

CALENDAR CALL

GENERAL PRACTICE AND TRIAL SECTION STATE BAR OF GEORGIA



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Tradition of Excellence Awards



Wright W. Gammon, Chairman of the General Practice and Trial Section, presents the 2004 "Tradition of Excellence" awards to (l-r) Chief Justice Norman S. Fletcher, Wayne Gammon, James T. McDonald, Jr., John C. Bell, Jr. and Wright Gammon

CALENDAR CALL

"Georgia's Largest Law Firm"

GENERAL PRACTICE AND TRIAL SECTION STATE BAR OF GEORGIA

Vol. VIII

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The "Tradition of Excellence" recipients for 2004 were presented their award at the General Practice and Trial Section Breakfast June 18, 2004 in Orlando, Florida. From left to right, Chief Justice Norman S. Fletcher, Wayne Gammon, James T. McDonald, Jr. and John C. Bell, Jr. and Wright Gammon, Chairman of the General Practice and Trial Section.

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 Cal Callier, Taylor, Harp & Callier, P.O. Box 2645, The Corporate Center, Columbus, Georgia 31902. **Published by Appleby & Associates, Austell, Georgia**

A Rare Opportunity This Election Year



This election year presents us – as general practitioners and trial lawyers – with a unique opportunity. The eleventh hour redistricting by the federal courts threw numerous well-entrenched and experienced state legislators into new or dual-incumbent districts. The result was an unprecedented number of retirements. Of those who chose to run for re-election, many face impressively strong opposition. The bottom line is that this year's elections could significantly change the complexion of Georgia's legislature.

One notable change is the increased number of lawyers running for the legislature than has occurred in quite some time. In the last legislative

session, a mere quarter of Georgia's legislators had a law degree. Lawyers, who are trained to focus on language and to analyze the potential legal consequences of that language, are absolutely crucial to the legislative process. For these reasons, former House Speaker Tom Murphy, himself a lawyer, reportedly sought to assign a lawyer to every single committee.

A big drawback of this year's mass exodus of experienced legislators, both Republican and Democratic, is the loss of those who knew and understood the legislative process, who knew how to negotiate complicated issues, and yet retain civility. Inexperience often leads to increased tension and less cooperation.

The flip side of the coin, of course, is the opportunity, or rather opportunities, presented this year. First, there is the opportunity for lawyer-legislators to change the course of our state's legislation. If a lawyer is running in your district, get to know them (if you do not already), help them understand the important issues facing you and your clients, build a relationship with them, offer yourself as a "sounding board" on legislative matters within your area of expertise, and perhaps most importantly in these days of high-priced campaigns, support them financially.

A different, and even more important opportunity arises if no lawyers are running in your district. If your district

will not be represented by a lawyer, it is even more imperative for you to get to know the candidates and build relationships with one or more of them. Once you have established a relationship, you can educate them about the issues of concern to you and your clients – both before the election and once they take office. Once elected, contact them frequently, particularly during legislative sessions, with information to help them make decisions on legislation of importance for your practice area.

By long tradition, Georgia's general practitioners and trial lawyers have ably served as legislators. I think it no coincidence that many of our most renowned elected officials over the years have been general practitioners and/or trial lawyers. Many other fine general practitioners and trial lawyers have preferred to remain in the "background" but have still provided much-needed assistance to (and financial support for) our elected representatives.

I am completely confident that, once again this year, the general practice and trial section of the State Bar of Georgia will rise to the occasion. You *can* make a difference. And that, in a nutshell, is what we should all strive for – to make a difference, to improve the lot of our clients, our profession, and all the citizens of the great state of Georgia.

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DEFENSE

James T. McDonald, Jr.



Introduced by
James Hiers

TRADITION OF EXCELLENCE AWARD

Thank you, for this opportunity where the defense gets to go first and we get to use up all the plaintiff's time. Honorable Jim Carrigan, United States District Judge, Denver, Colorado, tells a true story of a friend of his who grew up in a small town in south Georgia. This friend excelled in everything. He made fantastic grades in high school, so good that he received a scholarship from Harvard.

And when he attended Harvard, he had outstanding grades again. About that time he married his high school sweetheart, and he had such good grades at Harvard that he was given a scholarship to Harvard Medical School. He went there and then went into residency for ophthalmology, made excellent grades, and he decided I can't go back to this small town in south Georgia and practice ophthalmology, so he got all of these offers from everywhere, including from Denver, Colorado, a great facility out there.

And he went out and practiced there and was doing very well. Meanwhile, back in New York

City, there was an artist, a famous portrait painter, and he was losing his sight and he had been to Emory, and he had been to the Mayo Clinic, he had been to Johns Hopkins, he had been everywhere trying to correct this problem and no luck.

So he called the doctor in Denver, got an appointment. The doctor said I don't think I can do anything for you but come on out, and he did. He performed laser surgery and restored the artist's vision. And the artist thought, Boy, I've paid him but I want to do something special for him, and I want to paint his portrait, and he did.

And the day came for the unveiling of the portrait, and the judge was there and everybody was there and in the halls of the hospital and they pulled the draperies off expecting to see the face of the doctor. But instead, they saw this giant eyeball, and not a face. And it had intricate details, all of the blood vessels, you could see everything else.

And finally, if you look closely, you could see in the center of the eye the doctor in a white coat and a

stethoscope and everybody was sort of puzzled and the doctor's wife pulled on his coattail and said, "Henry, Henry, aren't you glad I talked you out of being a proctologist?"

So, Jim McDonald has two things in common with this doctor, he has excelled in everything he has done and he chose the right profession, the perfect profession for him. The legal profession has been very good to Jim McDonald, but he's even been better to the legal profession.

He got off to good start. He had great parents, his father, would you believe, played tackle for the University of Alabama and went to the Rose Bowl, not one time, but two times. And his mother was a delightful lady and passed away at 92. And a former secretary of Jim's says about him, "I especially admired the way he took care of his mother. The obvious respect and love he had for her, and he was totally attentive to her needs and desires." She said, "This says a lot about a man."

And he did grow up in Tallapoosa and he started off good. He was able to spell it by the time he was five. He can do it yet. He excelled at the Citadel. He was the captain of the Corps of Cadets, and a distinguished military student and he attended the University of Virginia Law School, he did the dean's list routine, and he was very successful there.

In the Air Force he was a captain in the Judge Advocate's Corps, and in 1966 another stamp of excellence, he was named by the U.S.J.C. while he was still on active duty to the Outstanding Young Men of America. He became an associate in Swift, Currie, McGhee & Hiers in '68, a partner in '72, and the senior partner when the old guy could receive it, and then got the hell out of there.

Another mark of the way he distinguished himself in the community, he served as Clerk of the Session on the Holy Innocents' Board of

Trustees and the Excellence of the Church in the Presbyterian Church is the same as the governing body, there are two offices there, the Preacher and the Clerk of Session. He served as Clerk of Session of the largest Presbyterian Church in the United States with about 13,000 members, Peachtree Road Presbyterian Church.

In Bar Association type activities, vice-president of the Federation of Corporate and Defense Counsel, and member of the Board of Trustees of Institute for Continuing Legal Education. He is married to Mary, and his son Judge is here, and that's a good name, isn't it? His daughter Boo, and three grandchildren. But what do other — I'm prejudiced but what do other lawyers say about Jim McDonald?

Tommy Malone, as you know, is an outstanding plaintiff's trial lawyer. Tommy says, Jim McDonald is always well prepared, a formidable adversary. Portrays always a gentleman, and most of all, a person whose word you can always trust."

Jon Peters said, "The best I have encountered in my time in practice, among the best I've encountered among my time in practice. In some ways, I hate to try a case with Jim McDonald, he is too unflappable, too smooth, too poised, and has the presence that makes me feel like a rumped toad in comparison."

And Rush Smith said, "It is not only Jim's respect paid to the court, to the parties and their attorneys as well as the superb lawyering he demonstrated, but the opportunity and guidance he gave to the associate in the trial that stuck with me."

Within his firm, Steve Cotter says, "The remarks I've heard from other lawyers always reminded me of Jim's true professionalism in his everyday law practice as opposed to some CLE seminar.

Bobby Pollard says, "When I started I noted earlier that Jim

McDonald was well-regarded within the firm and beyond, he had a significant work ethic. And, boy, does he. He's always totally prepared, well-groomed, no silver hair was ever, ever out of place."

And he treated other lawyers as a gentleman and he enjoyed Johnny Walker Red label Scotch. This was a man to emulate. He taught me how to be a lawyer. Some by instruction but mostly by example. In my 27 years of practice, I have never heard an unflattering remark about Jim McDonald.

And unlike a prophet in his own hometown, Jim McDonald is respected, appreciated, and loved within the firm. He believes that lawyers should work long and hard. He believes also that lawyers should dress like they are doing law work and not yard work, but he did finally relent and say okay, "We can give up. We will have one casual workday a week, Saturday."

He feels that he has always tried to treat people right and one of the first things he found out in practice is that Atlanta is not a mecca of all the good trial lawyers and all the good lawyers. He found that out in the state, great lawyers are found, and that's one important thing that he determined early.

Tremendous work ethic. His wife says it is a hundred and ten percent. Fair and honest, loves God and his country, she says. But listen to this though, in spite of devoting himself to the law, he's never missed a child's sporting event nor dance recital.

One former secretary says he's a dictation king. He stored 13 tapes on her desk at one time, she quit but (laughter) look at the people he's mentored, and this is important in the practice of law. What have you done for other lawyers?

Clayton Farnham, John Sacha, Bobby Proctor, Doug Bennett, Mark Goodman, Joe Munger, and Bridge

Continued on next page

James T. McDonald, Jr.

Continued from page 5

Perry. Every one of these mentorees has become an outstanding lawyer, highly respected.

My wife, Barbara, and I have been good friends with Jim and Mary, spent a lot of time with them, including trips to Europe. Jim has an excellent sense of humor, but when he puts down his yellow pad, he lightens up a little bit but he never relaxes his standards.

In mediations, which I do now, every week somebody says, "Oh,

you practice with Jim McDonald? He's such a great lawyer, such a fine gentleman. He treats me right." And it is every week at least somebody brings that up.

He's the stuff legends are made of. If every lawyer acted with the same ethical behavior and professionalism as Jim McDonald, the legal profession would not be regarded by the public in the same regard they hold for used car salesmen or salespeople. But they would be maybe perhaps even on the level of clergy.

We are here at Universal Studio, if

we were to send to central casting and say we need one who looks like a lawyer, acts like a lawyer should, and is highly regarded and an excellent lawyer, they would send us Jim McDonald.

