

CALENDAR CALL

GENERAL PRACTICE AND TRIAL SECTION STATE BAR OF GEORGIA

Vol. XIX

Summer/Fall 2005

No. 2



2005 Tradition of Excellence Awards

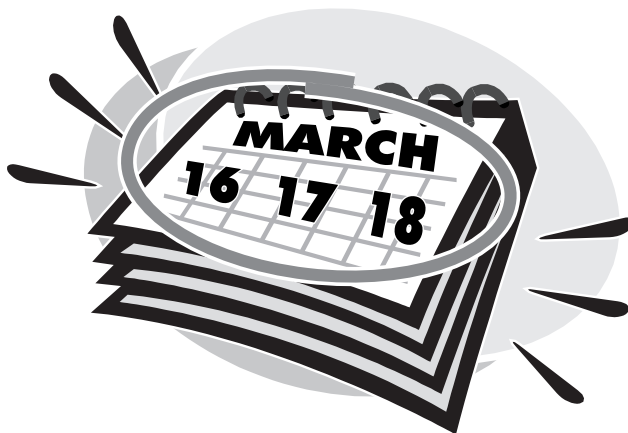


The General Practice and Trial Section 2005
"Tradition of Excellence Award Recipients"

from left to right:

Judge Walter C. McMillan, Jr., Sandersville (Judicial);
Phyllis J. Holmen, Atlanta (General Practice);
Ben L. Weinberg, Jr., Atlanta (Defense);
John E. James, Macon (Plaintiff); and
Section Chairman, Cathy Harris Helms

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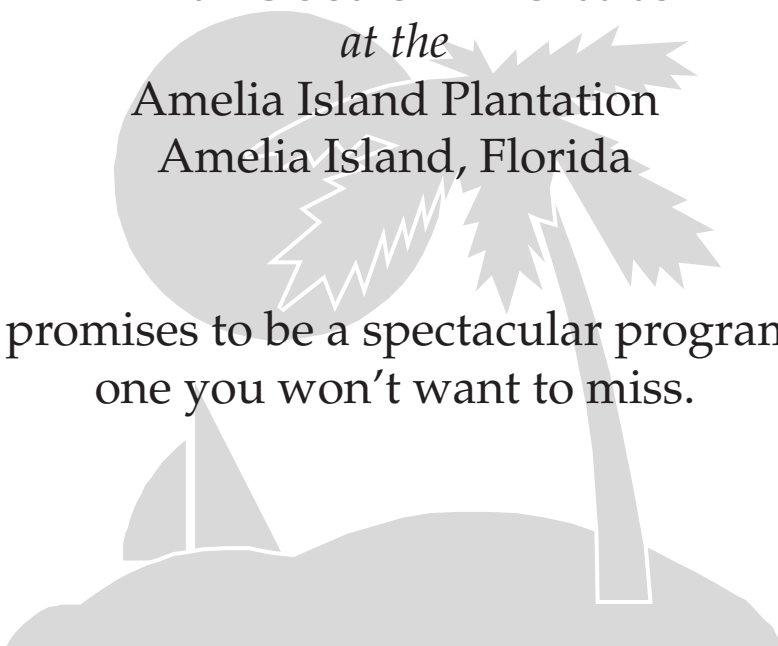
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"Georgia's Largest Law Firm"

GENERAL PRACTICE AND TRIAL SECTION STATE BAR OF GEORGIA

Vol. VIX

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The General Practice and Trial Section 2005 "Tradition of Excellence Award Recipients" from left to right: Judge Walter C. McMillan, Jr., Sandersville (Judicial); Phyllis J. Holmen, Atlanta (General Practice); Ben L. Weinberg, Jr., Atlanta (Defense); John E. James, Macon (Plaintiff); and Section Chairman, Cathy Harris Helms.

Calendar Call is the official publication of the General Practice and Trial Section of the State Bar of Georgia. Statements and opinions expressed in the editorials and articles are not necessarily those of the Section of the Bar. Calendar Call welcomes the submission of articles on topics of interest to the Section. Submissions should be doublespaced, typewritten on letter-size paper, with the article on disk together with a bio and picture of the author and forwarded to Elizabeth Pelypenko, The Pelypenko Law Firm PC, 100 Galleria Parkway, Suite #1320, Atlanta, Georgia 30339-5948. Published by Appleby & Associates, Austell, Georgia.

A Great Profession; A Great Opportunity – The State Bar's New Mentoring Program



During a recent court appearance, I observed a young lawyer – fresh out of law school – behave in a “take no prisoners” manner that needlessly alienated opposing counsel, angered the judge, and guaranteed a loss for his client. He even managed to offend the Clerk and court reporter by treating these kindly ladies with disdain. The bailiffs shook their wise old heads. This young man was in dire need of some experienced guidance. Although perhaps not to this extreme, we have all, in one setting or another, witnessed similar scenes.

While watching the antics of this young man, several of us in the courtroom talked among ourselves. We reflected on the various wonderful “mentors” we had each had – experienced lawyers who had

guided us, focused us, encouraged us, challenged us, and even, when necessary, chastised us.

I was lucky to have two such mentors. The first was a partner in the Atlanta law firm where I landed straight out of law school. The other was my second boss, a district attorney down in rural South Georgia. You could not have found two more different men on the face of this Earth. They were essentially alike, however, in several important ways – both were highly intelligent, honorable men who were always well prepared and who always treated others with the utmost respect. They both embodied at all times the sometimes elusive quality of “professionalism.” I consider myself extremely fortunate to have worked with both of these fine mentors.

Wouldn't it be wonderful if each and every young lawyer had the opportunity to learn from at least one such experienced legal mentor during his or her first year of practice?

This is the premise underlying the State Bar's recently approved program for new lawyers, set to begin on January 1, 2006. Formally called the “Transition Into Law Practice Program,” it consists of two main components: a Mentoring Program and a specialized “hands on” CLE training program to replace the old “Bridge the Gap” seminar. This ambitious new program will match each and every new lawyer with a seasoned nearby lawyer. A Pilot Project, which took place

during 2000-2001, overwhelmingly supported the conclusion that such a program was both workable and effective in creating more competent, professional lawyers.

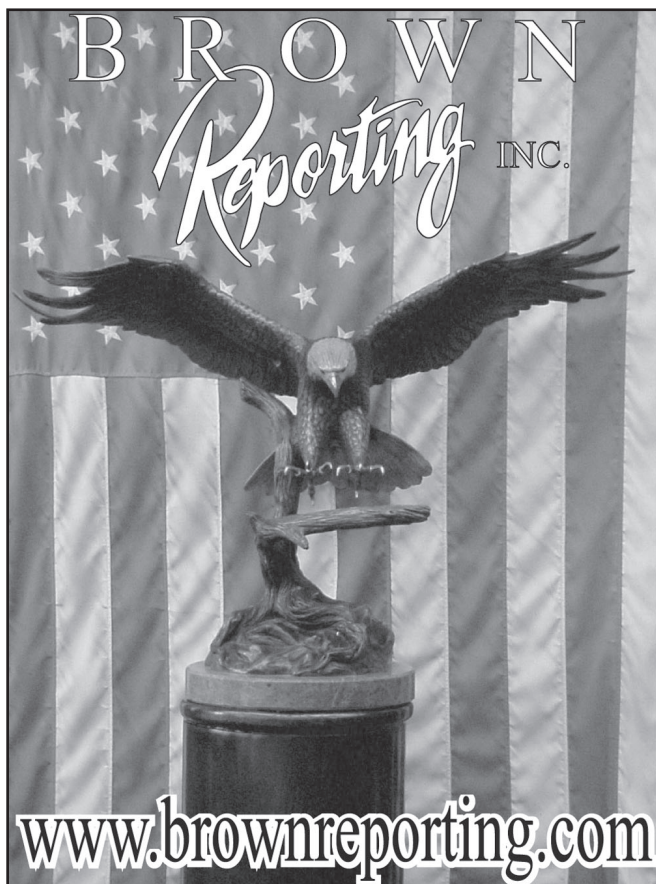
The success of this new program will depend, in large part, upon you – the many members of the General Practice and Trial Section. You are the experienced, seasoned attorneys who are needed as mentors for these new lawyers. Through this new program, you have a unique opportunity to make a difference in the life of a young person while simultaneously improving our profession.

Mentors will be appointed by the Georgia Supreme Court for a one-year term. A three-hour mentor training program has been scheduled for November 9, 2005, at the State Bar Center in Atlanta. You can also receive this training on-line.

I urge you to support this new, much needed program. I have signed up to act as a mentor and I hope you will also do so.

COMING EVENTS

- January 6, 2006** | **General Practice and Trial Section Luncheon**
Renaissance Waverly Hotel
- March 16, 2006** | **General Practice and Trial Institute**
Amelia Island, Florida
Chair: Cathy Helms
- April 6, 2006** | **Federal Civil Trial Practice**
Atlanta, Georgia
Chair: Myles Eastwood
- April 6, 2006** | **Jury Trials Seminar**
Atlanta, Georgia
Chair: Jefferson "Cal" Callier
- June 2, 2006** | **Tradition of Excellence Breakfast and Reception**
Hilton Head, South Carolina



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DEFENSE

BEN L. WEINBERG, JR.



TRADITION OF EXCELLENCE AWARD

Introduced by
Lester Tate

Ladies and Gentlemen, it is my distinct pleasure to introduce to you today the 2005 Winner of the Defense category, my friend, Ben Weinberg.

I am so proud that Ben Weinberg has asked me to introduce him here today because I've never worked for Ben, I've never been his law partner and I've never been co-counsel with him in any case. In fact, I have always, and on every single occasion, been Ben's adversary.

Now, that may surprise some people, and you've heard it said before I know, that you know a man by his enemies. If that were true of Ben Weinberg, we would never know him because in so far as I've been able to discover, he has no enemies.

And yet, I believe that Ben, being the true advocate that he is, always being my adversary, has always been my friend.

I've gotten to know Ben. I told somebody the other day, I think I have travelled more places with Ben Weinberg than I have any other non-family member. We have taken depositions all over the country. So let me tell you some of the places we've been.

