The Defense Line

S.C. Defense Trial Attorneys' Association

SPRING 1993
Volume 21 Number 2

TIME MANAGEMENT FOR LAWYERS

VOLUME 21, NO. 2, SPRING 1993

CONTENTS

TEN YEARS AGO

President ERNIE NAUFUL reported that the Executive Committee had approved a co-sponsorship agreement with the South Carolina Bar CLE thanks to BILL DAVIES. He reported plans for the 1983 Joint Meeting in Asheville were being finalized by BILL DAVIES working with TONY STOKES of the Claims Management Association. ED MULLINS was elected to a second term as Vice-President of DRI. WADE LOGAN, III, Treasurer, reported as of January 30, 1983, our Association's money market account was $47,174.28, checkbook balance $8,812.70. Membership Committee, ROBERT W. BROWN and GLENN BOWERS, reported as of February 18, 1983, total membership was 533.

TWENTY YEARS AGO

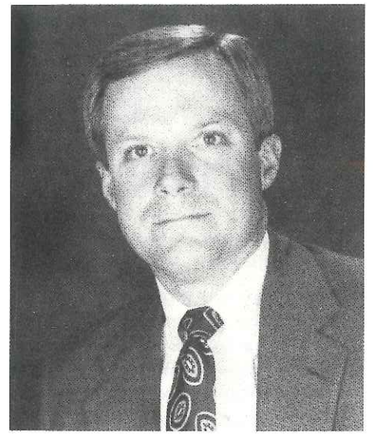
President ED MULLINS announced that the Joint Meeting with the Claims Management Association would be at the Atlantic Landmark in Myrtle Beach, August 24th and 25th. PAUL FOSTER was in charge of the educational part of the program and BOBBY HOOD the social program. J.B. COATES, President of Superior Insurance Company, and DR. OLIVER WOOD, USC Economist, were announced to be on the program for the Joint Meeting.

Our Association's Annual Meeting was set for Hilton Inn, Hilton Head, South Carolina on November 15th, 16th and 17th. SPENCER KING was Program Chairman and ERNIE NAUFUL Social Chairman. It was reported that DEAN KEATON, University of Texas Law School, and WALTER WORKMAN, Houston Attorney, would highlight the program. DEXTER POWERS represented our Association at the Sixth National Conference of Local Defense Associations in New Orleans.

The Defense Line is a regular publication of the South Carolina Defense Trial Attorneys' Association. All inquiries, articles, and black and white photos should be directed to Nancy H. Cooper, 3008 Millwood Avenue, Columbia, SC 29205, 1-800-445-8629.

President's Page

W. Hugh McAngus



Plans are underway for the Joint Meeting in Asheville, July 29 - 31, 1993. Charlie Ridley and Tom Wills are putting together an outstanding program. Social activities under the guiding hand of Mills Gallivan will be excellent as usual. Mike Bowers and Susan Lipscomb are hard at work putting the Annual Meeting together. Mark November 11 - 14, 1993, on your calendar and be sure to attend.

Our annual Trial Academy is scheduled for July 14 - 16, 1993. Frankie Marion and Joel Collins have assembled an outstanding faculty, and promise an excellent training experience. Enrollment will be limited, so sign up early.

We expected a quiet legislative year, but quite to the contrary has occurred. In addition to government restructuring legislation, significant workers' compensation reform is in the works. More detail will follow in the next issue. Of immediate interest on the legislative front are three other bills presently pending.

1. (H.3691) – (S.517) proposes a constitutional amendment to Section 22 Article 5 of the S.C. Constitution, which would abolish the 12 member petit jury and provide that the number of jurors would be "provided by law" (determined by the legislature).

   We have appeared before the Constitutional Law Sub-committee of the Judiciary Committee to oppose this bill. Please contact your house members and senators and express your opposition to this dangerous bill, which would significantly change our system of justice.

2. (H.3774) would re-establish voter registration lists as the criteria for selecting jurors as opposed to drivers' license registrations. Certainly we are in favor of this bill. It is presently in the House Judiciary Committee. Support this bill by contacting your local legislators.

3. (H.3759) would amend Section 34-31-20 to change the legal rate of interest on judgments, by tying the interest rate to prime or the T bill or some other factor, as opposed to a flat 14%. This bill also needs our support.

The Legislative Committee is actively involved, tracking legislation, and arranging appearances and testimony where necessary. Any comments or suggestions are welcomed.

Bill Coates and I just returned from DRI's National Conference for Defense Bar Leaders in San Francisco. Bill attended as our Association representative to the Leaders Conference. I attended as our representative to the Standing Committee on State and Local Defense Organizations. The focus of the Leaders Conference was the deteriorating relationship between insurance companies and their outside counsel, and the ongoing threat of house counsel. Breakouts included the long range role of the defense lawyer, the future of jury trial litigation versus alternative dispute resolution, and the role to be played by DRI in the future.

The SLDO meeting focused on the relationship between DRI and the local organizations and the method of selecting the DRI state chair. DRI is undergoing significant reorganization, therefore the method of electing the state representative was tabled pending the outcome of this reorganization.

We had significant discussions regarding revisions to Federal Rules of Civil Procedure 26, which would impose mandatory disclosure, in addition to existing discovery procedures. We unanimously agreed to oppose this change. In doing so, we need to identify defense attorneys who have close relationship with U.S. House Members and Senators, their contributors, political allies, and the like. DRI and the State and Local Defense Organization Committee need information on members who have such contacts who can help. If you can help, please contact me, particularly emphasizing any contacts with House or Senate Judiciary Committee members. We have copies of the proposed rules, and a position paper developed by DRI, which explores the problems, both substantive and ethical, which arise as a result of this proposed rule change. If anyone would like copies of this information, please do not hesitate to contact me.

As you can see, this has been a very busy year. I cannot thank the Executive Committee and the Standing Committees enough for their help and support. Keep it up!

I look forward to seeing everyone in Asheville.

Follow SCDTTA in 1993

From the Mountains
JULY 29-31
Joint Meeting
Grove Park Inn
Asheville, NC

To the Sea
November 11-14
Annual Meeting
The Cloister
Sea Island, GA

LAW OFFICE MANAGEMENT

EXPECT THE UNEXPECTED: TIME MANAGEMENT FOR LAWYERS

Jill J. Ramsfield

You may not feel that you have enough time to read this article – most lawyers have trouble finding the time to do casual reading. You may expect to have the time, but the unexpected often occurs – a frantic client calls and needs immediate attention; an associate returns a draft to you that is incomplete, unfocused, and late; a hearing that should have taken only two hours takes six. Time evaporates unexpectedly, and projects are pushed further along on the calendar. Your days become longer, your weekends are spent at the office, and your vacation has to be postponed – again.

As lawyers compete more for clients, become more sensitive to clients' demands to know how time is spent, and take on more work to make ends meet, managing the workday and year has become an increasingly important issue. Many lawyers reject traditional time-management courses whose credos do not speak to their needs. Following traditional advice like "Keep your desk clear of all paper" may be difficult for attorneys, who are often out of the office while mail and phone calls continue to arrive.

What follows are some ideas for tailoring a time-management approach to you, the lawyer. You can create an approach that will make your time more structured when necessary, more flexible when called for, and generally more useful for you.

The principle behind these ideas is that time invested early on will save much more time later. That principle will help you manage what you can – your office, your desk, your research and writing, and your client contacts. Applying the principle will make room for the tasks whose time you cannot manage – court appearances, lengthy hearings, client emergencies. You can fashion your time so that you are running your projects – they are not running you. The calendar and the clock will become your allies. You will be spending less time on work and accomplishing more.

Proper Perspective

Putting time in professional perspective will help you manage it efficiently. You will know more about what to expect when you have defined your tasks, your limits, and your breaks. Each of us has a different list, depending on our practice, our experience, and our goals. Though you may find that it is tempting to begin by defining all the work you do and trying to fit the rest of your life around your work, try reversing the order in planning your time. You deserve a break, and not just today.

Start by defining when you do *not* want to work. Your productivity is related to your energy level, and your general energy level is usually related to how much time off you take. So define your breaks.

Start with the next two years and figure out how much vacation you would like to have, or are allowed to have, in that period. If you would like two weeks or longer next year, put down vacation dates now.

Next do the same on the monthly and weekly levels. Decide when you want to spend time at home, with loved ones, pursuing a hobby, or simply relaxing. Then bring your ideal down to the daily level by setting aside time for jogging, eating lunch, reading the newspaper, or chatting with associates.

All these take time – and you should take time for them. Seeing them as a part of your professional life may hone your time-managing techniques. Enjoy this picture of your breaks for the year, the week, and each day. Resolve to take those breaks.

Having so resolved, define your limits. Decide how many billable or working hours you would like to put in this year, and divide that by the number of weeks you would like to work. If you are being asked by your firm to do 2,200 billable hours each year, then consider how much you can do beyond those official hours.

If you work on a contingent-fee basis, assess how many hours you should average to keep your bills and wages paid. Whatever your situation, decide how many hours you would like to work each week. Then decide when you would like to arrive at the office and when you would like to leave.

Try writing all this down. Then erase and scribble until you have a comfortable and realistic sense of your preferred daily, weekly, monthly, and yearly schedules.