It is appropriate that Jim McDonald should be given the Tradition of Excellence Award. In law, Jim McDonald is a Tradition in Excellence, in life Jim McDonald is a Tradition of Excellence. I'm proud to introduce Jim McDonald.

Remarks by
James T. McDonald, Jr.

You know, it is good to hear those nice things while you are still alive. I am not a golfer. I played golf quite a bit when I was younger and I was not very good. I'm not a gardener. My wife says that I cut off the part that is supposed to bloom. In fact, it all looks the same to me. I am not a woodworker or a stamp collector or a painter. I suppose I could do all of those things, but I am a lawyer, and that's where I have spent most of my time in the last many years. So to receive an award for being a lawyer is particularly meaningful to me.

My friend, Joe Weeks, called to let me know I had received the award. You folks know Joe. You know that after you finish talking with him on the phone, you better check your legs to make sure they are still in the joint, because he would pull that leg, and sometimes subtly.

So when he said to me I had been selected, I said, "you must be kidding," and it was just like — it would have been like him to say, you know that's right, I should have called Jim O'Connell, but he didn't, and I appreciated him making that call.

There are those I see here who have knocked me around courtrooms and depositions and even mediations. My worthy opponents. I thank those who selected me. I thank Mary McDonald for accepting the time that I spend and my family in this endeavor. I have been blessed to be with a fine firm and to follow after people like Jim Hiers who

paved the way for me and I hope now I paved the way for others. Everyday I practice with fine partners and associates.

Sometimes I believe we lawyers overlook how fortunate we are. We receive from people their absolute trust in their most personal business. One of the things that I do in my worklife now is defend claims made against lawyers. And so many times I see in that what the client looks at as a betrayal, a loss of trust. It is very painful and it is not something that you can always recompense with settlement.

In addition to that tremendous responsibility, we have interesting work that we do. Deciding how a product works, did the doctor meet the standard of care, putting together a personal injury case. I have been around long enough and I have seen enough walks of life to know that we do some of the most interesting work that there is.

And we have the trust of our clients, we have interesting work to do, and I think we can and do contribute to society. I do not accept the proposition that 99 percent of the lawyers make the rest of us look bad. I do not accept criticism of lawyers generally. I believe that we help the system, supposed to be the best in the world, work everyday. And I know you don't think about that but you do, and what we do in the administration of justice everyday we make the system work.

On the way to work the other morning,
Continued on next page

something was wrong. I had not turned on the radio. I drove for about 10 minutes. I wasn't listening to WSB News or to a golden oldie, I was listening to the sound of silence, and it was pretty pleasant. And this day I am not going back with you now to when the Selectric was the state of the art and carbon paper was used to make copies, but now you have Blackberries or whatever those things are, and Palm pilots and cell phones.

You know, we have a tremendous responsibility and we are in a hectic schedule and we need to be able to keep up all the time if we want to. Yet, I think we must guard against overburdening

ourselves in the practice of law, and while I would not to presume to give any of you any advice, I would suggest that at times in your busy practice you stop and listen to the sound of silence.

How do you measure what you do? To be gifted with the ability and the opportunity to be a lawyer requires us, I believe, from time to time to stop and measure what we've done with that gift and that ability. I'm proud to be a lawyer and I'm proud to be among those who have received this award, and I will tell you this, if this is part of my 15 minutes of fame, I'm going to cherish it forever.

ROY E. BARNES
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of Georgia

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GENERAL PRACTICE

Wayne Gammon



Introduced by
Joseph Anderson

TRADITION OF EXCELLENCE AWARD

You know, Wright has had difficulty in maintaining his objectivity about Wayne. I, like Wright, am not entirely objective. Wayne took me in when I had three children, a wife that didn't work or didn't work outside the home, and gave me an opportunity to come back home and paid me a living wage until I could get in out of the rain or know how to get out of the rain and I certainly appreciate him.

Some personal information about Wayne. He was born in 1929. It is hard to believe looking at his hair, Jim. And I have questioned him annually what hair coloring does he use and he assures me that he doesn't use any hair coloring and I believe that now, so we need to find out what he's doing.

He attended and graduated from the Cedartown public school systems, West Georgia College, and Emory Law School. He joined the United States Army in 1950 and became a member of the 82nd Airborne. And this is something that we had a lot of discussions about. I told him that it would take at least three Airborne to make one Marine.

He found exception to that and we talked, but he's jump qualified and attained the position of Jump Master.

Now, this was after he had attended law school and was a member of the Bar Association. He did not particularly want to become an officer but they found out that he was a practicing attorney and he was commissioned as an officer in the United States Army and obtained the rank of captain. In 1954, he really did himself well. He married a young lady from Dillon, South Carolina, Beth Page, whom he met at Fayetteville, North Carolina.

Beth had traveled to Fayetteville where all the eligible men were, and had started teaching school. So Wayne doing the proper thing, he met her and he didn't have any choice, married her, she's been the most wonderful woman you've ever met in the world.

They have four children, all of whom have been very successful, two are school teachers, one is a supervisor with the Department of Family and Childrens Services and the fourth is the president of General Practice and Trial Section of the State

Bar of Georgia. That ain't bad. It really isn't.

You know, professional information, he was admitted to the State Bar, and if I've heard this once, I've heard it a thousand times. He took the State Bar when he was 19. Well, he passed it shortly after his twentieth birthday, and he was a practicing attorney from age 20 on. Graduated from high school when he was 15.

But, anyway, he was just tremendous. Did everything early. He attended the first Judge Advocate school after the adoption of the Uniform Code of Military Justice. And for those of you that served in the Judge Advocate's Corps know that was really a time of flux. He prosecuted and defended soldiers extensively for three years. And then in 1954, Wayne returned to Cedartown to begin a general practice of law.

And since beginning his practice Wayne's held many positions locally and state-wide. He was a member of the Georgia Bar, was president, Select Committee on Evidence; he was a member and vice chairman of the State Bar Disciplinary Board. He was State Court Solicitor for Polk County for 12 years; and this is the most amazing thing to me for those of you who practice in small towns, he was the attorney for the Polk County Board of Commissioners for over 35 years continuously. Folks, that — if you have been in small

counties, that is tremendous.

Wayne's civic activities include, he's been a member and president of almost every civic organization in Cedartown, that includes the Jaycees, the Kiwanis Club, Optimist Club, Shrine Club, the Sportsmans Club, the Band Parents Club. I remember when Ann was going through the band and he came in the band parent's club, and then when Wright started playing football, he was the president of the Touchdown Club.

He's been there in the small town, that takes up a tremendous amount, just to give back to your community. The general practice of law, that's what the group is making this award for, the General Practice and Trial Section. I don't know how many of you have practiced in a small town. Jim left Tallapoosa, he got into this in Tallapoosa.

But Wayne was specialized in wills and estates, property law, Social Security claims, workers' compensation, personal injury, corporate law, county government, and criminal law.

Now, you know, it is impossible to specialize in each and every one of those, so basically what we tried to do was to recognize what was coming in and have sense enough to know when we were in too deep over our head. And he was excellent and he had a wisdom about him that he could either handle the case or point the client in the right direction.

Tremendous, uniquely talented, and I've never seen a combination of talents in any one individual as he has.

He's the best criminal trial lawyer I have ever seen, and I want to say that again, I've seen Bobby Lee, but Wayne is the best criminal trial lawyer I've ever seen, and that was the best kept secret outside of the Tallapoosa Judicial Circuit. Tried some tremendous cases, murder cases there in Polk and Haralson County. He's competitive, he is charismatic, an he's explosive, all of what you need to be a successful criminal trial lawyer.

His ability to cross-examine an adverse witness is just phenomenal. I held the brief case, I know, I was there, and watching him come back is just amazing. Wayne was not only a great criminal defense lawyer, he also possessed the talent to be a great county attorney. He was smart, he was self-deprecating, and he had the patience with a calming spirit.

He held the Polk County Board of Commissioners together for 35 years with very, very little comment. And when he stepped down as county attorney, then all hell broke loose. But Wayne was not only a great lawyer, he was also a great partner. He was supportive, he was generous, and he was forgiving, especially forgiving.

You know, the great thing about this is it gives me an opportunity to

Continued on next page



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Wayne Gammon *Continued from page 9*

tell Wayne Gammon that I appreciate him, that I have appreciated his association for 30 years, and one of the great things about this is that I have an oppor-

tunity to tell him personally what he has meant to me and my family in my lifetime and I want to thank him.

And it is with great pride and pleasure that I introduce to you,

Wayne Gammon, Sr., a 2004 recipient of the Tradition of Excellence Award as presented by the General Practice and Trial Section of the State Bar of Georgia.

Remarks by Wayne Gammon

I've always been told that you couldn't predict Joe Anderson. Today, I have learned the truth of that reputation. I don't know who he was talking about, Ladies and Gentlemen, certainly wasn't me.

I do appreciate this award so much. I am thankful for the opportunities to practice law for, I guess, too long. I was, as was mentioned, kind of handicapped in life in a way. I had a brother, and I grew a little faster than my brother, so at age four I was as big as he was. We looked a great deal alike, people thought we were twins.

So my mother kind of went along with the joke and dressed us alike on occasions. A few days after, oh, I think it was probably in August, they had — we lived only three doors from the school and they had a little taffy pulling for all the kids that were going to start next year.

And so I slipped off from home and went to school with my brother. My brother was a little small and I was a little large for my age at the time. And the teacher at that time, who was Miss Martha Battey, whose father became a very famous medical professional in the state, in the state of Georgia, and they enrolled me and I went home and told my mother.

She had been, of course, looking for me all day that I was going to school. She said, "Boy, you can't go to school, you are only four-years old. I said, "Well, I have to go. They have given me my instructions." And so I cried because she said I could not go.

My father came home from work and she related this fact to him and he said, "Awe, let him go for a day or two. He will get tired of it and quit." Well, apparently, I don't remember because this all is information from my mother, I don't remember it, but apparently I did not, so I entered school at four and that made me graduate from high school at 15.

And college, I went to college at 15 and kind of liked college and stayed around during the summers, and so I got through with that kind of early and went

to law school, I guess at 17, 18, I don't know. And at that time you could take the bar after your second year of law school, and so I took it.

So I passed it. And to show you how much I knew about the law, I got the notice that I had passed the bar exam from a man I'm sure a lot of you folks would remember, John Maddox of Matthews, Maddox, Stokes & Smith in Floyd County, who was on the board of the bar examiners at that time. He sent me a personal letter. I got it during the Thanksgiving holidays, and said I had passed.

