters.

*Remarks by*

# Jonathan C. Peters

I feel like waiving my argument to avoid weakening my case. Thanks to Mike for the kind words, and to the Section, and all of you for being here so bright and early this morning, and my good friend Adam Malone for this honor, and I certainly extend my congratulations to my fellow honorees. It makes a special day more special when the other folks that are coming up here to receive the award are the kind of lawyers and kind of people they are.

You know, I feel humbled, and a little old, to be receiving an award called the Tradition of Excellence Award. It is really hard to express what it means to me as a beat up old trial lawyer.

There are some other folks I need to thank for my extreme good fortune in my legal career. All my family, of course, for their support and love. My wife, Sherry, put me through law school and has been supporting me in other ways ever since. I owe her everything. I would like to acknowledge my older brother, Oliver, who was the college graduate in our family much less the first law graduate, and he was my inspiration for law school. He's ill and cannot be here today.

I have also had many mentors and colleagues who have shaped my career as all of us did. I have had the unique fortune and good privilege to have been molded and shaped by people like Clarence Peeler, Judge Clarence Peeler; Curtis Tillman, who I believe was and honoree of this award; Justice Hunstein, I served on the bench with her in Dekalb County; and I believe that others have told me this, that I had the good fortune of serving with probably the finest judges at the trial level at that time than anywhere in the state. I am certainly grateful for that opportunity, and I certainly learned a lot from it. Bob Wilson was the district attorney and I worked under him and with him, and I appreciate all the other mentors and all the colleagues who have shown me how to respect and protect the law.

I want to thank some of my partners along the way: Malcolm Murray, Hunter Allen, Darryl Love, and my present partner now who I'm very proud to practice law with and who is here this morning, Bob Monyak. I certainly need to thank all of the many associates I worked with and the loyal staff that I worked with for covering up my many shortcomings and making me look good.

Perhaps as importantly, as a trial lawyer I have benefited from opposing some of the best lawyers in Georgia, one of them who will be honored here today, Bill Bird. I have tried cases with Bill Bird, Tommy Malone, Phil Henry, and many, many other fine lawyers. These lawyers have challenged me and inspired me, and most have become friends through friendship forged in battle, and I'm thankful to them as well.

I'd like to thank my professors and my classmates, including Mike and many others at UGA law school. I received an excellent legal education at a fair price. I am particularly grateful to the unknown person, and I don't know who the person is, who withdrew two weeks before classes started, thus bumping me off the waiting list and that's the way I got in, and all you other middle of the roaders should take heart that I have come this far. I missed law review, I was rejected for moot court, and was not initially hired by the district attorney's office because of, quote a "lack of trial potential."

In my notification letter, Adam said that this award is unique because nominations are made and voted on by colleagues, and that is certainly true and that does not escape my recognition, because what could be more to anyone than to be recognized by your peers. In fact, not only is this the highest form of recognition, but for a trial lawyer is oftentimes going to be the ONLY recognition. As a young public defender, very young defender, I was assigned a rape case to defend, and the evidence looked pretty strong. My client's name was Willie Rufus Turntine. I remember him to this day. I still have the letter he sent me. But Mr. Turntine was charged with rape and I'm sure that I can get him out through legal means. He had decided to try to escape, and he was caught and brought back, so he had a rape case, rape charge, and an escape charge in front of him. And we tried the rape case and, lo and behold, we won the thing. He was acquitted of rape but we had to plead on the escape for a small period of time because the evidence was overwhelming. I was feeling pretty good about it as a new lawyer and had won a pretty big case, and so I got a letter after a few days from the jail.

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**Remarks by Johnathan C. Peters**

*continued from previous page*

Everybody knows what a jail letter looks like that's got one. They kind of smell like cigarettes and have kind of fancy curly-q writing on them, and very effusive in their contents. But anyway, I had a letter; it was from Mr. Turntine. And I thought, "Well, God, he's writing to thank me and give me words of praise for my brilliance," so I will quote the letter to you. I opened the letter, and here is what it said: "Dear Attorney Peters: I am in jail despite my innocence because of your poor representation of me. I want a real lawyer. For one supposed to be so smart, I must say that I find you just plain ignorant. Sincerely, Willie Rufus Turntine." I learned pretty early on you don't count on your clients for praise and recognition. And you certainly can't depend on jurors because all they want you to do is tell you what you missed and how much smarter they are than you are. Judges, don't count on them either. They are much more concerned about their error free record and their cleared calendar than they are in delivering praise. They can usually find time for criticism however. And, of course, you can turn to your family and I learned that they quickly grow tired of mind-numbing discussion about your cases, and after a while don't even show up for the tedium of a trial. So I did, now, get a complimentary letter one time from a serial killer named James Walraven. He said "Dear Mr. Peters: You should retire from prosecution, because you have gotten so good that you are convicting innocent people." Kind of like praise I guess.

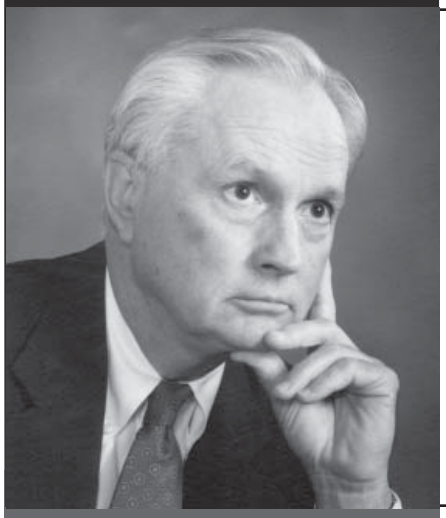
But really, all other lawyers, and since I've got the award for the trial part of this, I'll say trial lawyers: Trial lawyers understand the hollowness in the pit of the stomach, the night chills and insomnia, the testiness, and the terror of trial work. They know we usually lie when we announce "ready." Trial is like heaven; we all want to go, just not right now. They also know that we have come to realize as trial lawyers that we really can't rejoice our victories because we're so glad not to have lost, and we all have realized, at least I have after long years, and I now realize that true knowledge resides in the fact that no one else knows either and that you have to forge ahead with courage and guts and a little bit of bluster and just trust the system to do what it's designated to do, and frankly, in my experience it usually does.

Often time a trial lawyer's best work is not rewarded with parties or celebrations or even, as I said, much in the way of thanks. We pack up our briefcases and go home to face new challenges tomorrow. But I will say this, on this proud occasion for me and my family, that I am glad to be a part of a profession that is based on logic and fairness and that's dependent on honesty and trust.

I have learned an important lesson that professionalism and courtesy are not only the right way, they are also the most effective way to practice law successfully. It is my great privilege and my singular honor to be here among judges and lawyers that serve as ambassadors and warriors for the greatest of human institutions, our legal system. I would simply ask in closing that all strive to protect it, to build it up, and to thank God that we all are a small part of it. I thank you for your attendance to my remarks. Thank you very much.

GENERAL PRACTICE

# Robert E. Hicks



*Introduced by*
**Justice George H. Carley**

*Tradition of Excellence Award*

It is indeed an honor and a privilege for me to introduce to you the recipient of this year's Tradition of Excellence Award in the General Practice Category: Mr. Robert E. Hicks of Atlanta. Over the years, we have used an otherwise accurate expression so frequently that it may have lost some of its significance and that is "so & so is a lawyer's lawyer." Well, Bob Hicks is indeed a lawyer's lawyer in the truest sense of the word, but he is also a judge's lawyer, and an outstanding lawyer for all the clients he has represented over the years. Probably a more appropriate term for Bob would be that he is the legal profession's lawyer because he is the essence of competence and professionalism and has been throughout his almost sixty (60) years of practice.

Hicks was born in Rome, Georgia, but he grew up in Dublin, the second of seven children. Although Bob performed daily chores on the family's farm, he was exposed to the law from the beginning since his father was a lawyer and a justice of the peace. Bob excelled in academic and other activities in Dublin. He graduated from high school after finishing the 11th grade, because that is all there were at the time. He was accepted at Mercer and started his undergraduate studies there while working a part-time job to help pay expenses. However, World War II was looming, so Mr. Hicks joined the Navy and served admirably during the war until 1946. His naval service gave him the benefit of the GI Bill which allowed him to return to Mercer where he completed his education, earning both an AB and a LLB degree. He excelled in law school, made great grades and served as Editor-in-Chief of the Law Review. After being admitted to the Bar he came to Atlanta and was with the Attorney General's Office for a while and obtained great experience working with many fine lawyers. He then went with E. Smythe Gambrell's law firm. Mr. Gambrell represented Eastern Airlines, which was one of the major powers in the air at that time. Bob spent two years in New York representing Eastern where primarily he worked with the famous Captain Eddie Rickenbacker and he can tell quite a few stories about him. Although Bob enjoyed the museums and other culture in New York, he wanted to come home and he did. But he had to change firms to do it. Mr. Walton Nall was one of the great trial lawyers of the time, so Bob was able to get on with the Nall firm and stayed there from 1956 until 1959. He then joined the

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firm of a lawyer who was one of his dearest friends in life, the late great Morris Abram. At the time, it was Heyman, Abram and Young and later became Heyman, Abram, Young, Hicks & Maloof and after a merger it was known as Heyman and Sizemore. Then, for many years, Hicks was the Founding Member and CEO of Hicks, Maloof and Campbell and now is an outstanding Senior Counsel with McKenna, Long & Aldridge. Mr. Hicks is a Fellow in the American College of Trial Lawyers and was selected by his peers to be included in the 2005 listing of Georgia Trend's Legal Elite. There are so many stories that can be told about Bob's practice. He has handled some of the most interesting and complex cases, especially in the area of bankruptcy and related matters. Time does not permit me to even briefly mention these cases, so I refer you to the oral history of Robert E. Hicks contained in the volume before last of The Journal of Southern Legal History. It is indeed fascinating.

Most lawyers, when they get the podium as I have it now, want to talk about cases that they won. However, I want to discuss a case that I lost at every level from the trial court through the Court of Appeals and finally in the Supreme Court of Georgia. It was Housing Authority of the City of Decatur v. Western Union. My noble adversary was Robert E. Hicks who represented Western Union in many matters. Although I had known Bob through the Lawyers Club and other bar activities, this was the first time that I personally experienced what a great lawyer he was. Not only did he whip me good, he exemplified the real meaning of ethics and professionalism. I was just a young lawyer at the time and Bob was much more experienced and established, but he treated me with respect and as an equal. That is what the practice of law used to be about and I hope it still is. Bob, I hate to date us, but that Court of Appeals case appeared in Volume 124 and the current advance sheets of the Court of Appeals Reports is in Volumn 296! Justice Hawes' two lines affirmance of your Court of Appeals victory is in 228 Georgia.

Mr. Hicks has with him today his lovely wife, Micheline, who in addition to her charm and beauty is fluent in several languages while Bob and I have barely mastered "Southern English." Bob has two children, Dekie Hicks who cannot be here today, and Conrad, who is here. Bob is also very close to Micheline's children and grandchildren. Referring again to the oral history on Hicks, I was impressed by the introduction by Bob's daughter, Dekie, and I commend it to you. I believe Dekie said it best when she observed that Bob is always "concerned with the question, what is the right thing to do." What better guidepost could one have in life? It is my pleasure to introduce Robert E. Hicks to you for the presentation of the *2009 Tradition of Excellence Award.*

*Remarks by*

## Robert E. Hicks

Surely Justice Carley is more faithful to the record in preparing his Supreme Court Opinions than he was in his introduction of me. And while you listen to him, it flashed into my mind the story of the widow who, while listening to the preacher comment upon her deceased husband, leaned over to her son and told him to look into the casket and see if they were at the right funeral. Nevertheless, in spite of his tendency to embellish my record, I do thank him for not straying so far from reality as to make me totally unrecognizable as the person standing before you. Those of you who heard him introduce Judge Willis Hunt in 2006 on the occasion of his receipt of the *Tradition of Excellence Award* for the Judiciary will recall that the good Justice does feel quite relaxed in dealing with the facts.

John Bell phoned me a few weeks ago to tell me that I had been selected to receive the *Tradition of Excellence Award* for the General Practice along with Judge Blackburn for the Judiciary, Jonathan Peters for the Defense Bar, and Bill Bird for the Plaintiff's Bar. Knowing John as I do, I immediately assumed he was making me the butt of one of his jokes. He assured me that I would receive written confirmation from your Chairman, Adam Malone and your very able Section's Executive Director, Betty Simms. When confirmation came shortly thereafter, I began to detect in myself a struggle for supremacy between pride and humility.

The very name of the AWARD sounds exalted. To me it means a belief, a custom or a practice of the very highest quality or highest good passed along, orally or by example, from one generation to the next.

In Betty's letter outlining the arrangements for this breakfast and this afternoon's reception, she said I should be prepared to say a few words after Justice Carley's introduction and enclosed with the letter a list of the 92 previous recipients of the AWARD. Except for four or five, I know or knew, either

personally or by reputation, all the remainder and many of them on a first name basis.

It at first seemed to me that a good way to handle my remarks today would be to take those previous recipients whose beliefs, customs and practices which, to my mind, were of the highest quality and worthy of emulation, and give you, as Betty said, "a few words" of just why I thought each deserved this AWARD.

Of course, even a very, very brief few words about each of those recipients would require me to go far beyond a reasonable time. Indeed, I know so much about many of them that an entire day would not suffice. After all, Conley Ingram came into my life over 70 years ago in Dublin, Ga. when he was only six or seven years old. Judge Bill Daniel, Scott Walters, Al Reichert, Frank Jones and Judge Griffin Bell came into my life in the late 1940's at Mercer University where we all went to Law School. I met Edgar Neely and Ham Lokey when they were -- in my mind -- quite mature lawyers in their 40's and we remained in each others lives for the next 50 years. Paul Hawkins, Frank Love, Ben Weinberg, and Al Norman came along when we were all just beginners in the 1950's.

What are the teachings of these previous recipients?

Judge Sidney Smith and Judge Willis Hunt taught me that one can be both a Superior Court Judge and a United States District Judge without losing the common touch and still retain the universal respect of the Bar.

Frank Jones demonstrates that one can come from several generations of great lawyers and rise to even greater heights than his forebears.

Manley Brown's career shows that even a hillbilly from the remote mountains of North Carolina can reach the very pinnacle of our profession without giving up his boots and accent.

Justices Harold Clark and Hardy Gregory and Judge Marion Pope are examples of the fact that one may serve on the Supreme Court and Court of Appeals with distinction and afterwards re-enter the practice with a lot to offer.

Chief Justice Norman Fletcher of our Supreme Court set a perfect example of humility by giving up that prestigious position, moving to Rome and becoming Bob Brinson's chauffer and Brinson's willingness to risk his life by riding with him shows a certain type of reckless courage so necessary in a successful trial lawyer.

Reviewing the list of those who have stood here in years past and received this award, has provided me a great opportunity to rejoice in the pleasant memories knowing each of them has provided me, and I am disappointed that time will not permit mention of each one individually.

