# The Defense Line

S.C. Defense Trial Attorneys' Association

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South Carolina Defense Trial Attorneys' Association
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**CONTENTS**



### TEN YEARS AGO

President SAUNDERS N. (BAGGY) BRIDGES, (Florence) reported on our again being awarded the "Exceptional Performance Citation" at the Defense Research Institute Conference. CARL EPPS attended DRI Conference to receive the citation. Chief Judge of the Court of Appeals ALEXANDER has accepted our invitation to attend the meeting in Asheville set for July 26-29 with the Claims Managers. HUGH McANGUS (Columbia) and WADE LOGAN (Charleston) were making the arrangements. WADE LOGAN, President Elect made a report on behalf of the Long Range Planning Committee which had met and discussed long term goals for the Association, problems with judicial selection and Continuing Legal Education.

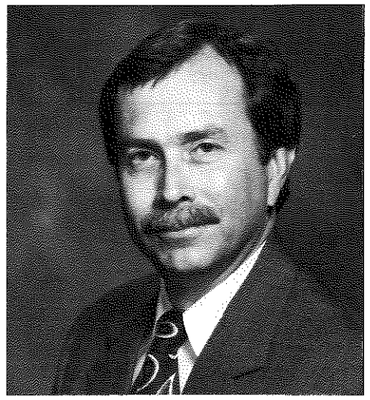
### TWENTY YEARS AGO

In July, 1974 President G. DEWEY OXNER (Greenville) reminded us of the Joint Meeting of the Claims Managers August 16 and 17 at the Myrtle Beach Hilton and the Annual Meeting of our Association set for November 7-10, 1974 at Hilton Head Inn, Hilton Head, South Carolina. The focus of our program was to be professional liability claims. BERNARD BROWN, Senior Claims Examiner of St. Paul was to give the insurance company's viewpoint. BURR V. MARCUM of Minneapolis, Minnesota was to give the defense attorney's viewpoint. Saturday morning session the late ROBERT M. FIGG, Dean of the Lawschool was to discuss comparative negligence and strict liability and then Resident Judge JULIUS NESS, the Second Circuit was to appear on a panel with U.S. District JUDGE SOL BLATT, JR. discussing trial of product liability cases. That panel being moderated by J.D. TODD (Greenville).

President OXNER also reported on the Seventh National Conference of Defense Attorneys which was held in Charleston April 11 through 14 at the Mills House. The immediate past president EDWARD MULLINS, JR. (Columbia) was State Chairman of the National Conference and DANA SINKLER (Charleston). GOVERNOR WEST welcomed the Defense Attorneys from across the country.

*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.*

# SCDTAA PRESIDENT



## William A. Coates

I hope each of you has made plans to attend the joint meeting in Asheville, July 28-30. Bill Davies and John O'Rourke have finalized the program, and it is excellent. The session on Alternative Dispute Resolution will be moderated by Bob Erwin and will feature a discussion of trends in ADR, led by John Van Winkle, the Chair of the ADR Practice Committee of the American Bar Association. We will explore the new mandatory arbitration and mediation rules which will be in place shortly. A discussion of the increased use of summary jury trials will be led by Judge William Howard; and will be followed by a summary trial demonstration.

Professor Robert Wilcox will address ethical concerns in marketing and in gifts to commissioners and judges. He will be followed by several insurance industry representatives discussing differing approaches in the use of outside counsel. We will conclude with an introduction to the emerging field of insurance coverage and employment litigation. The workers' compensation breakouts will feature Commission Chairman Vernon Dunbar.

Mike Bowers and his committee have put together an outstanding social agenda which includes golf, tennis and whitewater rafting. This year our western barbecue party will be held at the Grove Park Inn. The joint meeting has been steadily increasing in attendance and we look forward to our largest gathering yet.

John Wilkerson and Steve Darling have been hard at work on the program for the annual meeting to be held at Kiawah Island, October 20-22. In addition to an address from Professor Walter Dellinger, Assistant Attorney General and head of the Office of Legal Counsel, we will be hearing from Jim Archibald. Mr. Archibald is a practicing defense attorney in Maryland. He is a noted speaker and author on various aspects of trial advocacy. Judges David Norton and Gary Clary have agreed to coordinate presentations by our federal and state judiciary.

As we are all aware, the economic climate for defense firms and their clients is particularly volatile. We are planning to have a national legal consultant address economic and management issues presently confronting defense firms, as well as providing a glimpse of the defense practice of the future.

Frankie Marion is in charge of our social program. The golf and tennis tournaments on Friday afternoon will be followed by a low country seafood outing. We will reserve a number of tee times at the famous Ocean Course for those of you who wish to accept the challenge on Saturday afternoon. Saturday evening we will have our traditional dinner-dance. Please plan to be present for an informative and fun-filled weekend at Kiawah.

Joel Collins and Clarke McCants are putting the final touches on the 1994 Trial Academy, to be held July 13-15. An extraordinary number of you have volunteered your time as an advisor or lecturer. Thank you for your enthusiasm and support of this program. The Trial Academy is particularly beneficial to young litigators, and a few slots still remain for students. Please consider sending your young associates.

Mike Wilkes, Hugh McAngus, and I attended the DRI Leadership Conference in March. The theme of this conference was "The Changing World of the Defense Lawyer", and it contained many frank discussions regarding the challenges confronting defense firms. Our Association once again received the Exceptional Performance Citation Award in recognition of our leadership in South Carolina and nationally. Our leadership nationally was best illustrated by the honors accorded three of our members. Steve Morrison has been elected President-Elect of DRI. Hugh McAngus was elected Secretary of the SLDO, and David Dukes was named the outstanding State Chairperson for the Mid-Atlantic Region. Please join me in congratulating Steve, Hugh, and David, as they continue the SCDTAA tradition of leadership at the national level. We are honored to be selected to host the 1995 Leadership Conference next March in Charleston.

The 1994 legislative session is now over. Through your efforts we were successful in rebuffing an attempt to lower the number of jurors in civil cases from twelve to six. Your contacts with your legislators, as well as a combined effort among our Association, the South Carolina Chamber of Commerce, the South Carolina Textile Manufacturers Association, and the Columbia and Greenville Chambers defeated this legislation. During the legislative session, we found widespread agreement that the recent practice of drawing jurors from licensed drivers instead of registered voters is not working. One of our priorities next year will be to reverse this situation. We can expect support from the Sheriffs' Association, the Solicitors' Association, as well as the Clerks of Court.