We've dined together in Ben's club in Buckhead. We shared tiramisu in Douglasville, Georgia once. We had breakfast together, no grits, but ham and eggs in a motel restaurant in Wyoming once. We've eaten at the airport in Raleigh, North Carolina. And in fact, Ben once sent me to Boston for a deposition that didn't take place. But how could I be mad at Ben, because after I got there and found out that the deposition had been cancelled unbeknownst to me, I got my first opportunity to go to Fenway Park and see the Red Sox play.

And all of this is when I was on the other side, having sued Ben's client. And I had somebody tell me last night that one of the first things Ben did when he got a new file from the insurance company was to write the plaintiff's lawyer a letter thanking him for suing his client.

But Ben is the embodiment of that Shakespearian exhortation that we should do as adversaries in the law, "Strive mightily, but eat and drink as friends." And standing here today, I can still remember taking a deposition of a bucket truck designer in St. Joseph, Missouri, who was Ben's client, and when the deposition was

over, Ben insisted that all of us go to lunch together.

And I can tell you that Ben is such a great advocate that his client, as opposed to being horrified that this person has just been asking him a couple of hours of nosey and insulting questions is going to be taking lunch with them, looked at Ben and seemed to be quite gratified that we live in a country where this is the way that we settle disputes; that we may have differences of opinion, but at the end of the day we all sit down together.

And today, more than at any other time, we need great advocates like Ben Weinberg in our civil justice system. Ben has risen to the pinnacle of the Defense Bar because he is a great advocate, because he is a legal scholar, because he is plainly and simply one of the best lawyers to ever set foot in a courtroom, but also because he is always a professional and he is always a gentleman.

For those of you who may not know Ben, let me give you the essentials. He was born in Pinewood, South Carolina, in 1926. He served his country during World War II in the United States 1943 to 1946. He graduated cum laude from the University of Georgia in 1950, and from the University of Georgia School of Law in 1952.

He was president of the Atlanta Bar Association in 1969 and '70, and served on the Board of Governors of the State Bar for 17 years. Ben reached what I consider to be the highest honor any advocate can receive being elected a Fellow in the American College of Trial Lawyers. He founded what was once known as Long Weinberg and now as Weinberg, Wheeler, Hudgins, Gunn & Dial. He's probably tried more difficult cases with better results than any other lawyer in this state.

And by the way, because I used to be a defense lawyer, I'll tell you, you know, if you are a plaintiff's lawyer and you get a good verdict, you get better, easier cases. But if you are a defense lawyer and you get good results, you get harder and harder and harder cases to win, and still being loaded down with harder and harder cases to win, Ben Weinberg has always found a way to win those cases or to resolve them in a way that's fair to everybody.

While at Long Weinberg, Ben has trained hundreds of lawyers who practice both in his firm and throughout the state. But it is not just lawyers who look up to Ben. Now, I practice in Cartersville, Georgia, with the law firm of Akin & Tate, and my partner's father, Warren Akin, is 92 years old. He still comes to the office everyday.

And one day Ben and I had a case and Mr. Akin was through and he always likes to know what is going on and I told him Ben was there, and he said, "Ben is just a great lawyer." And it spurred this joke between Ben and I that I told Ben that Warren Akin was the only lawyer in the state of Georgia that thought Ben Weinberg was a nice young man.

And I want to tell you, Ben, that today is a special day for Mr. Akin, because June the 10th, 1935, he was sworn in as a lawyer, so today is his seventieth anniversary of practicing law. And I told him I was coming. He's received this award and I told him I was coming down here and he said for me to tell you that he still thinks you are a nice young man and a great lawyer, and I think so, too.

Martin Luther King once remarked that the ultimate measure of a man is not where he stands in moments of comfort or convenience, but where he stands in times of controversy and challenge. We know that in litigation and trial business that we're all in it is by definition challenge and controversy. Ben Weinberg's work in this arena as an advocate, as a legal scholar, and as a gentleman measures him to be a truly great man.

Ladies and Gentlemen, I give you my adversary, my mentor, and always on every occasion, my friend, a truly great lawyer and a truly great man, Ben Weinberg.

Continued on next page

Remarks by
Ben L. Weinberg, Jr.

Thank you, Lester. You know, I'd sort of thought that since I've been around so long, Lester would say "He needs no introduction," but apparently Lester thought I needed all the introduction he could muster.

I remember, just to reminisce a little bit, when summer came, blackberry was something of a summer delicacy that you ate, and now you talk to it or type in it. And I remember also when the courts were essentially closed from about June to September because of the summer heat. Air-conditioning has wrought its miracle there. Typewriters and carbon paper were the tools of the day. And, boy, you had to have really good eyesight after you got the fourth or fifth carbon because it all smudged together.

The practice of law today proceeds at a much, much rapid, much more fast pace than it did before, air-conditioning and computers, Blackberries, e-mails, and the rest. Copiers weren't even in vogue when I came along and whenever you had a suit on a note, you had to have your secretary or you type the copy of the note and attach it as an exhibit to the complaint.

Nevertheless, in as much as the work involves essentially people, then and now, the pressures on lawyers are about the same as they were then. The pace has picked up but the pressures are about the same. And we lawyers tend to work hard and play hard, and meet multiple demands on our time and energy, both physical and psyche.

With apologies to William Cullen Bryant, I would like to paraphrase the initial sentence of his poem "Thanatopsis." To him who in the love of the law holds communion with her visible form, she speaks a various language, and her language is as various full spectrum of human activity can generate."

The law has myriad facets and we're met daily with pressurized matters dealing with the life, liberty or property of our clients and urge to be zealous in the prosecution of this representation. Though we be zealous, we must not become a profession of zealots, lest we lose the very hallmark of our profession, which is sound judgment.

With unusual pressures and multiple demands made on us, it is difficult to maintain a balance in our lives between our profession, our family, and

ourselves. William Wordsworth may have had something of this sort in mind when he penned the words, "The world is too much with us; late and soon, getting and spending we lay waste to our powers."

It is sometimes necessary to escape the professional pressures in fashions other than merely time off to play. Sometimes it is necessary to literally reach beyond the stars in considering who we are, where we are, and more important, where we are going.

In this respect, our beautiful Earth photographs in space as a beautiful blue sphere. It holds many varieties of life, and it's a spirit held in gravitational bondage to a small yellow star which is hurtling through space towards a dark void between the constellations of Hercules and Lyra.

Relative to the distant stars, our Earth is rotating in a cycle of 23 hours, 56 minutes, 4.09 seconds, which we call with poetic license a day, 24 hours. Translating this into speed, at the Equator, our Earth is spinning at the rate of a thousand miles per hour, and since Savannah is located approximately 33 degrees north latitude, we are now spinning around at about 600 miles per hour. Just sitting here spinning, even though the building in which we are sitting is stationary or appears to be stationary and we can walk, stand or jump on the Earth's surface without being blown away by the motion, but that's just the beginning.

In addition to spinning like a top, our Earth is revolving around our small yellow star in a cycle of 365.242 days, a year in our nomenclature, at a speed of 66,000 miles per hour. And there's more. Our sun, along with all of us, the Earth and eight other planets, and with them many moons in tow, circles our galaxy, the Milky Way, in a cycle of 230 million years. In order to accomplish this, our solar system moves at the rate of 481,000 miles per hour.

To persist with these mind boggling figures, our Milky Way galaxy is moving around a super-cluster of thousands of galaxies at a speed of 1,350,000 miles per hour. Yet taking all of these things into consideration, we've managed to send human beings to our moon and retrieve them intact. We've sent unmanned space vessels while crammed with instruments and cameras to the nearby planet of

Mars. It's only 49,000,000 miles further away from the sun than we are.

And we have dispatched other space vessels to investigate the more distant planets in our own solar system. So here we are, comfortably seated or standing on a terrestrial ball that's spinning around at speeds up to a thousand miles per hour, and which is flying through space at 66,000 miles per hour around the sun, which is traveling 481,000 miles per hour around a super cluster of galaxies all in a pattern of cycles so exact that it is possible to predict the allocation of our own planet, the Earth, a thousand years from today, barring, of course, cosmic accidents.

Notwithstanding this intricate planetarian galactic ballet, we here are earthbound movers and shakers. This gives you some idea of proportion;

however, or balance, if you will, as to the relation between things and activities which we lawyers are involved and which we think are vital and imperative, of great moment, and sometimes of earth-shaking consequences.

Compared to the vastness of space with its hundreds of millions of stars, sometimes it's necessary just to fall back and think beyond the stars just to see where we are with our problems and pressures and how we fit into the greater scheme of things.

Franklin Roosevelt had three rules for public speaking. I'm going to follow the third one right now. The first one was: Be accurate. The second one was: Be brief. And the third one is: Be seated. Thank you.

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and give it out at your local Bar Meeting.

GENERAL PRACTICE

PHYLLIS J. HOLMAN



Introduced by
Mark Dehler

TRADITION OF EXCELLENCE AWARD

Good morning, everyone. We pride ourselves on being a nation of laws, governed by the rule of law and access to justice is guaranteed in our state and Federal Constitutions. As wonderful as that is, however, access must be truly universal for the system to work.

Universal access requires awareness of the rights people have. There must be knowledge of the system, physical and cognitive abilities to exercise those rights, and finally the resources with which to access them. To these principles our recipient has dedicated her entire professional career.

What could be more central to the general practice of law than those principles? For 30 years Phyllis Holman has worked with Georgia Legal Services Program. Like the Energizer Bunny, quite literally, she never shows any signs of slowing down. Mutual friends have told me stories about meeting Phyllis in the 1970s. They told me that she was quiet, reserved, even demure, among a more rowdy, generally male oriented, cast of characters.

Phyllis and her associates would quite literally put their files in the backs of their cars and drive circuits to meet with their clients, attend hearings, and trials. You may have read about some of the escapades of this group of people in Melissa Fay Greene's wonderful book, "Praying for Sheetrock." If you have not read it, please do. It A wonderful illustration of those years.

