S.C. Defense Trial Attorneys' Association

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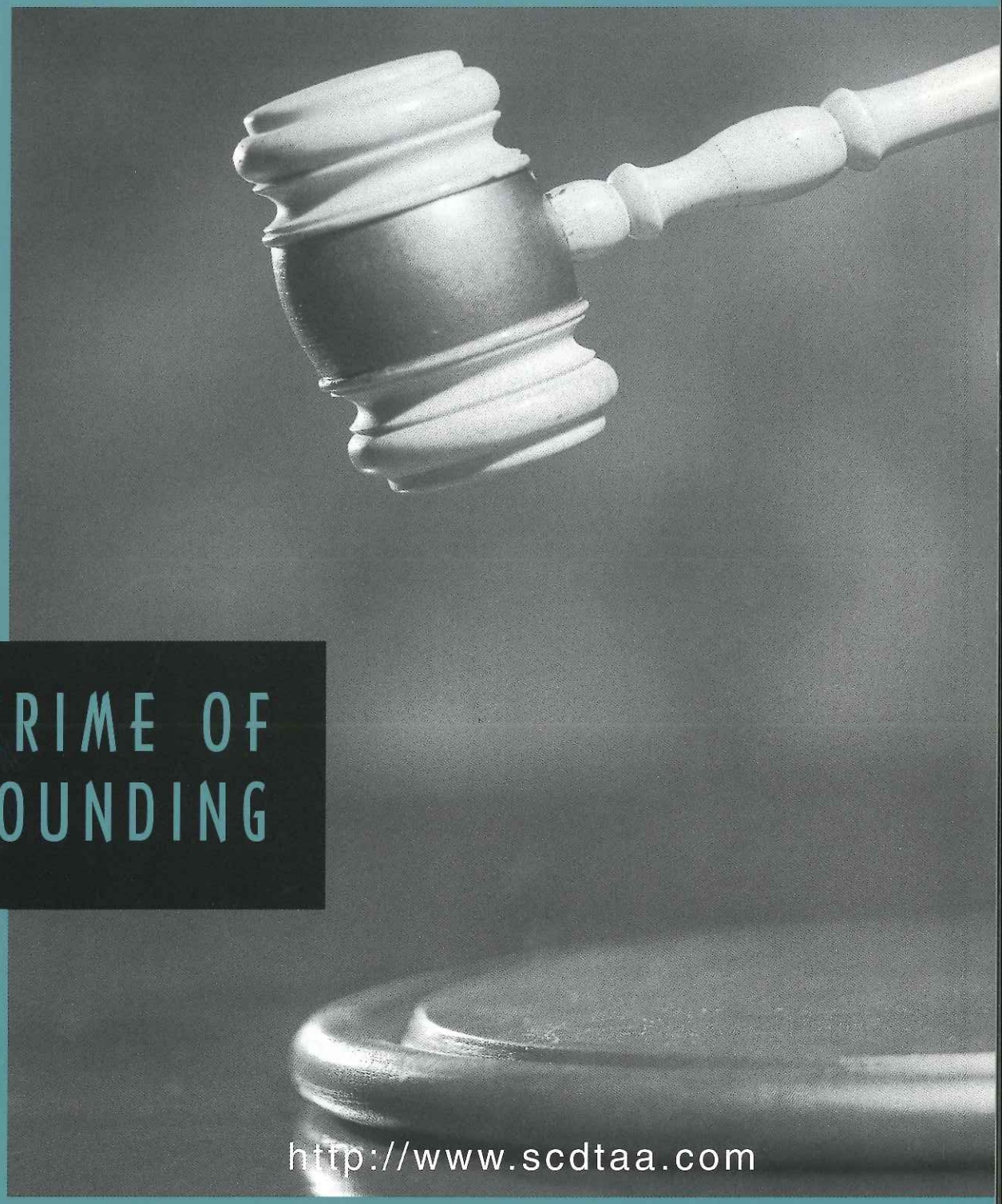
The DefenseLine



THE CRIME OF COMPOUNDING

http://www.scdtaa.com

1999 Joint Meeting

Grove Park Inn • Asheville, NC
July 29 - 31, 1999

Friday, July 30th

8:00 a.m. to 12 noon	Registration
8:15 to 8:45 a.m.	Coffee
8:15 to 8:30 a.m.	Welcome
8:30 to 9:00 a.m.	Insurance Law Update
9:00 to 9:30 a.m.	Update on ADR
9:30 to 10:15 a.m.	Preserving the Record for Appeal
10:15 to 10:30 a.m.	Break
10:30 to 11:15 a.m.	Employment Law Breakout
10:30 to 12:15 p.m.	Workers' Comp Breakout
11:30 to 12:15 a.m.	Federal Practice and Procedure
11:15 a.m. to 12:15 p.m.	Discovery Tactics

Saturday, July 31st

7:30 a.m.	Coffee
7:45 a.m.	SCDTAA Business Meeting
8:30 to 9:15 a.m.	Bad Faith Insurance Practices
9:15 to 10:00 a.m.	Federal Practice
10:00 to 10:15 a.m.	Legislative Update
10:15 to 10:30 a.m.	Coffee Break
10:30 to 11:15 a.m.	Third Party Audits
11:15 a.m. to 12:15 p.m.	Ethics - Handling Grievances at the Local Level

The DefenseLine

Ten Years Ago

At our 21st Annual Meeting at Kiawah Island, SC, **FRANK H. GIBBS, III**, of Greenville, was elected President. Past President **HAROLD W. JACOBS** of Columbia, was awarded the First Annual Hemphill Award. This award sponsored by our Association was given in honor of the late U.S. District Judge **ROBERT W. HEMPHILL**. The award is presented for distinguished and meritorious service to the legal profession and the public. Officers elected were **MARK WALL**, President-Elect, **BILL GRANT**, Treasurer, and **GLENN BOWERS**, Secretary. **DONNA MCINTOSH ROBINSON** was elected President of the South Carolina Claims Association.

Twenty Years Ago

Our Association concluded its 11th Annual Meeting on December, 1978 at the Kiawah Inn, Kiawah Island, SC. That meeting marked the end of the term of **MARK W. BUYCK, JR.** as President and the ascension of **R. BRUCE SHAW** as President. Burce's first report stated, "Our Annual Meeting was one of the biggest and best yet." One of the hot topics at that meeting had been PIP addressed by **GERALD GARNET**, then state claims manager of the Farm Bureau. The legislature was looking at comparative negligence, statutes of limitation, punitive damages and abolishing the Collateral Source Rule. In December, 1978, we celebrated our 10th Anniversary as an Association.