Then, having established your breaks and your limits, define what tasks are required of you. This list may include taking depositions, attending hearings, catching up on professional reading, working on office committees, recruiting, and creating a broader client base.

Make a list of all the tasks that you do regularly, including even the very smallest ones, like compiling deposition notes and organizing lose-leaf notebooks. Be completely honest with yourself and put down absolutely every single thing you do.

In order to enjoy your breaks, stay within your limits, and accomplish all your tasks, you are going to have to speed up your work by doing more in less time.

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Factoring in Your Audiences

Now consider the "audiences" with whom you work. Time management involves interrelations with the people around you, including partners, associates, staff – even communing with yourself. Consider who these audiences are and what their demands and expectations are.

For example, one partner may be uncompromising about deadlines, or some associates may procrastinate too long in getting work back to you. Therefore, you need to return work to the uncompromising partner even earlier and perhaps follow up immediately in person to see if anything else is needed. Similarly, you may need to return work to procrastinating associates earlier and use interim deadlines. You may also need to know more about staff members' propensities to work on a timely basis, to organize themselves, or to give you quick turnaround on your work product.

One of the easiest ways to find out more about your audiences is to ask them a few questions. Ask them if they are sensitive to deadlines, how much turnaround time they need to complete projects, when they would like to receive the assignments, when they think they can finish them, and what are their likes and dislikes in the writing process as well as in the written product.

If you delegate, make sure you also make your own propensities clear. You may be strict about deadlines, which helps in time management; if so, you will want to let staff members know well ahead of time. Being strict about deadlines requires quick turnaround on your part to reinforce the importance of timely submissions to you.

And you need to know yourself. You may be excellent on the phone with clients but chat too long. You may dislike going through piles of mail, so you put off sorting it and throwing it away. You may prefer to write your own drafts but find you can no longer afford the time to do so. Examine what habits you have that work well and what do not. If you are not sure, ask those who work with you.

Working Backward

Knowing your calendar and your audiences will allow you to work backward, using a kind of reverse engineering to manage time. You probably have a good sense of what tasks each project demands. Left unnamed, those tasks may run wild, taking as much time as they like. Identified, separated, and harnessed, they will transport you neatly to the end of the project in an appropriate amount of time. And you will be the driver.

Decide where you want the project to go and when you want to have it done, even if there is no official deadline. Be realistic, and note those major dates on your calendar. Separate the tasks needed on the project into smaller ones, some creative, some critical. For example, if you are writing a brief, you need to collect the legally significant facts for one issue, research that issue, research another issue, develop a theory of the case, sketch an outline, and dictate one draft brief on one issue and another on the second issue.

Separated from each other, these tasks can be delegated, accomplished in short spurts of concentrated energy, or moved around on your schedule. Taking note of the final deadline and the several tasks needed to accomplish it, you can drive the project at a steady rate.

For each major project, consider at least two other deadlines besides the major deadline. First, set a practical deadline a few days before the project must be completed. For example, if an appellate brief is due on July 14, decide that you will have it out of the secretary's hands and out of the office on July 11. This will give you some breathing room should unexpected delays occur.

Second, look at the date about half way between now and that deadline. Decide that you will finish the draft, or the major portion of the project, by then. That will allow you time for feedback, discussion, further research, or changes in approach.

If you are so inclined, you can create a series of interim deadlines: one for researching, one for sketching a picture of the project or for outlining it, one for drafting, one for reorganizing, one for making small-scale changes, and one for polishing. Or you may want to create interim deadlines for others involved in the project, with meeting times for checking on particularly difficult steps in the process, such as defining the issues or finalizing a theory of the case. Working backward from the deadline and defining and separating each task will probably reveal that you need to start sooner than you thought.

Allow yourself some breathing room between these interim deadlines so that if you miss one, you do not feel hopelessly behind in the project. Be realistic. Allow yourself free periods between segments of the project so you can catch up if something else intervenes.

Even on short projects that you expect to take only a few hours, allow yourself some time to take a break – to get a soft drink, have a chat with the secretary, or make some phone calls. These kinds of breaks, even in an intense project, will allow you to relax mentally so your mind can come back to work effectively.

In working backward to create effective deadlines, be aware of competing interests. You will have more than one project to do. You will have to deal with people who expect you to drop everything and work on something else. You will have to return phone calls, go to depositions, meet with clients, perhaps travel. Be aware of the foreseeable and unforeseeable possibilities as you decide on your turnaround time and your deadlines. Overestimate the amount of time you will lose to interruptions, so you can keep your time line marching along comfortably and still be ready for the unexpected.

Creating a System

Successful systems for time management are built on individual strengths. Every lawyer has strengths that can translate into excellent time management. Decide what your strengths are. You may be good at researching, speaking to clients, seeing the big picture, drafting an intelligent contract, or proofreading.

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Characterize your best approach to time management also. Consider what you do that works, as well as what you admire in others. You may admire people who can always find files, give prompt feedback, keep mail from piling up, or begin and end meetings promptly.

Decide what your bad habits are and smother them. You know that you tend to spend too much time on the phone with clients or that you let mail pile up for days. Admit it, write it down if you need to, and decide you are going to smother that bad habit. Lawyers have to do everything, from coming up with ideas to proofreading, so it is important to keep bad habits under control.

Then compose your own theme and variations. Decide how you want to be viewed as a time manager. For example, you may want to be seen as a strong leader who conducts short meetings, as an organized professional who responds quickly to client demands, or as a litigator who files documents on time and who never asks for extensions. Create a positive theme from that, such as "All papers will be filed on time." Reinforce the message by posting it, saying it out loud, or writing it out repeatedly.

Develop techniques suited to you so you can replace bad habits with specific low leeway for the unexpected. Choose from among the following techniques to get started:

1. *Eliminate paper.* Delegate to your secretary or a paralegal the task of organizing your files. This may work better if you design the process and write it out, or you may simply want to approve the plan before it is implemented. Put on computer disk what can be filed there and get rid of extraneous paper copies.

Read each day's mail immediately. Have your secretary eliminate all unnecessary mail and envelopes and sort the remainder into piles such as client correspondence, continuing legal education materials, bar notices, and personal correspondence. *Touch each piece of paper only once.* As you read the mail, throw away immediately anything you can and dictate a response or directions for handling the rest of it. Immediately give a "home" to each piece of paper that you decide to keep by returning it to your secretary.

2. *Write down directions.* If you have had any trouble with people misunderstanding what you want, write your instructions down. That way, if you are busy or absent, the person to whom the task has been delegated can continue to work on it without having to interrupt you. Even though writing precise directions appears to take unwarranted time, this investment will save hours of needless and annoying volleying between you and your staff and hours spent reminding yourself of where you have been and where you should be going on the project.

If you are being supervised by a poor time manager, write down what you understand the project to entail and give the memo to the supervisor to clarify or correct. "As I understand it," the memo may start, "you have asked me to research whether or not. ...Please let me know if this is incorrect. If I do not hear from you by Friday, I will continue with the project."

3. *Compartmentalize tasks.* Pull together similar tasks, such as sorting through mail, dictating letters, or answering phone calls. Then your mind can focus on a certain kind of task rather than leapfrog among several throughout the day. This eliminates the unnecessary "switch time" that occurs when you try to do too many things at the same time. Compartmentalizing will allow you to devote your full attention to each type of task.

4. *Concentrate deeply on each task.* Having compartmentalized tasks, you can devote 100 percent of your attention to each compartment. This focus will increase your efficiency because your mind will be clear of other matters. You know that you will reach the matters in the other compartment a bit later, so you can ignore that compartment and concentrate on this one. You should find that your mind works more easily and more quickly when it is focused on one thing at a time.

5. *Condense the time it takes to do each task.* Try to speed up your work. For example, if you took 20 minutes to dictate a five-page document, try taking 15 minutes to do the same task next time. If you took 30 minutes to meet and decide who will do the hiring and interviewing for the next year, take 20 minutes next time. Try to cut down on the quantity of time without jeopardizing the quality. Concentrate on condensing. Time yourself.

6. *Delegate more.* This is hard, especially when you are not sure what direction a case may be taking, but try to give more responsibility to others. They may need training, which will absorb time up front. But if you make your directions specific and build in time for progress reports, you may find that your associates will learn your likes and dislikes and take pride in helping you out. Give them credit, encouragement, discipline, and frequent, constructive feedback. Save your time for advocacy matters, and guide others to do the less specialized but more time-consuming tasks.

7. *Say "no."* This is hard for lawyers, whether they are dealing with clients, supervisors, or staff. But do it. Plan ahead, so you will not be forced to refuse ungraciously, but rather can kindly decline because you know your limits. Having defined your vacations, your family and personal commitments, your long-term goals, and your day-to-day tasks, you will know when you are taking on too much. You can refuse gently – "I would love to, but I don't think I can do a good job..."; firmly – "I'm sorry, I cannot do that for you"; or flatteringly – "Of all the people I love to work with, you are the one I enjoy most. But I cannot do it for you this time. Please ask again."

If you know that your refusal will get you into trouble, try asking the others to use you as a backup – "This is very inconvenient for me right now. Can you find someone else? If not, then get back to me." Or give long-term "no" "I will do this last project for you, but I cannot be called upon with such short notice in the future."