And, of course, I was at Emory Law School and I called the clerk of the court, said, "I would like to get admitted, Mr. Hagan. When is your next term of court?" This was in November of 1949 I guess. And he said, "Well, we don't have any more court until the fourth Monday in February." I didn't know and he didn't share with me that, of course, they had motion court two or three days a week. I could have been admitted then, but I waited from November, Thanksgiving day in 1950 until February the 27th, the fourth Tuesday in the next year, to be admitted. So I was 19 at the time I passed it and I was 20 at the time I was admitted. The Korean War broke out about that time, and I finished Emory Law School and I went to summer school the last year, and I finished actually the winter quarter and went home to practice law, and was presented with greetings from the president that my presence was required in the United States Army. And so I was examined and then told to go home, we will let you know when to come back.

So for nine months I waited and in January the next year I entered the Army. And I went through basic training at Fort Jackson, South Carolina, a wonderful assignment, then came to Atlanta, Fort McPherson, and Judge Advocate's section there and worked — was offered a commission, declined it, and I had my 21 months halfway done and President Truman, with

a stroke of the pen, extended every one in the military service, some of you remember this, for 36 months.

I was one unhappy citizen at that time. At that time I decided to go ahead and take the commission, then I would spend three years in there anyway, that I had been extended. So then I wound up at the University of Virginia, in the first Judge Advocate General class, then assigned to the 82nd Airborne and spent most of the rest of my time at Fort Bragg, thoroughly enjoyed it. And almost — had I not met my beautiful wife — I probably would have been a career military man. I was fortunate in getting a couple of promotions. I really liked it.

But I was fortunate enough to meet my wife and she informed me in no uncertain terms that she wanted nothing to do with the military, and that there was no church life, no community life in the military, and she wanted nothing to do with that. So that ended my military career and I came on back to Polk County and I practiced there for — I don't know how many years, a lot of years.

And Joe Anderson, many years later, became my partner and I don't know how many years, Joe, it's been —

MR. ANDERSON: Over 30 years.

About 30 years ago. But it's been a great ride, and I owe the practice of law a great deal, I owe the Bar a great deal, I've had a great life. I have four great children. I am proud of all of them. My wife is a teacher, her mother was a teacher, two of my daughters are teachers, one of my daughters, as Joe mentioned, is with the state. And, of course, my son claims to be a lawyer. I will let you be the judge of that.

And I'm glad to have with us today my first cousin, Buddy Gammon, Captain Buddy Gammon of U.S. Air Force who lives here in Florida, but he's originally from Rome, Georgia, just 18 miles away from Cedartown. I'm proud to have him and his daughter, Sarah, here with us today and all three of my daughters, Paige, Ann, and Claire, and my son, Wright, and our good friend here, and let's see — Oh, yes. That's right, Wright is married. I know him well. I was there, and his wonderful wife and two boys, Wayne, and I believe there's Winston. But, Ladies and Gentlemen, I'm taking too much time. I intended to speak about 30 seconds. It is

kind of like having a spillway where you can't stop this spillway and the letter that I received from Betty over here said, you need to be prepared to say a "few words" after the presentation.

And I understand that. That means a few words, then shut up and sit down. I've been in a position of having to listen to people like me for a time. Also, I would like to say that I was surprised and very pleased that I am privileged to personally know or have known about 80 percent of the recipients, the former recipients of this award, as I went over the list that Betty had forwarded to me. I was surprised. Well, where is Bob Brinson? He was the first one I heard from. Thank you, Bob.

Bob and I go back a long way.

MR. BRINSON: Yeah, we do. Don't tell it all.

No, I won't, Bob. I will tell the story that Bob Brinson and I were once — I believe it was at the Supreme Court or either the Court of Appeals, and the Chief Justice received a message — you remember this, Bob — that the parking lot where all the justices cars were parked, was going to be worked on beginning at 5:15, and that any cars left in the parking lot at that time would have to remain there until Monday.

He came in and announced that and then said, "You gentlemen may argue if you wish," and I looked at Bob and Bob looked at me, and we both agreed that our briefs covered our positions quite adequately. And we did not argue the case and went on our way.

A lot of things happen in strange sort of ways at times. But trial lawyers, you know, are under attack quite often and sometimes deservedly so. I'm the only perfect one that I know, that's the problem. But I kind of like the motto of a funeral home in my hometown, the motto is "It is better to know us and not need us, than to need us and not know us."

I appreciate this award, Ladies and Gentlemen. Thank you.

Chief Justice Norman S. Fletcher



Introduced by
Chief Judge J.D. Smith

TRADITION OF EXCELLENCE AWARD

I'm honored and flattered to have the opportunity to do this. I was honored and flattered before I got here and I was especially honored and flattered when Wright gave me a promotion to the Supreme Court. I expected at least one of Chief Justice Fletcher's colleagues to correct that misapprehension but I'm glad they didn't. I appreciate the temporary promotion.

I am honored and flattered to have this opportunity, but I think Chief Justice Fletcher knew that he could count on me doing this when he asked me to because all he had to do was to remind me of how many cert applications were pending with his court. So once I was asked, there wasn't much doubt but that I was going to do it. As Mark Dehler said to me this morning, that's what you'd call leverage.

To win this award, you have to excel in our profession and to excel in our profession, you have to be a master of effective communication. And to me effective communication at least means that you have a clear, unambiguous message and that you find a way to make sure that that

message is delivered timely to the right recipient.

And that brings me to what I call the story of two Roys. One fellow named Roy was a businessman who was about to take a trip to Orlando, Florida. And at the last minute he was very disappointed to find out that his wife was not going to be able to accompany him, but he promised to stay in touch with his wife by telephone and since we are in the twenty-first century by e-mail.

The second Roy was a man who tragically died about the same time and his wife also kept up with communications with her family by e-mail, and she neglected her e-mail for a while while her Roy was in the last stages of his illness.

And after the funeral, the day after the funeral, she checked her e-mail and something unfortunate had happened because the first Roy had made the mistake in one character in the e-mail address when he was e-mailing his wife. So the widow of the second Roy gets a fairly disquieting message. She looks at her e-mail and it has three sentences.

The first sentence just says, just

wanted you too know that I arrived here. The second sentence said, it's really hot down here. And then the third sentence said, I sure wish you were with me right now.

Well, our Honoree has been a master of effective communication for many, many years. And he's done a lot of other good things, too. But possibly his best communications job has been in the last couple of years. He's delivered a very clear, unambiguous message about indigent defense reform in our state and he's delivered it to the right people. He delivered it in a very timely fashion and he's brought about an important, significant result with his delivery of that message and his single-minded pursuit of that message.

Because of his efforts and the efforts of a lot of other people who are in this room today, we're truly at the dawn of a new era in this state. We are at the beginning of the time when we are going to give new meaning to the phrase "equal justice under law." And we're entering into uncharted waters in indigent defense because of that.

That's a great achievement but it's just the latest of many achievements for our honoree. This Tradition of Excellence Award this year truly is going to a man who has lived a life of continuing excellence.

Chief Justice Fletcher is a native of Fitzgerald, Georgia. He's the son of the late Frank Pickett Fletcher and Hattie Sears Fletcher. He acquired that habit of striving for excellence and also that habit of leadership very early in life. At the University of Georgia he was president of both his junior class and his senior class, president of his fraternity, Phi Delta Theta.

He achieved his BA in 1956 and after that he graduated from law school in 1958. During his time at the university, he was a member of the Sphinx, Gridiron, Blue Key, and ODK among other honors.

He continued those habits of leadership and excellence in law practice. He was in general practice for many years in Rome, and then in Lafayette, and during that time, he became Special Assistant Attorney General, and this is the one that really gets my attention, he was city attorney for Lafayette from 1965 through 1989, and he was Walker County Attorney from 1973 through 1988.

Those of you who are paying attention will notice that there's an overlap there. So if he was both city attorney and county attorney at the same time, we can only imagine some of the negotiations that he carried on with himself at the time. As Bob Brinson put it, those in the northwest corner of our state knew about this and referred to then County and City Attorney Fletcher, as conflict of interest per se.

He continued his general practice until he was appointed to the Georgia Supreme Court in 1989. He has been successfully elected, reelected three times, in 1990, 1996, and in 2002. He seemed to have forgotten the right way to do it in 2002, because the first two times he was elected without opposition, and then in 2002 he did it the hard way, and had opposition but all of us are thankful he prevailed in that contested election.

Again, he has continued his pursuit of excellence in all that he's done. He sought further legal education by going through the University of Virginia's graduate judge's program and achieved an LLM there in 1995 after he had joined the Supreme Court, and that as any of you who know anything about it, realize it's a very rigorous program that requires a substantial thesis before you are awarded the degree.

He continued his record of service and leadership to his school, his profession, his community, and his church. He continued to serve his

school, the University of Georgia, by being member, chair of the law school board of visitors, president of the law school association, and master and president of the Lumpkin Intercourt, which is closely associated with the University of Georgia Law School.

In his profession, he's a fellow of the American Bar Foundation and Georgia Bar Foundation. Past president of the Lookout Mountain Bar Association, president of the City Attorney Section of the Georgia Municipal Association, member of the State Bar Disciplinary Board and Chair of the Investigative Panel, and also a Co-Chair of the State Bar Committee on Disciplinary Reform that I believe was in 1989.

In civic work, he served three terms on the Board of the Lafayette Chamber of Commerce and he served as president of the Lafayette Rotary Club. He's been active in his church in all of the communities he's lived in. He's presently a member of the Peachtree Presbyterian Church in Atlanta and serves there as a Ruling Elder, he's a Ruling Elder in his day job, too, and he's previously served as officer in the Presbyterian Churches where he has attended and been a member in Rome and Lafayette and he's been an officer in the Cherokee Presbytery and a commissioner to the Presbyterian church USA.

You are not going to be surprised to hear that he's won some other awards in his time. He has been a recipient of the Emory Public Interest Committee Ethic Inspiration Award for Outstanding Leadership in the Public Interest, received that award in February of this year from Emory. That is pretty good for a Double Dawg, wouldn't you say?

He received the Harold G. Clark Award for Long Term Commitment to the cause of receiving equal justice for all of Georgia's citizens, the Atlanta Bar Association Judicial

Continued on next page

Chief Justice Norman S. Fletcher *Continued from page 13*

Section, Romae Turner Powell Judicial Service Award, the Association of County Commissioners Wayne Shackelford Excellence in Government Award in recognition of his outstanding public service by a former county officer. You will see that after he was on the Supreme Court.

He received the Leadership Award of the Atlanta Bar Association, then he also received in February of this year an award that all of us as Georgians should be very proud of him for receiving, the National Center of State Courts this year inaugurated an award called the Harry L. Character Award. That award is named for former Chief Justice of the Virginia Supreme Court, who was instrumental in creating the National Center for State Courts. The award is not necessarily to be presented each and every year, but when it is presented from time to time, it will be presented on the decision of the National Center of State Courts Board of Directors to a chief justice who has inspired, sponsored, promoted or led an innovation of national significance in the field of judicial administration.

