S.C. Defense Trial Attorneys' Association

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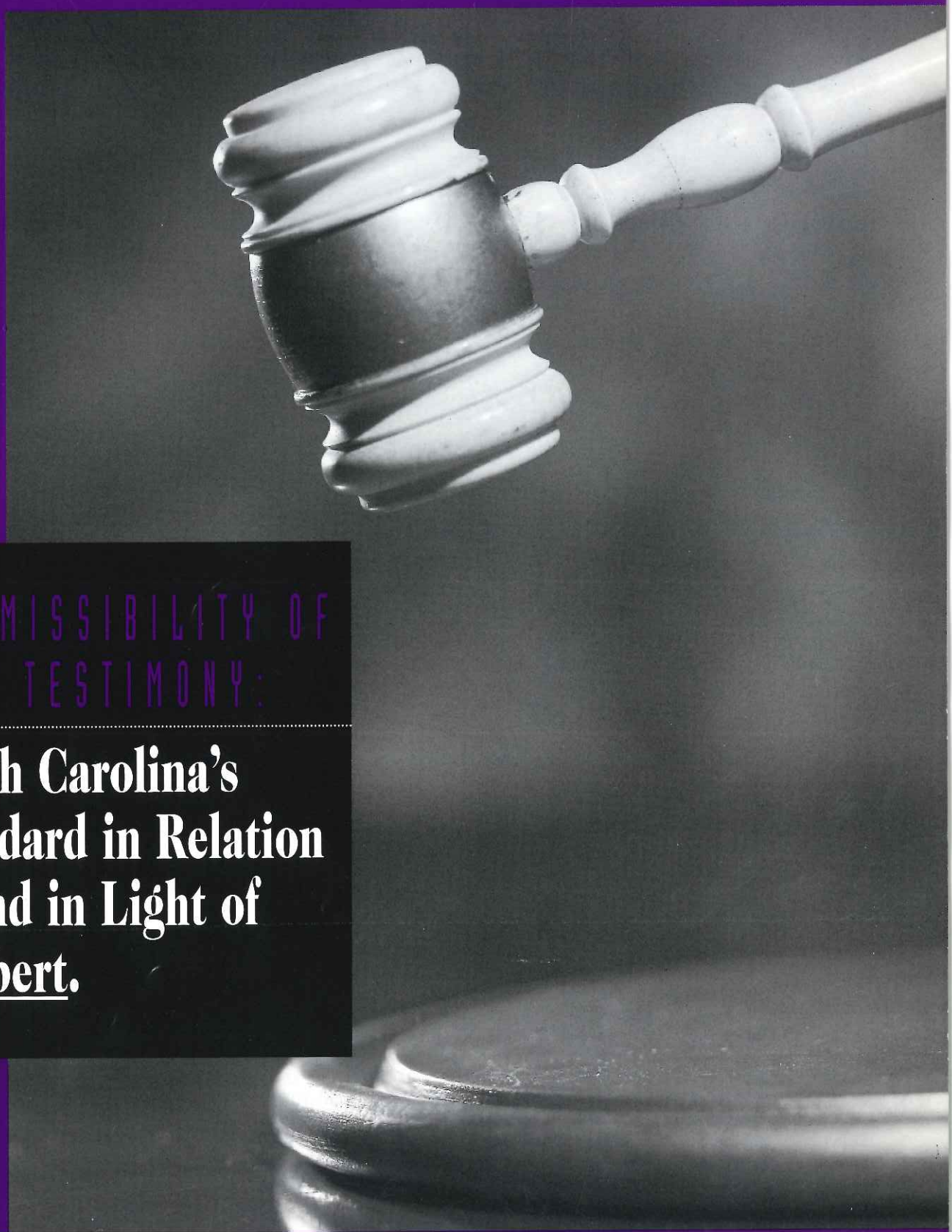
The DefenseLine



THE ADMISSIBILITY OF EXPERT TESTIMONY:

South Carolina's Standard in Relation to and in Light of Daubert.

The DefenseLine

Ten Years Ago

President GENE ALLEN introduced the program of the 1986 Annual Meeting. The HONORABLE J. B. NESS, Chief Justice of the Supreme Court, reported on the state of the judiciary. HAROLD JACOBS moderated a panel on unfair trade practices. The HONORABLE LEE M. THOMAS, Administrator of EPA, was introduced by the The HONORABLE ALEXANDER M. SANDERS, JR., Chief Judge of the South Carolina Court of Appeals and spoke on the scope of liability under current environmental laws, including Super Fund. The HONORABLE RANDALL T. BELL spoke on The Eloquent Brief; How to Write It." The HONORABLE HENRY T. HEFLIN, United States Senator, spoke on current congressional matters.

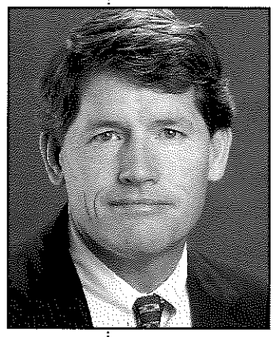
Twenty Years Ago

President C. DEXTER POWERS announced the program for the Ninth Annual Meeting of the South Carolina Defense Attorneys at Hilton Head Inn, Hilton Head Island, November 4-6, 1976. Dr. J. LOREN MASON, JR., Florence orthopedic surgeon, talked on whiplash. Dr. JACK SMITH, Columbia neurosurgeon, spoke regarding ruptured discs.

At the Annual Meeting, JACKSON L. BARWICK, JR. was elected President; MARK W. BUYCK, JR., President-Elect; ROBERT BRUCE SHAW, Secretary-Treasurer; and H. SPENCER KING, Spartanburg, SAUNDERS M. BRIDGES, Florence, and ROBERT H. HOOD, Charleston, Executive Committeemen. EDWARD W. MULLINS, JR., Columbia, Regional Vice President of DRI, presented information regarding that organization.

President's Letter

Thomas J. Wills, IV



Since the annual meeting in November, I have received numerous comments from members of the Association and members of the judiciary praising the quality of both the educational programs and the social events. There has also been a very favorable reaction to Atlanta as a location for the meeting. On behalf of the Association I want to thank Kay Crowe, Mills Gallivan, Mark Phillips and all the members of the convention committee for their fine work in making the meeting a success.

In Atlanta we lost a good friend, an excellent lawyer, and a loyal member of our Association. Bob Salane will be sadly missed by all of us. Our thoughts and prayers are with his family.

One of the essential purposes of the South Carolina Defense Trial Attorneys' Association is to assist our members in their efforts to effectively deal with the economic, legislative, and technological changes which are combining to alter the way defense lawyers practice. Case handling and billing guidelines are changing. The increased use of arbitration and mediation is having a significant effect on the practice. This Association is designed and equipped to help its members successfully adjust to these developments. Our publications and educational programs will be directed toward solving some of the problems these developments are creating. The Association needs your input and participation.

The Defense Line is a tool the Association uses to provide its members with circuit court or other unpublished opinions and articles dealing with the kinds of issues that are relevant to our defense practice. If you have any topics for articles or articles that you have prepared for other publications, please submit them so that they can be shared with the membership.

The Association is in the process of planning our programs for the Joint and Annual Meetings. We encourage your suggestions. Please mail or fax any suggestions or ideas for program topics or speakers to any of the Annual or Joint Meeting committee members listed on the back cover of this issue of *The Defense Line*.

For the past year the Association has employed a lobbyist to help monitor legislation that may affect defense practice. If you need information about pending legislation let us know. Articles concerning the status of pending legislation will appear periodically in *The Defense Line.*

Our trial academy has been a tremendous success and is helping to fill the need for more trial experience for young lawyers. I encourage all of our members to become more involved in the programs and services the Association provides. We can always use volunteers to participate in the trial academy as instructors and judges.