You will have to find the ways of saying "no" that work best with your personality and those of your associates. If you take on too much, you

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risk producing mediocre work and damaging your reputation for quality lawyering. Saying "no" when appropriate keeps the quality of your work high and may win you respect.

8. *"Percolate" rather than procrastinate.* Resolve to start each project immediately, but take only one step at a time. Gather the facts and sketch some issues; then turn to another project and allow your thoughts to percolate on what direction to take on the first case. Research just one issue at a time; stop; let that sink in while you read the mail. Rather than simply put a project at the bottom of the pile, you should make some notes, sketch some thoughts, and allow them to percolate. Often, percolating is not only a practical necessity but also better than doing the project all at once.

If you have a tendency to procrastinate, you need to figure out the cause. You may hate the project, or dislike writing first drafts, or fear your supervisor's ever-ready red pen. Get to the root of the problem and try to work around it. If you hate the project, approach it as a time-management challenge. You probably want it off your desk, so apply some of the techniques that are given below.

If you dislike writing first drafts, try the "Don't get it right, get it written" approach, writing it as you would an exam. Use the clock – and go!

If you fear the supervisor's pen, write the draft and add a short memo at the beginning, highlighting the places you think need attention. That way, you are asking for guidance directly.

If you still believe you work better when you are under pressure, then deliberately clear your schedule so that all the other smaller tasks are finished and you can have the luxury of working under pressure on just one project at a time.

9. *Use the calendar and the clock*
Keep your eye on both at all times. Know the major deadlines and pace yourself. Watch the clock and be aware of how long you take to do each task. Without becoming a slave to the clock, use it as a helpful friend that prods you when your mind is wandering unnecessarily ("Concentrate 100 percent!"), when a meeting is going on too long ("Our time is ticking away, so we need to move on"), or when you are tempted to come in on the weekend ("I need to stop chatting so I can finish this by four o'clock"). Things do take longer than we expect, so use the calendar and the clock to define and control exactly how long they do take.

10. *Choreograph your day.* Whatever your strengths are, program the least amount of time for jobs involving them. You like those tasks, they come easily, so do them faster. Save your high-energy times for the work you like least. You will do it faster. And when your energy wanes, answer phone calls; hold meetings, and schedule activities that will keep you awake.

Doing First Things First

Begin implementing your system in a small way so as not to upset either your own balance or that of your associates. You might start with one major project and try a new technique, not worrying about other projects. At the end of that project, assess how the technique worked. Try again on another project, then another, until you feel comfortable. Then try the technique on two projects at once, and so on. Introduce your new techniques into your schedule gradually, giving yourself a year or more to transform yourself into an effective time manager.

By using your new techniques, you send strong messages to any of your associates and clients who have difficulty managing their time. If they see that you are organized and focused, they also may become so. If they see that you keep to your calendar and your time limits, they may do the same. And if you keep your desk clear, they may, too.

Give them gentle but firm reminders to keep on schedule. If you are having trouble with someone, do not wait until evaluation time, but give immediate feedback along with suggestions for improvement. Their time-management problems may be due to poor directions from you or someone else. Try to get to the heart of the problem, so you both can operate more efficiently. Set your own best example.

Practicing law brings surprises and disasters. The unexpected may be what attracts some of us to the thrill and challenge of practice. But some disasters, and some "busy"-ness, are direct results of poor time management.

You know that the unexpected will occur, so take care of the expected. Clear your desk of the mundane and petty tasks, keep your phone conversations short and businesslike, and use the clock to keep your productivity high.

You will then be poised in emergencies, clear-headed when others are confused, and ready when any last-minute changes occur. You can expect the unexpected. Your job will be more satisfying, more productive – and more enjoyable.

Jill J. Ramsfield is an associate professor of law and director of legal research and writing at Georgetown University Law Center in Washington, D.C. She heads her own consulting firm, specializing in legal writing and time management. This article is based on her seminar, Time Management for the Practitioner: Expecting the Unexpected. *© Jill J. Ramsfield.*

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November 11-14

RECENT DECISION

Submitted by Marshall Winn of Wyche, Burgess, Freeman & Parham

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
Lisa Lynn Brown,
Plaintiff,
vs.
Dan William Russell and
John Forrest Ham, Jr.,
Defendants.

IN THE COURT OF COMMON PLEAS

ORDER 92-CP-23-485-R

Defendant John Forrest Ham, Jr., has moved to compel Defendant Dan William Russell to produce copies of four statements recorded and transcribed by Defendant Russell's insurer. For the reasons stated below, Defendant Ham's motion to compel is denied.

This action arises from a collision on May 18, 1990, between an automobile driven by Defendant Russell and a motorcycle driven by Defendant Ham, on which the plaintiff was a passenger. Defendant Russell's insurer, State Farm Automobile Insurance Company, took statements from Defendant Russell and witnesses Stephens and Land on May 21, 1990, and from Defendant Ham and the plaintiff on July 6, 1990, all of which were later transcribed. The summons and complaint in this action were filed on February 14, 1991.

The production of the recorded statements here sought by defendant Ham[1] is governed by S.C.R. Civ. P. (26(b)(3), which in pertinent part provides that "a party may obtain discovery of documents...prepared in anticipation of litigation or for the trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means." (emphasis supplied) The language of the South Carolina rule is identical to that of Fed. R. Civ. P. 25(b)(3), which was held not to require production of statements taken by an insurer shortly after an automobile accident and before institution of litigation. Fontaine v. Sunflower Beef Carrier, Inc., 87 F.R.D. 89 (E.D. Mo. 1980). While it is certainly in the ordinary course of business for an automobile liability insurer to take statements following an accident involving one of its insureds, "the anticipation of the filing of a claim is undeniable once an accident has occurred and a person injured or property damaged. This is especially true in today's litigious society. Documents prepared at that time, therefore, are clearly prepared 'in anticipation of litigation' and 'by or for another party's representative.' " Fontaine, 87 F.R.D. at 92. See also Almaguer v. Chicago, R.I.&P.R. Co., 55 F.R.D. 147 (D. Neb. 1972) (statement of witness taken by defendant's insurer one month after accident but two months before plaintiff retained counsel held to be "taken in anticipation of litigation"). I therefore conclude that the statements sought by Defendant Ham, taken shortly after the accident by Defendant Russell's insurer, were prepared "in anticipation of litigation" and are thus protected from discovery under S.C.R. Civ. P. 25(b)(3) absent a showing of substantial need and undue hardship in obtaining the substantial equivalent of the statements.

Defendant Ham has not made the required showing that he has substantial need of the materials in the preparation of this case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. There is no evidence that the witnesses are no longer available or that there are any other special circumstances which might create undue hardship in obtaining these witnesses' statements, by deposition or otherwise. See Guilford National Bank of Greensboro v. Southern Ry. Co., 297 F.2d 921 (4th Cir. 1962) (one party's exclusive possession and control of written statements taken immediately after accident does not constitute good cause for permitting discovery of such statements by other party under former Fed. R. Civ. P. 34, where substance of statements is discoverable by depositions or interrogatories or by arranging for interviews with witnesses themselves).

Because the statements in question here fall within the protection afforded by S.C.R. Civ. P. 26(b)(3), Defendant Ham's motion to compel discovery of the statements is DENIED.

H. Dean Hall
Circuit Judge

1. "Defendant Russell" has voluntarily produced a copy of Defendant Ham's transcribed statement.

ISADORE BOGOSLOW, long time member of the South Carolina Defense Trial Attorneys' Association passed away in April. He will be missed.

JURY SELECTION IN A CIVIL LAWSUIT IN SOUTH CAROLINA STATE COURT UNDER BATSON V. KENTUCKY AND CHAVOUS V. BROWN[1]

By: H. Sam Mabry, III and Brent O. E. Clinkscale
Haynsworth, Marion, McKay & Guérard, Attorneys At Law

1. Introduction

In Batson v. Kentucky, 476 U.S. 79 (1986), the United States Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment prohibits a state prosecutor in a criminal case from using peremptory challenges to strike potential jurors based solely on their race or the assumption that African American[2] jurors as a group would not impartially consider the state's case against an African American defendant. It took the South Carolina state appeals courts approximately five more years to finally decide that Batson applies to jury selection in a civil case in state court. In Chavous v. Brown, 299 S.C. 398, 385 S.E.2d 206 (Ct.App. 1989), the South Carolina Court of Appeals held that Batson applies to civil lawsuits and prohibits a party from striking potential jurors based on racial considerations. On writ of certiorari, the South Carolina Supreme Court reversed, finding that jury strikes by the attorney for a party in a civil lawsuit, even if racially motivated, do not constitute state action. Chavous v. Brown, 302 S.C. 308, 396 S.E.2d 98 (1990).

Subsequently, in Edmonson v. Leesville Concrete Co., 500 U.S. ___, 111 S.Ct. 2077 (1991), the United States Supreme Court found that the exercise of racially motivated peremptory strikes by a private civil litigant in federal court constitutes state action and applied the standards articulated in Batson to civil lawsuits in federal court. On writ of certiorari (111 S.Ct. 2791), the United States Supreme Court remanded Chavous to the South Carolina Supreme Court for reconsideration in light of Edmonson. The South Carolina Supreme Court then held that Batson applies to preemptory jury strikes in a civil case in South Carolina state court. Chavous v. Brown, 305 S.C. 388, 409 S.E.2d 357 (1991).

