The Defense Line

S.C. Defense Trial Attorneys' Association

FALL 1993
Volume 21 Number 4

No More, "No Comment"

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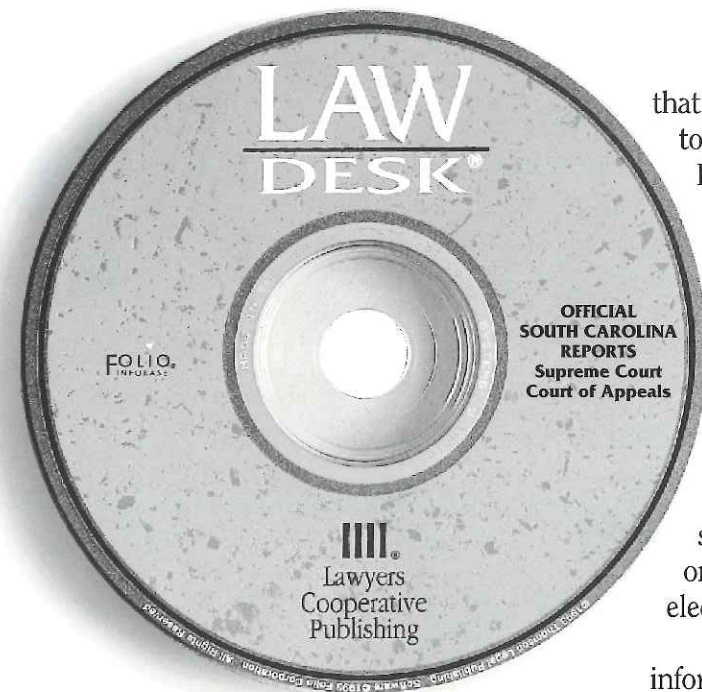

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VOLUME 21, NO. 4 Fall 1993

CONTENTS

2 President's Page
3 No More, "No Comment"
6 Annual Meeting
7 Proposed Rule 40 and Docket Problems in State Court
9 Offers of Judgement in SC Under Federal and State Law
14 DRI
15 SCDTAA By-Laws
17 SCDTAA Trial Academy

TWENTY YEARS AGO

President ED MULLINS reported the membership of the Association was up near the 200 mark. DAVE HOWSER was in charge of coordinating a program with RALPH McCULLOUGH, Assistant Dean of the Law School designed as a mini-seminar. South Carolina had been asked to host the Seventh National Conference of Local Defense Associations. Delegates from each State Defense Attorneys Association would attend the conference under the auspices of the Defense Research Institute. Plans were being made for Charleston, April, 1974, past Presidents DANA SINKLER and BEN MOORE, JR. are coordinating the plans. JIM McADEM, Vice President of Associated Management Services was considered to handle the publicity for the Association. JIM ALFORD Secretary-Treasurer reported as of 10/15/73 we had $2,878.40 in the bank.

TEN YEARS AGO

Fifty claims managers and more than 100 defense lawyers attended the Sixteenth Joint Defense Conference at Grove Park Inn, Asheville, North Carolina. JERRY TARLETON, President of the Claims Management Association and ERNIE NAUFUL, JR., President of the Defense Attorneys were co-hosts. CARL DUNN, TOM HESSE, STEVE DARLING, BUDDY BARNWELL and BILL GRANT discussed evaluating cases. JUDGE RANDALL BELL as Court of Appeals brought the group up to date on contributory negligence and comparative negligence. Saturday morning BOB CARPENTER presided over a panel of ED DILLARD, MAC TIMMONS, LAD HOWELL, and BILL DAVIES reviewing pet peeves of lawyers and claims men. Representative JOHN HAYES reviewed legislation for '83 and what could be expected in '84. Commissioners "BABE" NELSON and HOLMES DREHER reviewed recent compensation cases. GERALD GARNETT, who was named Executive Vice-President of South Carolina Farm Bureau Insurance Services, TOM YOUNG succeeded GERALD GARNETT as State Claims Manager.

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.

THE PRESIDENT'S PAGE

South Carolina Defense Trial Attorneys' Association

Hugh McAngus, President

Legislative activity has been the major thrust of our Association's activity during 1993. This year we faced attacks on the jury system in the form of legislation to reduce the size of juries, legislation regarding qualifications of jurors, legislation regarding interest rates on judgments, workers' compensation reform, restructuring, punitive damages, and accountants malpractice. Other than restructuring, the only bill to pass the legislature during this session is a bill which reduced the interest rate on judgments to prime plus 1%. All other bills died in committee, largely due to the efforts of your Association. Workers' compensation legislation, which we supported, never got out of the House LCI Committee. However, we expect next year to be a very active legislative session, and the legislative committee will need your help. You will be called upon to contact your legislators regarding these bills and others which will probably surface during 1994. Please be available and active in this legislative effort. Frankie Marion and Joel Collins conducted the Trial Academy July 14-16, 1993. As usual, the Trial Academy was tremendously successful. Our federal judiciary participated, as well as a number of our members as lecturers and mentors. The Trial Academy was increased to 24 students, the maximum we feel the Trial Academy can accommodate. This worthwhile endeavor can only be accomplished through the tremendous work of the planners, organizers and participants in this Trial Academy. Please remember to thank Joel and Frankie as well as the mentors and lecturers for their efforts.

The Joint Meeting with the S.C. Claims Managers' Association was held in Asheville July 29-31, 1993. The Program Committee chaired by Tom Wills and Charlie Ridley and the Convention Committee chaired by Mills Gallivan put together an excellent meeting. The speakers included Judges Houke, Howard, Rushing, Justice Toal, and Commissioner Hundley. Seminars dealt with cameras in the courtroom, contribution among joint tort feasors, mediation/alternative dispute resolution, Rule 40, and workers' compensation/employment law breakouts. The Social Program included barbecue and bluegrass at Taylors Ranch, golf and tennis tournaments, white water rafting and the usual luxurious accommodations of The Grove Park Inn. The meeting was excellent both socially and educationally, and the convention planning committee did a superb job.

During the Joint Meeting, the Association's bylaws were amended to provide that Executive Committee members are elected based on congressional districts as they existed before redistricting in 1992. Also, the by-laws were amended to make members of the Student Defense Attorneys' Association student members of our Association.

Mike Bowers and Susan Lipscombe are hard at work planning the Annual Meeting. The program will be dynamic with nationally recognized speakers Terrence McCarthy on the science of cross-examination and Ric Gass on defendants day in the life presentations. There will also be employment law and workers' compensation breakouts. We expect a number of the judiciary to be in attendance, so please register early and plan to attend this meeting.

We would like to welcome David Dukes of Nelson, Mullins, Riley & Scarborough who is the new State Chairperson for the Defense Research Institute who serves as liaison between DRI and our Association. David and the SLDO representative are our voice in the National Defense Bar. We will keep you posted as to the various issues which arise, the main one being Rule 26. The SLDO meets in September in Chicago to discuss this issue among many others. Our membership will be called upon to oppose changes in Rule 26 and to contact our congressman in this effort. Please help if called upon.

I look forward to seeing everyone at the Cloister.

Claims Management Association of South Carolina

Larry Haussmann, President

Educational workshops, mountain views, cool nights, great food, outdoor activities, BBQ, dancing, and a chance to renew our professional and business relationships are all part of our joint meeting. On behalf of the Claims Management Association of South Carolina, I would like to again thank the South Carolina Defense Trial Attorneys' Association for inviting our Association to be part of the meeting again this year in Asheville.

The educational program was extremely informative, and we can each in turn pass this information on to the people in our respective offices. The opportunity for open dialogue between members of the respective associations should certainly not be overlooked, as this is an extremely important part of each of our continuing education.

Congratulations to Nancy Clubb with Unisun Insurance Company on being selected as the 1993 Claims Manager of the Year. She has been a very hard working and active member of the Charleston Claims Association of South Carolina. Her selection was most deserving.

As part of our business meeting, we introduced an Amendment to our By-Laws that will be voted on at our Fall meeting. This Amendment is an Anti-Trust Statement that will be read at the beginning of each meeting.

For those of our organization that could not attend, we missed your presence. We look forward to seeing you in the fall.

NO MORE "NO COMMENT"

Dave Partridge

The mass media increasingly are impacting the whole fabric of society. The practice of law and the clients of law firms are no exception. As a result, it has become increasingly critical for corporations, government agencies, charitable institutions, and prominent individuals to develop media relations plans. More and more law firms are providing such assistance to their clients.

Issues develop in the media quickly. While some afford time to prepare responses, others do not. They occur with a dangerous swiftness that leaves little time for preparation. That is the best reason for potential news makers to consider designing media policies and response plans when times are good so that they can be implemented more quickly and effectively when the inevitable issue arises or outright crisis occurs.

Every reputable lawyer carefully prepares his/her client for the court of law. Information is gathered, strategy designed, quesions formulated, answers prepared, performance may even be rehearsed. It's all an effort to influence positively those who hear and decide upon the testimony. No sensible client would consider venturing into a court of law without the representation of a thorough, competent attorney.

However when it comes to the court of public opinion, many law firms and their clients are less particular. It's easier for a law firm simply to tell its clients to say nothing to the media and for the client to tell reporters "no comment." That may be the easiest way to respond to the media, for a short while. But that kind of simple, easy response does not satisfy reporters. Rather it tends to build suspicions and invite more questions. In short, that kind of response usually does not work. Here's why.

By the time a reporter calls or knocks on the door, a decision usually has been made to pursue a story. The reporter is simply following the direction of an editor or news director. Just because the object of the call or visit says "no comment" or in some other fashion refuses a reply does not mean the story will go away. Indeed, the failure to respond may only fuel the reporter's resolve to gain answers to questions. An individual or company or other organization is much more likely to blunt media scrutiny or respond to scrutiny more effectively when adequately prepared. Preparation also helps when a client wants to adopt a proactive posture and use the media to announce a product, service, facility, or to express its position on a controversy or matter tied up on litigation.

