



2013

Tradition of Excellence Awards



“Tradition of Excellence” awards were presented at the Section breakfast June 21st in Hilton Head. Pictured from left-to-right : Section Chair Laura Austin, Thomas S. Carlock, Atlanta, (Defense) Mary A. Prebula, Duluth, (General Practice) Judge William L. McMurray, Jr. Atlanta, (Judicial) and Eugene “Bo” Chambers, Jr. Atlanta (Plaintiff)

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AND
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CALENDAR CALL

"Georgia's Largest Law Firm"

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Laura Austin
Section Chair



REMARKS FROM OUTGOING CHAIR

I want to congratulate all of our exceptional Tradition of Excellence candidates and our 2013 winners: Mary Prebula for our General Practitioner, Tom Carlock as our Defense Attorney, Eugene P. (Bo) Chambers, Jr. as Plaintiff's Attorney and Judge William L. McMurray, Jr. as Honorable Judge. I was touched and amazed at the accomplishments of my fellow lawyers, feeling rather *de minimus* in my own endeavors throughout my career, but it is our profession as a whole that benefits from the outstanding work of these esteemed colleagues as well as the clients they serve

It has been my pleasure to serve our General Practice and Trial Section this year. I didn't do quite as well as I had hoped on our day of service, but we were able to served over 220 clients throughout the state. I am forever indebted to those who championed this cause with me and gave of their time and talents to assist – THANKS TO ALL OF YOU!!!!!!

And, as usually happens, my goals and aspirations to begin an

active role in leading our youth in basic understanding of the law from middle school through high school didn't quite get moving, but I won't give up. I met a wonderful group of people who were engaging and had much wisdom to offer in how to get going so that now that the plan has been laid out, it should be easier to implement. Just need a little more time.

Our membership rosters haven't risen by 25% or more as I had hoped, but we'll keep trying.

As I close my time as chair of this section, I feel the need to thank Betty Simms, our administrator of the section and to tell you what you probably don't know.....nothing would get done without Betty behind the scenes working and directing the flow of information and tasks. She is to be commended and recognized for her tireless efforts to keep us moving and on track.

I'd also like to thank those who helped us make some changes. We now are able to have a Membership Certificate emailed to each member

requesting same thanks to Doug Middleton's suggestion and our Bar's IT Guru, Derrick who made it happen.

Our Calendar Call is moving along and we feel honored to publish the articles brought in from our members. Each one of you should champion a topic and submit – it really is valuable for our membership.

Last on the agenda is the upcoming seminar that I will be helping to put together which will be held in March down at Callaway Gardens. We're hoping to make it entertaining, enlightening and engaging for both our attorneys and their families. The butterflies should be out and we're hoping to have a South African Safari evening that will be wonderful for the whole family.

Again, I thank all of you for supporting me during this year and I look forward to supporting our new chair and our section as we move forward. Most sincerely, Laura Austin, Esq.

LETTER TO THE MEMBERSHIP FROM INCOMING CHAIRMAN:

James W. Hurt, Jr.



I am honored to serve as this year's Chairman of the General Practice and Trial Section, "Georgia's Largest Law Firm." We are 2000 plus members strong, and for good reason: we are the only section in the any of the bar associations of any state that combine general practice and trial aspects of the practice of law.

And that makes sense. Once we leave the perimeter of Atlanta and proceed into the less populated areas of Georgia, the concept of general practice accompanied with the procedures of trial become the true reality of the practice of law. Members of this section know well the concept of the general practice. My father, James W. Hurt, Sr., is the master of the general practice, doing everything from advising the local bank's board of trustees to trying a road wreck case before a Crisp County jury. He has been a general

practitioner and a trial lawyer since 1968.

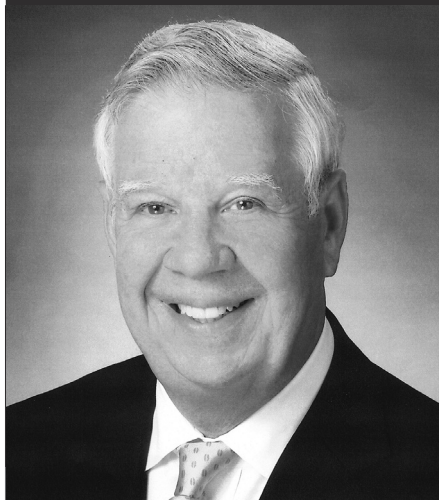
I was recently called upon by my local bar association to present on the topic of our right to a civil trial by jury to about 30 citizens of my community, and it gave me an opportunity to reflect on what a powerful right it truly is, and why we as lawyers, must fight to protect it. Our founding fathers considered our right to a jury so sacrosanct that they put it beyond the reach of the legislature and protected it by making it the Seventh Amendment of the Bill of Rights. In Joseph Story's 1833 treatise Commentaries on the Constitution of the United States, he wrote, "[I]t is a most important and valuable amendment; and places upon the high ground of constitutional right the inestimable privilege of a trial by jury in civil cases, a privilege scarcely inferior to that in criminal cases, which is conceded by all to be essential to political and civil liberty." But the real meat of the Seventh Amendment lies in the powerful truth that that the jury is the final arbitrator of our innocence or guilt, not a judge, not another court. And once these facts are determined by the fellow members of our community, no-one can undo it. The true power of remains in the people. As members of the General Practice and Trial Section, we fight for our clients to retain this Constitutional right, whether plaintiff or defense, corporate lawyer or solo practitioner.

In this edition of Calendar Call, we honor four esteemed members of our Section who embody our clients right

to a trial by jury. We will continue in the footsteps of excellence and follow the examples set by Thomas S. Carlock (Defense), Mary A. Prebula (General Practice), Judge William L. McMurray, Jr. (Judicial), and Eugene P. "Bo" Chambers, Jr. (Plaintiff) in meeting the needs and exceeding the expectations of our clients and in keeping the right to a trial by jury inviolate.

DEFENSE

THOMAS CARLOCK



Introduced by
Johannes S. Kingma

Tradition of Excellence Award

Tom Carlock has continued the tradition of legal excellence for more than 40 years.

School

Tom grew up in Atlanta and graduated from North Fulton High School, where he was president of the student body. He was the leading scorer in Atlanta high school basketball his senior year. Tom would be quick to point out that that didn't really count, because African Americans weren't allowed to play in that league in those days.

Tom went on to Vanderbilt University, where he played basketball for two years and baseball for one. He was also President of Phi Delta Theta.

Vanderbilt's football team did not achieve SEC excellence during Tom's time in Nashville, and thus, Tom was pleased to move on to law school at Emory University, where the football team remains undefeated. At Emory Tom was president of the Student Bar Association, Chief Justice of the Honor Court, and President of Phi Delta Phi.

Practice

After leaving Emory, Tom went into trial practice, which he also taught at

Emory for 10 years. He is a long time member and past National Director of ABOTA, and a Fellow of the American College of Trial Lawyers. In 1996, he was ABOTA's Trial Lawyer of the Year in Georgia. He helped found the firm that still bears his name in 1970. I don't think that anyone would deny that Tom Carlock and his drive for excellence turned that five man insurance defense firm into a ninety lawyer civil litigation firm. How'd he do that?

Vision

I would submit to you that he did it by a willingness to share his vision of excellence with clients, fellow members of the bar, judges, and associates. Tom is a very competitive guy. He played full court basketball well into his fifties, and can still crush a golf ball today. His competitive zeal translated quite well into trial practice, and he had a lot of success.

Elbow grease and creative thinking have always been a hallmark of Tom's pursuit of excellence. Tom doesn't understand people who don't try hard, but he knows they do exist, and he helps to inspire them to try a little harder. He is not afraid to take on complex matters, and in

the last 15 years has even become an accomplished ERISA litigator.

Tom was smart enough to understand that he would do better for his clients if he hired smart help. Tom sees the practice of law as a team sport, and he knows how to put together a good team. He also understood that good young lawyers needed a chance to achieve on their own, or else they would go away. Tom hired good, competitive young lawyers, showed them how to do what they should, and inspired them to work very hard.

Story

Tom has some interesting ways to communicate the tradition of excellence to those around him. I came to Carlock Copeland after a couple of years of transactional work. I didn't really understand the whole tri-partite relationship thing, but I was fortunate that Tom was there to teach me.

I had been at the firm about twenty minutes when I wrote something that Tom happened to pick up and read about a week later. In my ignorance I had written something that suggested that the insurance company's interest might bear equal weight with our insured client's interest. Tom went berserk. As he got finished reading, I was putting on my trench coat and heading off to a basketball game. Tom found me and was literally speechless in reaction to what I had written.

I will always remember him walking into my office and grabbing me by the lapels of my coat, desperately trying to communicate the gravity of my mistake. Tom and I usually see things eye to eye, although sometimes we are coming at them from different perspectives. In this instance, Tom had me by the lapels and was looking up sort of like this. His mouth was moving

but no words were coming out of his lips. We spent what seemed like an eternity relatively nose to nose as Tom gasped but couldn't speak. He finally walked out of the office, composed himself, and came back in. He then told me in no uncertain terms that our obligation was to our client who was depending upon us and not to the insurance company who might someday pay our bills.

I was a little amused, and a little perplexed by his dramatic, speechless reaction. When I came back to work the next day, several junior partners who had been listening outside the door that night came in to my office and were laughing hysterically at my predicament. It took me a while, but I eventually came to understand why Tom was so upset with me. Some lawyers do lose their way, forget who their client is, and put other interests ahead of their clients' interests. Tom would have none of that, and he wouldn't tolerate it in others at the firm. You need to work really, really hard to take care of your client. You need to put your client's interest first, and you can't get confused by other arrangements which are always less important. Tom still hands out lessons like that with regularity.

Teamwork

Tom's excellence is not simply defined by his effort and his competitiveness. Like all superb trial lawyers he has a twinkle in his eye and finds a way to touch almost everyone around him. From Ringgold to Brunswick, from Albany to Clayton, and no matter where you go, there will always be somebody at the courthouse who asks how Tom is doing. It may be the deputy in the courtroom or the chief judge of the circuit.

Tradition of Excellence

So what, then, is the tradition of legal excellence that Tom Carlock

helps to pass down to the younger generation? Tom believes that legal excellence requires really hard work and an unstinting devotion to your clients' interest. He also thinks he and we are truly blessed to have the opportunity to practice law, which is a joy and honor unlike any other. He knows it is important to treat everyone in the process, including the lawyers, the parties, and the witnesses, with great respect. Finally, he reminds us that practicing law is like all team sports, competitive and fun. While Tom's next jury trial may be in Baltimore, Maryland or Montana, I suspect there is no place he would rather be than together with all of you, the lawyers and judges who have helped make the practice of law so special for him. It is with great pleasure that I introduce someone you already know: Tom Carlock.

Remarks by
Thomas Carlock

I want to thank my partner, Joe Kingma, for the kind introduction. I also want to thank the General Practice and Trial Section of the State Bar for honoring me with the Tradition of Excellence award, as it is very special. This is especially true when I look at the prior recipients. I am doubly proud to join such a group of excellent lawyers.