Mills Gallivan and Sid Connor are coordinating our CLE seminar, to be sponsored jointly with the South Carolina Bar on November 11. This seminar will confront the problem of lack of civility among lawyers. This issue will be discussed from the prospective of the plaintiffs' bar, the defense bar, and both the state and federal judiciary. This is a timely topic which needs to be addressed. Please plan to attend.

Please remember that July 27 is the deadline for nominations for the Hemphill Award. I urge you to consider nominating those who have given distinguished service to this Association, to our profession, and to the public.

Please join me in thanking the officers and the Executive Committee, all of whom are working hard in your behalf. I look forward to seeing you in Asheville.



# CMASC PRESIDENT

## W. Ray Wessinger, Jr.

The members of the **Claims Management Association of South Carolina** always looks forward to our annual joint meeting with the **South Carolina Defense Trial Attorneys' Association** and this year is no exception. On behalf of the Claims Management Association, I want to encourage our members to attend what appears to be an excellent educational and social program. From a personal standpoint, this will be my ninth straight joint meeting. I view this meeting at the Grove Park Inn to be the highlight of our Association's year.

Our Association has not grown in the past few years and perhaps we can attribute that to the exit of many insurance carriers from our state and directives from many companies that ban their managers from joining our association allegedly for "antitrust" reasons. In spite of this reduction in membership, I feel we still are an Association that represents our profession well. This year we will contribute $3,000 to two scholarship awards. At our spring meeting held in Myrtle Beach in April a $2,000 award was given to Teresa Dezern, daughter of CMA member, James Dezern of GAB Business Services of Greenville, SC. We also contributed $1,000 to the scholarship fund of the SC Claims Association.

At our Fall meeting we will present $1,000.00 to our Bravery Award Recipient. This individual will be chosen by a CMA Committee from candidates from the following fields:

(1) Law Enforcement
(2) Fire Services
(3) Emergency Medical Services

On behalf of the CMA, I would like to thank the SCDTAA for this time we share with them each year. In some cases it is the only opportunity we get to visit with our defense counsel. In addition, it will be a welcome relief to escape the heat of late July in Columbia, and I look forward to seeing each of you in Asheville.

# A Community Celebration in Downtown Asheville

# BELE CHERE

Bele Chere is a community celebration held every year in Downtown Asheville. Since 1979, it has been a three-day extravaganza of music, food, fun, architecture, events, and children's activities; fun for the whole family!

You only have to visit Asheville, North Carolina, to realize why this festival was named "Bele Chere." Loosely translated into modern French, "Bele Chere" means "Beautiful Living." In this city where treasures abound, quality living is celebrated.

The historic fabric of Asheville's Downtown sets the scene for this unique celebration as nearly 300,000 people celebrate beautiful living – Asheville style!

- ❑ Music: From Beethoven to bluegrass from Joplin to jazz, all the way to rock n' roll and country, music pours from every corner of Downtown Asheville. This music is combined with children's entertainment in an exciting children's area. Drama, poetry reading, dance, and other performers, a veritable showcase of local and regional talent, complimented by a few national acts, round out five stages of entertainment throughout the days and evenings.
- ❑ Food: Approximately 70 food booths featuring Greek, Italian, Scottish, Chinese, Mexican, and other delicacies all contribute to a truly international food extravaganza. A special "Taste of Asheville" foods area features specialities from Asheville area restaurants.
- ❑ Events: Bike races, road races, 3-on-3 basketball, a belly flop contest, a human maze, fountain raft rides, a parade, and skydivers are part of a multitude of events at Bele Chere. These events provide great entertainment – join in as a participant or have a great time watching from the sidelines!
- ❑ Arts & Crafts: Local and regional artisans use this festival as an outlet to display and sell their art. Some of the finest examples of mountain crafts can be found at Bele Chere.

**REMEMBER!**

**BELE CHERE AND THE SCDTAA JOINT MEETING**

**THE LAST FULL WEEKEND IN JULY JULY 28, 29, 30**

# SCDTAA JOINT MEETING

**FRIDAY, JULY 29**

8:45 - 9:00 WELCOME (BILL COATES & RAY WESSINGER)

9:00 - 12:15 ARBITRATION, MEDIATION, SUMMARY TRIALS AND OTHER ALTERNATIVE DISPUTE RESOLUTION TECHNIQUES – Moderator Bob Erwin

(1) Current Trends and Topics in ADR - John Van Winkle, Chair, ABA ADR Practice Section

(2) Panel Discussion: ADR Practice in South Carolina (including new mandatory arbitration and mediation rules)

(3) Summary Jury Trials and Mini Trials - Honorable William L. Howard, Sr., Judge, Ninth Judicial Circuit

(4) Mock Jury Trial - Honorable William L. Howard, Sr., Judge, Ninth Judicial Circuit.

10:30 - 10:45 COFFEE BREAK

10:00 - 12:15 WORKERS' COMPENSATION BREAKOUT
Moderator - Mills Gallivan
Comments - Commissioner Vernon F. Dunbar, Chairman, South Carolina Workers' Compensation Commission

(1) Fraud in the Application - McDevitt & Street v. the APA (Drake Rogers)

(2) Pshrinks & Pstress Claims (Darryl Smalls)

(3) Burden of Proof in Unexplained Death Claims (Jeff Ezell)

(4) The Claims Manager's Perspective (Mary League and Everett Thomas, Kemper Group)

**SATURDAY, JULY 30**

8:30 - 9:00 BUSINESS MEETINGS

9:00 - 10:00 ETHICAL CONCERNS IN MARKETING INCLUDING ACCEPTED MARKETING TECHNIQUES AND GIFTS TO JUDGES, COMMISSIONERS OR CLIENTS

Professor Robert Wilcox, University of South Carolina School of Law

10:00 - 10:15 COFFEE BREAK

10:15 - 11:15 DIFFERENT INDUSTRY APPROACHES TO THE USE OF OUTSIDE COUNSEL

Lee Plumblee
Jay Rogers
Mitch Hardwick, S.C. Farm Bureau
Mack Timmons, Canal Insurance Company
Dan Mays, USF&G
Tommy Miller, Aetna

10:15 - 12:15 WORKERS' COMPENSATION BREAKOUT
Moderator - Mills Gallivan
Comments - Commissioner Vernon F. Dunbar, Chairman, South Carolina Workers' Compensation Commission

(1) Opt Out and the Benefits of Workers' Compensation (Bill Shaughnessy)

(2) Loss of Vision - Contacts, Lens Implants, and Related Matters (Roy Howell)

(3) General v. Specific Disability (Earl Ellis)

(4) Case Law & Legislative Update (Jay Courie)

11:15 - 12:15 LABOR/EMPLOYMENT LAW AND THE INSURANCE INDUSTRY

Hank Knight
Ken Childs
Jed Suddeth (Claims Manager)

(1) Insurer's Duty to Defend in General - Scope of Duty, Conflicts of Interest, Insurer's Duty to Settle, Insured's Duty to Cooperate

(2) Insurer's Duty to Defend Employee Claims Against Employers and Managers - Employment Discrimination and Other Employment Related Cases



# Justice Story's Advice to Young Lawyers

by Daniel L. Dreisbach*

Few Americans have had a more direct and profound influence on a generation of young lawyers than Joseph Story (1779-1845), Supreme Court Justice, Harvard law professor and poet.

