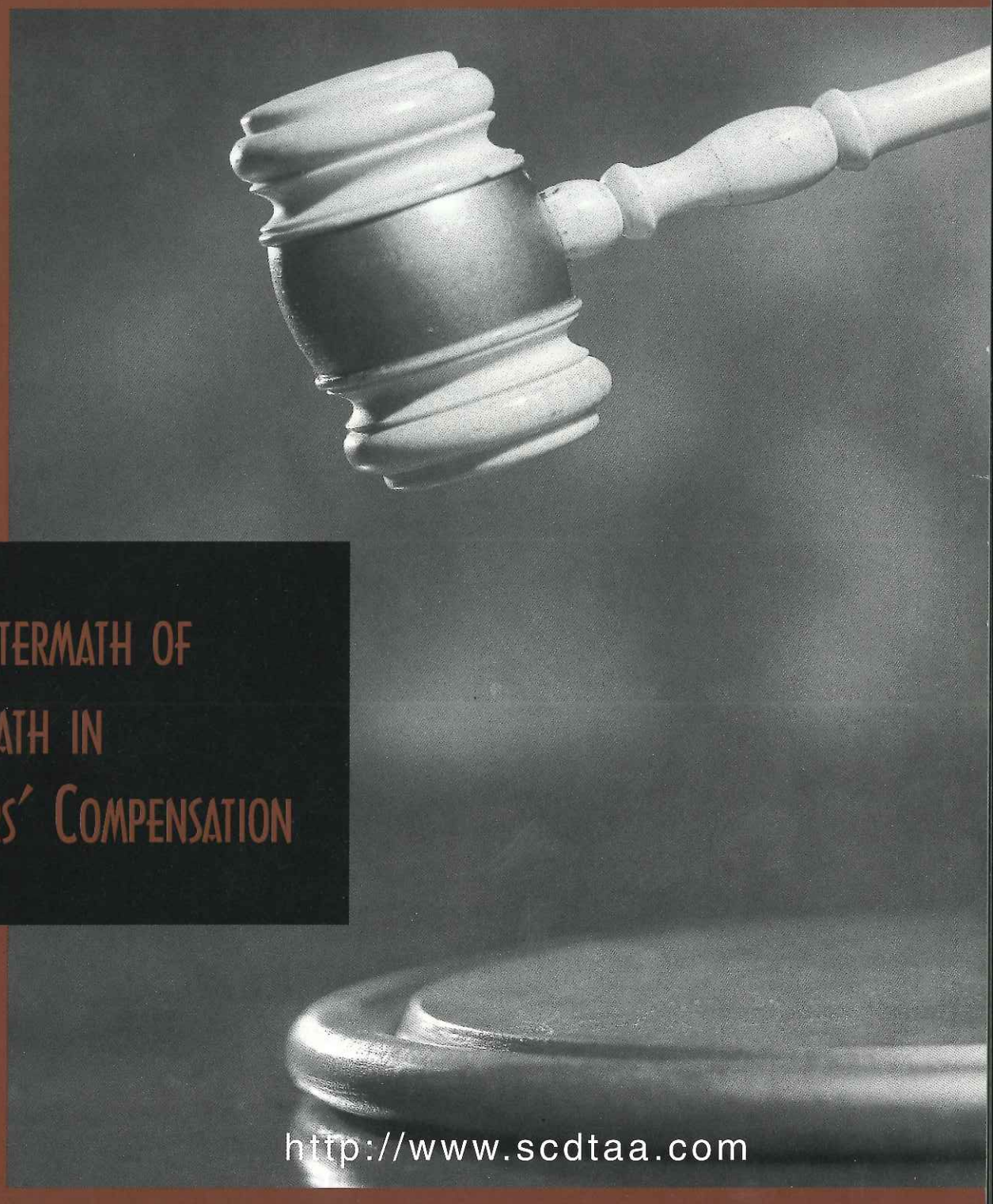
S.C. Defense Trial Attorneys' Association

Volume 26 Number 1 • Spring, 1998

# The DefenseLine



## The Aftermath of Hedgepath in Workers' Compensation

http://www.scdtaa.com


JOINT MEETING

**July 23-25, 1998**

Grove Park Inn ☛ Asheville, NC

summer

# TO THE SEA

fall

ANNUAL MEETING

**November 5-8, 1998**

Kiawah Island Resort ☛ Kiawah, SC

For Additional Meeting Information Check Out SCDTAA's Website

**http://www.scdtaa. com**





# The DefenseLine



## Ten Years Ago

The 20th Annual Meeting of the South Carolina Defense Trial Attorneys' Association was held in November, 1987, at the Inter-Continental Hotel at Hilton Head, SC. The HONORABLE J.B. NESS, Chief Justice of the South Carolina Supreme Court, addressed the Association on the state of the Judiciary. The HONORABLE JOHN L. NAPIER, Judge, United States Claims Court, was the keynote speaker along with the HONORABLE WALTER E. HOFFMAN, Senior United States District Judge for the Eastern District of Virginia. The HONORABLE ROBERT J. SHEHEEN, Speaker, South Carolina House of Representatives, and the HONORABLE CHARLES ALLEN WRIGHT, Professor of Law at the University of Texas, were also on the program. Newly elected officers for our Association were President, CARL EPPS of Columbia; President-Elect, FRANK GIBBS of Greenville; Secretary MARK WALL of Charleston; Treasurer, GLENN BOWERS of Columbia. Executive Committee members were TIM BOUCH of Charleston; BILL SWEENEY of Columbia; BILL GRANT of Greenville; M.M. WEINBERG of Sumter, and BILL COATES of Greenville.

## Twenty Years Ago

In his first message as President, MARK BUYCK announced that the Joint Meeting with the Claims Management Association would be held away from Myrtle Beach for the first time. It would be held at the Grove Park Inn and Country Club in Asheville, NC, on August 18, 1978. He announced that the Annual Meeting would be at Kiawah Island near Charleston, SC, on November 2-5, 1978. The Treasurer's report indicated that the balance on hand in checking was $5,568.27 and savings, $10,399.63.

# SCDTAA Trial Academy

Clarke McCants

The Eighth Annual South Carolina Defense Trial Attorneys' Association Trial Academy is scheduled to be held July 8, 1998 through July 10, 1998 at the USC School of Law. As in the past, the Academy should provide participants with a great opportunity for hands-on and practical trial experience to sharpen their advocacy skills.

In 1991, the SCDTAA began the Trial Academy. The purpose was to give young Association 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 were very successful, 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. There will also be a social gathering on Thursday night.

The third day of the program is reserved for the actual trials of cases before a judge and jury. As in the past we hope to be able to conduct the trials at the Richland County Judicial Center.

Enrollment in the Academy is limited to 24 students. The Academy is designed for SCDTAA members who have been in practice for less than five years and have some trial experience - this however, is not mandatory.

The cost for the Academy is $600.00. Each student is responsible for his or her own lodging. Lunch during the Academy will be provided and students are responsible for the remaining meals. We also anticipate that the Academy will qualify for CLE credit.

Anyone interested in the Academy, either as a student or instructor, should call Carol Davis at the SCDTAA Headquarters at 1-800-445-8629, or Clarke McCants at (803) 649-6200.

# DRI Mid Atlantic Region to Meet with SCDTAA

William A. Coates

The Mid Atlantic Region of the Defense Research Institute will hold its annual meeting at The Grove Park Inn in Asheville in conjunction with the joint meeting of the South Carolina Defense Trial Attorneys' Association and the South Carolina Claims Management Association. Participation in this meeting is open to members of the executive committees of the local defense organizations of North Carolina, Virginia, Maryland, the District of Columbia and South Carolina. In 1997, the regional meeting was held at Hilton Head in conjunction with the annual meeting of the North Carolina Defense Lawyers' Association.