There are other reasons for law firms and their clients to develop media policies and plans and to prepare and rehearse for potential media contact. First, what a client or an attorney says to reporters could return to haunt him and his attorney in a court of law. Secondly, the mass media drive many public agendas. For example, law makers and regulators often do not give much attention to certain needs or problems until those needs and problems are targeted in media reports. Thirdly, South Carolina is now one of several states which allows television cameras in court rooms. So a company spokesperson testifying in a court case may now be seen and heard by thousands of people at home, many of whom will be forming impressions not just on the basis of what is said but how it is said and how the witness looks while saying it. The alternative to being prepared to deal with the media before a reporter calls concerning a hot controversy, starts asking questions about a new lawsuit or stabs a microphone in your face on the courtroom steps could be costly to a client's public image or even to a client's best interests in the courtroom. That is why an increasing number of law firms are engaging media relations experts to assist the firm and its clients in the formulation of media relations strategy.

Perhaps the best reason for preparing a client for the potential of media contact is fear of the unknown. Most business clients of a law firm will consider themselves low profile, uninterested in and not in need of media coverage. The problem, of course, is that any firm could be thrust into the media's eye unwillingly. Jack-in-the-Box is a successful chain of restaurants based on the west coast. The firm had operated quietly and without controversy for years. Then last January, several children were hospitalized and some died from eating tainted hamburgers. Within days people across America, many of whom did not have a Jack-in-the-Box restaurant within hundreds of miles, knew the name and had likely formed a perception. That's the kind of emergency that strikes without warning and can have devastating consequences, especially if a firm has never considered how it would respond quickly and effectively to the media. How well it does that could determine a company's future course.

We have witnessed during the past year a number of examples of organizations seemingly unprepared to face the glare of media coverage and public examination and suffering as a result. One of the most painful examples is the unflattering publicity which surrounded the forced resignation of William Aramony, long time CEO of the United Way of America. Mr. Aramony was accused of taking exorbitant salaries and enjoying lucrative benefits. The numerous stories which resulted cast a long, troublesome shadow over the United Way – both the national office and its unsuspecting local affiliates. One critical result was a loss of support and a failure to meet budgets in many subsequent local United Way campaigns.

(Continued on page 4)

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What happened in that case? Perhaps the worst mistake was that United Way officials seemed too casual in their early responses to media inquiries. They apparently did not realize how the story could escalate and what damage could result. They were unprepared.

Henry Kissinger, who as Secretary of State had ample experience responding to the media and observing media strategy, says, "an issue ignored is a crisis invited." We can initiate crisis in the media by failing to recognize issues which could attract public curiosity and then media coverage.

What are those issues? They are numerous. Any business firm or other organization can quickly find itself the victim of a crime from within or without; can experience damage from a fire, explosion or storm; can be affected by a new law or regulation, court ruling or business trend; can be asked to respond to a government proposal or to provide a local comment on a broader regional or national story. Those issues can center on the environment, healthcare, public safety, education, transportation, economics, trade, civil or criminal justice, or any one of many other matters that attract public curiosity and concern. For example, when the government is preparing health reform proposals, your medical clients can expect to be questioned by the local media regarding their reaction to the proposals. When the economy is in trouble, some of your business clients will be contacted for their response to economic trends and the steps local, state and national governments are taking to encourage or reverse those trends.

Two professors at the University of California, Santa Cruz, Anthony Pratkanis and Elliot Aronson, have written a book about the everyday use and abuse of persuasion. In AGE OF PROPAGANDA, they share some interesting findings on their studies about the manipulation of public information and attitudes. In one pertinent observation they write, "Regarding issues with which most of us have had limited or no personal experience, such as crime and violence, television and the other mass media are virtually the only vivid source of information for constructing our image of the world."

Law firms represent many clients with which the majority of the general public have had no personal experience. To be sure, every company has its share of clients, customers, suppliers, users. But few companies are as pervasive as McDonald's or Wal-Mart or Exxon. So each one of your clients remains largely unknown to many people with whom your client has had little or no personal contact. According to Pratkanis and Aronson's conclusions, those people, lacking that personal experience, will have their perceptions of your clients formed primarily by the mass media.

Perception. It may be wrong but it is reality to the person who owns it. So if perceptions are formed in many instances by the media, we must be concerned that our clients project themselves in effective ways that will build the perceptions they want people to have. That is not an easy job. It requires careful planning and performance and a comfort level with the media which exudes confidence, authority, integrity, caring, and competence.

Even companies which are pervasive and popular can find themselves damaged or at least embarrassed by failure to prepare adequately for media scrutiny. Exxon had its Alaskan oil spill and McDonald's had the mass murders at its San Ysidro store in California (which it responded to effectively). A recent classic example is Wal-Mart. America's number one retailer in December, 1992 was the target of an NBC DATELINE report attacking the company's "Buy American" campaign. Under racks with Buy American signs, NBC reporters found clothing from many other countries. The report also showed videotape of children in a Bangladesh factory making clothes for Wal-Mart. It featured a trade representative talking about Wal-Mart's alleged links to an illegal Chinese firm. It interviewed a North Carolina clothing manufacturer standing in his empty plant and claiming that he was forced out of business when Wal-Mart cancelled a contract with him in favor of an off-shore company.

The report then showed the company's response to the charges in an interview with Wal-Mart's CEO David Glass. The interview was a disaster. Such a disaster that a company official stepped onto the set after several minutes and called a halt to it. Several days later, the report said at the request of the company, the inverview resumed with Mr. Glass explaining that he had been unprepared. But that second half of the interview wasn't much better than the first. What went wrong?

First, Mr. Glass appeared unprepared. Viewers were left with the impression that he had not anticipated many of the questions. So he had not been able to consider his answers. As a result, they were not persuasive. He was caught in the vice of having to deny knowledge or argue facts or pass responsibility for some actions to his employees. All of those responses damage credibility and stunt effectiveness in defending a position and building positive perceptions and public support.

Preparation for the interview was deficient in another important way as well. Logistics are vital when responding to the media. Where an interview is held, the background and lighting, the acoustics, how the interviewee is sitting (or standing), and what "props" the interviewer is allowed to bring to the interview are all important considerations. For example, in the interview with Mr. Glass, the interviewer brought a videotape player and monitor to show video excerpts. He carried several documents and examples of clothing. Mr. Glass seemed surprised by what he was shown and the issues that each item raised.

Not that Mr. Glass is the only one to blame for the performance. He was the one on camera who took the heat. But his subordinates should not have allowed it to happen. They should have anticipated issues that would likely be discussed and specific questions that would be asked. Then they should have worked with their boss in strategizing and rehearsing persua-

(Continued on page 5)

(Continued from page 4)

sive answers. Perhaps they should not have made the top man available for the interview. Who is to be the spokesperon in a certain situation is an important consideration. It may not always be in the best interests of a company to have the senior officer out front on an issue. Finally, those arranging the interview should have paid more attention to logistics. If "props" are to be allowed the interviewee needs to know what they are and have time to think about what issues they will prompt and what responses will be given.

The result of the 30 minute prime time network report on Wal-Mart? Company stock took a brief dip. There may have been some embarrassment. But Wal-Mart is big and popular, enormously successful. It would take more than one poor interview to inflict serious damage. However, all companies are not so fortunate. A less successful, smaller firm could be hurt badly by such unfavorable exposure on national television. And damage is not just limited to small firms.

Food Lion has 900 grocery stores in 14 states. 1991 sales were $6.4 billion. Then, last November, a 25-minute report on ABC's PRIMETIME LIVE accused the North Carolina-based supermarket chain of unsafe and unsanitary food handling procedures. Food Lion denied the charges and sued the network but the report had a major negative impact on the company's business. As late as April of this year, five months after the broadcast, Food Lion spokesman Mike Mozingo told the Lynchburg, Virginia NEWS AND ADVANCE, "It's going to have some long-term effects. We are just now getting our sales back to the pre-PRIMETIME level."

The problem with firms like Food Lion and Wal-Mart is compounded when you think of the potential media follow-up to one network, major newspaper or wire service story. The manager of a company store in any community could expect visits from local reporters seeking a local angle to the larger story, asking questions and requesting visuals. Company policy might prohibit store managers from granting interviews. But when reporters' suspicions are already aroused, when they already smell a good story, even the way in which a local manager states his refusal and how he acts can have an effect on how he and his store – and company – will be treated in the local media. That, of course, is important because it is not simply a matter of wanting to keep reporters happy and satisfied. Rather, it should be a company's goal to develop in the public perception the images which the company wants, and must have, if its success is going to continue: integrity, professionalism, competence, openness, friendliness, caring.

Public perceptions, as we all realize, are brittle. They can be broken and changed, quickly, by one unfortunate incident. How quickly and openly, honestly and persuasively a community responds when the incident occurs will often determine how much perceptions change. And since, as Pratkanis and Aronson explained, most of our perceptions are formed by the media, we need to be sure that our clients first understand the influence of the media and then become sophisticated in their responses. These underlying principles and the need to be prepared to deal with the media apply not only to large corporations but also to private citizens and small businesses who have become embroiled in litigation or some other matter that has attracted the attention of the media.

The risks of a company facing media scrutiny are increasing. The mass media are becoming more sophisticated in their techniques and demanding in their approach. And they are pervasive. One need only look at what has occurred in broadcast programming. A few years ago there were only 60 MINUTES and a few other network programs devoted to investigation. Now there are many, not just on the traditional networks (20/20, PRIMETIME LIVE, 48 HOURS, DATELINE) but in syndication, sold to network and independent stations. INSIDE EDITION, A CURRENT AFFAIR, HARD COPY, are examples of programs that are investigative in nature but produced solely for entertainment. And in many instances, the local media is following suit in their approach to news coverage. Nevertheless, they still drive public perceptions and they must be treated seriously.

That is not to say that an individual, a business firm or other organization should engage in serious preparation only when national media scrutiny is anticipated. Local media scrutiny can also be difficult and damaging. We must remember that local journalists are always looking for a local angle to a national story. For example, if a national grocery store chain is the object of a network television exposé or of a regulatory agency investigation, each of that chain's stores in cities throughout the country becomes a potential target for local journalists' questions. So the manager of each of those stores needs to know how to respond effectively to the media even if it is recognizing how to say "you must speak with headquarters" without alienating the reporters. This is even more true when there arises a strong local story that involves only local businesses and individuals. These are challenges which a media consultant can help a client meet.

In considering the serious implications of responding to the media, we must remember the role of reporters. They are trained to be curious, critical, skeptical. They carry no loyalty to a company on which they report. They may even harbor a bias. They work for print and broadcast media outlets that entertain as well as inform. They want to attract viewers, listeners, readers. So they must present stories in as compelling a fashion as possible. If that means emphasizing the controversy in a situation, they will. (60 MINUTES has not sat atop TV program ratings for so many years because it was simply a news information show. It's also entertainment.) Add to all that the fact that reporters labor under frustrating conditions: strenuous work loads, an overwhelming variety of assignments, imposing deadlines, fierce competition, and, in the case of television, complicated equipment.