One observer even told me that this group wasn't well received. Having grown up in Georgia, I can't say I'm surprised, and in some parts of our state that might have been true. But Phyllis was known then, as she is known now, to be extraordinarily bright, thorough, tireless, and compassionate. If I had asked Phyllis what she wanted me to say here today about her, I know what she would have told me. She would have said, "Don't say anything about me. Talk about what we do at Georgia Legal Services." Well, Phyllis, I'm going to let you do that and I'm going to talk a little bit more about you.

Phyllis came to us by way of the University of Illinois where she re-

ceived both her bachelor's degree and her law degree. She started as a staff attorney here in Savannah and quickly became the managing attorney for this area.

She was promoted to the senior attorney for Health and Education in 1984, became the Director of Litigation for Georgia Legal Services. In 1990, Phyllis became the Executive Director of the Georgia Legal Services Program.

For the past 15 years, she has managed an organization with 11 offices throughout the state, with approximately 75 full-time lawyers and as many as 700 pro bono and volunteer lawyers. During that period of time, Georgia Legal Services has been faced with ever increasing annual case load. One estimate I saw was 14,000 annual cases. 14,000 annual cases!

And every year fewer resources with which to work on those. It is my understanding that Phyllis has refused to increase her administrative staff at all. Instead, she has worked at providing new programs, like the Migrant Farm Workers program and expanding services throughout the state.

In looking into some of the issues facing Georgia Legal Services, I found some interesting statistics, and it became very obvious why providing legal services to the poor throughout the state of Georgia is such a daunting task. Seventy percent of our state's lawyers are in the five county metropolitan Atlanta area. Of Georgia's 159 counties, five counties

have no lawyers at all. Some might think that's a good thing, but for the poor and indigent populations, that's a very difficult circumstance. Nineteen of our counties have three lawyers or fewer.

As dedicated as Phyllis is to the mission of Georgia Legal Services, perhaps the most amazing thing that I discovered as I was working on this is her dedication to the causes that Georgia Legal Services does during the day. Not only are these causes a 9:00 to 5:00 job, and for those of us who know Phyllis, it is much more than 9:00 to 5:00, it's also her 5:00 to midnight shift job.

For the past two decades, Phyllis has been dedicated to other programs that are a hundred percent supportive of the same principles. Since 1987, she has been a board member of Chris Homes, a wonderful program that operates nine therapeutic group homes for children who have been abused and neglected. In 1988, Phyllis was the founder of the Women's Policy Group, and she's still active in that group today.

Phyllis has also served our profession by being extraordinarily active in the State Bar. She has been a member of the Board of Governors, the Chief Justice's Blue Ribbon Commission on the Judiciary, the Advisory Committee on Legislation, the Georgia Supreme Court's Commission on Indigent Defense, and the Judicial Nominating Commission. Now, I can tell you that that's maybe a quarter of the list of things that she's been active in just the State Bar.

Phyllis is also a very prolific speaker. I have heard her speak to Rotary Clubs on the topic of why legal services is good for business. I'm telling you, that's a hard sale in some audiences. She's also spoken as far away as Barcelona, Spain, on the rights of migrant farm workers and international globalization.

But behind everyone who achieves these kind of things and does this kind of incredible work are others who deserve recognition and credit. Phyllis is joined here today by her husband, Jonathan Hewett. Jonathan, thank you for being here, and by many members in this room, of the past board of directors, members, and staff of Georgia Legal Services.

I will close by suggesting that regardless of your religious beliefs or affiliations, I have to think that every philosophy of human experience emphasizes what people do for one another. Ultimately, we will all be asked, what did you do for the least of these? Is this world a better place because you were here? Did you give care for the sick? Did you give food and water to the hungry? Did you give shelter to the homeless? Opportunity to the less fortunate?

Phyllis Holmen has done all of that in spades her entire life. I'm very proud to call her my friend and to present to you Phyllis Holmen, our 2005 recipient of the Georgia General Practice and Trial Section's Tradition of Excellence Award in General Practice.

Continued on next page

Remarks by
Phyllis J. Holmen

Good morning. Thank you, Mark, that was a wonderful tribute, and my husband always tells me not to do this, but I also want to thank him.

You know, if you are lucky in life, if you are able to surround yourself with wonderful people who help you look good, and that's the only reason that I am to here is because there are so many people who have helped me or made me look good, starting with Jonathan, but going on to the people that I work with and the people who are my friends and family.

Getting an honor like this, though, is kind of like frosting on the cake because it's the work that I've done for all of these years that I've loved so much but the sweetness of this award just really enriches the cake. As we all know, some of us like to eat the frosting and not the cake.

When you receive an award like this, it makes you pause and think about what you've done with your life in looking back over those thirty years, which can go by in the blink of an eye as I know many of you realize. And you look back and consider whether you were able to accomplish what you wanted to accomplish when you started out, whether you've been able to do what you wanted to do, so I wanted to talk to you a little bit about where I came from and how I got into what I've spent my last thirty years doing.

I grew up in a traditional middle class home up in Chicago, went to the University of Illinois, as Mark said. My father was a breadwinner and my mother stayed home and kept house. I had two younger brothers, and we were close in age. They were smart and they were athletic and they were competitive, and we argued about everything. We argued about who got the middle seat in the car. We argued about the chores, we argued about the ice cream, and it had to be exactly equal.

I think now that when I look back that those were my introductions to due process and equal protection. Although I wouldn't have known it at the time, at the very least it taught me the importance of fairness. And also because I was the only girl, it taught me about fighting for the rights of the underdog and it taught me about that rules shouldn't be different just because you are a girl. And both of my brothers became lawyers, too, so we don't argue as much as we used to. We grew up.

I came of age in the sixties and I was the first in my family to go to college and the first to go to law school. Those were the days, as some of you will remember, of the movements. The civil rights movement, the anti-war movement, the free speech movement, the environmental movement, the women's movement, everything was moving, everything was changing. And it seemed like the world -- you could make a difference in the world, and that's what I decided that I wanted to do.

The problem was, I didn't know how to do that. I didn't know any lawyers. I had never been in a courtroom. I knew nothing about the law. I didn't know what lawyers did, but somehow I figured out, well, maybe if I went to law school I could make a difference in the world, so I went to law school.

My first year of law school, I will never forget this experience, I would come home from classes in the evening, and I'd turn on the news and I'd realize that everything is about the law. The news was about trials. It was about laws being passed. It was about programs being administered, it was about laws being broken.

I felt like somebody had turned on the light and opened the door and I suddenly understood the world. It was really an amazing experience. But I had hopes then that I could work for a world where there would be good jobs for everybody who needed one, there would be good education, people could have good housing and decent neighborhoods, people could have good health care, people could have a fair shot at an opportunity to do the right thing for their families, and there would be fair rules and processes, and I thought I could make a difference.

I started working at Georgia Legal Services here in Savannah in 1974, as Mark said. Part of the job was circuit riding to very rural counties. I was a northern girl and I had never seen places like -- I mean, there's a lot of rural parts of Illinois, including where I went to school, but I had never seen the rural south before, but I knew immediately that this was exactly what I wanted to do with my life.

Our work is about basic human needs and solving critical client problems for the kind of things that we all say we value the most, solving problems related to their families, related to their

homes, related to getting them back to health care, taking care of their seniors. The majority of our clients are members of families, most of them do work.

Many of our clients are the most vulnerable people in our communities. Some of them don't speak English well enough to handle a legal problem. Some of them are senior citizens, some of them are children. The largest of our 11 offices get as many as a thousand calls a week. For some people we are the first point of contact with the justice system. And as Mark said, we circuit ride to all the counties in the state.

We do the cases that would be a terrible burden to a private practice, although we do have hundreds of volunteers, as Mark mentioned, who are very important to the work we do. We handle the domestic violence cases, we handle evictions, we handle consumer fraud, we handle termination of food stamps, and disability benefits, we handle exploitation of seniors. We handle the cases where you've got to respond now or the crisis is going to go bad.

We go to nursing homes, to mental institutions, public housing units, senior centers, and domestic violence shelters, homeless shelters, AIDS clinics. We reach out to clients all across the state to try to meet their needs and talk to them about their legal rights.

Last summer, working with many volunteer lawyers across the state, we helped some 1300 nursing home residents remain in their nursing home by establishing qualified income trusts for them which protected their Medicaid eligibility after a change in the state Medicaid policy.

Earlier this spring we had a couple of lawyers at Red Cross shelters in Seminole and Miller Counties where tornadoes hit and damaged some 200 homes and destroyed more than two dozen.

Recently our website, www.legalaid.org had one thousand page views in the midst of the Terri Schiavo saga for people looking for information about living wills and advance directives. And Georgia Legal Services is a good value. Last year, we obtained about \$1.2 million in child support and spousal support for low income people across the state. Many of those people were domestic violence victims, taking the first step to independence and self-sufficiency, leaving a violent family.

We addressed consumer problems worth over \$1 million. We preserved housing for almost 2,000 families. These are big victories for these clients. They are not big money cases but they are about the critical life things. And they are good cases for their community, keeping people in their homes and not on the streets, putting money in their pockets so they can spend in the community instead of being in poverty.

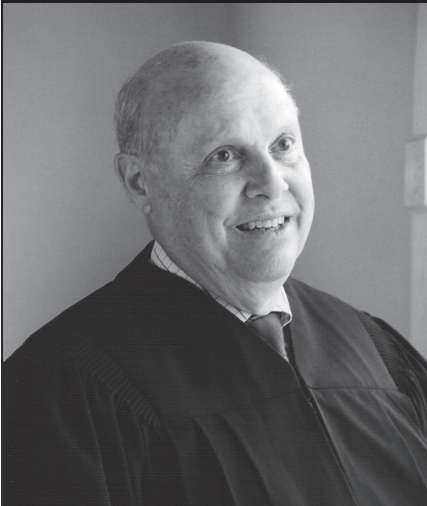
I feel very fortunate because I think I can look back and say that I have made a difference, that we all went to law school to try to make a difference, to try to make the world a little bit better place, and I feel very blessed to try to look back and think that I have left the world a little bit better place.