Yes, poet, with a published volume of verse to his credit and notebooks strewn with lyrical fragments eulogizing a departed child, celebrating the triumphant performance of a favorite actress, or memorializing both the mundane and grand events of daily life.

Story was a man of remarkable energy and talents. He was learned in the classics, a sage observer of American society, a scholar of philosophy, politics and history and, of course, the preeminent jurist and legal commentator of his time, venerated on both sides of the Atlantic.

His legal acumen was recognized early and in 1811, at the tender age of 32, President Madison appointed him to the high court. His opinions and treatises written during a distinguished 33-year tenure on the bench gave content and meaning to the Constitution.

He was generous in dispensing advice to his Harvard students and the young lawyers in his court. Celebrated nineteenth century novelist and attorney Richard H. Dana, Jr., recollected from his own experience that Story nurtured young lawyers as though he had their "success at heart."

"He took care," wrote Dana, "to interweave some compliment, if it was in the least degree deserved, and if our argument was on a false scent, from some ignorance of later decisions, or some error of application, he would hear it patiently, or try to give us the right direction, or the necessary information, in such a way as not only to save our feelings, but to save our credit with our clients and the spectators."

### Exhortation to Law Students

In his inaugural discourse as Harvard's Dane Professor of Law, Story exhorted the pupil, first, "to acquire a just conception of the dignity and importance of his vocation." Eschew all thought of legal practice "as a mere means of subsistence" or as an occupation of pettifoggery and the manipulation of contracts, titles and wills.

The noble calling of the lawyer, he said, is the "administration of justice," to serve "as a public sentinel, to watch the approach of danger, and to sound the alarm when oppression is at hand."

Law students who aspire to the fame and fortune that eminence in the profession promises, the Justice cautioned, must not vainly "imagine that the ascent is easy, or the labor light." Estimate the costs of success soberly. Perseverance, diligence and industry are handmaidens of professional attainment.

He also admonished students to drink deeply from diverse founts of knowledge. "[E]xamine well the precepts of religion...unlock all the treasures of history...drink in the lessons and spirit of philosophy [and study] the general literature of ancient and modern times."

Breadth of learning will aid the lawyer's powers of illustration, persuasion and reasoning. Nothing about the human condition or experience, he said, is useless to the "perfect lawyer."

### Plea for Literacy

In an 1839 letter to his son, William, the venerable judge opined that "every man should propose to himself one great object in life, to which he should devote his main, but not exclusive attention." Absent such purpose, one cannot hope for success.

"On the other hand," Story warned, "an exclusive devotion to a single pursuit or object generally makes a man narrow in his views, vulgar in his prejudices, and illiberal in his opinions."

Thus, "every man should widen his learning and literature, and vary his tastes as far as he may, by comprehensive examination, not inconsistent with, or superseding his main pursuit."

The lawyer, above all professionals, Story continued, should be acquainted with the arts and literature. "This alone," he instructed aspiring lawyers, "can impart a solid and lasting polish to the mind, and give to diction that subtle elegance and grace which color the thoughts with almost transparent hues."

Great literature "should be studied, not merely in its grave disquisitions, but in its glorious fictions, and in the graphical displays of the human heart."

### Advice to Young Lawyers

It was the Justice's habit at the bench, biographers report to versify casual thoughts, perhaps suggested to him by arguments of counsel. An 1831 extract from a piece entitled "Advice to a Young Lawyer" gave instruction on the subtle arts of advocacy:

Be brief, be pointed; let your
matter stand
Lucid in order, solid, and at hand;
Spend not your words on trifles,
but condense;
Strike with the mass of thought,
not drops of sense;
Press to the close with vigor, once
begun,
And leave, (how hard the task!)
leave off, when done...

The following term he expanded and refined the theme in lines written under the same title:

When're you speak, remember
every cause
Stands not on eloquence, but
stands on laws,
Pregnant in matter, in expression
brief,
Let every sentence stand in bold
relief!
On trifling points, nor time, nor
talents waste,
A sad offense to learning and to
taste;
Nor deal with pompous phrase;
nor e'er suppose

*(Continued on page 8)*

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Poetic flights belong to reasoning prose.
Loose declamation may deceive the crowd,
And seem more striking as it grows more loud;
But sober sense rejects it with disdain,
As naught but empty noise, and weak as vain.
The froth of words, the schoolboy's vain parade
Of books and cases, – all his stock in trade,–
The pert conceits, the cunning tricks and play
Of low attorneys, strung in long array,–
The unseemly jest, the petulant reply,
That chatters on, and cares not how, or why–
Studious, avoid, – unworthy themes to scan,
They sink the Speaker and disgrace the Man,
Like the false lights, by flying shadows cast.
Scarce seen when present, and forgot when past.
Begin with dignity, expound with grace,
Each ground of reasoning in its time and place;
Let order reign throughout, each topic touch,
Nor urge its power too little or too much,
Give each strong thought its most attractive view,
In diction clear, and yet severely true.
And, as the arguments in splendor grow,
Let each reflect its light on all below.
When to the close arrived, make no delays,
By petty flourishes or verbal plays,
But sum the whole in one deep, solemn strain,
Like a strong current hastened to the main.

**Advice on Oral Argument**

According to Story, the "eloquence of the bar is far more various and difficult than that which is required in the pulpit, in the legislative hall, or in popular assemblies."

It must of necessity "change its tone, according to its subject, and the tribunal, to which it is addressed." And "whatever may be the variety of effort demanded of forensic eloquence...[i]t may not stoop to ribaldry, or vulgar jests, or sickly sentimentality, or puerile conceits. It forbids declamation, and efflorescence of style. There is no room for the loquacity of ignorance, or the insolence of pride. If wit be allowable, it must be chaste and polished. The topics discussed in courts of justice are too grave for merriment and too important for trifling. When life, or character, or fortune, hangs on the issue, they must be vindicated with dignity, as well as with force."