I also want to thank my partners Gary Lovell and Harrison Spires for attending. A very special thank you to my daughter, Kelen, who is sitting right here. Unfortunately, my son, Scott, had to work and my daughter, Shell, is raising four boys (all 5 and under), so she is slightly busy.

I am especially honored to share this podium with my long time friend Bo Chambers, who is receiving the Tradition of Excellence award on behalf of the Plaintiff's bar. Bo has been a long time friend, worthy adversary and a gentleman in every respect. For all of you who know Bo, there are many Bo stories floating around and I have to tell at least one. It seems that Bo was representing a woman in a breast implant case. The physician was on the stand and, after a thorough direct examination by his lawyer, Bo stood up and asked the doctor "Doctor, why is my client's breast all cattywampus?" I am sure this is true, as I have heard it many times and Bo has actually confirmed this to me. Not to be outdone, I had the good fortune or misfortune of deposing Bo as an expert in a legal malpractice case. After everyone settled down for the deposition, I looked at Bo and asked "Would you define cattywampus?" Without hesitation, Bo said "Tommy, it is sort of like wampysided."

I am limited to three short minutes to accept this most prestigious award, and will try to comply, but it will be tough. I am especially mindful that I stand here looking down on many trial and appellate judges. After sitting below the podium for a little over 47 years, I am thrilled to be looking down on so many judges. I have been blessed with many rewarding, fun, and exciting years at the Bar. I am indeed fortunate that I have been in a profession with such wonderful people and one that I enjoy.

There is a lot of conversation and discussion that the practice of law has become too acrimonious and "Rambo" style of practice is becoming more and more normal. I agree with this assessment. The question is why and what can we do about it.

Pre-computers, e-mails, and texts, when one of us

would get upset with the other, we would dictate a smoking hot letter but by the time it came back to proofread and edit, the anger seemed to wane and the issue not nearly as difficult. Most of the time, we would edit the letter, tone it down, and create less issues. That is not the case today.

E-mails and texts have changed all this.

In the past, when trying to schedule depositions, meetings, and hearings, lawyers would call each other on the telephone, discuss the issues, and come up with convenient dates. True, it took longer but there were either face-to-face discussions or at least telephone discussions. Now, most law firms have "scheduling assistants" who inundate you with e-mails about scheduling a deposition. Often, you are not in a position to respond, because you might be driving your car or otherwise busy. Before scheduling something, you have to access your calendar and discuss the scheduling with your client. However, the scheduler is sitting at their desk, pounding away on their computer, and actually demands an immediate response. If you do not respond within minutes, there are all kinds of fusses about not cooperating, etc. There is no thought to the fact that the ones receiving the e-mails might be out of pocket and might not be able to respond. It is also true when you're scheduling depositions, you sort of want to know what you're doing the day before and the day after to make sure that you are back in town on the day in question. These issues spawn hateful and derogatory feelings. Sometimes they are used by your opponent to claim that you are not cooperating in discovery matters.

These issues, to me, have tended to create animosity within the Bar which is unfortunate and counter-productive. The lack of face to face communication has spawned problems that should not exist. I wish the State Bar had some type of rule that you don't have to respond to any e-mails or texts for 6 or 8 hours but I realize that is not possible. It seems to me that a lot of these Rambo-type of tactics would not exist if we knew our opponent, if we talked to our opponent, and perhaps even had a drink with them.

Having said all of that, the practice of law is a great way to make a living, I have enjoyed virtually every minute of it, and I thank you for this most appreciated award.

GENERAL PRACTICE

MARY A. PREBULA



Introduced by
Ashley Prebula Frazier

Tradition of Excellence Award

Good morning. I am Ashley Prebula Frazier, and it is a distinct honor for me to introduce my mother, Mary Aunita Prebula, whom you have selected as this year's recipient of the Tradition of Excellence Award for General Practice. My mother could not be more thrilled to be receiving this award in recognition of her hard work and achievements over nearly thirty years as an attorney. And, I could not be more proud to be her daughter.

When my mother asked me to introduce her, I asked her if she would rather have someone more prestigious do the honors. After all, I am only a 2011 graduate from the University of Georgia School of Law. Nonetheless, in her decisive nature you are all likely familiar with, she told me affirmatively, "I would like *you* to introduce me." And, that was that. So, in spite of my lack of legal experience, but with great personal insight, I will attempt to do my mother and her success, experience, and expertise justice in this introduction.

Many of you probably do not know that my mom was born in Binghamton, New York, lived her early years in Montrose,

Pennsylvania, and moved to Goldsboro, North Carolina at the age of nine. Although she rarely shares the fact, she comes from extremely humble beginnings—a fact that proves that anyone can achieve anything she dreams of with enough intelligence, determination, and drive.

My mom grew up with a feisty, independent, and determined mother Josephine, who shaped much of my mom's tough nature, but whose big heart my mother also inherited. Grandma Jo always told my mom, and later me, never to be an "aggravating agitator." This is a lesson that serves us well not only in our personal lives, but also carries into being a lawyer . . . although I am sure my mother would say that sometimes being an "aggravating agitator" against some opposing counsel is unavoidable. I am confident that Grandma Jo did not know she was teaching a lesson that most lawyers could benefit from taking to heart.

My mom attended the University of North Carolina at Chapel Hill for her undergraduate studies. She received her Masters in Education at

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Tradition of Excellence Award

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the University of North Carolina at Greensboro and taught for several years as a high school social studies teacher in Greensboro, North Carolina. She then moved to Atlanta to attend Emory University School of Law. She graduated from Emory in 1984 and joined the law firm of Hansell & Post. After Jones, Day, Reavis, & Pogue bought out Hansell & Post, mom stayed with the firm until 1993. At Hansell & Post and Jones Day, my mom focused on general civil litigation, environmental litigation and regulation, products liability, and ERISA. She then left Jones Day and worked at a smaller firm for a few years. In 1996, my mom went out on her own to form what is now known as Prebula & Associates LLC. She focuses on general civil litigation, including commercial, business, employment law, ERISA, COBRA, real estate, products liability, personal injury, probate, family law, general corporate, wills and trusts. She is truly a jack of many trades—a true general practitioner.

In acknowledgement of her exceptional legal ability and high caliber of practice, she has been recognized as one of Georgia's Top Rated Lawyers generally and in the areas of employment and family law. She has also been rated AV Preeminent by her peers according to the Martindale-Hubbell Peer Review Ratings and by the Martindale-Hubbell Bar Register of Preeminent Women Lawyers.

As a law clerk, I quickly learned how to distinguish quality honest lawyers from, let us call them, poor imprecise lawyers. My mother unequivocally falls into the first category and has upheld that reputation throughout her years of practice. Of course, I knew this long before becoming a law clerk or even attending law school. While many of you have had the opportunity to see my mom in action in the courtroom, I had the benefit of seeing her in action in other venues. Spending many nights as a

child and then adult debating ERISA over the dinner table, I have become confident that my mother is an intelligent woman and strong debater who I would put up against any of the most illustriously touted legal minds. Although I feel I have had more than one victory in these dinner table debates, I think the only legal argument that she must concede I won against her is that my Law Review Note on *Sereboff* and ERISA subrogation that she vehemently disagreed with was post-publication agreed with by the Supreme Court of the United States—a victory cannot be much sweeter. Yet, to this day she still contends the Supreme Court got it wrong.

Over the years, my mom has been extremely active in the State Bar of Georgia. She served on the Board of Governors, had leadership roles in the General Practice and Trial Law Section, and these are just a few of her instances of involvement. She currently serves as the chair for the Judicial Procedure and Uniform Rules Committee, on which she previously served as the co-chair and as chair of the Subcommittee on Electronic Discovery. Since 1989, she has been passionate about and involved in the Georgia Association for Women Lawyers, an organization for which I attended many meetings as a young child—naturally of my own volition. Since 1999 she has also been a Fellow in the Lawyers Foundation of Georgia and a Charter Lifetime Fellow in the Atlanta Bar Foundation. Discussion of her involvement in the Gwinnett County Bar Association, the Atlanta Bar Association, the Emory University School of Law Alumni Association, Georgia Trial Lawyers Association, and Georgia National Employment Lawyers Association could take most of my allotted time to discuss. Let us suffice it to say, she has maintained her professional involvement throughout her years of practice,

and she has done so not because of “networking” as us young lawyers attempt to do, but because of her passion for the profession and commitment to the excellence of the practice of law and community of lawyers in Georgia.

Somehow while remaining so involved, my mom also managed to write numerous publications and give numerous speeches throughout the years—many of which I edited when called upon to do so. And, I must confess it is quite difficult to find errors when editing the work of an uber perfectionist.

Amidst all of her professional commitments, my mom also found time to stay involved in civic activities. These activities include Leadership Gwinnett, the Gwinnett Chamber of Commerce and the American Business Women's Association in which she has held leadership roles. Significantly, my mother was a member of the Founder's Committee of Gwinnett County Legal Aid and continues her participation today. My mom was thrice awarded Gwinnett Pro Bono Project Awards from the Gwinnett County Bar Association for her commitment and contribution to pro bono endeavors. As an individual passionate about service and her community, my mom also served and continues to serve on several committees, local service projects, and an international missionary team at Mount Pisgah United Methodist Church in Alpharetta, Georgia.

You may be wondering when she made time for me, her much needing daughter during all of this. She did, above and beyond any other working mother I know. She served as the club leader for my Camp Fire Boys & Girls Club, she started an Elementary School Mock Trial Program at Woodward Academy North where I attended pre-kindergarten through sixth grade, and she coached my Wesleyan School high school mock trial team. Starting with

trying the Big Bad Wolf and concluding with a negligence case my senior year, she taught me how to be a trial attorney before the age of eighteen. Not to mention, she never missed an important event, assembly, soccer game, voice concert, or even doctor's appointment.

More than her professional accolades, my mom is a doting and supportive mother, steadfast friend, and

honest colleague. She has set a standard both professionally and personally for me and other young lawyers to strive to match.

Thank you mom for being my best friend, an example of a strong woman personally and professionally, my mentor, and now my peer in the legal field. I will strive to be as accomplished, poised, and principled a lawyer as you have become.

Congratulations on receiving the Tradition of Excellence Award today.

I would like to thank the General Practice and Trial Section of the State Bar for selecting my mom for this prestigious award. I am humbled and honored to introduce you to my mother and one of the finest lawyers I know, Mary Aunita Prebula.

Remarks by **Mary Prebula**

Good morning. I cannot possibly begin to tell you how moved I am by receiving the Tradition of Excellence Award this morning. It could not be more perfect than to have my daughter, Ashley Frazier, introduce me in the presence of my colleagues and friends as she embarks on her legal career. I want to acknowledge her wonderful fiancée, James Heintz, who is such a special part of our family now and thank him for being here. I also wish to thank the General Practice and Trial Law Section, and Laura Austin, its chair, for recognizing me and my work this morning.

When my good friend and law school classmate, Mark Dehler, called me and said "Congratulations," I said "For what? What did I do now?" When he told me the Bar was going to honor me with the Tradition of Excellence Award for General Practice, I naturally said, "You're kidding me." Then, I asked if I was old enough!! In his unique way, my friend assured me I was, but said "No, we're not old. You just have a body of wisdom and work now." Quite frankly, I never thought of my work and myself in that way before. I hope that my work and experience will lead young lawyers to understand that you do not have to be a specialist; you can have a wonderful career by constantly changing areas of practice and interest. It is the variety that keeps you alert, interested, and loving the profession.