Nevertheless, I will mention a few of the TRADITIONS OF EXCELLENCE they have shared with their contemporaries and passed along to subsequent generations.

I think I am perfectly safe in saying that I see running through the list at least these common characteristics:

They all -- each and every one -- began their entry into the profession answering a call to the bar.

While I am sure they all hoped they would make a living in the practice, something other than money lured them in -- and whatever that lure was never left them.

They did not view themselves as entering a trade for profit but a learned profession and as the years wore on I heard more than one lament the feeling that something was slipping away as the time sheet began to tyrannize them.

They all felt that what they did professionally was meaningful and necessary to society.

They each brought with them from the beginning an ingrained courtesy.

They each were blessed with the luxury of integrity. It was natural for them to do and say the right thing. Their word was their bond. They were proud of it and would go to any length to see that no one ever charged them with a lapse.

Perhaps most common to them all is their genuine love of the law and the practice of the profession.

They all shared a respect for each other's intelligence and skill.

They felt a delightful companionship with each other even in very adversarial circumstances.

As I recall, that hillbilly, Manley Brown, once said, in essence, when talking to the Bootle Inn Of Court: They never made enemies of their friends and always tried to make friends of their enemies.

I feel sure they all regarded acceptance by their peers as more satisfying than a financial statement that would impress their bankers.

As they grew older and more experienced as lawyers and judges, they seemed to realize that they were setting an example for those following in their footsteps and they endeavored to make that example worthy of emulation.

In conclusion, I'd like to suggest that the most worthy TRADITION OF EXCELLENCE common to them all was their taking the time to mentor and train younger lawyers without any expectation of reward beyond the satisfaction of knowing that

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**Remarks by Robert E. Hicks**

*continued from previous page*

some of the positive things they got from their predecessors will be passed along to the next generation.

Thank you for adding my name to the list of those receiving this coveted award and I also thank you for your patience in listening.

JUDICIAL

# Judge G. Alan Blackburn

*Introduced by*
**Honorable Marion T. Pope, Jr.**

*Tradition of Excellence Award*

Peters, Hicks, you make me proud to be a lawyer and a Judge by your reputation and your life. And I agree with Hicks, the worst thing that ever happened is billable hours. I agree with you, it destroyed the practice of law. Made it into a factory. Old town derelict – every town has one, bum, ne'er–do-well – died in forma pauperis, pine box. Nobody came to his funeral. The mortician was there. A few of his drinking buddies showed up and the barber. And the mortician said, "Well, somebody ought to say a few words about him before we put him in the ground." Nobody spoke up. His old drinking buddies just dropped their heads. Finally the barber said, "Well, I'll say one thing, he was an awful easy man to shave." Blackburn is an awful easy man to introduce. This I think, my personal opinion, this is one of the greatest honors because it comes from the Trial Bar. And of all the accolades that you get, plaques and resolutions, and so forth, I value this as number one.

Judge Blackburn was educated in public schools, (Neal Boortz don't like that) of North Carolina, Atlanta and Washington, D.C.

After serving 4 years in the U. S. Air Force, he entered John Marshall Law School, receiving an LLB in 1968 and was admitted to the Georgia Bar in 1972.

He began his practice in Decatur, Georgia (DeKalb County), Atlanta (Fulton County), and moved to Cobb County in 1985. He practiced both Civil and Criminal law for 20 years.

He served as an Administrative Law Judge for Georgia Department of Medical Assistance.

He ran for the Court of Appeals in 1992 against sitting Judge Jack Sognier. Nobody knew him. They didn't even know his name. Sognier. Nobody knew him, but he was on the Court of Appeals. I served with him.

He didn't get to the Appellate Court like anyone else I've been able to determine. Most of them Gary Andrews, Elizabeth Barnes, Debra Bernes and Sarah Doyle, they all ran for an open seat on the court. Very successful. But most of us knew a Governor. I knew two, Busby and Sanders. Both of them claim credit for my appointment. So most of us were appointed by a Governor we knew, a person got on the bench that

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**Tradition of Excellence Award**

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way. But not Blackburn. He was not appointed. He ran an open race and against an incumbent and won. And far as I have been able to determine, he is the only challenger to ever defeat a sitting Appellate Judge seeking re-election in 1992. He was re-elected to 6 year terms in 1998 and 2004.

Blackburn served as Chief Judge of the Court of Appeals in 2001-2002.

Charter member of Georgia Association of Criminal Defense Lawyers.

Former member of GTLA and Georgia Association of Administrative Law Judges.

Member of the American Bar, State Bar and Cobb Bar.

1997 selected 1 of the 40 fastest-rising public servants in Georgia by Georgia Trend Magazine.

He was very active in the American Legion Post 51 in 1998. Served as Master of the Justice Charles Longstreet Weltner Family Law Inn of Court. Served as a member of the Georgia Courts Automation Commission.

Served on Chief Justice's Commission on Professionalism and was a member of the Judicial Council of Georgia from 1999 to 2002.

He received his Masters of Law Degree from UVA (he's a wahoo) in Charlottesville and received a Masters of Law degree in 2001.

Has every reason to be proud of his family, who are at the table, his wife, Linda. Jennifer works for the Troutman Sanders firm. Chris, who could not be here because the Navy just don't let you go home. He is in training as swim/rescuer for the United States Navy in Pensacola. Meredith interned and worked for Laura Bush in the White House and now works in the U.S. Capital for U. S. Congressman Phil Gringrey (Cobb County), and Elizabeth graduated from GA Southern in May 2009.

I'm very fortunate; I served with him and was happy to serve on the Court of Appeals. He's one of a kind. He's a judge that is very serious about his work, and he served with great distinction. And I don't know why he joined the American Bar, but I joined so I could resign. I present to you Judge G. Alan Blackburn, the 2009 recipient of the "Tradition of Excellence Award" in the judicial category.

*Remarks by*

## Judge G. Alan Blackburn

Thank you Judge Pope. There are a few people who asked me, because they understand Pope was going to introduce me (I think it was Bob Brinson) "do you really trust Pope to do that?" And I assured him that I had pictures and it was not a problem.

You know, listening to Peters talk all sorts of things come back through your mind. I tried a case out in DeKalb County before him when he was sitting on the bench with Edgar Neely. You talk about a trial lawyer, that was a good man, a good man. Edgar just wanted to make sure that we could make our case and, as soon as we did, he decided to pay us some money. By the way, I'm kind of jumping around here, one thing that I would suggest that you might want to consider as part of the prize for coming here would be a parking space. It's a little crowded out there.

And my friend Marion Pope as I walked in, I'm reminded of a story he had told me about Saul Clark. I saw something as I came in about Saul Clark. I don't know exactly what it was. But I remember I hadn't been on the court too long and I had the pleasure of knowing Saul Clark who was then retired, of course. And I got this little memo from him one day about a great opinion I had written and how he really liked the style. I was extremely impressed. I was a new judge on the Court of Appeals and to get a letter from somebody of his prominence. So I made the mistake of explaining to Pope, I said, "You know, I got such a memo from Saul Clark, and he said I did a real good job on this particular opinion and I was quite pleased with it." Pope proceeded to deflate me a little bit. He said, "Well, you know, I got such a memo from Saul Clark when I came on the court,

and I felt real good too, until I found out about Saul. He likes to make the new judges feel good, so he sends everyone one." Nobody was more surprised than me to have received a call about this award. If you stop and think about it, I've been on the Court of Appeals for 17 years, and you think you're sort of out of sight and out of mind; and half the lawyers on any case you write are absolutely sure you're wrong, so to be selected for that is an incredible honor. And frankly, the only thing that really occurs to me to say this morning is just thank you very much. It is humbling, and I am grateful, and I am so pleased. On behalf of myself, my family and the Court of Appeals, I thank the General Practice and Trial Section of the Georgia Bar for this award.

Now, I wondered what in the world does anybody want to hear about at 7:00 in the morning. So I decided I would go back over some of the things that I know best and perhaps some folks don't, and that would be to just go back over what has happened in my seventeen years on the Court. It has been my privilege during my seventeen years on the court, to have served with some of the giants of the judiciary. When I arrived in January 1993, Marion Pope was the Chief Judge of the Court and he provided a great example of leadership. George Carley was my first Presiding Judge, but he was quickly elevated to the Supreme Court by Governor Miller, to replace Richard Bell, who had retired.

We have since lost Buck Birdsong and Harold Banke, two of my heroes on the Court. Marion Pope and Roy McMurray both retired, and Dorothy Beasley, the first woman to serve on an appellate court in Georgia, left the Court. I learned a great deal from each of them, and I miss them very much. I learned that, unlike trial judges, appellate judges have no discretion in the case they are reviewing, and must generally accept the facts as determined by the trial court. Also, we are further limited to the record which is before us. And we must adhere to the two-term rule.

Our founding fathers had the wisdom to require that all cases on appeal must be decided no later than the end of the term following the one in which it was filed or assigned for a hearing, or else it is affirmed by operation of law. To my knowledge, no case has ever been so affirmed.

While probably 85% of appealed cases are resolved by a Court of Appeals opinion, and that is not to take anything away from the Georgia Supreme Court because people don't realize often because they try to make a comparison between the courts, and there's really no comparison, it is very difficult to do. Our court basically is one that deals with cases. The Supreme Court has so many other things they do that we don't do that it's difficult to compare the two.

The Supreme Court also has many additional administrative and other functions, such as overseeing the State Bar of Georgia, answering certified questions from other courts, deciding those cases over which it has exclusive jurisdiction, and fulfilling its role in determining the direction of the law in Georgia.

The Court of Appeals, on the other hand, has a much more limited responsibility, and is the workhorse on the Georgia appellate courts in terms of appellate opinions, publishing approximately six printed volumes per year and that keeps us extremely busy trying to do that.

The role of the appellate judge is extremely unique and does not act alone unlike usually the trial judge. And that is the great difference if you stop and think about it. You have all the group dynamics that come into play, and then it's important that the appellate judges have the ability to properly influence that group to get it to go in the right direction with them and where they think it ought to be. And it's important also that appellate judges be independent and strong because, while that may be important for the trial judge, the trial judge doesn't have to convince any other judge. That trail judge makes his or her own ruling and that's the end of it. But on our court, you have to convince others to follow your lead and it's important, therefore, that we not have people on the court (judges) who are like lemmings just following some leader over the cliff every few years.

If you notice, I always like to make the comparison to a flock of eagles. You've never seen a flock of eagles because they don't fly in flocks. To me that's the best analogy for the appellate court judge is to be like an eagle, strong, independent, strong enough to stand up and say what they feel the law is and what it requires in a given case. That can be pretty hard when you get into group dynamics because the human tendency is to go with the crowd. I think it's important that judges not do that and that they stand up because, while

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**Remarks by C. Alan Blackburn**

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there may be some comfort to being part of the flock, it doesn't do much to protect the little person whose case demands justice.

I'm so delighted that you selected me for this award. I'm really pleased, and I could remember back when Adam-by the way, I will tell you this-he was not paid for that overtime. He came on without pay, and I think I did finally get him in for a 10-week internship toward the end, so he finally got paid. But he's a great man. I appreciate your picking me for this nomination for this award, and thank you very much.

PLAINTIFF

# William Q. Bird

*Introduced by*
**Robert K. Finnell**

*Tradition of Excellence Award*

A word of gratitude and sincere thanks to all, many in this room, who were kind enough to level their support to the nomination of this recipient.

William Q. Bird, a native of Ohio, raised on the shores of that mighty river within the commonwealth of Kentucky, flew west to the Hoosier state to obtain his undergraduate degree at Wabash University and then moved south to Austin to attend the University of Texas Law School. He came to Georgia, mentored under two former recipients of this award, Edgar Neeley and Paul Hawkins, and has become a gentleman of Georgia, known among his peers for his candor, kindness and passion.

These few words I will offer here today will not be able to adequately portray the full measure of the man, nor is there a means by which the complete dimension of his character can be appreciated, but I submit that all who have engaged him have experienced his decency, sincerity and the depth of integrity he possesses.

The award he receives today is but a physical manifestation of all those traits we, as a profession, hold high but he exhibits with humility on a daily basis.

His example allows us to reflect upon what we can and should be as lawyers and as people.

One need look no further than the love and devotion that his wonderful family bestows upon him to gain insight into how and what he reflects upon others. Unfortunately, some of that family could not be present today but they did want to extend their best wishes on this special occasion.

***[Video from Australia]***

Jim Bird, Jake Bird, Ethan Bird, Gabrielle (Ellie) Bird [Australia]
*"Congratulations Granddaddy."*

Jim Bird: [Australia]
*"Congratulations Dad. We're all really proud of you. I wish we could be there."*

***[Video from Atlanta]***

Anna Hayley Bird: [Atlanta]
*"Hey Dad. Congratulations on getting the Tradition of Excellence Award. I'm so proud of you. I know how special of an honor this is and I know you deserve it more than anybody. I love you. Congratulations."*

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## Tradition of Excellence Award

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***[Video from Kuwait]***

Brian Andrew Bird: [Kuwait]
*"Hey Dad. Sorry that we can't be there with you. We just wanted to congratulate you on your Tradition of Excellence Award and we're all really proud of you. I love you very much dad. Congratulations."*

***[Video from Atlanta]***

Lucas Allen Wilson: [Atlanta]
*"Congratulations Granddaddy."*

Lauren Hanley Wilson: [Atlanta]
*"Congratulations Granddaddy."*

Melissa Bird Wilson: [Atlanta]
*"Congratulations Dad. I know how much you've worked to get this far. You're such a good example of kindness and generosity, and it shows in the work that you do, the dad that you are, and the reputation you've built. Congratulations."*

***[Video from Asheville, NC]***

Jennifer Elizabeth Bird: [Asheville, NC]
*"Congratulations Dad. I am so proud of you. This award is a great honor for you and you deserve it completely. I am glad I'm going to be there to see you receive it."*

Julie Elizabeth Youtz: [Asheville, NC]
*"Congratulations Granddaddy. We love you so much."*

Trevor Patrick Youtz: [Ashville, NC]
*"Congratulations Granddaddy. I'm very glad you got this award. We love you."*

This recipient has received numerous nick names cast upon him through the years by friend and foe alike, such as The Birdman, Mr. Deposit, The Blue Chipper, Big Bucks Billy or, my personal favorite given to him by the first recipient of the award he is now to receive, the late and great Edgar Neely, Jr. when he tagged him as "The Baby Face Assassin." But all those are offered with grins or laughter because among those who know him, the one word that defines him is "gentleman." It is done without fanfare, without any expectations that someone will be there to observe it. I recently got to see an example of that, and as most acts of most gentlemen, it is done without fanfare, without any expectation that someone will be there to observe it. We were traveling in Normandy with our families and had an excellent guide. We were taking our tour and seeing all the monuments that I think all of us would want to see there. Our guide offered us an opportunity to go to a small French farmhouse that was not on the tour on a back road, which we took. Behind the barn in a lonely area, not viewable except if you traversed for a while, there was a small monument to the 147th Engineers of the United States Army. These are the men who cleared the minefields. There was a young lady there attending to the monument. She looked very young. She was painting and removing rust and taking care of it. We all observed it, turned to walk away from it. Bill took the time to read every name on that monument, and not just the names but the dates that those men passed away. And he noticed that one of the men died about five days before the landing, and he inquired further and was to learn that some of those engineers paratrooped in and met with French resistance and were there to map where they thought the mines would be so that they could alert the paratroopers. Bill took the time to observe that and to notice that. Then he thanked this young woman for attending to this monument. Everybody else had walked away. I was at the corner of the building and got to see my friend, a true gentleman, make this small gesture of kindness to a citizen of France who was maintaining the monument for our troops and I thought to myself, that's why my friend deserves this award.