My experience at DRI's Annual Meeting in Chicago in October of this past year confirmed a belief I have held for some time. The South Carolina Defense Trial Attorneys' Association is truly one of the most outstanding defense attorneys' organizations in the country. The Annual Meeting this year was dominated by South Carolina attorneys. Steve Morrison, Carl Epps, and David Dukes moderated and participated in outstanding programs presented to attorneys from all over the country. I had an opportunity to attend a program attended by Presidents-Elect and Presidents from state organizations from all of the 50 states. The program was moderated by David Dukes and presented by Mike Bowers. The subject of the program was basically a "how to" presentation on organizing and presenting seminars, but it also touched on almost every aspect of running a state defense attorneys organization. The program was excellent and extremely well received. From the questioning by those in attendance, it was clear they recognized the quality of the programs that our Association presents and the quality of our organization here in South Carolina.

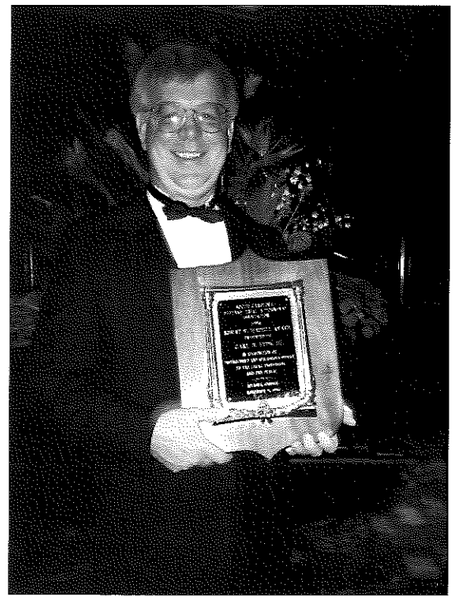
I look forward to the coming year and hope to see all of you at the Joint Meeting in Asheville scheduled for July 24th through the 26th and at the Annual Meeting scheduled for November 6th through the 8th.❖

Annual Meeting Report

The Association's Annual Meeting was a great success. Association members David Dukes and Danny White gave excellent presentations on the use of computers, both in the courtroom and in complex litigation management. Dean Harry Lightsey provided an entertaining, informative lecture on current ethical issues. U.S. Court of Appeals Judge (3rd Circuit) Jane Roth gave an excellent presentation on the emerging area of stigma damages in toxic tort cases. Judge Roth's husband, U.S. Senator Bill Roth, spoke on what to expect from the new Congress and from NATO. Senator Roth, also a lawyer, is Chairman of the Senate Finance Committee and is the new president of NATO.

The Ritz-Carlton Hotel was an elegant setting for the meeting. Bill Pickney and the original Drifters provided great entertainment during the Dinner-Dance on Saturday night. The Association was joined by forty of our state and federal judges for the weekend. ❖

Epps Receives Hemphill Award



Carl B. Epps, III, a partner with the Columbia firm of Turner, Padget, Graham, & Laney, P.A., was presented the 1996 Hemphill Award by the SCDTAA at the annual meeting in November at the Ritz-Carlton in Atlanta, GA.

The Association presents the award when deemed appropriate to a member or former member of the Association who has been instrumental in developing, implementing, and carrying through the objectives of the Association. It recognizes distinguished and meritorious service to the legal profession and the public.

Mr. Epps, a magna cum laude graduate of the University of South Carolina Law School was admitted to the Bar in 1970. While in law school he was a member of the Wig and Robe, Phi Delta Phi, the Board of Editors, and the South Carolina Law Review. His professional memberships include both the Richland County and Amerian Bar Associations, the South Carolina Bar, the American Judicature Society, The Association of Trial Lawyers of America, the South Carolina Defense Trial Attorney's Association (President, Columbia-Greenville Chapter, 1988-89), the American Board of Trial Advocates (President, Columbia-Greenville Chapter, 1992-93), the International Association of Defense Counsel, the Defense Research Institute (Board of Directors, 1994-98), Co-chair, Toxic Tort Subcommittee of DRI's Product Liability Committee, and Mentor and Co-chair to the Law Office Economics Committee and the Environmental Law Committee.

The Hemphill Award was established in 1988 and is named for the late United States District Judge, Robert W. Hemphill. Previous awards have honored Harold W. Jacobs, Edward W. Mullins, Jr., Jackson L. Barwick, Jr., G. Dewey Oxner, Jr., R. Bruce Shaw, and Benjamin A. Moore, Jr. ❖

The Admissibility of Expert Testimony: South Carolina's Standard In Relation to and in Light of Daubert.

William S. Davies, Jr., Esq., Nelson, Mullins, Riley & Scarborough, L.L.P.
Brian C. Duffy

In Daubert v. Merrell Dow Pharmaceuticals, Inc.[1], the United States Supreme Court held that the Federal Rules of Evidence superseded the "general acceptance" standard of admissibility set forth in Frye v. United States.[2] Prior to the ruling in Daubert, many states had adopted the Frye standard.[3] Now, although some courts have maintained allegiance to Frye, the majority of state courts addressing the issue follow the Daubert approach.[4]

The South Carolina Supreme Court previously discussed, but never explicitly adopted, the Frye general acceptance standard.[5] Recently, the Supreme Court quoted Daubert in determining the admissibility of DNA expert evidence and noted its effect on the Frye standard.[6] Once again, however, the Court has not specifically adopted the new approach,[7] but has maintained its own standard governing the admissibility of expert testimony.

The Federal Standard: Daubert v. Merrell Dow Pharmaceuticals, Inc.

In Daubert the United States Supreme Court found the general acceptance test too stringent to comply with the "liberal thrust" of the federal rules.[8] In affirming the trial judge's role as a "gatekeeper,"[9] the Court found that Rule 702 requires a judge to ensure both the relevance and reliability of the proffered expert testimony.[10]

To determine the relevance of the testimony, the trial judge must decide whether it will " 'assist the trier of fact to understand the evidence or to determine a fact in issue.' "[11] The standard requires the evidence to have "a valid scientific connection to the pertinent inquiry."[12] In other words, the testimony must "fit" the issue or be sufficiently tied to the facts in the case.[13]

In order to satisfy the reliability requirement, the expert's testimony must be sufficiently supported by "scientific knowledge."[14] Further, an expert must use scientific methods and procedures and must rely upon "good grounds" when formulating his opinion.[15] Daubert offers four non-exhaustive factors to determine whether opinion evidence qualifies as "scientific knowledge": (1) whether the theory or technique has been tested; (2) whether it has been subjected to peer review and publication; (3) the known potential rate of error or the existence of standards controlling the technique's operation; and (4) whether it has been generally accepted within the relevant scientific community.[16]

South Carolina and the Frye Standard

The South Carolina Supreme Court flirted with the Frye standard, but never explicitly adopted it. For example, in State v. Newton[17] the supreme court noted the widespread use of Frye in other jurisdictions to exclude expert testimony concerning scientific retesting of breathalyzer ampules to determine intoxication. However, the court did not reach the issue of admissibility of the expert testimony because no expert witnesses were produced on that issue.[18] In State v. Ford[19] the court noted that South Carolina had never adopted the Frye test but that, instead, the court employed a more liberal approach to the admissibility of scientific evidence such as the approach used in State v. Jones.[20] Nevertheless, the Ford court went on to find that the evidence in issue in that case was admissible under both Jones and Frye. Thus, the more restrictive "general acceptance" analysis merely bolstered the court's ruling that the evidence was admissible under the state standard.[21]

South Carolina courts have adopted the general acceptance test for the factual foundation upon which the expert relies. An expert witness unquestionably may base his opinion on a hypothetical situation framed in a manner similar to the circumstances at issue.[22] The South Carolina Court of Appeals followed a recognized trend and extended this principle in Howle v. PYA/Monarch, Inc.[23] Under Howle, expert testimony may be based on otherwise inadmissible information gathered from sources related to the case. Borrowing from Rule 703 of the federal rules, the court of appeals articulated the standard as being whether the information is "of a type reasonably relied upon by experts in the particular field."[24] Since Howle was decided, South Carolina has incorporated this standard into Rule 703 of the state rules of evidence.[25]