It is quite humbling to be included among my fellow recipients this year and all the incredible lawyers and judges who have been acknowledged and honored with this award in previous years. Many of those honorees were great influences on my early

career although they probably didn't even know it. Their leadership by example and efforts to always do the right thing at the right time for those who needed justice inspired me. To be considered in the same group as current and past honorees is truly one of the best days of my legal career.

It is quite remarkable that I stand here before you today accepting this great acknowledgement of my legal career. In fact, it's surprising that I even accomplished becoming a lawyer. You see, in my family and community in eastern North Carolina, girls who were poor with "very few prospects" didn't go to college—although they might go to business a/k/a secretarial school like my mother did. It was certainly not expected of me by my community to attend college, much less law school. In fact, I recall in the eighth grade when my school had the option to send me to Governor's School because I had scored the highest in my class on the qualifications test. But, my school chose not to send me with the explanation that the experience would be wasted on someone with such poor means and poor expectations. So, the other more advantaged student was recommended and allowed to go. Despite this setback, my goals were clear.

I had a very strong mother, Josephine Peele, who was much stronger than I, and much angrier than I was over the injustice. She bears the credit for making me believe, "If you work hard enough, you can be whatever you want to be." I took this mantra to heart.

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Remarks by Maru Prebula

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I am the first one in my family line to have a college education. Moreover, I am the proud holder of degrees in social sciences education, a master in social studies education with an emphasis in anthropology, and a Juris Doctor.

My choice of becoming a lawyer is directly connected to my observations of the need for and effect of being represented by a lawyer at an early age. A close teenage family member had a very serious criminal matter, but there was no money for a lawyer. I saw the doctor's son in that matter represented by the lawyer being treated differently than my poor relative without a lawyer. At literally the eleventh hour, a lawyer took the case for \$50 and \$50 a week for a very long time, and justice was served. I found my calling and pursued it. I also found a calling to provide pro bono legal services when I could.

With education and my legal practice, it seems I have always been a generalist. I began my career with a large regional defense firm where I did both plaintiff's and defense work, then merged with an international firm handling only defense, then went into small firm and occasionally solo practice doing primarily plaintiff's work.

People see me as a plaintiff's lawyer when I represent individuals. Others see me as a business litigation lawyer. Others just know me for family law. While most of my work is now plaintiff oriented, such as employment cases involving discrimination or Fair Labor Standards Act, personal injury cases, ERISA health coverage and pension issues, I also handle both sides of business litigation, family law cases, and guardianship and probate matters. In fact, I probably have more exposure to more areas of law than many other recipients of this award. In addition to those areas, I have handled environmental cases, environmental issues in bankruptcy, fiduciary duty cases, wills, and trusts. And once I even practiced admiralty law and "arrested" a yacht. I also represent a number of corporations in their general day to day needs such as advising on contracts, drafting buy/sell agreements, negotiating loans and buyouts and just acting as outside general counsel when needed.

I think it is also significant that I have represented people in all walks of life from the unwed teenager seeking child support, to the client who paid me in yard work, to the millionaire farmer in bib overalls, to small Mom and Pop businesses to Fortune

50 companies, and even a President. Most people don't know that I did most of the environmental legal work for President Carter and the Carter Presidential Center. I still have some ground-breaking soil in my desk!!

And so it is fitting that the award I am honored with today celebrates the Tradition of Excellence in General Practice. And so, I stand before you today very proud of my "general" category with my emphasis in civil litigation.

For those who know me, it will not be surprising that I am most proud to be one of the very few women—now 8 out of 112 recipients— who have been honored by this award, including such excellent jurists as Justice Carol Hunstein, Judge Yvette Miller, Judge Phyllis Kravitch, and Judge Dorothy Beasley; a wonderful female lawyer, friend, and politician, former Secretary of State Cathy Cox, and a dedicated Director of Legal Services, Phyllis Holmen. If you know me, you know I have always pushed for inclusion of women and minorities in our bar, in our profession, in speakers, in award, and all aspects of our profession.

But, I am especially honored that the Bar has chosen to honor me as a lawyer who happens to be a woman who does not hold a judicial seat or head a major legal organization, but is merely a fellow lawyer at the bar—a lawyer who happens to be a woman who is in the office, in the trenches, in the courtrooms on a regular basis striving to do good for one client at a time, striving to right the wrongs, to fix the problems, to give access to justice to all.

I truly love the law. I truly believe in access to justice. I truly believe in pro bono work and give back to our profession and our community. I truly believe ours is a noble and honorable profession. After all my years of practice, and there have been many, I still love what I do, I love my job, I like most of my clients, and I am proud to be a lawyer. I am proud to be a member of the Georgia Bar and this section.

I am proud and grateful that you honor me today as a member of the Bar, a member of the General Practice and Trial Law Section, and I hope each of you see me as a litigator, counselor, mentor, advisor, and friend.

In closing, it is interesting to me that many times people ask me, "What kind of a lawyer are you? After many years of answering this question with long explanations, in the last couple of years, I have

just finally started saying, "I'm a good lawyer." It always draws a laugh, but that has been my goal. I hope I have been a good lawyer and can continue to be for many years to come. I hope I have set a good example for those younger lawyers coming to the bar. I hope I have gained and imparted some

wisdom. I hope I have touched lives and made a difference. I hope I have served my clients well and obtained justice where I could, and in some way merit this Tradition of Excellence Award with which you honor me today. Thank you so much.

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JUDICIAL

JUDGE WILLIAM L. McMURRAY, JR.



Tradition of Excellence Award

Introduced by

Laura Austin and Tommy Malone

Laura Austin

I would like to make a few personal remarks before Tommy Malone introduces our judicial recipient. Judge McMurray and I met about 10 years ago when he was sitting on the Superior Court for Fulton County as a senior judge. It was a lovely experience getting to try my case fully under his watchful eye. Little did I know at the time that he had retired from the Georgia Court of Appeals in 2000 and had been acting as Senior Appellate Judge as well as Senior Judge throughout the various counties including Cobb, Fulton and DeKalb. Judge McMurray's lovely wife, Rosemary, was there with him observing in the Courthouse as she always does, whispering sweet words of encouragement and observations that were right on point with what was going on in the Courtroom. What a wonderful experience.

In 2006 GTLA bestowed upon Judge McMurray the Guardian of Justice Award and this year, 2013, The General Practice and Trial Section was able to award him The Tradition of Excellence award for his service on the bench and as

a lawyer held in highest esteem. His daughters Nancy McMurray Standard and Helen Jo McMurray Thorpe were there with the family as his award was presented with more kind words from Tommy Malone.

Recently I received a letter from the FBI regarding Judge McMurray and they had a story they wanted to make sure I heard. Their accolades about this wonderful judge who stepped aside for others to take the Chief position when it would have been his turn is so like Judge McMurray. He wanted to make sure that others who he felt were deserving while he was in the Court of Appeals would not miss the opportunity to lead – he knew his day would come but it was more meaningful to allow his brothers on the bench to lead before he took over - it was touching. His selfless sacrifice to ensure that those who might have missed the opportunity were allowed to step in front and take the position of leadership while they had a chance. Obviously his confidence in being where he was supposed to be doing just what God would have him

do was strong enough to be able to surrender the limelight to another without worry or concern. What a

wonderful way to live! It is men and women who lead by this type of example that give me hope for our pro-

fession. Now I ask Tommy Malone to introduce Judge McMurray.

Tommy Malone

Congratulations to our Tradition of Excellence award recipients for 2013. Tom Carlock for the defense bar, Bo Chambers for the plaintiffs, and Mary Prebula for general practice are all outstanding lawyers. Well deserved, my friends. It is my distinct pleasure to say a few words in recognition of our Judicial Honoree.

William LeRoy McMurray, Jr. was born on April 11, 1925, in Rock Hill, South Carolina. Soon thereafter his family moved to South Georgia and he grew up on a farm in Randolph County. Upon graduation from Cuthbert High School, he enlisted in the U.S. Army and served on active duty in Italy during World War II. After being honorably discharged, he came home and enrolled at Georgia Southwestern College in Americus where he graduated. Then he went to Macon where he graduated from the Walter F. George School of Law at Mercer University after having served as president of the student body his senior year. Again he answered his Country's call and served in the U.S. Army in Korea during the Korean Conflict.

After once more being honorably discharged from the Army, he entered government service. For six years our Honoree served as a Special Agent for the Federal Bureau of Investigation. One day while passing through the identification section, a beautiful young lady caught his eye. He asked her out for a date

and that same evening he proposed marriage. Rosemary said, "You have not even kissed me yet". That must have been some kiss for two weeks later the couple was off to Atlantic City for a memorable honeymoon.

Following several years with the Bureau, he brought his bride back to South Georgia where Judge McMurray began his law practice in Cordele. He became the City Attorney and served in that capacity until being elected, in a race against an incumbent, to the position of Superior Court Judge of the Cordele Judicial Circuit. Twice he was re-elected without opposition. It was during this time I first met Judge McMurray when I appeared before him while my practice was still based in Albany. Years later a metro trial judge perceived a conflict when he realized the defendant was the son of the court bailiff and may have been his campaign chairman. All the lawyers agreed upon Judge McMurray and it became my responsibility to contact him. When I asked him to fill in his reply was both humbling and disappointing. He said, "Tommy I could never sit on one of your cases, because since you appeared before me in Cordele, I have considered you the son I never had". I replied that I was thrilled to learn he felt that way but at that moment I found myself wishing he loved me just a little less. He did not accept the case.

Governor George D. Busbee of

Albany recognized the ability and talent of the young trial court Judge and appointed him to the Court of Appeals of Georgia on May 3, 1976. He was re-elected five times without opposition. During his tenure on the Court of Appeals he served as Presiding Judge for a total of 20 years, longer than any other judge. When it came time for our Honoree to become Chief Judge, he persuaded his colleagues to pass over him in order for Judge Arnold Schulman to serve as Chief before his retirement. Thereafter, Judge McMurray served as Chief Judge in 1984. He retired from the Court of Appeals in 2000. His service on the Court was indeed exemplary. His first opinion appears in volume 138 Ga. App. Reports and his last reported decision appears in volume 243. More than 4,500 opinions in 106 volumes is quite a record!

He served as Senior Judge for ten years presiding in trial courts throughout the state. In 2010 he really did retire in order to spend more time with his lovely and devoted, Rose, his daughters Nancy and Helen, and their 5 grandchildren. There has never been a more deserving recipient or appropriate title for one who has led an exemplary life at the bar. Join me in congratulating the Honorable William Leroy McMurray as the 2013 Judicial Tradition of Excellence Honoree.

Remarks by
Judge William McMurray, Jr.

Thank you very much for your, as the young folks, say “awesome” introduction. This is a special moment for me and also for my family to receive this Tradition of Excellence honor. I accept this prestigious honor with complete humility and gratitude.

I wish to extend my heartfelt thanks to each of you for this honor.