We've helped more than a million clients in Georgia since I started way back in the seventies. I believe in the end that justice does matter. It matters to our clients, it matters to our communities, and it matters to us in the profession. In the end, it's critical because, as we all know, if there is no justice there is no peace, and I see us as a peace mission and it's a real great honor to be able to work for a peace mission.

Thank you all so much for this honor. You are very, very important people to me and I can't thank you enough.

JUDICIAL

JUDGE WALTER C. McMILLAN, JR.



Introduced by
David Bell

TRADITION OF EXCELLENCE AWARD

Walter McMillan, Tradition of Excellence or Tradition of Endurance. In 1966, he's elected to the Superior Court Bench. That's before Chief Justice Leah Sears had even thought about law school. 1960, elected as a district attorney. So long ago, they called it solicitor general. Former Chief Justice Norman Fletcher hadn't even gone to law school by then.

Before that, like Judge Alaimo, he served in The army during a time of war. Almost half a century of public service. Tradition. What is Judge McMillan's secret?

Walt McMillan can work a crowd as well as Cathy Cox. If you have a party, if you invite Walt, everybody has a good time. Oh, how can I illustrate it? Oh, it was years ago, Tom Murphy — who remembers Tom Murphy? He had a complex patent case, I believe, down in Toombs County. They had a local lawyer, local tote the bag named Hugh McNatt, Toombs County McNatt. And they were up against slick Atlanta lawyers on the other side.

But at the end of the day, after they had fought as advocates, Walt went down to Hugh's cabin and Tom

Murphy went to Hugh's cabin and the Atlanta lawyers went to Hugh's cabin. Advocates during the day but at night everybody went to Hugh's cabin. Drank liquor, told stories, ate steaks. Isn't that the way we are supposed to be? Fight during the daytime, but friends at night.

If you are lucky like Bobby Reeves and you get to go to Judge McMillan's courtroom, it really is fun. But the secret to the Middle Circuit is you got to tell a story, and it wouldn't be right to introduce Walter without a story being told.

And I am reminded of Wyman Lamb. Some of you might remember Wyman. Wyman loves to tell this story. Wyman used to have a seminar. Now, if you've been to a Georgia Power seminar, it is a little different than the State Bar putting it on, because Wyman's seminars were always at Lake Sinclair and they usually started about dinnertime because you drank liquor, you ate steaks, and you told stories, and you got no CLE credits whatsoever.

Wyman's father, the President of Georgia Power, had heard about the seminar and at the seminar Wyman

invited every judge in Georgia, half of the legislators and the lawyers who protected Georgia Power in front of the jury, and it was a fun time.

And the President of Georgia Power has heard about the seminar and says, "Wyman, I too want to go." Well, Wyman has to roll out the red carpet. He calls the director of land management at Lake Sinclair and says the president is coming down. Take care of him.

Did he take care of him? Met him at 8:00 o'clock, got him on a fishing boat. They go out fishing all day long. This guide knew how to catch the fish. And they were pulling them in and the President of Georgia Power looks at that lake and he says, "What a wonderful place. Look at these beautiful homes. Our property owners at our lake, they take pride in Lake Sinclair. We are so fortunate."

And the president is busting at the seams. We get close to the end of the day and the guide says to the president, "I have one honey hole that I'm going to take you to. We are going to catch the big one, and then we'll go to the seminar." They go down this cove and the whole day turns.

The storm clouds roll in and the president looks up on the bank. He sees this house. He sees this thing. It's two rusted trailers welded together at the tip. The grass hadn't been cut in years. The front, whatever you call it, has on the middle of it an old toilet seat, and right in the middle is a tree growing it's been there so long.

The president is incensed. He shows up at the seminar. He grabs Wyman. He says, "Wyman, this is the most beautiful lake. We have proud property owners. They take care of their homes, except for one place. Wyman, you wouldn't believe this cove. I went in there. Two rusted trailers, the grass hadn't been cut and out on the front porch is a toilet seat with a tree growing through it. "Find

out that property owner, revoke that lease tomorrow. Evict them. We are not going to have that."

Wyman skips the seminar. He goes to the land management. He starts researching the title. At breakfast the next morning, the president says, "Wyman, what did you find out?" He says, "Mr. President, we've got it taken care of. That trailer over there belongs to Judge Walter McMillan." The president, without missing a beat says, "Wyman, you call up Judge McMillan right now, you tell him that Georgia Power is going to cut his grass, we're going to paint the trailer, and we're going to clean up the yard."

The truth hurts, doesn't it, Walter? But McMillan bleeds red and black. He is a d-a-w-g dog. But this ole dog can learn new tricks. No judge in Georgia has been more in the forefront on computers and technology than Walt McMillan. He's the one guy who has a computer on his bench, not for show but for use.

If you are a lawyer practicing in front of McMillan and you cite a case, you'd better be right because the ole guy is going to pull it up and read it, and he will read it back to you if you've missed anything. Bobby Reeves sitting there close to him, trying to get some brownie points, knows.

McMillan loves the law and there's nothing that gives him greater pleasure than having two good lawyers and being able to find a case that they didn't find and a case more on point. He respects the law and he respects good lawyers, and he wants those computers and technology. He recognizes the future.

How do you describe Judge McMillan? I guess in ways he's the salt and pepper of our bench. Sometimes it adds flavor and sometimes it's spice, but always we are changed by his presence, and he makes us all think.

It reminds me of the chairman, Cathy Helms' grandfather, the great Roy Harris. The Tom Murphy of Georgia of a different era. And Mr. Roy, who was just this wonderful guy, used to proudly say, "You know, I'm here because I've outlived all of my enemies." And Judge McMillan has outlived some of his enemies, many of his enemies. But he really helped Frank Sinatra tune those words or pen those words, "I've done it my way."

Walt is the only person I know who went to law school before going to college. And when he finally -- he'd passed the bar, and went to college and he studied finance because he knew he would never practice law. Well, it's true, he didn't practice law, he wrote the law. And he has been something to behold.

Thirty-nine years a Superior Court Judge. Longest serving judge in Georgia today, maybe in history. But one thing I can tell you, no judge ever again will serve on the superior court bench thirty-nine years. The rules of retirement don't apply to Walt. He was on the bench before they were enacted, so no one can ever beat that. Almost 50 years of public service.

Former president of the DA's Association, Chairman of the Court Automation Committee, Charter Member of the Judicial Council, former Chairman of the Council of Administrative Judges, former Member of the Judicial Qualifications Commission, a tradition there.

He is joined today with his lovely wife, Paige Peterson of Vidalia. He has one daughter, Lea. They have two step-daughters, Sumner and Emma, two wonderful grandchildren.

Walt McMillan, a lifetime of excellence, a Tradition, our Tradition of Excellence for the Judiciary. Welcome Walter McMillan.

Continued on next page

Remarks by
Judge Walter C. McMillan, Jr.

Thank you. I really don't know what I'm supposed to say now after all of that, but I do have one little thing I would like to play for you. Many lawyers have written wonderful letters supporting me in this honor and I appreciate it deeply, of course. And I notice that some of the letters - - I got copies of some of the letters -- and I notice very few of them were for -- or absolutely none that were from former clients or former parties in court.

And several years ago I received a little -- well, I receive e-mails quite often, also letters from prisoners and that sort of thing. We all know that. And I got a tape one day, and I opened the tape and I want you to know what a former party in court thinks of me, and a little bit of home service on that.

Now, I've got to make this thing work and you've got to listen. Might have to get my wife up here to check it out,

VOICE: The forefront of technology.

TAPE PLAYING: I sent this tape to you for I want you to know in case of my death what a God-damned stinking son-of-a-bitch you are.

JUDGE McMILLAN: I need to play that over because you missed one or two things. Now, listen carefully.

TAPE PLAYING: Judge McMillan, I'm Betty J. Morrison, and I'm sending this tape over to you for I want you to know in case of my death what a Goddamned stinking son-of-a-bitch I think you are.

JUDGE McMILLAN: It said "in all of south Georgia." After David said all of those nice things about me, I thought you'd really need to know something else. This old business of being judge for thirty-some-odd years or however long it's been, it does present a challenge on occasions and we all know that.

I had a young lawyer that was about to be sworn in, passed the bar exam and had his family there, and the clerk gave me the record, and I was getting ready to swear him, and I said to the clerk, in all seriousness, I said to the clerk: "Isn't there another form that's supposed to be completed

before I swear him in?" And about that time he went like that and his mom looked like that and his daddy looked like that, and I said, "It is that ethics form that you are supposed to have." He said, "Oh, yeah. Here it is, we got it. You can go ahead and swear him in." And I looked at him and I said, "You know that's not the last time you are going to be chastised by a judge and scared the hell out of."

This is really an humbling experience, and David has really made me humble by the comments that he made. I do think that you need to know that I sold that lot very soon, but I harvested the tree out of the commode first.

I thank you for attending and many of my friends that have known me over the years are here and I thank them for coming as well, and I certainly thank those who are responsible for my selection to this prestigious award.

And certainly I thank David for his friendship and the kind remarks that he made. David got out of law school and came to work with me as a law assistant and we had many, many great days together. And sometime I wish we had time to sit down and tell you about those days.

There are many others here, of course, who have done more than I've done to merit this award. However, I must admit that I'm enjoying these moments of recognition.

To follow in the footsteps of so many great Georgians is an overwhelming privilege. They all felt as we do, that man in nature carries with him the spark of divine reason, carries with him the spark of divine reason. And that's exactly what Ben was talking about in the world, and that's what Ms. Holmen was talking about when she was talking about the work that she did.

We are the only animal on the Earth that has that spark of divine reason, and then it's our duty and our responsibility through the law to let that divine reason take over and generate in us all those things that are necessary in order to do the job that we were directed to do by a greater power.

So that spark of divine reason guides us in the moral law and governs our private conduct, and governs our conduct towards others. It does it not only in our regular life but it does it in our pro-

fessional life as well, and we need to be aware of that.

That's the premise, of course, upon which our law is founded. What follows is gratitude, love, and respect. What follows is gratitude, love, and respect. To say the least, I'm experienced in that spark of spirituality that's expressed by you and others to me for what I have done, if I have done that to deserve it.