As oral argument droned on, one can imagine the great jurist, reducing his advice to verse. Whimsical couplets penned in 1831 offered advice to counselors before the bench:

You wish the Court to hear, and listen too?
Then speak with point, be brief, be close, be true.
Cite well your cases; let them be in point;
Not learned rubbish, dark, and out of joint –
And be your reasoning clear, and closely made,
Free from false taste, and verbiage, and parade.
Stuff not your speech with every sort of law,
Give us the grain, and throw away the straw.

* * *

Who's a great lawyer? He, who aims to say
The least his cause requires, not all he may.

* * *

Whoe'er in law desires to win his cause,
Must speak with point, not measure out, "wise saws,"
Must make his learning apt, his reasoning clear,
Pregnant in matter, but in style severe;
But never drawl, nor spin the thread so fine.
That all becomes an evanescent line.

A more structured verse entitled "Lines Written on Hearing an Argument in Court," further instructed young lawyers on the finer points of "forensic eloquence":

Spare me quotations, which, though learn'd, are long,
On points remote at best, and rarely strong;
How sad to find our time consumed by speech,
Feeble in logic, feebler still in reach,
Yet urged in words of high and bold pretense,
As if the sound made up the lack of sense,
O! could but lawyers know the great relief,
When reasoning comes, close, pointed, clear, and brief,
When every sentence tells, and, as it falls
With ponderous weight, renew'd attention calls,–
Grave and more grave each topic, and its force
Exhausted not till ends the destined course,–
Sure is the victory, if the cause be right;
If not, enough the glory of the fight.

**Conclusion**

With striking simplicity and brevity Story distilled his advice on legal writing and oral advocacy.

Legal argument should be "plain, direct, and authoritative" and, more importantly, should be brief and concise. Get to the point then shut up. Do not waste time on minor points or tangential cases.

Be organized in thought and strategy. Present your strongest argument first, and attack your opponent's weakest point with vigor.

Argument is won on strength of law, not on oratorical charm and flourish. Be "deliberative, and earnest, allowing little indulgence to fancy, and less to rhetoric."

As teacher, judge and scholar, Story was without peer. In prose and verse he bequeathed choice wisdom to aspiring and young lawyers. More than a century later, the young lawyer is well advised to be attentive to this wisdom.

**Daniel L. Dreisbach, is a professor of law at The American University in Washington, D.C. Mr. Dreisbach attended the University of Virginia and has strong ties to South Carolina.*



# RECENT DECISION

**IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA CHARLESTON DIVISION**
**Civil Action No. 2:92-2493-8**

Gerald Carter,
Plaintiff
v.
Guzzler Manufacturing, Inc.,
Defendant
and
Guzzler Manufacturing, Inc.
Third-Party Plaintiff,
v.
Fenn Vac, Inc.,
Third-Party Defendant.

**ORDER**

This matter involves a Motion to Dismiss a Third-Party Complaint alleging claims for contribution and indemnity. The Motion to Dismiss is granted for the reasons set forth below.

**FACTS**

This is a products liability case. Plaintiff Carter was injured on September 12, 1989, while operating a machine manufactured by Defendant Guzzler Manufacturing, Inc. (Guzzler). Plaintiff brought suit against Guzzler on theories of negligence, breach of warranty and strict liability.

At the time of the accident, Carter was working for Third-Party Defendant Fenn Vac, Inc. (Fenn Vac). Carter sought Workers' Compensation Benefits before the South Carolina Workers' Compensation Commission. On April 27, 1992, Carter and Fenn Vac, with the approval of The South Carolina Workers' Compensation Commission, executed a Final Lump Sum Agreement and Release in which Carter received benefits as a result of his injury and released and discharged Fenn Vac from any and all claims arising out of the accident.

Thereafter, Carter filed this action against Guzzler. Guzzler answered and filed a Third-Party Complaint against Fenn Vac alleging contribution and equitable indemnity. Fenn Vac has moved to dismiss Guzzler's Third-Party claims pursuant to F.R.C.P. 12(b) (6).

**ANALYSIS**

In support of its argument that Fenn Vac should remain in the case as a Third-Party Defendant, Guzzler cites the following South Carolina Workers' Compensation statute, South Carolina Code §42-1-580 (1976 as amended), which reads:

> When the facts are such at the time of the injury that a third person would have the right, upon payment of any recovery against him, to enforce contribution or indemnity from the employer, any recovery by the employee against a third person shall be reduced by the amount of such contribution of indemnity and the third person's right to enforce such contribution against the employer shall thereupon be satisfied.

For the following reasons, I find that §42-1-580 does not prevent dismissal of Guzzler's Third-Party claims against Fenn Vac in this action.

1. CONTRIBUTION UNDER §42-1-580.

Section 42-1-580 was first published in the South Carolina Code of Laws in 1942, §7035-13. Despite it passage, the South Carolina Supreme Court in Indemnity Insurance Company of North American v. Odom, 237 S.C. 167, 116 S.E. 2d 22 (1960), held that the contributory negligence of an employer constitutes no defense to an action brought by an injured employee against a third party, and that the employer and third party are not joint tortfeasors as to the employee because the liability of the employer arises under the Workers' Compensation statutes "and not out of any theory of tort, and such liability is not concerned with any negligence on the part of the employer or employee." Id. at p. 27. The court in Odom specifically invited the legislature to take some action to change the result, which has not been done. See also, Burns v. Carolina Power and Light Company, 88 F.Supp 769 (D.S.C. 1950) (Court dismissed third-party complaint brought against employer by third party defendant in action against third party defendant by injured plaintiff/employee, despite enactment of $42-1-580 (§7035-13 (1942)).

Guzzler submits that the results of Odom and Burns would be changed by virtue of the enactment of the South Carolina Contribution Among Joint Tortfeasors Act, South Carolina Code §15-38-10 et seq. (1976, as amended) (effective April 5, 1988). I disagree.

First, the Act allows for contributions "[W]here two or more persons become jointly or severally liable in tort for the same injury to person..." §15-38-20(A). As noted in Odom, above, the South Carolina Supreme Court has specifically held that an employer is not a joint tortfeasor with a third party as the employer's liability is statutorily created. See also, Larsen's Workman's Compensation Law §76.20.