Those facts present your clients with an opportunity. It is the opportunity to build good media relations

(Continued on page 6)

(Continued from page 5)

when times are good and develop techniques for working with the media. Then, when issues develop or crisis strike, or a lawyer or client needs to seek publicity, there are policies and plans in place, acquaintances (if not friends) in the media, and an understanding of the way reporters work and what they will want and need.

Just as in preparing for the court of law, preparing for an effective performance in the court of public opinion requires work. That work is best accomplished with the help of a trained consultant who understands and has had experience in the media. Just as a lawyer's legal training and experiences guide his judgment and instincts on how to construct a legal case and implement a defense, the media consultant's training and experience can provide direction, strategy and rehearsal for clients who could find themselves the target of media inquiry.

The court of law has its jury. So does the court of public opinion. That jury is forming perceptions and developing attitudes and habits that will greatly help of deeply hinder a company's ability to conduct business. With those as the stakes, it's worth a client taking its preparation for the court of public opinion as seriously as it does its preparations for the court of law.

EDITOR'S NOTE: Dave Partridge has 33 years of experience in communications including 20 years as a broadcast journalist for radio and television stations in Greenville and Columbia where he served as news director, anchor, reporter and interviewer. Then for eight years he answered reporters' questions as spokesperson and Vice President for Marketing/Public Relations for the Greenville Hospital System. For the past five years he has operated his own public relations consulting firm. Much of his work involves media relations/spokesperson training for a variety of clients throughout the country including law firms and their clients. Partridge is available to work with other law firms in making such training available to their clients.

SCDTAA Annual Meeting
The Cloister
November 11-14, 1993

The South Carolina Defense Trial Attorneys' Association will hold its 26th Annual Meeting at the Cloister, Sea Island, Georgia, November 11 through November 14, 1993.

On Friday, J. Ric Gass, a trial lawyer with the Milwaukee law firm of Kravit, Gass and Weber, will present a fast paced presentation covering The How, Why & What of Visual Communication. This presentation will present the research findings that show not only how much more jurors learn and remember and are persuaded by visual communications, but also how the use of visuals enhances credibility. Mr. Gass will demonstrate the most current visual technology and give examples of "what" to communicate visually. He will conclude with his Choices and Challenges approach to neutralizing Day-in-the-Life videos with defense videos. Mr. Gass will then moderate a thirty-minute panel discussion with the Federal Judges and secure their reactions to the need for and use of visual communication. Mr. Gass is a frequent lecturer and writer, and serves as an advisor to 3-M Corporation, Polaroid and other companies on the use of their visual aids products in the courtroom. In addition, he has spent over twenty years in the courtroom trying a broad spectrum of civil personal injury cases including both consumer and industrial products liability cases, professional negligence cases, property damage cases and especially complex and aggravated litigation.

In addition, on Friday there will be the first session of a Workers' Compensation breakout seminar addressing such issues as Opt-out alternatives to Workers' Compensation coverage, statute of limitations issues, Administrative Law Judge practice under possible legislative changes and a Workers' Compensation case law update, featuring several experienced Workers' Compensation attorneys as well as a Commissioner from the South Carolina Workers' Compensation Commission. In addition, there will be an ethics hour offered on Friday on Ethical Considerations regarding the Attorney/Client Privilege.

On Saturday, Terence F. MacCarthy, the long time Executive Director of the Federal Public Defender Program for the United States District for the Northern District of Illinois will present his revolutionary view on the Science of Cross-Examination. Mr. MacCarthy has developed a system of cross-examination that will give you straight forward methods to control the witness, enhance the juror's receptiveness to your themes and give your side of the case an aura of power and infallibility. Mr. MacCarthy is a frequent teacher and lecturer on trial techniques. He has spoken at CLE Programs in forty states to such organizations as the American Bar Association, the Federal Judicial Center, the Federal Bar Association, the Practicing Law Institute and law schools and state and local legal organizations from Sacramento, California to Dublin, Ireland. He is a permanent faculty member for Trial Advocacy courses organized by the National Criminal Defense College Northwestern University Law School, University of Virginia and the Western Trial Advocacy Institute.

In addition, on Saturday the second portion of the Workers' Compensation break-out will conclude addressing such issues mental-mental cases and how to cross-examine the claimant's psychiatric expert as well as other legal issues including sexual harassment claims. There will also be an Employment Law break-out session addressing the issues of employment at will, handbook issues and Covenants Not to Compete. There will also be a general litigation session addressing the proposed changes in the Federal Rules of Civil Procedures as well as proposed changes in the South Carolina Rules of Civil Procedure. Saturday's session will conclude with a brief question and answer period involving both State and Federal Judges.

As usual, there will be entertainment activities at night and recreational activities during the free afternoons. The Program Committee looks forward to a large turn-out in Sea Island. - Mike Bowers

PROPOSED RULE 40 AND DOCKET PROBLEMS IN STATE COURT

THE HONORABLE DON S. RUSHING
FRANK H. GIBBES III

Proposed Rule 40

RULE 40.GENERAL DOCKET, TRIAL ROSTERS, AND CALL OF CASES FOR TRIAL

(a) Dockets and Trial Rosters; Designation by Party.

(1) Clerk to Maintain Docket and Trial Rosters. The Clerk of Court shall maintain: (1) a General Docket of all cases filed in the Circuit Court; (2) a Jury Trial Docket of all cases transferred from the General Docket wherein the case is, by agreement of counsel, scheduling order, or expiration of time, deemed ready for jury trial; (3) A Non-jury Docket of all non-jury matters including all motions filed in the Circuit Court.

(2) Pleading or Motion to Designate Type of Matter. At the time of filing of a complaint or responsive pleading thereto, the party shall inform the clerk, or the pleadings shall state in the caption, subject to Rule 38(b), whether the matter is to be heard by a jury or to be heard by the court as a non-jury matter. In the absence of such statement the clerk shall file it as a non-jury matter, subject to a motion to transfer to the appropriate docket. All motions relating to discovery matters, scheduling orders or emergency matters shall state in the caption: Priority Matter.

(b) General Docket, Transfer of Cases to Jury Trial Roster; Call of Cases Only from Jury Trial Roster; Order of Call. The clerk initially shall place all cases in which a jury has been requested on the General Docket. A case may not be called for trial until it has been transferred to the Jury Trial Roster. Trial shall be had no earlier than 30 days from the date the case first appears on the Jury Trial Roster. Cases shall be called for trial in the order in which they are placed on the Jury Trial Roster, unless the court in a Scheduling Order has set a date certain for the trial, or, after the case has been set on the trial roster, the court, upon motion, grants a continuance as provided in (i) below. The first twenty cases on the Jury Trial Roster at the opening of court on the first day of a term, excluding those previously dismissed, continued or otherwise resolved before the opening of that term of court, may be called for trial. For each additional judge sitting during that term of court an additional twenty cases are subject to call. All other cases may be called for trial in that term only upon no less than twenty-four (24) hours notice. Notwithstanding the foregoing, no action may be called for trial until 120 days after the filing of the last pleading which adds a new party to the action, unless all parties consent in writing.

(c) Transfer to Jury Trial Roster by Agreement. A case may be moved from the General Docket to the Jury Trial Roster at any time by agreement of all counsel of record. If agreement is reached, counsel shall notify the clerk in writing who shall immediately transfer the case to the Jury Trial Roster.

(d) Transfer to Jury Roster Within Six to Twelve Months of Filing.

(1) Agreement or Objection. No earlier than one hundred and eighty days after the date the case was filed, any party may file and serve upon all other parties a Request to Transfer that case from the General Docket to the Jury Trial Roster. Within 10 days of the service of the Request to Transfer all other parties shall file and serve either an Agreement to Transfer, or, an Objection to the Request to Transfer. If all parties have agreed to the transfer, the requesting party shall notify the clerk in writing of the agreement and the clerk shall place the case on the Jury Trial Roster, and it may be called for trial as provided in paragraph (b). If any party files an objection to Transfer, the case may not be transferred to the Jury Trial Roster within one year of filing except by agreement or as provided in (d)(2) below.

(2) Objection Shall State Proposed Date of Transfer. Any party who objects to the transfer to the Jury Trial Roster shall also state in its Objection to Transfer whether it will consent to the transfer of the case to the Jury Trial Roster within one year of the date of the filing of the complaint, and the date on which it will consent to the transfer. If all non-moving parties specify a date within three hundred and sixty-five days of the filing of the action on which the case may be transferred, the requesting party shall notify the clerk in writing of the agreement to transfer the case to the Jury Trial Roster on the latest date specified by any party that is less than three hundred and sixty-five days after filing.

(e) Transfer to Jury Roster One Year to Eighteen Months After Filing.

(1) Request and Response. No earlier than one year after the case was filed, any party in any case on the General Docket may file or re-file and serve upon all other parties a Request to Transfer to the Jury Trial Docket. Within 10 days of the service of the Request to Transfer all non-moving parties shall file and serve either an Agreement to Transfer on the date requested, or a Request for a Scheduling Order as provided in (e) (2) below. No other response is permitted. If all counsel of record have agreed to the transfer, the moving party shall notify the clerk in writing of the agreement, and the clerk shall place the case on the Jury Trial Roster and it may be called for trial as provided in (b).

(2) Mandatory Scheduling Order. If any party requests a Scheduling Order, that party, and all other parties,

(Continued on page 8)

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within 10 days thereafter, shall file and serve Response to the Request for a Scheduling Order which shall include: (1) all matters deemed relevant by counsel that may be raised in a Pre-Trial Hearing under Rule 16 including all motions outstanding, and all dispositive motions to be filed; (2) all discovery remaining to be completed or other discovery matters governed by Rule 26(f) Discovery Conference; and (3) any other matter affecting the trial date, including the disposition of all previous requests to transfer the case to the Jury Trial Docket; and (4) the date on which all pre-trial matters shall be completed and the case ready for trial. The clerk shall promptly set the request for a Scheduling Order for a hearing which shall take priority as provided in (h) below, at which time the court review the matter and, in its discretion, set a date on which the case is to be transferred to the Jury Trial Roster, and may set a date certain for trial.