When I returned to the United States of America from the Korean War, as a ship docked and the Army band on shore played patriotic songs, with thousands of crying soldiers on board. It was a symbol of appreciation. We all experience those good times, like the day your family was pleased that you got your driver's license, when the dog is glad to see you when you return home, and maybe even your spouse is glad to see you get there as well.

When you were hugged by loved ones at your graduation, when you passed the bar exam, and people congratulated you, when you won your first case and your client was pleased. When you were elected to something and others shared the excitement of the moment. When you mar-

ried, and everyone smiled because you and your spouse were happy, and perhaps on the golf course you may have even made a hole in one or a great shot, and your partners jump with joy because they were glad for you. When you were stopped by a virtual stranger and told that several years ago you helped that person or you helped a loved one and when you pleased your parents, they expressed their love for you.

Of course, I could go on and on about those pleasures of life and those expressions of gratitude. Those were times of appreciation. Today that's one of those days for me. It's an honor to be recognized by the distinguished members of the Georgia Practice and Trial Section of the State Bar of Georgia. Appreciation by you is by far the highest honor that I could expect to receive. If I've earned that respect for my service as a judge, I expect no higher reward.

From the bottom of my heart, I accept your love and appreciation and thank God for your kindness. Thank you so very much and God bless you and God Bless America.

Start thinking about nominee's for the:

“Tradition of Excellence Awards”

**The nomination letter will go in the mail next month
and all nominations will need to be received
by March 1, 2006 for consideration.**

PLAINTIFF

JOHN E. JAMES



TRADITION
OF
EXCELLENCE
AWARD

Introduced by
Anthony A. Alaimo

I guess when you get to be 85, why you are glad to be anyplace. A couple of years ago, when this function was held down at Amelia, it happened to fall on Friday, the 13th. And, of course, that created some apprehension among not only the honorees but the people who were giving the honors. And I see that this year these have missed it by about a week, and I'm sure that satisfies the most of us at the meeting this morning.

This morning it really is my -- what I call a nonjudicial act -- to perform a most pleasant assignment to me. And that is to present to you John James over there, one of this year's recipients of the prestigious Tradition of Excellence Award by the General Practice and Trial Section of the State Bar.

And that is indeed a momentous accomplishment, to be selected as one of those to be honored for this award out of some 30,000 active lawyers in the state of Georgia. At least that's what the State Bar told me yesterday, and that is just incredible, absolutely incredible, that our Bar has reached such size.

Now, as witness that John is re-

ally most deserving of this award, let me mention some facts from his curriculum vitae; and, of course, it is impossible to encapsulate the life of a human being in just a few moments, but I wish to give you some of the highlights that he has attained.

He was born in 1932 up in Gainesville, Georgia. And by the way, I'll have to forego the opportunity and desire to roast him this morning as suggested. He attended Emory at Oxford until 1949, and then Georgia Tech from which he received a bachelor of science degree in 1954.

He graduated from Mercer University Law School receiving a bachelor of laws degree in 1964, and was admitted to the Bar in 1962 before graduation, as was the practice in those days.

He's a member of the Macon, the state of Georgia, the American Bar Associations, the American Judicature Society, the Southern Trial Lawyers Association, the Association of Trial Lawyers of America, of which he is a life member and in which he served as its president in 1983, and as a governor from 1985 until 1991.

He's a member of the Roscoe

Continued from page 16

Pound Foundation, a member of the Board of Visitors of Mercer University, and was its chairman in 1979. And he was a member of the Judicial Qualifications Commission beginning in 1989, and was its chairman from 1995 to 1998. He's a member of the International Society of Barristers, and Middle Georgia Colliseum Authority, having been its past chairman.

He's received a number of distinguished awards, the Distinguished Service Award from the Georgia Trial Lawyers Association. He has been designated Amicus Curiae of the Georgia Supreme Court. He re-

ceived the Heritage Award from the Georgia Trial Lawyers Association, and also the Outstanding Alumnus Award from the Walter F. George School of Law at Mercer University in 2005.

He was formerly a partner of the late Gus Jones, an outstanding plaintiff's lawyer from Macon, and he's currently a partner in the law firm of Harris & James in Macon, Georgia.

He has endowed an annual lecture at Mercer Law School in the name of Lord Gordon Slynn, a Law Lord of the House of Lords, Britain Supreme Court. And that to me is one of his most distinctive accomplishments

in support of the tradition of a true professional in the legal profession.

In short, in my opinion, he exemplifies the characteristics distinguishing this award, and throughout his career I find him to be a person of impeccable integrity and keen intellect, which in my book is the lodestar of any professional because we must continually remind ourselves that at the end of the race, there's a fragile prize, and that prize is called reputation.

And so I commend this organization for having selected him as one of its honorees. Now, I present to you Mr. John James.

Remarks by **John E. James**

Thank you. I was flattered and excited a few weeks back when Rudolph Patterson called me and said, "What are you doing June the 10th?" Well, a number of years ago I complained about the disciplinary work going on in the State Bar.

And Rudolph became president and I complained to him, and he put me on the oversight panel, so I thought that was what he was calling about. And thankfully it was not. He said, "Betty will be in touch with you." Betty called and said that Judge Alaimo had volunteered or agreed to do an introduction, which further excited me because a few years back Judge Alaimo decided that it would be a good thing for me to be a part of the Southern District.

And it was at a meeting like this he kept insisting that I go over and sign up and be a member of the Southern District. And I said, "Tony, I don't really want to do that because I've heard a rumor that the Southern District, unlike other districts, has a tendency to appoint people on criminal cases." He said, "I guarantee you it won't happen. I guarantee you it won't happen."

So I went over on a Saturday morning, and he interrupted a jury trial, introduced me to the jury, and I thought it was a eulogy. It was wonderful. But I was happy to be a member of the Southern District for a number of years, and continued to from time to time try some cases down here and oftentimes with him and in his area.

And then about five or six years ago, I got a call from a guy who says, "I am the magistrate and we are appointing you on a criminal case." I said, "Wait a minute. I had a clear understanding and agreement with Judge Alaimo that this wouldn't happen." And he said, "Was he the chief judge then?" And sure enough, he was then and he wasn't then.

But fortunately, it was an interesting kind of case. The gentleman had represented himself and had been convicted, and then he wanted to appeal and he let the time run to file the appeal but he wanted to continue to represent himself, but the time had run and he didn't know, and the question was: Under those circumstances should the time be waived?

Well, I had a very clever young associate, Lisa Neal Beckman, in my office. And I said, "Lisa, this looks like a good case for you. Write a brief on it." And she did, and she prevailed. And he got a new trial for which he's continued to want to represent himself. But in the process she came to the attention of the Federal Judges in Macon and they hired her out of my office.

I would like to particularly thank Cindy and Tommy Lee Wilcox, my former law partner, for being here. They wanted to be sure I showed up. Sort of like a friend a number of years ago when I was working for an insurance company after getting out of Georgia Tech before I went to law school. And I was an inspector, building inspector, et cetera.

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John E. James

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And I went into an area where we had a very clever young agent and he said, "I got a building I want to insure and I want your company to insure it, and you got a mutual company that pays a dividend and I will be able to get this business." I said, "Well, I'll take a look at it, but I don't like the neighborhood it's in." He said, "Look, either you approve it or I'm going to call your boss and tell him we were happy to see you show up sober today." All true.

I am flattered to be included in this group today. Walter McMillan doesn't recall but when I had been practicing law 90 days or more, we had a situation in our office there, one of them working for Gus Jones and Neal McKinney where they took the position that I should do general practice for a year. Now, Gus, I sympathize with what you are doing. I tell you, I got admitted to the Bar early because, as the judge said, that was allowed at that time, and they had me doing general practice for a year.

Actually I got admitted in December, and jumping ahead a moment, along about September I asked if a year meant from the time I started doing it or from the time I graduated, because if it was going to start from the time I graduated I was going back to work for the insurance company. General practice is a little tough.

But at any rate, we had a case -- they had a case that involved child custody. Easily resolved matters. And it was going to be over in Walter's courtroom. My lady was on the other side of the state and the husband was a former father of the children, at any rate, was there. And I had heard about home cooking, and I looked concerned so I went to Neal McKinney and I said, "I understand you and Walter McMillan are friends." He said that's right. I said, "How about calling him and sort of smoothing the rocks out over there for me." He said, "Okay, that will be fine."

So I went over and Walter talked to those parents. He ignored the lawyers. He resolved the problem. Everybody went home happy. I got back and I said, "Neal, I sure do appreciate you calling him because he handled it this way and it was so grand." And he said, "Well, I knew he was going to do that, that's the reason I never called him."

Well, Ben Weinberg and I had a situation together many years ago, too. It was at the State Bar meeting, Bench and Bar meeting. I don't know whether, Ben, you recall that or not, over in Callaway Gardens. And they divided everybody up and Ben and I were on a little panel together with the judge designated Bar, Harold Hill, who was then the Chief Justice of the Georgia Supreme Court, and Harold got Ben and I together and he was saying what about this, what about that.

We were talking about voir dire questions. I was advocating what Judge Alaimo did because I thought Judge Alaimo asked so many questions on voir dire you had trouble thinking of one to add. The great advantage of that is that it does not cause the juror or potential jurors to be resentful toward either side. Most judges won't do that because it's extra work for the judge, in my opinion.

But, at any rate, Harold Hill was throwing out these things and Ben and I were saying that sounds good or he'd say why don't they do so and so? And I'd say that sounds good. And Harold said, "Wait a minute, I thought you guys were on opposite sides. Y'all are agreeing on everything," and we're talking about how you get a fair trial. We agree.

Now, if I got a case and my client is old or young or male or female, I may have a different idea about how the jury ought to be chosen. If we are going to talk about the abstract and not going to know what we're going to have, then, that's what was being done.

Someone asked a while back, pleasant, courteous and passing the time of day, how did you ever end up deciding to go to law school? Well, I sort of had that in the back of my head for a long time, had some uncles that were lawyers. My wife, Lil and I got married, and she was in medical school and I kept talking about going to law school.