Finally, Carter has given to Fenn Vac a release of any and all claims arising out of the accident. Section 15-318-50 of the Contribution Among Joint Tortfeasors Act provides:

> When a release or covenant not to sue or not to enforce judgment is given in good faith to one or two or more persons liable in tort for the same injury or the same wrongful death:
>
> (2) it discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

Therefore, even if Fenn Vac were a joint tortfeasor (and I specifically find that it is not under existing South Carolina law) Guzzler would have no claim against Fenn Vac by virtue of the release given Fenn Vac by Carter.

2. INDEMNITY.

Guzzler maintains that Fenn Vac should remain a Third-Party Defendant by virtue of Guzzler's alleged equitable indemnification claims against Fenn Vac. I disagree.

I specifically do not rule on the

(Continued on page 10)

(Continued from page 9)

issue of whether equitable indemnification might be applicable in favor of Guzzler against Fenn Vac at some point in the future. I would note that there is no contract for indemnification between Guzzler and Fenn Vac. Fenn Vac asserted that equitable indemnity is only available if the parties have a special relationship such as contractor and subcontractor.[1] However, Guzzler argues that in the case of Town of Winnsboro v. Wiedeman-Singleton, Inc., 414 S.E. 2d 118 (1992) the Court left open a suit for equitable indemnity in cases where the wrongful acts of one party have involved the other party in litigation, Id., 414 S.E.2d at 120. Therefore, based on the Town of Winnsboro case, Guzzler asserts that a special relationship is not necessary for equitable indemnity. Guzzler also asserts that it is entitled to indemnity because Fenn Vac's failure to properly instruct the Plaintiff in the use of the product was the alleged proximate cause of the accident.

The Court declines to rule on this issue at this time. Equitable indemnification is allowed in South Carolina only where a party is found to be free of fault. Lightner v. Duke Power Company, 719 F.Supp. 1310 (D.S.C. 1989) (Under South Carolina law, one who is himself negligent cannot maintain action for indemnity in absence of contractual relation between parties). Furthermore, there is no equitable indemnification among joint tortfeasors in South Carolina. Scott By McClure v. Fruehauf Corporation, 302 S.C. 364, 396 S.E.2d 354 (1990).

In light of the uncontested facts in this action, and in view of the law as noted above, I find that Fenn Vac should not be forced to remain in this action on the chance that Guzzler might have an indemnification claim against Fenn Vac at some point in the future. Equity is better served by dismissing Fenn Vac from this action entirely at this time. I specifically rule, however, that the dismissal of Guzzler's indemnification claim against Fenn Vac at this time is without prejudice and does not preclude Guzzler from making a claim for indemnification against Fenn Vac after the final conclusion of this litigation.

## DEFENSE TRIAL ACADEMY

The Fourth Annual South Carolina Defense Trial Attorneys' Association's Trial Academy is scheduled to be held July 13 through July 15, 1994 at the USC School of Law. As in the past, the Academy should provide participants with a great opportunity for a hands-on practical trial experience to sharpen their advocacy skills.

In 1991, the SCDTAA initiated the Trial Academy. The purpose was to give young SCDTAA members an opportunity to gain courtroom experience through instruction by more experienced members. By design, the program gave students the opportunity to be on their feet, presenting their positions in front of a critical audience – their peers. Previous programs have been big successes, and much was learned by both the students and the instructors.

This year's program will provide three full days of nuts-and-bolts trial technique. During the first two days of the program, students will be given instruction by more experienced Association trial attorneys and will meet in break-out sessions to practice their skills.

The third day of the program is reserved for the actual trial of a case before a judge and jury, and at the conclusion of the trial, we anticipate that the juries will deliberate in open court. The Association has invited Federal Judges to participate in the Academy and preside in the mock trials. There will also be a social gathering Thursday evening.

In order to maintain a high instructor-to-student ratio, attendance will be limited to 24 participants. The Academy is designed for SCDTAA members who have been in practice for less than five years and have very limited trial experience (some trial experience is recommended). The cost for the Academy is $500.00. Each participant is responsible for his or her own lodging and meals. In the past, the Academy has qualified for CLE Credit.

Anyone interested in participating in the Academy, either as a student or an instructor, should call the Association at 1 (800) 445-8629, Joel Collins at (803) 256-2660 or Clarke McCants at (803) 643-4110.

**CONCLUSION**

For the reasons stated above, Fenn Vac's Motion to have it dismissed as a Third-Party Defendant in this action is hereby granted.

IT IS SO ORDERED.

Sol Blatt, Jr.
Senior U.S. District Judge

June 4, 1993



# Alternative Dispute Resolution

## by George A. Kastanes

Whether we like it or not, it is imperative that we understand and learn to accept the fact that mediation is coming to South Carolina. While the concept of mediation is in and of itself not new, its widespread application as a means of dispute resolution in lieu of litigation is a recent development. Mediation has manifested itself in South Carolina in the form of settlement weeks in both the State and Federal Courts, which have been moderately successful. At least one Circuit has, under the provisions of Rule 16, referred a significant number of cases for mediation in accordance with a formal set of rules established in the format of a pretrial order. The Chief Justice of our Supreme Court has expressed a keen interest in the concept and the South Carolina Bar has established a subcommittee which is charged with the task of developing ideas for statewide implementation of some form of Court ordered mediation. No one can seriously doubt that mediation will over time come to play a significant role in the way we resolve disputes in this State. Given this, it is appropriate to examine the concept, gain some insight into its history, and perhaps come to appreciate how, since it is coming whether we like it or not, we can use it to our advantage.

Since we are confronted with the reality that the trend in South Carolina is for the use of mediation to increase, it might be helpful to take a brief look at how we have arrived at this point.

Mediation is a form of alternative dispute resolution. Put at its most basic level, alternative dispute resolution refers to any technique or practice that disposes of cases headed for litigation in some manner other than the traditional trial before judge or jury. The term includes various modes of intervention, including in addition to mediation, arbitration (both binding as well as nonbinding), mini-trials, and private trials. These various alternatives share some common elements and at the same time have some important distinctions. They all however have as their objective resolution of a dispute in such a way so as to minimize expense, manage risk, reduce the time to resolution and, in general, avoid the traditional trial by jury track of most court cases.

To understand why alternatives are being sought, we need only look at the course of the "average" court case. Once pleadings are filed, we launch upon a lengthy and relatively expensive course of discovery, including document production, interrogatories and depositions. While this is going on, the case is working its way up a trial docket, and will generally be reached for trial one and one half to two years after filing. At the end of the long wait the case is often called for trial suddenly, leaving attorneys scrambling to get witnesses and exhibits to court. Once in court we trust the outcome of the case to twelve jurors who are not at all familiar with the case and rely for the knowledge of the case upon what they hear from the witness stand. After receiving a charge as to the law (which jurors seldom understand) we put our fate in the hands of these jurors and hope that they have paid attention to the testimony during the trial and recall enough of it to make a rational decision. To add to the bitter irony, there is a good probability that if the case hasn't settled "on the courthouse steps", it will settle as everyone is sitting around waiting for the jury to return. It should come as no surprise then that people are seriously arguing that there must be a better way!