He is one who walks among princes and paupers and treats them the same.

For over 30 years, it has been my privilege to call him friend and indeed brother.

We have traveled far together, around the world, across our great state, trying cases from Dalton to Swainsboro and even down to Albany. Through the years some have sought to analogize our friendship to other historical pairs. Some of our adversaries say we remind them of these folks:

**[Video: Sherlock Holmes and Doctor Watson]**
*"Elementary my Dear Watson"*

Unfortunately, some judges have a less than charitable view:

**[Video: Laurel and Hardy]**
*"This is another fine mess you have gotten me into"*

We have attempted without success to convince our wives that we are similar to these guys:

**[Video: Butch Cassidy and The Sundance Kid]**

Butch Cassidy: *" Listen. I don't mean to be a sore loser, but when it's done if I'm dead…kill him."*

Sundance Kid: *"Love to…."*
But unfortunately they see us as more like this:

**[Video: GEICO Cavemen]**

Ad Rep: *"Seriously- We apologize- we had no idea you guys were still around."*
Caveman #1: *"Yea- well next time maybe do a little research."*
Waiter: *"Gentleman- Are we ready to order?"*
Caveman #2: *"I'll have the roast duck with the mango salsa."*
Caveman #1: *"I don't have much of an appetite, thank you."*

I have decided on the occasion of my dear friend receiving this wonderful award to reveal the only historical analogy that he and I have always used to describe our friendship and this wonderful adventure we have shared:

**[Video: Cisco and Poncho]**
*"Oh Cisco"*
*"Oh Poncho"*

So Cisco, come on up here and get your award.

*Remarks by*

# William Q. Bird

I want to thank Bob for the kind remarks, and for being such a great friend over the years. Everyone should be so lucky as to have a friend like Bob Finnell.

It seems that almost every recipient of this award proclaims the shock they experienced when they learned that they would be receiving the award. They were right.

When Adam Malone called and told me I was going to be receiving this award I was speechless. Not a good thing for one holding himself out as a trial lawyer. My first coherent thought was "Why me?" There are many others who I believe are more deserving. When I look at the list of recipients to which my name will be added I feel honored beyond expression and deeply, deeply humbled. There are trying days when the practice of law makes even the most zealous advocate question his or her profession. This is not one of those days.

No lawyer of any success or devotion accomplishes as much without help. I need to thank my wife Betsy, not because it is obligatory to thank your wife, but because of her support and more importantly her understanding of the demands that being a trial lawyer places upon a marriage. She has been my confidant and counselor for over 20 years. Thank you, Betsy.

Two of my children are here today: Melissa Wilson and Jennifer Bird, my two oldest daughters. My oldest son, Jimmy, is a doctor and he lives in Australia with his family. My youngest son, Brian, lives in Kuwait with his family. For obvious reasons they could not be here. My daughter, Hayley, is attending class as a Senior at the University of Georgia. Finally, my youngest daughter, Mary Beth, has just returned from an exchange program in France. I need to apologize to them for the time that the law has required – perhaps stolen – that would have otherwise been theirs. I want to also thank them because, in retrospect, I realize that on too many occasions to count they have been my mock jury, focus group and trial consultant. It is amazing what you can learn when you take the time to listen to your children.

I'd also like to thank my partner, Darren Summerville, and his son, Court, for making the effort to attend this morning.

I'd like to spend a minute to talk about my parents. My mother grew up in Lawton, Oklahoma, she was in college at Oklahoma University when the depression hit, and dropped out of school to help back home. My father grew up in Bradford, Pennsylvania. He became a geologist, attending Harvard for two years, Missouri School of Mines for one year and graduating from Yale, all in a total of four years. They met during World War II when my father was stationed at Fort Sill, Oklahoma. Dad told the story that after he was transferred to Fort Knox, he called my mother on the phone and asked her if she would marry him. She said, "Yes…who's calling?"

My mother was blessed with more common sense than anyone I have ever known. I believe a fair amount of it rubbed off. My father was a man of great principles. He liked to say "It is better to be thought a fool and say nothing, then to say something and remove all doubt." Being a trial lawyer, I obviously didn't heed that advice. But, he also said, "Never think anyone is beneath you, son. You can take something valuable from every person you will ever come across during your life, as long as you are willing to make the effort." Emerson put it a bit differently: "Every person I meet is in some way my superior." The practice of law has demonstrated the accuracy of those words. Be it client, co-counsel, opposing lawyer, juror or judge, each has something to teach.

Because this award is about tradition, I have an obligation to mention those who came before me and played a significant role in my appreciation of law and the legal profession. My mentor was Paul Hawkins. That is something I say with great pride. Let me tell you a story about Paul that I feel says worlds about the man. I was a young lawyer, toting Paul's briefcase, figuratively, because he always insisted on carrying it himself. We were defending an elevator manufacturer in a products case where a service elevator fell. Bobby Lee Cook represented the plaintiff. Our co-defendant was a company that serviced the elevator. We felt we had an excellent chance of getting out on directed verdict, but if the case went beyond that we could use the help of the co-defendant. Paul explained the situation to the co-defendant.

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**Remarks by William Q. Bird**

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To our surprise, he came out swinging in opening statement and told the jury this was a case of liability and it was either the fault of his client or ours. Just before lunch on the fourth day we moved for directed verdict. The judge said he would announce his decision after the lunch recess. Paul again approached the defense lawyer about our evidence to gain his cooperation. There was no immediate response. After lunch the court granted our motion and dismissed us from the case. I started to pack as fast as possible. Paul said we had to wait for an hour. He said in explaining to the defense lawyer what had actually caused the elevator to fail, he had offered him our evidence regardless of the judge's ruling on our motion. I pleaded with Paul that the other lawyer had withheld evidence from us and then at trial had tried to throw us under the bus, essentially that he had forfeited any right to assistance from us. Paul simply said, "I gave my word, and that trumps his actions." I learned my craft at the feet of a lawyer's lawyer

I have had the fortune to work with and against some of the best lawyers in our profession. One lawyer I worked both with and against was Bill Wagner, a renowned plaintiff's lawyer from Tampa. He shared a perspective on juries that I wish to pass on. For many, if not the majority, of the people on the jury that experience will be the most significant exposure they have to the legal profession. If we wonder why so many people think ill of our profession then we need to be cognizant of the effect of our actions. Taking the high road benefits both your case and our profession. Many could take a lesson from Jon Peters, also a recipient of this award. Jon and I have litigated many cases against each other, and he practices with an integrity that should be a model.

Minds as great as Thomas Jefferson believed the right to trial by jury was a more important fundamental right in guaranteeing freedom than the right to vote. He put it better than I could ever hope to: "A trial by jury is the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution." Think about that. The principal author of our Declaration of Independence felt the right to a trial by a jury a greater safeguard of liberty than the right to vote. And the right to have our peers decide cases has never been more threatened than it is today.

Most potential jurors come to court with a bias that plaintiffs are in court for the lottery. Corporate America has been economically handicapped by a civil justice system that has run wild. They believe that there has been an explosion of tort suits that are clogging the courts and over-burdening the system. This is the result of a well-heeled propaganda campaign to stack the deck. Jury voir dire eventually turns to that "McDonald's Verdict" where the stupid lady spilled coffee in her lap and got millions of dollars – even though well-meaning citizens are rarely privy to the real facts.

It is not enough that these forces are poisoning the well of jurors. More recently, special interests have unleashed a full frontal assault on the independence of the judiciary. Nothing could be more dangerous. Jefferson believed only a jury of common citizens could provide protection against powerful special interests. Lincoln said "America will never be destroyed from the outside. If we falter and lose our freedoms, it will be because we destroyed ourselves." As lawyers it falls to us to be the frontline of defense of our civil rights and liberties.

You have honored me with this award. I will try to live up to your expectations. Thank you.

# Joint & Several Liability, Apportionment and Set-Off: What is the law in Georgia?

**Adam Malone, Esq.**

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*Adam Malone dedicates his practice to representing those who have suffered severe injury and death arising out of ordinary and professional negligence. He graduated from Atlanta's John Marshall Law School in 2000, and in 2007, John Marshall honored him with the law school's Distinguished Alumni Award at commencement ceremonies. In 2009, Adam joined the Board of Directors for John Marshall Law School.*

*In addition to being honored by his law school, Adam has also been honored by his peers. Adam was selected for inclusion in the 2010 edition of The Best Lawyers in America® in the specialties of Medical Malpractice Law and Personal Injury Litigation. He has also been recognized by Georgia Trend magazine as one of the 40 best and brightest young professionals under the age of 40 in Georgia, by the Fulton County Daily Report as one of the top 12 lawyers in Georgia under the age of 40, and by the American Trial Lawyers Association as one of the top 100 lawyers in Georgia. His jury verdicts have been included in the National Law Journal as among the highest in the nation.*

*Adam is board certified by the American Board of Professional Liability Attorneys through the American Bar Association in the field of medical negligence. He also serves in numerous national and state professional organizations including:*

Southern Trial Lawyers Association
*Immediate Past President*
General Practice & Trial Section, Ga. Bar
*Immediate Past Chair*
Traumatic Brain Injury Litigation Group of AAJ
*Board of Governors*
Professional Negligence Section of AAJ
*Chair*
Interstate Trucking Litigation Group of AAJ
*Board of Directors*
Plaintiff's Trucking Lawyers of America
*National Advisory Board*
Georgia Trial Lawyers Association
*Chair of Education*
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## I. Summary Of Conclusions

The American Law Institute (ALI) thoroughly analyzed the law in every jurisdiction in the nation and produced the Restatement (Third) of Torts, Apportionment of Liability in 2000. In 2005, the Georgia General Assembly modified our previously existing apportionment statutes found at O.C.G.A. § 51-12-31 and O.C.G.A. § 51-12-33. Importantly, the General Assembly made no changes to our contribution statute found in O.C.G.A. § 51-12-32. Analyzing these three statutes against the authority contained within the Restatement (Third) of Torts, not much changed after the 2005 amendments. In fact, O.C.G.A. § 51-12-31 was only reworded to say the same thing it did before the amendment and O.C.G.A. § 51-12-33 added a procedure for reducing damages according to the percentage of the plaintiff's fault before authorizing the jury to apportion damages among the defendants and authorized a procedure for adding non-parties to the verdict, but only in cases where the apportionment statute applies.

It is clear that the 2005 tort reform

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legislation did not abolish joint and several liability in all cases. In cases where there is no triable issue regarding fault on the part of the plaintiff (comparative negligence), the apportionment statute does not apply. In those cases, liability of a defendant who is a joint tortfeasor remains joint and several. The joint tortfeasor defendant still has the right to pursue actions for contribution from other non-party or settling joint tortfeasors. In those cases, the law of set-off applies just like it did prior to the 2005 tort reform legislation.

Non-parties can only be added to the verdict form if the apportionment statue applies. In those rare cases where the apportionment statute applies, the statute expressly provides that liability shall not be joint, but shall only be liable for damages according to their degree of fault. When the apportionment statue applies, defendants are prohibited from pursuing any contribution action.

The law of set-off does not apply when the apportionment statute does apply. Without joint liability, a non-settling defendant does not receive a set-off for any amount paid to a plaintiff by a settling tortfeasor. No jurisdiction in the entire United States with an apportionment statute mandating several liability like Georgia's permits a tortfeasor to get *both*. See *Restatement (Third) of Torts, Apportionment of Liability, Track B (See especially §B18, Comment (a); §B19, Comment (k) and Illustration (5)); and* See *Restatement (Third) of Torts, Apportionment of Liability, §16, (See especially Comments (f), (h) and (e)).* In cases where joint liability applies, the law is like it always was and the law of set-off does apply.

When the apportionment statute applies, it only applies to tortfeasors engaged in tortious conduct. Apportionment does not apply to actions predicated upon vicarious liability. In other words, it does not apply to provide for apportionment between an employer or principal who is only vicariously liable for the negligent conduct of an employee or agent. The liability of an employer and employee or principal and agent remains joint and several and the remedy of employer or principal is in an action for indemnification. The *Restatement (Third) of Torts, §13* makes it clear that liability cannot be apportioned between employers and employees when the theory of liability against the employer is based upon the doctrine of *respondeat superior*.

Section 16 of the *Restatement (Third) of Torts* explains how apportionment works in general. The *Restatement (Third) of Torts* shows us that apportionment statutes across the nation fall within one of five different "Tracks" depending on the variations in their language. The apportionment statute like the one we have here in Georgia is found in Track B. These authorities recognize the rule in jurisdictions with apportionment statutes mandating several liability (as in Georgia) that a non-settling defendant shall not receive a set-off for partial settlements and recognize the rule that a plaintiff may recover more than the factfinder's award since the plaintiff bears the risk that a partial settlement may be inadequate.

As explained below with citations to authority, the 2005 tort reform legislation did not abolish joint and several liability in *all* cases. Indeed, pursuant to the plain language of O.C.G.A. § 51-12-33, in cases where the plaintiff is blameless, defendants remain jointly and severally liable.

## II.
## The 2005 Tort Reform Law Does Not Permit The Jury To Apportion Damages Among Joint Tortfeasors When The Plaintiff Is Not Partially At Fault

Some mistakenly believe that the 2005 amendments to O.C.G.A. §§ 51-12-31 and 51-12-33 effectively abolished joint and several liability in Georgia and mandate apportionment in all cases. A careful reading of the applicable statutes reveals this argument to be without merit.

In the context of statutory construction, a court must "look diligently for the intention of the General Assembly." O.C.G.A. § 1-3-1(a) (2006); Clark v. Wade, 273 Ga. 587 (2001). Any statute in derogation of common law must be strictly construed and is thereby limited in strict accordance with the statutory language used therein, and such language can never be extended beyond its plain and ordinary meaning. King v. Goodwin, 277 Ga.App. 188 (2006); Bienert v. Dickerson, 276 Ga.App. 621 (2005). "Statutes must be construed . . . so as to square with common sense and sound reasoning." City of Brunswick v. Atlanta Journal & Constitution, 214 Ga.App. 150, 153 (1994). "In all interpretations of statutes, the ordinary signification shall be applied to all words, except words of art or words connected with a particular trade or subject matter . . ." O.C.G.A. § 1-3-1(b). To successfully abrogate the common law, the General Assembly must act "by express statutory enactment." Fortner v. Town of Register, 278 Ga. 625 (2004).