Thirty Years Ago

Following the very successful first Joint Meeting of South Carolina Defense Attorneys' and the Claims Managers in December at Hilton Head, President **BEN MOORE** communicated with officers and members of the defense attorneys anxious to move forward in printing a booklet as of January 1, 1969, naming the officers and executive committeemen, a list of attorney members and setting out the Bylaws of the new Association. As of that time, the officers were President **BENJAMIN A. MOORE, JR.** of Charleston, Vice-President **H.GRADY KIRVEN** of Anderson, Secretary-Treasurer **HAROLD W. JACOBS** of Columbia, Executive Committeemen were **C. WESTON HOUCK** of Florence, **REMBERT D. PARLOR** of Spartanburg, and **R. FRANK PLEXCO** of Greenville, SC.

President's Letter

by John Wilkerson

New Tricks For Old (Trial) Dogs?

Defense practice has become too complicated. As I write this President's Letter, I am preparing for a week-long civil trial. This letter is a welcome relief from the work at hand. How will my client perform on the stand? What brilliant argument can I craft to sway the jury? Hours of meticulous research will certainly be necessary to counter the Plaintiff's latest legal theory. However, these and other strategic issues which have for years motivated trial lawyers to outwork their opponents have now been displaced by a more basic concern: Will I be paid for my work?

The insurance carrier who retained me has established strict litigation guidelines and requires that I submit my statement for services rendered to a third party audit service to determine compliance before they will pay my bill. Learning and applying these guidelines has proven to be substantially more complex than the Rule Against Perpetuities. The prohibition against "block billing" requires me to specify each task as a separate entry. It is no longer acceptable to describe this Saturday away from my family as "trial preparation," even though we all know exactly what that means. How many minutes did I spend on that phone call to a witness to remind him to be in court at 2:00 on Monday? How silly of me! That task is not billable: it is a "secretarial function." But I didn't feel comfortable calling my secretary at home to ask her to place the call for me. How long did it take to prepare for direct examination of my client, opening statement, or cross examination of the plaintiff? Can the time it took for any of these tasks be accurately estimated?

At the moment I am faced with a dilemma relating to the Plaintiff's expert witness. In reviewing his testimony for the second time (I'm sure the auditor will question this activity as "duplicative"), I suddenly realize there is a major flaw in his theory that may result in a directed verdict. I vaguely recall a court decision that may be helpful and begin a brief computer search for the precedent that may win this case. But wait! The guidelines require preapproval of all legal research and I don't know the home number for the claim representative. Should I do the research anyway, or go home and forget about the case?

I have finally come face to face with a harsh reality: our clients view defense counsel as a commodity and appear no longer willing to pay for the extra effort which we have always considered to be the basis for our reputations as trial lawyers. Of course it could (and no doubt will) be argued that I should have anticipated the trial preparation dilemmas before the weekend and obtained approval for the research in advance. But that reasoning ignores the dynamic realities of trial practice. Perhaps they are telling me that they want me to change the way I practice. Can I make the change? Is there a future for me in litigation?

Why do we do this type of work anyway? I remember . . . the firm has long-standing relationships with many carriers and they assign a lot of cases to us. But when I look down the hall at my commercial litigation partners, they bill at twice my hourly rate and don't seem to work nearly as hard as we "trial lawyers." (I'm sure they would take me to task on that statement, but I don't see any of them in the office on this Saturday morning.) We have traditionally given discounted rates because insurance carriers have always paid all of our bills and we usually receive payment in 30-60 days. Those memories are rapidly fading, at least for those carriers who have chosen to hire third party auditors "to keep us honest." And we are now told that the prospect of future business from these clients depends entirely on our performance as measured by objective standards (this probably means a computer is involved in the evaluation process). What happened to long-term relationships built on trust and mutual respect? Although most of the individual claim represen-

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The Crime of Compounding

by John P. Freeman

It is not clear how a lawyer or litigant can square confidentiality clauses in settlement agreements involving egregious misconduct by defendants with the crime of "compounding." *Black's Law Dictionary* 259 (5th ed. 1979) defines "compounding crime" as follows:

> Compounding crime consists of the receipt of some property or other consideration in return for an agreement not to prosecute or inform on one who has committed a crime. There are three elements to this offense at common law, and under the typical compounding statute: (1) the agreement not to prosecute; (2) knowledge of the actual commission of a crime; and (3) the receipt of some consideration.
>
> The offense committed by a person who, having been directly injured by a felony, agrees with the criminal that he will not prosecute him, on condition of the latter's making reparation, or on receipt of a reward or bribe not to prosecute.
>
> The offense of taking a reward for forbearing to prosecute a felony; as where a party robbed takes his goods again, or other amends, upon an agreement not to prosecute.

Compounding crime is forbidden in South Carolina. S.C. Code Ann. Section 16-9-370 (1980) reads:

> Any person who, knowing of the commission of an offense, takes any money or reward, upon an agreement or undertaking expressed or implied to compound or conceal such offense or not to prosecute or give evidence shall:
>
> (a) If such offense is a felony be deemed guilty of a misdemeanor and upon conviction shall be fined not more than five hundred dollars or imprisoned not more than one year, or both;
>
> (b) If such offense is a misdemeanor be deemed guilty of a misdemeanor and upon conviction be fined not more than one hundred dollars or imprisoned not more than three months or both.

Compounding poses risks for lawyers. This was forcefully driven home by the ethics case of *In re Himmel*, 125 Ill.2d 531, 127 Ill. Dec. 708, 533 N.E.2d 790 (1988). Himmel represented a woman injured in a motorcycle wreck who sought to recover from her former attorney, Casey, $23,233.34, which was her share of a $35,000 settlement Casey had negotiated on her behalf.

Himmel conducted an investigation which included contacts with the insurance company that paid the money, its counsel, and Casey. After studying the situation, Himmel concluded that Casey had stolen the client's funds. The client specifically directed Himmel he was to take no further action against Casey other than to get her money. Himmel then negotiated a settlement by which Casey agreed to pay the client $75,000 and in return the client agreed not to file a criminal, civil, or disciplinary complaint against Casey. Had Casey paid the money, Himmel would have received one-third of the settlement as his fee. Casey failed to perform, leaving Himmel with no choice but to sue him.