The response has been the various forms of alternative dispute resolution. For the most part these techniques are not new, although their application to litigation on a general basis is a recent development. To better understand mediation, it is helpful to look at one or two other forms of alternative dispute resolution and compare them to mediation.

1. ARBITRATION. This is a topic that most of us are at least aware of, if not familiar with in the course of handling different kinds of cases. The construction industry has long incorporated mandatory and binding arbitration provisions in the "standard" AIA contract forms. The securities industries has not only incorporated mandatory, binding arbitration clauses in their contracts with customers, but has gone all the way to the U.S. Supreme Court to establish the validity and enforceability of such provisions. While there are numerous different forms of arbitration (binding vs nonbinding, hi-lo, etc.) all have in common the fact that some entity, whether an individual or a group, listens to a presentation of a case by each side and makes a decision. The result is that whether the decision is binding or not, a judgment of some sort is made and at the very least, implicitly imposed upon the parties. It is for this reason that many litigants have shunned arbitration. The consensus seems to be that if a decision is to be imposed by a third party, then it should be the courts, with the opportunity for trial by jury that renders the decision. Arbitration also is considerably more expensive than mediation. First, there are often three arbitrators whose fees and expenses must be paid. Second, since arbitration involves a somewhat formalized presentation of a case, including introduction of relevant evidence, legal expenses and preparation costs are generally much higher than for mediation.

2. MINI TRIALS/PRIVATE TRIALS. The development of mini trials began in California to deal with the clogged court dockets. A mini trial is usually not so much an alternative form of dispute resolution as it is an alternative form of litigation. Generally it involves the parties paying the cost for a retired or former judge, making arrangements to use or rent a courtroom, and then conducting a regular trial. While the parties may agree to some limitations on presentation of evidence, or other procedures to expedite the trial, it is nevertheless a full and formal case presentation. The judge then renders a decision, which, pursuant to the original agreement of the parties may or may not be binding. When compared with mediation or other forms of alternative dispute resolution, it becomes

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clear that a mini trial really saves very little in terms of expense – it may in fact be more expensive than a regular trial where the parties are generally not liable for the actual costs of a judge and courtroom. The overall intent of a mini trial is really directed at saving time as opposed to expense.

A survey of methods of alternative dispute resolution being used will show that outside of specialized areas such as construction litigation, or security dealer/client disputes, mediation is by far the most popular and widely accepted mode. The primary reasons for such popularity are apparent when it is noted that mediation offers two qualities in a unique combination – it is nonbinding as well as offering confidentiality during the mediation session. Put another way, parties to a mediation are given the opportunity to settle their dispute, but at the same time are assured that in the event there is no settlement, they are left as they were prior to mediation. The result is that while various groups oppose other forms of alternative dispute resolution, such as compulsory, binding arbitration for example, there has been relatively little resistance to mediation. Still another reason for the popularity of mediation of other forms of alternative dispute resolution is, put as simply as possible, that works! Under certain circumstances mediation can result in a settlement rate in the range of 80% of referred cases. That is 80% or more of the cases referred for mediation, which otherwise could be expected to require trials, are settled. A brief examination of developments in two other states will give some insight into what we can expect as South Carolina courts turn increasingly to mediation to help unclog their dockets and expedite the resolution of disputes.

Florida has by legislative action adopted statewide, court ordered mediation. North Carolina has a court ordered mediation program in limited pilot districts, using a system modeled after the Florida statutes and rules. In both of these states the essentials of the program are that the presiding judge is empowered to designate certain cases which must be mediated before they will be permitted to come to trial. The programs incorporate a system of mediator certification requirements and provide for appointment by the court of mediators from a list maintained for that purpose by the court administrator. Even though a mediator is court appointed, the parties are at liberty to select a mutually acceptable mediator. The fees for appointed mediators are set by the court, and upon conclusion of the mediation, whether successful or not a report is filed with court administration so that the viability of the program can be monitored. Both the North Carolina and Florida models provide for immunity for the mediator from suit, and specify that nothing discussed during a mediation is admissible in a subsequent trial. In both systems if the mediation is not successful, the case progresses to trial as if there had been no mediation – in other words the attempt to achieve a mediated settlement does not in any way compromise the positions of the respective parties.

In South Carolina there is currently no concerted effort to enact any legislation that would provide for court ordered mediation in civil cases. It appears instead that the courts are moving in that direction through the rule making powers of our Supreme Court. The South Carolina Bar has designated an alternative dispute resolution committee and there is a subcommittee which is working toward getting mediation rules and procedures as well as requirements for mediators standardized. As of the date of this writing a draft set of rules and guidelines for mediators has been prepared for possible consideration by the Supreme Court.

Interestingly, at the same time that the Bar is trying to formulate specific guidelines and rules, several circuit court judges have adopted their own set of procedures to promote mediation in their respective circuits. In the ninth judicial circuit the chief administrative judge has promulgated, apparently under the authority of Rule 16 a detailed and comprehensive order providing for pretrial mediation. The order contains not only specific provisions for the referral of cases, but also addresses such topics as mediator selection and qualifications. In other circuits the administrative judges, with the support of the local bar associations have set up settlement weeks. These have generally consisted of week long periods during which cases are referred to a team of mediators (generally on a voluntary basis) for expedited efforts at mediation.

It appears clear when developments in South Carolina are considered in their entirety, together with developments in other States, along with its relatively high effectiveness, that some form of court-ordered mediation is virtually inevitable in our State. Since we are going to be dealing in the course of handling our cases with the concept of mediation, it would behoove us to learn as much as possible about the concept. Oftentimes when we are confronted with change the reaction is to resist and to cling instead to tried and proven methods. It is respectfully suggested that the better course is to accept the inevitable and expend our energies and efforts instead on learning as much about, and preparing as well as possible for the changes. In this case since it is clear that we will be encountering mediation in the course of litigation, I would like to spend the remainder of this article discussing the mechanisms of mediation, what can be expected in a typical mediation session, and how best to represent the interests of our clients or insureds in the course of mediation.