And Chief Justice Fletcher received the first of these awards for his work in the area of indigent defense

reform in our state. And again, we as Georgians should be very proud that he is the first recipient of that award.

His greatest rewards, though, come through his family. I told you he pursued excellence early on, and he did that when he was in law school by persuading the former Dorothy Johnson to marry him while he was still in law school. He tells me that they've known each other since childhood but they really didn't start dating until much later, although there were some times when they double-dated but they were dating other people.

He told me there were some interesting stories from that but he stopped short of actually telling me the stories. You may have to ask him about that after our meeting today. He and Dot are the parents of two daughters and they have five grandchildren and two of those grandchildren, Libby and Catherine, are here with us today.

On a personal note, for the past couple of years, I've had the opportunity to work closely with Chief Justice Fletcher on relations between our two courts, on some Judicial Council business and some other matters that involve the Court of Appeals and the Supreme Court. I've developed a deep sense of

admiration for his leadership and for his untiring effort to improve Georgia's judicial system.

Those skills are especially important in a state like Georgia, because we don't have in Georgia what's called a unified judicial system. Chief Justice Fletcher is the Chief Justice of the Georgia Supreme Court but unlike chief justices in some other states, he's not technically the chief justice of all of the court system. But we have kind of a hybrid system and he does have some leadership responsibilities that involve working with other classes of courts. And I can tell you that effective leadership in that kind of environment has to come through persuasion, conciliation, compromise, and most of all, through setting a good personal example. And he in all of these areas, as he has in everything he's done, has truly excelled.

To sum it up, Chief Justice Norman Fletcher through his exemplary life, his many achievements, his service to our profession, and his unswerving dedication to the cause of justice has made himself a most worthy recipient of the Tradition of Excellence Award and I'm proud and honored to have an opportunity to introduce him. Thank you.

Remarks by
Chief Justice Norman S. Fletcher.

I can tell you one thing, J.D., your opinion for now certainly is cert proof.

I am very honored to receive this award at a time with such fine people as Wayne, Jim, John, and I'm very pleased it could be at this time. For 32 years I experienced the trials and tribulations, good times, tough times, that come

from devoting a career to general practice. And I wouldn't trade that experience for anything.

When I left general practice and that nice life 15 years ago, I never dreamed that my time in the court would be nearly so long as it has been or that it would lead to this recognition and great honor. And rather than debate the very

debatable issue of whether I deserve this award, I would just tell you, there's no other group that I'd rather receive recognition from and I deeply appreciate it. It is a distinct honor granted by special friends, and I will always treasure both this award and this occasion here today.

I believe that the most vital

ingredients for a happy, meaningful life are a deep faith and great supportive family and friends, an enjoyable career filled with opportunities. You already know as I have told you on many occasions, I've been blessed with an abundance when it comes to faith, great family, and great friends.

Together they have played a primary role in my being given a most enjoyable career that has been filled with opportunities to make a positive difference in this world. As J.D. pointed out, part of my great family, my soul mate of nearly 47 years, Dot, and two of our grandchildren, Libby Cohran

and Catherine Cottie, are here with us today. And this room is filled with my many great friends.

You family members and you friends have placed me in a position filled with opportunities to do good. And together, we have seized on many of those opportunities and we have made a positive difference in this world and I'm very pleased for that great opportunity for both of us.

And I'll ask this of you today: Let us continue that course together so long as we shall live and may that be for a long, long time.

Thank you very much.

THE PLANS ARE IN THE WORKS

Wright Gammon is Chairing

The Date is April 14-16, 2005

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PLAINTIFF

John C. Bell, Jr.



Introduced by
David Bell

TRADITION OF EXCELLENCE AWARD

Chief Justice, if I have your permission, I will stand down here. That end of the room is filled with defense lawyers and there's never been a defense lawyer ever listened to a plaintiff's lawyer. And Jim Hiers, they did let the defense go first because they saved the best for last.

And, Wright, this is a day when family members are involved but I can promise you I am not going to cry and my brother is not worried about my telling a lie, but after I got asked to do this, I wrote a wonderful speech that didn't contain lies but told the truth. And then John had the audacity for bringing our mother with us. I had to tear it all up.

And some of you might ask: Why is a plaintiff's lawyer who's collected those millions and millions of dollars from Bob Brinson and Swift Currie, why would he still be practicing. The final answer is there are six reasons, four of which are here today, his wife DeeDee has impeccable taste, his daughter, Ansley, who is also a lawyer is here with her husband, Paul Threlkeld, and one of John's three favorite grandchildren, Hughes. His second oldest

daughter, Elizabeth, could not be here, his son, Chapman, who just graduated from college, there is hope that one day he will get a W-2.

And then the two daughters, Anne Katelynn and Hailie are here. What a wonderful six reasons why you still work even into old age. But John is proud to have his mother, Martha Bell Daniel, her husband, Dick Daniel, he even talked his sister-in-law into coming, Susie Bell, as final protection against anything I might say. His nephew Payton Bell and his first cousin, Steve Rothenberg. He brought reinforcements, and what a great group.

But the next question to be asked is why this award? What does the Tradition of Excellence Award stand for with the plaintiff? Is it the best known lawyer in Georgia? No, that's Ken Nugent. Is it the wealthiest lawyer? That's some real estate lawyer that develops land. Is it the lawyer who works the most hours? No, that's the King & Spalding Associate. No, the Tradition of Excellence Award is much more. It's about: Is the profession better? Have you helped people? And does

the community benefit from what you did?

And let's look at these to see whether or not John qualifies. John's beginning in the legal profession started with excellence. He did quite well in law school. Top five percent of his class, an honor graduate, Phi Theta Phi.

As a seminar speaker he is frequently in demand and actually people stay awake and listen to him. He's written numerous articles, and he is frequently asked to participate in and be a part of the professional society. As Jay Cook and Tommy Burnside will tell you, only the best plaintiffs' lawyers get asked to be the president of the Georgia Trial Lawyers, and he is a past president of the Georgia Trial Lawyers.

Only the better ones. John, as a lawyer, gets high marks. But the more important question, Chief Justice, is did you help people? And that's where it's interesting. One of probably John's first plaintiff's cases and, you know, if you are a plaintiff's lawyer sometimes you make a fee and sometimes you just do something important and you just do it to help people and you don't necessarily benefit. But his first big case was a products liability case where a young high school football player got injured at his neck, and it was a suit against the helmet manufacturer.

I don't know whether he made great money, that was 30 years ago and he certainly didn't do it so he could retire. But because of that suit and other suits against football helmet manufacturers, the helmets today are safer, and every young man playing football in high school, college or pros is safer because of the design. And they don't realize it, and Chief Justice, they don't appreciate it, but they go home at night and they eat dinner with their parents safely because of that.

He is truly the Don Quixote of the plaintiff's bar and he chases dreams.

Now, unlike Don Quixote, he isn't going against windmills, he is going against big corporations, and isn't it fun to be the little guy going against the giant. Class action lawyers, and we even have some class action defense lawyers who have made a good living because of their clients being sued by the likes of John Bell.

A couple of these suits that come to mind, there's a case against Southern Bell. I don't know whether the boy can ever collect money, but Southern Bell had entered into a partnership with an entity in the north that was allowing gambling to occur over the telephone, and the gambling debts were being collected by the monthly telephone company bill. And it was because of a class action that that activity was changed.

But in the area of environmental law, us plaintiffs lawyers call it toxic tort. No lawyer in Georgia is better respected from the plaintiff's side than my brother, John Bell. How do I know this? When Jim Butler gets a plaintiff's case in the toxic tort area, he associates John. That ain't a bad referral source.

And do these cases make a difference? You can come to my hometown and drive down Walton Way past the old gas company location, and that location is today being cleaned up and will one day be pretty and be a park because of the class action against the polluter of that area. Our people are better and they make a difference, and at the end of the day the clients feel good. Isn't it wonderful that you can build a law practice on referrals from other clients and not have to go out and advertise to get your business. Does John have the respect of his peers? The mark of a good lawyer is often measured by who do you go up against. Who's on the other side of the podium when you stand in front of Justice Sears or Justice Carley or Justice Hunstein. It's like Sampras and Agassi, McEnroe and Connor, Magic and Larry Bird. None of

them would have been great without that adversary.

And let me tell you, when you are going into court, it isn't much sport when it is 1-800-win-win-1 on the other side. John's lawsuits are answered by King & Spalding; Kilpatrick, Stockton; Swift, Currie, McGhee & Hiers; Sutherland Asbill, and they respect quality legal service and when they come to Augusta they send their best. But a great philosopher once said, "What you get defines your living, what you give defines your life."

And all of these professional accomplishments mean nothing if you haven't made difference in your community. And let's look at that as our last qualification to decide today whether John is a proper Traditions of Excellence recipient.

John and his family are active in the Good Shepherd Church in Augusta. He teaches, he leads, he participates. In our community, he's active on the Red Cross where he's been chairman. He is very active in the local star student program and has been so for 20 years. Had leadership roles in Leadership Georgia, and we have a plaintiff's lawyer who has been the chairman of the Board of Health in Augusta. Think about it. Doctors on the Board of Health allowing a medical malpractice lawyer to be the chairman of their Board of Health. That, my friends, takes respect.

Do we meet the requirements of the Traditions of Excellence? I would say that not only in law school was he a good student but today we get straight A's, family, community, profession, faith, and church. It is with great pleasure that I present to you the Plaintiff's Tradition of Excellence recipient, the best for last, John Bell.

Continued on next page

Remarks by
John C. Bell, Jr.

It is so special for me to be here today with my wonderful wife Dee Dee, with whom I shared so many golden moments, with three of our daughters Hallie, Katelynn and Ansley, with my son-in-law, Paul Threlkeld, whom we are so lucky to have in our family and has fathered our amazing grandson, Hughes. It is so special to have my Mother, Martha, here with our step-father, Dick, who has brought such happiness into her life. He was a life-long, dear friend of our father's.

David and I grew up with a Tradition of Excellence. It was our father. He was an excellent lawyer, who spent much of his professional life helping folks who could pay little or nothing for his services. He was an excellent lawyer who could have earned far more money had he not spent so much time in service to his church, his community, to the Bar in numerous positions of leadership, and to his state in the Georgia Legislature. He was a lawyer who never forgot how to laugh, and whose reputation for honesty and for integrity was never questioned. He was a lawyer who worked hard, but still found time to hunt and fish, and he was almost always at our games. He was our Tradition of Excellence. David and I live in his shadow. It's a very nice shadow.