The legal analysis utilized under Batson is similar to the three step analysis applied by the courts in a disparate treatment case under Title VII of the Civil Rights Act of 1964. See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Under Batson, the party challenging strikes for racial motivation has the initial burden of establishing a prima facie case of purposeful racial discrimination in the other party's selection of a jury. State v. Elmore, 300 S.C. 130, 386 S.E.2d 769 (1989).[3] The Batson court stated that a prima facie case is established when a defendant shows: (1) he is a member of a "cognizable racial group"; (2) the other party has exercised peremptory challenges to remove veniremen of his race; and (3) facts and circumstances raising an inference that the prosecutor used his peremptory challenges for the purpose of striking minorities. Batson v. Kentucky, supra, 476 U.S. at 97.

If a prima facie case is made, the trial court must then hold a Batson hearing to require the opposing party to offer racially neutral explanations for the challenged strikes. On the other hand, if a prima facie case is not established, the trial judge has no duty to hold a Batson hearing nor is the other party required to explain his jury strikes. State v. Jones, 293 S.C. 54, 358 S.E.2d 701 (1987). At the Batson hearing, the other party must come forward with a neutral explanation for striking the juror or jurors in question. Once the other party articulates a legitimate non-discriminatory reason for the strike, the party challenging the strike has the burden of showing that this reason was a pretext for discrimination and has the ultimate burden of proving purposeful racial discrimination in exercising the challenged jury strikes.

A judge's determination on whether or not a prima facie case was established will not be reversed except for an abuse of discretion. State v. Jones, supra; State v. Smith, 293 S.C. 22, 358 S.E.2d 389 (1987). Likewise, the trial court has the right, and the duty, to examine the legitimacy of the explanation for a strike. State v. Tomlin, 299 S.C. 294, 384 S.E.2d 707 (1989). Further, it is within the discretion of the trial judge to determine purposeful discrimination in making jury strikes based on the "totality of relevant facts", including the credibility of the attorney making the strikes. State v. Green, 306 S.C. 94, 409 S.E.2d 785 (1991). Because the trial judge's findings regarding purposeful discrimination rests largely upon an evaluation of the credibility of the attorney making the strikes, an appeals court will give those findings great deference. However, where the record does not support the attorney's stated reason for making the strike, the trial court's findings must be overturned. State v. Patterson, ___ S.C. ___, 414 S.E.2d 155, 157 (1992).

2. The Prima Facie Case

While Batson sets forth three criteria to establish a prima facie case, the South Carolina Supreme Court has adopted a more liberal "bright line" test for when a trial judge should hold a Batson hearing. In State v. Jones, supra, 358 S.E.2d at 703 (1987), the Supreme Court found "the better practice is for trial courts to hold a Batson hearing out of the jury's presence (1) at the defendant's request, (2) when the defendant is a member of a cognizable racial group, and (3) when the State has exercised peremptory challenges to remove members of the defendant's race." State v. Tomlin, 299 S.C. 294, 384 S.E.2d 707, 709 (1989). In Chavous v. Brown, supra, the South Carolina Court of Appeals applied this test to find a prima facie case where a white defendant, sued by an African American, used all four peremptory strikes to exclude African Americans from the jury.

Under this "bright line" test, a party challenging jury strikes can

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establish a prima facie case by basically showing his race and that jury veniremen of his race were stricken by the other party. The "bright line" test focuses solely on whether jury veniremen of the party's race were struck by the other party. A prima facie case of racially discriminatory jury strikes can be made even if persons of the same race are placed on the jury. For example, in State v. Wright, 304 S.C. 529, 405 S.E. 825 (1992), an African American male was tried in absentia in Sumter County for distributing cocaine. In selecting the jury, the solicitor exercised two peremptory strikes to remove African Americans from the jury. The South Carolina Supreme Court found that a prima facie case of racial discrimination had been established based on the fact that the defendant was African American, the defendant's attorney had requested a Batson hearing and two African Americans were struck from the jury. No mention was made whether other African American veniremen were seated on the jury.

However, in State v. Elmore, supra, the South Carolina Supreme Court may, to some extent, have created an exception to, or at least backed away from, the "bright line" test. In Elmore, the jury which tried the African American defendant consisted of 11 whites and 1 African American. Additionally, an African American was seated as an alternate juror. However, the solicitor used two peremptory challenges to strike potential African American jurors. Although a prima facie case existed under the "bright line" test because the defendant was African American and the State struck two potential African American jurors, the trial judge found that defendant did not make a prima facie showing of discrimination. The Supreme Court affirmed this finding on appeal.[4] Likewise, in State v. Johnson, 302 S.C. 243, 395 S.E.2d 167 (1990), the Supreme Court noted that three African Americans had been seated on the jury in favorably reviewing the explanations given for striking other African American veniremen.

While there is no state appeals court case on point, some South Carolina state court judges have applied a statistical analysis to determine whether a prima facie case has been shown under Batson. These judges find that a prima facie case is established where a party exercises its jury strikes to remove a minority in a greater percentage than the minority appears on the jury list. For example, with a jury list of 75% white and 25% African American, a judge would find a prima facie case of discrimination where a white defendant used two of his/her four peremptory strikes to remove African Americans from the jury since the number of African Americans struck (50%) exceeds the percentage on the original list (25%). On the other hand, a prima facie case of race discrimination would not exist where the white defendant used his/her peremptory challenges to strike one African American juror since the percentage of African American strikes (25%) equals the percentage of African Americans on the jury list (25%).

3. Legitimate Non-Discriminatory Reasons

If the party challenging the jury strikes establishes a prima facie case, the other party then has the burden of providing a racially neutral explanation for the use of his peremptory strikes. The other party need only articulate or state a legitimate reason for the strike. This explanation must be related to the particular case being tried but need not rise to the level of a challenge for cause. Chavous v. Brown, supra, 385 S.E.2d at 208.

However, the other party's burden is not satisfied merely by stating it was his intuitive judgment that the juror would be partial because of his race or by denying that he had any discriminatory motive in striking the juror. To rebut the prima facie case, the explanation offered by the other party must meet four criteria: (1) it must be neutral; (2) it must relate to the case to be tried; (3) it must be clear and reasonably specific; and (4) it must be legitimate. State v. Tomlin, supra, 384 S.E.2d at 709. In examining the legitimacy of the party's explanation, the trial court may consider several additional factors: (1) the susceptibility of the particular case to racial discrimination; (2) the attorney's demeanor in explaining the strikes; (3) whether similarly situated African American jurors were struck on comparable grounds; and (4) whether the explanation relates to the specific juror and the case to be tried. Id. at 709-710.

Set forth below are factors which the courts have held are legitimate reasons for striking a juror:

(1) Age (too old or too young);

(2) Sex (don't want females on jury because of factors such as scarring, injury to children, etc.);

(3) Same basic background as plaintiff (education, work, social or economic). Chavous v. Brown, supra;

(4) Juror did not seem interested during jury voir dire or jury questioning. State v. Tomlin, supra;

(5) Juror has possible criminal record. State v. Martinez, 294 S.C. 72, 362 S.E.2d 641 (1987);

(6) Juror is unemployed. State v. Tomlin, supra, State v. Martinez, supra;

(7) Juror knew the other party's attorney. State v. Lewis, 293 S.C. 107, 359 S.E.2d 66 (1987);

(8) Juror same sex as other party. State v. Martinez, supra;

(9) Juror same age as other party. State v. Martinez, supra;

(10) Juror could be related to plaintiff. Chavous v. Brown, supra (juror had same last name as maiden name of plaintiff's spouse);

(11) Juror was plaintiff or defendant in another lawsuit;

(12) Juror has children same age or background as plaintiff or plaintiff's children;

(13) During voir dire questioning, juror expressed some opinion or attitude supporting other party's claim, witnesses or potential defenses or contrary to your claim, witnesses or defenses. State v. Howard, 295 S.C. 462, 369 S.E.2d 132 (1988) (during voir dire questioning juror stated reluctance to grant death penalty);

(14) Juror has read newspaper articles or seen television report on the particular case, the facts of

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the case or on similar type cases;

(15) Party knows juror or has had bad dealings with juror in past;

(16) Party suspects he/she knows juror or has had bad dealings with jurors in past;

(17) Attorney has had previous dealing with juror (sat on another jury; sued another client of the attorney, etc.);

(18) Juror's neighbor or relative knows the party or had bad dealings with the party in the past. State v. Johnson, supra (juror's neighbor arrested by State's investigator);

(19) Juror had generally "unstable" personal history such as divorce, children born out of wedlock, or periods of unemployment. State v. Robinson, 305 S.C. 469, 409 S.E.2d 404 (1991);

(20) Juror still living with his/her parents. State v. Robinson, supra;

(21) Juror lives or lived near party. State v. Johnson, supra;

(22) Juror did not appear interested in the courtroom or what was going on. State v. Wright, supra, 405 S.E.2d at 827 (1991) ("juror acted like he didn't want to be here");

(23) Single, college student more likely to sympathize with opposing party. State v. Richburg, 304 S.C. 162, 403 S.E.2d 315 (1991);

(24) Juror showed up late showing disrespect for the court. State v. Wilder, ___ S.C. ___, 413 S.E.2d 323 (1991);

(25) Demeanor or disposition of the juror. State v. Wilder, supra; State v. Wright, supra; State v. Tomlin, supra;

(26) Juror knows or had dealings with one of the witnesses for the other side. State v. Oglesby, 298 S.C. 279, 379 S.E.2d 891 (1989);

(27) Juror gave inconsistent answers to voir dire questions. State v. Bell, 305 S.C. 11, 406 S.E.2d 165 (1991), cert. denied, 112 S.Ct. 888 (1992).