(f) **Automatic Transfer.** The clerk shall review the General Docket and shall transfer to the Jury Trial Roster all cases which have remained on the General Docket for eighteen months and in which the court has not entered a Scheduling Order setting the date when the case is to be transferred to the Jury Trial Roster or in which there is no pending motion for a Scheduling Order in the file. The clerk shall notify counsel of record of the transfer, but publication of the trial roster also shall be deemed notice of the automatic transfer.

(g) **Motion to Strike from Jury Trial Roster.** A party may move to strike a case from the Jury Trial Roster if upon timely motion that party establishes that it did not consent to the transfer as represented to the clerk, or that at the time the case was automatically transferred under (f) above, there was in effect a scheduling order setting another date for the transfer, or a pending motion for such order.

(h) **Non-Jury Roster; Priority of Matters.** The clerk shall immediately transfer all matters designated as non-Jury matters from the General Docket to the Non-jury Docket. All motions filed in any case shall be immediately placed on the Non-jury Docket. The Administrative Judge, in cooperation with the clerk, is responsible for setting all matters on the Non-jury Roster for disposition. Priority in scheduling hearings on non-jury matters shall be given to all motions designated Priority Matter which includes emergency matters, discovery motions, and all requests for Scheduling Orders as specified in (a)(2) above. Provided, however, that no contested non-jury matter may be called for trial on the merits until 120 days after the filing of the summons and complaint, unless agreed to in writing by all parties.

(i) Continuance

(1) **For Cause.** As actions are called, counsel may request that the action be continued. If good and sufficient cause for continuance is shown, the continuance may be granted by the court. Ordinarily such continuance shall be only until the next term of court. Each scheduled calendar week of circuit court shall constitute a separate term of court.

(2) **For Absence of Witness.** No motion for continuance of trial shall be granted on account of the absence of a witness without the oath of the party, his counsel or agent, to the following effect, to wit: That the testimony of the witness is material to the support of the action or defense of the party moving; that the motion is not intended for delay; but is made solely because the party cannot go safely to trial without such testimony; that there has been due diligence to procure the testimony of the witness or of such other circumstances as will satisfy the court that the motion is not intended for delay. In all such cases where a subpoena has been issued, the original shall be produced, with proof of service, or the reason why not served, endorsed thereon, or attached thereto; or, if lost, the same proof shall be offered with additional proof of the loss of the original subpoena. A party applying for such postponement on account of the absence of a witness shall set forth under oath in addition to the foregoing matter what fact or facts he believes the witness if present would testify to, and the grounds for such belief.

(j) **Case Stricken From Docket by Agreement.** A party may strike its complaint, counterclaim, cross-claim or third party claim from any docket one time as a matter of right, provided that all parties adverse to that claim, counterclaim, cross claim or third party claim agree in writing that it may be stricken, and all further agree that if the claim is restored upon motion made within one year of the date stricken, the statute of limitations shall be tolled as to all consenting parties during the time the case is stricken, and any unexpired portion of the statute of limitations on the date the case was stricken shall remain and begin to run on the date that the claim is restored. Upon being restored, the case shall be placed on the General Docket and proceed from that date as provided in this rule.

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OFFERS OF JUDGMENT IN SOUTH CAROLINA UNDER FEDERAL AND STATE LAW

E. WARREN MOISE

I. Introduction

As a technical matter, the defendant who prevails at trial must be reimbursed for his costs unless the court directs otherwise. On the other hand, the victorious defendant (especially one whose defense is financed by an insurance carrier) who moves for costs frequently is directed otherwise by the trial judge. Certainly, this inclination is understandable: the judge is only human and often reluctant to require the losing plaintiff to suffer further. Denying defendants their costs, however, does little to discourage meritless claims or reduce crowded dockets.

Offers of judgments[1] are available in South Carolina to parties[2] defending claims in federal courts as well as in state forums. If a successful offer of judgment is made, a defendant must be reimbursed for his costs; furthermore, the defendant's liability for the plaintiff's costs is either reduced or ended completely.

Federal Rule of Civil Procedure 68 permits a party to offer a settlement of a claim made against him. If the claim is not accepted in ten days and the offeree/plaintiff fails to obtain a more favorable judgment, he must pay certain costs of the offeror/defendant. South Carolina Rule of Civil Procedure 68 is analogous to the Federal Rule, and other state statutes also permit offers of judgment.

Little caselaw regarding offers of judgment is available to guide trial attorneys. The United States Supreme Court has only decided two major cases regarding Federal Rule of Civil Procedure 68, the Court of Appeals for the Fourth Circuit has handed down few opinions interpreting the Rule, and the author has found no recorded South Carolina federal district court opinions on the subject. Although there are a few South Carolina Supreme Court cases construing offer-of-judgment statutes that predate State Rule 68, there is only one South Carolina appellate-court decision interpreting the rule itself.

II. Background and Goals of Offer-of-Judgment Rules and Statutes

The Federal Rule was adopted in 1938 and based upon existing state statutes providing for offers of judgment. Federal Rule of Civil Procedure 68 was amended in 1946 and 1966, but only minor changes were made.

The goals of Federal Rule 68 are to encourage early settlement[3] and to discourage exorbitant demands and protracted litigation.[4] Rule 68 was adopted to protect the defendant from paying the plaintiff's costs[5] and to influence or induce the adverse party to accept a settlement.[6] The Rule, at least in civil rights cases, is not intended to favor the plaintiff or defendant[7] and will not be "warped to conform to the demands of Title VII litigation."[8] Federal Rule of Civil Procedure 68 is essentially a statute, and the Supreme Court will look no further than its plain meaning[9] when interpreting it.

When South Carolina Rule of Civil Procedure 68 was enacted in 1985, a similar statute had been in the state code for over a century. In 1870, statutory offer-of-judgment provisions were enacted for trial level litigation.[10] Despite minor amendments, the nineteenth-century statute was still in the state code at sections 15-21-10 and -20[11] when replaced by the rules of civil procedure in 1985. The present South Carolina offer-of-judgment Rule is analogous to the Federal Rule in many respects but also includes language from sections 15-21-10 and -20. State Rule 68 is reprinted below. The underlined passages differ from those found in Federal Rule 68.

(a) at any time[12] a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in the offer, with costs then accrued. If within ten days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in the proceeding to determine costs. If the complaining party fails to obtain a more favorable judgment he cannot recover costs but must pay the defending party's costs from the time of the offer.

(b) In an action on contract the defending party may serve upon the complaining party an offer in writing that, if he fails in his defense, the damages be assessed at a specified sum. If the complaining party accepts the offer in writing before trial and on the trial has a favorable verdict, the damages shall be assessed accordingly. If the complaining party does not accept the offer he shall prove his damages as if the offer had not been made and no evidence of the offer shall be admissible. If the damages assessed in his favor do not exceed the offer the defending party shall recover his costs incurred in necessary preparation and defense in respect to the question of damages.[13]

The purpose of South Carolina Rule of Civil Procedure 68 is to "encourage settlements and avoid protracted litigation."[14] Thus, its purpose comports with prior policy of this State's appellate courts.[15]

In mechanics' lien cases, parties may take advantage of a statute similar to Rule 68. Section 29-5-20(C)[16] provides for offers and counteroffers and also includes attorney's fees for the prevailing party under certain circumstances.

The present Statute covering offers of judgment in magistrate's courts is similar to the nineteenth-century statute mentioned above as well as State Rule 68.[17]

Finally, there are code provisions covering offers of judgment in

(Continued on page 10)

(Continued from page 9)

appeals to the South Carolina circuit courts.[18] A respondent in magistrate's court also may offer to accept a revised judgment in the particulars noted in the appellant's notice of appeal, but there are no special cost shifting advantages to the respondent in doing so.[19]

III. The Form of the Offer and the Ten-Day Limit

Under the Federal Rule, an offer need only be reasonably clear, and the Rule does not explicitly require that a sum certain be stated.[20] Apparently, the offer also may include a disclaimer of liability.[21] The offer's form and acceptance must comply with the basic requirements of the Rule, however. An informal negotiating offer not accepted by the plaintiff will not suffice.[22]

The value of the consideration in a Rule 68 offer has been addressed by the lower courts in varying ways, with some courts requiring the amount of the offer to be "reasonable" under the circumstances.[23] One court held that an offer of $25 and a promise to cease future infringement was sufficient in a patent infringement case.[24] The United States Supreme Court has held that there is no need "to read a reasonableness requirement into the [Federal] Rule";[25] however, the South Carolina Court of Appeals has noted in dictum that an offer of judgment under State Rule 68 must be made in good faith.[26] The general rule in the federal courts seems to be that offers of judgment "are construed according to ordinary contract principles."[27] Mutual mistakes in the offer might be corrected by a court at a hearing.[28] Defending attorneys must be prepared however, to have the maxim "ambiguities are construed against the drafter" applied to the written offer of judgment.[29]

If the offer states that costs are included or adds a specific amount for costs, the judgment will be deemed already to include all costs.[30] An offer silent on costs obliges the court to add an additional amount for costs then accrued.[31]

There is no South Carolina common law discussing the offer's requisite form, either under the Pre-Rule 68 statute or under Rule 68 itself.

The Federal Rule requires that an offer be served more than ten days before trial. This is to give the plaintiff (or defendant who has counterclaimed) sufficient time to make an informed desicision before accepting or rejecting the offer.[32] State Rule 68 also has a ten-day deadline, but it does not mandate that the ten-day period run before trial begins. The magistrate's court statute does not require that the offer stay open any length of time.[33] For offers in cases appealed to circuit court, the offer may be served at any time before trial.[34]

The federal courts are split as to whether an extension of the ten-day deadline is proper.[35] One court held that procedural delays, such as an interlocutory appeal, in and of themselves will not stay the running of the ten days.[36]

There is "general agreement" that a Federal Rule 68 offer may not be revoked until the ten days have run.[37] The Fourth Circuit Court of Appeals has ruled, however, that principles of equity may be used to revoke or rescind offers of judgment in exceptional circumstances.[38]

There are no state appellate decisions discussing the revocability of the offer. On the other hand, there is a great deal of analogous South Carolina jurisprudence pertaining to equitable issues and contract law.[39]

Another problem area regarding offers of judgment arises when a plaintiff's complaint demands both money damages and equitable relief. The Federal and State Rules permit parties defending "a claim" (as opposed to "a lawsuit" which might involve multiple claims) to make offers, but neither Rule specifically addresses this problem. One district court in North Carolina held that if a complaint demands legal and equitable relief, an offer excluding legal or equitable relief is "ineffective."[40] Another North Carolina court found that an offer of judgment for only money damages in response to a complaint demanding legal and equitable relief was "valid."[41]

IV. Procedural Issues: Service, Acceptance, Date Upon Which Costs Begin to Accrue, Filing, and Record on Appeal

Under Federal and State Rules of Civil Procedure 68, service of the offer is to be made pursuant to Rule 5.[42] The offer must be in writing,[43] and the acceptance must also be written.[44] The defendant should not file the offer but instead merely serve it upon the opposing party.