Plans presently call for attendees to arrive in Asheville on Friday and join the members of our two Associations for the Friday evening function. The regional meeting will be held during the day on Saturday, July 25, 1998, with dinner following on Saturday evening.

## ALIMONY BEFORE TOBACCO

Judge JAMES K. HINES, in Smith v. Smith, 154 GA. 702, 115 S.E. 73.

**FACTS** The court held that the trial judge did not abuse his discretion in awarding the wife $20 per month as temporary alimony and $50 as attorney's fees, the latter amount to be paid in monthly installments of $10 each.

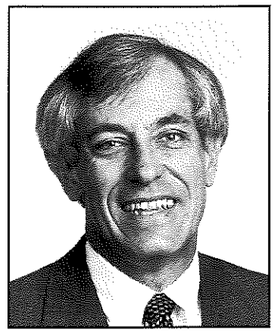
**OPINION:** In their brief, counsel for the defendant states that, after paying this alimony and fee, he will not have any money for tobacco. We appreciate the pleasures of this weed. By experience, the writer knows how hard it is to break oneself from its use. When a man enters into the bonds of matrimony, he puts a yoke upon his neck, which is often light and easy to be borne, but which is sometimes heavy and hard to be borne. One of the matrimonial burdens is the support of his wife and children by the husband; and, when a conflict arises between the dischare of this duty and the use of tobacco, the latter must yield to the former. We can only hope that, by the increase in earnings or a decrease in the cost of living, the defendant will not be deprived of his tobacco.



# President's Letter

Bill Davies

John Wilkerson, your President-Elect, is chairing the Long Range Planning Committee for the Association during 1998. This committee is to study all aspects of the organization and consider any suggestions. If you have thoughts in this regard, please contact John.



One aspect of long range planning is a recommendation approved by the Executive Committee which will be presented to the membership at the Joint Meeting. This proposal would alter the present order of holding office within the Association. At present, when an individual is selected to the officer ranks of the organization, the new member is normally elected as the treasurer. After a year, that individual is considered for the position of secretary. Following a year as secretary, a person is considered for the position of President-Elect. The position of secretary is less detail oriented due to the outstanding professional administrators we have for the organization. The Executive Committee believes that reordering the "officer positions" would be helpful. Thus, if the proposal is accepted by the membership at the joint meeting in Asheville, Mike Bowers would again be considered for treasurer for next year (1999), and the incoming officer would be considered for the position of secretary. If any of you have a comment regarding this recommended change, please contact any member of your Executive Committee.

Another area for consideration is the makeup of the Executive Committee. At present the Executive Committee consists of the officers, the immediate past president, and 12 Executive Committee members. Two representatives are selected from each congressional district (as those districts existed immediately prior to the 1992 reorganization of congressional districts). A recent survey indicates that the membership of the organization is very strongly centralized in three counties. At the time of the survey, the organization had 780 total members. Of that number, 291 resided in Richland County, 170 in Charleston County, and 145 in Greenville County. Florence has 39 members, Horry County has 26, Spartanburg County 24, Beaufort 15, and Anderson 11. These are the only counties with greater than "single digit" membership. Basic math tells us that approximately 78% of our members reside in the three counties of Richland, Charleston, and Greenville. This has led to problems in obtaining active representation for some of the districts which did not include one of these larger counties. Also, interested lawyers in these smaller counties have limited leadership opportunities. The Long Range Planning Committee will review this matter and hopefully make a recommendation for a change in the membership of the Executive Committee and/or the districts for election of Executive Committee members. The intent of the new plan will be to provide adequate representation for all of the counties in the state, but will also recognize the numerical imbalance which exists in the three main counties. If you have any suggestions in this regard, please contact John Wilkerson.

## New DRI State Chairman

The South Carolina Defense Trial Attorneys' Association is represented at meetings of the Defense Research Institute by the South Carolina State DRI Chairman. David Dukes of Nelson Mullins in Columbia has been the South Carolina DRI Chairman for the last three years. David has done an outstanding job representing us at DRI, and the Association owes David a vote of thanks for holding this position while it was in its formative stages under the new DRI approach to local organizations.

As allowed by the bylaws of DRI, your Executive Committee has elected Bill Coates of Greenville as the new chair for the next three years. Bill, a partner in the firm of Love, Thornton, Arnold & Thomason in Greenville, is a 1974 graduate of the University of South Carolina School of Law where he served as President of Phi Delta Phi. Subsequently, he has practiced in both Washington, D.C. and Greenville. Bill was President of the South Carolina Defense Trial Attorneys' Association in 1994. As state chair, Bill will be an ex-officio member of the Executive Committee for the next three years. If any of you have any questions about DRI, please call Bill.

# The Aftermath of Hedgepath in Workers' Compensation

Don S. Clardy and Jeffrey D. Ezell,
Gibbes, Gallivan, White & Boyd, P.A.

*A Physician shall respect the rights of patients, of colleagues, and of other health professionals, and shall safeguard patient confidence within the constraints of the law. - S.C. Code Reg. 81-60(D) Principles of Medical Ethics.*

**"...within the constraints of the law."** - Until recently, this sentence would have seemed reasonably straightforward and understandable. As is often the case, however, judicial interpretation under a seemingly narrow set of facts has given rise to a heated debate between claimant's attorneys and workers' compensation defense attorneys. Presently, the debate seems to center on the extent to which a physician may communicate with counsel for a party adverse to his patient. Perhaps nowhere is this debate being waged with more fervor, and less assuredness, than in the workers' compensation arena.

## Recent Decisions

In January of 1997, the South Carolina Supreme Court decided the case of *South Carolina State Board of Medical Examiners v. Hedgepath*, 480 S.E.2d 724 (S.C.1997).[1] The *Hedgepath* case involved a physician engaged in the practice of addictionology who had served as the family therapist for a married couple. Sometime later, he ceased therapy with the husband, but continued as the individual therapist for the wife.

The couple later instituted divorce proceedings and the physician was contacted by the attorney for the husband. At the informal request of the husband's attorney, and without the knowledge or consent of the wife or her attorney, the physician prepared an affidavit for use by the husband at the family court temporary hearing. Although the Court's opinion did not divulge the specific content of the affidavit, it was stipulated that the affidavit contained "confidences" entrusted to the physician by the wife during the course of therapy. Further, it was clear that the affidavit was not compelled by subpoena or other legal process.

In holding that the physician's actions violated the applicable Regulation[2], the Court conceded that there exists no evidentiary physician-patient privilege in South Carolina.[3] The Court further stated, however, that there exists a fundamental difference between information subject to a "physician-patient privilege" and a patient "confidence". The Court essentially decided that a physician violates his professional duty when he, without the compulsion of legal process or the express authorization of his patient, reveals the confidences entrusted to him by that patient. As such, the *Hedgepath* Court found that the physician involved was subject to professional sanction for his conduct.

Before the ink was dry on the *Hedgepath* decision, the South Carolina Court of Appeals carried the issue one step further. In *McCormick v. England*, Op. No.2751, Filed November 17, 1997, the Court of Appeals held that there exists a private cause of action in South Carolina for a physician's breach of the "duty of confidentiality". The factual circumstances underlying the *McCormick* decision were similar to *Hedgepath*, i.e., a written statement prepared by a treating physician and used in a family court proceeding by the party adverse to the plaintiff/patient. The physician in *McCormick* prepared a "To Whom It May Concern" statement indicating that the patient in question was a "danger to herself and to her family with her substance abuse and major depressive symptoms". Although the physician claimed he prepared the statement in response to a subpoena, and in lieu of attending the Family Court hearing, the record reflected that the subpoena post-dated the doctor's statement.