Next, I would like to congratulate and extend best wishes to all of you special persons for your respective honors.

Please bear with me as I digress for a moment or two. Let me tell you about the McMurray family team who played the prominent role in getting me elected as a judge in the first place. Please know that

I would like to share this prestigious honor with my loving and loyal family, my dear wife Rosemary and our precious daughters Nancy and Helen. They, appreciate a judge’s commitment to always seek justice, and through their undying love and devotion, have understood what has been at stake throughout my forty-five year career and have unselfishly shared me with the people of the Great State of Georgia. I shall love my family forever with all my heart.

Thank you.

May GOD bless you all!



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PLAINTIFF

EUGENE "BO" CHAMBERS, JR.



Introduced by
Ken Shigley

*Tradition of
Excellence
Award*

Bo Chambers is the gracious, clever and witty Southern lawyer from central casting, more Matlock than Matlock.

Bo grew up in a time and place where he was able to absorb by osmosis the tradition of Southern storytelling. Bo's father owned a general store at Fort Gaines, in the southwest corner of Georgia. Young Bo soaked in the stories of old men on the porch and around the wood stove, picking up the cadences, the timing and the wit that others turned into classics of Southern literature. His sainted mother, undoubtedly a woman of infinite patience, balanced that by imbuing in him a fine sense of fairness and morality.

By high school young Bo was a star debater, and at 16 he matriculated at the University of the South in Suwanee, Tennessee. After three years, his father figured he had spent enough on undergraduate frivolity so Bo entered the University of Georgia Law School at the ripe age of 19. He enjoyed fraternity life a lot but managed to collect his LL.B. anyway. Bo's stories of law school remind me of the remark one of John Grisham's professors at Ole Miss law school wrote on exam

paper: "You have a great talent for fiction."

After a brief sojourn in small town practice, Bo hung his shingle in a cubbyhole office at Five Points in 1958. It was a time when young lawyers could get a lot of trial experience on small subrogation and insurance defense cases. With his personality Bo developed a winning track record and a following.

One of Bo's trademarks has always been his "magnolia mouth" accent, which he has somehow retained despite 55 years inside Atlanta. He still maintains the family home place at Fort Gaines, which I have suspected he keeps partly to keep his speech patterns fresh, away from the corrupting influences "inside the perimeter."

Bo has won through wit throughout his career. The stories of his courtroom inspirations abound. But one of his former partners told me he had a lot of Bo Chambers stories, though none that would do to tell.

Once, defending a clear liability rear end collision case, Bo posed in closing argument the question, "Where else was he to go? He didn't have a helicopter to fly over him. He

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Tradition of Excellence Award

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didn't have a submarine to go under him." The amused jury gave him a defense verdict for wit and creativity

Defending an inner tube manufacturer in a tire failure case, he made a puppet of the slashed tire, and made a comedy routine of the tire saying to the jury in closing, "please don't blame Mr. Inner Tube, he didn't do anything wrong!" Again, his client prevailed as much due to Bo's wit and skill as the evidence.

Bo has long been a competitive golfer, and at 80, if he is not in the office he is probably on the golf course

at Druid Hills. His competitiveness extends to "office golf" at office Christmas parties, leading band made more merry by refreshments in a cutthroat putting competition throughout the office.

In his late sixties, Bo left the insurance defense firm he had founded and with a merry band of apostles set up a plaintiffs' practice in Midtown Atlanta. While many other lawyers fled from medical malpractice cases, Bo embraced that calling, taking on the challenge of cases many would deem impossible or impracticable.

Entering the ninth decade of life he remains enthusiastic and energetic in taking on challenging new cases.

Undoubtedly the good Lord broke the mold after he made Bo Chambers. We are unlikely to see the like of him again. One of the great privileges of my life has been to share an office with Bo for the past five years, entertained daily with his stories.

Certainly no one could be more deserving of the Tradition of Excellence Award than my dear friend, Bo Chambers.

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Remarks by
EUGENE 'BO' CHAMBERS, JR.

My feelings right now would be very adequately expressed by one of my favorite singers, George Jones. The song I am referencing goes like this, "Lord, what have I ever done to deserve even one of the favors you gave? Why me Lord? I really am not sure what exactly I have done to deserve the kindness you have shown." At the risk of sounding too modest, which all of you know that I'm really not, and being familiar with the illustrious list of lawyers who have also received this honor, I am indeed so humbled to be chosen by my professional colleagues to receive this special recognition. I am positive that at this very moment I have made my Mama proud.

In spite of my many known shortcomings, I have been blessed with the foresight and wisdom to know to surround myself with people who have made up for my deficiencies. I am also aware of the fact that it is very important that I attach myself and associate myself with people whose personalities and intellectual prowess compensate for my lack thereof. The fact that I have etched out a reasonable living over the years continues to make me certain in keeping with that old saying, "that someone up there, for some unknown reason, has seen fit to recognize my shortcomings and amaze me with the many wonderful blessings that I have received." At this time, without naming any names, I want to make clear that I owe my sincere gratitude to those people for enlightening me along the way and at times for just putting up with Bo.

I know the older generation always thinks that their time was the best, but without going into too much detail, I do wish that we could turn back the clock to what I perceive was a more civil climate, before *Daubert* and its ilk. Back when, at least in my perception, when trying cases was an art form and not a display of electronics, laser pointers and power point presentations. It was simply the art of telling a story.

When I, as we all do, get down and concerned, I remind myself of the poem written by Kipling, *IF*. If you dont mind, I would like to recite that to you now

*If you can keep you head when all about you
Are losing theirs and blaming it on you,
If you can trust yourself when all men doubt you,
But make allowance for their doubting too;
If you can wait and not be tired by waiting,
Or being lied about, don't deal in lies,
Or being hated, don't give way to hating,
And yet don't look too good, nor talk too wise:*

*If you can dream - and not make your dreams your master;
If you can think - and not make thoughts your aim;
If you can meet with Triumph and Disaster
And treat those two imposters just the same;
If you can bear to hear the truth you've spoken
Twisted by knaves to make a trap for fools,
Or watch the things you gave your life to, broken,
And Stoop and build 'em up with worn-out tools:*

*If you can make one heap of all your winnings
And risk it on one turn of pitch-and-toss,
And lose, and start again at your beginnings
And never breathe a word about your loss;
If you can force your heart and nerve and sinew
To serve your turn long after they are gone,
And so hold on when there is nothing in you
Except the Will which says to them: "Hold on!"*

*If you can talk with crowds and keep your virtue,
Or walk with Kings - nor lose the common touch,
If neither foes nor loving friends can hurt you,
If all men count with you, but non too much:
If you can fill the unforgiving minute
With sixty seconds' worth of distance run,
Yours is the Earth and everything that's in it,
And - which is more - you'll be a Man, my son!*

When the Case is Over: Public Schools as an Additional Resource for Children Disabled in Accidents

Tim Schwarz



Tim Schwarz is the founder of the Law Office of Tim Schwarz, where he works representing parents seeking appropriate special education plans from school districts throughout north Georgia. He graduated from the University of Chicago with a BA in Philosophy in 2003 and graduated from Emory Law School in 2007. After law school, Mr. Schwarz worked for two years at the Staff Attorneys' Office of the Eleventh Circuit Court of Appeals. Mr. Schwarz also writes the Georgia Special Education Law Blog, available at www.educationlawgeorgia.com/blog.

I. Introduction

When a child has been seriously injured, an attorney can seek a judgment or settlement from those responsible to compensate for the child's injuries. But when your client's case is over, you might be worried the settlement is not enough to provide support for the rest of your client's life, especially when the child is very young. Yet you have exhausted all of the sources for tort liability and recovery. This article highlights an additional source of services to help your disabled child clients: the public schools. Specifically, school districts have obligations to children under Section 504 of the Rehabilitation Act¹ and under the Individuals with Disabilities Education Act² ("IDEA").

Section 504 prohibits denying a program benefit to a child with a disability simply because the child has a disability. While this requirement to accommodate is helpful to some special needs students, it may not be helpful to your severely injured client, who requires additional services, not merely tolerance of differences. These additional services are available under the IDEA. A child cannot be turned away simply because of the expense of caring for the child or changing the curriculum to educate the child or providing support services.³ The school district cannot require that private insurance or public benefits be used to pay for the costs of educating the child.⁴

A student is eligible for special education under the IDEA if the student's disability (*a*) impairs the child's ability to learn so that (*b*) the child requires specialized education, and (*c*) the student has one of the listed disabilities (including blindness, deafness, traumatic brain injury, or specific learning disabilities).⁵ Because *other health impairment* is specifically listed as one of the categories of eligibility, a child injured as the result of a negligent accident is very likely to qualify under the IDEA unless the injury has no effect on the child's ability to learn.⁶ Further, the school district is obligated to be proactive and identify children with disabilities who need special education, whether they are enrolled in the public schools or not.⁷

Under the IDEA, the school district is required to provide a "free, appropriate, public education" to children with a disability.⁸ This obligation begins once a child turns 3 and ends when the child graduates or turns 21.⁹ The public schools have an obligation to create a plan, called an Individual Education Program (IEP), to help a child learn and to provide the services necessary to enable the child to attend public school. An IEP must contain all the accommodations, modifications, and support services (such as paraprofessionals) necessary for the child to receive educational benefit from the public schools.¹⁰ The focus of the IEP is providing educational benefit, but "educational benefit is not

limited to academic needs [and] includes the social and emotional needs that affect academic progress, school behavior, and socialization."¹¹

Although the school district is obligated to create a plan to educate all children eligible under the IDEA, the district is not obligated to maximize educational benefit.¹² Instead, the school district is only required to provide a plan "reasonably calculated to provide educational benefit."¹³ Thus, the school district commits no wrong if a disabled child does not make progress, as long as the district implemented a plan that has a reasonable chance to succeed. If a school district provides "a basic floor of opportunity," the district has complied with its obligations under the IDEA.¹⁴

II. Procedural Rights

Notwithstanding the low substantive standard, parents and children with special needs have a large number of procedural rights, such as the right to an IEP planning meeting at least once per year and mandatory elements to the IEP document, including a description of the child's needs and measurable annual goals to meet those needs.¹⁵ This section will discuss some of the most helpful procedural rights for children injured in serious accidents, including comprehensive evaluation by experts at public expense, support services necessary for a child to obtain education benefit (such as basic nursing services), and protections from the imposition of serious school discipline.

A. Evaluation at Public Expense

Because disabled children require specialized education, the school district is required, at public expense, to seek the advice of relevant experts to determine the appropriate interventions needed to provide educational benefit. Thus, parents can use the school district as a resource to determine their disabled child's needs. Although the evaluation is aimed at educational needs, often the generalization from needs in school to needs generally is fairly straightforward.