O.C.G.A. § 51-12-31 provides that:

> Except as provided in Code Section 51-12-33, where an action is brought jointly against several persons, the plaintiff may recover damages for an injury caused by any of the defendants against only the defendant or defendants liable for the injury. In its verdict, the jury **may** specify the particular damages to be recovered of each defendant. Judgment in such a case must be entered severally. (Emphasis added).

This code section does not mandate that the jury must specify the amount of damages assessed against each defendant; it merely states that the jury "may" do so. Although the language authorizing the jury to take this discretionary step existed in this

statute prior to the 2005 amendment, the courts applied this provision only to claims involving property damage. See Union Camp Corp. v. Helmy, 258 Ga.App. 263, 268 (1988). Even in cases involving property damage, this language was interpreted so as not to require apportionment and did not abolish joint and several liability. See Branch v. Alliance Syndicate, Inc., 220 Ga.App. 561, 564 (1996); See also Thyssen Elevator Co. v. Drayton-Bryan CO., 106 F.Supp.2d 1342, 1348 (IIA) (2000).

O.C.G.A. § 51-12-32 explicitly addresses the right of a joint trespasser to contribution from another or others, providing that "contribution among several trespassers may be enforced just as if an action had been brought against them jointly." O.C.G.A. § 51-12-32(b) specifically envisions a right of contribution when "a judgment is entered jointly against several trespassers and is paid by one of them." The only situation in which Georgia law proscribes joint liability is delineated in O.C.G.A. § 51-12-33, entitled: **"§ 51-12-33. Apportionment of damages in actions against more than one person where plaintiff is to some degree responsible for injury or damages claimed."** If the title alone does not make clear that this code section applies only "where plaintiff is to some degree responsible for injury or damages claimed," the language of the statute clearly does:

West's Code of Georgia Annotated
**Currentness**
Title 51. Torts (Refs & Annos)
Chapter 12. Damages
Article 2. Joint Tort-Feasors (Refs & Annos)

**§ 51-12-33. Apportionment of damages in actions against more than one person where plaintiff is to some degree responsible for injury or damages claimed**

(a) Where an action is brought against one or more persons for injury to person or property and the plaintiff is to some degree responsible for the injury or damages claimed, the trier of fact, in its determination of the total amount of damages to be awarded, if any, shall determine the percentage of fault of the plaintiff and the judge shall reduce the amount of damages otherwise awarded to the plaintiff in proportion to his or her percentage of fault.

(b) Where an action is brought against more than one person for injury to person or property, the trier of fact, in its determination of the total amount of damages to be awarded, if any, shall after a reduction of damages pursuant to subsection (a) of this Code section, if any, apportion its award of damages among the persons who are liable according to the percentage of fault of each person. Damages apportioned by the trier of fact as provided in this Code section shall be the liability of each person against whom they are awarded, shall not be a joint liability among the persons liable, and shall not be subject to any right of contribution.

(c) In assessing percentages of fault, the trier of fact shall consider the fault of all persons or entities who contributed to the alleged injury or damages, regardless of whether the person or entity was, or could have been, named as a party to the suit.

(d)(1) Negligence or fault of a nonparty shall be considered if the plaintiff entered into a settlement agreement with the nonparty or if a defending party gives notice not later than 120 days prior to the date of trial that a nonparty was wholly or partially at fault.

(2) The notice shall be given by filing a pleading in the action designating the nonparty and setting forth the nonparty's name and last known address, or the best identification of the nonparty which is possible under the circumstances, together with a brief statement of the basis for believing the nonparty to be at fault.

(e) Nothing in this Code section shall eliminate or diminish any defenses or immunities which currently exist, except as expressly stated in this Code section.

(f)(1) Assessments of percentages of fault of nonparties shall be used only in the determination of the percentage of fault of named parties.

(2) Where fault is assessed against nonparties pursuant to this Code section, findings of fault shall not subject any nonparty to liability in any action or be introduced as evidence of liability in any action.

(g) Notwithstanding the provisions of this Code section or any other provisions of law which might be construed to the contrary, the plaintiff shall not be entitled to receive any damages if the plaintiff is 50 percent or more responsible for the injury or damages claimed.

A review of the language contained in subsections (a) and (b) make clear that the only circumstance where apportionment is authorized is when the plaintiff is to some degree responsible for the injury or damage claimed. Those sections provide:

> (a) Where an action is brought against more than one person for injury to person or property **and the plaintiff is to some degree responsible** for the injury or damage claimed, the trier of fact in its determination of the total amount of damages to be awarded, if any, shall determine the percentage of fault of the plaintiff and the judge shall reduce the amount of damages otherwise awarded to the plaintiff in proportion to his or her percentage of fault. (Emphasis added).
>
> (b) Where an action is brought against more than one person for injury to person or property, the trier of fact, in its determination of the total amount of damages to be awarded, if any, shall **after a**

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> **reduction of damages pursuant to subsection (a) of this Code section**, if any, apportion its award of damages among the persons who are liable according to the percentage of fault of each person. Damages apportioned by the trier of fact as provided in this Code section shall be the liability of each person against whom they are awarded, shall not be a joint liability among the persons liable, and shall not be subject to any right of contribution. (Emphasis added).

In other words, it is only if a jury determines that a plaintiff is partly at fault for an injury that the jury must award damages severally, and not jointly, "among the persons who are liable according to the percentages of fault of each person." O.C.G.A. § 51-12-33(b). This is done *only after* the award to the plaintiff is reduced according to the plaintiff's degree of fault. O.C.G.A. § 51-12-33(a).

Prior to 2005, O.C.G.A. § 51-12-33 only applied if the plaintiff was found to be partly at fault. Nothing contained in the 2005 amendments to this statute changed the fact that its application is only triggered by the plaintiff's fault (as is clearly evidenced by the title of the statute). The amendments to O.C.G.A. § 51-12-33 only changed the procedure for reducing a negligent plaintiff's damages and introduced a procedure for the conduct of non-parties to be considered by the jury *if the plaintiff is to some degree at fault for causing his own injury*. In other words, the fault of non-parties cannot be considered if the plaintiff is not at fault. If the legislature had intended the conduct of non-parties to be considered in cases where a plaintiff is not at fault, it would have amended O.C.G.A. § 51-12-31 to provide a mechanism for the jury to consider this sort of conduct. However, the General Assembly chose not to do so and only authorizes the conduct of non-parties to be considered and listed on the verdict form when the jury is authorized to apportion fault. Therefore, the General Assembly in amending O.C.G.A. § 51-12-33 left the long-standing public policy of placing the risk of insolvency of a tortfeasor upon those found to have negligently caused the injury rather than upon the shoulders of an innocent plaintiff and his family.

A court should construe all statutes relating to the same subject matter together to ascertain the legislative intent. Shorter College v. Baptist Convention, 279 Ga. 466 (2005). Reading O.C.G.A. § 51-12-31, O.C.G.A. § 51-12-32, and O.C.G.A. § 51-12-33(b) together, it is impossible to find that joint and several liability has been abolished. To do so would require reading words into the statute which are not there and were not legislated or voted on by members of the General Assembly. The joint liability provisions of O.C.G.A. § 51-12-32 are meaningless if one takes O.C.G.A. § 51-12-33(b) to mean that joint liability no longer exists. Consequently, if a court were to determine that the legislature intended to abolish joint liability when it amended O.C.G.A. § 51-12-33(b), that court would also be required to determine that the legislature intended to render O.C.G.A. § 51-12-32 a nullity. In the opinion of this author, courts are unable and should be unwilling to make such a determination.

## III. The Jury Cannot Apportion Damages When A Defendant Is Liable For Successive Medical Malpractice

It is no defense for a defendant to blame doctors or hospitals for failing to rescue him from the consequences of his own negligence. Nothing in the 2005 tort reform bill changes this longstanding rule of law. Indeed in 2007, the Court of Appeals re-affirmed this rule when it confirmed that a physician remains liable for subsequent malpractice in response to his own malpractice:

> A negligent actor is liable not only for the injury caused by his own acts but is also liable for any additional harm resulting from the manner in which reasonably required medical services are rendered. [Cit.] A defendant may be liable not only for all damages resulting directly from his negligent act "but also for all damage resulting from the improper or unskillful treatment of the injuries by the physician." [Cit.] Applying these principles, we have held in several medical malpractice cases that malpractice by one or more successive physicians does not constitute an intervening cause as a matter of law that cuts off the original physician's liability. [Cit.] The same rule applies and squarely controls in this case. This, too, is a case where "the injury was the result of malpractice in response to malpractice." (Citations omitted). Amu v. Barnes, 286 Ga. App. 725, 733-734(2(b))(2007).

Moreover, "[i]t is not necessary that an original wrongdoer shall anticipate or foresee the details of a possible injury that may result from his negligence. It is sufficient if he should anticipate from the nature and character of the negligent act committed by him that injury might result as a natural and reasonable consequence of his negligence. 'In order that a party may be held liable in negligence, it is not necessary that he should have been contemplated or even been able to anticipate the particular consequences which ensued, or the precise injuries sustained by the plaintiff. It is sufficient, if, by exercise of reasonable care, the defendant might have foreseen that some injury would result from his act or omission, or that consequences of a generally injurious nature might

have been expected.'" (Punctuation and citations omitted.) Coleman v. Atlanta Obstetrics, etc., 194 Ga.App. 508, 510(1) (1990), aff'd, Atlanta Obstetrics, etc. v. Coleman, 260 Ga. 569 (1990).

When a defendant started the chain of events which would not have occurred but for his original negligence, he is liable for *all of the harm* that resulted from his negligence as the original wrongdoer. Apportionment, even if authorized, would not reduce an original wrongdoer's liability since he is responsible for the entire amount.

## IV. When A Non-Settling Joint Tortfeasor Is Jointly And Severally Liable For Damages, The Second Restatement And Traditional Georgia Rules Of Set-Off And Contribution Apply

When independent acts and omissions combine to produce indivisible injuries the negligent actors are known as joint tortfeasors. When the law of joint and several liability apply to a case, then traditional rules of set-off apply. Therefore, a defendant found jointly and severally liable for damages is entitled to a set-off equal to the amount paid in a settlement with a joint tortfeasor. Candler Hospital, Inc. v. Dent, 228 Ga.App. 421 (1997). Some defendants claim that the recent decision of the Court of Appeals in Dziwura v. Broda, 297 Ga.App. 1 (2009), *cert. granted* June 8, 2009, stands for the proposition that they should get apportionment *and* a full set-off. This case does not support any such notion. In fact, neither that case, nor any of the cases it cites, are apportionment cases.

Dziwura v. Broda and all of the cases cited therein are cases which either involve claims of vicarious liability or claims involving independently acting joint tortfeasors without comparative fault on the part of the plaintiff. In those cases, the law has always required the judgment to be entered jointly and severally and, because of that, traditional rules of set-off applied. To the extent those cases held that a jointly and severally liable defendant was entitled to a set-off equal to the amount plaintiff received from a settling joint tortfeasor or from a party who would have been vicariously liable, those holdings are correct and remain good law even after the 2005 amendments to O.C.G.A. §§ 51-12-31 and 51-12-33. Therefore, it is not surprising that Georgia courts continue to uniformly hold in joint and several liability cases that "a joint tortfeasor is entitled to set-off any payments made to a plaintiff by another joint tortfeasor so as to prevent a double recovery." Dziwura v. Broda, at *2 (2009).

## V. Questions Presented When The Apportionment Statute Does Apply

If O.C.G.A. § 51-12-33 applies to your case, at least two important questions arise: (1) which party has the burden of proving fault of the non-party?, and (2) are the defendants entitled to reduce the amount of the judgment to be entered against them by receiving "credit" or a "set-off" for settlement amounts paid to plaintiffs by others? The short answer to these questions follows in the next two paragraphs with a more elaborate discussion below.

Comparative fault when raised by a defendant is an affirmative defense. Fault of a non-party, when raised by a defendant, is also an affirmative defense. When defendants allege the conduct of a non-party is a legal cause of a plaintiff's injuries and damages, the burden of proof is on the defendants just as it is with any affirmative defense. If the defendants fail to produce sufficient evidence, this affirmative defense will fail as a matter of law and be eliminated from the consideration of the jury by a directed verdict. If the defendants meet their burden of proof, they are not required to prove the percentage of comparative responsibility.

As shown above, Georgia's apportionment statute does not eliminate joint and several liability in all cases. In cases where the facts authorize apportionment of fault, judgment may not be entered jointly. This means when fault is apportioned among two or more responsible parties, judgment must be entered severally. When judgment has been entered severally against a defendant, the defendant is liable for satisfying the entire judgment for the amount entered against him and is not entitled to credit or a "set-off" for amounts paid to the plaintiff by others.

## VI. The Burden Of Proof Is On Defendants For Fault Of Non-Parties

When damages are apportioned to a non-party, the burden of proof that the non-party's tortious conduct was a legal cause of the plaintiff's injury is on the defendant to prove as an affirmative defense. "The burden of proof generally lies upon the party who is asserting or affirming a fact and to the existence of whose case or defense the proof of such fact is essential." O.C.G.A. § 24-1-1; See Glenridge Unit Owners Ass'c. v. Felton, 183 Ga. App. 858 (1987) (holding the burden of proving an affirmative defense remains with the party relying upon it and not upon the party making the original negligence claim to disprove it); *see also Restatement (Third) of Torts §16, Comment f. Burden of Proof.* Therefore, if a defendant chooses to assert that a non-party was a legal cause of any of the injuries or damages claimed by a plaintiff, defendants have the burden of proving such and plaintiffs have no burden of disproving the affirmative defense.

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## VII. Joint Tortfeasors Who Refuse To Settle Do Not Receive A Set-Off When Damages Are Apportioned Pursuant To O.C.G.A. § 51-12-33

If O.C.G.A. § 51-12-33 applies, judgment must be entered severally based on the percentage of fault allocated to the defendants by the jury. When judgment is entered severally, defendants must pay the amount of the entire judgment entered against them and the liability of the defendants is not reduced by any payment made by any other party or non-party to the plaintiff. Indeed, O.C.G.A. § 51-12-33 explicitly provides that liability in such cases is several, not joint. Subsection (b) of O.C.G.A. § 51-12-33 provides in relevant part:

> Damages apportioned by the trier of fact as provided in this Code section shall be the liability of each person against whom they are awarded, **shall not be a joint liability** among the persons liable, and shall not be subject to any right of contribution. (Emphasis added).