Citing *Hedgepath* for the proposition that a duty to maintain patient confidences exists independent of any physician-patient privilege, the Court of Appeals held that South Carolina public policy favors the maintenance of the confidential nature of the physician-patient relationship. The Court of Appeals went on to follow what it called the "majority rule" and held that a cause of action in tort exists for the breach of the duty to maintain the confidences of a patient "in the absence of a compelling public policy interest or other justification for the disclosure". *McCormick, supra.*

This last phrase from the *McCormick* opinion has generated much of the debate within the community of workers' compensation practitioners. Physicians are beginning to refuse to talk to attorneys representing the employers and carriers even though the defendants are often paying the bills for treatment. In some cases the doctors have received letters forbidding them from talking to attorneys for the employers. These cautionary letters to the medical community implicitly warn against potential tort liability for disclosure of any "confidential" information relating to claimants under their care. It is almost certain that these actions by the claimant's bar will have a chilling effect on what has long been a free exchange of relevant medical information within the workers' compensation context.

## Applicable Workers' Compensation Statutes And Regulations

South Carolina Code Section 42-15-80 provides in pertinent part:

> No fact communicated to or otherwise learned by any physician or surgeon who may have attended or examined the employee, or who may have been present at any examination, shall be privileged, either in hearings provided for by this Title or any action at law brought to recover damages against any employer who may have accepted the compensation provisions of this Title.

Most of the cases interpreting this statute deal with other portions of the same section pertaining to the employer's right to request that the claimant submit to a medical evaluation. There do not appear to be any cases directly addressing the extent to which the express absence of any "privilege" pertains to the release of any "confidences".

South Carolina Code Section 42-15-95 also has significant bearing on this issue. The applicable portion of this statute reads:

> **All existing information** compiled by a health care facility, as defined in Section 44-7-130, or a health care provider licensed pursuant to Title 40 pertaining **directly** to a workers' compensation claim **must** be provided to the insurance carrier, the employer, their attorneys, or the South Carolina Workers' Compensation Commission, within fourteen days after receipt of written request. (Emphasis added).

Finally, South Carolina Workers' Compensation Regulation 67-1301(D) clarifies, Section 42-15-95 and provides that:

> The physician **shall furnish** on demand **all medical information relevant** to the employee's complaint of injury to the claimant, the employer's representative, and the Commission. (Emphasis added).

As expected, the debate surrounding these statutes and Reg. 67-1301(D) has recently grown more fierce. What impact do *Hedgepath* and *McCormick* have on these statutes and the regulation?

## Discussion

While the South Carolina Courts have discussed whether an adverse party is entitled to *ex parte* communications with treating physicians in other civil cases, the courts have yet to address whether *ex parte* communications are appropriate between defense counsel and a patient's treating physician in the workers' compensation arena.[4]

Courts in other jurisdictions that have addressed this issue in tort and domestic cases have reached conflicting results. Many courts have held that the policy of protecting confidential communications made by a patient to a physician ultimately prevails. However, the traditional respect accorded the physician-patient relationship under other circumstances does not necessarily carry the same weight in workers' compensation cases, as Sections 42-15-60 and 42-15-80 specifically and exclusively vest the employer/carrier with the right to direct medical treatment and examinations. Arguably, Regulation 67-1301(D) authorizes the employee's physician to provide confidential relevant information to the defense attorney.

Courts which have denied *ex parte* interviews with a plaintiff's treating physician in civil cases, have done so for a number of policy reasons. First, courts have denied *ex parte* interviews based upon the confidentiality underlying the physician-patient relationship. Courts are generally concerned that *ex parte* interviews might result in the disclosure of irrelevant, privileged medical information. Placing the burden of determining relevancy on an attorney, who does not know the nature of the confidential disclosure about to be elicited, is risky at best. Critics likewise argue that asking a physician, who is untrained in law, to assume the burden of determining whether certain information is relevant to the claim being litigated, is unfair to the physician, and places him at risk of liability.

A physician has an interest in avoiding inadvertent wrongful disclosures, as a cause of action may lie against a physician for wrongful disclosure of privileged or confidential

Continued on page 8

Continued from page 7

information, as was the case in *McCormick*. Additionally, physicians have a self-imposed standard of conduct, originating in the Hippocratic oath, that a physician not disclose a patient's confidences without the patient's consent, except as authorized or required by law. Clearly, the risk of making that type of disclosure is greatly enhanced during an *ex parte* communication between opposing counsel and a treating physician.

There is also a concern that an adversarial attorney will attempt to improperly influence a patient's treating physician. The perceived danger here rests in the notion that the patient's lawyer is afforded no opportunity to object to the disclosure of medical information that is irrelevant or compromising in a context other than the lawsuit at hand.

Weighing policy arguments such as these in workers' compensation cases is within the discretion of the legislature, not the courts. Furthermore, unlike in civil cases, the policy considerations relevant to workers' compensation law suggest that *ex parte* communications between defense counsel and the treating physician are appropriate so long as they are restricted to relevant medical information.[5] This argument is further enhanced in states where there is no statutory physician-patient privilege, as is the case in South Carolina.

As discussed above, *Hedgepath* and *McCormick* have held that the communication of patient confidences constitutes a breach of fiduciary duty, unless such communication is compelled by law. However, the South Carolina Workers' Compensation statutes and Regulation 67-1301(D) discussed above clearly state that physicians "must" provide relevant medical reports **and** medical information to representatives of the employer upon demand.

While medical reports clearly consist of written documents, there is nothing in the language of the Reg. 67-1301(D) that requires "medical information" to be in written form. Likewise, South Carolina Code Section 42-15-80 pertains to any fact "communicated or otherwise learned by any physician or surgeon who may have attended or examined the employee...". Once again, there is nothing in the language of this statute that would appear to limit its scope to written medical reports or documentary facts. Rather, the language in Reg. 67-1301(D) and Section 42-15-80 opens the door for the employer/carrier to obtain all relevant information known by the treating physician.

Further, the lack of any obvious statutory distinction between a medical report and medical information clearly suggests that the release of relevant medical information is not limited to the written form. Generally, the words of a statute or regulation must be given their plain and ordinary meaning.[6] The ordinary meaning of "information" is "the communication or reception of knowledge or intelligence."[7] As such, a physician who releases medical information either in the form of written reports or by verbal communication when required by statute, should not be exposed to any legal liability.

Moreover, the public policy considerations relevant in tort and domestic cases should not be controlling in the workers' compensation context. Rather, one must analyze the underlying goals and policy considerations relevant to the Workers' Compensation system. The threat of disclosing irrelevant medical information that may compromise the confidential nature of the doctor-patient relationship is always a concern. However, the scope of inquiry in Workers' Compensation cases is generally so narrow that the possibility of revealing extraneous or irrelevant medical information which constitutes a patient confidence is significantly lower than in civil cases.[8]

Additionally, an important goal of the Workers' Compensation system is to provide for the quick and efficient delivery of benefits to injured and disabled workers at a reasonable cost to the employers who are subject to the provisions of the Workers' Compensation Act. To produce quick and efficient payment of benefits, discovery must also be more efficient and less costly. Informal methods of discovery such as *ex parte* interviews (which are allowed by the Workers' Compensation Act) are clearly less expensive and time-consuming than formal discovery, especially when dealing with physicians whose depositions often result in substantial costs to the deposing party.