Federal Rule of Civil Procedure 68 provides that the defendant's cost begin accruing (and the plaintiff's recoverable costs end) after the offer is made – not when the offer is rejected or the ten-day limit ends. The United States Supreme Court, however, obscured this issue by using contradictory language in Marek v. Chesny.[45] The Court first noted in Marek that "[c]ivil rights plaintiffs...will not recover attorney's fees for services performed after the offer is rejected."[46] On the other hand, the Court stated in its holding as follows: "We hold that petitioners are not liable for costs...incurred by respondent after petitioners' offer of settlement."[47] After the Marek decision, one federal district court in the fourth circuit has ruled that the effective date for purposes of cost shifting is the date the offer is made.[48]

To consummate the agreement, one of the parties must file the (a) offer, (b) notice of acceptance, and (c) proof of service (upon the other party) with the clerk of court.

Once the parties agree to file a Rule 68 judgment, a federal judge or clerk of court has no discretion to withhold its entry or otherwise frustrate the agreement.[49] The clerk's duty in this regard is merely ministerial, and a court should enter the judgment nunc pro tunc if the clerk refuses to file it.[50] This is true even if the "costs then accrued" have not yet been determined.[51]

When an offer of judgment is filed by the clerk, it is binding like any other judgment. The defending party's counsel should ensure that after his client pays the judgment, a satisfaction-of-judgment form is filed with the clerk to avoid damaging the defendant's credit standing. In many cases, the defendant simply may want to file an order of dismissal rather than the Rule 68 judgment; this settlement procedure avoids the need to obtain and file a satisfaction-of-judgment form.

(Continued on page 11)

(Continued from page 10)

The Federal Rule requires that the offer be made more than ten days "before trial." In federal district courts it is customary that a jury be chosen sometimes as long as a month or more before opening statements are given by the attorneys. One court held that an offer made after the jury was chosen (but before the jury returned to be sworn) was valid so long as the ten-day grace period had run in the interim.[52] An offer of judgment made before one trial is still in effect for later trials of the same case under the Federal Rule.[53] In some cases Federal Rule 68 also permits offers to be made during "trial."[54]

State Rule 68 does not explicitly require that the offer be made before trial, and the magistrate's court statute regarding offers of judgment directs that the offer be served on the adverse party before the complaint is answered.[55]

Offers of judgment in cases appealed to the state circuit courts may be served at any time before trial; however, the offer must be accepted within ten days.[56]

If an offer is made but not accepted and the defending party later becomes entitled to costs under Rule 68 or its statutory counterparts, he must obtain a judgment from the clerk of court so that he can collect the costs. Unfortunately, neither the federal nor state rules or statutes address what trial procedures, if any, are required to validate an offer of judgment; no mention is made of whether a motion must be made or whether the costs simply may be submitted to the clerk as under Rule 54.[57]

One court ruled that the basic requirements of an offer must be shown in the record for appeal.[58] Thus, the prudent approach would be to move for costs immediately after the bench or jury verdict is delivered. Counsel should mark as exhibits the written offer together with its proof of service and put the following on the record: (a) an identification of the exhibit; (b) the date of the offer and its service; (c) the nonacceptance/rejection of the offer; (d) the amount or specifics of the offer's consideration; (e) the attorney's intention to submit costs to the clerk of court; and (f) if possible, request a ruling by the judge on the matter.

The list of costs submitted to the clerk should be itemized. Some courts might require that each cost include the date incurred and an explanation of the necessity for the expense.[59] In cases where attorneys' fees are awardable, lawyers' daily time sheets might be requested by the court.[60]

Under South Carolina law, costs need not be presented by an affidavit. Disbursements must be verified,[61] however.

A judgment entered pursuant to Rule 68 is a consent judgment, and generally no appeal may be taken from it.[62] The Fourth Circuit Court of Appeals rarely will permit an appeal from a consent judgment unless, for example, extraordinary reasons exists for doing so or if the judgment specifically reserves the right to appeal.[63] An order under Rule 60(b)(6)[64] setting aside a Rule 68 judgment, however, is immediately appealable.[65]

V. Defendants' Verdicts and Other Judgments

(A) Defendants' Verdicts

The United States Supreme Court held in Delta Air Lines v. August[66] that a defendant's verdict is not a judgment that triggers Federal Rule 68. Justice Stevens, in a five-to-four decision, stated that a defense verdict is one obtained by the defendant, but that Rule 68 only applies if the plaintiff has "finally obtained" a judgment.[67] Thus, in federal courts, if a defendant serves a valid offer of judgment for $10,000 and the jury awards a penny to the plaintiff, the defendant can recover costs. But if the jury awards nothing to the plaintiff, the defendant apparently can recover no costs.

The Court's sophistic reading of Rule 68 in Delta Air Lines ignored three state statutes upon which the Rule was premised[68] and all prior district-court opinions[69] on the subject, prompted an outcry from commentators,[70] spurred two major attempts to amend the Rule by the advisory committee,[71] and recently was criticized by a federal district court a decade after Delta Air Lines was decided.[72]

One of the statutes upon which Federal Rule 68 is based was that of Minnesota, but Minnesota now has adopted a statute analogous to Federal 68. Despite the Delta Air Lines decision, the Minnesota courts apparently have continued to construe their Rule 68 as permitting an award of costs to the defendant when a defense verdict is rendered.[73] Minnesota's Rule 68, like South Carolina's Rule, does not include the words "judgment finally obtained by the offeree" interpreted by the Supreme Court in Delta Air Lines.[74]

South Carolina adopted its version of Rule 68 after Delta Air Lines, and the drafters of State Rule 68 declined to include the judgment "finally obtained by the offeree" language of the Federal Rule. Instead, the South Carolina Rule 68 retains the century-old language of former section 15-21-10[75] providing that if the claimant "fails to obtain a more favorable judgment"[76] he is not entitled to costs. Section 15-21-10 was repealed in 1985 when the state rules of civil procedure were adopted.[77]

The former language of section 15-21-10 (now embodied in State Rule 68) was interpreted in Steinhert v. Lanter[78] in which a plaintiff's foreclosure petition had been dismissed prior to trial. The plaintiff had not accepted the defendant's offer of judgment, and the South Carolina Supreme Court held that the defendant was "entitled" to costs under section 15-21-10.[79] Despite the great criticism directed at the United States Supreme Court's opinion in Delta Air Lines, the refusal of at least one other state court to apply Delta Air Lines's reasoning to its State Rule 68, South Carolina's decision after Delta Air Lines to adopt its prior statutory language instead of that in the Federal Rule 68, and the South Carolina Supreme Court's decision in Lanter, the South Carolina Court of Appeals recently ruled in Black v. Frank[80] that State Rule 68(a) "has no applicability to" defendant's verdicts.[81]

(B) Other Judgments

"'Judgment' as used in [the Federal Rules of Civil Procedure] includes a decree or any order from which an appeal lies."[82] Under the South Carolina Rules of Civil Procedure, a judgment "includes any decree or order

(Continued on page 12)

(Continued from page 11)

which dismisses the action as to any party or finally determines the rights of any party."[83] Thus, under the state and federal rules a default judgment, judgment upon the pleadings, or summary judgment generally could qualify as "judgments" for purposes of Rule 54. Whether these pretrial judgments qualify under Rule 68 is a different matter, however.

Certainly, in federal court Rule 68 does not apply to a default judgment, summary judgment, or a judgment upon the pleadings if the court finds for the defendant and completely dismisses the lawsuit.[84] This is because under Delta Air Lines v. August[85] a pretrial judgment for the defendant is not one finally obtained by the plaintiff.[86] One federal court held that Rule 68 does not apply unless there is a trial;[87] however, another court found that Rule 68 applies to summary judgments.[88] A third court held that Rule 68 does not control judgments entered after a stipulated dismissal and settlement.[89]

When an offer of judgment is not accepted and the case ultimately is tried, the plaintiff's judgment must be greater than the offer.[90] The federal courts are not uniform on whether the amount of a plaintiff's "judgment" constitutes only the jury (or bench) verdict or whether it includes other relief also. The Fourth Circuit Court of Appeals has held that when attorney's fees are awardable under statutes, the plaintiff's judgment finally obtained includes attorney's fees accrued before the offer was served.[91]

One court held that prejudgment interest should be added to the plaintiff's judgment before comparing it to the offer.[92] On the other hand, a plaintiff who accepts an offer cannot later have prejudgment interest added to the judgment amount. This is because prejudgment interest is deemed already included in the offer, absent a contrary indication.[93] The Fourth Circuit Court of Appeals held taht adding nonjudgment relief into the plaintiff's judgment before comparing it to the dollar figure in the offer is improper.[94]

When the plaintiff's judgment finally obtained includes money damages and equitable relief, the value of the equitable relief can be assessed by the judge after trial. The judge then may add the value of the equitable relief to the money awarded by the jury (or court) and compare the total to the defendant's offer.[95]

South Carolina has no caselaw on whether pretrial judgments for the defendant such as default judgments, summary judgments, or judgments upon the pleadings entitle a defendant to costs under Rule 68; however, in Steinhert v. Lanter[96] the South Carolina Supreme Court did award a defendant costs under the statutory predecessor to Rule 68 after the plaintiff's case was dismissed before trial.[97] The recent decision of Black v. Frank[98] by the Court of Appeals would appear to mandate a contrary result from that ordered by the Supreme Court in Steinhert. No South Carolina cases were found by the author in which the courts indicated what dollar amounts if any might be added to a plaintiff's judgment before comparing it to the defendant's offer of judgment.