Himmel subsequently obtained a $100,000 judgment against Casey, which eventually translated into a $10,400 payment to the client, and zero dollars for Himmel. Himmel did not report Casey's misconduct to the Illinois Grievance Board. At the time, Illinois had in effect the Code of Professional Responsibility, DR-103(a) of which called for mandatory reporting by lawyers of their unprivileged knowledge of another lawyers unethical behavior.

Casey was disbarred for other misconduct. In the course of disbarring Casey, the Illinois investigators learned of Himmel's litigation, and about the attempted confidential settlement agreement. Himmel was charged with violating

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DR 1-103(a). The hearing board found that he violated the provision and recommended a private reprimand. The Reviewing Board recommended dismissal. The Illinois Supreme Court weighed the evidence, which included proof that (1) Himmel had never had a grievance against him in over ten years of practice; (2) he never took a fee for his work on behalf of Casey's victim; (3) he had been instructed by his client not to report Casey; (4) he thought his client had reported Casey; (5) he believed that his information about Casey was privileged and hence not subject to DR 1-103(a)'s mandatory reporting requirement. Illinois' Supreme Court suspended Himmel for a year.

Crucial information in his hands was viewed as unprivileged, since it stemmed from sources other than his client. (The court also noted that on some occasions Himmel had received information from his client in the presence of her fiance and mother, thus probably barring any claim of privilege as to those client communications.) The court ruled that whether or not Himmel's client had reported Casey was irrelevant to the existence of his affirmative obligation. It likewise brushed aside his defense that the client had demanded he not report, holding that lawyers are duty-bound to honor mandatory ethical rules whether their clients want them to or not.

The court announced that it was "particularly disturbed," by proof that Himmel chose to try to settle with Casey and give him confidentiality rather than make the mandatory report. The court held that by doing this,

> both respondent and his client ran afoul of the [Illinois] Criminal Code's prohibition against compounding a crime, which states in section 32-1: "(a) A person compounds a Crime when he receives or offers to another any consideration for a promise not to prosecute or aid in the prosecution of the offender. (b) Sentence. Compounding a Crime as petty offense."

The court pointed out that "both respondent and his client stood to gain financially by agreeing not to prosecute or report Casey for conversion."

Himmel's reliance on the Illinois compounding statute was a wake-up call. One can safely assume that when *Himmel* came down, few lawyers were aware whether the crime of compounding was on the books in the state in which they practiced, and fewer still appreciated the statute's consequences if it were. South Carolina is a state with a compounding statute, and several consequences are immediately evident.

One is that if a settlement agreement (like the one in *Himmel*) gives rise to the compounding offense, then the contract likely is unenforceable. This is certainly the case in South Carolina. In *Jackson v. Bi-Lo Stores, Inc.*, 437 S.E.2d 168, 170 (S.C. App. 1993), the Court of Appeals emphatically endorsed the illegality defense, saying:

> It is a well founded policy of law that no person be permitted to acquire a right of action from their own unlawful act and one who participates in an unlawful act cannot recover damages for the consequence of that act. 86 C.J.S. Torts Section 12 (1954). This rule apples at both law and in equity and whether the cause of action is in contract or in tort. 1A C.J.S. Actions Section 29 (1985). See also *Graham v. Graham*, 276 S.C. 341, 278 S.E.2d 345 (1981); *Nelson v. Bryant*, 265 S.C. 558, 220 S.E.2d 647 (1975); *Roundtree v. Ingle*, 94 S.C. 231, 77 S.E. 931 (1913); *Restatement (Second) of Torts* Section 774 (1977).

The illegality doctrine has also been recognized by the United States Supreme Court which, in McMullen v. Hoffman, 174 U.S. 639, 19 S.Ct. 839, 43 L.Ed. 1117 (1899), held illegality is a defense to a contract action:

> The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract. In case any action is brought which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce it, nor will they enforce any alleged rights directly springing from such contract.

Id. at 654, 19 S.Ct. at 845 (emphasis added). South Carolina courts have reached similar conclusions refusing to aid plaintiffs who are themselves guilty of an illegal act. In *Roundtree*, the court concluded that "[his] whole transaction is without the pale of the law, and [he] cannot invoke the aid of the courts in enforcement of any claim depending on it." *Id.* 77 S.E. at 932. *See also, Berkebile v. Outen*, 311 S.C. 50, 53, 426 S.E.2d 760, 762 (1993) ("An illegal contract has always been unenforceable . . . . South Carolina law is well established on this point. The general rule is that courts will not enforce a contract which is violative of public policy, statutory law or provisions of the Constitution.").

Jackson and cases like it give a lawyer a good reason not to cause a client to enter into a compounding agreement: nothing is gained since the provision is unenforceable. And even better reason is that the illegal provision may taint the entire contract, enabling the other side to set it aside altogether. Indeed, "[m]ost reported decisions dealing with compounding . . . are civil disputes in which the victim is attempting to enforce a note or other obligation given by the alleged offender." ALI., Model Penal Code & Commentaries, Section 242.5, cmt. 3, at 252 (1980) (Model Penal Code). A client who sees a favorable settlement agreement held unenforceable because it contains an illegal provision is not going to be happy with the lawyer who negotiated it, particularly where the statute of limitations has run against the wrongdoer.

Another problem with a compounding agreement is the lawyer who negotiates it is setting the table for multiple ethical violations on his or her part:

Rule 1.2(d): a lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent...

Rule 1.16(a)(1): [A] lawyer shall not represent a client, or, where representation has commenced, shall withdraw from the representation of a client if: (1) The representation will result in violation of the Rules of Professional Conduct or other law...

Rule 8.4(e): It is unprofessional conduct for a lawyer to: (e) [e]ngage in conduct that is prejudicial to the administration of justice. (Note: "[T]he purpose of the law of compounding is to encourage reporting of crime by punishing agreements to forestall prosecution." Model Penal Code Section 242.5, cmt.3, at 251 (1980)).

It is noteworthy that the Model Penal Code's compounding provision gives victims an "affirmative defense" to prosecution so long as the pecuniary benefit they receive as part of the bargain does not exceed what was due them as restitution or indemnification. *Id.* Section 242.5. No such affirmative defense is present in South Carolina's formulation.