Allowing informal communications also prevents the claimant's attorney from strategically excluding potentially unfavorable evidence related to the case, or from using the doctor's fiduciary duty of confidentiality to manipulate or influence the physician's testimony. The treating physician should be free to receive input from both parties to the litigation as opposed to being sheltered from everyone except his patient. Allowing defense counsel access to the claimant's treating physicians clearly helps to mitigate the tactical advantage which the claimant may attempt in these cases. This argument is particularly applicable in the majority of workers' compensation cases where the defense attorney represents the employer/ carrier who is paying the medical bills and thus has a significant client relationship with the physician.

While *ex parte* communications between defense counsel and treating physicians should clearly be allowed in workers' compensation cases, this should not be considered a "blank check" to unlimited communication between attorney and physician. John Freeman, Professor of Law at the University of South Carolina, who is well versed in the legal and ethical issues related to *ex parte* communications, endorses the propriety of *ex parte* communications between defense counsel and treating physicians in workers' compensation cases. Professor Freeman urges that the free and open exchange of all relevant medical information between the treating physician and defense counsel is appropriate, and based upon the pertinent statutes, informal *ex parte* communication between treating physicians and defense attorneys should clearly be allowed in workers' compensation cases.

Professor Freeman also states, however, that both the inquiring attorney and the physician are asking for trouble, and are apt to find it, when the attorney asks, and the physician responds to, questions calling for information beyond the scope of the physician's medical reports and historical observations in the case. Professor Freeman warns that, in his opinion, an attorney steps out of bounds when he or she leads a physician to provide data or opinions beyond the realm of relevant historical medical information for the attorney to use as an advocate. In other words, Professor Freeman views South Carolina workers' compensation law as providing protection to lawyers who contact physicians and gather factual data already imparted to the physician. However, Freeman does not read either the workers' compensation statutes or Reg. 67-1301(D), to protect lawyers who seek to turn claimants' physicians into *de facto* expert witnesses, used to generate opinions aimed at undermining their patients' cases. The distinction, according to Freeman, is between providing existing data (which appears permissible in workers' compensation cases) and generating new information useful to the patients adversaries.[9]

## Conclusion

Needless to say, as this question is currently posed, there are infinitely more arguments than answers. This article is by no means intended to be an authoritative solution to a debate that will likely continue for some time to come. There are strongly held opinions on each side of this issue, and final resolution is perhaps best left to the legislature. In the meantime, defense attorneys must continue to practice within the haze that exists between *Hedgepath* and *McCormick* on the one hand, and the Workers' Compensation Act on the other. From a practical standpoint, statutory support appears to exist for the right of counsel for the employer and/or carrier to speak informally with the claimant's physicians, at least with regard to information clearly relevant to the pending claim. Those who choose to proceed in this fashion, however, are best advised to heed Professor Freeman's caution by staying within the bounds of relevant information pertaining to medical reports and tests. Further, attorneys should stay well clear of any actions or inquiries which could be perceived as intended to sway or influence the medical opinions or treatments of a physician. When in doubt, it's probably still best to depose.

## Footnotes

[1] It should be noted that during the time relevant to the facts in *Hedgepath*, the pertinent Regulation from the *Principles of Medical Ethics* was amended and/or rewritten. Although the language of the two Regulations was quite different, the Board of Medical Examiners, and the Supreme Court, felt that there was no substantive difference between the two versions.

[2] S.C. Code Reg. 81-60(D).

[3] *See, e.g. Peagler v. Atlantic Coast Line Railroad*, 101 S.E.2d 821 (S.C. 1958); *Aakjer v. Spagnoli*, 352 S.E.2d 503 (S.C. App. 1987).

[4] It should be noted that the McCormick court specifically delineated a number of situations where a physician is authorized by law to reveal information gained in his or her professional capacity. Among those circumstances listed were situations involving the suspected physical or mental abuse of a child and the notification of the spouse or known contact of an HIV positive individual. Conspicuously absent from this list was the situation at hand, i.e., communications with the employer/carrier and/or its representatives in the workers' compensation setting.

[5] A numberof states have allowed *ex parte* communication in workers' compensation cases, despite the fact that they have expressly prohibited them in other civil matters. In 1988, the Supreme Court of Washington held that defense counsel may not engage in *ex parte* contacts with a plaintiff's treating physician even if physician patient privilege has been waived. *Loudon v. Mhyre*, 756 P.2d 138 (Wa. 1988). However, in 1992 the same court held that defense counsel is not prohibited from communicating *ex parte* with claimant's treating physician in workers' compensation cases. Likewise, in 1986 the Supreme Court of Iowa held that waiver of physician patient privilege has no application to a nontestimonial situation and thus private conversations between defense counsel and a treating physician are not allowed in personal injury cases. *Roosevelt Hotel Ltd. Partnership v. Sweeney*, 394 N.W.2d 353 (Iowa 1986). However, in 1989, the same court held that when a claimant waived privilege pertaining to the release of medical information in a workers' compensation claim, that claimant does not have the right to have her counsel present when the employer's counsel interviewed the claimant's treating physician. *Morrison v. Century Engineering*, 434 N.W.2d 874 (Iowa 1989). Finally, in 1993, the West Virginia Supreme Court of Appeals held that absence of statutory physician-patient privilege did not negate the existence of confidential physician-patient relationship such that defendant in medical malpractice action could conduct *ex parte* interviews with patient's treating physicians. *State ex rel. Kitsmiller v. Henning*, 437 S.E.2d 452 (W.Va. 1993). Subsequently, in 1994, the same court held that ex parte communications were allowed in workers' compensation cases in order to resolve claims more expeditiously, but limited the communications to information contained in the written medical reports or other routine inquiries which do not involve the exchange of confidential information. *Morris v. Consolidation Coal Co.*, 446 S.E.2d 648 (W.Va. 1994).

[6] *Proveaux v. Medical University of South Carolina*, 482 S.E.2d 774 (S.C. 1997).

[7] *Webster's New Collegiate Dictionary* 592 (1977).

[8] Medical issues are often the sole issues in dispute in workers' compensation cases, unlike in *Hedgepath* and *McCormick*, which were domestic cases where the confidences disclosed were ancillary issues.

[9] Comments by Professor Freeman were obtained during a phone interview and are quoted with his approval.

# Recent South Carolina Bar Ethics Opinion Regarding Audit Services and Legal Bills

Upon request by a SC Bar member, the Ethics Advisory Committee has rendered this opinion on the ethical propriety of contemplated conduct. This committee is not the disciplinary authority over attorneys in this state. Such authority is the SC Supreme Court.

### Ethics Advisory Opinion 97-22

### Date:

12/97

### Facts:

Law Firm represents Insurance Company and defends its insureds under its liability policies. Insurance Company sends Law Firm's bills to an outside Audit Company, which is not affiliated with or an employee of Insurance Company. Audit Company makes recommendations to Insurance Company as to payment or nonpayment. Law Firm's bills contain detailed information about the services performed pursuant to the representation. In addition to this, Insurance Company has asked Law Firm to allow Audit Company to review the detailed bills which Law Firm has sent to other insurance companies, unrelated to Insurance Company.

### Questions:

1. Would Law Firm's submitting its Insurance Company bills directly to Audit Company, rather than to Insurance Company, violate the South Carolina Rules of Professional Conduct?
2. Would Law Firm's submitting other clients' bills to Audit Company violate the South Carolina Rules of Professional Conduct?