VI. "Costs" Under Offer-of-Judgement Rules and Statutes

A successful offer of judgment has two effects: first, it requires the plaintiff to pay the defendant's costs from the date the offer is effective.[99] Second the plaintiff in federal court cannot recover his own costs from the date of service.[100] Under State Rule 68, a plaintiff apparently is barred from receiving any costs at all.[101]

There is no definition of "costs" in the Federal Rule or any indication in the Rule's history of the intended meaning of "costs."[102] The United States Supreme Court has held that "costs" "costs."[97] The United States Supreme Court has held that "costs" under Rule 68 include all properly awardable costs under a "relevant substantive statute or authority."[98] When a statute or authority defines "attorneys' fees" as costs, the fees are awardable under Federal Rule 68.[99] Conversely, a successful Rule 68 offer denies costs to a plaintiff in federal court after the offer becomes effective.

There are no South Carolina cases specifically discussing what costs are permitted for a successful Rule-68 offer of judgment,[100] but it is likely that the same costs would be allowed as under South Carolina Rule of Civil Procedure 54(d).

VII. Conclusion

Offers of judgment have been available in federal courts for over fifty years and in South Carolina state courts for more than a century. Relatively few decisions guide the practitioner in the federal courts and even less caselaw is found in state appellate reporters. A broad reading, however, of the offer-of-judgment rules and statutes, including the "costs" awardable to the prevailing party, will best serve the judicial goals of reducing litigation and encouraging early settlement of cases.

OFFERS OF JUDGMENT: FOOTNOTES

1. Federal Rule of Civil Procedure 68 was adopted by the Supreme Court in 1938 pursuant to authority granted by Congress in 1934 through what is now 28 U.S.C. § 1652 (1988). For authorities regarding the Federal Rule, see D. CURRIE, FEDERAL COURTS 411-14 (3d ed. 1982); 12 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D §§ 3001-05 (1973 & Supp. 1992) 35B C.J.S. Federal Civil Procedure §§ 1117, 1236, & 1276 (1960); Mark S. Cady, Curbing Litigation Use and Misuse: A Judicial Approach, 36 DRAKE L. REV. 483 (1986-87); John P. Woods, For Every Weapon, a Counterweapon: The Revival of Rule 68, 14 FORDHAM URB. L.J. 283 (1985-86).

2. Offers of judgment are available in federal courts to parties defending claims. A plaintiff may make an offer of judgment to settle a counterclaim against him but not to settle his claim against the defendant. See Delta Air Lines, Inc. v. August, 450 U.S. 346, 350 & n.5 (1981). Despite the South Carolina Court of Appeals' emphasis of the word "plaintiff" in a recent case, see Black v. Frank, Op. No. 3048 (S.C. Ct. App. filed July 6, 1993) (Davis Adv. Sh. No. 18, at 39, 41 n.3), it is assumed that any party defending a claim may make an offer of judgment. For the sake of simplicity, examples in this article refer to an offer of judgment made by a defendant to a plaintiff.

3. Id., 450 U.S. at 352.

4. See, e.g., Maguire v. Federal Crop Ins. Corp., 9 F.R.D. 240 (D. La. 1949).

5. See Perkins v. New Orleans Athletic Club, 429 F. Supp. 661 (D. La. 1976).

6. See Mr. Hanger, Inc. v. Cut Rate Plastic Hangers, Inc., 63 F.R.D. 607 (E.D.N.Y. 1974).

7. Marek v. Chesny, 473 U.S. 1, 10-11 (1985).

8. Spencer v. General Elec. Co., 894 F.2d 651, 664 (4th Cir. 1990) (citing Martin v. Wilks, 490 U.S. 755.

9. See Delta Air Lines, Inc. v. August, 450 U.S. 346, 351-52 (1981).

10. See 1870 S.C. Acts 402, at 513. This statute was very similar to S.C. Code Ann. §§ 15-21-10 and -20 (Law. Co-op. 1976). For a case construing the nineteenth-century statute, see Williford v. Gadsden, 27 S.C. 87, 2 S.E. 858 (1887).

11. S.C. Code Ann. §§ 15-21-10, -20 (Law.

(Continued on page 13)

(Continued from page 12)

Co-op. 1976), repealed by 1985 S.C. Acts 100, at 277-80.

12. The Federal Rule reads: "At any time before the trial begins a party... may serve...an offer to allow judgment . . . ." FED. R. CIV. P. 68 (emphasis added). South Carolina's Rule merely provides as follows: "At any time a party . . . may serve an offer to allow judgment . . . ." S.C. R. CIV. P. 68 (emphasis added).

13. S.C. R. CIV. P. 68. Subsection (b) of State Rule 68 permits a defendant to stipulate to damages in a contract lawsuit and to try the case on liability only. If the plaintiff does not accept the offer, the case is tried on both liability and damages.

14. See Black v. Frank, Op. No. 2048 (S.C. Ct. App. filed July 6, 1993) (Davis Adv. Sh. No. 18, at 39).

15. See Darden v. Whitham, 258 S.C. 380, 188 S.E. 2d 776 (1972).

16. S.C. Code Ann. § 29-5-20(C) (Law. Co-op. Supp. 1992).

17. See S.C. Code Ann. § 22-3-220 (Law. Co-op. 1976).

18. See S.C. Code Ann. § 18-7-110, -260 (Law. Co-op. 1976).

19. See S.C. Code Ann. § 18-7-100 (Law. Co-op. 1976).

20. One court held that an offer of $10,000 less statutory wage deductions" was sufficiently clear in an employment-discrimination case. See Waters v. Heublein, 485 F. Supp. 110 (N.D. Cal. 1979). But cf. Tansey v. Transcontinental & W. Air, 97 F. Supp. 458, 459 (D.D.C. 1949) (requiring a specific sum for settlement of future damages). As to ambiguous offers, see Boorstein v. New York, 107 F.R.D. 31 (S.D.N.Y. 1985).

21. In Mite v. Falstaff Brewing Co., 106 R.F.D. 434 (N.D. Ill. 1985) the district court upheld as valid an offer of judgment stating that it constituted "no admission of liability and said judgment herein to have no effect whatsoever except in settlement of this case." Id. at 435.

22. See Spell v. McDaniel, 616 F. Supp. 1069, 1082 (E.D.N.C. 1985).

23. See, e.g., Delta Air Lines, Inc. v. August, 600 F.2d 699 (7th Cir. 1979), aff'd on other grounds, 450 U.S. 346 (1981).

24. See Mr. Hanger, Inc. v. Cut Rate Plastic Hangers, Inc., 63 F.R.D. 607 (E.D.N.Y. 1974).

25. See Delta Air Lines, Inc. v. August, 450 U.S. 346, 355 (1981).

26. See Black v. Frank, Op. No. 2048 (S.C. Ct. App. filed July 6, 1993) (Davis Adv. Sh. No. 18, at 39, 41).

27. Goodheart Clothing Co. v. Laura Goodman Enters., 962 F.2d 268, 272 (2d Cir. 1992).

28. See Blair v. Shanahan, 795 F. Supp. 309, 312 (N.D. Cal. 1992).

29. See id. at 316 (quoting Erdman v. Cochise County, Ariz., 926 F.2d 877, 880 (9th Cir. 1991)).

30. Marek v. Chesny, 473 U.S. 1, 6 (1985).

31. Id.

32. Polk v. Montgomery County, Md., 130 F.R.D. 40 (D. Md. 1990).

33. See S.C. Code Ann. § 22-3-220 (Law. Co-op. 1976).

34. See S.C. Code Ann. § 18-7-110 (Law. Co-op. 1976). The statute requires that the offer be accepted within ten days, however. See id.

35. Compare Staffend v. Lake Central Airlines, 47 F.R.D. 218, 219-20 (N.D. Ohio 1969) (extension is improper with Whitcher v. Town of Mathews, 136 F.R.D. 582 (W.D.N.C. 1991) (court can extend ten-day limitation and retroactively validate late offer under FED R. CIV. P. 6(b)).

36. See Staffend, 47 F.R.D. at 218.

37. Roy D. Simon, Jr., The Riddle of Rule 68, 54 GEO. WASH. L. REV. 1, 5 n.13 (1985). The Fourth Circuit Court of Appeals apparently has not decided this issue. Cf. Colonial Penn Ins. Co. v. Coil, 887 F.2d 1236, 1240 (4th Cir. 1989).

38. See Colonial Penn, 887 F.2d at 1240.

39. See generally 5 S.C. DIG 2D Compromise and Settlement §§ 1-72 (1991) (South Carolina caslaw regarding settlement offers); 5 & 6 S.C. DIG. 2D Contracts §§ 1-355 (1991) (citation of South Carolina contract cases); 11 S.C. DIG. 2D Equity §§ 1-466 (1992) (equity case).

40. See Whitcher v. Town of Mathews, 136 F.R.D. 582, 585 (W.D.N.C. 1991).

41. See Leach v. Northern Telecom, Inc., 141 F.R.D. 420, 428 (E.D.N.C. 1991). Cf. Seven-Up Co. v. O-So-Grape Co., 283 F.2d 103 (7th Cir. 1960) (offer only on certain issues in case), cert. denied, 365 U.S. 869 (1961).

42. See Nabors v. Texas Co., 32 F. Supp. 91 (D. La. 1940), for a federal case on point. Federal and South Carolina Rules of Civil Procedures 5(a) require that "every...offer of judgment...shall be served upon each of the parties" as set forth in Rule 5(b).

42. Cf. Grosvenor v. Brienen, 801 F.2d 944 (7th Cir. 1986) (subsequent oral offer).

44. Cf. Gamlen Chem. Co. v. Dacar Chem. Prods. Co., 5 F.R.D. 215 (W.D. Pa. 1946) (acceptance varying from offer).

45. 473 U.S. 1 (1985).

46. Id. at 10 (emphasis added).

47. Id. at 12 (emphasis added).

48. Denny v. Hilton, 131 F.R.D. 659, 663-65 (M.D.N.C. 1990), aff'd sub nom., Lawrence v. Hilton, 939 F.2d 603 (4th Cir. 1991).