If the defendants satisfy their burden of proof, Sections B18 and B19 of the *Restatement (Third) of Torts* and Comments to those Sections provide step-by-step guidance for proper understanding and analysis of the implications of settlement, set-off, and non-parties. Relevant Sections and Comments are set forth below:

**§B18. Liability of Multiple Tortfeasors for Indivisible Harm**

**If two or more persons' independent tortious conduct is the legal cause of an indivisible injury, each defendant, subject to the exception stated [for intentional torts], is severally liable for the comparative share of the plaintiff's damages assigned to that defendant by the factfinder.**

The comments provide that this Section replaces the old joint and several liability rules from the *Restatement (Second) of Torts* and places the risk of insolvency of a wrongdoer on the plaintiff rather than on those found liable for the damages. Comment *a* to §B18 provides:

> *a. Several liability.* Restatement Second, Torts § 879 imposed joint and several liability on those whose tortious acts combined to cause an indivisible injury. Section B18 replaces § 879.
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> Imposing several liability reverses the effects of joint and several liability. The risk of insolvency of one or more persons legally responsible for the plaintiff's injury is placed on the plaintiff. In addition, the burden of suing all potentially responsible persons is placed on the plaintiff.

Regarding apportionment, entry of a several judgment, and set-off are addressed in §B19 and the relevant Comments provided here:

**§B19. Assignment of Responsibility: Severally Liable Defendants**

**If one or more defendants may be held severally liable for an indivisible injury, and at least one defendant and one other party, settling tortfeasor, or identified person may be found by the factfinder to have engaged in tortious conduct that was a legal cause of the plaintiff's injury, each such party, settling tortfeasor, and other identified person is submitted to the factfinder for an assignment of a percentage of comparative responsibility.**

Comment "*k*" to §B19 and the factual illustration setting forth an example of a case between a plaintiff and three joint tortfeasors following comment "*k*" reveal that when a plaintiff settles with some but not all tortfeasors, the non-settling tortfeasor does not get a set-off for any amount.

> *k. Partial Settlements.* No rule is provided to govern a settlement with one or more but less than all severally liable tortfeasors. See § 16 and Comment *h*. Because each tortfeasor is liable only for its comparative share of the plaintiff's damages, there are no contribution claims. Because there are no contribution claims, the question of a credit for the nonsettling defendant does not arise. Nevertheless, the final apportionment of responsibility to the nonsettling defendant is identical whether the settlement occurs pursuant to the rules stated in this Track "B" or the rules stated in the other Tracks. As when joint and several liability is the governing rule, the plaintiff may recover more than the total damages determined by the factfinder as a result of making a beneficial settlement with some tortfeasors. See § 16, Comment *e*.
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> **Illustration:**
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> 5. In a suit based on a furnace explosion, A sues B, the landlord; C, the installer of the furnace; and D, the manufacturer of the furnace. The landlord (B) and the installer (C) settle with A for a total of $100,000. At trial, the factfinder assigns 20 percent responsibility to A, zero percent to the landlord (B), five percent to the installer (C), and 75 percent to the manufacturer (D) and finds that A's damages total $300,000. Judgment is entered in favor of A and against D in the amount of $225,000.

This illustration clearly shows the nonsettling defendant D did not get any set-off for the previous settlement of $100,000 from defendants B and C. The total damages awarded by the jury were $300,000 and the jury apportioned seventy-five percent (75%) fault to defendant D. Seventy-five percent of $300,000 is $225,000 and this was the amount of

the judgment.

If the defendant in the illustration above had made the same argument as some defendants have been known to make here in Georgia claiming a right to apportionment *and* a set-off, it would have moved the court to subtract $100,000 (the full amount of the prior settlement) from the $225,000 (the amount of the judgment after apportionment) so that judgment would have been entered for only $125,000. This argument has not been accepted by any jurisdiction in the United States!

## VIII.

## No Jurisdiction With An Apportionment Statute Like Georgia's Has Ever Permitted A Negligent Joint Tortfeasor To Receive An Apportionment Of Damages And A Full Set-Off For The Entire Amount Paid By A Settling Joint Tortfeasor

In the experience of this author, no defendant who has ever claimed to be entitled to both apportionment and a set-off has been able to cite any Georgia decision authorizing or approving such a windfall to a negligent party. All of the cases cited by defendants claiming the right to receive such a windfall involve issues of set-off with joint and several liability, not apportionment. None of the cases involve apportionment or issues where a jury fixes the exact amount owed by each person according to his or her degree of fault. None of the cases involve the entry of judgment severally. None of the cases involve the question of whether a defendant against whom a several judgment is to be entered is entitled to any credit for amounts paid by another person, especially when that other person could never be held liable for harm caused by anyone except himself. And none of these cases address the question of how to calculate the amount of a set-off, if any, in apportionment cases.

For over two hundred and fifty years, the policy of this state has been that wrongdoers should not profit from their wrongs. When a plaintiff settles with less than all defendants, plaintiffs take the risk that the settling defendants paid too little and the settling defendants take the risk that they may have paid too much. If the jury is permitted to apportion fault when the case proceeds to trial among the non-settling defendant and the non-party settling defendant, then under no circumstance did the settling defendant pay any amount for anyone other than their own liability for this. To hold otherwise would punish the settling defendant for settling and permit the non-settling defendant to enjoy an absurd windfall and to profit from their wrongful conduct. Moreover, to hold that a non-settling defendant is entitled to have liability apportioned by the jury and then receive "credit" for an amount paid by someone else would encourage negligent defendants everywhere to intentionally frustrate settlement and force cases to trial that never would have been tried in the past by hoping that when the verdict comes in they can avoid responsibility again by claiming someone else already paid their share of liability. Plaintiffs understand why a negligent joint tortfeasor would want to be able to hurt people and not have to pay for it and thereby profit from it, but such a tortured public policy has not been authorized by the General Assembly and would be contrary to everything meant by the motto that guides the public policy of our state in the way of Wisdom, Justice, and Moderation.

After analyzing the law in every jurisdiction in the nation, the American Law Institute (ALI) recognized that different rules apply for set-off when juries apportion fault and judgments are entered severally. Indeed, the ALI recognized the *Restatement (Second) of Torts* was outdated and did not properly address majority and minority rules dealing with apportionment issues. Consequently, the ALI produced the *Restatement (Third) of Torts, Apportionment of Liability*. Given the complete absence of authority on this question in Georgia, and if apportionment is permitted, we must turn to the *Restatement (Third) of Torts, Apportionment of Liability*, for the answer.

# Getting Too Personal

## An Analysis of *Mitsubishi Motors Corp. v. Colemon* and the Current State of Georgia's Long-Arm Statute and Personal Jurisdiction

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### I. Introduction[1]

Georgia has long had a 'specific jurisdiction' limitation on its courts, meaning that Georgia courts could only exercise personal jurisdiction over a nonresident defendant on causes of action that arose from that defendant's contacts with the state of Georgia.[2] This limitation was based on explicit language in Georgia's 'long-arm' statute, OCGA § 9-10-91, and a consistent line of cases interpreting the statute as precluding 'general jurisdiction' – personal jurisdiction over a nonresident defendant on causes of action separate and distinct from that defendant's contacts with the state of Georgia.[3] A recent case, Mitsubishi Motors Corp. v. Colemon (hereinafter "Colemon"), has upended what had been a well-settled point of law in holding that Georgia courts may in fact exercise general jurisdiction.[4]

This article analyzes the exercise of personal jurisdiction over nonresident defendants by Georgia courts, and focuses on two recent court decisions that have substantially altered how Georgia's long-arm statute is interpreted by Georgia's courts.[5] The article begins with an abbreviated history of the United States Supreme Court's major decisions relating to state courts' exercise of personal jurisdiction over nonresident defendants, particularly the three decisions in which the United States Supreme Court has discussed general jurisdiction.[6] It then briefly examines Georgia's long-arm statute and its treatment by Georgia courts, focusing on the cases limiting Georgia courts to specific jurisdiction.[7] The specific focus is on the two recent cases reinterpreting Georgia's long-arm statute, Innovative Clinical & Consulting Services, LLC v. First National Bank of Ames (hereinafter "ICCS")[8] and Colemon. The article concludes Colemon was wrongly decided, and while Georgia courts should be able to exercise general jurisdiction so as to provide Georgians with maximum

legal recourse against non-resident defendants, Georgia's long-arm statute does not currently permit it.[9]

### A. Background/Pennoyer

The United States Supreme Court has over the years used a variety of approaches to analyze the exercise of personal jurisdiction by a state over a nonresident defendant.[10] The Court has largely abandoned the 'power' theory embodied in Pennoyer v. Neff[11] and moved towards a fact-specific evaluation of whether the exercise of personal jurisdiction in a particular case would "offend traditional notions of fair play and substantial justice."[12] Of particular relevance to this paper, the United States Supreme Court has repeatedly endorsed, under certain circumstances, a state's exercise of personal jurisdiction over a nonresident defendant in a cause of action not arising from that defendant's contacts with the forum state.[13]

As every first year law student learns, Pennoyer v. Neff "for nearly a century served as the basic statement of the limits on state court jurisdiction imposed by the 14th Amendment due process clause."[14] Pennoyer embraced a "territorial power theory" that meant "a state ha[d] absolute power over defendants or property found within its territorial boundaries, regardless of the nature of the dispute."[15] This focus on territorially-based power also meant that a state had very little power over nonresidents who did not own property within its boundaries, a limitation which eventually "caused [the power theory from *Pennoyer*] to fall out of step with the realities of twentieth century life," particularly over corporate defendants.[16]

### B. International Shoe Co. v. Washington

In International Shoe Co. v. Washington, decided in 1945, the United States Supreme Court abandoned the requirement of the defendant's 'presence' in the forum State (whether real or fictive) and established that due process would only require that a defendant not present in the forum state "have certain minimum contacts with [the forum State] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[17]

In the Court's view, when a corporation conducted activities within a state, it enjoyed the "benefits and protection of the laws of that state," and the "exercise of that privilege may give rise to obligations."[18] Accordingly, in cases where "those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue."[19]

The Court then set the stage for what would come to be described as general jurisdiction when it noted that "there have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities."[20] In three decisions following International Shoe, the Court has specifically held and reaffirmed that a state court may, consistent with due process, exercise general jurisdiction, i.e. personal jurisdiction, over a nonpresent defendant on claims unrelated to the defendant's forum contacts.[21]

### C. The United States Supreme Court & General Jurisdiction

#### 1. Perkins v. Benguet Consolidated Mining Co.

In 1952, the United States Supreme Court upheld Ohio's exercise of personal jurisdiction "to enforce a cause of action not arising out of the [defendant's] activities in the state of the forum."[22] The defendant was a Philippine company whose president and principal stockholder moved to Ohio after being forced to leave the Philippines during World War II, opened an office there, and "carried on in Ohio a continuous and systematic supervision of the necessarily limited wartime activities of the company."[23] The cause of action did not arise in Ohio, nor did it relate to the corporation's activities in Ohio.[24] The Court permitted a suit "to enforce a cause of action not arising out of the corporation's activities in the state of the forum," explicitly building on International Shoe's suggestion that "continuous corporate operations within a state" that were "thought so substantial and of such a nature" would justify suit against a defendant on causes of action unrelated to the defendant's forum contacts.[25]

#### 2. Helicopteros Nacionales de Colombia, S.A. v. Hall

In 1984, the United States Supreme Court dealt with a suit in Texas against a Colombian corporation over a helicopter crash in Peru.[26] The plaintiffs claimed that the corporation's purchases of helicopters in Texas, training of its pilots in Texas, and a solitary negotiation in Texas were sufficient contacts to permit Texas courts to exercise jurisdiction, even though the suit did not arise out of and was not related to those contacts.[27] The Court held that those contacts were not "the kind of continuous and systematic general business contacts … found in Perkins," and accordingly Texas could not exercise jurisdiction over the defendant.[28]

The Court did however reaffirm the rule from Perkins that upon a showing of continuous and systematic contacts with a forum state, a defendant would be subject to suit there "[e]ven when the cause of action does not arise out of or relate to the foreign corporation's activities in the forum State."[29] In a footnote, the Court expressly used the term 'general jurisdiction' to describe the exercise of "personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum."[30]

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**3. Burnham v. Superior Court of California, County of Marin**

The final United States Supreme Court case involving general jurisdiction unanimously upheld "the constitutionality of jurisdiction over a nonresident who had been served with process while visiting the state."[31] The Court unanimously agreed that absent unusual circumstances, physical presence alone would suffice to permit the exercise of general jurisdiction over a defendant.[32] That point, interestingly, was the only "clear holding," as there was no majority opinion, with two groups of four Justices who each "emphatically rejected the other's rationale" for the outcome and Justice Stevens writing a separate opinion "declining to agree with either side."[33]

## II. Georgia

### A. History/Background

Georgia has long been a specific jurisdiction-only state. Georgia's long-arm statute (OCGA § 9-10-91) appears to only confer specific jurisdiction in that it only provides for the exercise of personal jurisdiction over causes of action "*arising from* any of the acts, omissions, ownership, use or possession enumerated."[34] While Georgia courts frequently say that they interpret the Georgia long-arm statute as extending as far as due process will permit,[35] Georgia courts have in fact (with one recent anomaly) consistently interpreted the statute as not extending as far as due process would in fact allow, i.e., permitting general jurisdiction as well as specific jurisdiction, but instead have required the cause of action to arise from the defendant's contacts with Georgia.[36] The (virtual) unanimity of Georgia courts on this topic has not, however, constrained federal courts interpreting Georgia's long-arm statute, as they routinely construe it as providing general jurisdiction, usually without even acknowledging, let alone discussing, Georgia precedent to the contrary.[37] This paper examines two recent cases which have construed Georgia's long arm statute, and concludes that the recent conclusion of a panel of the Georgia Court of Appeals that Georgia has moved to a general jurisdiction state was in error.