### Summary:

While Law Firm may submit its Insurance Company bills directly to Audit Company, after fully informed consent by company and insured, submitting other clients' bills to Audit Company would violate the Rules of Professional Conduct

### Opinion:

The confidentiality of client communications is governed by SCRPC 1.6. "A lawyer may not ...reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation...." *Id.* Two other exceptions, one dealing with prospective criminal acts and one with defenses on the lawyer's behalf, are enumerated in the rule. The comments to the rule also acknowledge that final court orders and provisions in SCRPC 2.2, 2.3, 3.3, and 4.1 allow, or require, certain disclosures. The comment regarding "disclosures impliedly authorized" is narrowly written. **Lawyers must keep "inviolate" client confidences; such is a fundamental part of the relationship**. SCRPC 1.6, Comment. The ethical duty of confidentiality is broader than the evidentiary privilege, Robert M. Wilcox, *South Carolina Legal Ethics* Section 6 (South Carolina Bar CLE Division 1996), and continues after the representation has concluded. Rule 1.6, comment.

A review of some of our prior opinions concerning the release of client information will be helpful in defining the scope of Rule 1.6. The opinion most similar to the situation presented in this opinion is Adv. Op. 89-03. There, the Committee opined that where a real estate lawyer is also an agent for a title insurance company, the lawyer may not, pursuant to the company's audit, disclose information from its real estate files without the express, informed consent of the client (unless the information was already released to the insurer to obtain the insurance). That opinion mentioned, without resolving, the separate question of releasing information of clients which did not have a relationship to the insurer. Other relevant opinions include the following: a lawyer who is a party to a lawsuit may not, in response to discovery requests, identify former clients or the amount of work done for them, without the informed consent of each client (unless under court order) (Adv. Op. 90-14); a lawyer may not reveal client confidences to a person holding the client's power of attorney, unless the client is incompetent or consents (Adv. Op. 93-04); preparing legal memoranda for an insurance company's agents requires informed consent (Adv. Op. 90-09); a lawyer should not reveal a client's address, if the address was communicated in confidence, absent a court ruling (Adv. Op. 94-30); a lawyer who, after the representation has ended, discovers that the former client committed a crime during the representation, may not disclose that fact without informed consent (Adv. Op. 90-30); a lawyer may only perform a credit check on a client if doing so does not reveal the person's status as a client; similarly, a lawyer may not report a nonpaying client to a credit bureau (as it is not necessary to the collection process) and may only tell a collection agency information necessary to the collection of the legal fee (Adv. Op. 94-11).

### Question One:

Upon receipt of informed consent from the insurer as well as the insured, a lawyer would not be ethically prohibited from submitting his bills directly to a third-party auditing firm, unless the lawyer believes that doing so would **substantially affect the representation**.

As a final consideration prior to addressing the individual questions, the question of the identity of the client must be answered. When a lawyer is hired by an insurance company to defend a person under the insurer's liability policy, the lawyer has two clients: the insured and the insurer. The lawyer's duty to the insured is governed by the Rules of Professional Conduct, not by the insurance contract. ABA Formal Op. 96—403. Therefore, the lawyer should have the informed consent of the insured, as well as the insurer, prior to releasing billing information to third parties.

### Question Two:

Law Firm may not ethically release other clients' billing records to Audit Company. As a practical matter, achieving the informed consent necessary to such an endeavor is highly problematic. Client consent to the release of confidential information must be informed consent, based upon more than the mere fact that a certain type of information, such as billing records, will be released to third parties. Due to the potential effects of the misuse or abuse of such information, disclosure must be full. The lawyer should elaborate on the type of information which may be found in billing records, as well as the potential legal effects of releasing such information to third parties. While this committee does not express opinions on legal questions, a lawyer contemplating the release of client billing information to third parties should carefully consider issues of waiver and other possible impacts on the case, as well as informing his client of such matters as a part of obtaining informed consent.

Since Lawyer would be serving lawyer's own interests by turning over a past client's billing records to a third party, Lawyer must take careful steps to avoid self-dealing and conflict of interest as described in Rule 1.7(b).

### Footnotes

[1] Readers interested in this particular topic may also refer to the recent case of *AIA v. Kentucky Bar Association*, 917 S.W. 568 (Ky. 1996).

[2] *See also* the recent South Carolina cases of *South Carolina Medical Association v. Hedgepath*, 480 S.E.2d 724 (S.C. 1997) and *McCormick v. England*, (S.C.Ct. of App., Opinion No. 2751 filed November 17, 1997) - which create a common law cause of action for release of privileged (confidential) information by a physician to a third party.

# Legislative Report

James R. Courie

The Legislature returned to Columbia on January 13, 1998, to begin the second session of the 112th General Assembly. Although they return to a full slate of issues, election year politics will impact much of this year's actions. The year 1998 brings all 124 members of the House of Representatives up for re-election along with the governor, lieutenant governor and other constitutional officers. We anticipate that most of the attention will be devoted to video gaming, taxation of personal motor vehicles, and educational incentives. Nevertheless, we will continue to monitor several key pieces of legislation that impact our organization.

The Medical Incident/Occurrence Report (H.3248) legislation seems to be getting a considerable amount of attention. As you may recall, this legislation was sponsored by Representative Fletcher Smith (D-Greenville) and requires hospitals and other health care facilities to include and maintain as part of a patient's medical records, any incident or occurrence report that is in any way related to the diagnosis, care, or treatment of a patient. By requiring these reports to be included in a patient's medical records, they will certainly be more available for discovery in any civil action that might arise. The Bill is presently on the House calendar. There have been several attempts to refer the Bill to Committee; however, as of this time, those attempts have been unsuccessful. The Hospital Association and other medical organizations are working diligently to defeat this legislation. It appears that the legislation has a good chance of passing the House, and further lobbying efforts may need to focus more on the Senate.

We anticipate some activity on Senator Saleeby's (D-Hartsville) Bill that requires bench trials when the amount in controversy is less than $25,000 (S.19). The Bill is currently in the Senate Judiciary Committee. We continue to monitor the proposed Tort Reform legislation (H.3019, H.3023, H.3024). Representative Kirsh's bills remained in committee last year; however, there will likely be an effort to get this legislation on the House calendar. There will also be significant activity on the Pre-Paid Legal Insurance legislation (H.3299). It appears that pre-paid legal insurance will be approved in South Carolina. The main issue at this time will be whether or not our state will permit closed panel insurance programs. As you may recall your Association appeared before the subcommittee to address the issue. There seems to be a compromise brewing to allow insurers to offer closed panel programs only if there is a competitively priced open panel alternative.

Finally, there are a number of judgeships up for election this year. Last year several judicial elections were not held because of a dispute between the Senate and House concerning the weighting of votes between Representatives and Senators. Efforts are underway to resolve the impasse, and hopefully elections will take place this session.

If you are interested in a particular piece of legislation or are aware of legislation that will affect our Association or our clients, please contact me. Our members are our greatest resource. I can be reached at (803) 779-2300, or by e-mail at jcourie@mgclaw.com.