The South Carolina Standard and its Relation to Daubert

Notwithstanding its citations and discussions of Frye, South Carolina courts have adhered to a more liberal standard regarding admissibility of expert testimony.[26] Rule 702 of the South Carolina Rules of Evidence is identical to the federal rule.[27] Therefore, the standard for relevance is similar in both the South Carolina rules and Daubert. On the other hand, the definition of reliability is not as clear and seems to engender a standard of admissibility at least as liberal as that suggested in Daubert.[28]

Admissibility of expert testimony is within the discretion of the trial judge.[29] As the Court held in Daubert, the trial judge must determine whether the proffered testimony is relevant.[30] Additionally, the testimony must assist the trier of fact in understanding the evidence or determining a fact in issue.[31] Generally, if it has the direct effect of making a matter in issue more or less probable, the testimony is relevant.[32] The South Carolina Supreme Court's interpretation of Rule 702 provides a relevancy standard that is similar to, but more exacting than, the one enunciated in Daubert.[33] In South Carolina courts, the party must make a clear showing that the expert's "special knowledge has been brought to bear upon the facts of the case being tried."[34]

The basis of an expert's opinion must be "scientific, technical, or other specialized knowledge."[35] Within this general rule, the measure of reliability in South Carolina is more liberal than the Frye standard. In Ford the Supreme Court reiterated the standard set forth in Jones as being "the degree to which the trier of fact must accept, on faith, scientific hypotheses not capable of proof or disproof in court and not even generally accepted outside the courtroom."[36] The Ford Court went even further and performed a general acceptance analysis.[37] In contrast, in Jones the court considered factors similar to those suggested in Daubert, noting that the experts had not based their challenged opinions on "untested methods or unproven hypotheses"; instead, they applied established techniques.[38]

The South Carolina Supreme Court has adopted a liberal standard of admissibility by giving the jury the role of determining reliability.[39] The Court stated in State v. Dinkins[40] that the jury should be allowed to determine the reliability of the proffered expert testimony and the statistics therein. Courts, therefore, should decide only the relevance of the evidence. The evidence in Dinkins was deemed admissible because it would assist the trier of fact in determining the guilt of the appellant.[41] In other cases, the Court has ruled that defects in experts' methodology will go to the weight the jury may give the testimony, not its admissibility.[42]

Allowing the jury to determine reliability does not prevent a party from attacking the testimony as irrelevant or prejudicial.[43] The court may then consider whether any cross-examination or contrary evidence was presented to challenge the reliability of the testimony.[44] Notably, in Dinkins, the Court quoted Daubert to suggest ways in which parties may effectively challenge expert testimony given the liberal standard of admissibility: "[V]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."[45] Thus,

The South Carolina Supreme Court has adopted a liberal standard of admissibility by giving the jury the role of determining reliability.

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even under the present state standards, expert testimony can still be exposed for its unreliability.

The South Carolina Standard In Light of Daubert

In South Carolina the requirement of reliability, assuming there is one,[46] is ill-defined. The South Carolina Supreme Court has conducted a range of analyses from the more stringent general acceptance standard,[47] to Daubert-like considerations,[48] to little or none at all.[49] If South Carolina joins other states in adopting the guidelines for reliability set forth in Daubert, the impetus probably will not be to establish a more liberal standard of admissibility, but rather to achieve a more uniform, cognizable approach.

A clear judicial role and well-defined factors for the determination of reliability would provide guidance to practitioners in structuring arguments on this issue. The South Carolina Supreme Court has cited Daubert[50] and discussed similar factors in assessing reliability. Moreover, cases such as Ford and Jones were decided prior to Daubert and the effective date of Rule 702;[51] arguably, therefore, the continued efficacy of these cases is questionable. Additionally, since the South Carolina rules were modeled after the federal rules, federal decisions interpreting identical evidentiary rules (such as Daubert) should be viewed as strongly persuasive – although not controlling – authority.[52]

The Daubert rule is fair to all parties and ensures that only reliable and relevant evidence is admitted.

The Daubert rule is fair to all parties and ensures that only reliable and relevant evidence is admitted. State circuit courts have already cited Daubert with approval and applied its test when considering admissibility of expert evidence under state rule 702.[53] Accordingly, the Daubert approach may become the de facto standard in South Carolina if attorneys carefully use the Supreme Court's prior rulings in structuring arguments. ❖

This article was co-authored by Brian C. Duffy, a second year student at Vanderbilt University School of Law in Nashville, Tennessee. He is a native of Charleston, S.C.

1. *509 U.S. 579 (1993).*
2. *293 F. 1013 (D.C. Cir. 1923). In Frye the United States Court of Appeals for the District of Columbia held that expert opinion based on a scientific technique is inadmissible unless the technique is "generally accepted" as reliable in the scientific community:*
   > *Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.*
3. *Id. at 1014; see also Daubert, 509 U.S. at 584.*
4. *See Joseph R. Meany, Note, From Frye To Daubert: Is a Pattern Unfolding?, 35 Jurimetrics J. 191, 192-93 (1995).*
5. *Id. at 192-93.*
6. *See State v. Ford, 392 S.E.2d 781, 783 (S.C. 1990); Meaney, supra note 3, at 194.*
7. *State v. Dinkins, 462 S.E.2d 59 (S.C. 1995).*
8. *See Meaney, supra note 3, at 192. The Daubert Court based the decision on its interpretation of Rule 702 of the Federal Rules of Evidence. 509 U.S. at 588. Rule 702 of the South Carolina Rules of Evidence is identical to the federal rule. See S.C. R. Evid. advisory committee's note.*
9. *509 U.S. at 588.*
10. *Id. at 589.*
11. *Id. The Court limited its analysis of reliability to "scientific" knowledge. 509 U.S. at 590 n.8. Rule 702 also addresses "technical, or other specialized knowledge." Fed. R. Evid. 702; Daubert, 509 U.S. at 590 n.8.*
12. *Id. at 588 (quoting Fed. R. Evid. 702).*
13. *Id. at 591-92.*
14. *Id. at 591.*
15. *Id. at 589-90. The trial judge's focus is on the methodology of the expert, not the opinions. Id. at 595.*
16. *Id. at 590.*
17. *See Id. at 592-94. The fourth factor is the old Frye test, which the Court found to be a useful consideration rather than an absolute prerequisite. See Id. at 594. On remand, the Ninth Circuit included a fifth factor: whether the testimony has a basis in the expert's independent research or whether the opinion was developed expressly for the purposes of testifying. Daubert, 43 F.3d 1311, 1317 (9th Cir. 1995).*
18. *262 S.E.2d 906, 909 n.1 (S.C. 1980).*
19. *Id. at 909 n. 1.*
20. *392 S.E.2d 781, 783 (S.C. 1990).*
21. *259 S.E.2d 120 (S.C. 1979).*
22. *Some may argue, despite the its explicit denial of the Frye standard, that the court implicitly adopted the general acceptance standard in Ford. Nevertheless, in State v. Dinkins, 462 S.E.2d 59 (1995), the court distinguished the Frye analysis by noting that it decided Ford before the new rule took effect (referring to former Rule 24(a) of the South Carolina Rules of Civil Procedure, which was identical to Rule 702 of the South Carolina and Federal Rules of Evidence and before the Supreme Court held in Daubert that similar federal rules had superseded Frye). 462 S.E.2d 59, 60 n.3 (S.C. 1995). The court further limited its holding in Ford to the admissibility of DNA test results. Id.*
23. *See State v. King, 155 S.E. 409 (S.C. 1930); see also Daubert, 509 U.S. at 592 (discussing the relaxation of the "first-hand knowledge requirement" for expert witnesses).*
24. *344 S.E.2d 157, 162 (S.C. Ct. App. 1986) (citing Fed. R. Evid. 703 and Booker v. Duke Med. Ctr., 256 S.E.2d 189 (N.C. 1979)).*
25. *Id.*
26. *See S.C. R. Evid. 703. The rule is identical to the federal rule. South Carolina has since incorporated the standard into the rules of evidence. Rule 703, S.C. R. Evid. advisory committee's note.*
27. *See State v. Ford, 392 S.E. 2d 781, 783 (S.C. 1990).*
28. *Rule 702, S.C. R. Evid. advisory committee's note; State v. Dinkins, 462 S.E.2d 59 (1995). Rule 24(a) of the South Carolina Rules of Criminal Procedure, which was at issue in Dinkins, is also identical to state and federal Rule 702.*
29. *See infra notes 44-47 and accompanying text.*
30. *See, e.g., Creed v. City of Columbia, 426 S.E.2d 785, 786 (S.C. 1993). The discretionary authority of the trial judge is the same in the civil context as in the criminal context. See McMillan v. Durant, 439 S.E.2d 829, 831 (1993).*
31. *509 U.S. at 589; see also Rule 702 S.C. R. Evid. The rule also requires the judge to assess whether the witness possesses the "knowledge, skill, experience, training, or education" in a particular field to qualify as an expert and give opinion testimony in that field. Id. The South Carolina Supreme Court has established that the test for qualification is relative and depends on the witness's reference to the subject. See Lee v. Suess, 457 S.E.2d 344, 346 (S.C. 1995). The judge considers the witness's experience, training, and education relevant to the particular area of testimony. See McMillan, 439 S.E.2d at 831-32. In O'Tuel v. Villani the court of appeals restated the rule as follows: "If the witness through his education and experience is able to draw inferences that could not be drawn by a layman, he should be qualified as an expert." 455 S.E.2d 698, 701 (S.C. Ct. App. 1995). Furthermore, any defects in the amount and quality of a witness's education or experience factor into the weight of the testimony, not the admissibility. See State v. Schumpert, 435 S.E.2d 859, 861 (S.C. 1993).*
32. *S.C. R. Evid. 702; see also Carter v. R.L. Jordan Oil Co., 365 S.E.2d 324, 328 (S.C. Ct. App. 1988), rev'd on other grounds, 385 S.E.2d 820 (S.C. 1989) (citing Fed. R. Evid. 702).*
33. *See State v. Alexander, 401 S.E.2d 146, 148 (S.C. 1991).*
34. *See discussion supra at notes 8-16 and accompanying text (discussing the standard set forth in Daubert).*
35. *Young v. Tide Craft, Inc., 242 S.E.2d 671, 678 (S.C. 1978). For example, in Dinkins the court found that the DNA population frequency statistics introduced through expert testimony helped the jury determine whether the defendant was the attacker. 462 S.E.2d at 60.*