Those of you who know Lil will understand her to be a little blunt sometimes. Lil said, "Tell you what, I will be graduating here in a few months, I want you to go to law school or shut the hell up!" Thank you.

Medicaid Subrogation

Neal Childers
General Counsel
Department of Community Health



Neal Childers holds a B.A., History, 1981 Mars Hill College; J.D., cum laude, 1984, Walter F. George School of Law, Mercer University
PROFESSIONAL EXPERIENCE
(1984-1999): Georgia Department of Law, Assistant Attorney General, Public Safety Division, Senior Assistant Attorney General, Criminal Justice Division; 1999-2000: Georgia Department of Public Safety, Deputy Director, Legal Services Division; 2000-2001: Georgia Department of Public Safety, Director, Legal Services, Georgia State Patrol Division; 2001-2003: Georgia Department of Motor Vehicle Safety, General Counsel; 2003: Georgia Department of Motor Vehicle Safety Interim Commissioner; 2003-present: Georgia Department of Community Health, General Counsel

OVERVIEW OF THE MEDICAID PROGRAM

Medicaid is a jointly funded federal/state healthcare assistance program created in 1965 through Title XIX of the Social Security Act. It is the largest source of funding for medical and health-related services for people with limited income. Among the groups served by Medicaid are eligible low-income parents, children, seniors, and people with disabilities. Medicaid reimburses healthcare providers for covered services rendered to eligible individuals.

While each state administers its own Medicaid program, the federal Centers for Medicare and Medicaid Services (CMS) establishes requirements for service delivery, quality, funding, and eligibility standards. The largest share of Medicaid's cost is paid by the federal government. Georgia's Medicaid program receives various levels of federal reimbursement for different services and functions. For example, the federal government pays 90% of the cost of family planning services while certain administrative functions are reimbursed at 50%. The Department of Community Health (DCH) spends nearly \$6 billion in state and federal funds to provide services to 1.5 million Georgians annually. Almost one in five Georgians are currently enrolled in the Medicaid program, and an even larger percentage have been on Medicaid at some point in their life.

Under federal law Medicaid is considered the payor of last resort. Therefore, DCH is obligated to pursue repayment of Medicaid funds from

any third party responsible for injuries suffered by a Medicaid member. This may include, but is not limited to, automobile insurance companies, hospitals, malpractice insurance carriers, employers, workers compensation carriers, and homeowner insurance plans. Recovered funds are returned to both the state and federal governments based upon the rate of contribution to the program.

As part of the recovery process, code section O.C.G.A. § 9-2-21 requires all attorneys to notify DCH when representing a Medicaid member. The Department has worked to streamline the notification process and currently allows attorney's offices to submit required information via telephone, fax, or US mail. If you are not sure if your client is or was Medicaid eligible at the time of the incident, the Department will be happy to do the research for you upon request.

THE RECOVERY PROCESS

The Subrogation Unit (SU) is responsible for facilitating the recovery of Medicaid funds from third parties. Public Consulting Group, Inc. (PCG), currently contracts with the Department for some of the following key functions of the unit:

PROCESSING OF ACCIDENT/IN-JURY INFORMATION

Medicaid members are bound by contract upon enrollment to assign their rights to payment for medical care to the Department, as a condition of eligibility for benefits. They

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Tradition of Excellence
Breakfast & Reception

Annual Meeting 2005

June 10, 2005

The Westin Savannah Harbor Resort & Spa
Savannah, Georgia



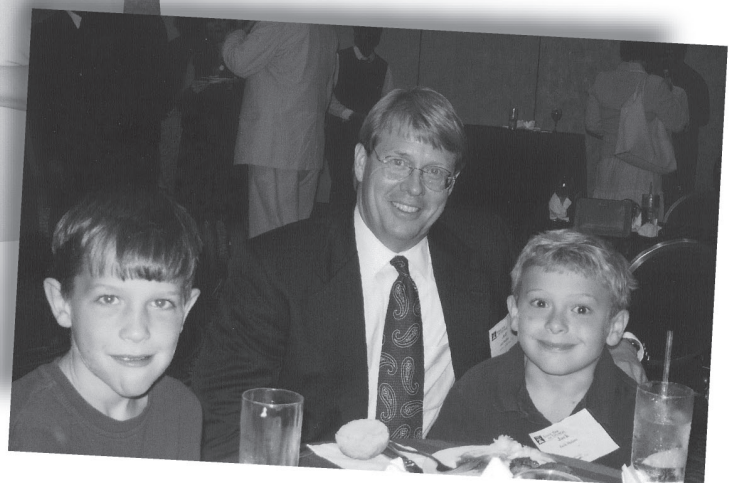
John James, Dianne Burnside, Tommy Burnside,
Judge Anthony A. Alaimo, and Ben Weinberg



David Bell and Justice George Carley



Scott Coulter, Myles & Linda Eastwood



Daniel Griffin, Jeff Helms and Jack Helms



Sold out "Tradition of Excellence" breakfast



New chair Myles Eastwood and immediate past chair Cathy Helms



Daisy Hurst Floyd and Judge Tommy Day Wilcox



Ben Weinberg, Justice Carol Hunstein, and Nita Weinberg



Lester Tate and Dale Akins



Sally Akins, Judge Bonnie Oliver, and Judge Walter McMillan

Medicaid Subrogation

Continued from page 19

are also required to provide the Department with information that may assist in the identification of a liable third party. This information may include attorney contact or insurance information. The Subrogation Unit will then notify them of the Department's interest.

Upon contact by an attorney, the Subrogation Unit will establish the member's Medicaid eligibility status at the time of the accident, determine whether the Medicaid program incurred any medical expenses as a result of the accident or injury, and generate a complete medical history of Medicaid claims filed on behalf of the member. This information is available to attorneys who submit a written request along with a signed release from their client granting the attorney access to their claims records. Attorneys should follow the four steps described below to determine if their client was eligible for Medicaid at the time of the accident:

- 1) Ask your client - many members will not tell you unless you ask them
- 2) Investigate who paid for medical services
- 3) Contact the SU at 770-980-9777 option 2 or via fax at 770-937-0180
- 4) Mail a notice of representation to:

Georgia Department of
Community Health
Medicaid - Subrogation Unit
5660 New Northside Dr. \ Suite 750
Atlanta, GA 30328

The Subrogation Unit also conducts a series of mailings to members for which Medicaid has paid claims that have diagnosis codes consistent with trauma-related accidents. The SU also routinely conducts data matches with the Department of Motor Vehicle Safety and Board of Workers' Compensation to identify potential recovery cases.

DETERMINING MEDICAID'S INTEREST

Once the member's eligibility has

been determined, the Subrogation Unit staff reviews Medicaid payment reports to identify claims related to the accident. Members occasionally receive unrelated medical services about the time of the incident. Medical services not related to the incident are excluded from the amount of Medicaid's interest.

Because Medicaid reimburses inpatient claims based on the Diagnosis Related Grouping (DRG) system and not on charges submitted, there is usually a disparity between the amount actually paid by Medicaid and the amount billed by the provider of service. In most cases, Medicaid pays less than the amount of the submitted charges. Contractually, the provider must accept Medicaid's reimbursement as payment in full and cannot bill the member for the difference between charges and the Medicaid payment.

In seeking reimbursement, Medicaid can only legally claim repayments up to the amount that it has expended. This is another good reason to contact the Subrogation Unit. Once a provider has submitted claims for adjudication, they must accept Medicaid's payment as payment in full. A provider cannot refund payment to Medicaid and then pursue a higher reimbursement from the member or from the third party. By requesting a detailed list of the claims paid by Medicaid, you can ensure your client is not paying a claim twice or at a higher rate.

MEDICAID'S RIGHT TO RECOVERY

The Department may recover its expenditures under three legal theories:

Subrogation: In accordance with O.C.G.A § 49-4-148, members' rights to collection are subrogated to the Department.

Assignment: In accordance with O.C.G.A § 49-4-149, all members enrolled in Medicaid have assigned their rights to receive monies from

third parties to the Department for services that Medicaid has paid.

Department Lien: In accordance with O.C.G.A § 49-4-149, the Department may file a lien with the clerk of court in both the county of residence of the Member and also in Fulton County. If the Medicaid claim for payment is ignored, the Department forwards the claim to the Office of the Attorney General. The Attorney General's Office shall then seek reimbursement through the measures prescribed in O.C.G.A. § 44-14-470 through O.C.G.A. § 44-14-473.

SETTLING A CASE WITH MEDICAID

After you settle your case with the third party, you must pay all the outstanding creditors and lien holders. In Medicaid's case, you may either forward a check to the Georgia Department of Community Health at the address above or, under specific circumstances, request a reduction. Under O.C.G.A § 49-4-148, the Department has the authority to reduce a lien at its discretion. Reductions may be granted if there are insufficient funds from the settlement to pay the attorney for fees and expenses and satisfy all the lien holders. If this situation applies, you can forward a request for a reduction to the Subrogation Unit. Each request must contain the following:

- a) Amount and date of the settlement
- b) List of all creditors and amount of their claims
- c) Itemized list of Attorney's fees and expenses
- d) Documentation of any reductions from other creditors and/or attorney
- e) Reason for requested reduction

The SU will process and respond to the request for reduction within seven (7) days of receipt. For your convenience, we have attached at the end of this article a fax transmittal form for you to use to contact us.

Continued from page 22

If you have any questions about your obligation as an attorney or your client's responsibility as a Medicaid member, please contact the subrogation unit at 770-980-9777 option 2.

Effective July 1, 2005, this function transferred to the Department of Transportation, pursuant to H.B. 501.

Fax Transmittal Form

Fax: 770-937-0180

Attn: Case Notification Clerk
Department of Community Health
Medicaid-Subrogation Unit

From:

Lawyer / Paralegal / Assistant

Law firm

Member Name

Date

Number of Pages

Medicaid Number / DOB

Date of Injury

Insurance Company

Type of Injury

- Auto
- Medical Malpractice
- Worker's Compensation
- General Liability
- Other

Address

City

State

Zip

Notes:

Claim Representative

Claim Number

Claim Representative
Phone Number

Should Your Disabled Client Have A Special Needs Trust?