Since there is not yet a formalized structure for court-ordered mediation in place throughout South Carolina, it is most likely that at least in the early stages, referral of a case for mediation will be on a voluntary basis, or perhaps even at the suggestion of one of the parties to a dispute. You yourself, in the course of handling a dispute may recognize that mediation might provide an attractive opportunity to get the case resolved without resorting to litigation. Clearly there are obvious benefits to avoiding litigation. Jury awards can be uncertain: there is always the risk of large "sympathy verdicts or even punitive damages." Protracted litigation involves protracted expenses. Reserves are tied up while a matter is pending. From the other side, a plaintiff's attorney may wel-

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come mediation as well. He or she may be experiencing client control problems or other difficulties that make it difficult to get the case settled without intervention. For all or any of these reasons you may find yourself in a position where mediation of a case might be a consideration. The first question then becomes how to go about getting a case mediated.

Once a decision has been made to refer a case for mediation, it is necessary to do the administrative work necessary, such as selection of a mediator, timing, etc., all of which will have the cumulative result of getting the parties all sitting together at a mediation table. If the mediation has been court ordered, then along with the order setting the mediation, a mediator will be appointed, subject to approval of the parties. If one or both of the parties have elected to submit their dispute to mediation, then they will have to take care, among themselves of the administrative details. There are some options on how to handle this.

There are in fact several vendors of mediation services, commercial as well as nonprofit. The American Arbitration Association, purportedly nonprofit, offers mediation services in addition to arbitration services. United States Arbitration and Mediation is a national franchise operation which offers mediation services throughout the United States. Judicial Arbitration and Mediation Services is another vendor, emphasizing the services of former members of the judiciary. All of these organizations are similar in that they charge an administrative fee for a variety of services and provide trained mediators for parties to a dispute. The level of services vary, as does the cost. At least one commercial vendor offers as part of its administrative service the contacting of the adverse party or their attorney and "educating them" about mediation in order to induce them to agree to participate. All charge an administrative fee, and, in addition collect a higher hourly fee for the mediator services than they pay. All at least purport to provide some mediator training, though the nature and extent of the training is often questionable. With the exception of the American Arbitration Association, which regards this information as confidential vendors will generally make available to prospective mediation participants resumes of available mediators so that the parties can select one that is mutually acceptable. All will take care of all of the details of setting up a mediation, including final appointment of a mediator, designation of a date, time and place, and, if necessary, making arrangements for a mediation site. Of course convenience has a price and generally speaking parties that engage a vendor to arrange a mediator will often pay at least double what it would cost to simply agree among themselves to a mediator and pay only his or her hourly fee. Moreover, there is no guarantee that a mediator provided by a vendor will be any more qualified than one selected by the parties, or, sadly, will have had any specialized training at all. One vendor for example provides no training at all to its mediators, operating on the erroneous premise that experience as a judge qualifies one in and of itself as a mediator. There are unfortunately no licensing requirements for vendors of mediation services and consequently, there is no way, other than experience to know whether or not a vendor is reputable and more important, whether or not mediators they designate are properly trained or experienced.

If a vendor is not utilized, and if a mediation has not been ordered, then it is incumbent upon the parties to make their own arrangements for a mediation. The task is not nearly as insurmountable as it might first appear. There really are only three things that must be decided – a mediator must be selected: the parties must decide how the expenses are to be born; and a date, place and time must be agreed upon. Obviously the most difficult of these is to agree upon a mediator. One factor that makes a selection somewhat easier is that mediation, by its nature is non-binding and unlike arbitration, no decision or ruling, whether binding or not is imposed upon the parties. Consequently while the mediator is called upon to use his or her skills to bring the parties to an agreement, the strict principles for designation of a judge or arbitrator are not nearly so critical. This makes selection much easier. The parties can concentrate on selecting a trained and experienced mediator as opposed to being overly concerned about possible biases with regard to subject matter or other aspects of the case. The more difficult aspect is to locate a mediator with enough training and experience to be effective. Unfortunately while South Carolina is moving toward acceptance of mediation, there is not currently available any centralized registry for qualified mediators. The South Carolina Bar Association's Alternative Dispute Resolution Committee is considering establishment of a resume file system for mediators who have training or experience. It is contemplated that these lists would be made available upon request so that mediator resumes could be studied for the purpose of making an informed selection. Likewise, the University of South Carolina School of Law has expressed an interest in establishing some form of central registry, but that is, at the time of this writing still in the contemplation stages. At the present time probably the only proven manner of selecting a mediator is to inquire of other litigants or insurance professionals who have had exposure to individual mediators.

The next consideration is what needs to be looked for in selection of a mediator. Generally speaking, the more training and experience, the better. The proposed rules for court ordered mediation in South Carolina, as well as the rules in both Florida and North Carolina require generally that an attorney, in order to be designated as a mediator must have been in practice for at least five years, must have received at least forty hours of specialized training and must have observed or conducted at least two mediations. The training must have been approved and include such things as mediation techniques and procedures, negotiation techniques and ethical considerations. The foregoing qualifications should be required as an absolute minimum. In addition it is recommended that a mediator to any serious dispute have accumulated significant experience in mediating a variety of cases, including specifically experience in the kind of

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case for which mediation is proposed. One word of caution needs to be interjected here, and that is to distinguish between civil mediation versus family mediation in considering training and experience. While mediation is relatively new to civil disputes, it is well established in the context of family law. Consequently there are several organizations which have provided training and services in the realm of family law mediation. Some are suggesting that individuals who have received training in family mediation are also qualified by virtue of such training to be civil mediators. This is simply an untrue representation and is symptomatic of what often occurs when new developments and concepts are introduced. Family law mediator training generally places emphasis on matrimonial law, sociology, family economics and other topics germane to domestic disputes. Very few of these concepts are transferable to the resolution of civil disputes. Consequently, when selecting a mediator, it is essential to insure that he or she is qualified as a civil mediator.

Once a mediator has been selected, and the date, time and place set, preparation for the mediation should begin. Preparation for a mediation requires a firm understanding of the mediation process itself. First, it should be stressed that a mediation requires the presence of those individuals necessary to settle the case. Mediation is in many respects a psychological mechanism that develops its own momentum. Consequently it is generally absolutely essential that the plaintiff and his attorney be present and on the side of the defendant, whoever will make the final decision as to a settlement. That may be the defendant, but more likely will be the insurance representative with authority adequate to settle the case. Experience has shown that while other individuals may be present, their presence is rarely necessary and can sometimes be a distraction. An example of this is where a plaintiff may bring several family members for "support".