    Furthermore, before expert testimony is admitted to establish a causal connection between a plaintiff's injury and the defendant's act, an expert must testify that the act was the most probable cause of the result in question. Baughman v. American Tel. & Tel. Co., 410 S.E.2d 537, 543 (1991).
36. *S.C. R. Evid. 702. The thrust of the holding in Daubert was in the "reliability" requirement of the Court's two-prong test. The Court found that a sine qua non general acceptance standard was too restrictive. See discussion supra note 8 and accompanying text.*
37. *392 S.E.2d at 783 (quoting Jones, 259 S.E.2d 120, 124 (S.C. 1979)). The court noted that the standard is "less restrictive" than the general acceptance standard. Id.*
38. *See supra notes 19-21 and accompanying text.*
39. *Jones, 259 S.E.2d at 125.*
40. *The extent to which the "standard" has judges assess the reliability of expert testimony is difficult to determine given judges' broad discretion in this area. Notwithstanding the language bestowing the role upon the jury, the court without fail has discussed the methods and procedures that the experts employ. See, e.g., Dinkins, 462 S.E.2d at 60; Bodiford v. Spanish Oak Farms, 455 S.E.2d 194, 197 n.1 (S.C. Ct. App. 1995).*
41. *Dinkins, 462 S.E.2d at 59, 60 (S.C. 1995).*
42. *Id. at 60-61. The court also rejected the appellant's claim that the prejudicial effect outweighed the probative value of the evidence.*
43. *See, e.g., Bodiford, 455 S.E.2d at 197 (admitting testimony despite the expert's reliance on the least preferred method of surveying land, courses and distances); Seaboard Coast Line R.R. v. Harrelson, 202 S.E.2d 4, 6 (S.C. 1974) (admitting testimony over the contention that the expert relied upon sales of property dissimilar to the tracts at issue in the condemnation proceeding).*
44. *Dinkins, 462 S.E.2d at 60. The Daubert Court made similar statements when it admonished the judiciary to consider rules other than Rule 702 when ruling on admissibility. 509 U.S. at 595.*
45. *See Dinkins, 462 S.E.2d at 60-61 (including the concurrence of Justice Finney); Ford, 392 S.E.2d at 493; Jones, 259 S.E. 2d at 125.*
46. *Dinkins, 462 S.E.2d at 60 (quoting Daubert, 509 U.S. at 596).*
47. *In Dinkins the court distinguished and limited its holding in Ford, 462 S.E.2d at 60 n.3, and similarly distinguished Jones. Id. The court then stated that the jury should determine reliability. Dinkins. Id. at 60.*
48. *See, e.g., Ford, 392 S.E.2d at 783-84.*
49. *See, e.g., Jones, 259 S.E.2d at 125.*
50. *See, e.g., Dinkins, 462 S.E.2d at 60.*
51. *Id. at 60 n.3.*
52. *See S.C. R. Evid. 1103 ("These rules shall become effective September 3, 1996.").*
53. *Cf. S.C. R. Evid. 608(b) staff note (stating that courts should "be guided by the decisions of federal courts" regarding that subsection). See also 29 Am. Jur. 2d Evidence § 10 at 67 (1994) (providing that a state rule of evidence should be guided by federal courts' decisions construing federal evidentiary rules).*
54. *For example, in a recent circuit court opinion, the Honorable William L. Howard held that proffered expert testimony was inadmissible under Daubert. See Order Granting Baxter Healthcare Corporation's Motion for Summary Judgment (Estes v. Bon Secours-St. Francis Xavier Hospital, No. 93-CP-10-4821, Charleston County Court of Common Pleas) (May 9, 1996).*

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Recent Order of Interest

State of South Carolina, County of Greenville, In the Court of Common Pleas Pamela L. Norwood, Plaintiff, vs. Allstate Insurance Company, Defendant

ORDER

Introduction

This matter came before this Court on November 11, 1996, upon the Plaintiff's Motion for Summary Judgment and the Defendant's Motion for Summary Judgment.

Background

On November 1, 1993, the Plaintiff obtained an insurance policy from Defendant insurance company. The policy provided liability coverage in the amount of $25,000/$50,000/$25,000. Defendant offered Plaintiff UIM coverage in varying amounts both less than and up to the limits of liability coverage. The Plaintiff declined to purchase underinsured motorist coverage in the amounts offered by Defendant.

On August 17, an accident occurred involving a vehicle owned by the Plaintiff. The Defendant paid the Plaintiff $25,000 in liability coverage, but refused to pay Plaintiff's claim for underinsured coverage.

Defendants take the position that Plaintiff had rejected its offer of underinsured coverage, and thus, underinsured coverage did not extend to Plaintiff.

The Plaintiff contends the Defendant never made a meaningful offer of underinsured coverage as defined by the case law of this state; and therefore, the Plaintiff is entitled to retroactive underinsured coverage on its insurance policy.

II. Summary Judgment Standard

For the reasons more fully stated below, this Court orders that Defendant Allstate Insurance Company's Motion for Summary Judgment be granted.

It is further ordered that Plaintiff Pamela L. Norwood's Motion for Summary Judgment be denied.