(28) Juror has children same age as other party. State v. Bell, supra.

Of course, other racially neutral explanations could be given which would justify striking a juror.[5]

However, the South Carolina Supreme Court has held that explanations such as the juror "shucked and jived" or talked slow are not racially neutral because they are based on traditional racial stereotypes.[6] State v. Tomlin, supra. Additionally, the South Carolina Supreme Court has recently held a party does not articulate a legitimate non-discriminatory reason for striking an African American veniremen by simply asserting that a third person made the decision to strike the juror and communicated this decision to the party's attorney. State v. Adams, ___ S.C. ___, 414 S.E.2d (402) (1992). A clear and reasonably specific explanation must be offered as to why the third person made the decision to strike the minority veniremen. According to the Court, "[w]ithout this requirement, there would be no assurance that the third person did not make the decision based on the juror's race." 415 S.E.2d at 403. See also State v. Marble, Opinion No. 23769, Davis' Advance Sheet No. 1, pp. 19-20 (S.C.Sup.Ct. filed December 21, 1992). Based on Adams, it would appear that parties using a jury selection service or third-party assistance in selecting a jury cannot simply rely on the decision of the service to strike a minority veniremen. Rather, the trial court would have to be given a nondiscriminatory explanation for why the third party recommended striking the minority venireman.

4. Pretext

Even if the party whose strikes are challenged articulates legitimate reasons for the strikes, the party challenging the strikes can establish that the explanations are a pretext. A party can do this by showing that similar white jurors were seated while African American veniremen were struck. For example, in Chavous v. Brown, the defendant struck a potential African American juror because of her youth. However, the Court of Appeals found this explanation was a pretext because two white females and three white males who were seated on the jury were actually younger than the potential African American juror. This finding was eventually affirmed by the South Carolina Supreme Court. 409 S.E.2d at 356-357.

Any explanation given for a strike must be applied equally across the board. For example, in State v. Adams, supra, the State sought to explain its use of a peremptory challenge to remove a African American male from the jury on the grounds the docket clerk had placed several question marks by the juror's name which the solicitor interpreted to mean the juror had a criminal record. The Supreme Court found that this explanation was a pretext because the solicitor had not struck a white juror who also had question marks by his name. Similarly, in State v. Oglesby, supra, the Supreme Court found that striking of three potential African American jurors because they allegedly knew one of the defendant's witnesses was a pretext where white jurors who knew the witness were allowed to serve on the jury.

Even if the party challenging peremptory strikes can show that white veniremen having the same characteristics were seated and African American veniremen with those characteristics excluded, the other party may nevertheless avoid a finding of pretext by showing an additional nondiscriminatory reason for treating the white and African American veniremen differently. For example, in State v. Wilder, supra, the solicitor struck two African Americans because they reported late for jury duty. Although a white woman who reported late was seated and eventually became jury forelady, the Supreme Court found no pretext because the white female's "express willingness to serve on the jury overrode the Solicitor's concern that veniremen who come in late convey disrespect for the court." 413 S.E.2d at 325.

Similarly, in State v. Richburg, supra, the solicitor struck an African American male from the jury because "he was a single college student and the State felt that college students were 'more tolerant towards drugs,' " 403 S.E.2d at 317. The defendant argued that this explanation was a pretext because a single white female college student was placed on the jury. However, the Supreme

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Court found no evidence of pretext because the "white juror who was a single college student was not struck because the State had run out of peremptory challenges at the time she was presented and was therefore unable to strike her." Id.

A party can also establish pretext by showing that the reason given for striking a venireman is not supported by the record. For example, in State v. Patterson, supra, the State sought to justify the striking of an African American member of venire on the grounds she had indicated difficulty in voting for the death penalty. However, the Supreme Court examined the records and found that this was an isolated comment and that, taken as a whole, the voir dire of this juror did not support this argument. "Because the record [did] not support the solicitor's evaluation of [the juror's] responses, the Court found the trial judge erred in ruling that the solicitor offered a race-neutral reason for exercising the strike." 414 S.E.2d at 157. See also State v. Davis, ___ S.C. ___, 411 S.E.2d 220 (1991).

5. Application

At this time, Batson and Chavous would appear to only apply to jury strikes based on race. Batson does not apply to jury strikes based on nonracial factors such as gender, religion, sexual preference, etc. E.g., United States v. Hamilton, 850 F.2d 1038 (4th Cir. 1988), cert. denied, 489 U.S. 1094 (1989) (strike based on gender).

Batson clearly applies to a situation where an African American, Hispanic, Oriental or other minority is a party, whether a plaintiff or defendant. In other words, Batson and Chavous allow an African American plaintiff to challenge strikes of African American veniremen by a white defendant and a African American civil defendant could challenge strikes of African American veniremen by a white plaintiff.

Two recent criminal cases decided by the United States Supreme Court suggest that a white civil litigant may also have standing to raise Batson challenges. In Georgia v. McCollum, supra, the Supreme Court held that Batson prohibits a white criminal defendant from exercising his peremptory challenges to strike African Americans from the jury based solely on their race. In a concurring opinion, Judge Clarence Thomas suggested that the next logical step would be to hold that Batson prohibits African American defendants from striking white veniremen based on their race. 112 S.Ct. at 2360. Accordingly, Batson may give a white civil litigant the right to challenge an African American party's striking of potential white jurors.

Additionally, in Powers v. Ohio, 499 U.S. ___, 111 S.Ct. 1364 (1991) the United States Supreme Court held that, in the trial of a white criminal defendant, a prosecutor is prohibited from excluding African American jurors on the basis of race. Assuming it applies in a civil case, Powers would appear to hold that a white party cannot exclude African American veniremen from the jury on the basis of race even if the opposing party is also white. However, this interpretation of Powers creates problems involving the application of South Carolina's "bright line" test since, under this test, a prima facie case is established by showing the race of the party and that persons of the party's race were excluded from the jury. In a civil case involving two white parties, one side could exercise all of its strikes to remove African Americans veniremen without violating this "bright line test" since the other side is also white and no whites were stricken. Under Powers, a more logical method of determining a prima facie case would be a statistical analysis to see whether veniremen were struck in percentages roughly equivalent to the percentage they represent in the original jury pool or on the original jury list.

A Batson challenge must be made after the jury is selected but before the jury is sworn. State v. Jones, supra,. 358 S.E.2d at 703. In cases where a party makes a Batson challenge after the jury is sworn, the party whose strikes are challenged should note on the record that the challenge was untimely.

At trial, the remedy when a party exercises his/her strikes in a racially motivated manner is dismissal of the jury selected and selection of an entirely new jury apparently from the remaining veniremen. State v. Jones, supra, 358 S.E.2d at 704. This procedure could theoretically have some interesting consequences for a civil party making a Batson challenge. For example, assume in a civil case involving an African American plaintiff and a white defendant that the list of potential jurors is approximately 70% to 80% African American. The attorney representing the white defendant could simply strike the first four African Americans on the jury list and, if challenged, admit the strikes were racially motivated on the hope that the new jury list would be a more racially balanced jury from the perspective of the white defendant.[7] Accordingly, there may be some situations where Batson actually benefits the other party. A lawyer considering a Batson challenge should evaluate whether a new jury might be less racially balanced than the one the lawyer currently has.

On appeal, the remedy where the trial court makes some procedural error, such as failing to allow a party to establish a prima facie case or failing to hold a Batson hearing after a prima facie case is shown, appears to be remand to the trial court to correct the procedural error. If the trial court ultimately finds that the challenged strikes were not racially motivated, the original trial verdict will apparently stand. See State v. Jones, supra, 385 S.E.2d at 703-704. On the other hand, the remedy where an appeals court finds that a party exercised his/her strikes in a racially motivated manner is reversal and remand of the case back to the circuit court for a new trial. Chavous v. Brown, supra, 385 S.E.2d at 211.

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[1] Although not the authors' original intent, this article supplements two previous, outstanding treatments of this issue by John H. Blume and Vance L. Cowden. Blume, "Applying Batson v. Kentucky in South Carolina Cases", South Carolina Lawyer Vol. 3, Number 3 pp. 18-24 (November /December 1991); Cowden, "[Edmon] Son of Batson: Racial Stereotypes in

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Civil Jury Selection", South Carolina Lawyer Vol. 3, Number 3 pp. 25-30 (November/December 1991).

[2] While many of the cases use the term "black", the authors have elected to use the now more accepted term "African American." See, e.g., Georgia v. McCollum, ___ U.S. ___, 112 S.Ct. 2348 (1992).

[3] Throughout this article, the authors assume that South Carolina decisions applying Batson in a criminal case would also be binding precedent in a civil lawsuit in state court.