The school district is required to evaluate a child when the district has reason to suspect a child is disabled and receives consent to evaluate.¹⁶ The school district cannot require exhaustion of any state or local education interventions, and must complete the initial evaluation within 60 days of appropriate consent to evaluate.¹⁷ Once a child has an IEP, the school district must evaluate the child comprehensively every three years and must evaluate the child annually if requested by the parent.¹⁸ An evaluation must address "all areas of suspected disability"¹⁹ and must distinguish cognitive, behavioral, physical, and developmental factors.²⁰

Additionally, a parent who disagrees with an evaluation conducted by the school district can request a second opinion, also paid for at public expense.²¹ All a parent must do to invoke the right to an Independent Educational Evaluation ("IEE") is state disagreement with the school district about the school evaluation.²² The school district can ask for the specific basis for the disagreement, but the parents are not required to answer.²³ Once a school district receives a request for an IEE, the district must act without unreasonable delay to either (a) pay for the IEE or (b) initiate a proceeding before an administrative law judge ("ALJ") and show that the evaluations the school district has already done are appropriate.²⁴ Because this is a difficult standard to meet and litigating the issue is expensive, most school districts find it easier to fund an IEE rather than challenge parents in court.

B. Related Services

The IDEA requires the school districts pay for services "required to assist a child with a disability to benefit from special education," including transportation, speech-language pathology services, audiology services, psychological services, physical therapy, and occupational therapy.²⁵ Thus, a school could be required to pay for care providers to come in to school during the day to provide therapeutic

services, provided that those services are necessary for the child to receive education benefit. Like all other obligations on the school district, the related services must be provided at the adequate level at no cost to the parents.

The statute excludes most medical services from the definition of related services, providing that "medical services shall be for diagnostic and evaluation purposes only."²⁶ Nonetheless, the Supreme Court held in *Irving Ind. Sch. Dist. v. Tatro* that "clean intermittent catheterization" did not fall within the medical services exception to related services because it could be performed by a nurse or trained layperson outside the presence of a doctor.²⁷ Therefore, there is a strong argument that medical maintenance that must be performed during the school day must be provided or funded by the school district.²⁸

Nonetheless, there is a split of authority on how to interpret the statutory language in light of *Tatro*. For example, the Eighth Circuit has held that a school district was required to provide a personal attendant to provide urinary bladder catheterization, suctioning of the student's tracheostomy as needed, and general monitoring to prevent or alleviate malfunction of the student's ventilator.²⁹ However, the Sixth Circuit has held that the school district was not required to provide an attendant to suction a student's tracheostomy because the intervention fell within the medical exception to the requirement to provide related services.³⁰ Unfortunately, the Eleventh Circuit has not specifically interpreted the scope of the medical exception to the related services requirement of the IDEA. But regardless of the specific interpretation of related services, a support service that qualifies as a related service must be provided at adequate level at no cost to the parent in for the school district to be meeting its legal obligation to provide a free appropriate public education.³¹

Continued on next page

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C. School Discipline

Finally, children with special needs have some extra protections in the school discipline process, to prevent school districts from avoiding responsibility by expelling students who are difficult to service. If a school district contemplates a suspension of ten or more days³² or school discipline that amounts to a change in placement,³³ the school district cannot impose that discipline without holding a meeting with parent participation to determine if the school misconduct was a manifestation of the child's disability.³⁴ A child's conduct is a manifestation of the disability:

- if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or
- if the conduct in question was the direct result of the local educational agency's failure to implement the IEP.³⁵

If the IEP team determines the school misconduct was a manifestation of the disability, the serious school discipline cannot be imposed.³⁶ Instead, the school district is required to complete an assessment of the child's behavior to figure out why the child is committing misconduct.³⁷ Using that assessment, called a Functional Behavior Assessment (FBA), the school district is required to create a Behavior Improvement Plan (BIP) designed to reduce the frequency of the problem. By implementing the BIP and other necessary services, the student should be able to remain in the placement in which the student was located before the school misconduct occurred.³⁸ In short, the school district cannot relieve itself of the obligation to provide services for a student with special needs simply because the student's disability makes it more difficult for the student to comply with all of the school's rules of appropriate conduct.

III. Remedies

If a parent believes that the school district has not provided a free, appropriate, public education, the parent can initiate an administrative challenge.³⁹ This administrative challenge, generally called a due process challenge, can be initiated by parents proceeding *pro se*,⁴⁰ with the assistance of an attorney, or with the assistance of a non-attorney advocate (with permission of the ALJ). Nonetheless, an attorney is practically necessary in any challenge to the school district's decisions because the substantive standard is so low, and the procedural rights can be very complicated and technical.⁴¹ In addition, a *pro se* party is still required to comply with the procedural rules of the Georgia Office of State Administrative Hearings, which is the office from which ALJs are appointed in Georgia.⁴²

If an ALJ determines that the school district failed to meet its legal obligations, equitable remedies could include determination that a child is eligible for services, addition or removal of portions of an IEP, or private placement at public expense.⁴³ However, money damages are not a remedy available under the IDEA.⁴⁴ In extreme cases, a school district can be required to provide additional education services in order to compensate for past failures.⁴⁵ In addition, the school district can be required to reimburse the expenses the parent incurred if the school district was on notice that the parent intended to seek private services to compensate for the school districts failure to offer or implement a legally adequate IEP.⁴⁶

Finally, a brief word on the Georgia Special Needs Scholarship Program, also known as State Bill 10 ("SB10"). In brief, if a student has an IEP and meets some other criteria, the parents can receive a voucher providing partial tuition at an eligible private school.⁴⁷ By state regulation, accepting the SB10 voucher waives all rights un-

der the IDEA.⁴⁸ Because proof that the IEP offered is inadequate is required to receive a remedy, such as *complete* payment of private placement by the school district, acceptance of the SB10 voucher effectively cuts off any claim against the district. Thus, accepting the SB10 voucher is a trade-off between the risks of litigation and the possibility that the private placement selected by the parent is completely funded by the school district.

IV. Conclusion

There are many resources available to assist parents exercising their children's rights to a free, appropriate public education. For example, the organization *Parent to Parent of Georgia* is a central clearinghouse of resources for the disabled.⁴⁹ Additionally, parents can hire assistance from an attorney or non-attorney advocate.⁵⁰ As with any complicated and technical area of law, the assistance of an attorney who focuses on special education advocacy can provide substantial benefits. Many such specialists are members of the *Council of Parent Attorneys and Advocates*.⁵¹

Generally, attorneys or non-attorney advocates bill by the hour, at the expense of the parents (or the child's settlement trust). The most common service an attorney or advocate provides is attending an IEP meeting, to add an additional voice and perspective on the IEP team's decisions. Those meetings must be held at least once per year, and an additional IEP meeting can be requested at any time.

If a parent anticipates the possibility of litigation with the school district, the prudent course is to involve an attorney as soon as possible, preferably at the IEP meeting where the potentially challenged decision is being made. An attorney at that meeting can crystalize the district's position to paint the already existing dispute into the clearest light for a favorable decision from the ALJ.

If parents prevail in the due process

proceeding, the school district is generally responsible for the parent's attorneys' fees.⁵² However, in *Arlington Central School Dist. Bd. of Ed. v. Murphy*, the Supreme Court specifically held that the IDEA fee shifting provision does not cover the cost of experts hired by parents to show that the IEP offered by the school district was legally inadequate.⁵³ Thus, the costs of hiring an expert will often be an out-

of-pocket expense for parents, even if the attorney is willing to accept the case on a fee-shifting contingency basis, because generally there is no damages remedy available to draw from to pay the expert's fee.⁵⁴

In short, if you have closed a case with a child disabled because of a tragic accident, then there is help for the child and the family available beyond the settlement from the tort-

feasor. By seeking a free, appropriate, public education from the school district, parents can help ensure that their child's needs are regularly evaluated, their child is educated and makes meaningful progress towards appropriate goals, and their child receives an additional source of services to support the child's medical needs.

Endnotes

- 1 29 U.S.C. § 794.
- 2 20 U.S.C. § 1400, et seq.
- 3 See, e.g., *Timothy W. v. Rochester, New Hampshire School Dist.*, 875 F.2d 954 (1st Cir. 1989) (holding that a child was eligible for services even though some experts believe the child could never make academic progress).
- 4 34 C.F.R. § 300.154(d)(2)(i), (e)(2)(ii).
- 5 20 U.S.C. § 1401(3).
- 6 *Id.*
- 7 *Id.* at § 1414(a)(2).
- 8 *Id.* at § 1401(9).
- 9 The IDEA requires services starting at birth, but divides responsibility based on the child's age. Part B of the IDEA, discussed *infra*, creates obligations on school districts. Obligations under Part C, for children aged 0-3, are provided by the *Babies Can't Wait* program. For more information on that program, visit www.health.state.ga.us/programs/bcw/
- 10 20 U.S.C. § 1414(d)(1)(A).
- 11 *County of San Diego v. California Special Edu. Hearing. Ofc.*, 93 F.3d 1458, 1467 (9th Cir. 1996).
- 12 *JSK v. Hendry County Sch. Bd.*, 941 F.2d 1563 (11th Cir. 1991).
- 13 *Board of Edu. v. Rowley*, 458 U.S. 176, 206-07 (1982).
- 14 *Drew P. v. Clarke County Sch. Dist.*, 877 F.2d 927, 930 (11th Cir. 1989).
- 15 20 U.S.C. § 1414(d)(1)
- 16 20 U.S.C. § 1414(a)(1)(C).
- 17 *Id.* The Georgia Department of Education has issued rules that exclude certain calendar days, such as summer vacation, from the 60-day timeline. Ga. Comp. R & Regs. § 160-4-7-.04(1)(b).
- 18 20 U.S.C. § 1414(a)(2)(A)(ii).
- 19 *Id.* at § 1414(b)(3)(B)
- 20 *Id.* at § 1414(b)(2)(A)
- 21 *Phillip C. v. Jefferson Cnty. Bd. of Edu.*, 701 F.3d 691 (11th Cir. 2012).
- 22 34 C.F.R. § 300.502(b).
- 23 *Id.* at § 300.502(b)(4).
- 24 *Id.* at § 300.502(b)(2).
- 25 20 U.S.C. § 1401(26)(A).
- 26 *Id.*
- 27 468 U.S. 883, 892-94 (1984).
- 28 See *id.* at 894 (noting that "if a particular medication or treatment may appropriately be administered to a handicapped child other than during the school day, a school is not required to provide nursing services to administer it" regardless of how easy it would be for school district employees to perform the task).
- 29 *Cedar Rapids Community Sch. Dist. v. Garret F.*, 106 F.3d 822, 823-25 (8th Cir. 1997).
- 30 *Neely v. Rutherford Cnty. Sch.*, 68 F.3d 965 (6th Cir. 1995).
- 31 *Donald B. v. Bd. Sch. Com'rs of Mobile County, Ala.*, 117 F.3d 1371, 1374-75 (11th Cir. 1997).
- 32 20 U.S.C. § 1415(k)(1)(C).
- 33 34 C.F.R. § 300.530(b).
- 34 20 U.S.C. § 1415(k)(1)(E).
- 35 *Id.* at § 1415(k)(1)(E)(i).
- 36 *Id.* at § 1415(k)(1)(F).
- 37 *Id.* at § 1415(k)(1)(i).
- 38 *Id.*
- 39 *Id.* at § 1415(f)
- 40 In fact, parents can proceed to federal court representing both their own rights and the rights of the student, without hiring a lawyer at all. *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516 (2007).
- 41 The situation is slightly different when the school district is seeking ALJ approval of refusal to fund an IEE because the district bears the burden of proof and the substantive question is so parent friendly. See *supra* notes 21-24 and accompanying text. Nonetheless, an attorney can be very helpful in navigating the litigation process.
- 42 More information on the Office of State Administrative Hearings is available at the OSAH website (osah.ga.gov).
- 43 See 20 U.S.C. § 1415(i)(C)(iii).
- 44 *N.B. by D.G. v. Alachua Cnty. Sch. Bd.*, 84 F.3d 1376 (11th Cir. 1996). However, Section 504 allows money damages and creates "independent substantive rights" for children with special needs. *Georgia Assoc. of Retarded Children v. McDaniel*, 716 F.2d 1565 (11th Cir. 1983).
- 45 *Draper v. Atlanta Ind. Sch. System*, 518 F.3d 1275, 1280 (11th Cir. 2008).
- 46 *Sch. Committee of Burlington v. Dept. of Edu. of Massachusetts*, 471 U.S. 359 (1985)
- 47 See O.C.G.A. §§ 20-2-2110-2118.
- 48 Ga. Comp. R & Regs. § 160-5-1-.34(6)(d)
- 49 www.p2pga.org
- 50 Whether an attorney or non-attorney advocate is best for a family depends on the type of difficulties facing the family. When the family is concerned that the district is cannot assemble its resources to produce an appropriate placement, an experienced non-attorney advocate can provide a helpful additional perspective and can suggest solutions used with similar students in the past. But when a family anticipates litigation against the district will be necessary, an attorney is likely to be more helpful.
- 51 See www.copaa.org.
- 52 20 U.S.C. § 1415(i)(3)(B).
- 53 548 U.S. 291 (2006).
- 54 See *supra* note 44 and accompanying text.