Actual preparation for a mediation is not difficult, since there is no requirement of any formal presentation of a case, or introduction of evidence. On the other hand, preparation does require a thorough understanding of the case, a complete understanding or briefing as to the applicable law, and firm and conscious decision, before the mediation commences of what the settlement value of the case is. Likewise, from the plaintiff's perspective, the case should be thoroughly evaluated and a conscious decision made, before arriving at the mediation of the absolute "bottom dollar" and the circumstances under which it will be accepted. Too many participants to mediations take too seriously the suggestion that the mediation is entirely informal, and show up unprepared and indecisive. The results of such lack of preparation can range from a waste of everyone's time to a settlement that is later regretted.

The mediation process, from the perspective of the parties is actually relatively simple. Generally the mediator will intentionally not know anything about the case prior to the mediation. This reduces the likelihood of preconceived notions as to merit and valuation. The parties will generally meet with the mediator in a conference room type setting, where the "ground rules" will be explained. The mediator will then usually ask each side to give an informal statement of their respective positions, explaining in the process the case itself and what is in dispute. At this point in time the parties may be asked to sign an agreement to mediate, wherein the mediator's fees and expenses are addressed, as is the issue of confidentiality. Once this has been accomplished, and each side stated their positions, the mediator will break the parties up and begin meeting with each side individually. These sessions are sometimes called private sessions, or caucuses. It is during these private meetings that the mediator is most effective and in which the advantages of mediation as a means of dispute resolution are most apparent. This is the time when the mediator, meeting privately with the parties, and with the assurance of confidentiality, learns the details of each party's respective position. The mediator can explore with a party the strengths and weaknesses of their respective positions, and will learn aspects of the case that would never otherwise be disclosed. When the mediator is able to combine what has been learned from both parties, he or she will have a much better picture of the entire case than either of the parties. Armed with this information the mediator is in a position to question the respective positions of the parties and ideally to move them toward a mutually acceptable position. The biggest single strength of mediation is that the parties are able to disclose to the mediator, and thereby arm him with essential knowledge, things that would never be disclosed to an adverse party prior to litigation. Such information can be disclosed with the knowledge that will not, absent consent, be divulged to the other side.

During the course of the mediation, a skilled mediator will void expressing specific opinions as to a party's position, but instead, will attempt to raise questions as to a specific issue. One technique that is often used is to ask a party to a personal injury case for example for an honest assessment as to the best and worst case amount of a jury verdict where liability is not in dispute. This has the effect of making a party recognize that for every good outcome, there is a downside risk. When both parties accept this reality, their range of expectations will often overlap, making a settlement likely. The important thing here is for the participants to recognize what a mediator is doing and where he or she is going. This is not to suggest resistance – a good mediator will never mislead either party – merely make them aware of the range of possibilities. At the same time the participants must remain cognizant of the merits of their positions and be prepared to challenge the mediator if suggestions are erroneous or exceed the party's own expectations and assessments. Bear in mind that a typical mediation will involve several private meetings with each side, and as is the case with any negotiation, progressive concessions will be sought as the process continues. While it is counterproductive to

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simply "fight" the process, remain aware of the limits that you have established beforehand. Remember at all times that the mediation is non-binding, if there is room for movement, by all means, continue. On the other hand, if a preset limit has been reached, beyond which you are not willing to go, feel free to announce that to the mediator. That is, again one of the reasons that mediation is so successful and so widely accepted. Either party can call it off at any time for any reason.

A good mediator will not ask, at early stages for your best position. It is understood that mediation is most effective when a momentum of compromise and concession is established. A good mediator understands that a party is far more likely to "go the extra step" if the adverse party is perceived as having made significant concessions. Consequently an experienced mediator will encourage numerous small moves as opposed to one large but relatively final move.

Another consideration is that a skilled mediator will make use of various tried and proven negotiating techniques. Some of these, such as the "resort to higher authority" or "good cop bad cop" techniques are eliminated by the very nature of the mediation process. On the other hand other techniques are very much viable. The fact for example that concessions should be made in ever decreasing increments; the "nibble" where seemingly small concessions are demanded which become significant in the aggregate; and the "last best offer" technique work as well in a mediation as in any other negotiation. Consequently, while certainly not necessary, a participant who has experience or training in negotiation has a marked advantage in a mediation.

In conclusion I think it fair to say that we can look for mediation to become a significant factor in the way we handle disputes in South Carolina. Nor, is that necessarily a negative development. In "selling" mediation to the insurance industry, we have often argued the cost effectiveness of the process and the potential savings to be realized. Nor do plaintiffs have all that much to complain about. Settlements mean money for litigants and attorneys sooner as opposed to later. Moreover, while the potential of the "bell ringer" jury verdicts may be moderated, so too are the converse elements of risk. By and large, for an investment of a little bit of time and a few hundred dollars most cases can be mediated and the majority of mediated cases, where both parties enter the mediation in good faith will be settled. Since settlements are almost always preferable to litigation, it is hoped that litigants in South Carolina will at the very least give the process a fighting chance.

*Mr. Kastanes is engaged in private practice in Lexington, South Carolina. He has previously worked almost exclusively as a mediator and arbitrator and continues to provide these services as a significant portion of his practice.*

## The Rape of Justice

A. Edward Smith, Columbus

One of the best all-around lawyers I've ever known was Mr. E.K. Wilcox, of Valdosta, affectionately known far and wide as Lige Wilcox. He was a self-educated man, but a magnificent lawyer. He usually represented corporations, and usually was cast in the role of counsel for the defense

On one occasion he was engaged in defending an important damage suit case against a corporate client of his. The court reporter was a beautiful young lady, who was as efficient as she was beautiful. She, like most other people, was very fond of Mr. Wilcox, who was the unquestioned leader of his bar.

After a hard-fought trial, the judge brought in a very large verdict against Mr. Wilcox's client. As soon as she had an opportunity, the young court reporter went over to Mr. Wilcox and said, "Why, Mr. Wilcox, I am terribly sorry. That verdict is an absolute rape of justice."

"Why, young lady, don't let that worry your pretty head," replied Mr. Wilcox. "I've been raped before!"

# 1994 HEMPHILL AWARD
# Call for Nominations

**CRITERIA**

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

**By Noon on Wednesday, July 27, 1994**
**Clip and Send to: SCDTAA, 3008 Millwood Avenue,**
**Columbia, SC 29205 or FAX 803-865-0860**

I NOMINATE _____

OF THE FIRM OF _____

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CITY AND STATE _____

BECAUSE _____

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(ATTACH A SHEET OF PAPER IF NECESSARY)