# Evidence Matters

E. Warren Moise
Grimball and Cabaniss, L.L.C.

## THE SHIELD AGAINST EVIDENCE OF SUBSEQUENT REMEDIAL MEASURES

### A. INTRODUCTION

After learning that his product caused an injury, the fact that a defendant takes steps to prevent future injuries or accidents might be relevant (at least under a liberal view) that he was negligent for not having previously done so.[1] However, such evidence also has a tendency to distract a jury and create prejudice against a defendant.[2]

Rule 407 controls the issue of subsequent remedial measures. It generally prevents remedial measures to be used as evidence of a rule-801(d)(2) party admission[3], although it may not limit discovery into this issue.[4]

Federal rule 407 was revised effective December 1, 1997.[5] The new language specifically includes products liability cases within rule 407's protection.[6] The commentary notes to the amendment state that if the probative value of the evidence regarding remedial measures is outweighed by the danger of unfair prejudice or confusion, rule 403 may be a ground for exclusion.[7] A stipulation by the defendant about a controverted issue may preclude evidence of remedial changes.[8]

South Carolina Rule of Evidence 407 is still identical to the former federal rule. Staff notes to the South Carolina rule state that it is "consistent" with prior South Carolina law.[9]

Although the federal rule's advisory committee notes use "accident" in describing rule 407 and its limitations, other courts have read it more broadly. Enforcement of a claimed unconstitutional limitation of a prisoner's access to an attorney[10] and a contractual provision violating antitrust law have been held to be excludable under the rule.[11]

The primary basis for the rule is a policy of encouraging ("or at least not discouraging") accident prevention.[12] Another reason for excluding such measures is a lack of relevance.[13] Rule 407's protection sometimes is interpreted more broadly than some attorneys might think, but like any rule, there are notable exceptions. Some important aspects of the rule are discussed below.

### B. WHAT IS AN EVENT?

The federal rule bars remedial steps taken after an injury or harm, and the state rule bars steps following an "event." Apparently, only fortuitous personal injury was considered an event at common law.[14] The addition of the word "harm" might be seen as a broadening of the rule, as one definition of harm includes "damage,"[15] which would relate to almost any cause of action. Under the common law, however, the rule would be inapplicable to a breach-of-warranty action.[16]

### C. IS THE EVIDENCE A SUBSEQUENT REMEDIAL MEASURE?

If the defendant's act is a remedial measure, it generally is inadmissible. What are examples of subsequent remedial measures? Obviously evidence that a product or place has been improved and made more safe is inadmissible.[17] The rule is broader, however: "[C]ourts have applied this principle to exclude evidence of . . . changes in company rules . . . and discharge of employees . . . ."[18] Other examples might be: (a) new instructions issued by a company after a negligent act;[19] (b) removal of a hazardous condition from the place where an accident occurred;[20] (c) recall letters;[21] (d) spreading sand or salt on ice after a fall;[22] (e) corrections to an unsatisfactory employee evaluation after the employee complained that it was unfair;[23] (f) discontinuance and/or temporary withdrawal of a product from the market;[24] and (g) corrective action noted in a corporation's annual report.[25] If the measure occurred immediately after the accident (such as turning on one's car lights), a court might be tempted to read in a *res geste* exception to rule 407.[26]

On the other hand, some of the things that have been held not to be within the rule's protection are: (a) reports of investigations made after the event;[27] (b) a service bulletin referring to the recall of a battery charger that allegedly had caused a fire;[28] (c) rebuttal to a contributory negligence defense and to refute

Continued on page 14

Continued from page 13

testimony;[29] and (d) subsequently released publications which contain warnings.[30]

Even if the remedial measure was admitted, a curative instruction might remove any otherwise reversible error.[31]

## D. WHAT IS THE CUTOFF DATE FOR EVIDENCE OF REMEDIAL MEASURES?

The new federal rule specifies that barred remedial measures include those taken after an injury or harm occurred.[32] State rule 407 has not yet been amended to read like the federal rule, but the common law held that steps taken after an injury were barred.[33] Events occurring after the date of the sale but before an accident generally would be admissible as an inference of negligence.[34]

## E. WHAT ARE SOME EXCEPTIONS TO THE RULE?

Remedial measures are inadmissible to show negligence or culpable conduct. They may be admissible for other reasons, however.[35] Thus, if the issue is actually controverted,[36] evidence of subsequent remedial measures may be allowed to show ownership, control,[37] or feasibility of precautionary measures.[38] Another possible use is to prove the existence of a "duty" (such as a duty to repair),[39] although this is difficult to separate from proof of negligence.[40] Changes made by third parties are often seen as admissible.[41] Under prior state law, an exception permitted use of the measures to show conditions existing at the time of the accident[42] and in actions not founded upon negligence.[43]

## F. THE IMPEACHMENT EXCEPTION

Rule 407 states that evidence of subsequent remedial measures may be permitted for impeachment of a witness's credibility,[44] an exception that could swallow up the general rule.[45] The courts[46] and legal authorities[47] have noted that this exception, if expansively applied, is a cause for some concern. Thus, its application has been applied cautiously[48] and often concurrently with a rule 403 analysis.[49] The impeachment exception may not be used as a subterfuge to admit evidence of negligence or culpability.[50]

The cases allowing subsequent remedial measures to be proved for impeachment reasons often involve a witness, frequently an expert, first having opened the door into an issue[51] or otherwise just being seen as necessary for a credibility attack.[52] Examples are when a witness: (a) uses superlatives about a product such as being the best and safest product on the market;[53] (b) contradicts the propriety or necessity of sending a warning of a product's dangers when his own employer or client has done so;[54] (c) states that a product is safe despite his own letter admitting that the product can cause death if not "rigidly mounted";[55] (d) testifies that language in a notice explaining stock options was simple and straightforward;[56] or (e) states that all reasonable care was being exercised at the time of a rape.[57] Note that a mere denial of negligence by the defendant does not permit remedial measures to be introduced under the guise of impeachment.[58] Judge G. Ross Anderson, while noting the Fourth Circuit of Appeals' strictness on the admissibility of subsequent remedial measures and that there is no definitive ruling on the question, has posited the question whether the door is opened when an expert states he relied in part upon a manufacturer's design changes.[59]

If its witness opens the door at trial, the defendant may attempt to close the door by making an immediate motion to strike its witness' answer as non-responsive.[60] Note that the adverse party may not purposely open the door on cross-examination and then take advantage of the situation through impeachment.[61]

## G. CONCLUSION

Subsequent remedial measures are generally excluded from evidence under rule 407. However, approaching any case potentially involving rule 407 should be done cautiously, as the defendant or its witnesses might well inadvertently blunder into giving the plaintiff the very weapon with which to destroy its case.

## Footnotes

[1] Fed. R. Evid. 407 advisory committee notes. *See generally* Russell J. Davis, *Admissibility of Evidence of Subsequent Remedial Measures Under Rule 407 of Federal Rules of Evidence*, 50 A.L.R. Fed. 935 (1980)[hereinafter *Admissibility of Evidence*].

[2] *Bolen v. Strange*, 192 S.C. 284, 292, 6 S.E.2d 466, 469 (1939)(quoting Columbia & P.S. R. v. Hawthorne, 144 U.S. 202 (1892)).

[3] *Cf. Maus v. Pickens Sentinel Co.*, 258 S.C. 6, 186 S.E.2d 809 (1972)(pre-rule 407 common law consistent with federal law).

[4] Compare *Rosier v. Ford Motor Co.*, 573 F.2d 1332, 1345 (5th Cir. 1978)(reversing for defendant's failure to produce discovery document allegedly inadmissible under rule 407) with *Elliott v. Webb*, 98 F.R.D. 293 (D. Idaho 1983)(denying discovery upon relevancy ground). *See also* 1 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Evidence Manual* Section 7.04[02], at 7-76 (1996)(better rule is to permit discovery)[hereinafter *Weinstein's Evidence Manual*]; *Admissibility of Evidence*, *supra* note 1, at 941 (no barrier to discovery).