### B. Innovative Clinical & Consulting Services, LLC v. First National Bank of Ames

In 2005, the Georgia Supreme Court in ICCS significantly reinterpreted the Georgia long-arm statute and extended its reach. The facts of ICCS are slightly complicated. ICCS itself was a medical facility in Atlanta whose management outsourced some of its billing and collections operations to an Iowa company.[38] That Iowa company then opened two bank accounts at the First National Bank of Ames for the receipt of ICCS's receivables.[39] The accounts were supposed to remain under ICCS's exclusive control.[40] Payments were allegedly made from these accounts without permission from ICCS, and ICCS later sued the bank alleging fraud, conversion and breach of contract.[41] Notably, the "bank's only contacts with Georgia were the exchanged letters and telephone calls with ICCS regarding the accounts," as "the bank accounts were opened by an Iowa resident at an Iowa bank."[42] The trial court dismissed the bank's motion to dismiss for lack of personal jurisdiction but granted a certificate of immediate review which the Court of Appeals accepted.[43]

**1. The Court of Appeals Opinion**

The Georgia Court of Appeals rejected, on a variety of grounds, ICCS's argument that jurisdiction was appropriate under subsection one (OCGA § 9-10-91(1)) of the Georgia long-arm statute, the "transacts any business within [Georgia]" subsection.[44] First, in the part of its opinion that the Georgia Supreme Court would later overrule, the Court of Appeals held that the bank's letters to and phone calls with ICCS did not satisfy subsection one, as "mail and telephone contact alone have been held to be insufficient to establish the purposeful activity necessary for personal jurisdiction."[45]

The Court of Appeals then rejected ICCS's argument that the bank's contracts with the billing company with whom ICCS had a contract made that company the bank's agent (and that then the agent's contacts with Georgia could be attributed to the bank) as the bank's relationship with the billing company was "nothing more than that of bank and customer and [the company] was not its agent."[46] Finally, the Court of Appeals concluded that the bank's security interest in ICCS's contract payments were not sufficient because "not one of ICCS's causes of action sounding in contract is remotely related to the security interest taken by the bank."[47] This lack of connection between the bank's alleged contact with Georgia through the security interest and ICCS's causes of action was relevant (and outcome determinative) because "[f]or personal jurisdiction to be asserted over a nonresident, the litigation *must result from alleged injuries that arose out of the nonresident's activities*."[48] In other words, the Court of Appeals correctly applied the established interpretation of Georgia's long-arm statute restricting Georgia courts to only exercising specific jurisdiction.[49] The Court of Appeals then dismissed ICCS's attempts to predicate jurisdiction on either subsection two or three of the long-arm statute.[50]

**2. The Supreme Court Opinion**

The Georgia Supreme Court granted certiorari and took the opportunity to "address perceived inconsistencies in our precedents," i.e, to overrule a number of cases that had artificially narrowed the reach of subsection one of the long-arm statute.[51] The Court first reaffirmed its ruling in Gust that Georgia courts were bound to a "'literal construction' of OCGA § 9-10-91," "notwithstanding that these limiting conditions may preclude a Georgia court from exercising personal juris-

diction over the nonresident to the fullest extent permitted by constitutional due process."[52] Accordingly, it upheld the portions of the Court of Appeals opinion that found jurisdiction inappropriate under subsection two or three because "the Iowa bank did not commit a tortious act within Georgia and … does not regularly conduct or solicit business in Georgia, engage in any other persistent course of conduct in Georgia or otherwise derive substantial revenue from goods used or consumed or services rendered in Georgia."[53] The Court also noted that Georgia appellate courts had "for over 17 years … urged the Legislature to amend Georgia's long-arm statute so as to provide the maximum protection for Georgia residents damaged by out-of-state acts or omissions committed by nonresident tortfeasors" to no avail.[54]

Of more importance going forward, the Court then stated that the logic of Gust "necessarily affects the construction heretofore applied to subsection (1) of OCGA § 9-10-91."[55] The Court held that prior cases had unnecessarily limited subsection (1), e.g., as applying only to contract cases,[56] or requiring the physical presence of the nonresident in Georgia,[57] despite the fact that "there are no explicit legislative limiting conditions on subsection (1)."[58] Applying the tenet from Gust that the long-arm statute was to be literally construed, the Court held that "OCGA § 9-10-91 grants Georgia courts the unlimited authority to exercise personal jurisdiction over any nonresident who transacts any business in this State,"[59] although it further noted that it would only construe that authority as reaching as far as procedural due process permitted. [60]

### C. Mitsubishi Motors Corp. v. Colemon

The Georgia Court of Appeals case of Mitsubishi Motors Corp. v. Colemon recently broke sharply from the prior unbroken line in permitting the exercise of general jurisdiction based upon the defendant's "continuous and systematic business contact" with Georgia.[61] The defendants filed a petition for certiorari with the Supreme Court of Georgia, but the Supreme Court of Georgia denied the petition (as well as a motion for reconsideration).[62] While the exercise of general jurisdiction may well be desirable, this paper concludes that the Court of Appeals erred in Colemon in extending ICCS to find general jurisdiction for several reasons and was thus wrongly decided.

#### 1. The Decision

The facts of Colemon are classic general jurisdiction facts in that the cause of action in no way arose out of the defendant's admittedly pervasive contacts with Georgia.[63] The case stems from a car accident in Honduras involving a Mitsubishi Pajero driven by Lisa "Left-Eye" Lopes (a popular hip-hop/R&B artist).[64] Other passengers in the vehicle sued Wanda Lopes Colemon, Lopes' mother and the administratix of her estate, who in turn filed a third-party claim against Mitsubishi Motors Corporation in DeKalb County State Court.[65] Mitsubishi admitted in its answer that it transacts business in Georgia through its agent, Mitsubishi Motors North America, and that "it is in the business of designing, testing and manufacturing motor vehicles for use in Georgia."[66] Mitsubishi argued that it could not be sued in Georgia for this car crash, however, as the accident "involved a vehicle model not sold in the United States and [thus the suit] did not arise out of Mitsubishi's contacts with Georgia."[67]

The Court of Appeals nonetheless held that Mitsubishi was subject to personal jurisdiction, notwithstanding the lack of a connection between Georgia and the cause of action.[68] It first claimed ICCS held that subsection one of the Georgia long arm statute[69] was to be read as conferring all forms of personal jurisdiction permitted by procedural due process.[70] The opinion then dismissed the defendant's argument that the case did not "arise out of" their contacts with Georgia on the logic that general jurisdiction permits personal jurisdiction even through unrelated contacts.[71] It concluded by holding that the exercise of general jurisdiction in this case was consistent with due process and was justified because of the defendant's "continuous and systematic business contact" with Georgia.[72]

#### 2. Analysis

The Court of Appeals' holding that general jurisdiction is available to Georgia courts is erroneous for several reasons. Notably, the Colemon court only analyzed due process requirements for the exercise of personal jurisdiction but did not address the conflict between the preamble language in the Georgia long-arm statute ("a cause of action *arising from*")[73] and its finding that general jurisdiction was available to Georgia courts. Nor did it attempt to reconcile this new holding with the previous line of cases rejecting general jurisdiction in Georgia.[74] Presumably, the Court of Appeals intended its discussion of ICCS to serve as justification for the move away from the statutory limitation, but that step is not made explicit, nor does it appear to be in accord with ICCS itself.

In ICCS, the Supreme Court of Georgia overturned several prior cases that had artificially constrained the reach of subsection one of Georgia's long-arm statute (the transacting business subsection) and explicitly construed subsection one to reach as far as permitted by due process.[75] The Supreme Court opinion in ICCS also reaffirmed the Court's interpretation of subsection three of the long-arm statute (a tortious injury in Georgia, caused by act or omission outside Georgia), however, as not extending as far as due process permits.[76] It flatly rejected the notion

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that Georgia courts could ignore the "plain and unambiguous language" of the statute and "interpret OCGA § 9-10-91 to provide what the Legislature chose to omit."[77]

While the Supreme Court in ICCS did emphasize that subsection one should be read as "reaching … 'to the maximum extent permitted by procedural due process,'" it did not suggest this new approach overrode the statutory language that arguably keeps Georgia a specific jurisdiction state notwithstanding the new interpretation of subsection one, i.e., the "arising from" language in the preamble to OCGA § 9-10-91.[78] Read in context with the prior cases that the Court discussed and the limitations the prior cases had previously imposed, this holding should more accurately be read as simply rejecting court-created limitations on the concept of "transacting any business," such as applying only to contract cases, not as a full-fledged revolutionary reinterpretation that subsection one henceforth provides all jurisdiction possible under the due process clause.[79]

As further evidence that ICCS did not abandon the "arising from" limitation, the Georgia Supreme Court lamented the Georgia General Assembly's continued refusal "to provide the maximum protection for Georgia residents damaged by the out-of-state acts or omissions committed by nonresident tortfeasors," and also reaffirmed that separation of powers would make it "inappropriate" for the judiciary to "reject the plain language of a statute."[80] Accordingly, the implication the Colemon court apparently read into ICCS, that the requirement that the cause of action arise from the contact serving as the basis for jurisdiction was judicially abandoned, appears unjustified.

The Supreme Court in Gust rejected readings of the long-arm statute that stepped around the explicit limits in the statute despite the fact that the alternative readings would better reach towards the limits of due process.[81] The Court reaffirmed that it would continue to honor those statutorily created constraints in ICCS.[82] Both in Gust and in ICCS, the Court expressly noted that the General Assembly had chosen not to extend the long-arm statute (and hence Georgia courts' jurisdiction) as far as due process would permit.[83] Accordingly, to read ICCS to implicitly or somehow accidentally hold what it and Gust expressly disavowed is quite simply to read isolated portions of the opinion out of context.[84]

Finally, even if the Court's opinion in ICCS can correctly be read as intended to instruct lower courts to disregard the "arising from" language and move to full general jurisdiction, that portion of the opinion would be dicta and thus not binding precedent. First, the record in ICCS contained no evidence of any contacts by the defendant bank with Georgia aside from those with the plaintiff, much less 'continuous and systematic' contacts sufficient to justify general jurisdiction, meaning ICCS cannot be read as anything other than a specific jurisdiction case.[85] In fact, the Court specifically upheld the portion of the Court of Appeals' opinion holding "that the Iowa bank does not regularly conduct or solicit business in Georgia, engage in any other persistent course of conduct in Georgia or otherwise derive substantial revenue from goods used or consumed or services rendered in Georgia."[86] While the Court did not compare this to the 'continuous and systematic' test for general jurisdiction, it is difficult to imagine that these facts could satisfy that presumably higher threshold, which means general jurisdiction would not have been available in ICCS even had the Court been so inclined. There is also no suggestion in either the Court of Appeals opinion or the Supreme Court opinion that either party even raised the possibility that general jurisdiction would apply.[87] Second, as Georgia courts have routinely explained," [s]tatements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand are obiter dicta, and lack the force of an adjudication."[88] Accordingly, while it is clear that ICCS was not intended to suggest that general jurisdiction was available to Georgia courts, any such suggestion would involve an issue neither necessary to the decision nor argued to the Court, and thus textbook dicta.

## III. Conclusion

It is easy to understand why Georgia courts would like to move to exercising general jurisdiction – indeed, they have repeatedly made that desire and the rationale behind it clear in their opinions.[89] Moving to general jurisdiction (and otherwise exercising personal jurisdiction out to the limits of procedural due process) would "provide the maximum protection for Georgia residents damaged by the out-of-state acts or omissions committed by nonresident[s]."[90] The problem is that "the Legislature has chosen to retain the statutory limitations on in personam jurisdiction set forth in OCGA § 9-10-91(3)," and it would be "inappropriate" and a violation of separation of powers for the judiciary to discard them given the legislature's decision to retain them.[91] The Court of Appeals' recent decision in Colemon was in error and should be overturned, regardless of whether we might support the broader outcome, i.e., the accomplishment through judicial craft of what the Georgia General Assembly has failed to do for decades – permit Georgia residents to have maximum legal recourse against non-residents who wrong them.

The best possible solution would be for the General Assembly to amend the long-arm statute (OCGA § 9-10-91) to expressly reach as far as permitted by due process, including deleting the "arising from" language from the preamble.[92] Georgia courts would then be able to exercise all con-

stitutionally permitted personal jurisdiction, and their authorization to do so would appropriately have been enacted and approved by the legislative and executive branches. Legislative action would also create the greatest degree of certainty about the scope of Georgia courts' jurisdiction, as general jurisdiction would exist as a clear statutory matter, rather than purely as a reinterpretation of long-standing law by Georgia's intermediate appellate court.

## FOOTNOTES

[1] Portions of this material are discussed in the forthcoming Georgia State University Law Review article Getting Personal With Our Neighbors – A Survey of Southern States' Exercise of General Jurisdiction & A Proposal for Extending Georgia's Long-Arm Statute. The author graduated from the Georgia State University College of Law and is an associate at Bondurant, Mixson & Elmore, LLP.

[2] See infra notes 34-37 and accompanying text. For discussion of specific v. general jurisdiction, see infra Sections I.B,C. The commonly attributed source of the specific/general jurisdiction distinction is Arthur von Mehren & Donald Trautman, Jurisdiction to Adjudicate: A Suggested Analysis, 79 HARV. L. REV. 1121 (1966).

[3] OCGA § 9-10-91. For examples of the cases interpreting OCGA § 9-10-91 as permitting only specific jurisdiction, see infra note 36 and accompanying text. For a discussion of general jurisdiction, see ROBERT C. CASAD & WILLIAM M. RICHMAN, JURISDICTION IN CIVIL ACTIONS 139-44 (3d ed. 1998). For criticism of the concept of general jurisdiction, see generally Mary Twitchell, The Myth of General Jurisdiction, 101 HARV. L. REV. 610 (1988). For a survey of Southern states' long-arm statutes, including Georgia, see Robert L. Ashe et al., Getting Personal With Our Neighbors – A Survey of Southern States' Exercise of General Jurisdiction & A Proposal for Extending Georgia's Long-Arm Statute, 25 GA. ST. U. L. REV. ___ (2009).

[4] Mitsubishi Motors Corp. v. Colemon, 290 Ga. App. 86, 89 (Mar. 6, 2008), cert. denied, Ga. Supreme Court (June 30, 2008).

[5] See infra section II.

[6] See Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952); Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984); Burnham v. Superior Court of California, 495 U.S. 604 (1990). For discussion of these cases, see infra text accompanying notes 23-34 in section I.A.

[7] See infra section III.

[8] Innovative Clinical & Consulting Servs. v. First Nat'l Bank of Ames, 279 Ga. 672, 674-75 (2005).

[9] See infra Section IV.

[10] See CASAD & RICHMAN, supra note 3 at 67-178.

[11] Pennoyer v. Neff, 95 U.S. 714 (1878).

[12] The quote is from International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945), discussed infra at text accompanying notes 17-21.

[13] See infra notes 22-32 and accompanying text.

[14] CASAD & RICHMAN, supra note 3 at 68.

[15] Twitchell, supra note 3, at 619.

[16] CASAD & RICHMAN, supra note 3, at 80.

[17] International Shoe v. Washington, 326 U.S. 310, 316 (1945).

[18] Id. at 319.

[19] Id..

[20] Id. at 318; see also Casad & Richman, supra note 3, at 139-44 and generally Twitchell, supra note 3.

[21] See Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952), Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984); Burnham v. Superior Court of California, 495 U.S. 604 (1990).

[22] Perkins, 342 U.S. at 446.

[23] Id. at 448.

[24] Id. at 438.

[25] Id. at 446, citing and quoting International Shoe Co. v. Washington, 326 US 310, 318 (1945).

[26] Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 409-10 (1984).

[27] Id. at 411, 415.

[28] Id. at 415-16, 418-19.

[29] Id. at 414.

[30] Id. at 414, n. 9.

[31] The case is Burnham v. Superior Court of California, 495 U.S. 604 (1990), and the quote is from CASAD & RICHMAN, supra note 3 at 122-23.

[32] CASAD & RICHMAN, supra note 3 at 87.