Any South Carolina lawyer called on to draft a settlement agreement needs to be aware of the compounding prohibition. Lots of forms of client misconduct are criminal. A seemingly simple conversion case can, at least theoretically, embrace criminal issues under the breach of trust statute, the federal wire fraud statute, the false statement statute, not to mention conspiracy and money laundering possibilities. Bank fraud is ubiquitous. So is adultery, tax fraud, securities fraud, bankruptcy fraud, wire tapping, and just about any other kind of significant wrongdoing a person can engage in. A lawyer who either demands or accedes to total confidentiality from a victim in exchange for money to settle a dispute risk:

(a) becoming a co-conspirator in criminal misconduct;
(b) adding supposed client protection that works against the client's best interests by causing the settlement to be subject to attack on illegality grounds;
(c) getting sued by the client when the settlement fails to stick or if the client gets attacked for criminal compounding;
(d) getting attacked by the Commission on Lawyer Discipline like poor Mr. Himmel.

Under the circumstances, the most lawyers involved in drafting settlement agreements should insist upon is a simple factual recitation that the party receiving compensation has no present intention of taking any further action against the party buying its peace. Another provision worth adding is one specifying that it is the parties' intent that the agreement comply with all applicable law, and that any provision that is illegal or contrary to public policy, or that would call for illegal action or action contrary to public policy, is void and to be severed.

John P. Freeman is a professor at the University of South Carolina School of Law in Columbia.

Recent Order

In the United States District Court for the District of South Carolina Aiken Division. Karen M. Bryant and John Garvilla; Individually and as representatives of all persons similarly situated, collectively designated as John Doe and Jane Doe, Plaintiffs, vs. Great American Reserve Insurance Company; and Glenn Guffey, Defendants.

This matter comes before the court on plaintiffs' Motion to Certify Class Action. In their Complaint, plaintiffs set out multiple causes of action on behalf of themselves and a putative class of other purchasers arising out of their purchase of certain annuity policies from Jefferson National Life Insurance Company ("Jefferson National"), or its successor-in-interest defendant Great American Reserve Insurance Company ("GARCO"). These annuities, known as "Flex II annuity policies," were sold either through defendant Glenn Guffey ("Guffey") or his company, Tax Sheltered Services ("TSS"). Guffey and/or TSS employed nine selling agents handle sale of the annuities in South Carolina, including Richard Patierno and Silvine Patierno.

Plaintiffs allege that the selling agents misrepresented that the Flex II policies carried no front-end sales charges or "loads" when, in fact, the policies clearly did have such loads. Plaintiffs seek actual and punitive damages for fraud, breach of contract, conversion, and civil conspiracy, and have also requested an equitable accounting of their premiums paid.

Only two of the original five named plaintiffs remain in this action. Plaintiffs have voluntarily dismissed the other three original plaintiffs because they did not purchase the annuity policy in question. The depositions of the two remaining named plaintiffs show that they purchased their respective Flex II annuity policies from different agents, at different times and based on different alleged oral representations and written materials.

Plaintiffs' counsel has attached to his Motion for Class Certification the affidavits of the nine selling agents who sold the Flex II annuity policies in South Carolina, including Silvine Patierno and Richard Patierno. The caption on each Affidavit references Civil Action No. 2:95-1868-18, *Thomas E. Grier, Donald K. Owens, James H. Nelson, John M. Stone, Thomas G. Allen, Richard K. Patierno, Richard K. Patierno, Jr., Silvine Patierno, and Joe M. Gilstrap v. Jefferson National Life Insurance Company, et al.* In that prior action, brought in the Charleston Division of this court, the same attorneys representing plaintiffs in this case represented the nine selling agents who actually sold the Flex II annuities, including the two agents who allegedly made the oral misrepresentations regarding those annuities to the two named plaintiffs.

The four requirements for maintaining a class action, as set forth in Fed.R.Civ. P. Rule23(a), are commonly referred to as numerosity, commonality, typicality and representativity. A plaintiff seeking to maintain a class action as representative of his class has the burden of showing that he has fulfilled all four requirements. *Green v. Cauthen*, 379 F.Supp. 361 (D.S.C. 1974). In resolving the issue of class certification, a court may not confine itself to the allegations of the plaintiff's complaint, but should consider the discovery undertaken on the class certification issues. *Shelton v. Pargo, Inc.*, 583 F.2d 1298 (4th Cir. 1978).

In addition to the requirements of Rule 23(a), Rule 23(b) further limits class actions to one of three specific situations, the first two of which are inapplicable to this action. Plaintiffs claim that this action can be maintained under Rule 23(b)(3) which contains the following requirement:

> Questions of law or fact common to the members of the class [must] predominate over any questions affecting only individual members, and [the court must find] that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

In the following, this court has attempted to apply these principles, as amplified by the teachings of the Fourth Circuit Court of Appeals in *In Re A. H. Robins Co., Inc.* 880 F.2d 709 (4th Cir. 1989).

A. Numerosity

Plaintiffs argue that common sense supports a finding of numerosity. They claim that since 2,500 annuities were sold in South Carolina alone, Rule 23's numerosity requirement is satisfied because joinder is presumptively impractical. Plaintiffs, however, do not attempt to estimate how many purchasers might qualify as class members. Rather, they simply assume that joinder is impracticable. But, "mere speculation as to the number of parties involved is not sufficient to satisfy Rule 23(a)(1)." 7A C. Wright, A. Miller and M. Kane, *Federal Practice and Procedure*, Civil 2d Section 1762, p. 164 (1986).

Furthermore, mechanical head counting alone is not conclusive as to whether the numerosity is satisfied. Indeed, there is not a single factor which is dispositive on the question of whether a putative class warrants certification on the basis of size. Resolution of this question depends on the facts of each individual case. In making this determination, courts consider such factors as geographic diversity, whether it would impose an unreasonable hardship on putative class members to institute individual suits or to join others, and judicial economy. *Id.* at 157.

In this case, plaintiffs have not clearly demonstrated that they satisfy the numerosity requirement. The class is not geographically diverse. All prospective class members are South Carolinians. Distance will not preclude individual suits or joinder or intervention.