But folks, do you know why you are here today? It was more than twenty years ago, I was the outgoing chair of this section, and Paul Hermann was the incoming chair. And we wanted to put together a really great program for our time slot of the State Bar Convention. We decided that we wanted to bring together three of the greatest characters ever to be members of the Georgia Bar, Ham Lokey, Edgar Neely and Judge Randall Evans.

Ham and Edgar were then in their sixties, Judge Evans in his seventies. All three of them were great raccorteurs. Edgar Neely and Ham Lokey each knew in his own mind who was by far the greatest lawyer in Atlanta, who was the best teller of tales and it wasn't the other guy.

In fact, though they had grown up together in Atlanta and were close friends it was said that they would knowingly appear on the same program together because each always expected to be the

center of attention. Jim Hiers agrees.

Well, we decided to create an award that we pompously called the Tradition of Excellence Award to literally all three of these brilliant but rather ego centered men to come speak to us.

Ham Lokey and Edgar Neely both readily agreed to come and be honored. I called Judge Evans to tell him he had been selected to receive the Tradition of Excellence Award at the annual meeting of the State Bar of Georgia. His first question to me was, is anyone else receiving the award?" I said, "yes, Judge." He said, "I'm not coming."

Edgar Neely and Ham Lokey did come and I got to introduce Ham Lokey but I had long heard stories of his excellence as a lawyer, the wide variety of cases that he had successfully tried. I had heard him speak of his adventures when he climbed Mount Kilimanjaro. I had heard his speech about Belle Whatley's watch, an allegedly truthful tale about his grandfather's representation of Belle Whatley, the madam of a house of ill repute and a character in "Gone with the Wind." It was a speech in which Ham described how his grandfather received as his fee a pocket watch, and Ham would end the oft-given speech by pulling from his pocket, with dramatic flair, the watch.

I was nervous but proud to be able to introduce the great Ham Lokey. He gave a magnificent acceptance speech. It was my very good fortune to later become a good friend of Ham's and to hear him tell the many tales of his life as a lawyer and as an adventurer, how he had climbed numerous mountains all over the world, trekked the Kiber Pass and, for his 80th birthday, jumped out of an airplane.

Edgar Neely, too, was a very special friend, a man with an irrepressible zest for living. I was privileged to work with him on cases and to learn lessons that I value today. His book, "How to be a Vibrant Driver" was published at his own expense, and is a far more entertaining self-improvement book than anything you will find at Barnes & Noble.

Edgar Neely celebrated his 85th birthday party at the Piedmont Driving Club, being as always, the

center of attention and reciting a lengthy poem that he had written for the occasion. Ham Lokey was there, though he had grown quite frail.

A few months later Edgar Neely didn't show up for work. He had passed away during the night. His funeral was at Saint Luke's Episcopal Church and began as a formal Rite One service, with incense and ornate vestments. The eulogy, though transitioned into a stream of Edgar Neely stories, told first by each of his five children, then by his law partners, followed by skits entitled, "You are a cousin if..." in the vein of Jeff Foxworthy. The stories went on and on. People in the congregation came forward and volunteered their tales. The packed St. Luke's became a comedy club.

Edgar would have loved it. The printed order of service for funeral contained one of Edgar's favorite quotes: "I have loved every golden moment."

So, you might say that today's award that I so proudly receive was not created so much to honor, but as bait, to lure some good characters of the Georgia Bar to come and tell their stories. I assure you that I quickly bit the bait and I proudly accept this award.

I had the pleasure of having lunch last week with another giant of the Georgia Bar, and a past recipient of this award, Judge Griffin Bell, who at lunch spoke sadly of so many of today's lawyers, "They are all so glum. All they do is manufacture billable hours. They need to get a life."

And my wish today for all of us is that we can draw inspiration from these greats of the Georgia Bar whom we have talked about today in hopes that we, too, can say as the sun for us sets: I have loved every golden moment.

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Tradition of Excellence Breakfast & Reception

Annual Meeting 2004

June 17-20, 2004 • Portofino Bay Hotel, Orlando, Florida



Chairman, Wright Gammon presents the Plaintiff Award to John C. Bell, Jr. of Augusta.

Chairman, Wright Gammon presents the Judicial Award to Chief Justice Norman S. Fletcher of Atlanta.



Chairman, Wright Gammon presents the General Practice Award to Wayne Gammon of Cedartown.



Chairman, Wright Gammon presents the Defense Award to James T. McDonald, Jr. of Atlanta.



The family of John and Dee Dee Bell enjoy the festivities.



A packed room for the "Tradition of Excellence" Award breakfast.

Dee Dee Bell and Past Award Recipient Jay Cook stop for a picture.



Incoming Chair Cathy Helms Presents Wright Gammon with the Chairman's Plaque.



The Gammon family at the reception.



John Bell and the Burnsides had a great time.

Jim McDonald and his wife Mary and son Judge, Jim Heirs and his wife Margaret and their friends enjoy seeing him receive the award.



Eight Things the Jury Needs to Know In Closing

Randi McGinn
McGinn & Carpenter, P.A.
Albuquerque, New Mexico



Randi McGinn, 48, is a trial lawyer in Albuquerque, New Mexico who believes in creativity and magic in the courtroom. Representing both seriously injured people and accused citizens caught up in suspicious criminal circumstances, she has cross-examined witnesses using the Roadrunner/Wile E. Coyote cartoon, a biography of John Wayne and a grapefruit. Several years ago she cross-examined a lying government snitch so thoroughly, he threw up. Known for her extensive use of visual aids and demonstrative evidence, she has recreated in the courtroom: a doctor's examining room complete with examination table; the tiny interrogation room where police coerced a false confession from a client; a 3-dimensional model of the mountain hillside where a tree was felled onto a man's head and a department store mannequin bearing a lifetime of bruises and injuries suffered by a battered woman.

INTRODUCTION

It is the moment you have been building toward throughout the trial, the moment in which, using all of your very best storytelling skills, you remind the jury of the themes and theories you have carried throughout the trial. It is supposed to be the pinnacle of the case, the showcase of a lawyer's skills at oratory and persuasion. And how are you feeling? Exhausted. No matter how long or short the trial, the hours spent in preparation and intense concentration have wrung you out like a wet dishrag. Now is the moment when you must summon your hidden resources and inspire the jury to do the right thing.

The perfect closing argument would have jurors making nooses out of their ties for the defendant and would send them marching into the jury room whistling the old Peter, Paul and Mary song, "If I had a hammer.".Can you do it?

There is no one right way to do a closing argument; however, there are things you want every jury to know:

Tell the Jurors What You What Them to Do

Put yourself in the jurors' place. If you are exhausted, so are they. They have been thrown into a new and unfamiliar environment where they have been asked to sit still for days or weeks, listening to hours of information and testimony presented in stilted and foreign format. The biggest question burning in their

mind when you stand up to do closing is "what am I supposed to do now?" Early in your closing argument, you must answer that question for them.

What is it you want the jury to do? The key to obtaining your desired result is often in the way you ask for it:

1. Now is the time for you to set things right.
2. The time has come for you to fix the unfixable.
3. Hold this corporation/person/business responsible.
4. Make the world a safer place.
5. Bring sanity to the insane practices of this business.
6. Make a change.
7. Make a difference.
8. Send a message.
9. Prevent this from happening to anyone else.
10. Give Jane Doe (the plaintiff) the freedom to have not just minimum care, but the best care money can buy.
11. Make Jane Doe whole.

The idea is to empower the jurors to do what is right and appropriate in your case.

Tell Them How to Do It

Once empowered, the jury will need some help on how to make a decision. First, you need to think through how you want them to decide this case. Often, the verdict form or the special interrogatories

Continued on next page

provide a road map for decision making.

You may want to walk the jury through the verdict form or special interrogatories, question by question. Show them a blown-up version of the form and questions they must answer. Take them through how they decide:

Was the defendant negligent?

Yes_____ No_____

Tell the story of how and why the defendant was negligent, finishing with a physical example of what the jury should do at the end of that analysis, i.e., putting an "x" in the box that says "yes."

Was the defendant negligent?

Yes__X__ No_____

Simplify the Jury's Task

Based on the language of most state and federal jury instructions, you would think we were trying to confuse the jurors rather than help them make a decision. Your job is to translate the abominable massacres on the English language into common concepts that the jury can understand.

In my trials, the jurors themselves have usually come up with far better definitions than the ones provided in the jury instructions. Here are two examples of written questions sent out by jury members when they hit a wall in their deliberations:

Is irresponsibility the same thing as negligence?

Does proximate cause mean the approximate cause?

These are great definitions to use to translate the jury instructions. I now tell jurors that:

Negligence is simply irresponsibility.

Proximate cause is the approximate cause of the injury.

Another good explanation for "proximate cause" is the "but for" test we learned back in law school.

The jurors understand causation if translated into the concept that the injuries would not have occurred "but for" the act or omission of the defendants. You can visualize the "but for" test through a decision tree that shows how the acts would not have occurred but for the decisions made by the defendant.

The farther away from the actual injury you can move the defendant's ability to avoid the death or injury, the better off you are:

The drunk driver began driving toward the Chavez family fifteen years ago. During all that time, his employer held the keys to the government car he drove and had the ability to take those keys away from him. The employer was the keeper of the keys through all nine of his DWI arrests and the five times his license was suspended. Despite knowledge of some of these arrests and his driving history, not once did they take the keys away. As a result, the drunk driver kept driving toward the Chavez family until, on January 25, he hit them head on, killing everyone in the car.

Reinforce and Repeat Themes, Theories, and Rules

The closing argument is a time to reinforce and repeat the themes, theories, and rules of the case you have been discussing all along. In addition, make sure the jury knows who the villains are in the case and who the heroes are or may be.

Of course, you need to discuss the actions of the villains(s) *before* you talk about your client's injuries. ATLA research establishes that jurors cannot be sympathetic or focus on damages until they assign blame.

If you do not have a villain in the case, you have a problem on liability.

Highlight the heroes or sheroes in your case. One of the best heroes of all is an empowered jury.

Persuasion Through Analogies and Similes

We all learn through stories, analogies, and similes that we utilize to understand our world. Trial lawyers should be students of storytelling, looking for analogies and similes in great literature, the Bible, Aesop's Fables, advertising, and my personal favorite, country western songs. These analogies and similes are a shorthand way for the jurors to understand your theory and theme of the case.