[4] Elmore can possibly be reconciled with other cases on the grounds that, while a trial judge should apply the "bright line" test to determine whether a prima facie case has been established, the trial judge does not commit reversible error by failing to do so. See State v. Tomlin, supra, 384 S.E.2d at 709 (Supreme Court "recommended that the better practice" for trial courts is to hold a Batson hearing if the "bright line" test is satisfied).

[5] Many of the racially neutral explanations approved by the South Carolina appeals courts, although neutral on their face, could theoretically have a disparate impact on a particular racial group. Compare Griggs v. Duke Power Co., 401 U.S. 424, 853 (1971) (Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation"). For example, striking an African American venireman because he/she lives in the same neighborhood as the African American plaintiff has the same impact as intentional discrimination in light of the de facto segregation in many neighborhoods, particularly in metropolitan areas. Similarly, given the relatively high unemployment rate among young African American males, striking an African American venireman because he is unemployed has a disparate impact on African Americans. To date, no South Carolina appeals court has addressed whether a racially neutral explanation for jury strikes is invalidated because the explanation has a disparate impact on a specific racial group. In Hernandez v. New York, ___ U.S. ___, 111 S.Ct. 1859, 1862-1863 (1991), four Justices stated that, while the fact that the reason for striking a juror has a disparate impact on a racial group does not establish a per se violation of Batson, a "trial court should give appropriate weight to the disparate impact of the...criterion in determining whether the [attorney] acted with forbidden intent" in striking a juror.

[6] The difference between striking a juror because of "demeanor" and because the juror "shucked and jived" or talked slow is, practically speaking, difficult to draw. Apparently, the solicitor in State v. Tomlin made the mistake of using traditional racial stereotypes to describe the demeanor of the African American juror the solicitor struck in

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FAMILY AND MEDICAL LEAVE ACT OF 1993: TOO MANY REQUIREMENTS AND QUESTIONS, TOO FEW ANSWERS

By Thomas R. Haggard and William H. Floyd III

In recent years, workforce statistics have reflected a steady rise in the number of employees who are single parents or whose spouse also works. This has increased the demand for employment benefit packages that allow extended leaves for child rearing, health care, and other family emergencies. The market was not slow in responding to the change. In recruiting and retaining competent employees, many employers found it advantageous to offer extended family and medical leave plans as a part of the overall compensation package. Each plan was thus custom tailored to accommodate the employees' needs with that particular employer's financial and operational constraints. Of course, many employers found it either unnecessary or impractical to offer extended leave as an employment benefit.

Congress, however, was not satisfied with a free market resolution of the problem. Acting on the political theory that what is good for some must necessarily be required of all, it passed the Family and Medical Leave Act of 1993 (FMLA). President Clinton quickly signed the bill on February 5, 1993. For most employers, the law becomes effective on August 5, 1993. The effective date for unionized employers is the earlier of the following two dates: the collective bargaining agreement's termination date or February 5, 1994.

The act contains three major uncertainties. What is it ultimately going to cost American industry? What impact is it going to have on the hiring of persons who are perceived as being the most likely to claim the benefits of the act? And how is it going to apply in the almost endless variety of situations that will arise in the daily operation of a business?

The Department of Labor is expected to develop regulations to clarify the act and assist employers in complying with its myriad of confusing requirements. These regulations, however, are not due until early June, while most of the provisions of the act go into effect in August. Employers who are trying to develop plans for complying with the statute are thus left somewhat in the dark.

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Tomlin.

[7] The authors express no opinion on whether an attorney can ethically strike veniremen solely because of their race in hopes of getting a better jury list after losing a Batson hearing. See Rule 407, Rule 3.1, 3.2, 3.4(c) and 3.5(c), SCRAP.

The purpose of this article is to provide a broad overview of FMLA, to identify some of the major points of uncertainty, and to provide practice pointers for lawyers assisting business clients to plan for compliance.

COVERAGE

FMLA applies to every business or public agency that employs 50 or more employees for each working day during each of 20 or more calendar work weeks in the current or the preceding calendar year. Full-time, part-time, permanent, and temporary employees are all counted.

Only certain employees, however, are eligible to receive family or medical leave under FMLA. A person must have been employed by the covered employer for at least 12 months and during the prior 12-month period must have worked at least 1,250 hours.

The act excludes certain federal officers and employees. Persons employed at a worksite with less than 50 other employees are also ineligible if the employer, regardless of the total number of employees, has less than 50 employees working within 75 miles of this worksite.

The FMLA also provides special rules for teachers in elementary and secondary schools. These rules were designed to "balance the educational needs of children with the family needs of teachers." They deal with the amount of intermittent leave a teacher may take and with the timing of leaves in relation to when semesters end. The act also has separate sections dealing with civil service and congressional employees.

REASONS FOR LEAVE

A person is eligible for a FMLA leave only for the following reasons:

- To give birth to or care for a child born during the preceding 12-month period.
- To care for a child that has been adopted or accepted for foster care during the preceding 12-month period.
- To care for a child, spouse, or parent that has a serious health condition.
- To care for one's self, because of a serious health condition that makes the employee unable to perform the job.

FMLA defines a "serious health condition" as an illness, injury, impairment, or physical or mental condition that involves either inpatient care at a hospital or continuing treatment by a doctor at home. The "child care" provision applies to children who are either under 18 or who are incapable of self-care because of mental or physical disability.

LENGTH OF LEAVE

An employee is eligible for up to 12 weeks of leave during any 12 month period. Either the father, the mother, or both may take a leave following the birth or adoption of a child. If, however, they work for the same employer, 12 weeks is the aggregate amount of leave that they both may take to care for a newly born or adopted child or to care for a parent.

PAID/UNPAID LEAVE

An employer is not required to provide paid leave. Moreover, an employer may require employees to use accrued paid vacation or leave time as a part of the total 12 week FMLA leave.

INTERMITTENT AND REDUCED SCHEDULE LEAVES

If an employee wants to take an intermittent or reduced work-hours leave, the employee must obtain the employer's agreement if the purpose of the leave is to care for a newly born or adopted child. If the purpose is to provide self-care or care for a sick spouse, parent, or child, then the employer is required to grant the leave but may transfer the employee into an equivalent paying position that better accommodates the episodic nature of the absence.

NOTICE AND CERTIFICATION

Generally, an employee must give 30-days notice prior to the beginning of the leave. This is certainly true when the date of a birth, adoption, or a planned medical treatment can be known in advance. Moreover, the employee must make a reasonable effort to schedule the planned medical treatment at a time when it would not unduly disrupt the employer's operations. If an unforeseen event occurs, the employee is only required to provide notice "as soon as practicable."

If an employee is requesting leave because of a serious health condition of either the employee or a family member, the employer may require that a doctor's certification be submitted in a "timely manner." The certification must contain:

- The date the serious health condition began.
- The probable duration.
- Appropriate medical facts concerning the condition.
- If the leave is to care for a family member, a statement that the employee is needed to provide this care and an estimate of how long the need will last.
- If the leave is because of the employee's serious health condition, a statement that the employee has become unable to perform the job.
- For intermittent or reduced-hours leaves:
  - The expected dates and duration of the treatment, if the leave is for planned medical treatment.
  - A statement of the nature and probably duration of the medical necessity, if the leave is because of the resulting inability of the employee to perform the job.
  - A statement of the need and probable duration of the need, if the leave is to provide care to a sick family member.

If the employer doubts the validity of a certification, it may require a second option from a doctor of its choice (other than an employee of the employer). The employer must pay for the second opinion. If the two opinions conflict, then the employer may require a third opinion – again, at its expense. This third opinion must be from a doctor that both par-

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ties agree to, and the opinion of this doctor is final.

The employer may also require subsequent recertifications on a "reasonable basis."

HEALTH BENEFITS DURING LEAVE

The employer is required to continue the employee's group health insurance coverage during the leave period, at the same level and under the same conditions as are available to active employees. However, if the employee fails to return to work for (a) reasons unrelated to the serious health condition that entitled the employee to the leave or (b) other conditions beyond the employee's control, then the employer may recover the premiums that were paid to maintain the coverage during this period.

REEMPLOYMENT RIGHTS

At the termination of a FMLA leave, the employee must be restored to the job previously held or to an equivalent job with equivalent benefits, pay, status, and other terms and conditions of employment.

Job restoration may be denied, however, to certain "highly compensated employees." These are employees who are among the highest paid 10% of the employees working within 75 miles of the facility where the employee works. Nevertheless, the exception only applies when job restoration would cause "substantial and grievous economic injury to the operations of the employer." The employer must notify the employee of its intent to deny restoration as soon as the employer determines that this injury would occur.

If notice is given after the leave has already commenced, the employee must be given the option to return immediately to work. employees enjoy.

INTERFERENCE WITH RIGHTS

Employers are prohibited from interfering with or restraining employees in the exercise of FMLA rights. Employers are also prohibited from discriminating against employees who oppose the employer's illegal leave practices or who participate in enforcement or other proceedings under the act.

ENFORCEMENT

Employees who believe that their FMLA rights have been violated may sue in state or federal court, or they may complain to the United States Department of Labor. After an investigation and an attempt to resolve the complaint, the Department may bring suit on behalf of the employee.