The Medicare Subrogation Dinner Party: Who's Invited and Who's Not?

Mark Jones



Mark Jones is an attorney at Gary O. Bruce, P.C., and an award-winning author. Since 2010, Mark's practice has focused exclusively on representing injured claimants in personal injury and workers compensation matters in Georgia and Alabama.

Mark has a passion for defeating or substantially reducing subrogation claims for his clients. Mark has successfully defeated or reduced claims by various entities, including: Medicare, Medicaid Advantage Plans, Medicaid (Georgia & Alabama), Tricare, Federal Employees Health Benefits Plans, ERISA plans, medical payments coverage, workers compensation carriers, and hospital liens.

Prior to working at Gary O. Bruce, P.C., Mark clerked for the Honorable Frank J. Jordan, Jr. in the Superior Court of the Chattahoochee Judicial Circuit for three years. He is a graduate of The University of Georgia School of Law (J.D., 2007). During law school, Mark was published twice. He is the winner of the 2006 Oklahoma Supreme Court Sovereignty Symposium Writing Competition, taking home 1st place for his paper on gaming law.

Mark loves the practice of law and representing injured claimants. Mark grew up in Fort Worth Texas. Regardless of the area of practice an attorney chooses, Mark firmly believes that an attorney must practice law with a heart. Mark resides in Columbus, Georgia with his wife, Ginny, and three children.

For the personal injury attorney, understanding medical subrogation claims¹ against a client's settlement is an integral part of competent representation. In any case, there may be multiple subrogation claimants seeking reimbursement from a client's liability, uninsured/underinsured motorist settlement, and medical payments coverage for health benefits paid out by the subrogation claimant. This article focuses on subrogation claims involving: (1) Medicare; (2) Medicare Advantage Organizations (MAOs); and (3) Medicare Prescription Drug Plans ("PDPs") and seeks to give the practitioner a general understanding of these subrogation claims.

An analogy will assist us in analyzing

these subrogation claims. The client's settlement is much like a dinner party at the client's house. Certain subrogation claimants are invited to the dinner party and have a place at the table. Others are not invited—although they may claim they are. Based on the current case law, traditional Medicare almost always has an invitation to your client's dinner party, but they may have to share their food. Conversely, outside of the Third Circuit, MAOs and PDPs likely do not have an invitation to the

dinner party in states, like Georgia,² that do not permit subrogation as a matter of state law.



Jose Ramirez, Table for Four (Used With Permission)

Medicare's Superlien

Medicare Always Has a Place at the Table, but Has to Share and Sometimes Must Take a Smaller Serving.

It is the day of your client's dinner party. Your client hears a knock at her door: an agent from Medicare is at the door.

He demands that he be seated at the head of your client's dinner table for the party. His dinner must be made

in a very particular way; the plate must be certified, china dinnerware; the silverware, he insists, must be set in a certain spot at a certain distance from the dinner plate; the napkin must be folded in the shape of a swan and placed on his plate before he will sit to be served. He requires a coaster for his drink. Food must be prepared at an exact temperature. His drink needs a certain number of ice cubes and so forth.

Must your client let the agent from Medicare in for the dinner party? Must he meet his various ridiculous demands in serving him dinner? Generally, yes. In fact, your client must, indeed, seat the Medicare agent at the head of the dinner table and must comply with his very precise instructions on serving him.

Under the Medicare Secondary Payer Act³ (“MSP”), Medicare has a first-priority lien on essentially any conceivable insurance policy that covers damages for injuries inflicted by a third-party against a Medicare beneficiary.⁴ This lien also extends to settlements involving self-insured entities, such as Wal-Mart.⁵ Self-insurance, liability insurance, uninsured/underinsured motorist insurance, and no-fault insurance are all known as “primary plans” under the MSP because Medicare pays “second” to these plans. However, since liability settlements generally involve lump sums paid many months or years after a given injury, Medicare will make payments before a settlement *on condition* that Medicare be reimbursed from any tort settlement with the primary plan.⁶

Medicare’s lien is often colloquially referred to as a “superlien,” and Medicare is quite forceful in demanding reimbursement for benefits paid out.

If Medicare is not reimbursed from the settlement funds, Medicare may pursue payment from anyone who touches the settlement money: the insurance company, the client, and the attorneys.⁷ This superlien makes

Medicare the closest thing to the “IRS” of personal injury practice. Their liens strike fear in the hearts of all involved in the settlement process—particularly the insurance adjuster.

Medicare has very specific procedures it employs that the practitioner must comply with in order to obtain Medicare’s final lien amount. Specific compliance with those procedures is outside the scope of this article. However, generally speaking, Medicare’s procedure for obtaining their final lien amount involves:

- (1) notification of the injury and your representation (the sooner in the representation, the better);
- (2) awaiting a “conditional lien amount,” which is a preliminary lien amount itemizing what payments Medicare has made that it *thinks* are related to the injuries the client received;
- (3) notification of settlement by the attorney, including notice to Medicare of procurement costs and the amount of attorneys fees;
- (4) receipt of the final lien amount demanded by Medicare; and
- (5) payment of the Medicare lien within 60 days to avoid an interest penalty. Medicare has been more efficient lately by setting up a website wherein lawyers and their staff can track the progress of a lien online through the “Medicare Secondary Payer Portal.”⁸

The short of it is this: generally speaking, Medicare must be paid back from your client’s personal injury settlement for any related medical care for which Medicare issued payments.

With this said, there are two glimmers of hope under federal law for practitioners seeking to limit Medi-

care’s portion of the settlement proceeds.

First, Medicare will automatically reduce its final lien amount by sharing pro-rata in your attorney’s fee and also taking into account any out-of-pocket expenses in obtaining the settlement.⁹ Medicare refers to these as “procurement costs.” This is essentially a codification of the equitable common fund doctrine.¹⁰

Secondly, at least in the Eleventh Circuit, it is possible to reduce Medicare’s superlien using equitable allocation principles, but the stars must align properly. Such was the case in *Bradley v. Sebelius*, 621 F.3d 1330 (11th Cir. 2010). There, the Court flatly rejected Medicare’s claim that it was entitled to full reimbursement from a de minimus wrongful death settlement. Due to insufficient insurance coverage, the settlement in the *Bradley* case was for far less than what the claims of the estate and the surviving children were worth as per the finding of the probate court allocating the settlement.¹¹ Under Florida law, the surviving children’s claim for the proceeds from the wrongful death settlement was separate and apart from the estate; the estate possessed the claim for the decedent’s medical expenses.¹²

In *Bradley*, Medicare sought over \$38,000.00 in reimbursement from a \$52,500.00 settlement. The decedent’s personal representative and the surviving children petitioned the probate court for an allocation of the settlement funds. The Secretary of Health and Human Services declined to attend the probate court hearing, despite notice, and the court allocated \$787.50 to Medicare as its proportional share of the limited settlement funds¹³ Medicare thumbed its nose at the probate court, calling the court’s decision “advisory” and citing its own manual as authority to ignore a court’s allocation of settlement funds. Medicare demanded full reimbursement from the settle-

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The Medicare Subrogation Dinner Party

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ment, and the family and children appealed Medicare's decision all the way to the Eleventh Circuit Court of Appeals, exhausting all administrative remedies.

In a harshly worded opinion, the *Bradley* Court gave *no deference* to Medicare's *Medicare Secondary Payer Manual*, which states Medicare is always entitled to full reimbursement, unless there is an allocation after an adjudication on the merits. The *Bradley* Court thus affirmed the probate court's allocation of \$787.50 to Medicare as full satisfaction of its lien, despite no adjudication on the merits.

Reading the case broadly, the *Bradley* decision stands for the following propositions: (1) Medicare is not entitled to full reimbursement from a settlement where doing so would work an injustice; and (2) Medicare is subject to equitable allocation principles in pre-litigation settlements. Reading the decision narrowly, Medicare is not entitled to full reimbursement only where there is: (1) a claim that inherently involves some form of apportionment like the wrongful death claim in *Bradley*; (2) actual apportionment by a court with Medicare receiving notice; and (3) insufficient coverage

Bradley is the only decision that has not held that Medicare is entitled to full reimbursement of its lien. The leading decision holding the opposite is *Hadden v. United States*, 661 F.3d 298 (6th Cir. 2011). In *Hadden*, a Medicare beneficiary was struck by a corporate truck that swerved to avoid colliding with a John Doe motorist that ran a stop sign. A panel of the Sixth Circuit rejected a beneficiary's argument that Medicare was entitled to only 10% of its lien amount due to the John Doe motorist being 90% responsible for the wreck that injured Plaintiff. The *Hadden* settlement was with the remaining corporate tortfeasor that the Plaintiff claimed was only 10% responsible for his loss. Medicare refused to reduce its \$82,000.00

lien on a \$125,000.00 settlement.

The Sixth Circuit held that Medicare was entitled to full reimbursement and deferred to Medicare's

decision pursuant to the *Bradley* decision, there is an argument that Medicare has to reduce its dinner portion based on equitable principles.

PRACTICE POINTER:

It is better to deal with a Medicare reduction issue concerning unrelated conditional payments before notification of the settlement to Medicare.

This is because Medicare's attitude has consistently been that it is entitled to full reimbursement for all related payments made regardless of comparative fault issues, shaky liability scenarios, or very limited policy amounts—all of which, in the reality of personal injury practice, play significant roles in settling a case.

Therefore, the prudent practitioner will dispute any unrelated charges immediately after receipt of the conditional lien and will refrain from notifying Medicare of any settlement until after an updated conditional lien is received that removes the unrelated charges.