Some examples follow:

1. For an expert witness:
 - a. He who pays the piper calls the tune.
 - b. Actions speak louder than words.
 - c. Bo knows.
 - d. Garbage in/garbage out.
 - e. A workman is only as good as his tools.
2. For a lying witness:
 - a. His wife is like the woman in the old country western song who will "stand by her man" no matter what.
 - b. Throwing someone to the wolves to save your own skin.
 - c. No fury like a woman scorned.
 - d. You can't buy the truth.
 - e. Desperate men do desperate things.
3. Description of a mistaken police officer/investigator
 - a. He is someone who believes the end justifies the means.
 - b. Might makes right.
 - c. Wrong place/wrong time.
 - d. The faithful bloodhound.
 - e. The blind leading the blind.

Asking and Answering Hard Questions/Ammo for Your Jurors

By the time you reach closing, hopefully there are some people on the jury who are on your side. Among those people there may also be some who are not yet persuaded.

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Jury deliberations will be a wrestling match between those who are for you and those who are against you. In order to win that tussle in the jury room, you need to provide the people on your side with the ammunition and arguments to win over the few stragglers.

The best way to do that is to ask and answer the very questions you think the jurors who are against you will ask those who are on your side. For example:

When you are back in the jury room, someone might suggest, "How about just giving Jane her medical bills and lost wages, because wouldn't that be fair?"

When that happens, your answer should be a resounding "No." Awarding her just medical expenses and lost wages is not fair. It does not restore her to the way she was before the collision. It does not give her back her kidney. It does not even pull her back to even. Such an approach would be in violation of the jury instructions given by the judge, which require you to consider other kinds of damages, including permanent impairment, pain, and the horrendous suffering she had during her surgery and recovery.

What other kinds of questions might the other side bring up in your case? Here are just a few that you might want to think about answering:

1. The plaintiff probably has health insurance, so why should we award medical bills?
2. How do we know the patient isn't faking or exaggerating his or her injuries?
3. Why should we give the plaintiff any money if this was partially his or her fault?
4. Why should these parents get lucky and get a bunch of money just because their child died? [A real question from a juror in voir dire.]
5. What good will it do for us to

award money in this case?

6. Won't our insurance rates or health costs go up if we award money?
7. Won't this doctor leave town if we find against him or her in this medical malpractice case?

Scary, the kinds of things they may come up with to defeat your arguments in the jury room. There will be even scarier issues in your own individual cases. You must address these questions in closing argument (or earlier in the trial) or you will find the answer to these questions in a big goose egg on your jury verdict form.

Visualize Your Arguments

Increasingly, our jurors are becoming people of the screen rather than people of the word or people of the book, as is the case with most lawyers. People of the screen get their information from screens, rather than books—television screens, computer screens, movie screens. They are more likely to believe something they see visually rather than something they hear orally.

Not only do they want to see things visually, they need almost constant visual stimulation to keep their interest. Before the MTV generation, it was the practice of television and movie editors to change the visual image every seventeen seconds. This is why, even during a conversation between just two people, the angle of the camera will change numerous times during the same conversation. After MTV, the viewer's interest is kept only by cuts of even faster duration (a second or fraction of a second) in which a new image comes on the screen.

Where does that leave lawyers who present our arguments by talking and talking and talking? With a jury that is asleep, unless you use PowerPoint or boards or some other kind of visual imagery to support your closing argument. I hope to give you some ideas about

visuals you can use to help make your argument to the jury.

Make Damages Make Sense

1. What it means to be injured in this way—descriptions plus client's own stories.

It is not enough to have a doctor describe what it means for your client to have been injured or to have died. In addition to the description of what occurred and the ramifications to the client, the jury can only understand the depth of the injury if you use analogies and the client's own stories to bring home the loss.

a. Death

Description: The client's son was beaten to death while at school.

Analogy: The decision to have a child is a decision to have your heart go walking around outside of your body.

Story: Since Jason's death his parents have not celebrated Christmas. It was Jason's favorite holiday and the reminder is too painful for them. As a result, they no longer send any Christmas cards, they return all wrapped presents unopened, they do not put up a tree, nor do they gather around the piano to sing Christmas carols.

Jason's father is a stoic cowboy, the kind of man that Jason wanted to grow up to be. For two years following his son's death, he never cried. Instead, he was the strong one, letting his wife lean on him and weep until there were no more tears, only dry racking sobs coming from her chest. Then, one day, he was driving down the freeway when he saw a bumper sticker on a car. "Ask me about my grandchildren" it said. And suddenly, for the first time, Jason's dad realized that, with the death of his only son, his only child, he would never have any grandchildren. Jason's dad pulled to the side of the road and

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there, alone in his pick up truck, cried for an hour.

b. Brain injury

Description: Our client was assaulted while working alone at a late night convenience store. The man kicked him over and over in the face, fracturing the bones around his eye socket and pushing them up into his brain, causing brain injury and loss of his short term memory.

Analogy: If someone asked you to pick a body part to lose or injure, the last organ you would choose is your brain. That's because it controls everything about us—who we are, how we feel, memory, language, movement.

Story: When, occasionally, I have a bad day, I think it might be a good idea not to have a short term memory. Wouldn't it be wonderful to be able to push the erase button and have all of the bad things that occurred to you during the day gone? That is what it is like for Ken, except that he does not get to choose what days or what memories he forgets. Yes, the occasional bad days are gone, but so are the majority of wonderful days and wonderful memories. When he holds his newborn grandson and smells that wonderful smell that babies have, within an hour, the memory of that smell, of that touch is gone, erased forever by the beating he took in the store that night.

c. Back injury

Description: A woman truck driver slipped and fell while taking her CB to be repaired at a repair shop with a sidewalk covered with ice. The injury herniated a disc in her back and prevented her from driving her truck.

Analogy: Some women are beautiful, some women are smart and some women are strong.

Story: Billie was never in the running to win prom queen in high school,

nor was she ever a challenger for valedictorian. However, she had something that set her apart from all other women and made her unique. She was the strongest girl in her school, an Amazon who could out lift, out pull, out muscle nearly every boy in the school. That unique ability helped her get one of the highest paying careers of most of the kids she went to school with, that of a truck driver. As a truck driver, she did everything the men could do, including changing her own tires on those eighteen wheel semis. The ice on that sidewalk took away the one thing that made her unique among women and gave her something she could be proud of. She is not the kind of woman who could be hired to put on a mini skirt and sell cocktails nor would she ever be happy sitting behind a desk at a typewriter. The carelessness of that shop keeper robbed her of her ability to be on the open road.

2. What will the damages accomplish? What difference will it make?

In this day and age of jurors being worried about "frivolous lawsuits," "runaway juries," and "lottery litigation," you better have an answer for your jurors about why they should give damages. They will want to know how the damages may make a difference in the life of your client and what difference it will make.

a. Compensatory

In awarding compensatory damages, make sure you point out that any future medical bills that you have asked for are for the "minimal" life care or services for your client. Since the jury cannot give your client what they really want—no longer being a quadriplegic, no longer having a back injury, the life of their deceased relative—the jury should at least give them medical benefits that will provide the maximum kinds of services they need, rather than the minimum services. If there is

some kind of experimental treatment that can give your client hope of walking again, then they should have that amount of money to be able to seek those kinds of treatment.

The most difficult kinds of questions on compensatory damages often come up in a death case, especially for the death of children or elderly persons. The jury will want to know, and want you to answer, what good it will accomplish to give money for the death of this person. It is best to acknowledge that, if the jury had the power to bring the person back to life and could make him or her walk through the courtroom door, your clients would gladly give up any claim they had, including the claim to all the tears shed over the loss of their loved one. Since the jury does not have the power to give them what they want, it can give them the next best thing, that is an award that reflects the value of the life of their loved one. A low award means that the defendant's misconduct did not matter. A low award for an elderly person sends the message that it is okay to kill people in nursing homes because their lives are not worth much. A low award for a child, in an amount less than that for an adult, means that people should try to run over children rather than adults because their lives are worth less.

b. Punitive damages

Unless you have a good villain on the other side, it is unlikely that you will get punitive damages. If you are unable to convey to the jury the depth of the villainy of the corporation, business, or defendant, then do not count on a big punitives award. However, if you have the right kind of villain, the jury will be anxious to "send a message" and "make a difference" with a large verdict.

Motions For Summary Judgment and Responses

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INTRODUCTION

Perhaps no civil motion is more important than the motion for summary judgment, since it can end one's claims or defenses based upon the evidence, prior to jury trial, depriving a litigant of that right. Summary judgment can thus be a litigant's greatest friend or foe. This motion therefore requires extremely serious attention, from the beginning of the case through the filing of pleadings, conduct of discovery and entry of a pretrial order. While this paper cannot attempt to be a comprehensive compendium on summary judgment, such as is available through various treatises, it does present one experienced lawyer's observations from nearly thirty years of trial practice. It does not purport to be a scholarly statement of law, but a pragmatic guide, an "approach" to summary judgment. The focus will therefore be practical reflections upon this all-powerful tool.

DEVELOPMENT OF THE LAW

In earlier days of the law, expedited disposition of civil actions without trial depended primarily upon the pleadings, using the demurrer and motion for judgment on the pleadings. These procedural devices, however, "could not go behind the pleadings," as the pleadings were accepted "at full face value."¹ Summary judgment procedure was therefore developed "to meet the problem of the paper or sham issue."² In England, summary judgment was initially limited to

liquidated claims, but was expanded to cover other claims.³ This expansion has continued in our development of the law despite the arguments of those, such as the esteemed trial judge Jerome Frank, who believed that "trial judges should exercise great care in granting motions for summary judgment," since "[a] litigant has a right to a trial where there is the slightest doubt as to the facts...". *Doehler Metal Furniture Company vs. United States*, 149 F.2d 130, 135 (2d Cir. 1945).

This "slightest doubt" attitude has been significantly marginalized in recent decades. The increasing number and complexity of cases, and resulting need for greater court efficiency, have worked their effect upon judges and their willingness to summarily dispose of civil actions. This trend was noted, for example, as early as the 1948 Report of the Judicial Council of Massachusetts, 33 Massachusetts Law Quarterly No. 5, 30, which noted "the heavy public burden of expense of litigation in our courts," thus dictating "that reasonable procedure should be provided to avoid waste.[since it] seems obvious that [a party] has no right to put the public, or his opponent, to the expense and delay of a trial of a case in which there is no genuine dispute as to material questions of fact."⁴ These evolving attitudes in favor of summary judgment have forced lawyers to "reckon with" summary judgment, offensively and defensively, more so

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than in earlier times.

CONSIDERATION EARLY IN THE CASE.