Summary judgment should be granted only

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Recent Order of Interest

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where it is clear that no issue of fact is involved and inquiry into the facts is not desirable to clarify the application of the law...Stevens v. Howard D. Johnson Co., 181 F.(2d) 390 (4th Cir. 1950); Middleborough Property v. Montedison, ___S.C. ___, 465 S.E.2d 765 (1995).

The relevant statute pertaining to the offer of underinsured motorist coverage ("UIM") is S.C. Code Section 38-77-160, providing in pertinent part: "Automobile insurance carriers shall offer...at the option of the insured, underinsured motorist coverage up to the limits of the insured liability coverage..."

In the case *sub judice*, Allstate made a meaningful offer of underinsured coverage to the Plaintiff in an amount less than the liability coverage of $25,000/$50,000/$25,000. *See*, State Farm Mut. Auto Ins. Co. v. Wannamaker, 291 S.C. 518, 354 S.E.2d 555 (1987). The issue thus becomes whether an insurer is obligated to offer underinsured coverage beneath the minimum policy limits of $15,000/$30,000/$5,000 when the policy provides liability coverage over this minimum amount.

Recent case law exists which at first glance appears to support Plaintiff's theory that an insurer must offer underinsured coverage beneath the minimum limits. In Osborne v. Allstate Ins. Co., ___S.C.___, 462 S.E. 2d 291 (Ct. App. 1995), the Court opined:

> Although UIM coverage may be distinguished from liability and UM coverage because UIM coverage is not mandated by the statute, it seems clear that had the legislature intended there to be a minimum offer requirement for UIM coverage it would have done so. In addition, the clear and unambiguous language of the statute requires UIM coverage to be offered up to the limits of the insured's liability coverage.

Id. at __ (*quoting*, White v. Allstate Ins. Co., ___S.C.___, 442 S.E.2d 195 (Ct. App. 1994).

The Court of Appeals thus found the insurer's offer of UIM ineffective because it did not indicate that coverage could be obtained in an amount less than the insured's liability coverage of $15,000/$30,000/$5,000, *see, also* Butler v. Unison Ins. Co., Supreme Ct. Op. No. 24487 (Filed Sept. 3, 1996) (State Supreme Court echoes line of reasoning enunciated in Osborne by Court of Appeals).

The Defendant maintains that while Osborne and Butler stand for the proposition than an insurer must make an offer of UIM coverage beneath the minimum policy limits of $15,000/$30,000/$5,000, these cases are distinguishable in that the liability coverage provided in Osborne and Butler was the minimum policy limit. The Defendant further contends no court has extended a duty to offer UIM coverage beneath the minimum policy limits to a policy with liability coverage in an amount greater than the minimum limits.

The Court agrees with the reasoning set forth by the Defendant. The plain language of Section 38-77-160 indicates only that an insurer must make an offer of UIM up to the limits of the policy. The insureds' liability coverages in Osborne and Butler were set at the minimum limit of $15,000/$30,000/$5,000. Therefore, the insurers were under a statutory duty to offer UIM under the minimum amount, since this minimum amount also constituted the amount of liability coverage. This Court believes this duty to offer UIM beneath $15,000/$30,000/$5,000 did not stem from any mandate to make an offer beneath the minimum amount, but instead from the statutory requirement of offering UIM in an amount less than the existing liability coverage.

In the present case, the insured possessed liability coverage in the amount of $25,000/$50,000/$25,000 in the form provided by Allstate, the insured was offered UIM coverage in an amount equal to the liability limits, but also offered coverage in the specific amounts of $15,000/$30,000/$5,000 and $15,000/$30,000/$10,000. Both of these offered UIM coverages are less than the insured's liability coverage. Therefore, the Court finds Allstate's offer of UIM coverage valid under S.C. Code Section 38-77-160.

Aside from the arguments detailed above, the Court also notes the impracticality of offering UIM coverage in an amount less than $15,000/$30,000/$5,000 when the minimum premium rate authorized by the Insurance Commission coincides with a $15,000 policy.

Conclusion

Because of the lack of any material issue of fact and the reasons stated above, the Court orders the Plaintiff's Motion for Summary Judgment be denied. The Court further orders the Defendant's Motion for Summary Judgment be granted.

The Honorable Henry F. Floyd ❖

Blessed Be! The Tie That Binds: Conflicts of Interest Revisited

R. Davis Howser, Esq.
Howser, Newman & Besley, L.L.C.

I. Setting the Stage

While the insured and his wife are motoring to the Grove Park Inn to attend a convention, they have an automobile accident. The wife is seriously injured. She brings suit and the insurance carrier retains defense counsel to defend the lawsuit for the husband. The retained attorney interviews the defendant husband who informs the lawyer of the details of the accident and then states: "This automobile accident was not my fault and I was not negligent." He gives the lawyer a written statement to that effect and outlines exactly how the accident occurred.

About the same time, a motorist is riding down the road in his neighborhood when a child darts out in front of him. The motorist slams on brakes and cuts to the left in an effort to avoid striking the child, but is unable to avoid the accident. In an interview, the insured insists that he should have seen the child sooner and could have stopped in time to avoid striking the darting child. The insured insists that he be called to testify at the trial so that he can tell what happened and how he could have applied his brakes sooner.

A year later the trial date arrives for both cases, and the husband in the first case states: "I am going to testify that the accident was my fault."

1. Assuming that the insured does take the stand and testifies contrary to his earlier written statement, can the defense attorney impeach his own client, the insured, by showing that he has made inconsistent statements?
2. In case number two, can the lawyer, as part of his trial strategy, refuse to put the defendant on the stand?

II. Historical Role and Relationship of Defense Counsel

In addressing these questions we must examine the relationship of defense counsel to the insured and the insurer. Where counsel represents both the insured and the insurer, a tripartite relationship is created.

The tripartite is described in American Mutual Liability Ins. Co. v. Superior Court, 38 Cal.App.3d 579, 591-92, 113 Cal. Rptr. 561, 570-71 (1974) as follows:

> In the insured-insurer relationship, the attorney characteristically is engaged and paid by the carrier to defend the insured. The insured and the insurer have certain obligations each to the other***, arising from the insurance contract. Both the insured and the carrier have a common interest in defeating or settling the third party's claim. If the matter reaches litigation, the attorney appears of record for the insured and at all times represents him in terms measured by the extent of his employment.
>
> In such a situation, the attorney has two clients whose primary, overlapping and common interest is the speedy and successful resolution of the claim and litigation. Conceptually, each member of the trio, attorney, client-insured, and client-insurer has corresponding rights and obligations founded largely on the contract, and as to the attorney, on the Rules of Professional conduct as well. The three parties may be viewed as a loose partnership, coalition or alliance directed toward a common goal, sharing a common purpose which lasts during the pendency of the claim where litigation is brought against the insured.

Currently, there is debate over whether counsel represents both the insured and the insurer. While most jurisdictions adhere to the view that counsel represents two clients the insured and the insurer, a smaller number of states hold that the defense counsel only represents one client, the insured. The minority view is gaining favor and the American Law Institute, in tentative drafts of The Restatement of the Law of Governing Lawyers, supports the view that the

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Blessed be the Tie that Binds

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lawyer has only one client.

Even in the tripartite relationship, the lawyer owes a fiduciary relationship to the client or clients. A fiduciary relationship exists when one has a special confidence in another so that the latter, in equity and good conscience, is bound to act in good faith. Island Car Wash, Inc. v. Norris, 292 S.C. 595, 599, 358 S.E.2d 150, 152 (Ct.App. 1987). An attorney/client relationship is by nature a fiduciary one. In re: Green, 291 S.C. 523, 354, S.E.2d 557 (1987); Hotz v. Minyard, 304 S.C. 225, 403 S.E.2d 634 (1991).

In the attorney client relationship, the lawyer acts as an agent for his client. The duty of loyalty requires an agent to act solely for the benefit of a principal or client in matters falling within the scope of the agency relationship. The Restatement (Second) of Agency Section 387 (1958) provides that unless otherwise agreed upon an agent is subject to a duty to his principal to act "solely for the benefit of the principal."