[5] The first sentence to federal rule 407 is stated below. New language (and thus not included in state rule 407) is underlined; also, new language is followed by brackets containing any deleted language):

When, after an *injury or harm allegedly caused by an* event, measures are taken *which*, if taken previously, would have made the *injury or harm* [formerly reading "event"] less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, *culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction* [formerly reading "or culpable conduct in connection with the event"].

[6] Product-liability cases were already within the rule's protection in the Fourth Circuit. *See Werner v. Upjohn Co.*, 628 F.2d 848, 858 (4th Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981))(cited in *In Re Air Crash Disaster*, 86 F.3d 498, 529 (6th Cir. 1993)). The *Werner* court cited *Chambers v. G. D. Searle & Co.*, 441 F. Supp. 377, 381 (D. Md. 1975), *aff'd* 567 F.2d 269 (4th Cir. 1977) in support of this proposition.

[7] Fed. R. Evid. 407 amendment commentary.

[8] *See Wheeler v. John Deere Co.*, 862 F.2d 1404, 1410-11 (10th Cir. 1988).

[9] *See* S.C. R. Evid. 407 staff note.

[10] *See Ford v. Schmidt*, 577 F.2d 408, 410-11 (7th Cir. 1978).

[11] *See Noble v. McClatchy Newspapers*, 533 F.2d 1081, 1090 (9th Cir. 1975), *reh'g denied*, 537 F.2d 1030 (1976), *vacated on other grounds and remanded for further consideration*, 433 U.S. 904 (1977), *original opinion aff'd*, 536 F.2d 1030 (1976), *cert. denied*, 433 U.S. 904 (1977).

[12] *Id.*

[13] *See Seaside Resorts, Inc. v. Club Car, Inc.*, 308 S.C. 47, 416 S.E.2d 655 (Ct. App. 1992).

[14] *See Green v. Atlantic Coast Line R. Co.*, 136 S.C. 337, 134 S.E. 385 (1926); 23 Charles A. Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* Section 5283, at 102 (1980)[hereinafter *Federal Practice and Procedure*]. The Uniform Code used the word "event," whereas the Model Code used "harm."

[15] *Webster's New Universal Unabridged Dictionary* 827 (2d ed. 1983).

[16] *See, e.g., Manning v. City of Columbia*, 297 S.C. 451, 377 S.E.2d 335 (1989); *Kumpf v. United Tel. Co.*, 311 S.C. 533, 429 S.E.2d 869 (Ct. App. 1993); *Seaside Resorts, Inc. v. Club Car, Inc.*, 308 S.C. 47, 416 S.E.2d 655 (Ct. App. 1992).

[17] *See Maus v. Pickens Sentinel Co.*, 258 S.C. 6, 186 S.E.2d 809 (1972)(pre-evidence rules case).

[18] Fed. R. Evid. 407 advisory committee notes. *See also Mills v. Beech Aircraft Corp.*, 886 F.2d 758 (5th Cir. 1989)(revised shop manual); *Ford v. Schmidt*, 577 F.2d 408 (7th Cir. 1978)(new prison regulation).

[19] *See Whelan v. Welch*, 304 S.C. 548, 405 S.E.2d 836 (Ct. App. 1991).

[20] *O'Dell v. Hercules, Inc.*, 904 F.2d 1194 (8th Cir. 1990).

[21] *Chase v. General Motors Corp.*, 856 F.2d 17, 21-22 (4th Cir. 1988).

[22] *Agostinho v. Fairbanks Clinic*, 821 P.2d 714, 715 (Alaska 1991)(cited in 23 Charles A. Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* Section 5284, at 29 n.14 (Supp. 1997)).

[23] *See Dennis v. County of Fairfax*, 55 F.3d 151, 153-54 (4th Cir. 1995)(racial discrimination suit).

[24] *Rabb v. Orkin Exterminating Co., Inc.*, 677 F. Supp. 424, 429 (D.S.C. 1987).

[25] *Malone v. Microdyne Corp.*, 26 F.3d 471, 480 (4th Cir. 1994).

[26] *See Federal Practice and Procedure*, *supra* note 14, Section 5283, at 103.

[27] *Rocky Mountain Helicopters v. Bell Helicopters*, 805 F.2d 907, 918 (10th Cir. 1986).

[28] *Seaside Resorts, Inc. v. Club Car, Inc.*, 308 S.C. 47, 416 S.E.2d 655 (Ct. App. 1992). *Seaside* was a pre-evidence rules case.

[29] *Rimkus v. Northwest Colo. Ski Corp.*, 706 F.2d 1060 (10th Cir. 1983). The court noted that the "trial judge might well have chosen to exclude the evidence," *id.* at 1066, that such cases are difficult, but that a cautionary instruction had been given, *see id.*

[30] *Wetherill v. University of Chicago*, 565 F. Supp. 1553 (N.D. Ill. 1983).

[31] *See Shields v. Department of Highways and Public Transp.*, 303 S.C. 439, 401 S.E.2d 185 (Ct. App. 1991). *Cf. Benedi v. McNeil-P.P.C., Inc.*, 66 F.3d 1378, 1389 (4th Cir. 1995)(mere mention of subsequent measure before sustained objection not cause for new trial).

[32] If the major goal of rule 407 is to encourage manufacturers to make products safer, the cutoff date for evidence of remedial measures arguably would be the date of manufacture. Similarly, the prejudicial effect might be such that the jury would simply disregard all other evidence and find that the defendant is automatically liable after hearing of remedial measures.

[33] *See Maus v. Pickens Sentinel Co.*, 258 S.C. 6, 12-13, 186 S.E.2d 809, 811 (1972)(referring to common-law rule). *Cf. Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 462 S.E.2d 321 (Ct. App. 1995)(duty to warn or recall controlled by industry standards in effect on the date of manufacture).

[34] *See, e.g., City of Richmond, Va. v. Madison Management Group*, 918 F.2d 438 (4th Cir. 1990); *Chase v. General Motors Corp.*, 856 F.2d 17, 22 (4th Cir. 1988). On the other hand, a plausible argument may be made that if a manufacturer had no knowledge until after the sale that a product was defective but failed to warn or recall the product, evidence of acts between manufacture and injury should be excluded. For cases lending support to this theory, see *Gregory v. Cincinnati Inc.*, 538 N.W.2d 325, 328 (Mich. 1995) and *Bragg*, 319 S.C. 531, 462 S.E.2d 321.

[35] Fed. R. Evid. 407; S.C. R. Evid. 407. According to Wright and Graham, any relevant use of such evidence not involving an inference as to the repairer's consciousness of fault is permissible. *See Federal Practice and Procedure, supra* note 14, at Section 5286. In some cases, similar acts after an event may be admissible to prove intent *Cf. Campus Sweater and Sportswear v. M.B. Kahn Constr. Co.*, 515 F. Supp. 64, 94 (D.S.C. 1979)(stating this proposition in rule-407 discussion), *aff'd* 644 F.2d 877 (4th Cir. 1981).

[36] *See Grenada Steel Indus. v. Alabama Oxygen Co.*, 695 F.2d 883, 888-89 (5th Cir. 1983)(when feasibility of preventative measures not controverted, evidence should be excluded). Even if the other purpose is actually controverted, this should not be a guarantee of admissibility due to the potential for misuse of the evidence. 2 Kenneth S. Broun *et al., McCormick on Evidence* Section 267, at 203 (4th ed. 1992)[hereinafter *McCormick on Evidence*]. The issue should still be examined by the court under rule 403, considering the availability of other means of proof as an important factor in the balancing process. *Id.* A stipulation may preclude evidence of remedial measures. *See Wheeler v. John Deere Co.*, 862 F.2d 1404, 1410-11 (10th Cir. 1988).