Given its dispositive potential, summary judgment should be considered at the earliest stage of every case to determine whether it is realistically applicable. Nothing is more important in addressing summary judgment than the nature of the case, both legally and psychologically. Certain kinds of cases lend themselves more to summary judgment than others from a legal standpoint, and case analysis from a psychological standpoint demands similar consideration. Evaluation of these factors should occur early in the case. Pleadings should reflect that study, and discovery should maximize the opportunity to gain or resist summary disposition.

a. Legal Nature of the Case.

Negligence cases are generally recognized as not being the subject of summary judgment,⁵ given the permissible latitude in the fact-finder's resolution of fact disputes and application of the law thereto. Similarly, cases involving disputed intent,⁶ credibility,⁷ reasonableness,⁸ and similar issues are not usually the subject of summary judgment.

On the other hand, cases in which the facts are not in dispute, or in which, despite some differences, the core facts are sufficiently established to permit summary judgment, fall into a different category. Disputes over irrelevant or *de minimis* matters do not negate summary judgment.⁹ The modern trend away from Judge Frank's above-noted antipathy against summary judgment was exhibited, even accelerated, in the 1986 Supreme Court of the United States decision in *Celotex Corporation vs. Catrett*, 477 U.S. 317 (1986). In *Celotex*, the Supreme Court altered the burden of proof on motions for summary judgment, specifically holding that summary judgment is mandated "against a party who fails to make a showing sufficient to

establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." 477 U.S. at 322. The Court went on to hold that "affidavits or other similar materials *negating* the opponent's claim" did not necessarily have to be filed by the moving party, since the language of F.R.Civ.P. 56 clearly did not require affidavits. The Court found that motions should "be granted so long as whatever is before the [trial] court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56 (c), is satisfied." 477 U.S. at 323.

The Georgia Supreme Court, while not accentuating the lack of any requirement that a defendant movant file any affidavits in support of the motion, nevertheless has likewise held that "[a] defendant who will not bear the burden of proof at trial need not affirmatively disprove the nonmoving party's case; instead, the burden on the moving party may be discharged by pointing out by reference to the affidavits, depositions and other documents in the record that there is an absence of evidence to support the nonmoving party's case," in which case "the nonmoving party cannot rest on its pleadings, but rather must point to specific evidence giving rise to a triable issue." *Lau's Corporation, Inc. vs. Haskins et al.*, 261 Ga. 491, 405 S.E. 2d 474, 476 (1991). These rulings clearly require that counsel understand fully the burden that movant and respondent bear, since misjudgment may be costly, as noted more fully in section seven (7) below. It seems apparent that judicial philosophy has evolved in favor of summary judgment, thus heightening counsel's responsibility to remain mindful of the possible application of the motion in most civil cases.

b. Psychological Nature of Case.

Where the nature of a plaintiff's claim is particularly explosive

emotionally and thus appealing to a jury, summary judgment demands strong consideration by a defendant in hopes of avoiding exposure to a potentially volatile jury verdict. Likewise, if the nature of a plaintiff's claims is more tenable legally than emotionally, partial summary judgment on the liability issue should be considered. Where the public exposure and publicity of a jury trial is potentially damaging without regard to the actual outcome, or where the expense of trial will obviously be substantial despite confidence in the outcome, summary judgment is particularly effective. Settlement negotiations can be strongly affected by a defendant's "knocking out" a claim for punitive damages¹⁰ or other open-ended damage claims, just as a plaintiff may "up the ante" by negating some defenses, or even gaining partial summary judgment on the issue of liability as expressly recognized by subsection (c) of both the state and federal versions of Rule 56. Expedited resolution therefore must be considered in such cases.

c. Other Considerations.

Counsel should also "back off" before filing the motion, momentarily jettison understandable bias in favor of one's own case, and ask realistically "is this motion 'good,' does it have a real chance to succeed?" Obviously invalid motions should not be filed. They waste time, cost money and damage credibility with the court. That said, valid motions which "could go either way" may serve several worthwhile ends. The need to "educate" the trial judge on the complexities or peculiarities of a case may be served by a justifiable motion for summary judgment. The judge may be informed of the "equities" of the case, even when the motion is not granted. This may yield benefits in the court's rulings on other motions and at trial. Such

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motions are also valuable discovery tools themselves, forcing an opposing party to reveal strategies and evidence, since a respondent must “present his case in full,” e.g., *Summer-Minter & Associates, Inc. et al. v. Giordano et al.*, 231 Ga. 601, 604, 203 S.E. 2d 173, 176 (1973). Conversely, one must also consider whether a motion with marginal chances of success may reveal more in strategy or evidence than it extracts from the other side, or force the opponent to better prepare his or her case. The dormant opponent may sometimes be better left that way until trial.

Counsel must also consider the risks and disadvantages of motion filings. Every affidavit commits the affiant to testimony that can be used to impeach at trial. This is particularly true when the affiant is a party client, counsel must ask, “how can the affidavit be used against my client?” Likewise, positions and arguments adopted by motion may be used against the movant in unexpected ways, including at trial.

IMPORTANCE OF PLEADINGS

After thorough consideration and investigation of a case, great care should be taken in framing the complaint or defensive pleadings with a view toward summary judgment. Attention should be focused upon all permissible claims and defenses under the facts, including identifying those which are most likely supportive of or resistant to summary judgment. In this regard, fundamentals of the rules of procedure often are as overlooked as they are important. For example, the Georgia Civil Practice Act clearly allows that “[a] party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses.”

O.C.G.A. § 9-11-8(e)(2). Likewise, a litigant is allowed to “state as many separate claims or defenses as he has, regardless of consistency and whether based on legal or on equitable grounds or on both.” O.C.G.A. § 9-11-8(e)(2). Likewise, a litigant is allowed “to state as many separate claims or defenses as he has, regardless of consistency and whether based on legal or on equitable grounds or on both.” O.C.G.A. § 9-11-8(e)(2). The comparable federal rule is to the same effect. Subject of course to the admonition of section 11 (a) of the Civil Practice Act that an attorney’s signing of pleadings certifies “that he has read the pleading and that it is not interposed for delay,” and the more demanding requirements of Rule 11 of the Federal Rules of Civil Procedure, and the requirements that only meritorious claims and contentions be advanced and that candor shall always be shown to the court, see, e.g., Rules 3.1, 3.2, 3.3, Georgia Rules of Professional Conduct, considerable latitude is afforded in the statement of a party’s claims and defenses.

Within those parameters, study should always be given to alleging those positions and legal theories allowable under the facts of a particular case, in such a manner as to invoke those legal theories which are most consistent or inconsistent with summary judgment as reviewed in section 3 (a) above. For example, where one’s claims implicate matters of intent, negligence, reasonableness and the like, as opposed to those theories with more rigid elements (such as statutory claims), the existence *vel non* of which are more favorable to summary judgment, such effort should be considered, so long as this does not unduly increase one’s burden at trial. Likewise, when one’s adversary has made such effort, attention must be directed at

contending and proving that those theories are irrelevant or *de minimis*, that is, only “red herrings” designed solely to defeat summary judgment. On the other hand, “over-pleading” may risk tainting the good claims with the weaker claims, increasing the risk of summary judgment against the over-pleader.

CONDUCT OF DISCOVERY

While all aspects of the case must be carefully considered during discovery, including obtaining necessary evidence for trial, one eye must be kept on summary judgment. This requires attention to the “elements of the offense,” that is, each component of a particular claim and defenses thereto. Counsel must frequently review those components, asking the question how will my adversary or I prove each such component, or negate one of those components defensively. In this regard, it should be remembered that it is sufficient for summary judgment if “one essential element” of a theory is negated.¹¹ This demands constant vigilance and scrutiny, always scanning the horizon for the possible. The trial lawyer’s counterpart of Thoreau’s admonition to “simplify, simplify” must be “anticipate, anticipate.”

The discovery rules provide an amazing arsenal for such purposes, although frequently under-utilized. Among those weapons are requests for admissions,¹² which require precision and “detail,” the “stuff” of summary judgment, and the motion to compel,¹³ which can, properly used, remove “fuzzy” discovery responses. “Fuzziness” is the archenemy of summary judgment. All too often, lawyers allow non-responsive or incomplete discovery responses to go unchallenged. Those pursuing summary judgment cannot afford to do so. “Eternal vigilance” is not only the price of liberty,¹⁴ but of

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summary judgment as well.

ROLE OF DEPOSITIONS, ERRATA SHEETS AND AFFIDAVITS

One aspect of discovery which must be emphasized is the different treatment allowed deposition testimony and affidavit testimony. Rule 30 of the Georgia Civil Practice Act and the Federal Rules of Civil Procedure provides that certain objections which may be "obviated," or "removed" or "cured" at the taking of the deposition may be waived if not then stated, unless otherwise agreed. Often counsel routinely stipulate simply to the rote agreement that "all objections are reserved except those which go to form of the question or responsiveness of the answer." This stipulation demands more attention than it normally receives, as does the approach to deposition testimony in general and attempts to clarify that testimony or correct errors therein. This is because deposition testimony which is damaging or helpful to one's client and case may be more probative and compelling to a trial judge than are changes via errata sheet or by conflicting affidavit. While the rules of procedure allow both the "form or substance" of deposition testimony to be amended by errata sheet,¹⁵ experienced counsel and judges as well might say that use of this errata amendment process, particularly when lengthy and on matters of substance, may sometimes incline a judge against one making such intemperate use of this privilege.

Similarly, the law is circumspect concerning attempts to "undo" damaging deposition testimony by conflicting affidavits. The law is rather clear that when confronted with a party-witness's affidavit testimony that contradicts that party's prior deposition testimony, without adequate explanation, the contradictory testimony may be construed against that party, under *Prophecy Corporation v. Charles Rossignol, Inc. et*

al., 256 Ga. 27, 343 S.E. 2d 680 (1986) and its progeny. All of this must be carefully considered during the taking of depositions, and it may be well to sometimes attempt to clarify during the deposition any testimony thought to be in error, despite the pitfalls of doing so.

PREPARING THE MOTION AND RESPONSES

a. Compliance with Technical Requirements.

Considerable attention is necessary to drafting motions for summary judgment and responses in opposition thereto. Counsel should not do so without careful examination of applicable law and of the relevant evidence of record. Awareness of the particular requirements of the state and federal courts, which differ significantly, is particularly important given the finality and dispositiveness of this motion. No matter how many times counsel has filed such motions and responses, it is a good idea to always review them, in "check list" fashion, to be sure that all requirements are being met. For example, whereas thirty days are allowed for response in state court, only twenty days are allowed in federal court (by current local rule in each of Georgia's three federal judicial districts). Although supplemental briefs are liberally permitted in state court, such is not the case without leave of court under the federal system, where the movant is normally allowed an original brief in support of the motion, and a reply brief responding to the non-movants brief, and the respondent is allowed only the single brief in opposition. The respondent must therefore "make that brief count."