In either case, if the employer is found to have violated the act, it may be required to pay:

- Damages equal to the wages, salary, benefits, and other compensation that the employee lost.

or

- If no compensation has been lost, damages equal to the monetary losses suffered by the employee because of the violation, such as the cost of providing care to a sick family member, up to sum equal to 12 weeks of the employee's wages.

plus

- Interest, double damages unless the employer acted in good faith and had reasonable grounds for believing that it was not violating the law, attorney's fees, expert witness fees, and court costs.

plus

- Equitable relief requiring that the employee be hired, reinstated, promoted, or otherwise made whole.

The statue of limitations is two years, or three years in cases of wilful violations.

RECORDS AND NOTICES

Employers must make, keep, and preserve records pertaining to compliance with FMLA. They must also post a notice (to be distributed by the Department of Labor) containing information about FMLA and advising employees on how to file a charge. Failure to post notices will subject the employer to a $100 penalty for each offense.

PREEMPTION

The FMLA does not preempt state and local laws providing greater leave rights, nor does it modify or affect in any federal or state anti-discrimination statutes, including Title VII of the Civil Rights of 1964 and the Americans with Disabilities Act.

The act also has no effect on collective bargaining agreements and employment benefit plans that provide greater leave rights.

UNCERTAINTIES

As with any new statute, the FMLA is unclear on a number of specific points, including the following.

- When determining whether an employer is covered by the act, how should the 75-mile radius be measured? For example, can each 75-mile radius be linked to include other small facilities which are within 75 miles of only one other facility?
- When must the 50-employee threshold be met? Should it occur when an employee gives notice of an upcoming leave or when an employee actually begins the leave?
- Exactly what does the phrase "to care for" encompass? Does it encompass mere psychological comfort and reassurance?
- At what point does a mere illness become a "serious health condition"?
- What is the test for determining whether an employee is "unable to perform the functions of the position"?
- What exactly does "intermittent" leave mean?
- Where both spouses have the same employer, are the spouses limited to only the aggregate of 12 weeks leave to care for more than one sick parent or sick son or daughter?
- After an employee gives notice, can the employer immediately require that accrued paid leave be used, thus preventing the employee from using that leave during the notice period? Or does the requirement only apply to accrued leave that is actually available at the time the FMLA leave begins?
- Can the employer require that notice be given in a particular form or pursuant to particular procedures?
- What happens if the employee fails to provide adequate notice?
- When is certification provided in a "timely manner"?

(Continued on page 16)

(Continued from page 15)

- What happens if the parties cannot agree on a doctor to provide a third opinion concerning confirmation of the need for a leave?
- What is a "reasonable basis" for a recertification requirement?
- What does "substantial and grievous economic injury" mean?
- How will the FMLA affect an employer's current obligations under COBRA? For example, if an employee on leave does not return to the employer when leave expires, when did the "qualifying event" occur under COBRA and what are the employer's rights and responsibilities?
- What will be considered an "equivalent" job for the purposes of satisfying the restoration of job requirement?
- Exactly what kind of records will employers be required to keep?
- Can an employee rely on the beneficial provisions of both the FMLA and non-preempted state laws, or must an employee opt to proceed entirely under one statute or the other?
- With respect to the recovery of health insurance premiums, what does "other circumstances beyond the control of the employee" mean?

Presumably, the Department of Labor regulations will attempt to answer these and the many other questions that have arisen under the statute. The legislative history of FMLA may also be helpful in resolving some of them.

PRACTICE POINTERS

At this point, the FMLA presents employers with more questions than answers. August looms ahead for all non-unionized employers who might be covered by the act. Between now and August 5, 1993, many employers must prepare to comply with the act by reviewing their current policies and procedures and creating new ones designed to satisfy the Act while keeping administrative costs to the minimum. Their first step may be to call their lawyer and ask for his or her advice regarding what to do.

For those lawyers who are faced with such a call, here are a few suggestions on where to begin:

- Carefully review the DOL regulations, which should be promulgated in June, paying particular attention to whether some of the previously discussed "uncertainties" are resolved.
- Determine whether your client has employed 50 or more employees within any 20 weeks during the current or preceding calendar year. Be especially careful when a client is close to 50 employees because of the 75-mile rule or its employment history.
- Review your client's employee handbook. Focus on sections dealing with vacations, leaves of absence, COBRA, and employee benefits. Consider whether the handbook should contain a section specifically addressing employee rights and responsibilities under the FMLA.
- Review your client's policy manuals. Nearly all policies dealing with leave and employee benefits should be carefully considered. Does your client need a specific policy to help management comply with the Act when an employee requests leave? Should a form be prepared for an employee to provide notice of his or her need for leave or to certify the necessity of leave? Does your client want to require employees to exhaust paid-leave when taking leave under the Act. Many other policy questions must be considered depending upon each client's situation and sophistication.
- Consider unwritten policies and procedures. Some employers have unwritten practices or do not follow their written policies. Will any of those practices violate the Act?
- Make plans now to keep the facility operating while one or more employees go out on leave. Where will the temporary replacements come from? Potential sources include: cross-training, other shifts, temporary employment agencies, recent retirees, and laid ,off employees.
- Evaluate how the FMLA will affect your client's benefit plans. Specifically consider what health insurance benefits for the employee and, if applicable, his or her dependents will be involved. Regarding COBRA, should notification forms be revised to address situations where an employee never returns to work after the leave expires?

CONCLUSION

Whether you agree with the political and social theories behind the FMLA or not, the act poses another legal hurdle for business clients. Legal counsel for such clients should become prepared to help them anticipate and overcome these hurdles.

Thomas R. Haggard is the David W. Robinson Chair Professor at the University of South Carolina School of Law. Although he has taught a variety of legal subjects, he is a leading authority on labor and employment law in South Carolina and is a Certified Specialist by the South Carolina Bar in that area. He has authored numerous articles and books and is a regular contributor to the South Carolina Lawyer. Professor Haggard is Of Counsel to the law firm of Ogletree, Deakins, Nash, Smoak & Stewart. The firm has seven offices spread throughout the Eastern United States and generally limits its practice to representing management in all aspects of labor and employment law, employee benefits law, environmental law, construction law, and litigation.

William H. Floyd III is an Associate Attorney in the Greenville, South Carolina, office of Ogletree, Deakins, Nash, Smoak & Stewart. After graduating from Wofford College and the University of South Carolina School of Law, Mr. Floyd has spent the past five years representing management clients in labor and employment matters. He regularly conducts employment law seminars for clients and organizations throughout South Carolina.

1992 HEMPHILL AWARD
G. Dewey Oxner, Jr.

The Fourth recipient of the Hemphill Award, G. Dewey Oxner, Jr. of Greenville, South Carolina received that award at the Annual Meeting of the South Carolina Defense Trial Attorneys' Association at Kiawah Island held in November, 1992. Mr. Oxner is a resident of Greenville, South Carolina and a partner in the law firm of Haynsworth, Marion, McKay & Guerard. He is a graduate of Washington & Lee University and the University of South Carolina Law School, having been admitted to the Bar in 1959. He has practiced with the Haynsworth firm since that time.

Mr. Oxner's contributions to the practice of law in South Carolina are many and varied. He was one of the founding members of the South Carolina Defense Trial Attorneys' Association and served as its president in 1976. He became active in the Defense Research Institute, serving as the South Carolina representative of that organization, as a Regional Vice President, and as a member of its Board of Directors. He has also been active in the state and local Bar associations, serving as President of the Greenville County Bar Association in 1985, as a member of the House of Delegates of the South Carolina Bar Association and a member of the Board of Governors of that Association.

He is a member of the International Association of Insurance Counsel, the Federation of Insurance Counsel, an advocate of the American Board of Trial Advocates, a fellow of the American Bar Association, and a member of the American College of Trial Lawyers.

DRI Update

By Carl B. Epps, III

Bill Coates, Hugh McAngus, and I attended the National Conference for Defense Bar Leaders held in San Francisco on March 17-20, 1993. This was the sixth conference I have attended, either on behalf of our Association or as a representative of DRI. The meeting was by far the most informative meeting, and while I am excited about DRI's effort to promote the defense practitioner's interest, the news from around the country is not good.

The focus of the meeting was economical problems facing the defense attorney. Keynote presentations were given by claims managers from State Farm Automobile Insurance Company and the AETNA, and their message was not encouraging. The insurance industry is clearly headed toward staff counsel and a reduction in the number of law firms handling their business. AETNA, for example, formerly had approximately 2,300 law firms representing it nationwide, with no staff counsel engaged to defend its insureds. It has now reduced the number of outside firms to approximately 800 firms, and over the next several years will reduce that number to 300 firms. It also plans to use staff counsel to defend approximately 60% of its litigation. State Farm's plans are similar. When you consider that much of the remaining litigation is comprised of atypical litigation such as intellectual property suits where special expertise is required, not much personal injury litigation will be left for the private practitioner.

The reasons offered by the industry spokespersons were the rising cost of defense. They argued that defense costs were rising at approximately 20% per annum, which far exceeded both the national average rate of inflation and their premium increases, which they said averaged approximately 3%. Obviously, they argued, changes had to be made. They stated that in metropolitan areas in particular the private defense practice as we now know it either no longer exists or will shortly disappear.

It was clear from the discussions among the defense attorneys present that the economic impact has already been felt. Attorneys from the west coast and northeast in particular described shrinking law firms under the best of circumstances, and the total disappearance of other firms.