It is also significant that few, if any, prospective class members have claims involving defendant Guffey. Guffey was a general agent. He "personally handled very few direct sales to ultimate policyholders." *Affidavit of Glenn H. Guffey*, Paragraph 3. Defendants have deposed plaintiffs Garvilla and Bryant. Mrs. Bryant never spoke to Guffey. Plaintiff Garvilla bought his annuity from Silvine Patierno. He only spoke with Guffey after purchasing the annuities.

This evidentiary record supports the view that Guffey spoke with only a very limited number of the members of the prospective class before they purchased the Flex II annuity. The plaintiffs have advanced no reason why this small number of claims by an unknown percentage of the relatively few people who spoke with Guffey cannot be brought individually.

In sum, the court concludes that plaintiffs have not adequately demonstrated numerosity.

B. Commonality

Upon review of the record, this court concludes that the named plaintiffs cannot prove that there are questions of law or fact common to the class. "It is a general rule that an action based substantially on oral rather than written communications is inappropriate for treatment as a class action suit." *Graham v. Security Sav. & Loan*, 125 F.R.D. 687, 690 (N.D.Ind. 1989)(citations omitted), *aff'd*, 914 F.2d 909 (7th Cir. 1990).

In *Graham*, the plaintiff class, consisting of approximately 300 persons, alleged that approximately sixteen representatives of the defendant made fraudulent oral misrepresentations to them over a two year period. The court held that "since there are at least 300 separate oral representations made by Adelphi representatives over a two year period, this case is inappropriate for class certification in that the commonality requirement cannot be met". *Id.* at 691; *See also Liberty Lincoln Mercury v. Ford Marketing Corp.*, 149 F.R.D. 65 (D.N.J. 1993).

In this case, the two named plaintiffs have independently testified that substantially different representations were made to them, by different agents, in separate meetings, at which no one other than the individual named plaintiff and selling agent were present. Furthermore, one of the two named plaintiffs could not even remember what written materials, if any, he was given. In such a case, their allegations can only be decided on an individual basis, and therefore do not meet the commonality requirements of Rule 23(a).

C. Typicality

An inquiry into typicality requires a comparison of the claims or defenses of the representatives with the claims or defenses of the purported class. *Graham*, 125 F.R.D. at 691. In this case, as in *Graham*, there are various defenses which may be applicable to some members of the putative class but not others,

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such as estoppel, laches and statute of limitations, as well as the degree and reasonableness of reliance of each class member. In an action in which the plaintiffs claim to have relied on oral representations, the degree of reliance defeats the typicality requirement of Rule 23(a)(3). *Id.* n.4. To illustrate this point, it is noteworthy that the named plaintiffs' allegations are not even typical of each other, much less the putative class members. The named plaintiffs have clearly testified they were subject to different oral representations, by different agents, at different times and could not testify they were given the same written materials.

D. Representativity

In evaluating whether the requirement of representativity has been met, the adequacy of counsel and fairness of representation are crucial factors. "In other words, the representative party must be interested enough to be a forceful advocate, and his chosen attorney must be qualified, experienced, and generally able to conduct the litigation." *Green, supra*, 379 F.Supp. at 373. As noted in *Burkhalter Travel Agency v. MacFarms Int'l., Inc.*, 141 F.R.D. 144 (N.D. Cal. 1991), the representativity requirement reaches concerns about class counsel's conflicts of interest. This court has noted defendants' claims that plaintiffs' counsel are operating under a conflict of interest because of their prior representation of the nine Flex II selling agents. Because of its view on the other requirements essential to class certification, this court finds it unnecessary to address the alleged conflict in deciding this Motion.

E. Predominance of Common Questions

Even if plaintiffs had satisfied this court that they had met the requirements of numerosity, commonality, typicality and representativity, they would still be required under rule 23(b)(3) to show that such common questions of law or fact predominate over individualized elements of proof and unique defenses. This court concludes that they have failed to do so.

As previously discussed, plaintiffs allege that they were defrauded by representations made, in most instances, in face-to-face meetings between the plaintiffs and nine different selling agents. Courts have repeatedly stated that actions based upon oral misrepresentations are not particularly amenable to class certification because the representations made are not necessarily uniform. *See, Graham, supra; Soper v. Valone*, 110 F.R.D. 8 (W.D.N.Y. 1985). This is particularly true when it is alleged that the misrepresentations were made by several different people, as in this case.

It is also well-established that certification of a class action is not appropriate when individual proof of reliance is required. *See Darms v. McCulloch Oil Corp.*, 720 F.2d 490 (8th Cir. 1983); *In re Scot Paper Co. Sec. Litig.*, 142 F.R.D. 611 (E.D.Pa. 1992); *Bear v. Oglebay*, 142 F.R.D. 129 (N.D.W.Va. 1992). Since the claims underlying the alleged class action are grounded in allegations of fraud, individual proof of justifiable reliance by each policyholder must be pled and proven in every instance. *Florentine Corp. v. PEDA I, Inc.*, 339 S.E.2d 112 (S.C. 1985).

In *Martin v. Dahlberg, Inc.*, 156 F.R.D. 207 (N.D.Cal. 1994), purchasers of hearing aids sued a hearing aid manufacturer, retailers, franchisees and hearing consultants, alleging misrepresentations in connection with the sale of hearing aids. Like the plaintiffs herein, the *Martin* plaintiffs, in support of their motion for class certification, argued that reliance could be inferred on a class-wide basis in consumer fraud class actions. The court disagreed since, although some guidelines for salespersons may have existed, the actual representations varied. The court in *Martin* held that there was no basis to draw an inference of class-wide reliance "without a showing that representations were made uniformly to all members of the class" and that the individualized questions of reliance precluded certification of the plaintiff class. 156 F.R.D. at 217.

Courts are often reluctant to certify cases of securities fraud because individual issues predominate. The case now before the court concerns insurance products, and individual issues are equally pronounced in this context. Each presentation of the Flex II annuity, of necessity, had to differ from the alleged "canned" format because of the different needs of each potential purchaser. Consequently, virtually every claim will involve questions of what representations were made, issues of reliance and purchaser sophistication.

As regards defendant Guffey, the individual issues are even more pronounced. Plaintiffs claim that defendants' alleged misrepresentations induced them to buy Flex II annuities. Guffey spoke with few policyholders and to none of the prospective class representatives until after the sale. Consequently, at trial the substantive elements of any claims against Guffey and the evidence concerning these claims will have little in common with the evidence introduced to support claims arising from pre-sale representations.