49. Mallory v. Eyrich, 922 F.2d 1273, 1279 (6th Cir. 1991).

50. Oates v. Oates, 866 F.2d 203, 208 (6th Cir.), cert. denied, 490 U.S. 1109 (1989).

51. See Oates, 866 F.2d at 208.

52. See Greenwood v. Stevenson, 88 F.R.D. 225, 229 (D.R.I. 1980).

53. FED R. CIV. P. 68 advisory committee's notes on 1946 amendment.

54. See FED. R. CIV. P. 68 (last sentence).

55. See S.C. Code Ann. § 22-3-220 (Law. Co-op. 1976).

56. S.C. Code Ann. § 18-7-100 (Law. Co-op. 1976).

57. The Federal and State Rules 54(d) are identical. Compare FED. R. CIV. P. 54(d) with S.C. R. CIV. P. 54(d).

58. See Home Ins. Co. v. Kirkevold, 160 F.2d 938, 941 (9th Cir. 1947).

59. See e.g., Lyons v. Cunningham, 583 F. Supp. 1147, 1159-60 (S.D.N.Y. 1983).

60. See id. at 1160.

61. Mitchell v. Barrs, 64 S.C. 197, 41 S.E. 962 (1902); Durham Fertilizer Co. v. Glenn, 48 S.C. 494, 26 S.E. 796 (1897); Cureton v. Westfield, 24 S.C. 457 (1886).

62. Mock v. T.G. & Y. Stores, 971 F.2d 522 (10th Cir. 1992) (citing Cohen v. Virginia Elec. & Power Co., 788 F.2d 247, 249 (4th Cir. 1986)). See also Jones v. Webb, 8 S.C. 202 (1876); Lord Jeff Knitting Co. v. Mills, 281 S.C. 374, 315 S.E.2d 377 (Ct. App. 1984).

63. Colonial Penn Ins. Co. v. Coil, 887 F.2d 1236, 1240 (4th Cir. 1989(. Cf. Allinsmith v. Funke, 421 F.2d 1350, 1351 (6th Cir. 1970) (consent decree disturbed only for fraud, mutual mistake, or lack of counsel's authorization to settle); Blair v. Shanahan, 795 F. Supp. 309, 312 (N.D. Cal. 1992) (mutual mistake in offer may be corrected by court at a hearing).

64. FED. R. CIV. P. 60(b) (6).

65. Mallory v. Eyrich, 922 F.2d 1273, 1279 (6th Cir. 1991). See Bowman v. Johnson, 783 F. Supp. 1129 (N.D. Ill. 1991) regarding justiciability of a motion for relief from judgment by a defendant who previously had been dismissed without prejudice but who later filed an offer under Federal Rule 68.

66. 450 U.S. 346 (1981).

67. Id. at 351.

68. See FED. R. CIV. P0. 68 advisory committee notes to 1938 version; Delta Air Lines, 450 U.S. at 372 (Rhenquist, J., dissenting). The Court's reading is akin to the common-law scenario in which the defendant who caused the plaintiff's wrongful death was better off than if the plaintiff survived. Consider, for example, a civil rights case in which attorneys' fees are awardable to a plaintiff if he prevails at trial. In many cases, defendants might serve an offer of judgment for nuisance value to settle a weak case brought by a plaintiff. The plaintiff has at least some money on the table and thus incentive to settle because even a minimal offer is preferable to a defendant's verdict. If the defendant wins at trial in federal court, the plaintiff is liable for none of the defense costs under Delta Air Lines. The defendant has to lose at least some money to be automatically entitled to costs. Accord Note, Delta Air Lines, Inc. v. August: The Agony of Victory and the Thrill of Defeat, 45 ARK. L. REV. 604 (1982).

69. See Delta Air Lines, 450 U.S. at 374 (Rhenquist, J., dissenting).

70. See Roy D. Simon, The Riddle of Rule 68, 65 GEO. WASH. L. REV. 1, 10 (1985).

71. Id. at 10-19.

72. "[T]his court is of the opinion that the dissent in Delta Air Lines has the better argument." Danese v. City of Roseville, 757 F. Supp. 827, 831 n.4 (E.D. Mich. 1991).

73. See Bucko v. First Minnesota Sav. Bank, 471 N.W.2d 95 (Minn. 1991).

74. Rather than adopting "the judgment finally obtained" language found in the Federal Rule, Minnesota's Rule 68 uses the phrase "judgment finally entered." MIN. R. CIV. P. 68 (emphasis added).

75. S.C. Code Ann. § 15-21-10 (Law. Co-op. 1976).

76. Id. (emphasis added).

77. See 1985 S.C. Acts 100.

78. 284 S.C. 65, 325 S.E.2d 532 (1985) (plaintiff's lien vacated and foreclosure dismissed prior to trial: defendants entitled to costs under statute).

79. Id.

80. Op. No. 2048 (S.C. Ct. App. filed July 6, 1993) (Davis Adv. Sh. No. 18, at 39).

81. Id. A Petition for Rehearing has been filed regarding Black v. Frank.

82. FED. R. CIV. P. 54(a).

83. S.C. R. CIV. P. 54(a).

84. See Allen v. United States Steel Corp., 665 F.2d 689, 697 (5th Cir. 1982). Cf. Coleman v. McLaren, 92 F.R.D. 754 (D. Ill. 1981) (entry of summary judgment by one of multiple defendants).

85. 450 U.S. 346 (1981).

86. Allen, 665 F.2d at 697.

87. Good Timez Inc. v. Phoenix Fire & Marine Ins. Co., 754 F. Supp. 459 (D.V.I. 1991).

88. See Liberty Mut. Ins. Co. v. E.E.O.C., 691 F.2d 438 (9th Cir. 1982).

89. Id.

90. An exception would be if the verdict is for a defendant under Federal or State Rules 68.

91. See Marryshow v. Town of Bladens-

(Continued on page 14)

(Continued from page 13)

berg, 986 F.2d 689, 692 (4th Cir. 1993). See 42 U.S.C. § 1988 (1988 & Supp. III 1991) which permits a judge to award attorneys' fees to the prevailing party as part of costs.

The threshold issue of who is the "prevailing party" under the statute is a critical issue, and a body of law interpreting the words has developed. Consider a situation in which a valid offer of judgment was made for $10,000 before trial, but the jury only awarded $100 to the plaintiff. The plaintiff still might be deemed the prevailing party for attorneys' fees purposes and also defeat the offer of judgment. This is because some courts add attorneys' fees to the verdict and then compare the sum to the offer-of-judgment amount.

The prevailing party for attorneys' fees purposes need only be successful on "any significant issue in the litigation which achieve[d] some of the benefit of part[y] sought in bringing suit." Texas State Teachers' Ass'n v. Garland Indep. School Dist., 489 U.S. 782, 791-92 (1989) (construing 42 U.S.C. § 2000e-5(k) (1988) & Supp. III 1991) and quoting Nadeau v. Helgemoe, 581 F.2d 275, 278-79 (1st Cir. 1978)). An example of success on a "significant issue" might be having caused a defendant corporation to set up or update an anti-harassment policy for employees. See Spencer v. General Elec. Co., 894 F.2d 651,m 662 (4th Cir. 1990). Non-judgment relief, however, is not part of the "judgment finally obtained" by the plaintiff. Id. at 651 (Title VII litigation).

92. Gorelangton v. City of Reno, 638 F. Supp. 1426 (D. Nev. 1986).

93. Mock v. T.G. & Y. Stores, 971 F.2d 522, 527 (10th Cir. 1992).

94. See Spencer v. General Elec. Co., 894 F.2d 651 (4th Cir. 1990).

95. Leach v. Northern Telecom, Inc., 141 F.R.D. 420, 428 (E.D.N.C. 1991).

96. 284 S.C. 65, 325 S.E.2d 532 (1985).

97. See id. (interpreting former § 15-21-10).

98. Op. No. 2048 (S.C. Ct. App. filed July 6, 1993) (Davis Adv. Sh. No. 18, at 39).

99. See FED. R. VIV. P. 68; S.C. R. CIV. P. 68.

100. Marek v. Chesny, 473 U.S. 1, 12 (1985).

101. The South Carolina Rule mandates that the plaintiff "cannot recover costs."

102. Marek, 473 U.S. at 8-9.

103. Id. at 9.

104. Id.

105. The court in Black v. Frank, Op. No. 2048 (S.C. Ct. App. filed July 6, 1993) (Davis Adv. Sh. No. 18, at 39) disallowed costs under Rule 68, then proceeded to discuss costs under Rule 54(d) and statutory law. See Black, at 41-44. For background information on costs under South Carolina law, see generally Note, Recovery of Attorneys' Fees as Costs or Damages in South Carolina, 28 S.C. L. REV. 823-70 (1987) (Roest, P., author). See also S.C. R. CIV. P. 54(d), (e) (provision relating to costs); 6 S.C. JURIS. Compromise and Settlement § 2, at 83 (1991); 7 S.C. JURIS. Costs § 53, at 143-45 (1991).

E. Warren Moise is a trial attorney at Grimball & Cabaniss, Charleston, doing primarily insurance-defense litigation.

DRI-SERVING THE DEFENSE ATTORNEY

David E. Dukes

The Defense Research Institute ("DRI") continues to implement changes designed to ensure that it remains responsive to the needs of local defense attorneys. The first strategic move occurred recently when state and local defense organizations ("SLDO's") became an integral part of the DRI structure through a separate membership classification. Numerous state and local defense organizations throughout the country have joined DRI and now send delegates to DRI to express the concerns of the local defense attorney.

Our state association is represented on the SLDO committee by Hugh McAngus. Both Hugh and I are committed to making sure that DRI understands and responds to the needs of local defense attorneys. The SLDO committee is chaired by James W. Williams from Asheville, North Carolina, who many of us know as a former President of the North Carolina Association of Defense Attorneys.

In support of SLDO's, DRI has retained a full-time legislative analyst to assist states in their legislative programs. DRI will be monitoring not only federal legislation, but also state legislation relating to issues that effect us, including punitive damages, protective orders, joint and several liability, comparative negligence, and caps on damages. Through the efforts of DRI and the SLDO subcommittee on legislative education, we in South Carolina can better address legislative issues that affect the civil justice system and ultimately the public who ends up bearing the expense of liberalized remedies which have proliferated over the years. Legislative monitoring is certainly a timely topic with the South Carolina Legislature having just concluded its session at which bills relating to the size of civil juries, the method of selection of jurors, and the interest rate on judgments were introduced.