[33] Id. at 123, 127

[34] OCGA § 9-10-91 (emphasis added). It reads:

"A court of this state may exercise personal jurisdiction over any nonresident or his executor or administrator, as to a cause of action arising from any of the acts, omissions, ownership, use, or possession enumerated in this Code section, in the same manner as if he were a resident of the state, if in person or through an agent, he:

(1) Transacts any business within this state; [subsection one]

(2) Commits a tortious act or omission within this state, except as to a cause of action for defamation of character arising from the act; [subsection two]

(3) Commits a tortious injury in this state caused by an act or omission outside this state if the tort-feasor regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state; [subsection three]

(4) Owns, uses, or possesses any real property situated within this state; [subsection four] or

(5) With respect to proceedings for alimony, child support, or division of property in connection with an action for divorce or with respect to an independent action for support of dependents, maintains a matrimonial domicile in this state at the time of the commencement of this action or, if the defendant resided in this state preceding the commencement of the action, whether cohabiting during that time or not. This paragraph shall not change the residency requirement for filing an action for divorce." [subsection five]

For the rest of the article, I will refer to the first paragraph of the statute (the unnumbered one) as "the preamble" and the numbered paragraphs as "subsection [number]," i.e., the paragraph which reads "(1) Transacts any business within this state" will be referred to as "subsection one."

[35] See, e.g., SES Indus., Inc. v. Intertrade Packaging Mach. Corp., 236 Ga. App. 418, 420 (1999) (explaining that Georgia courts "have consistently held that our Long-Arm Statute confers jurisdiction over nonresidents to the maximum extent permitted by due process.").

[36] See, e.g., Innovative Clinical & Consulting Servs. v. First Nat'l Bank of Ames, 279 Ga. 672, 674-75 (2005) (discussing how the "plain and unambiguous language" in subsection three of the Georgia long-arm statute, and Georgia courts' consistent "literal construction" of it, have precluded Georgia courts "from exercising personal jurisdiction over the nonresident to the fullest extent permitted by constitutional due process."); Gust v. Flint, 257 Ga. 129, 130 (1987); Aero Toy Store, LLC v. Grieves, 279 Ga. App. 515, 521 (2006) (noting requirement that suit must arise out of defendant's contacts with Georgia and that accordingly Georgia's long-arm statute did not authorize the exercise of general jurisdiction); Pratt & Whitney Canada, Inc. v. Sanders, 218 Ga.App. 1, 3, 4-5 (1995) (explaining that the exercise personal jurisdiction over a nonresident "requires that the cause of action arise out of its activities within [Georgia]," and specifically rejecting the dissent's argument that general jurisdiction could be used); Shellenberger v. Tanner, 138 Ga.App. 399, 407 (1976) (discussing prior version of Georgia's long-arm statute which also contained the "arise from" requirement).

[37] See, e.g., Nippon Credit Bank, Ltd. v. Matthews, 291 F.3d 738, 745-49 (11th Cir. 2002) (exercising general jurisdiction over a Florida defendant in Georgia using the Georgia long-arm statute); Francosteel Corp. v. M/V Charm, 19 F.3d 624, 627 (11th Cir. 1994) (claiming "Georgia's long arm statute confers in personam jurisdiction to the maximum extent allowed by the due process clause of the federal Constitution"); see also Innovative Clinical & Consulting Servs., 279 Ga. at 674 n.2 (discussing federal courts' continued "erroneous" interpretation of the Georgia long-arm statute as extending as far as federal due process will permit). But see Baynes v. George E. Mason Funeral Home, Inc., Civil Action No. 1:07-CV-2805-JOF, 2008 WL 5191808, at *3 (N.D. Ga. Dec. 10, 2008) (discussing ICCS and Aero Toy Store in holding that the Georgia long arm statute required that the cause of action arise from or be connected to the defendant's contact with Georgia).

[38] First Nat'l Bank of Ames v. Innovative Clinical & Consulting Servs., 266 Ga. App. 842 (2004), overruled by Innovative Clinical & Consulting Servs., 279 Ga. at 676.

[39] First Nat'l Bank of Ames, 266 Ga. App. at 842-43.

[40] Id.

[41] Id. at 843.

[42] Id. at 844.

[43] Id. at 843.

[44] First Nat'l Bank of Ames, 266 Ga. App. at 844-46, discussing OCGA § 9-10-91(1).

[45] Id. at 844. See also the Court's discussion of its inability to discard prior precedent on this point despite disagreeing with it. Id. at 846.

[46] Id. at 844-45.

[47] Id. at 845.

[48] Id. (emphasis added).

[49] See supra note 36.

[50] Id. at 845-46, discussing OCGA §§ 9-10-91(2,3).

[51] Innovative Clinical & Consulting Servs., 279 Ga. at 673, discussing OCGA § 9-10-91(1).

[52] Id. at 673-74.

[53] Id. at 674, 676.

[54] Id. at 674.

[55] Id. at 675.

[56] Id. at 675, discussing Whitaker v. Krestmark of Alabama, Inc., 157 Ga. App. 536 (1981).

[57] Innovative Clinical & Consulting Servs., 279 Ga. at 675, discussing Wise v. State Board for Exam., Qualification & Registration of Architects, 247 Ga. 206, 209 (1981).

[58] Innovative Clinical & Consulting Servs., 279 Ga. at 675.

[59] Id.

[60] Id.

[61] Mitsubishi Motors Corp. v. Colemon, 290 Ga.App. 86, 88-89 (Mar. 6, 2008), cert. denied, Ga. Supreme Court (June 30, 2008). The petition for certiorari was docketed March 25, 2008, and was docket number S08C1164. The Supreme Court of Georgia denied the petition on June 30, 2008, and denied a motion for reconsideration on July 25, 2008.

See the Supreme Court of Georgia's electronic docket, available at: http://www.gasupreme.us/docket_search/results_one_record.php?docr_case_num=S08C1164. For some of the previous cases holding that Georgia was a specific jurisdiction only state, see supra note 37.

[62] See supra note 61.

[63] Mitsubishi Motors Corp., 290 Ga. App. at 87-88.

[64] Id. at 86. Ms. Lopes was the former girlfriend of Andre Rison who burned his house down. See Jane Ridley, Rise of the Bad Girl Rappers, N. Y. DAILY NEWS, July 17, 2007 (noting Ms. Lopes' resulting arson conviction).

[65] Mitsubishi Motors Corp., 290 Ga. App. at 86.

[66] Id. at 87.

[67] Id. at 88.

[68] Id. at 88-89.

[69] OCGA §9-10-91(1).

[70] Mitsubishi Motors Corp., 290 Ga. App. at 87, discussing OCGA §9-10-91(1) and Innovative Clinical & Consulting Servs., 279 Ga. 672.

[71] Mitsubishi Motors Corp., 290 Ga. App. at 88-89, citing Helicopteros Nacionales de Colombia, discussed supra notes 27-31.

[72] Mitsubishi Motors Corp., 290 Ga. App. at 88-89, citing Helicopteros Nacionales de Colombia, discussed supra notes 27-31.

[73] OCGA § 9-10-91 (emphasis added).

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# A Defending Lawyer's Conferences With a Party Deponent During A Deposition May Contravene Discovery of the Truth

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## Introduction

In today's practice of law, depositions are no longer considered pedestrian side paths en route to trial. Of course, there are many discovery tools that may precede the deposition (interrogatories, request for production, request for admission, etc), but such tools involve the careful supervision of the deponents' lawyers and, at the very minimum, are filtered through the prism of their lawyers' thought and reasoning processes. Few would disagree that discovery, without the attorneys active involvement, would trump the mandate that a lawyer must zealously represent his client. Even considering that the vast majority of civil cases will terminate their courses before trial, the mere prospect of a trial necessitates that lawyers engage in the arduous task of preparing for the long haul. The importance of the deposition is highlighted by the number of cases which never actually make it to trial. The United States Department of Justice Bureau of Statistics reports that "98,786 tort cases were terminated in U. S. District Courts during fiscal years 2002 and 2003."[1] However, only two percent were tried before a judge and jury.[2] Because so few cases reach trial, the importance of the deposition is further magnified, thus making this discovery device a key component in a fair and final resolution of a dispute. Against the backdrop of the likelihood that the vast majority of cases will be resolved without a trial, it is vital that counsel treat the deposition as the cornerstone in evaluating the merits of a case. "The primary purpose of the deposition is to obtain discovery,"[3]

> Depositions serve other purposes as well the memorization, the freezing, of a witnesses' testimony at an early stage of the proceeding, before that witnesses' recollection of the events at issue either has faded or has been altered by interfering events, other discovery, or the helpful suggestion of lawyers.[4]

This article will focus on the importance of obtaining unfiltered testimony of deposition witnesses under cross-examination, and on the extent to which the Federal Rules of Civil Procedure, the Federal Rules of Evidence and the Local Rules of the District Courts in Georgia circumscribe the defending lawyer's interference during cross examination.

### The Federal Rules

Federal Rule 30 governs depositions and the terms and rules under which deposition testimony may be taken. Rule 30 provides that: "[a] party may take the testimony of any persons, including a party, by deposition upon oral examination without leave of court except as provided in paragraph (2)."[5] Rule 30(d) grants the

court authority to limit the scope of depositions.[6] The Federal Rules of Civil Procedure unequivocally vest courts with broad discretion to control all aspects of discovery, including the taking of depositions. Federal Rule 16 grants courts oversight and authority over the scheduling and planning of the means, methods, and manner of discovery.[7] Federal Rule 26(f) mandates the parties to specify the subject matter and limitations of discovery.[8] All phases of examination during depositions are subject to control of the court, which has the discretion to make orders necessary to prevent the abuse of the discovery and deposition process.[9]

Federal Rule 30(c) governs cross-examination and objections. In pertinent part, Rule 30(c) provides: "examination and cross-examination of witnesses may proceed as permitted at trial under provisions of the Federal Rules of Evidence except Rules 103 and 65."[10] Unmistakably, the drafters of the Federal Rules demonstrate a clear intent that cross-examination during a deposition should proceed as it would occur in the course of a trial supervised by a judicial officer. A lawyer taking a deposition is permitted to conduct a thorough and sifting cross-examination of any adverse deponent. Cross-examination during a deposition should be treated no differently than during a trial.

In the case of Hall v. Clifton,[11] the District Court in the Eastern District of Pennsylvania decided the question of whether or not a defending lawyer and the deponent can engage in private conversation during a deposition.

In this case, Defendant's counsel described the deposition to the Plaintiff-deponent after he had been sworn. Defendant's counsel then informed the Plaintiff that he would clarify any questions Plaintiff did not understand. Plaintiff's counsel interjected to the Plaintiff that "at any time if you want to stop and talk to me, all you have to do is indicate that to me."[12] Counsel for the defendant replied "(t)his witness is here to give testimony, to be answering my questions, and not to have conferences in order to aid him in developing responses to my questions."[13] Two interruptions by plaintiff's counsel ensued, and defense counsel lodged objections. The deposition was suspended and the intervention of the Court was sought to resolve the dispute. Counsel were ordered to submit briefs to the Court. The Court held "that a lawyer and client do not have absolute right to confer during the course of the client's deposition."[14]

"The fact that there is no judge in the room to prevent private conferences does not mean that such conferences (between deponent and counsel) should or may occur."[15] The Court reasoned that the basis for disallowing private conferences is simply to avoid the appearance of altering the truth.[16] The United States District Court for the Eastern District of New York issued a standing order mandating that "(a)n attorney for a deponent shall not initiate a private conference with the deponent during the actual taking of a deposition, except for the purpose of determining whether a privilege should be asserted."[17] The District Court notes that such conferences present an insidious evil because "the examining attorney is not privy to the private conferences."[18] Neither the Federal Rules nor the advisory committee elaborates as to the scope or limitations on cross-examination during a deposition. The federal and state courts have deemed cross-examination a fundamental right that should proceed unhampered except when necessary to curtail abuse.[19] Given the leeway provided to lawyers in conducting cross-examination during a trial, there is no legal basis for imposing limitations on cross-examination during a deposition except for the imposition of a recognized privilege. The nature of the proceeding does not alter the purpose of cross-examination. From a pragmatic vantage point, however, Federal Rule 30(c) requires that a deposition proceed irrespective of objections. Rule 30(c) further provides:

> All objections made at the time of the examination to the qualifications of the officer taking the deposition, to the manner of taking it, to the evidence presented, to the conduct of any party, or to any other aspect of the proceedings shall be noted by the officer upon the record of the deposition; but the examination shall proceed, with the testimony being taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.[20]

Objections related to the conduct of any party or any other aspect of the proceeding shall be noted "but the examination shall proceed" Id. This mandate of Rule 30(c) requires the completion of the proceeding subject to a lawyer's objections. Not only does Rule 30 encourage efficiency by compelling the lawyers to complete the deposition, but the Rule also encourages civility amongst lawyers by requiring evidentiary objections be "in a nonargumentative and nonsuggestive manner."[21]

The objecting party must lodge the objection and proceed with the deposition. If the conduct of the offending party "impedes" or "delays" or "has frustrated the fair examination on the deponent,"

*continued next page*

sanctions may be imposed.[22] The remedies available to the non-offending attorney are provided in (d)(2) which states that the court may impose an appropriate sanction, "including the reasonable costs and attorney's fees incurred by any parties as a result thereof."[23]

**Stipulations of Counsel**

Frequently, prior to beginning a deposition, lawyers enter into the "standard" or "usual" stipulations regarding objections. This rote exchange at the beginning of a deposition, if strictly adhered to, may waive the right to object to clear violations of the Federal Rules. Stein writes there are "only two" stipulations to which counsel should agree:

> [a]ll objections, except those as to form and foundation are preserved until trial; and the right to read and sign, which is reserved by the defender or requested by the questioner."[24]

Objections under the Federal Rules are governed by Rule 32.[25]

Form and foundation objections can be easily responded to and rectified by the deposing lawyer. Do lawyer conferences during cross-examination cover "a party's conduct, or other matters that might have been corrected at the time"? F.R.C.P. 32(d)(3)(B). Arguably it does and, therefore, any such objections must be made if only to preserve the record thereby subsequently allowing for the remedies provided under Rule 30(d). A plain reading of Rule 32 should warn lawyers that a deponent's conversations with his lawyer while the deponent is under cross-examination must be objected to or may otherwise be waived.

Clearly, at the outset of a deposition a lawyer should not stipulate that a deponent may confer with counsel at any time. Hall imposes a duty upon counsel to object to any suggestion that a deponent may stop the deposition to confer with counsel unless "the conferences are necessary to make a determination of whether or not a privilege must be interposed."[26] At the outset of a deposition, lawyers must be mindful that stipulations must never be general, must be thoroughly fleshed out, and must recognize the impact of the Federal Rules of Civil Procedure regarding waiver and objections.

**Conferences Between Lawyers And Client During The Deposition**

Generally speaking, conferences between the attorney and a party deponent should not take place during the deposition. However, there is no specific Federal rule expressly prohibiting such conferences. One explanation for the lack of a specific rule regarding such discussions may be found in the stipulations made between counsel prior to commencing a deposition. As noted above, many potential obstacles during a deposition are avoided via stipulation. However, lawyers must articulate stipulations with particularity and be cognizant of the application of Federal Rule 32. Given that during deposition many lawyers tend to be conciliatory, the failure to carefully articulate the particulars of stipulations prior to beginning a deposition could prove costly.