III. The Problem(s)

If the attorney is subject to a duty to act solely for the benefit of the principal, can he attack the credibility of his client, the insured, during his examination of the client during trial or in closing argument? Can attorneys refuse to call the insured as a witness?

The court recognized that the possibility of fraud and collusion in tort cases between family members and hosts is always present.

IV. The Answer

Consider first what transpired in Montanez v. Irizarry-Rodriguez, 273 N.J. Super. 276, 641 A.2d 1079 (Super.Ct., App. Div. 1994). The plaintiff, Angelina Montanez, an attorney and wife of defendant Santos Irizarry, was a passenger in her husband's vehicle when it left the road and struck a utility pole. She brought an action against her husband and others including General Motors. As against her husband, the plaintiff alleged that he was negligent in the operation of his vehicle so as to cause it to leave the roadway. With regard to the other defendants, who were dismissed prior to trial, the plaintiff alleged that the accident was the result of a tire-blow out that occurred in the roadway.

During the defense side of the case, the following exchange occurred:

Q. ***Around the time the accident happened did you hear any unusual sounds around your car?
A. Yes.
Q. What did you hear?
A. A small explosion.
Q. ***And where did the small explosion seem to be coming from?
A. I can't say for sure, because at the time of the explosion, I was already in the woods.
Q. Did you hear any sounds while you were on Moss Mill Road that were unusual to you?
A. No.

Following this testimony, defense counsel approached sidebar, announced to the judge that he was "surprised" by his client's testimony, and requested that he be permitted to treat his client as a hostile witness. The defense counsel advised the judge that the defendant had informed him that the blow out had occurred in the roadway, whereas, the present testimony indicated that the defendant was "already in the woods" when he heard the explosion. The defense counsel also represented that his client had given an oral recorded statement to the insurance carrier. He further advised the court that he had interviewed the defendant in preparation for trial, and had recorded that interview. Counsel then proceeded to place a tape recorder on counsel table. The court then permitted defense counsel to treat the defendant-client as a hostile witness.

Counsel proceeded to ask this client such questions as:

Q. Do you remember telling me at the time we met in my office that the explosion that you heard was a loud explosion? Do you remember comparing it to a truck backfiring?
Q. Today you said it was a small explosion. In my office you said it was a loud explosion. Why did you give a different answer today?
Q. Do you remember telling me in my office that you didn't think this accident was your fault at all?
Q. Do you remember telling me that you wanted your wife to get as much money as possible?
Q. At any time in my office during our interview did you tell me that were not paying attention when you were driving?
Q. [Do you know] what the penalty of perjury is?
Q. Do you understand that [perjury] is a crime?

During final argument defense counsel lambasted his client, telling the jury that the defendant wanted to lose the case so that his wife could win the case and collect money. He further told the jury that while he felt uncomfortable about attacking his client, "that's my job, I had to do it [because Defendant] was not credible." The jury must have been impressed. It returned a verdict for the defendant. The plaintiff appealed.

The appellate court stated that:

> It became obvious to us *** that defense counsel had no reason to impeach his client's testimony were it not for his unexpressed concern that the testimony was going to be harmful to the interests of the insurer who had appointed him to defend the matter.

Id. at 283.

In reversing, the court held that defense counsel is not permitted to impeach the insured, and found that the insured's impeachment is relevant only to an issue between the insured and the insurer, and has no bearing on the only issue in the case at hand: whether the insured is liable to the plaintiff. Since the insurer is not a party to the case between the plaintiff and the insured, the question of liability cannot be adjudicated in that litigation.

The court recognized that the possibility of fraud and collusion in tort cases between family members and hosts is always present. When the insurance company has knowledge of the fraud or collusion in sufficient time to act before the trial of the case between the claimant and the insured, it has two possible remedies.

First, the insurance company may seek to intervene in the case between the claimant and the insured. It would reveal its status in the case, treating the covered defendant insured as a hostile witness in order to attack credibility, and show for example that the husband and wife may be scheming to gain a recovery against the insurance company. Second, the insurer may institute a declaratory judgment action following disclaimer. Both of these possible remedies envision that the issue of collusion will arise prior to trial with sufficient time for the insured to react. But what happens, as it did in this case, when the collusion becomes known only during the course of the trial?

The courts that have addressed this issue are unanimous in their view that insurance counsel may not treat the defendant-client as a hostile witness in order to vindicate the insurance company's interest. *See, e.g.,* Katz v. Ross, 216 F.2d 880 (3rd Cir.1954); Newman v. Stocker, 161 Md. 552, 157 A. 761 (1932); Gass v. Carducci, 37 Ill.App.2d 181, 185 N.E.2d 285 (1962); Spadaro v. Palmisano, 109 So.2d 418 (Fla.App. 1959).

These decisions suggest the following approaches as the solution to this problem:

First, the insurer may institute a new suit to adjudicate liability under the policy where the carrier could assert that:

- the insured seeks indemnity for loss from a collusive agreement rather than from the liability imposed by law which is the subject of insurance;
- the insured has failed to co-operate in violation of policy terms;
- other grounds may exist under the policy for determination of no coverage.

Second, insurance counsel can do a number of things short of impeaching the insured. He should remind the insured of his obligation to testify truthfully and the penalties for not testifying truthfully. Defense counsel should explain to the client that by testifying falsely he may be jeopardizing insurance coverage by breaching the "duty to cooperate" clause. Defense counsel should explain to the client that he cannot be a party to presenting false and untruthful testimony to a court and that he is obligated to take reasonable measures to correct any false testimony that has been given. If the client persists in this position, defense counsel has a conflict and must withdraw.

Rule 1.7 of the Rules of Professional Conduct as adopted by the South Carolina Supreme Court prohibits a lawyer from representing a client if the representation of that client may be materiality limited by the lawyer's responsibility to another client, unless the lawyer reasonably believes the representation will not be adversely affected, and the client consents after consultation. If it would be impossible to get consent, the lawyer probably has no recourse but to withdraw from the case.

Before the lawyer withdraws he should inform the insured that the insurance company will be able to discover all information which defense counsel has about the truthfulness of the insured's testimony. He should further explain that if the uninsured is unwilling to testify truthfully, the insured is in essence directing and controlling the defense which the

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Blessed be the Tie that Binds

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insured has no right to do. The lawyer should explain the necessity of withdrawal and the consequences of it.

When the conflict develops during the course of trial, insurance counsel should ask for a recess when it becomes clear that the insured's testimony varies from prior statements. During the recess, counsel should explain to the client the obligation to testify truthfully and the consequences of giving testimony which is known to be untrue. If the client persists in the view that the testimony about to be given is the correct version, counsel should make application to the court for permission to withdraw from representation, assuming counsel's continued belief that the client's testimony is fraudulent.

Above all the attorney cannot impeach his own client.

Let us examine the situation where the insured's testimony will be favorable to the plaintiff. Under what circumstances can the lawyer not call the client to testify? If the insured does not insist on testifying, then the lawyer does not have a conflict and he is free not to call the insured as part of his strategy. The lawyer should be concerned about whether there is a possibility of an excess verdict. If it is a fully insured claim, there does not appear to be a conflict.

If another fact is added to the equation, in which the insured insists on testifying, what is the lawyer to do? Again the lawyer is representing both the insured and the insurer. The majority view throughout the country is that when the interests of the insurer and the insured differ, the insurance defense lawyer's ethical duty of undivided loyalty to the client is owed to the insured. Brooke Wunnicke, *The Eternal Triangle: Standards of Ethical Representation by the Insurance Defense Lawyer,* FOR THE DEFENSE, Feb. 1989, at 9. On the other hand, the insurer has the right to control the defense through its attorney.