Here, it is also likely that the statue of limitations defense will be one of paramount importance to each claim asserted. The South Carolina statutes of limitations for contract and tort actions apply the discovery rule for determining when a cause of action accrues. *Santee Portland Cement v. Daniel Int'l Corp.*, 384 S.E.2d 693 (S.C. 1989)(breach of contract); *Burgess v. American Cancer Soc.* 386 S.E.2d 798 (S.C. App. 1989)(fraud). Precisely when each individual policyholder knew or should have known he or she had a cause of action arising out of the purchase of the Flex II annuity will be, therefore, different in every instance. It has been held that where there are unique defenses that predictably will become a major focus of the litigation, certification of a class action should be denied. *Edgington v. R.G. Dickinson & Co.*, 139 F.R.D. 183 (D. Kan. 1991).

For the reasons set out above, this court concludes that individual factual issues will predominate in this case, making a class action as proposed by plaintiffs an inefficient, confusing, and inappropriate vehicle. Plaintiffs' Motion to Certify Class Action is hereby denied.

AND IT IS SO ORDERED.

Charles E. Simons, Jr.
Senior United States District Judge
Aiken, South Carolina
May 26, 1998.

The Trial Academy

July 7 - 9, 1999

The Trial Academy will be held on Wednesday, July 7 through Friday, July 9, 1999.

Anyone interested in the Academy, either as a student or instructor, should call SCDTAA Headquarters at (800) 445-8629 or (803) 252-5646.

The Pro Bono Committee Needs Your Input

The Pro Bono Committee is developing objectives for the Committee. We would like to hear from you about Pro Bono work in which you are involved, whether as a part of a firm Pro Bono program, appointments from the Bar or otherwise. We want to publicize the pro bono work of our members as well as determine what programs we want to implement.

You may write to SCDTAA or call, write, fax, e-mail Bev Carroll, Kennedy Covington Lobdell & Hickman, L.L.P., P.O. Box 11429, Rock Hill, South Carolina 29731-1429, (803)329-7604, (803) 329-7678 (fax) or bcarroll@kclh.com

Statement of Stephen G. Morrison

before the Judicial Conference Advisory Committee on Rules of Evidence of the Federal Judicial Conference On Proposed Evidence Rule Amendments 701, 702 and 703

October 22, 1998

Thank you for the opportunity to express my views on proposed revisions to Rules 701, 702 and 703 of the Federal Rules of Evidence. My comments reflect my own experience as a partner and practitioner in the law firm of Nelson, Mullins, Riley & Scarborough in Columbia, South Carolina, as well as the input I have received from members of Lawyers for Civil Justice (LCJ), a national coalition of the leading corporate counsel and defense bar organizations of which I currently serve as President. It also reflects my experience as General Counsel for Policy Management Systems Corporation, a publicly traded (NYSE) technology, computer software and services company and my recent experience as President of the Defense Research Institute, an organization of 21,000 lawyers defending civil cases in America's courts everyday. While my firm has over 200 lawyers in North Carolina, South Carolina, and Georgia, my testimony is primarily based upon personal experience as lead trial counsel in over twenty states and the privilege I have had to try over 200 cases to jury verdict. Most of my work for the past 20 years has been in the federal courts and nearly every case, whether it involved personal injury or commercial damages, has involved scientific evidence and expert testimony.

For over a decade, Lawyers for Civil Justice and the Defense Research Institute and I, personally, have worked to ensure that some credible measure of scientific reliability accompanies all technical evidence admitted in our trial courts. We have consistently spoken out against the abuses which have come to be known as junk science.

The Advisory Committee on Rules of Evidence is to be commended for undertaking an examination of rules 701, 702 and 703 and the impact of these rules on our legal system. In expressing my appreciation to Judge Fern Smith and the members of the Advisory Committee, I wish to acknowledge the extraordinary significance of your efforts to clarify a complex legal subject which deserves our attention.

The proposed revisions to Rule 702 will strengthen judicial decision making by ensuring that scientific expert testimony will have a greater degree of reliability before it is presented to the jury. By enhancing the trial court's role as gatekeeper for the admission of expert evidence, the proposed revisions adds emphasis to the principles articulated five years ago by the U.S. Supreme Court in *Daubert v. Merril Dow Pharmaceuticals, Inc.* and *General Electric Co. v. Joiner* last year. The non-exclusive checklist articulated by the Court in *Daubert* is further clarified in the threshold requirements expressed in the proposed revisions to Rule 702. While the Committee Notes acknowledge that these requirements are neither dispositive nor exclusive, they provide important guideposts for furthering the underlying goal: that expert testimony has some minimum characteristics of reliability before it is presented to the jury. Overall this amendment goes far in addressing conflicts in the courts about the meaning of *Daubert*.

The revisions to Rule 702 further clarify the scope of *Daubert* and end confusion among the circuits by applying the trial court's gate keeping function to testimony by any expert. Specifically, numerous courts have addressed whether *Daubert* is applicable to all expert testimony or merely scientific testimony. The proposed amendment appropriately makes no distinction between the two. Although there is some divergence among circuits on this point, there is simply no practical or policy reason why the *Daubert* standards should not apply to all expert testimony. The proposed Rule 702 eliminates any doubts as to its application by embracing uniform standards for expert testimony set out in *Watkins v. Telsmith*, 121 F.3d 984, 991 (5th Cir. 1997).

As the Committee Notes bluntly but accurately emphasize, "An opinion from an expert who is a scientist should receive the same degree of scrutiny for reliability as...a scientist." Quite simply, the gate keeping function should apply to both.

In short, Proposed Rule 702 enforces the important principals of *Daubert*, clarifies ambiguities and conflicts in interpretations and wisely affirms the vital role of the trial judge as gatekeeper for all expert testimony. I support particularly the clear statement that the trial judge in all cases of proffered expert testimony must find that it is properly grounded, well reasoned, and not speculative before it can be admitted. The amendment properly provides that if there is a well accepted body of learning and experience in the expert's field, then the expert's testimony must be grounded in that learning and experience to be reliable, and the expert must explain how the conclusion is grounded. If the witness is relying solely on primarily on experience, the amendment wisely provides that the witness must explain how that experience leads to the conclusion reached. The trial court's gatekeeping function requires much more than "taking the expert's word for it." The Advisory Committee has fairly concluded that the more controversial and subjective the expert's inquiry, the more likely the testimony should be excluded.