Debra A. Robinson

Robinson, Jampol, Schleicher & Jacobs, LLP



Debra A. Robinson represents individuals and small businesses in estate planning, probate, elder law, charitable giving, and business law. In her practice, Debbie prepares wills, revocable and irrevocable trusts, health care directives, charitable giving documents, and related business agreements such as share holder and split dollar agreements. She also represents clients in probate matters, guardianships for minors, and guardianships for incapacitated adults. In her elder law practice, Debbie advises senior citizens and their families regarding estate and long term care planning. As a woman widowed at a young age, Debbie offers her clients a unique understanding of the importance of estate planning in easing the legal, financial and emotional difficulties that result from the loss of a loved one.

A special needs trust is an irrevocable trust established for the benefit of a disabled person. The type of special needs trust used in the context of litigation is a self settled special needs trust, which is established with assets of the disabled person, usually from the proceeds of a personal injury tort, medical malpractice claim, or workers' compensation claim. A self settled special needs trust is an important element in case settlement for a disabled client.

PURPOSE OF SPECIAL NEEDS TRUST

A settlement, whether a lump sum or periodic payments, will cause a disabled individual to be ineligible for government benefit programs which are means tested. The purpose of a special needs trust is to enable the disabled person to qualify for public benefits, while preserving funds to supplement the public benefits, thereby improving the overall quality of life of the beneficiary. In addition to preserving public benefits for the beneficiary, a special needs trust provides for the management and investment of assets without the constraints of a court supervised guardianship or conservatorship.

DISADVANTAGES TO GUARDIANSHIP

There are multiple disadvantages to the distribution of settlement proceeds to a guardian for a disabled person, whether a minor child or adult. The guardian is required to report annually to the court regarding the use of guardianship funds, is limited to certain permissible investments, may not disburse from principal without court

approval, and must pay for a bond. In applying for government benefits, guardianship assets will be considered available resources of the ward, forcing the guardian to spend down until the assets are low enough to begin or reinstate public benefits. It is certainly not in your disabled client's best interest to be directed to a legal system that will deplete almost the entire settlement, if there is an option that will preserve those funds.

STATUTORY AUTHORITY

Self settled special needs trusts were first implemented in 1993 when Congress amended the Medicaid statute. 42 U.S.C. Section 1396p(d)(4)(A) (part of the Omnibus Reconciliation Act of 1993) authorizes a special needs trust that is funded with the beneficiary's assets, but which will be disregarded for purposes of determining eligibility for need based government programs.

BENEFITS PROGRAMS

In any case where the beneficiary is receiving or will likely be eligible to receive benefits from a government program, it is imperative that a self settled special needs trust be used. Such programs include, but are not limited to:

- Medicaid
- Supplemental Security Income (SSI);
- Section 8 Housing
- Food Stamps
- Vocational Rehabilitation Programs;
- Recreational Programs;
- State waiver programs.

For many tort victims, Medicaid is the only form of medical insurance they will ever have. Preserving eligibility for Medicaid can be critical.

TRUST REQUIREMENTS

The requirements for a self settled special needs trust (often called a "(d)(4)(A) Trust") are:

1. The beneficiary is under age 65;
2. The beneficiary is disabled, as defined by the Social Security Act; and
3. Upon the death of the beneficiary, medical assistance paid on behalf of the beneficiary under a state plan will be paid back to the state.

AGE

Although not spelled out in the statute, the government has taken the position that a trust established for a disabled person under age 65 remains exempt for the rest of that person's life with respect to assets funding the trust prior to age 65. In structured settlement cases, payments from an annuity that continue after the beneficiary attains age 65 do not disqualify the trust, because it is the annuity that funds the trust, not the payments from the annuity. As long as the trust is funded with the annuity before the beneficiary attains age 65, the annuity payments can continue after age 65.

DISABILITY

The definition of disability for (d)(4)(A) trusts is provided in the Social Security Act at 42 U.S.C. '1382c(a)(3)(A) and (B): an individual shall be considered to be disabled for purposes of this subchapter if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months. The impairment must be so severe that the claimant is unable to do his or her previous work or any other "substantial gainful activity" which exists in the national economy.

PAYBACK

Self settled special needs trusts are often referred to as "payback" trusts because of the requirement that the funds remaining in the trust at the beneficiary's death be paid back to

the state which paid medical benefits during their lifetime. The trust must contain a provision requiring that any state which provided payments under its benefits programs be reimbursed. The trust should also contain provisions for notification of the appropriate state agencies at the beneficiary's death.

Counsel will sometimes try to minimize the impact of the payback requirement by allocating some of the settlement funds to the disabled client's parents or spouse. If the client might be eligible for SSI, this type of allocation can backfire. SSI eligibility laws deem the resources and income of a parent available to a child under 18 living at home. Consequently, if the disabled person is a minor child living at home, attention must be paid to the parent-to-child deeming rules. SSI also has rules for spouse-to-spouse deeming that can result in similar ineligibility.

FUNDS MUST BE UNAVAILABLE

For the trust funds to be deemed "unavailable" to the beneficiary, the trust must be irrevocable. Most states, including Georgia, follow the general trust principle based on the Doctrine of Worthier Title, that if a grantor is the sole beneficiary of the trust, the trust is revocable, but if there is a named residuary beneficiary, then the trust is irrevocable. Social Security takes the position that a state which will be paid back funds at the beneficiary's death is not a residuary beneficiary. Because it has only a reimbursement right, it is simply a creditor. Naming the disabled person's "estate" "heirs" or "next of kin" as remainder beneficiary does not satisfy the requirement to name a remainder beneficiary and can cause the trust to be deemed revocable.

WHAT ARE "SPECIAL NEEDS"?

A special needs trust can be tailored to the needs of the beneficiary. Such trusts usually include a detailed (but not exclusive) list of permissible expenditures. Such expenditures might include: special medical equipment, extraordinary or experimental medical

services, dental, ophthalmic and auditory care, psychological support services, improved living arrangements other than those which might be provided for or funded under public assistance programs, computer equipment, magazine subscriptions, camping, athletic contests, supplemental nursing or physical therapy care, differentials in cost between housing and shelter for a shared or private room in an institutional setting, stereos, tvs, furniture, movies, a handicap van, etc.

It is permissible for the Trustee to purchase a home, titled in the Trust's name, to be used as the disabled person's primary residence. Alternatively, the Trustee can pay for home improvements, repairs and maintenance on an existing home.

Payments to a parent for care of a disabled child will be considered the discharge of a legal duty to support unless the parent care giver is providing care over and above what is normally provided by a family member. For example, if the parent had to give up outside employment to provide the care, it should be permissible to pay an hourly rate comparable to the going rate for home health agency care givers.

If the family has incurred credit card debt that was related to the beneficiary's care, payment of that debt should be an appropriate expenditure.

Where a life care plan has been prepared for use at trial, it is an excellent source of information regarding the beneficiary's expected special needs.

WHO ESTABLISHES SPECIAL NEEDS TRUST?

The statute does not permit the disabled individual to establish his or her own special needs trust. The Trust must be established by a parent, grandparent, legal guardian or a court. This rule restricting the ability of a mentally competent adult with disabilities to establish his or her own trust can present problems if there is no living parent or grandparent. The disabled person must either pursue the appointment of a legal guardian through the probate court, or ask a superior court to serve

Continued on next page

Special Needs Trust

Continued from page 25

as the creator of the trust. Judges are generally reluctant to sign a trust as grantor. In that event, the court can simply enter an order directing the establishment of the trust.

STRUCTURED SETTLEMENTS

In resolving personal injury claims, a portion of the plaintiff's recovery is often paid out on an installment basis in periodic payments. Compared to lump sum cash settlements, the structured settlement provides management of the benefits, a guaranteed payment, and favorable income tax treatment. However, a structured settlement does not preserve the disabled recipient's qualification for public benefits programs; it does not meet the requirements of 42 U.S.C. Section 1396p(d)(4)(A) because it is not a trust and there is no payback at the recipient's death. The monthly payment will be counted as an available resource for Medicaid and other government programs. If the lump sum cash portion of the settlement has been diminished by medical expenses, the periodic payment may not be enough to meet the disabled person's needs, but at the same time might be too much to allow him or her to qualify for public benefits.

A properly drafted special needs trust, named as the recipient of the periodic payments, should preserve the benefits of a structured settlement while enabling the plaintiff to qualify for Medicaid and other government programs. It is essential that the named payment recipient of the annuity benefits be the special needs trust, and not the disabled individual.

THE DRAFTING OF A SPECIAL NEEDS TRUST

Because the rules regarding special needs trusts are so complex and frequently change, in any case where the client is or might be eligible for a government program, a trust or elder law attorney with experience in special needs trusts should be engaged early in the process. That attorney may have valuable input on how to best structure the settlement and can ensure that

a valid and appropriate special needs trust is drafted on a timely basis.

It is important to make clear when a trust or elder law attorney is engaged that such attorney has been retained by the client, and not the plaintiff's attorney. This is true even if the plaintiff's attorney brings the trust attorney into the case. An engagement letter should be signed between the trust attorney and the client, evidencing that the trust attorney's duty of loyalty is to the client, and that the trust attorney has undertaken the role of counsel in the area of the special needs trust and public benefits programs.

ADMINISTRATION OF SPECIAL NEEDS TRUST

In addition to being properly drafted and funded, a special needs trust must also be properly administered. Loss of public benefits can occur if the Trustee makes improper distributions from trust funds. Consequently, the selection of a Trustee is a critical element in establishing a special needs trust.

The Trustee must identify the Trust's investment objectives and make decisions that establish the Trust's management strategies. To do so properly, the Trustee must understand the goals of the Trust, and the beneficiary's needs for current income and/or long term growth. With a self settled special needs trust, the Trustee's investment responsibilities will be different depending on whether the settlement is a structured settlement or a lump sum.