In this author's experience, disputing Medicare's conditional lien amount on the front end leads to a far higher success rate in significantly reducing Medicare liens.

Medicare Secondary Payer Manual.¹⁴ A vigorous dissent by Judge Hellene N. White pointed out the elephant in the room: that a policy of full reimbursement without considering fault allocation would lead to absurd results – thereby precluding any recovery at all since beneficiaries (and their attorneys) will fear that Medicare will devour the entire settlement if there is a large lien.¹⁵ Ultimately, the issue of whether equitable reductions/apportionment applies to Medicare will have to be resolved by the Supreme Court, but for now, the Supreme Court has declined to get involved.¹⁶

In sum, Medicare's lien must be satisfied from your client's settlement, i.e., they always have a place at the table at your client's dinner party. However, Medicare *does* have to share some of its food with you as the claimant's attorney since Medicare reduces its reimbursement claim pro-rata to share in any attorney's fees and out-of-pocket costs. Furthermore, at least in the Eleventh Cir-

Medicare Advantage Plans and Medicare Part D Prescription Drug Plans Are Likely Not Invited to the Dinner Party in States Where Subrogation is Not Allowed.

Continuing with our analogy, let us assume that your client hears another knock at the door. This time it is the Medicare agent's little brothers at the door. They heard about your dinner party and are elbowing to get a place at the table. The little brothers represent Medicare Advantage Organizations ("MAOs") under Medicare Part C, and Medicare Part D, involving prescription benefits ("PDPs").

The Code of Federal Regulations provides that subrogation claims for PDPs are identical to MAOs.²¹ Therefore, the analysis under the law is the same concerning these two subrogation claimants. However, the case law deals primarily with MAOs.

Whether MAOs/PDPs have a valid right of subrogation is not settled by the current case law. The short answer is that, they may have a valid

private cause of action under federal law for reimbursement against a primary plan such as a self-insured tortfeasor or an insurance company; however, MAOs/PDPs may, but likely do not, have a valid right of subrogation for medical payments made against a plan beneficiary so long as: (a) the state where the beneficiary resides does not permit subrogation; and (b) there is no diversity jurisdiction where the MAOs/PDPs could sue the beneficiary in federal court.

A bit of background is necessary to understand why these entities are probably not invited to share in your client's dinner.

MAOs "replace" traditional Medicare. Congress created the MAOs through the Balanced Budget Act of 1997²² and revamped them in 2003 under the Medicare Modernization Act.²³ MAOs were created to provide "private efficiency" to Medicare.²⁴ The Medicare Modernization Act created Medicare Part D, which provides prescription drug benefits to Medicare beneficiaries.²⁵

The case law concerning subrogation claims of MAOs focuses on a ju-

isdictional analysis regarding whether Congress intended to grant MAOs a private cause of action to enforce reimbursement claims in federal court.

While this is an unsettled area of the law, the leading cases on the subrogation rights of MAOs are:

- *Humana v. Reale*, 2011 U.S. Dist. LEXIS 8909, 2011 WL 335341 (S.D. Fla.);
- *Parra v. PacifiCare of Arizona, Inc.*, 2011 WL 1119736, (D. Ariz.); and
- *In re Avandia Marketing*, 685 F.3d 353 (3rd Cir. 2012).

In *Reale*, Humana paid \$19,155.41 in medical benefits for a plan beneficiary, Reale, who was injured in a slip and fall at a hotel. The plan beneficiary went on to settle her case with the hotel for an amount in excess of the \$19,155.41. Reale did not reimburse Humana, and Humana sued Reale in federal court. Humana contended that the MSP, specifically 42 USC § 1395y(b)(2)(B)(i),²⁶ provided it a private right of action for reimbursement against a plan beneficiary.

In essence, Humana argued that it stepped into the shoes of the Secretary of Health and Human Services pursuant to 42 C.F.R. § 422.108(f), which provides: "the [MAOs] will exercise the same rights to recover from a primary plan, entity, or individual that the Secretary exercises under the MSP regulations [...]."

Reale moved to dismiss the action for lack of federal jurisdiction, arguing that the MSP did not provide MAOs with a private cause of action under federal law, and there was no diversity jurisdiction.

The Court held that exclusive authority to bring a federal collection action for reimbursement against a beneficiary under the MSP rested with the *United States* pursuant to 42 U.S.C. § 1395y(b)(2)(B)(iii).²⁷ To the Court, stepping into the shoes of the Secretary did Humana no good because only the United States itself could bring a collection action against a beneficiary for reimbursement of payments made by Medicare. *Id.* (Although not discussed by the *Reale* Court, the Department of Justice brings the claim on behalf of the United States under the Federal Claims Collection Act.²⁸)

In *Parra*, the procedural posture was identical to *Reale*. The MAO initiated a private action in federal court for reimbursement against a plan beneficiary; the beneficiary moved to dismiss for lack of federal jurisdiction. The *Parra* Court exhaustively catalogued the various statutory mechanisms that MAOs have used to attempt to bring a private cause of action in federal court. The Court rejected each one of them stating:

The Medicare statutes at issue, here, do no more than create a federal right. They stop short of creating a federal private right of action to enforce that right and do not contain any

PRACTICE POINTER:

In their zeal to protect Medicare's "superlien," sometimes the insurance adjuster will want to include Medicare on the settlement check even after a settlement amount is agreed upon.

This is not required by federal law.¹⁷ A primary plan has no authority to act as Medicare's debt collector.¹⁸ At best, this practice is horribly inefficient;¹⁹ at worst, it is bad faith²⁰ and tortious interference with your contractual relations with your client. The real issue is the potential for the primary plan to have to pay the lien twice—i.e., the plan's own liability rather than any "requirement" under federal law.

The practitioner should make clear in any settlement demand how the check should be made payable and that any check with co-payees on it will be considered a counteroffer to avoid any confusion or delay on this issue.

This is particularly important once Medicare is notified of the settlement, since Medicare requires payment – from whatever source – within 60 days of the date of its final demand letter.

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The Medicare Subrogation Dinner Party

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jurisdictional provision granting the federal courts exclusive jurisdiction ...

Conversely, in *In re Avandia Marketing*, supra, the Court found that the MSP provided a private cause of action by MAOs against a self-insured tortfeasor, GlaxoSmithKline (“GSK”)

A careful reading of the *Avandia* decision shows that its holding was actually quite limited and does not hold that MAOs have a private right of action against the beneficiary. Instead, the *Avandia* Court held that the 42 U.S.C. § 1395y(b)(3)(A) provided Humana with a private cause of action against GSK—the self-insured, defendant tortfeasor and “primary plan.” 42 U.S.C. § 1395y(b)(3)(A) provides:

There is established a private cause of action for damages (which shall be in an amount double the amount otherwise provided) in the case of a primary plan which fails to provide for primary payment [...].

Reading this language broadly and applying *Chevron* deference to the *Medicare Secondary Payer Manual*, the *Avandia* Court held that the “plain language” of this section permitted Humana to seek reimbursement against GSK through a private action in federal court.²⁹ But the “plain language” of this section nowhere mentions bringing an action against a *plan beneficiary* and instead is couched in terms of a “primary plan.” Thus, in the Third Circuit, practically speaking, the MAOs have snuck in through the back door to your client’s dinner party since they have a private cause of action against the primary plan. This means the insurance adjuster will want the MAOs’ claim for reimbursement addressed from the settlement proceeds.

The only arguable holding of *Avandia* that provides MAOs with a private right of action against a plan

beneficiary is the application of *Chevron* deference to the *Medicare Secondary Payer Manual*, CMS regulations, and unsigned memoranda³⁰ stating, without substantive explication, that MAOs have the same enforcement rights as Medicare.

However, *Chevron* deference is insufficient to resolve the issue because *Chevron* deference does not address the *Reale* Court’s argument that only the United States may bring a collection action against the plan beneficiary. One might go so far as to say to the *Avandia* Court to “get real.” As to subrogation against plan beneficiaries, the *Reale* Court has the stronger “plain language” argument concerning the statutory interpretation of the MSP since the statute says in 42 U.S.C. §1395y(b)(2)(B)(iii) that only the *United States* may recover reimbursement for conditional payments against a beneficiary.

Nor does the *Avandia* Court address the *Bradley* Court’s arguments that an agency manual, such as the *Medicare Secondary Payer Manual*, is not entitled to *Chevron* deference.³¹ To paraphrase Judge White’s dissent in the *Hadden* case, *Chevron* deference is not the answer to every issue concerning the MSP.³²

So where does the case law leave the practitioner confronted with MAOs/PDPs demanding reimbursement from a client’s settlement and a place at the dinner table?

Practitioners in the Third Circuit should: (1) avoid having the personal injury client sign any indemnity language in the release, since *Avandia* is arguably limited to private causes of action against primary payers such as insurance companies and self-insured defendants; or (2) confront the issue head on and negotiate a reduction of the MAO’s subrogation claim.

A few points may assist those practicing in the Third Circuit in negotiating with MAOs/PDPs. First, even the *Avandia* Court would admit that

MAOs/PDPs should receive rights no greater than what Medicare itself has.³³ Therefore, MAOs/PDPs should be subject, just as Medicare is, to sharing pro rata in any attorney’s fees and other procurement costs.³⁴ MAOs/PDPs should also permit your client to benefit from contractor enhancements that Medicare allows, such as the fixed payment option and self-calculate option.³⁵ Further, since the Medicare regulations and memoranda provide that MAOs/PDPs have the same rights as the Secretary of Health and Human Services,³⁶ at least one court has suggested that MAOs/PDPs must exhaust administrative remedies before proceeding to federal court.³⁷ An equitable argument based on *Bradley* may also assist the practitioner in arguing equitable allocation/reduction applies to MAOs/PDPs’ subrogation claims.

For those not practicing in the Third Circuit, if the state in which the client resides does not permit subrogation of medical benefits³⁸ and there is no diversity jurisdiction, then there is a strong argument that forum state’s subrogation law will apply to any claim for reimbursement by an MAO. This is because, presumably, the state court would apply its own anti-subrogation law to any claim arising in its own court system, which is what the *Parra* Court implied in dicta.³⁹ However, the practitioner must still exercise care. At least one state court has held that its anti-subrogation statute was pre-empted by federal law, and the MAOs had a right to reimbursement—even at the *state* level in an anti-subrogation state.⁴⁰

In sum, it is debatable whether MAOs/PDPs have an invitation to your client’s dinner party. They likely do not if your state: (a) bars medical benefits subrogation; and (b) there is no diversity jurisdiction concerning your client’s subrogation claim.

Some authority provides that MAOs have no private cause of action in federal court against a ben-

eficiary for reimbursement, leaving state law to govern the issue of subrogation. In the *Avandia* decision, the Third Circuit recognized a private cause of action for MAOs in the context of an action against a primary plan who failed to reimburse an MAO, which, practically speaking, provides MAOs with a place at the table at your client's dinner party.