I also endorse the clarification in Rule 702 that the gatekeeper function applies not only to the methodology employed by the expert, but also to the application of the methodology to the facts of the case. I agree with Judge Edward R. Becker's reasoning in *In Re Paoli, Railroad Yard, PCB Litigation*, 35 F3d 717, 745 (3rd Circuit, 1994). He wrote that "any step that renders the analysis unreliable renders the expert testimony inadmissible. This is true whether the step completely changes a reliable methodology or merely misapplies that methodology."

I support the proposed amendment to Rule 701, which eliminates an additional ambiguity regarding experts: proffering an expert as a lay witness and thereby endrunning both the reliability requirements of Rule 702 and the disclosure requirements pertaining to expert testimony. Specifically the rule revision rightfully distinguishes between expert and lay witness' **testimony** rather than expert and lay **witnesses**. The inadmissible information is then disclosed to the jury in the guise of the expert's basis. However, the specific language in the revision and the practical impact of it troubles me. Although setting out to cure a glaring defect, the suggested language still encourages the admission of backdoor hearsay as long as it is relevant and as long as a limiting instruction is given upon request. The implication of the recommended language is that backdoor hearsay which is more prejudicial than probative should still come into evidence unless the objecting party can show the dangers of admission substantially outweigh the probative value of the evidence.

Based on my experience, courts need more guidance in applying the suggested limiting instructions. Among the criteria which courts should take into account are:

- Is the underlying data reasonable and trustworthy?
- Is the underlying data seriously disputed?
- Is the underlying data case specific?
- Does the opponent have a meaningful opportunity to rebut the underlying data or is the data of a type that cannot be meaningfully rebutted?

I believe addressing these issues would provide the trial courts with necessary guidance in limiting inadmissible information into the proceedings. On this issue, I respectfully request the Committee to make further changes. These suggestions for improvements to the revisions outlined for Rule 703 in no way diminishes my support for the Committee's overall goals as they have been articulated.

I endorse the Committee's important proposed amendments.

Thank you for the opportunity to appear before you today.

Evidence Matters

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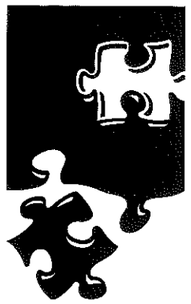

THE RULE AGAINST ADMISSIBILITY OF INSURANCE: THE REST OF THE STORY

In civil cases other than insurance-coverage or bad-faith litigation, insurance generally is inadmissible by either the plaintiff or defendant. Federal and South Carolina Rules of Evidence 411 are identical and prohibit liability insurance from coming before the trier of fact against the defendant. Conversely, the collateral-source rule forbids a showing that the plaintiff had health insurance to cover her bills.

Whether introduced by the plaintiff or defendant, the effect of insurance coverage upon jurors can be devastating. Despite these rules of exclusion, "such evidence frequently is received."[1] Some exceptions to the general rules are discussed below.

A. Liability Insurance

Various public policies lie behind exclusion of insurance evidence. An inference might be drawn that an insured defendant more likely would be inclined to be careless, or on the other hand, that someone without insurance might tend to be more careful.[2] Such distinctions are tenuous at best.[3] Another public policy (and a better reason) for keeping liability insurance issues from the jurors is that they might decide the issue based upon improper grounds.[4] For example, jurors might award more against a defendant with insurance or give less when he has to pay the judgment out of his own pocket.[5]

Exceptions to the rule do exist. Evidence of liability insurance is admissible for the purposes noted in rule 411, however, and the list is not exhaustive. The rule specifically allows such evidence for proof of agency, ownership, control, or bias or prejudice of a witness. Inquiry into a witness's bias, prejudice or motive to misrepresent is specifically allowed under state evidence rule 608(c) also.

A classic case involving bias of a witness is when the insurance carrier's adjuster testifies regarding a prior-inconsistent statement he took of the adverse party. In such cases, the circumstances surrounding the taking of the statement and the fact that he works for the insurance carrier may be admissible. The purpose of this evidence is to show a bias toward his insured and that the manner the statement was taken was not in the adverse party's best interests.[6] (However, this theory of admissibility might not apply to independent appraisers.)[7] This same approach also has been used to show that an expert witness has been previously employed by the defendant's insurance carrier.[8] For those lawyers who have considered putting forth another local defense attorney to testify that the plaintiff's doctor has a bad reputation for truthfulness (e.g., is a "litigation doctor" the lawyer has dealt with in the past), be forewarned that this might make liability insurance relevant - especially when the testifying attorney also does work for the defendant's insurance carrier.[9]

When a party indirectly opens the door into liability insurance, the adverse party may offer evidence of this same topic. Sometimes the mere fact that an insurance-company investigator was called as a witness by the insured's attorney has been seen as opening the door into liability insurance.[10]

All trial lawyers know that liability insurance sometimes pops out of witnesses' mouths without any attempt to solicit this by the attorney. A strong fact to be considered in reversing a verdict is whether the mention of insurance was brought out by the insured's own lawyer during direct examination.[11] However, the mere fact that insurance is volunteered by a plaintiff's witness during cross-examination by the defense lawyer does not mean the defendant is precluded from a mistrial, especially when the plaintiff's witness is an expert with ample courtroom experience and should have known better.[12]

Some other purposes for which liability insurance have been admitted include a scenario where the defendant has contended the plaintiff could have mitigated damages by going back to work sooner. The plaintiff could show the insurance company told him that he would be taken care of if he went back to school to learn a new trade.[13]

Some older cases have held that such evidence is admissible when it forms an inseparable part of a harmful admission,[14] such as "Don't worry [I don't need to be more careful:] I have insurance for that"[15] or "we have insurance to cover my boy because he `is careless and drives too fast. [We've] taken out insurance to protect him [and] if you won't prosecute . . . we will do all we can do to help you get that $5,000 insurance.'"[16] At first glance, these cases seem at odds with one of the policies behind rule 411, which is that an inference of the defendant's carelessness merely because he has insurance is tenuous. When the defendant expressly states that he acts carelessly because he has insurance coverage, however, the inference is a reliable one, although the situation would be different when a parent or third party makes the statement.