Annuity payments from a structured settlement are mostly income tax free, and payment to a self settled special needs trust maintains the tax free characterization. Income earned on reinvestment of the payments will be subject to tax, depending on the character of the investments. The size of the annuity payments, and the needs of the beneficiary, will dictate whether any reinvestment is possible. A lump sum settlement is also tax free, but will involve a much greater level of responsibility for investments. The lump sum will likely be intended to last for the beneficiary's lifetime, so invest-

ment should be for growth, as well as income. Annual budgeting is important in either scenario, but particularly with the lump sum.

The Trustee should make distribution of funds directly to service providers, rather than to the beneficiary. The Trustee must maintain accurate records of assets, income and disbursements. The Social Security Administration has the right to review disbursements made to or on behalf of the beneficiary. The Trustee must provide accountings to the beneficiary, file federal and state tax returns for the trust, and assist the beneficiary with personal returns if the beneficiary is unable to handle the filing. SSI recipients have certain reporting requirements, and the beneficiary will need the Trustee's assistance to comply. The Trustee should also assist the beneficiary to seek eligibility for all available government programs and might retain the services of a government benefits advisor to assist in that regard. Where appropriate, the Trustee should retain the services of a professional care manager to coordinate agencies and professionals, home health aides, personal care providers or any other services in the beneficiary's best interests.

CHOICE OF TRUSTEE

Often a parent, spouse, sibling or other family member is chosen to serve as Trustee. A close family member can be a good choice as Trustee because he or she will know the beneficiary well, and can identify the beneficiary's needs. Also, a family member will generally serve without taking a fee, thus preserving more of the trust assets for the beneficiary. However, because the Trustee usually serves without being required to report to a court, and without giving bond, there is a risk of mismanagement or misappropriation. Many prospective Trustees are unsophisticated. A family member as Trustee is not advisable in those situations where the family considers the funds as belonging to all of them and not just to the beneficiary, and a family member wants to be named as Trustee

in order to control distributions. Assuring that public benefits are maintained can be challenging, because it requires an understanding of complicated eligibility rules. A family member Trustee interested in using the funds for his own benefit won't take long to make distributions that render the beneficiary ineligible for benefits. If a family member is selected as Trustee, the Trust should authorize the Trustee to retain the services of a professional investment advisor to assist in formulating an investment strategy.

Another option for Trustee is a financial institution with trust powers. Corporate Trustees will often have trust officers who have expertise administering special needs trusts. Even banks which do not have the experts available on staff, will have the ability to access professional assistance. Corporate Trustees are familiar with local trust laws, tax law, investment alternatives, and the general duties of a Trustee. However, many corporate Trustees will not accept a trust that is less than \$1,000,000. Most corporate Trustees charge a fee that is based on a stated percentage of the market value of the assets, with a minimum annual fee even if the assets fall below a certain level. To illustrate, if the bank charges 1% on the first \$1,000,000, and a minimum flat fee of \$5,000, if the value of the Trust falls to \$500,000, the Trustee fee would be \$5,000, or 5% of the Trust's value. Because of the fees, a special needs trust funded only with monthly payments from a structured settlement annuity would not be a good candidate for a corporate Trustee.

Aside from cost factors, families can be apprehensive that a corporate Trustee will not have a personal relationship with the beneficiary, or an understanding of the family dynamics. To combine the benefits of family and professional, clients will often select a family member and a bank to serve as Co-Trustees. An important advantage to a corporate Co-Trustee is the comfort level that an unbonded and inexperienced family member will not cause harm to the beneficiary by

improper distributions which cause disqualification from public benefits.

FAMILY MEETINGS

In those circumstances where family members look at the settlement funds as family money, it may be helpful to have a meeting with the trial attorney, trust attorney and family members, before the trust is funded. Before the meeting, the family should be asked to prepare an annual budget for the disabled person's needs. At the meeting, it should be made clear to the family members what the limits are on the powers of the Trustee, and what types of distributions are permissible. The life care plan, budget items and specific expenditures can be addressed. If the beneficiary is a minor, the parents should be instructed that trust assets not be used to discharge their parental duty of support. A recommendation should be made that meetings be held at least annually with the family, disabled person, Trustee and care manager.

PROCEDURE TO IMPLEMENT SPECIAL NEEDS TRUST

If the settlement is a compromised claim of a minor or incapacitated adult, it will probably be necessary to seek probate court approval, even if the trial court has already approved the settlement. If there is a court appointed guardian of the property, the guardian should petition for probate court approval for establishment and funding of the trust. If there is no guardian, a petition for guardianship of the property (conservatorship) should be filed with the petition for approval of the trust, explaining that the sole purpose of the guardianship is to authorize the guardian to establish the trust and transfer the settlement proceeds to it. Of course, if the beneficiary is a physically disabled but mentally competent adult, there will not be a need for probate court approval.

Many probate court judges and trial court judges are unfamiliar with special needs trusts. It is helpful to submit a brief citing the federal law that authorizes the creation of the trust, along

with an explanation of its purpose. Getting approval of a special needs trust sometimes becomes a "which comes first" dilemma: Should a guardian be appointed first in probate court, and then the settlement proposal with the special needs trust be submitted in superior court? Or should the settlement agreement be approved, and submitted to the probate court with the petition for guardianship? There is no clear procedure.

It is not uncommon to encounter reluctance on the part of both probate and superior court judges to authorize an individual to serve as Trustee without giving bond and filing annual reports, particularly if the disabled person is a minor. If such reluctance cannot be overcome by reference to trust law and the fiduciary responsibilities of a Trustee, it may be necessary to seek a corporate Co-Trustee.

IS THERE A DUTY TO IMPLEMENT A SPECIAL NEEDS TRUST?

There appears to be a trend to hold plaintiffs' lawyers to a duty to implement a special needs trust where need based benefits are at issue. Malpractice judgments have been awarded where a special needs trust was not part of the settlement process and lump sum or annuity payments to the beneficiary, a guardian, or a non qualifying trust caused the beneficiary to be ineligible for means tested benefits.

UPDATE - NEW GEORGIA RULES

The Georgia Department of Human Resources issued a new policy on special needs trusts October 1, 2005. DCH Legal Services will determine the validity of all special needs trusts. To be a valid special needs trust, the attorney preparing the trust must send it to DCH Legal Services two months prior to execution and/or judicial approval. If funded with settlement proceeds, a certified copy of the settlement and court order must be submitted with the trust. Notice of the time and place of any hearing regarding court approval of the settlement and special needs trust should be served on DCH at least 15 business days before the hearing. There are additional requirements regarding the terms and administration of the trust. Failure to comply will result in the trust being counted as an asset or transfer of resources.

Mentor Volunteers Needed For Transition Into Law Practice Program

Remember when you were a “new” or “green” lawyer? Does reflecting upon your “trials by fire” motivate you to help a newer member of the profession learn how to be a lawyer?

The new mandatory Transition Into Law Practice Program (which replaces the “Bridge the Gap” program as of January 1, 2006) places a Beginning Lawyer with a Mentor for the first 12 months of their practice. The goal of the program, also known as the Mentoring Program, is to afford every beginning lawyer newly admitted to the State Bar of Georgia with meaningful access to an experienced lawyer for the first 12 months of their practice equipped to teach the practical skills, seasoned judgment, and sensitivity to ethical and professionalism values necessary to practice law in a highly competent manner. The Program is essentially an educational program that combines a Mentoring component with a Continuing Legal Education (CLE) component.

Mentors will be appointed by the Supreme Court of Georgia for one-year terms and may serve for more than one term. They must meet minimum qualifications, including being a member in good standing with at least five (5) years practice experience with a reputation in their local legal community for competence and ethical and professional conduct.

A Mentor Orientation Program will be offered by ICLE on November 9, 2005 at the Bar Center in Atlanta, with simultaneous simulcast to the South Georgia Bar Office in Tifton. The Chief Justice of the Georgia Supreme Court will formally swear in Mentor Volunteers at the conclusion of the training program. Mentor Volunteers attending this program will receive 3 hours of CLE credit at no charge - all registration and CLE reporting fees will be paid by the Transition Into Law Practice Program.

The Georgia Supreme Court and the State Bar of Georgia are looking for Georgia Bar members from across the state to give back to the profession by dedicating their time to serve as Mentors in this ambitious new program.

To request a Mentor Volunteer form, please contact the Transition Into Law Practice Program at 404-527-8704 or tilpp@gabar.org.

To assist lawyers in their transition from student to professional, the Supreme Court of Georgia, on Feb. 2, 2005 authorized the State Bar of Georgia to proceed with the creation of the Transition Into Law Practice Program. The core of the program, informally known as the Mentoring Program, is to match beginning lawyers, after admission to the Bar, with a mentor during their first year of practice.

Most beginning lawyers will be paired with an experienced lawyer in the same law firm, office, or practice setting who will serve as the beginning lawyer’s mentor (“inside mentor”). However, based upon historical averages, roughly 150 to 200 newly admitted lawyers each year will enter practice on their own and not in association with a lawyer who has at least five years of experience and who is qualified to serve as a mentor. These beginning lawyers will be matched through the Program with an outside mentor or assigned to a Mentoring Group as part of a group of beginning lawyers and mentors arranged on a regional basis.

The Program is operated under the auspices of the Commission on Continuing Lawyer Competency (“CCLC”), through its Standards of the Profession Committee, pursuant to its general supervisory authority to administer the continuing legal education rules.

For more information, read the the Transition Into Law Practice Program Executive Summary, or contact the Program Director, Douglas Ashworth at (404) 527-8704 or tilpp@gabar.org.

CALENDAR CALL

"Georgia's Largest Law Firm"

GENERAL PRACTICE AND TRIAL SECTION STATE BAR OF GEORGIA



APPLICATION FOR MEMBERSHIP IN THE GENERAL PRACTICE & TRIAL SECTION OF THE STATE BAR OF GEORGIA

For members of the State Bar of Georgia:

Name: _____

State Bar #: _____

Address: _____

City, State & Zip: _____

E-Mail: _____

Application date: _____

Cost: \$35, payable by check to the State Bar of Georgia, and send to:
The General Practice & Trial Section, 104 Marietta Street, NW, Suite #650, Atlanta, GA 30303

Signature

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