The defense attorney should explain to the insured the reasons why he does not want to place the insured on the stand. He should explain to the insured the potential conflict of interest. He should discuss with the insurer his desire not to place the insured on the stand. If the insurer and the insured have conflicting wishes with regard to the insured desiring to testify, and the insurer not wanting him to, the lawyer may have no choice but to withdraw from the defense of the case. If his loyalty is to both clients, he has an irreconcilable conflict of interest. Rule 1.7 of the Rules of Professional Conduct would probably require his withdrawal. If he has undivided loyalty to the insured, then he would be obligated to put the insured on the stand, but he should keep the insurer advised.

As a practical matter in this situation the insurer would probably have to acquiesce to the request of the defendant to testify rather than retain separate counsel. In a fully covered situation, counsel and the insurer should remind the insured of his duty to cooperate in the defense of the case, and that his insistence on testifying may be a breach of that duty to cooperate.

V. Conclusion

Defense counsel should never impeach his own client. He must consider the alternatives to impeachment and should attempt to resolve the issues which would require impeachment. If he is unable to resolve those issues, his only recourse may be to withdraw. Defense counsel may also find himself in a potential conflict of interest when the insured, against the wishes of counsel and the insurer, desires to testify at a trial. ❖

A Perspective on Alternative Dispute Resolution

C. Bruce Littlejohn, Chief Justice Retired

There is no function of government more important than that of providing a forum for the resolution of conflicts between citizens. If disputes cannot be settled through courts or other instrumentalities of the government, the tendency to take the law into one's hands is hard to resist. In days of yore, conflicts were settled by combat. The strong always won – whether right or wrong.

We inherited the jury system from England, and I would not abolish it. We have, however, abolished it in many areas of litigation such as equity matters, domestic matters and workers compensation claims. Add to these the determinations made by administrative agencies throughout the country, and it will be found that a substantial portion of conflicts are now being settled other than by jury trial.

As the cost of litigation tends to escalate, the people may come to the same conclusion as Chief Justice Burger when he said: "There must be a simpler, speedier and less costly way to settle disputes. The criticism, which the courts receive, arises not so much out of the quality of justice dispensed but out of the unusual delays and increasing costs incident thereto."

At a conference of Chief Justices in Savannah, Georgia, I was surprised to hear one of the speakers say that the United States is the only country left in the world where litigants can, as a matter of right, demand a jury trial in a civil action. I was well aware of the fact that in England all civil cases are tried before a judge or judges, but I did not realize that the jury trial had been so universally abandoned in civil suits in other countries.

It depresses me that it becomes more difficult for people in all human relations to get along with each other. This tendency begins in the home where it is more difficult for husbands and wives to maintain happy marriages; it is more troublesome for parents and children to live together in harmony; and it is more difficult for pupils and teachers to get along. This is true as relates to capital and labor, employee and employer, vendor and vendee, and you can carry this on down through all human relations in society today.

Someone asked me why it is that today there is more need for courts and for settlements of disputes than was true in the past. I do not know if I am wise enough to answer that question, but it is inescapable that people are going more places and doing more things than used to be the case. There are more transactions of all sorts, and more opportunities for disagreements every year. And when this is true, it is inescapable that more conflicts are sure to arise. Some means of settling these disputes must be available. The Hatfields and McCoys settled their own disputes by shooting each other until not many were left.

The method of settling disputes is sometimes not as important as the need for bringing about the settlements. The jury is merely one way of settling disputes. In actuality, percentage wise, not many disputes are being settled by jury verdicts. By far the great bulk of disputes are being settled by way of administrative hearings, workers compensation commissions, family court judges, masters-in-equity and trial judges with non-jury matters.

I have often pointed out the fact that every workers' compensation commissioner in South Carolina, and certainly every Family Court judge in South Carolina, controls more discretionary money and property than any Circuit Court judge and his jury. Despite this fact, a Circuit Court judge is looked upon as holding the more prestigious office.

South Carolina Court Administration records reveal that yearly approximately 50,000 cases are filed in the Courts of Common Pleas, 100,000 in the Family Courts, 110,000 in General Sessions, nearly one million in the Magistrates Courts and some 300,000 in the Municipal Courts.

If it is remembered that at least two persons are involved in every family case and at least two persons are involved in every civil case, one

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A Perspective on Alternative Dispute Resolution

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sees that well over one million people are directly involved in some court activity every year.

As a member of the Supreme Court, we often talked about and deplored the fact that litigation has become so expensive. We abhorred the fact that there were substantial delays in all courts.

If a person owes a debt, he owes it now. If one is entitled to collect, he is entitled to collect it now, or at least reasonably soon after the indebtedness arises.

There has come into being a group swell for a simpler way to settle conflicts, especially on the civil side of the court system. There has come into popular use the term "alternative dispute resolution." The tremendous cost of litigation cries out for increased use of arbitration and mediation.

I submit that the citizens generally, and the taxpayers particularly, are not greatly interested in the many disputes which arise between individuals or between individuals and corporations. It makes good sense to me that those who create their own problems should be required to exhaust the possibilities of settling their problems before they call on the taxpayers to finance a jury "settlement", and call upon jurors to leave their respective places of employment for a minimum fee to their own personal detriment.

I know of nothing more fair than to require a plaintiff to select an arbitrator, the defendant to select an arbitrator and to have the two select a third person to evaluate a claim. I know of nothing more fair than to have litigants agree upon a single arbitrator.

There has come into being in more than one hundred jurisdictions throughout our country, what we refer to as "court mandated" or "judge-ordered non-binding arbitration." In those jurisdictions the judges, in order to unclog congested dockets, have required litigants to go to arbitration in a multitude of cases involving usually less than about $30,000. If either litigant is unhappy with the arbitration award, he or she may ask for a jury trial *de novo*.

This would appear at first to be only one more layer of litigation and delay, but the statistics prove that in more than 90% of the cases, the parties, having aired their views, settle the conflict by accepting the award or using it as a barometer for settlement.

Statistics show that in cases where plaintiffs asked for a jury trial, 40% of those plaintiffs faired more poorly than the arbitration award. Statistics show that where defendants asked for jury trials, 30% of those defendants faired more poorly than the arbitration award. By court rule or by statute, this system of handling a multitude of comparatively small claims has come into being in Florida, Georgia and North Carolina, and is working well. In addition, the system is used in many other state jurisdictions as well as several federal courts throughout the United States.

There has also come into being what we sometimes refer to as "high-low arbitration." In such a case the parties agree that if more than a specified figure is awarded, only that specified figure must be paid. If less than the specified figure is awarded, the specified figure must still be paid. It takes a large measure of gamble out of the arbitration and permits the parties to place a ceiling and a floor on the ultimate award.

On the other hand, arbitration, as we have known that term in years past, may be binding without the right of appeal. This method of settling disputes can only come into being by agreement of counsel or by contract. Many of the contracts, particularly in the building and construction world, have provisions requiring all disputes to be settled by way of binding arbitration.

Mediation is also coming into popular use. A mediator has no binding authority. He is in effect a troubleshooter. A mediator becomes a middleman whose chore it is to point out to the plaintiff and the defendant the strengths and weaknesses of the case. In effect, mediation adds a third and neutral party to the settlement conference which is normally composed of two lawyers. In some jurisdictions mediators have been able to bring about settlements in approximately 80% of the cases in which they were designated to serve.

Since my retirement, I have mediated and/or arbitrated more than 200 cases of all courts. It

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Legislative Report

The General Assembly returns to Columbia on January 14 to begin the 1997 session. Daily meetings of the Senate and House of Representatives will continue to be held at the Carolina Plaza on Assembly Street while the State House continues to be renovated. Following the November election, Republicans retained control of the House of Representatives. The composition of the House membership, by party, is seventy (70) Republicans, fifty-three (53) Democrats, and one Independent. In the Senate, Democrats continue to be in the majority with twenty-six (26) seats. Republicans hold twenty (20) seats in the Senate.