B. Plaintiff's Own Insurance Other Than Liability Policies

The collateral-source rule prohibits a wrongdoer from taking advantage of an injured party's own insurance benefits,[17] and it includes gratuitous and also non-gratuitous benefits arising from employment, insurance, or other contractual agreements.[18] However, the plaintiff's own insurance coverage may be admissible when relevant to other issues. For example, when a plaintiff complains of continuing health problems from an accident but claims she cannot afford to pay for further doctors' treatments, evidence of her health insurance may come into evidence to show that she is financially able to pay for further health care.[19]

Worker's compensation insurance is inadmissible when the sole purpose is to reduce a third party's liability to the injured person, but it may be admitted for other purposes, such as to shed light on the credibility of witnesses.[20] Thus, this principle would apply to admit evidence of a claim by a plaintiff who previously had received money from a worker's compensation settlement but now alleges she is insolvent due to a wrongful discharge from her job.[21]

When a plaintiff receives treatment for an injury but the medical-care provider writes down the bill to the Medicare or Medicaid limits, the plaintiff might nonetheless attempt to recover the full, pre-write down amount of the bill at trial. A good-faith argument can be made that the collateral-source rule is inapplicable to the part of the bill above the written down amount.[22] If the full amount of the bill were admitted into evidence, this argument would support evidence that the plaintiff enjoyed Medicare or Medicaid benefits.

Insurance might be relevant to knowledge by a party of a relevant matter in the case. For example, a shipowner's purchase of insurance has been held admissible to show he knew the shipyard did not bear the risk of loss to the ship while it was being refitted.[23] Similarly insurance might be admissible to show that a plaintiff who purchased insurance was aware of a trade usage limiting damages for defective film to replacement only.[24]

Footnotes

[1] 1 Kenneth S. Broun et al., McCormick on Evidence Section 201 (1992)(discussing liability insurance)[hereinafter 1 *McCormick*].

[2] *Id.*

[3] Fed. R. Evid. 411 advisory committee note.

[4] *Id.*

[5] 1 *McCormick* Section 201.

[6] *See Powers v. Temple*, 250 S.C. 149, 156 S.E.2d 759 (1967)(noting this exception to the rule should never be applied except when proper reasons exist).

[7] *See Averett v. Shircliff*, 218 Va. 202, 237 S.E.2d 92 (1977).

[8] *See Eppinger & Russell Co. v. Sheely*, 24 F.2d 153, 155 (5th Cir. 1928).

[9] *See Charter v. Chleborad*, 551 F.2d 246 (8th Cir. 1977).

[10] *See Central of Georgia Ry. v. Walker Truck Contractors*, 270 S.C. 533, 243 S.E.2d 923 (1978).

[11] *Norton v. Ewaskio*, 241 S.C. 557, 129 S.E.2d 517 (1963).

[12] *See Haynes v. Graham*, 192 S.C. 382, 6 S.E.2d 903 (1940).

[13] *Kubista v. Romaine*, 87 Wash. 2d 62, 549 P.2d 491 (1976).

[14] 1 *McCormick, supra* note 1, Section 201, at 855 n.15 and accompanying text.

[15] *Herschensohn v. Weisman*, 80 N.H. 557, 119 A. 705 (1923).

[16] *Reid v. Owens*, 98 Utah 50, 93 P.2d 680 (1939).

[17] *Isgett v. Seaboard Coast Line Railroad Co.*, 332 F. Supp. 1127, 1138 (D.S.C. 1971). *See also Joiner v. Fort*, 226 S.C. 249, 84 S.E.2d 719 (1954)(collateral-source rule applies even when other plaintiff paid insurance benefits).

[18] *Johnson v. Aiken Auto Parts*, 311 S.C. 285, 428 S.E.2d 737 (Ct. App. 1993).

[19] *See Bonaparte v. Floyd*, 291 S.C. 427, 354 S.E.2d 40 (1987) (citing *Powers v. Temple*, 250 S.C. 149, 156 S.E.2d 759 (1967)).

[20] *See Rauch v. Zayas*, 284 S.C. 594, 327 S.E.2d 377 (Ct. App. 1985).

[21] *See Campbell v. Bi-Lo, Inc.*, 301 S.C. 448, 392 S.E.2d 477 (Ct. App. 1990). *See also Blue Ridge Rural Electric Cooperative v. Byrd*, 264 F.2d 689 (4th Cir. 1959)(although worker's compensation benefits generally inadmissible, they may be brought before jury when relevant to credibility)(followed in *Powers v. Temple*, 250 S.C. 149, 156 S.E.2d 759 (1967)).

[22] *See* Julius W. McKay, II, *Payments of Plaintiff's Medical Bills by Medicaid: An Exception to the Collateral Source Rule*, 25 *The Defense Line* 7-10 (Summer 1997)(citing *Bates v. Hogg*, 921 P.2d 249 (Kan. Ct. App. 1996)).

[23] *See* 1 *McCormick, supra* note 1, Section 201, 855 n.16 (citing *B. Morton v. Zidell Explorations, Inc.*, 695 F.2d 347 (9th Cir. 1982)).

[24] *See* 1 *McCormick, supra* note 1, Section 201, 855 n.16 (citing *Posttape Assocs. v. Eastman Kodak Co.*, 537 F.2d 751, 758 (3d Cir. 1958)).

President's Letter
Continued from page 4

tatives still live by these tenets, the corporate mentality seems to have redefined the concept of "quality." Am I capable of providing "quality" legal services in this environment?

The auditors claim we did it to ourselves, citing examples of 26 hour billing days, designer shoes billed to clients as "ground transportation," and similar egregious billing abuses. We have all heard the horror stories, but I still don't wear designer shoes. Those stories must have come from attorneys in other states—or did they?

These and other similar issues have invaded the relationship between defense lawyers and insurers across the nation. We seem to have five available responses: We can (1) change the way we practice; (2) look for different clients; (3) wait and hope the audit craze is just a passing fad; (4) fight the auditors; or (5) continue to do whatever it takes to represent our clients and worry later about whether or not we will be paid for our work. For the moment—on this Saturday before trial—I choose the last alternative. I would like to claim I choose this route out of a strong sense of professionalism and ethics. But in reality, I am simply afraid of being humiliated by the other side at trial if I am not prepared. Perhaps these auditors have us figured out. The fight will have to wait for another day.

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