Oral argument is particularly important, since the ruling on the motion may terminate the case. In the state system, while oral argument is discretionary with the court in other motions, it is allowed of right with summary judgment motions so long as properly

requested in a separate pleading "filed no later than five (5) days after the time for response," Uniform Superior Court Rule 6.3, and the corresponding State Court Rule. While oral argument does not appear to be of right in the federal system, argument may be ordered by the court, see, *e.g.*, Local Rule 7.1E, U.S. District Court, Northern District of Georgia.

Counsel must always be sure that all required filings as part of the motion or responses are included, such as the statement of material facts contended to be without genuine issue for trial and the accompanying statement of each theory of recovery, and the respondent's statement of each material fact contended to be at issue at trial.

b. The Motion.

After assuring compliance with all technical requirements, the movant must attend to the basics of the motion. Fundamentals matter. It is a good idea to re-read Section 56 as one begins preparation. Do the pleadings, depositions, discovery responses, and affidavits truly show no genuine issue of material fact? If the movant is a plaintiff, are the required elements of all claims addressed in the motion established, and all defenses negated? If the movant is a defendant, has at least one element of all claims of the plaintiff been negated, or are there defenses which the plaintiff has not negated?

Does the motion draw upon all of the pertinent evidence of record, and is all such evidence on file with the clerk? Valuable evidence becomes of no value if not submitted to the court for consideration on the motion. Has all evidence been filed and served on the opposing party with the motion, or at least thirty days before the time for a hearing as required by state law, or ten days before the hearing as set by federal law?

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Has the motion made use of helpful technology? Where video or computer presentations effectively make the point, they should not be neglected out of a belief that this is a presentation to the court and not a jury. Judges must be convinced also, and creative and attention-grabbing methods should be used.

c. The Response

In particular, despite the movant bearing the initial burden of demonstrating “that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law,” when that showing has been made, the “adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided.... must set forth specific facts showing that there is a genuine issue for trial.” O.C.G.A. §§ 56 (c) and (e), F.R.Civ.P 56 (c) and (e). It is a mistake to lightly consider the movant’s showing. Given the stakes, prudence dictates that a respondent err on the side of over-responding rather than under-responding to the motion. A certain amount of bulk or heft is often necessary in the response. When “thick” motions, supported by multiple affidavits, deposition cites, other references to evidence, and a substantial brief, are filed, ordinarily the response must be of similar import and substance. While there is a place for the targeted response, shorter than the motion and focused on its fallacies, the risk that the court will literally “weigh” the opposing submissions must always be considered.

Respondents must also be careful to flyspeck the movant’s submission for any conclusory or other improper parts of the submission. Affidavits must be “made on personal knowledge” and must “set forth such facts as would be admissible” in evidence, as required by section 56(e)

of both the state and federal acts. Failure to object to such improper submissions can result in waiver.¹⁶ Care should also be taken to be sure that any inadvertent admissions by the movant are seized upon in one’s response, or identified for use at trial. Similar care is necessary in the respondent’s submission to be sure that nothing helpful to the other side is inadvertently included.

Attention also should perhaps be focused upon that language in O.C.G.A. § 9-11-56 (c) that reads “but nothing in this Code section shall be construed as denying to any party the right to trial by jury where there are substantial issues of fact to be determined.” Curiously, this language, which seems to be somewhat undeveloped in the case law is included in the state act, but not in the federal act. It notably emphasized the right to trial by jury, and refers only to “substantial issues of fact,” omitting that sub-section’s earlier reference to “genuine” issues of “material” fact. This language is a carry over from Georgia statutory law in force prior to adoption of the Civil Practice Act modeled on the Federal Rules of Civil Procedure. One wonders whether this language might not offer more assistance to respondents in opposition to summary judgment than has previously been realized or developed in the law. Finally, all counsel should be aware that any time summary judgment motion is “in play,” there is authority that summary judgment can be granted even to a non-moving party where the filing would be a pure formality, such as where the issues are the same as those in the motion being granted in favor of another party.¹⁷ Although such *sua sponte* summary judgments are rare, attentive counsel should always be aware of such risks.

Respondents opposing summary judgment must always bear in mind, even where the burden is upon the

movant, that an unwritten “burden” is always upon the respondent to put forth all evidence and argument necessary to defeat summary judgment. Despite those rulings suggesting that it is the duty of the court to search the entire record before granting such a motion, see, e.g., *Sacks v. Bell Telephone Laboratories, Inc.*, 149 Ga. App. 799, 256 S.E. 2d 87 (1979), counsel cannot rely upon the court to do counsel’s job. Counsel opposing such motions should always be mindful that where no evidence is deemed to have been submitted which refutes plaintiff’s proofs, grant of summary judgment is demanded. *General American Insurance Company v. Boyens*, 125 Ga. App. 414, 188 S.E. 2d 172 (1972). Similarly, a “vague” defense may not be deemed adequate to defeat summary judgment, *Meade v. Heimanson*, 239 Ga. 177, 236 S.E. 2d 357 (1977). Thus, it is probably always a wise course for counsel opposing summary judgment to treat the motion as if casting the burden of proof upon that counsel. In fact, so long as justifiable, the cross motion for summary judgment is often part of an effective response in opposition to a summary judgment motion. This may further afford the opportunity to file an additional brief, in reply to the responsive brief opposing the cross motion.

PARTIAL SUMMARY JUDGMENT

Often neglected is the motion for partial summary judgment. Both the Georgia Civil Practice Act and the Federal Rules of Civil Procedure provide for limited summary judgment on those claims or defenses which while not entirely dispositive of a case, nevertheless may eliminate portions of the case from necessity of jury trial.¹⁸ This may shorten the trial and allow the jury to focus more upon the real issues in the case.

Continued on next page

Substantial advantage can also be gained thereby in settlement discussions and otherwise, as noted above.

Partial summary judgment law also provides considerably more room for entry of a broad order that will significantly affect trial than is commonly utilized. Both state and federal law permit an order "specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such proceedings in the action as are just."¹⁹ That same law provides that "[u]pon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly." This rather sweeping authority is quite similar to the statutory language that permits a pre-trial order which "controls the subsequent course of the action."²⁰ Rarely do counsel and the courts, however, so utilize this broad aspect of partial summary judgment. One suspects that if they did, considerable efficiency would be gained, and settlement possibilities enhanced.

APPEALABILITY

O.C.G.A. § 9-11-56(h) grants to a party against whom summary judgment has been entered the right of direct appeal. That section also allows direct appeal of grants of even partial summary judgment, as an exception to the normal rule of finality being required for appeal. This allowance is not found in the federal system. Only summary judgments constituting, or merging into, the "final judgment" in the case are appealable in the federal system, except by certificate from the district court.²¹

Orders denying a motion for summary judgment are interlocutory and not appealable in the state system without a certificate of immediate review under O.C.G.A. §5-6-34(b). Ordinarily, denials of summary judgment are not appealable in the federal courts also,²² but exceptions exist, for example, in motions involving immunity defenses.²³ Counsel should always be aware that denial of summary judgment is mooted by trial of the case.²⁴

In any event, on any ruling for or against summary judgment, counsel must carefully review the ruling in light of the differing rules of appealability in the state and federal systems. One should also always be aware of Section 54(b), which allows a trial court to enter certain rulings as final judgments, which may render appealable orders that would otherwise not be appealable. In every situation, careful study is required to be sure that an appeal is not lost by assuming that it is later appealable when it may not be.

CONCLUSION

Motions for summary judgment require extremely serious consideration, beginning with the earliest stages of the case. Given their potential for terminating a case, or important claims and defenses therein, without benefit of jury trial, constant familiarity with the evidence, applicability of summary judgment and rules of appeal therefrom are demanded.

FOOTNOTES

1 James, *Civil Procedure*, Little, Brown and Company (Boston and Toronto, 1965), p. 230.

2 *Id.* at 231.

3 Scott and Kent, *Cases and Other Materials on Civil Procedure*, Little, Brown and Company (Boston and Toronto, 1967), p. 658.

4 *Id.* at 663.

5 See, e.g., *Lockhart v. Walker*, 124 Ga. App. 241, 183 S.E. 2d 503 (1971).

6 See, e.g., *State Farm Fire & Casualty Company v. Morgan*, 258 Ga. 276, 368 S.E. 2d 509 (1988).

7 *Jones v. Howard*, 153 Ga. App. 137, 264 S.E. 2d 587 (1980).

8 *Ambrose v. Sheppard*, 241 Ga. App. 835, 528 S.E. 2d 282 (2000).

9 *James v. Ford Motor Credit Corp.*, 166 Ga. App. 879, 305 S.E. 2d 604 (1983).

10 *Taylor v. Powertel, Inc.*, 250 Ga. App. 356, 551 S.E. 2d 765 (2001).

11 *Williams v. Trust Co. of Georgia*, 140 Ga. App. 49, 230 S.E. 2d 45 (1976).

12 O.C.G.A. § 9-11-36, F.R.Civ.P. 36.

13 O.C.G.A. § 9-11-37, F.R.Civ.P. 37.

14 John Philpot Curran, speech upon the Right of Election of the Lord Mayor of Dublin, July 10, 1790, also attributed to Thomas Jefferson.

15 O.C.G.A. § 9-11-30(e), F.R.Civ.P. 30(e).

16 *Parlato v. Metropolitan Atlanta Rapid Transit Authority*, 165 Ga. App. 758, 302 S.E. 2d 613 (1983).

17 *Cruce v. Randall*, 152 Ga. App. 183, 262 S.E. 2d 488 (1979), *affirmed*, 245 Ga. App. 669, 266 S.E.2d 486 (1980).

18 O.C.G.A. § 9-11-56 (c) and (d); F.R.Civ.P.56 (c) and (d).

19 *Id.*

20 O.C.G.A. § 9-11-16(b); F.R.Civ.P.16(b).

21 *Santaella v. Metropolitan Life Insurance Company*, 123 F. 3d 456, 461 (7th Cir. 1997); 28 U.S.C.A. § 1292 does permit, however, certification by the district court for appeal of interlocutory orders.

22 *Ahrenholz v. Board of Trustees of Univ. of Illinois*. 219 F.3d 674 (7th Cir. 2000).

23 *Christy v. Pennsylvania Turnpike Comm'n*, 54 F. 3d 1140 (3d Cir. 1995).

24 *Preferred Risk Mutual Insurance Company v. Thomas*, 153 Ga. App. 154, 264 S.E. 2d 662 (1980).



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