In addition, DRI continues to enhance the services available to local defense attorney members and our law firms. These DRI services include:

FOR THE DEFENSE - DRI's flagship publication offering the latest news and trends in defense oriented substantive law and practice

MONOGRAPHS - A series of comprehensive examinations of specialized defense law topics

SPECIAL PUBLICATIONS - Including products liability trial notebook, defense practice trial notebook, products liability pretrial notebook, as well as others

SPECIALTY COMMITTEES - DRI's 25 specialty committees focusing on various areas of specialization, including medical malpractice, environmental law, insurance law, products liability, drug and medical device law, employment law and other areas

SEMINARS - DRI is nationally recognized for the quality of its continuing legal education seminars on substantive law, trial techniques, expert issues, and emerging trends

EXPERT WITNESSES - DRI maintains a computerized nationwide index of both adverse and potential defense expert witnesses

BRIEF BANK - DRI maintains a brief bank providing briefs from previously litigated cases of value to the defense community indexed by legal issues

In today's environment, the defense attorney needs both a voice at the national level and quick access to information at the local level. DRI is the only national organization capable of serving the local defense attorney and it is committed to doing so. We must all support DRI if it is to continue expanding its efforts at both the local and national level. 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 less than five years. In addition, those who have been in practice less than five years are entitled to attend a DRI seminar for free by joining. Please contact me at (803) 733-9451 and I will be glad to complete and process your DRI application for you.

David Dukes is the new State Chairman for DRI replacing Carl Epps who was recently elevated to the position of Regional Vice President of DRI. David serves on the Steering Committee of the DRI Drug and Medical Device Committee.

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SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION BY-LAWS

ARTICLE I

NAME:

The organization shall be named "South Carolina Defense Trial Attorneys' Association".

ARTICLE II

PURPOSE:

The purpose of this Association shall be to bring together by association, communication and organization, lawyers of South Carolina who devote a substantial amount of their professional time to the handling of litigated cases and whose representation in such cases is primarily for the defense; to provide for the exchange among the members of this association of such information, ideas, techniques or procedure and court rulings relating to the handling of litigation as are calculated to enhance the knowledge and improve the skills of defense lawyers, to elevate the standards of trial practice in this area and, in conjunction with similar associations in other areas, to develop establish and secure court adoption or approval of a high standard code of trial conduct and courtroom manner; to support and work for the improvement of the adversary system of jurisprudence in our court; to work for the elimination of court congestion and delays in civil litigation; and in general to promote improvements in the administration of justice and to increase the quantity and quality of service and contribution which the legal profession renders to the community, State and nation.

ARTICLE III

QUALIFICATIONS FOR MEMBERSHIP:

Those persons shall be qualified for membership who (1) Are members in good standing of the South Carolina State Bar; (2) Are actively engaged in the private practice of civil law, or employed by governmental bodies; and (3) Individually devote a substantial portion of their time in litigated matters to the defense of damage suits on behalf of individuals, insurance companies and corporations, private or governmental, or the representation of management in labor disputes.

Application for membership must be made upon a form provided by the Secretary and submitted to the Secretary, who shall then refer the application to the Membership Committee. A check for annual dues, in an amount fixed by the Executive Committee, shall accompany the application.

Law students of the University of South Carolina who are members in good standing of the student division of the Association shall be qualified as "Student Members" of the Association.

ARTICLE IV

OFFICERS:

The officers of the Association shall be a President, a President-Elect, a Secretary and a Treasurer.

ARTICLE V

EXECUTIVE COMMITTEE:

There shall be an Executive Committee which shall consist of two officers, the immediate past-president and twelve executive committee members made up of two representatives from each congressional district and three at large executive committee members. For the purposes of the election of officers of the Executive Committee, the congressional districts shall have those boundaries existing immediately prior to the 1992 reorganization of congressional districts, and shall not be affected by subsequent reorganization or redistricting of the congressional districts. Eight members of the Executive Committee shall constitute a quorum. The state chairman of the Defense Research Institute shall be an ex-officio member of the Executive Committee provided he or she is a member of the Association in good standing.

ARTICLE VI

ELECTION OF OFFICERS AND TERMS OF OFFICE:

The first election of officers shall be held at the meeting in which these By-Laws are adopted in general session by those present at said meeting. Thereafter, the election of officers shall take place at the Annual Meeting of the Association, the date to be determined by the Executive Committee. Officers shall be elected by a majority vote of the members present. The fifteen members of the Executive Committee who are not officers or the immediate past-president shall be elected in the same manner.

The terms of each officer and member of the Executive Committee shall begin on the date of election and end on the election of his or her successors. No person shall be eligible to succeed himself or herself as President except as provided in Article VII.

The term of each member of the Executive committee who is not an officer or an immediate past-president shall be three years. Five members shall be elected at each annual meeting. Vacancies in office, other than the President and President-Elect, shall be filled by the Executive Committee. The terms of office of the at large members of the Executive Committee elected at the 1984 Annual Meeting shall be staggered so that one at large member shall serve for one year, one member for two years and one member for three years.

ARTICLE VII

DUTIES OF THE OFFICER:

The PRESIDENT shall preside at all meetings of the Association and of the Executive Committee. The President shall, with the assistance of the Secretary, present to each meeting of the Association and of the Executive Committee an agenda of the matters to come before such meeting. The President shall perform such other

(Continued on 16)

(Continued from page 15)

duties and acts as usually pertain to his or her office and as may be prescribed by the Association and/or the Executive Committee.

THE PRESIDENT-ELECT shall succeed to the office of President upon the expiration of the President's term or upon the President's death, disability or resignation. In the event of succession to the office of President by reason of death, disability or resignation of the incumbent, the President-Elect, shall serve out the remainder of that term and the term for which he or she was elected. While serving as President-Elect, he or she shall assume the duties of the President upon request of the President or when the President is absent or otherwise unable to perform the duties of his or her office.

THE SECRETARY shall be custodian of all books, papers, documents and other records of the Association. The Secretary shall keep a true record of the proceedings of the Association and the Executive Committee and do and perform all acts usually pertaining to his or her office and as may be prescribed by the Association and/or Executive Committee – all under the supervision and direction of the Executive Committee. The Secretary shall make reports of the Association's activities at every meeting of the Association and of the Executive Committee.

THE TREASURER shall be the custodian of all books, documents, funds and other property relating to the financial aspects of the Association. The Treasurer shall perform the usual duties of a treasurer in associations of this kind: collect dues, keep accounts and except for current expenses shall disburse the money of the Association only upon direction of the Executive Committee of the Association at every meeting of the Association and of the Executive Committee. If required by the Executive Committee, the Treasurer shall have a good and sufficient bond for the performance of his or her duties.

ARTICLE VIII

MEETINGS:

The Association shall meet annually at such time and place as the Executive Committee may determine. Special meetings may be called by the President or by a majority of the members of the Executive Committee, upon five days' written notice to the membership.

Those present at any meeting shall constitute a quorum except for the purpose of changing the By-Laws, for which purpose there shall be at least one-third of the members of the Association present to constitute a quorum.

ARTICLE IX

COMMITTEES:

The following committees shall be appointed annually by the President, by and with the advice and consent of the Executive Committee: Amicus Curiae Committee, The Defense Line Committee, Judiciary Committee, Legislative Committee, Long Range Planning Committee, Membership Committee, Programs and Conventions Committee, Seminars Committee, Defense Research Institute Association Committee, Finance Committee, Ethics Committee, By-Laws Committee and Practice and Procedures Committee. The President shall have the authority to appoint, from time to time, such other standing or special committees as he or she deems advisable. Each standing and special committee shall consist of a number of members to be determined by the President, one of whom, when feasible, shall be a member of the Executive Committee.

A Nominating Committee composed of the immediate past president, and at least three (3) other past presidents of the Association, chosen by the President prior to the business meeting at the Annual Meeting, shall recommend and report to the membership at the Annual Meeting names of candidates nominated by such Nominating Committee to serve as officers and members of the Executive Committee. In the event of the inability of the immediate past president to serve on the Nominating Committee, the past president or past presidents most recently having served as president and available to serve shall be appointed to the Nominating Committee. If less than three (3) past presidents are available to serve, the President may appoint other members of the Association in their stead.

ARTICLE X

REMOVAL OF MEMBERS:

A member may be removed or expelled from membership by the Executive Committee or by a majority vote of the Association at any regularly called meeting, for conduct which is adverse to the best interest of the Association. A member shall have the right to a full hearing before the Executive Committee before expulsion.

ARTICLE XI

FISCAL YEAR:

The fiscal year of the Association shall be from January 1 through December 31.

ARTICLE XII

AMENDMENTS:

These By-Laws may be amended or rescinded at any meeting of the Association by an affirmative vote of two-thirds of the members present, provided further, that notice of the proposed change be given by the Secretary to the members by mail at least fifteen (15) days before the meeting at which such action is proposed.

ARTICLE XIII

Upon dissolution of the Association, the assets of the Association must be distributed exclusively to another eleemosynary corporation which is exempt from South Carolina income tax and will in no event inure to the benefit of any private individual.

SCDTAA TRIAL ACADEMY

The South Carolina Defense Trial Attorneys' Association would like to express their thanks in appreciation to the following individuals who served as lecturers, mentors and judges for the Trial Academy held recently here in Columbia at the University of South Carolina Law School.

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The Honorable David C. Norton
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The Honorable William M. Catoe, Jr.
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OPINIONS AND STORIES
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by
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Member of the Georgia and New York Bars

A PATIENT JUDGE

ARTHUR G. POWELL, in I Can Go Home Again, page 141.

In his later years Dick Kennon went to Texas and came back to Fort Gaines only a short while before he died. He was then down and out financially, and was in ill health; but the old fire was still in him. He drank heavily. His feet were so swollen that he had to wear bedroom slippers instead of shoes. He wore in court a long linen duster instead of the Prince Albert coat he once had worn. He would sit in the courtroom with his eyes drooping or closed till the battle was on, and then he would pull himself together and would be his old self again.

One day he was trying a case before Judge Griggs and was apparently attempting to kill time, for some reason, by drawing out the examination of a witness to undue lengths, when the Judge spoke from the bench and admonished him. "Mr. Kennon, you must get through with this witness. I have been very patient with you."

Old Dick never raised his voice but in his characteristic drawl, slowly said, "Thank you, Your Honor. I like to see patience in a judge, especially a young judge."

SOUTH CAROLINA
DEFENSE TRIAL ATTORNEY'S ASSOCIATION

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