It is not clear from the *Avandia* decision whether this private cause of action may be brought against a plan beneficiary and points can be made on both sides of the issue, depending on how one reads *Avandia*. Regardless, even in the Third Circuit, MAOs/PDPs should: (1) be subject to a pro-rata offset for procurement costs of any settlement, just as Medicare is; and (2) comply with any beneficial options Medicare permits, such as the self-calculate or fixed payment options. Finally, MAOs/PDPs may have to exhaust administrative remedies

before bringing a federal action. If all else fails, an argument still exists that MAOs/PDPs are subject to equitable allocation per *Bradley*. Otherwise, the forum state's own law should apply to govern the claims of MAOs.

**Conclusion:
Medicare is Always Invited;
Medicare Advantage Plans and
Medicare Prescription Drug Plans,
Probably Not.**

Medicare always has an invitation to your client's dinner party. Medicare will reduce its lien, however, to share pro-rata in your attorney's fees and expenses, and Medicare may be subject to equitable reduction and allocation principles under the *Bradley* decision.⁴¹

If the state where the client resides bars subrogation for medical benefits paid out by an insurer; the subrogation amount is less than \$75,000.00, and/or there is no complete diversity; then MAOs/PDPs likely have

no subrogation rights and no place at the dinner table against your client's settlement.

In the Third Circuit, the MAOs/PDPs can enter into your client's dinner party through the back door since they have a private cause of action against the primary plan. An experienced adjuster/defense attorney will protect the interest of the MAOs/PDPs and will almost certainly demand that the plaintiff's attorney address any subrogation claims by the MAOs/PDPs. However, the practitioner still has a few arrows in his quiver to reduce the MAOs and PDPs' subrogation claims: (1) the common fund reduction for attorney's fees and expenses as codified at 42 CFR § 411.37; (2) the benefits of Medicare's own streamlining options; and (3) an argument that MAOs and PDPs must exhaust administrative remedies before filing a private action in federal court.

Endnotes

- 1 Although subrogation and liens have different legal meanings, in modern practice, the terms are used interchangeably. In this article, subrogation is used as a term representing any entity seeking to take money from a client's settlement for reimbursement.
- 2 O.C.G.A. § 33-24-56.1(Georgia's anti-subrogation statute); *Davis v. Kaiser Foundation*, 271 Ga. 508, 521 S.E.2d 815 (1999).
- 3 42 U.S.C. § 1395y
- 4 *Id.*
- 5 42 U.S.C. § 1395y(b)(2)(A)(ii).
- 6 42 U.S.C. § 195y(b)(2)(B)(i)-(ii).
- 7 42 U.S.C. § 1395y(b)(2)(B)(iii); *Zaleppa v. Seiwel*, 9 A.3d 632, 629 n.7 (Pa. Sup. Ct. 2010) (government may pursue personal assets of the beneficiary as well as the beneficiary's attorney and any other entity or person that acted as an intermediary); see, e.g., *United States v. Stricker*, 2010 WL 6599489 (N.D. Ala.) (attorneys and defendant sued by United States for reimbursement of conditional payments).
- 8 <https://www.cob.cms.hhs.gov/MSPRP/>
- 9 42 CFR § 411.37.
- 10 See generally, *GEICO v. Capulli*, 859 So. 2d 1115 (Ala. Civ. App. 2002)(describing common fund doctrine in depth).
- 11 *Bradley v. Sebelius*, 621 F.3d 1330, 1333-1334 (11th Cir. 2010).
- 12 *Id.*
- 13 *Id.*
- 14 See *Hadden v. United States*, 661 F.3d 298 (6th Cir. 2011).
- 15 *Id.* at 308-309 (White, J., dissenting). Ironically, since Medicare generally pays health providers at significantly discounted rates, cases where there are limited settlement funds and large Medicare liens are the cases where the primary plan will usually have the greatest incentive to settle due to the presence of catastrophic injury. Further these cases are the ones where Medicare needs reimbursement the most due to having made significant expenditures on a beneficiary's behalf. They are also the most likely to require some sort of equitable apportionment/reduction due to the reality that most insurance policies are simply insufficient to cover catastrophic injuries.
- 16 The Supreme Court denied certiorari in the *Hadden* case. 2012 WL 1106757.
- 17 Tomlinson v. Landers, 2009 WL 1117399 (M.D. Fla.) (no meeting of the minds where insurer refused to issue check without Medicare as co-payee); *Zaleppa*, at 9 A.3d at 640 (defendant could not satisfy judgment with check including Medicare as co-payee); *Hearn v. Dollar Rent a Car, Inc.*, 315 Ga.App. 164 (726 S.E.2d 661) (Ga. App., 2012) (no authority for insurer's practice of including Medicare as a co-payee on settlement check).

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2013
**Tradition of Excellence
Breakfast and Reception**

March 15 ♦ Amelia Island Plantation ♦ Amelia Island, Florida



*Judge William McMurray
and Rosemary*



*Bo and Nancy
Chambers*

The Breakfast



*Incoming Chair
Jimmy Hurt
presents Laura
Austin with a
plaque for her
service as chair*

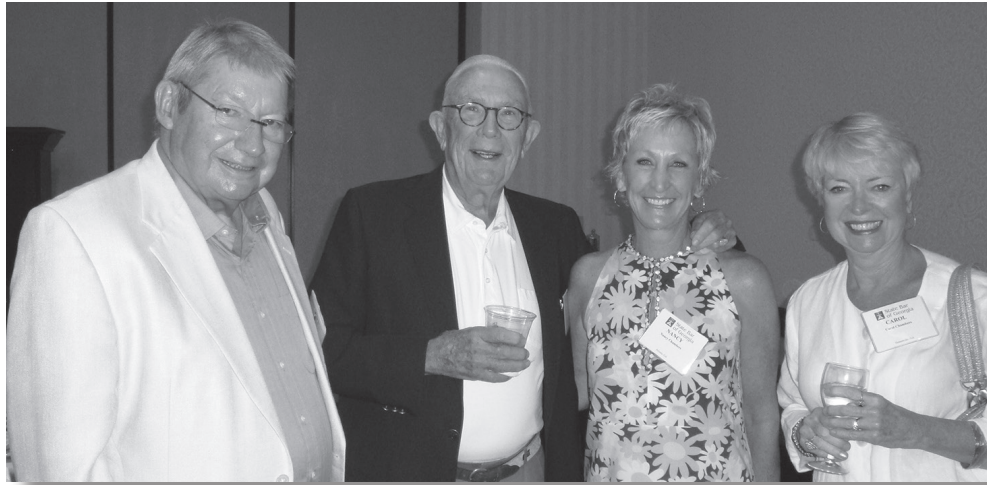
*Ashley Prebula Frazier, Mary Prebula and
future son-in-law James Heintz, Jr.*



Full house for breakfast

The Reception

Everyone had a Great Time!



Tom Chambers, Bo and Nancy Chambers and Carol Chambers



Jimmy Hurt presents the Traditional bottle of champagne to outgoing Chair, Laura Austin



Kelen Carlock, Ken Shigley (past bar president) and Tom Carlock



Debbie and Tommy Malone enjoy the reception with Elizabeth Pelypenko



Everyone had a great time and enjoyed the food

The Medicare Subrogation Dinner Party

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- 18 Zaleppa, 9 A.3d at 640.
- 19 Hearn, 315 Ga. App. at 172.
- 20 Wisinski v. American Commerce Group, 2011 WL 13744 (N.D. Pa.).
- 21 42 C.F.R. § 422.108; 42 CFR § 423.462.
- 22 Pub.L. 105–33.
- 23 Pub.L. 108–173.
- 24 Some question whether the MAOs create any efficiency since they receive billions in taxpayer subsidies each year. See Families USA, *Special Report: Whose Advantage? Billions in Windfall Payments Go to Private Medicare Plans*, June 2007, available at: <http://www.familiesusa.org/assets/pdfs/medicare-private-plans.pdf>.
- 25 Pub.L. 108–173.
- 26 42 U.S.C. § 1395y(b)(2)(B)(i) provides: The Secretary may make payment under this subchapter with respect to an item or service if a primary plan described in subparagraph (A)(ii) has not made or cannot reasonably be expected to make payment with respect to such item or service promptly (as determined in accordance with regulations). Any such payment by the Secretary shall be conditioned on reimbursement to the appropriate Trust Fund in accordance with the succeeding provisions of this subsection.
- 27 42 U.S.C. § 1395y(b)(2)(B) (iii) provides in relevant part: The United States may bring an action against any or all entities that are or were required or responsible [...] to make payment [...] under a primary plan. The United States may [...] collect double damages against any such entity. In addition, the United States may recover under this clause from any entity that has received payment from a primary plan or from the proceeds of a primary plan's payment to any entity.
- 28 See, e.g., *United States v. Stricker*, 2010 WL 6599489 (N.D. Ala.).
- 29 But see, *Stalley v. Catholic Health Initiatives*, 509 F.3d 517, 524–525 (8th Cir. 2007) (“Section 1395y(b)(3)(A) grants *the Medicare beneficiary* a private right of action for double damages against an insurer or other primary payer that fails to pay the amounts it owes on the insured's behalf” because “the beneficiary can be expected to be more aware than the government of whether other entities may be responsible to pay his expenses [...]”)(emphasis added).
- 30 CMS Memo, *Medicare Secondary Payment Subrogation Rights*, December 5, 2011 http://www.cms.gov/Medicare/Health-Plans/HealthPlansGenInfo/downloads/21_MedicareSecondaryPayment.pdf
- 31 *Bradley v. Sebelius*, 621 F.3d at 1338 (citing *Christensen v. Harris County*, 529 U.S. 576, 587 (ordinarily “policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron* style deference”).
- 32 *Hadden*, 661 F.3d at 307.
- 33 See *In re Avandia* 685 F.3d at 364 (noting, “MAOs were intended to enjoy a status parallel to that of traditional Medicare.”).
- 34 42 C.F.R. § 411.37.
- 35 See generally <http://www.msprc.info/> for information concerning these options.
- 36 42 C.F.R. § 422.108(f).
- 37 See *Parra v. PacifiCare of Arizona, Inc.*, at *7-8 2011 WL 1119736, (D. Ariz.) (“PacifiCare fails to recognize that recovery actions taken by the Secretary involve detailed administrative procedures, which are required to be exhausted [...]. Practically speaking, this means the Secretary cannot proceed directly to federal court in circumvention of the beneficiary's rights and must issue a final decision before bringing legal action for reimbursement.”).
- 38 See generally, *The Made Whole Doctrine in All 50 States*, available at: <http://www.mwl-law.com/CM/Resources/Made-Whole-in-All--50-States-8-31-09.pdf>.
- 39 See *Parra*, at *8 (“There being no jurisdiction in this Court for PacifiCare's claim, it must proceed in state court ... for what is essentially a contract claim ...”); *Nott v. Aetna U.S. Healthcare, Inc.*, No. 03-CV-4044 (E.D. Pa. Jan. 23, 2004)(remanding MAOs claim back to state court for lack of federal jurisdiction).
- 40 *Trezza v. Trezza*, 2012 NY Slip Op 9048 (N.Y. App. Div., 2012).
- 41 Note that *Bradley*-based arguments for reduction are the practitioner's “in case of emergency break glass” argument. The author sees *Bradley* based arguments as falling on deaf ears in dealing with Medicare.

2013/2014

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