Other issues facing the defense practitioner are mandatory alternative dispute resolutions, mandatory binding mediation, what was sometimes described as unnecessarily oppressive audits, and a general widening of the gap between rates charged by the defense attorney when compared to other litigators.

The defense practitioner needs a spokesperson now more than ever. DRI has accepted the challenge and is the only national organization capable of acting for us to protect our interests. All of us need to support DRI if it is to remain financially sound. The dues are only **$110.00** for attorneys who have been in practice for five years or more and **$75.00** for those who have been in practice for less than five years. In addition, those who have been in practice less than five years are entitled to a free seminar. All members receive DRI's monthly monograph tailored to the defense attorney, and many other benefits.

DRI needs your support, and if you will agree to join, let me know and I will complete and process your application for you.

1993 HEMPHILL AWARD

Call for Nominations

CRITERIA

1. **Eligibility.**
   (a) The candidate must be a member of the South Carolina Bar and a member or former member of the South Carolina Defense Trial Attorneys' Association. He or she may be in active practice, retired from active practice or a member of the judiciary.
   (b) The current officers and members of the South Carolina Defense Trial Attorneys' Association Executive Committee at the time the award is made are not eligible.
2. **Criteria/Basis for Selection.**
   (a) The award should be based upon distinguished and meritorious service to the legal profession and/or the public, and to one who has been instrumental in developing, implementing and carrying through the objectives of the South Carolina Defense Trial Attorneys' Association. The candidate should also be one who is or has been an active, contributing member of the Association.
   (b) The distinguished service for which the candidate is considered may consist either of particular conduct or service over a period of time.
   (c) The candidate may be honored for recent conduct or for service in the past.
3. **Procedure.**
   (a) Nominations for the award should be made by letter, with any supporting documentation and explanations attached. A nomination should include the name and address of the individual, a description of his or her activities in the Association, the profession and the community and the reasons why the nominee is being put forward. Nominations should be directed to the President of the Association prior to the joint meeting each year.
   (b) The Hemphill Award Committee shall screen the nominees and submit its recommendation to the Executive Committee of the Association at its meeting immediately preceding the Annual Meeting of the Association. "The Hemphill Award Committee shall be comprised of the five (5) officers of the Association, and chaired by the immediate Past President."
   (c) The Hemphill Award shall be made in the sole discretion of the Executive Committee, when that Committee deems an award appropriate, but not more frequently than annually.
4. **Form of Award**
   (a) The recipient shall receive an appropriately engraved plaque commemorating the award at the annual meeting.
   (b) The family of the late beloved Robert W. Hemphill; in the person of Harriet Hemphill Crowder of Mt. Pleasant, has consented to having the award named for the late United States District Judge, Robert W. Hemphill, When possible, the Association shall have a member of the Hemphill family present whenever this award is presented.

Robert W. Hemphill

By Noon on July 17th, 1993
Clip and Send to: SCDTAA, 3008 Millwood Avenue, Columbia, SC 29205 or FAX 803-765-0860

I NOMINATE _____

OF THE FIRM OF _____

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CITY AND STATE _____

BECAUSE _____

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(ATTACH A SHEET OF PAPER IF NECESSARY)

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Claims Managers/Defense Attorneys 1993 Annual Joint Meeting July 29-31,1993

Grove Park Inn , Asheville, NC

The Defense Trial Attorneys' and Claim Managers 1993 Annual Joint Meeting will again be held in beautiful Asheville, North Carolina at the Grove Park Inn during the weekend of July 29-31, 1993.

There are several interesting and timely issues which will be placed on the Agenda for this years' meeting and, as usual, our speakers are excellent.

A presentation on Contribution and Indemnification Among Joint Tort-Feasors will be given by the Honorable Jean Hoefer Toal. One focus of this discussion will be whether a third-party action to bring in other joint tort-feasors is permissible in the plaintiff's original action brought against one or more but not all of the joint tort-feasors before the plaintiff's action is ended by trial or settlement.

The subject of Mediation will provide another topic for this year's Meeting. This discussion will be presented by The Honorable C. Weston Houck and The Honorable William L. Howard, Sr. They will discuss their experiences with the mediation and settlement weeks which have been conducted in both Federal and State Court.

On Saturday, the issue of television in the courtroom will be discussed by the Honorable Don S. Rushing, a media representative and member of the bar who recently has been involved in this process. A focus of this discussion will be the ethical considerations and constraints related to the use of cameras in the courtroom. A discussion of Rule 40 of the South Carolina Rules of Civil Procedure, to be conducted by Judge Rushing and Frank Gibbs, will follow this discussion.

Finally, Rusty Goudelock has organized a Workers' Compensation Breakout program to discuss recent developments in the law, as well as proposed changes by the legislature to the system and the possible ramifications of such changes.

As usual, there will also be several forms of entertainment geared to all lifestyles. The programs Committee looks forward to seeing you in Asheville!

TENTATIVE SCHEDULE

THURSDAY, JULY 29	
3:00pm - 5:00pm	Executive Committee Meeting
4:00pm - 7:00pm	Registration
6:30pm - 8:00pm	Welcome Reception
	DINNER ON YOUR OWN
FRIDAY, JULY 30	
8:00am - 12 Noon	Registration
8:15am - 8:45am	Coffee Service
8:45am -10:30am	Television Cameras in the Courtroom
	The Honorable Don Stanley Rushing
10:15am - 11:00am	Workers' Compensation Breakout
	Case Law Update
	Calvin C. Harmon, Esquire
10:30am -10:45am	Coffee Break
10:45am - 12 noon	Rule 40 and Docket Problems in the Circuit Courts
	The Honorable Don Stanley Rushing
	Frank H. Gibbes, III, Esquire
11:00am - 11:45am	Workers' Compensation Breakout , Legislative Summary
	The Hon. R. Walter Hundley,
	Chairman,SC Workers' Compensation Commission
	A. Eugene Jarrett
	Companion Property and Casualty Insurance Company
12:15pm - 1:15pm	Beverage Break
12:15pm - 6:00pm	White Water Rafting Trip
	(Must Bring a towel and change of clothes!)
12:30pm	Golf Tournament
2:15pm	Tennis Tournament
6:30pm	Buses Begin Departing for Taylor Ranch
7:30pm - 10:30pm	Evening at Taylor Ranch
SATURDAY, JULY 31	
8:15am - 8:45am	Coffee Service
8:30am - 9:00am	SCDTAA Business Meeting
8:30am - 9:00am	CMASC Business Meeting
9:00am - 10:30am	Contribution Among Joint Tortfeasors and Indemnity
	The Honorable Jean Hoefer Toal
	Justice,South Carolina Supreme Court
9:00am - 9:30am	Workers Compensation Breakout
	Prior and Subsequent Disabilities
	Grady L. Beard, Esquire
9:30am - 10:15am	Employment Law
10:15am - 10:45am	Commissioner's Comments
	The Honorable R. Walter Hundley
10:30am - 10:45am	Coffee Break
10:45am - 12 noon	Mediation
	The Honorable William L. Howard
	The Honorable C. Weston Houck
12:15pm - 1:15pm	Beverage Break
	DEPARTURE

SOUTH CAROLINA
DEFENSE TRIAL ATTORNEY'S ASSOCIATION

3008 MILLWOOD AVENUE, COLUMBIA, SC 29205

ADDRESS CORRECTION REQUESTED

South Carolina Defense Lawyers' Trial Academy
University of South Carolina Law School
July 14-16, 1993

The third annual South Carolina Defense Lawyers' Trial Academy has been set for July 14, 15 and 16 to take place in Columbia at the USC School of Law. This year's program will be an enhancement of the two previous programs.

The program is designed to give attorneys with at least one year of trial experience hands on instruction in the presentation of a tort case. Experienced defense lawyers will present tips and trial technique lectures on various aspects of presenting a personal injury case to a jury. Each student is then given an opportunity to practice their technique in front of their peers and instructors for a critical analysis of their presentations. In addition to representing a fictitious client, the participants will also act as witnesses to give them insight as to how witnesses feel on the witness stand. Each participant is video taped during his presentation so the tape can be later reviewed for close self-examination.

After two days of instruction, participants are divided into trial teams and on the third day present a case to real judges and mock juries. Last year we were fortunate to have federal judges conduct the mock trials; this year it is anticipated that real judges will once again graciously take time from their busy schedules to preside over these proceedings.

Enrollment for the Trial Academy is limited to twenty-four students in order to maintain a close ratio between student and instructor. In the past two years, 18 hours of CLE credits have been given. The cost of the program is $500.00 per particpant. The cost of the program also includes a reception on Thursday evening for the judges and participants.

We invite all who are interested to sign up early and then be prepared to work hard, learn a lot and have fun at the Trial Academy.

Please register me for the SCDTAA Defense Lawyers Trial Academy

Name _____

Firm _____

Address _____

City,State,Zip Code _____

Telephone _____

I understand that the registration fee for this seminar is $500.00 (including a $25.00 non-refundable processing fee)

ADVANCE REGISTRATION IS ENCOURAGED AS ENROLLMENT WILL BE ON A FIRST-COME,FIRST-SERVE BASIS. FOR MORE INFORMATION CALL SCDTAA HEADQUARTERS, 1-800-445-8629.