During the deposition of a party deponent, it is disconcerting to observe the defending lawyer conferring with the deponent during questioning. Attorney-client privilege aside, it is generally acknowledged that "private conferences between deponents and their attorneys during the taking of the deposition are improper."[27] The primary rationale for the Court in Hall, supra, et al., holding that conferences between a deponent during a deposition are improper is because of the need "to insure that the testimony taken during a deposition is completely that of the deponent, rather than a version by the deponent's lawyer."[28] The Hall Court's rationale implicitly invokes the underlying purpose of the rule of sequestration.[29] The nexus between the rule of sequestration and cross-examination emanates from the general policy that witness testimony must be free from fabrication and undue influence. The clear purpose of the rule is to "prevent the shaping of testimony by one witness to match that of another, and to discourage fabrication and collusion."[30] A combination of the rule of sequestration and general principles of cross-examination elucidates the interrelationship of these issues. The cross-examination of a party deponent should occur unfettered by his attorney except in instances of abuse.The U.S. Supreme Court, in Alford v. United States, stated "cross-examination of a witness is a matter of right that a court should abridge only to curb abuse."[31] Alford also recognized that prejudice may ensue from the denial of a lawyer's ability to properly cross-examine a witness.[32] Courts in Georgia also recognize the right of counsel to cross-examine a witness unhampered by opposing counsel.[33] Given the discretion provided to counsel during cross-examination and the acknowledgement that cross-examination is the "greatest legal engine invented for the discovery of the truth,"[34] neither the courts nor the Federal Rules authorize the interruption of cross-examination by a deponent's counsel. Such interruptions (save for an objection based on privilege), tend to stymie the development of the facts to alter the truth and contravene the notion that depositions should be conducted "under the same testimonial rules as are trials."[35]

**Georgia District Court Local Rules**

The local rules of each of Georgia's District Courts provide general commentary regarding deposition testimony. However, neither of the District Courts' Local Rules particularly circumscribe lawyer and deponent conferencing while the deponent is

under cross-examination during a deposition. The Standards of Conduct contained in the Local Rules of the Middle District of Georgia touch upon the issue. Standards of Conduct 5(g), (h) and (i) construed collectively, curtail a deponent's lawyer from molding the deponent's testimony during the deposition. Middle Dist. Local Rules, Standard of Conduct 5(g) provides: [a] lawyer defending a deposition should limit objections to those that are well founded and necessary for the protection of the clients' interest. A lawyer should bear in mind that most objections are preserved and need be interposed only when the form of a question is defective or privileged information is sought.

Standard of Conduct 5(g) encourages efficiency in taking depositions by suggesting that objections be limited and interposed to specific instances.[36] Standard of Conduct 5(h) mandates that "while a question is pending, a lawyer should not, through objections or otherwise, coach a deponent or suggest answers."[37] Standard 5(h) is the only express prohibition against coaching a deponent found in the local rules of Georgia's District Courts. It, however, stops short of forbidding all coaching of a deponent. The elimination of the clause "while a question is pending" would provide the precise instruction necessary to lawyers that would forbid the skewing of testimony by a deponent who confers with counsel during cross-examination. A redacted Standard 5(f) merged with Standard 5(i) states:

> [a] lawyer should not direct a deponent to refuse to answer questions unless he or she has a good faith basis for claiming privilege, for seeking a protective order, or for enforcing a limitation imposed by the court.[38]

The reconstruction of Standard 5(h) merged with 5(i) would provide an express prohibition against objections and conferences during depositions interposed to mold, influence, alter or fabricate the testimony of a deponent under cross-examination. The Court in Hall cites In Re Domestic Air Transp. Antitrust Litig., an unreported case in the Northern District of Georgia that held

> private conferences between deponents and their attorneys during the taking of a deposition are improper unless the conferences are for the purpose of determining whether a privilege should be asserted.[39]

## Conclusion

Depositions are a vital tool in shaping the posture of a case for either settlement or trial. The importance of depositions is magnified when viewed against the backdrop that only a small percentage of cases are actually tried. When a lawyer evaluates a case once discovery has been completed, depositions are likely the single most important component considered in whether or not a case should be settled. While there is no explicit Federal Rule enjoining a defending lawyer from engaging in private conversations with a deponent during a deposition, a clear reading of the purpose and scope of cross-examination coupled with the rule of sequestration strongly suggests that such conversations contravene the search for the truth. While stipulations of counsel at the beginning of a deposition operate to forestall a defending lawyer's conferences with a deponent during a deposition to have the desired effect, stipulations must be clearly stated on the record. The dearth of case law is indicative that district courts have been effective in either requiring that lawyers resolve discovery issues without resorting to the courts or that courts have stepped in early and nixed such disputes. Moreover, the vast number of cases settled prior to trial may have also played a role in the relatively small number of reported cases dealing with the issue of deponent-lawyer conferences during discovery. With the foregoing in mind, the deposition of a party opponent must be safeguarded against coaching of the deponent, suggesting answers, conferencing with counsel during cross-examination or otherwise obstructing the deponent's can-

**FOOTNOTES**

1 Dept. of Justice, Bureau of Statistics (May 2005).

2 *Id.*

3 Klien, Deposition Guidebook, 11

4 *Hall v. Clifton Precision, a Division of Litton Systems, Inc.* 150 FRD 525(E.D. Pa 1993)

5 F.R.C.P. Rule 30(a)(i)

6 F.R.C.P. Rule 30(d)

7 F.R.C.P. Rule 16

8 F.R.C.P. Rule 26(f)

9 8 Wright and Miller, Federal Practice and Procedure § 2113, 2116 (1971)

10 F.R.C.P. Rule 30(c)

11 *Hall v. Clifton, Id.* at 526

12 *Id.*

13 *Id.*

14 *Id.*

15 *Id.* at 528

16 *Id.*

17 Standing Order of the Court on Effective Discovery in Civil Cases, 102 FRD 339, 351, No. 13 (E.D.N.Y. 1984)

18 *Id.* at 351

19 *Lewis v. Emory University,* 235 Ga.App. 811, 509 SE 2d 635 at 819 (1998); *Alford v. United States,* 282 U.S. 687, 691 51 S. Ct. 218, 75 L.ED. 624 (1931)

20 F.R.C.P Rule 30 (c)

21 F.R.C.P. Rule 30 (d)(1)

22 F.R.C.P. Rule 30 (d)(2)

23 *Id.*

24 Stein, Depositions and Discovery, ALI ABA p. 6 (2007).

25 The preservation of objections other than form and foundation is covered under Fed. R. Civ. P. 32(d)(3)(A) and (B) which provides : Rule 32. Using Depositions in court Proceedings

(d) Waiver of Objections.

(3) To the Taking of the Deposition.

(A) Objection to Competence, Relevance, or Materiality
An objection to a deponent's competence—or to the competence, relevance, or materiality of testimony—is not waived by a failure to make the objection before or during the deposition, unless the ground for it might have been corrected at the time.

(B) Objection to an Error or Irregularity. An objection to an error or irregularity at an oral examination is waived if:

(i) it relates to the manner of taking the deposition, the form

*continued page 40*

## *2009*

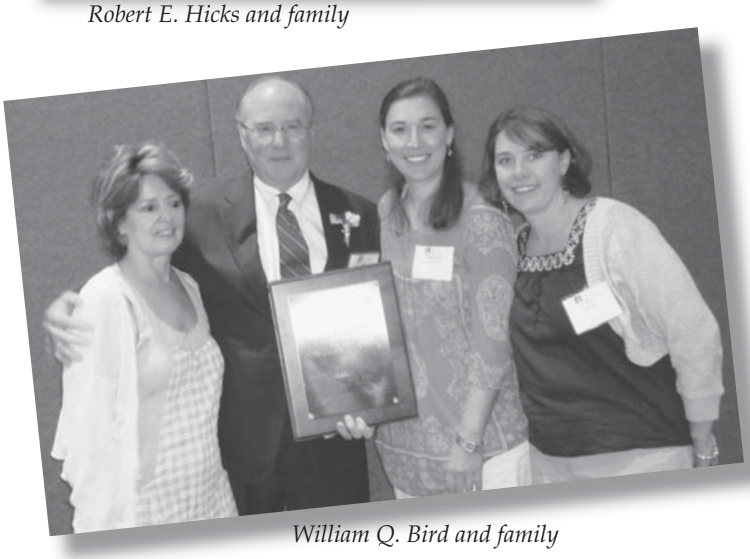
# Tradition of Excellence Breakfast and Reception

**June 6, 2009 ◆ Amelia Island Plantation ◆ Amelia Island,Georgia**

*A full house for the Tradition of Excellence breakfast*

*Robert E. Hicks and family*

*Judge G. Alan Blackburn and family*



*William Q. Bird and family*

*Jonathan C. Peters and family*

*(L-R)Outgoing Chair Adam Malone receives the traditional bottle of champagne from incoming Chair Pope Langdale*

*(L-R)Evelyn and Pope Langdale*

*Everyone enjoyed the buffet*

*(L-R)Bob Finnell and Bill Bird*

*(L-R)Sam Olens and Judge Blackburn*

*(L-R)John Timmons and Jay Cook*

*(L-R)Bill Bird and Jonathan Peters enjoy the party*

## FOOTNOTES - Getting Too Personal

*continued from page 33*

[74] See supra note 37.

[75] Innovative Clinical & Consulting Servs., 279 Ga. at 675-76, discussed supra notes 39-59 and accompanying text, construing OCGA § 9-10-91(1). See also discussion of ICCS in Aero Toy Store, 279 Ga. App. at 520-21.

[76] Innovative Clinical & Consulting Servs., 279 Ga. at 674-75, discussing OCGA § 9-10-91(3).

[77] Id.

[78] Id. at 675; see also discussion of Pratt & Whitney Canada, Inc. in Aero Toy Store, 279 Ga. App. at 521.

[79] See text accompanying notes 54-59.

[80] Innovative Clinical & Consulting Servs., 279 Ga. at 674-75.

[81] See Gust, 257 Ga. at 130.

[82] See discussion of Gust's holding in Innovative Clinical & Consulting Servs., 279 Ga. at 673-74 (holding that Gust "reinstated the difference between subsections (2) and (3) established by the literal language of the statute…. notwithstanding that these limiting conditions may preclude a Georgia court from exercising personal jurisdiction over the nonresident to the fullest extent permitted by constitutional due process").

[83] See Gust, 257 Ga. at 130 (Gregory, J., concurring & Smith, J., dissenting); Innovative Clinical & Consulting Servs., 279 Ga. at 674-5.

[84] See Gust, 257 Ga. at 130 (Gregory, J., concurring & Smith, J., dissenting); Innovative Clinical & Consulting Servs., 279 Ga. at 674-5.

[85] Innovative Clinical & Consulting Servs., 279 Ga. at 676 (briefly discussing defendant's contacts with Georgia and directing readers to the Court of Appeals opinion for further explanation of those contacts); First Nat'l Bank of Ames v. Innovative Clinical & Consulting Servs., 266 Ga. App. 842, 842-43 (2004) overruled by Innovative Clinical & Consulting Servs., 279 Ga. at 676.

[86] Innovative Clinical & Consulting Servs., 279 Ga. at 676.

[87] Id.

[88] Metropolitan Prop. & Cas. Ins. Co. v. Crump, 237 Ga. App. 96, 98 (1999). See also Zepp v. Brannen, 283 Ga. 395, 397 (2008); Palmer v. State, 262 Ga. 466, 468 (2007).

[89] See, e.g., Innovative Clinical & Consulting Servs., 279 Ga. at 674; Gust, 257 Ga. at 130 (Gregory, J., concurring & Smith, J., dissenting); Phears v. Doyne, 220 Ga. App. 550, 552 (1996) (Beasley, C.J., concurring specially).

[90] Innovative Clinical & Consulting Servs., 279 Ga. at 674. See also E. R. Lanier, Long Arm, Short Reach: The Dilemma of Georgia's Long Arm Statute, The Verdict, Dec./Jan. 1990, at 22.

[91] Innovative Clinical & Consulting Servs., 279 Ga. at 674.

[92] See Ashe et al., supra note 3.

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## FOOTNOTES - A Defending Lawyer's Conferences

*continued from page 38*

of the question or answer, the oath or affirmation, a party's conduct, or other matters that might have been corrected at that time; and

(ii) it is not timely made during the deposition.

[26] *Hall v. Clifton Precision, a Division of Litton Systems, Inc.,* 150 FRD 525, 527 62 US 10 (1993)

[27] *Hall v. Clifton Precision, a Division of Litton Systems, Inc.,* 150 FRD 525, 528 (E.D. Pa 1993 p.3)

[28] *Id.* at 527

[29] The Rule of Sequestration is found in Fed. R. Evid. 615 and provides: At the request of either party, or on its own motion, the court shall order the exclusion of witnesses so that they cannot hear the testimony of any other witnesses in the case.

[30] *Miller v. Universal Studios, Inc.,* 650 F.2d 1365, 1372 (5th Cir. 1981)

[31] *Alford v. United States,* 282 U.S. 687,691 51 S. Ct. 218, 75 L.ED. 624 (1931)

[32] *Id.* at 692

[33] See generally, *Lewis v. Emory Univ.,* supra. and *Eason v. State*, 260 Ga. 445, 396 S.E. 2d 492 (1990)

[34] *California v. Green,* 399 U.S. 149, 158, 90 S. Ct. 1930, 1935, 26L. Ed. 2d 489 (1970), quoting S Wigmore, Evidence § 1367.

[35] *Hall, Id.* at 528

[36] U.S. Dist. Court, Middle Dist. Of Georgia, Local Rules Standard of Conduct 5(g).

[37] Id, Standard of Conduct 5(h).

[38] Id, Standard of Conduct 5(i).

[39] In Re Domestic Air Transp. Antitrust Litigation., 1992 – 1 Trade Cases 69, 731, 1990 WL 358009 (N.D. GA Dec. 21, 1990)

## GPTS MEMBERS ONLY LISTSERV ANNOUNCEMENT

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The GPTS listserv will be a private listserv. We intend to use this listserv as a communication tool among all members to assist them in their practice and to share legal knowledge among members. You will be able to seek assistance from other members across the state for various legal issues that arise. It will also be used for section business, news and events.

The listserv will be monitored for appropriate messaging, and should not include messages which uses inappropriate language, is inflammatory, is derogatory towards other bar members nor should it be used for any type of political gain. We reserve the right to remove any members from the listserv for any of the reasons noted above. Unlike many commercial listserves, there are no advertisements associated with this listserv.

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2). Please make sure your e-mail spam filter is adjusted to allow e-mails from our new listserv provider's domains: lawhelp.org and probono.net.

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