The House of Representatives held its organizational session on December 2, 3, and 4 at which time they elected officers, made committee assignments, and addressed other organizational matters. Representative David Wilkins (R-Greenville) and Representative Terry Haskins (R-Greenville) were re-elected to their respective positions as Speaker and Speaker Pro Tempore. In a closely contested race, Representative Bobby Harrell (R-Charleston) defeated Representative Mark Kelley (R-Horry) for Majority Leader. All committee chairmen, such as Representative Jim Harrison (R-Richland) of the Judiciary Committee, were re-elected.

The Senate is expected to organize itself during the first day of the legislative session.

Prefiling of legislation in the House of Representatives is scheduled for December 11 and 18, 1996, and January 8, 1997. No prefiling is scheduled for the Senate. ❖

- Mike Eye

A Perspective...

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is my observation that most lawyers and particularly litigants prefer this means of ending disputes. All of us simply need to sell the concept.

Insurance adjustors and lawyers are in a position to render a much more valuable service to the public by encouraging and promoting arbitration and mediation as a means of settling disputes. It is usually to the advantage of all litigants to end conflicts in this way. By reason of the fact that insurance companies are regularly involved in litigation, they tend to understand the advantages. It is not always easy to convince a citizen who has only one claim that this method of settling disputes is advantageous. Arbitration can save defendants, as well as claimants, much time and money. It is a concept which lawyers are in a position to promote by suggesting to clients the advantages.

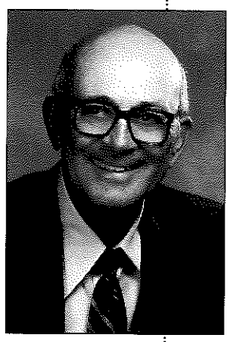
Some of the advantages are:

(1) Litigants are permitted to select a mediator or an arbitrator in whom they have confidence;
(2) Delay in settling the disputed matter is eliminated;
(3) A hearing can be scheduled for a particular day and hour convenient to all parties;
(4) The hearing may be held in private;
(5) Collection can be brought about promptly – often times on the same day of the hearing;
(6) Appeals are eliminated; and
(7) litigants' costs and court costs are minimized.

The increased caseload in all courts, state and federal, cries out for a new way for citizens to settle their problems. The time for arbitration and mediation as a more popular means of settling disputes has arrived. We simply have more conflicts than our court system is able to handle promptly. The congested docket problem will not vanish. It will escalate. We must come to grips with the problem and give high priority to alternative dispute resolutions. The people are entitled to an alternative method of staying out of court. ❖

In Memoriam

H. Fletcher Padget, Sr.



Padget

The South Carolina legal community recently lost one of its most colorful and respected attorneys. H. Fletcher Padget, Sr. lost his long battle with cancer on Sunday, November 24, 1996. Fletcher's oratorical skills were first recognized when he was declared the winner of the National American Legion Oratorical contest with final competition being held in Springfield, Illinois. The sixteen year old was then asked to address the South Carolina Legislature where he was lauded for bringing distinction to the State. The Saluda county native used his American Legion scholarship to attend Wofford College where he held several class offices, commanded the R.O.T.C. Unit, was President of the Honor System, inducted into Kappa Sigma (social fraternity) and was elected to Phi Beta Kappa (National Scholastic Honorary Society).

Fletcher served in World War Two as a Captain in the U.S. Army. Wounded in the Battle of the Bulge, he was awarded the Purple Heart for receiving wounds that left his right arm permanently stiff. Despite his injury, Padget was a lifelong golfer and avid huntsman.

Following the War, Fletcher entered the University of South Carolina Law School and graduated in 1948. He was a member of the Order of Wig and Robe and won the Sapp-Funderburke Award. The young attorney began practice with N.A. Turner, Esq. while simultaneously teaching several courses at the Law School from 1948 to 1950. The law firm grew to become Turner, Padget, Graham and Laney, a firm of more than 40 lawyers. Padget served as the Senior Partner of the firm until his retirement in 1984.

Fletcher Padget will be remembered for his skills as a defense attorney but will be especially remembered by those attorneys who had the unique opportunity of studying and learning under his tutelage. His wit and wisdom will be long remembered.

- Ed Martin

Robert Edward "Bob" Salane

Salane

On the evening of Friday, November 8, 1996, Robert Edward ("Bob") Salane died. He was in Atlanta at the time attending the annual convention of our Association.

Bob died entirely too soon. He was only 49 years old. He was a partner in the firm of Barnes, Alford, Stork and Johnson.

Reaching beyond the obvious–that Bob was purely brilliant–he can best be described as thorough, almost to a fault. When Bob tackled a problem, he meticulously examined every pathway, every nook and every cranny, to find the best and the fairest solution.

Bob was the epitome of the phrase "he was a lawyer's lawyer." When other lawyers approached Bob for advice and counsel, he never pleaded that he didn't have time to talk. He always listened patitently to the recitation of a problem and, more often than not, Bob would have a number of incisive comments. He was never too busy to share his wisdom.

Bob relished a good, hard-fought legal skirmish, and the tougher the opponent the better he liked it. To Bob, the challenge was everything. The courtroom–where he excelled–was Bob's natural habitat, his work-space and his playground.

Remembering Bob's thoroughness, one particular example comes to mind. Bob and his wife vacationed in Scotland in 1985 and 1987. A fellow member of the bar, planning his own trip to Scotland, asked Bob for suggestions of things to see and do. Bob personally typed a seventeen page, precisely detailed memorandum covering everything he had done and seen on his two trips. Those who didn't know Bob well were cautioned never to ask him about a movie he had seen or a book he had read. Bob's mind worked like a reel of movie film. He plugged it in and the listener was the recipient of a play-by-play account from opening credits to the last fade-out.

Bob was a devoted family man, leaving behind his wife Teri, his two children, three brothers (including his twin) and a sister. Bob was an avid and very competitive golfer. Some of us were privileged to see Bob and his twin Thom

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John Bell and Steve Darling presenting Dean Montgomery of the S.C. Law School with a check in appreciation for the school's support of the 1996 Trial Academy.

Workers' Compensation Medical Evaluations

The South Carolina Workers' Compensation Commission reminds all attorneys and insurance representatives that payments for independent medical examinations of injured workers are established by the Commission's *Medical Services Provider Manual*. Before performing an IME, a physician or chiropractor must have a written request which specifies the body area(s) to be evaluated. Payment may be made only for the number of body areas specified in the request. The Commission recognizes seven general body areas: head, cervical region, lumbar region, and four extremities (two upper and two lower extremities).

When the evaluation is conducted for one or two body areas, the maximum allowable payment is $350, for more than two body areas, the maximum allowable payment is $500. Whatever the source of payment, any person who receives a fee more than the maximum allowable payment may be guilty of a misdemeanor pursuant to S.C. Code Ann. § 42-15-90 (1976) . For more information, contact the Commission's Medical Services Division at 803-737-5741.❖

Memoriam

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competing head-to-head on the golf course as vigorously as if they were playing for a world championship.

In dealing with his fellow attorneys, Bob never carried a grudge. He was never interested in "getting even" regardless of how someone might have angered him. Day in and day out, Bob was Bob. He always tried to do his very best at work and at play simply because he thought that was the way life should be lived. His ethical standards and his work ethic were beyond compare. He could have coined the word "civility."

Bob had a delightful sense of humor and would have especially enjoyed a comment made at his wake: "God looked around Heaven and decided there were too many Plaintiffs' lawyers in attendance so he sent for Bob to balance things out."

Bob will always be loved, remembered and respected by all of us who knew him. We are indeed blessed for having had him with us for 49 all too short years. We will miss him.

- Jim Alford

Newly Appointed Executive Committees

Amicus Curiae	Buck James
By-Laws	Jim Nance
Annual Convention	Steve Darling
	Mark Phillips
	Sam Outten, Co-Chairs
Joint Meeting	Susan Lipscomb
	Mills Gallivan, Co-Chairs
Seminar	Lee Plumblee
	Joel Collins
Defense Line	Will Davidson
	Clarke McCants
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