[37] See Powers v. J.B. Michael & Co., 329 F.2d 674 (6th Cir. 1964)(pre-rule 407 case dealing with control).

[38] Fed. R. Evid. 407; S.C. R. Evid. 407. *See Doyle v. United States*, 441 F. Supp. 701 (D. S.C. 1977). Feasibility is a troublesome issue that should be analyzed under rule 403 also. For example, *see Gardner v. Chevron U.S.A., Inc.*, 675 F.2d 658 (5th Cir. 1982). *See also Werner v. Upjohn Co. Inc.*, 628 F.2d 848, 853 (4th Cir. 1980)(reversing when evidence of remedial

Continued on page 16

measures admitted for purpose of showing feasibility but actually used to prove negligence).

[39] *See Wallner v. Kitchens of Sara Lee, Inc.*, 419 F.2d 1028 (7th Cir. 1969)(pre-rule 407 case regarding duty to repair).

[40] *See Weinstein's Evidence Manual, supra* note 4, Section 7.04[04](d), at 7-74 (stating that this type use should be excluded unless a three-pronged test is met). For example, evidence of subsequent repairs or other changes have been allowed to show the defendant's duty to repair and also to prove the defendant's ownership or control of the premises when these issues are controverted. *McCormick on Evidence, supra* note 36, Section 267, at 201-02.

[41] *TLT-Babcock, Inc. v. Emerson Elec. Co.*, 33 F.3d 397, 400 (4th Cir. 1994). Admissibility of third-party measures should be covered by the general relevancy rules (401-03). *Weinstein's Evidence Manual, supra* note 4, Section 7.04[01], at 7-65-66.

[42] *See Taylor v. Nix*, 307 S.C. 551, 416 S.E.2d 619 (1992)(citing *Eargle v. Sumter Lighting Co.*, 110 S.C. 560, 96 S.E. 909 (1918)); *Plunkett v. Clearwater Bleachery Mfg. Co.*, 80 S.C. 310, 61 S.E. 431 (1906); S.C. R. Evid. 407 staff note. *Accord Federal Practice and Procedure, supra* note 14, Section 5290, at 149 (continued validity under rule 407 citing law review article). But if the record contains other proof that the prior condition existed or if there is no denial by the defendant that the condition existed, the subsequent measure may properly be excluded. *Landry v. Hilton Head Prop. Owners Ass'n*, 317 S.C. 200, 452 S.E.2d 619 (Ct. App. 1994). Accord *Malone v. Microdyne Corp.*, 26 F.3d 471, 480 (4th Cir. 1994).

[43] See *supra* note 16 for a case citing this principle.

[44] For cases discussing both sides of this issue, *see Petree v. Victor Fluid Power, Inc.*, 887 F.2d 34, 38-39 (3d Cir. 1989)(citing various rulings regarding rule 407).

[45] *See Bickerstaff v. South Central Bell Tel. Co.*, 676 F.2d 163, 169 n.6 (5th Cir. 1982)(cited in *McCormick on Evidence, supra* note 36, § 267, at 203 n.27 and accompanying text).

[46] *See Public Serv. Co. of Indiana v. Bath Iron Works Corp.*, 773 F.2d 783, 792 (7th Cir. 1985); *Flaminio v. Honda Motor Co.*, 733 F.2d 463, 468 (7th Cir. 1984).

[47] *See Weinstein's Evidence Manual, supra* note 4, Section 7.04[04](e), at 7-75 (should not affect courts' traditional reluctance in limiting cross-examination in such cases); *McCormick on Evidence, supra* note 36, § 267, at 203 n.27 and accompanying text (noting concern).

[48] For a pre-rule 407 case, *see Avery v. S. Kann Sons Co.*, 91 F.2d 248 (D.C. Cir. 1937). One ground cited for its exclusion was that because the allegedly defective linoleum had been replaced five or six months after the accident, the evidence was too remote. *See id.* at 250.

[49] For cases permitting impeachment after considering rule 403, *see Petree v. Victor Fluid Power, Inc.*, 887 F.2d 34, 40-41 (3d Cir. 1989) and *Dollar v. Long Mfg., N.C., Inc.*, 561 F.2d 613, 618 (5th Cir. 1977).

[50] *Hardy v. Chemetron Corp.*, 870 F.2d 1007, 1010-12 (5th Cir. 1989).

[51] *See, e.g., Petree*, 887 F.2d at 38; *Bickerstaff*, 676 F.2d at 168 (noting commentator's writings to this effect). *Cf. Petree*, 887 F.2d at 42 (noting no substitute for cross-examination of adversary's sole expert witness).

[52] *See Petree*, 887 F.2d at 42. In *Allred v. Maersk Line Limited*, 826 F. Supp. 965, 969 (E.D. Va. 1993) the court permitted evidence of what it considered to be subsequent remedial measures of important and late-breaking witnesses; the reason was for impeachment. The Fourth Circuit, however, stated that the evidence was admissible but disagreed that it showed any subsequent remedial measures. *See Allred v. Maersk Line Limited*, 35 F.3d 139, 142 (4th Cir. 1994).

[53] *Compare Muzyka v. Remington Arms Co.*, 774 F.2d 1309 (5th Cir. 1985)(design change admissible after expert's use of superlatives claiming that rifle was "the" best and safest on market) with *Hardy v. Chemetron Corp.*, 870 F.2d 1007, 1011 n.9 and accompanying text (5th Cir. 1989)(refusing to allow impeachment when no similar superlatives used by defendant's witness); *Probus v. K-Mart, Inc.*, 794 F.2d 1207, 1210 (7th Cir. 1986)(defendant's claim that materials used were appropriate did not open the door to subsequently used materials; no claims made that materials were the best or another material not feasible).

[54] *See Petree v. Victor Fluid Power, Inc.*, 887 F.2d 34, 42 (3d Cir. 1989); *Bickerstaff*, 676 F.2d at 168-69.

[55] *See Dollar v. Long Mfg., N.C., Inc.*, 561 F.2d 613, 618-19 (5th Cir. 1977).

[56] *See Trytko v. Hubbell, Inc.*, 28 F.3d 715, 724-25 (7th Cir. 1994). *See also Jones v. Benefit Trust Life Ins. Co.*, 800 F.2d 1397, 1400-01 (5th Cir. 1986)(admissible to impeach defendant's position that policy language was ambiguous).

[57] *See Kenny v. Southeastern Penn. Transp. Auth.*, 581 F.2d 351 (3d Cir.), *cert. denied*, 439 U.S. 1073 (1978)(cited in *Petree v. Victor Fluid Power, Inc.*, 887 F.2d 34, 38 (3d Cir. 1989)).

[58] *City of Richmond, Va. v. Madison Mgmt. Group*, 918 F.2d 438, 459 n.21 (4th Cir. 1990).

[59] *See* G. Ross Anderson, Jr., *Opening the Door*, South Carolina Trial Lawyer Bulletin 7, 8-9 (Fall 1997)[hereinafter *Opening the Door*].

[60] *See id.* at 10 ("If you do this immediately, you have closed the door.").

[61] *United States v. Lambert*, 463 F.2d 552 (7th Cir. 1972); *Opening the Door, supra* note 59, at 10.

South Carolina Defense Trial
Attorneys' Association
3008 Millwood Avenue
Columbia, SC 29205

Address Service Requested

PRESORTED
FIRST-CLASS MAIL
U.S. POSTAGE PAID
Columbia, SC 29201
PERMIT NO. 383