S.C. Defense Trial Attorneys' Association

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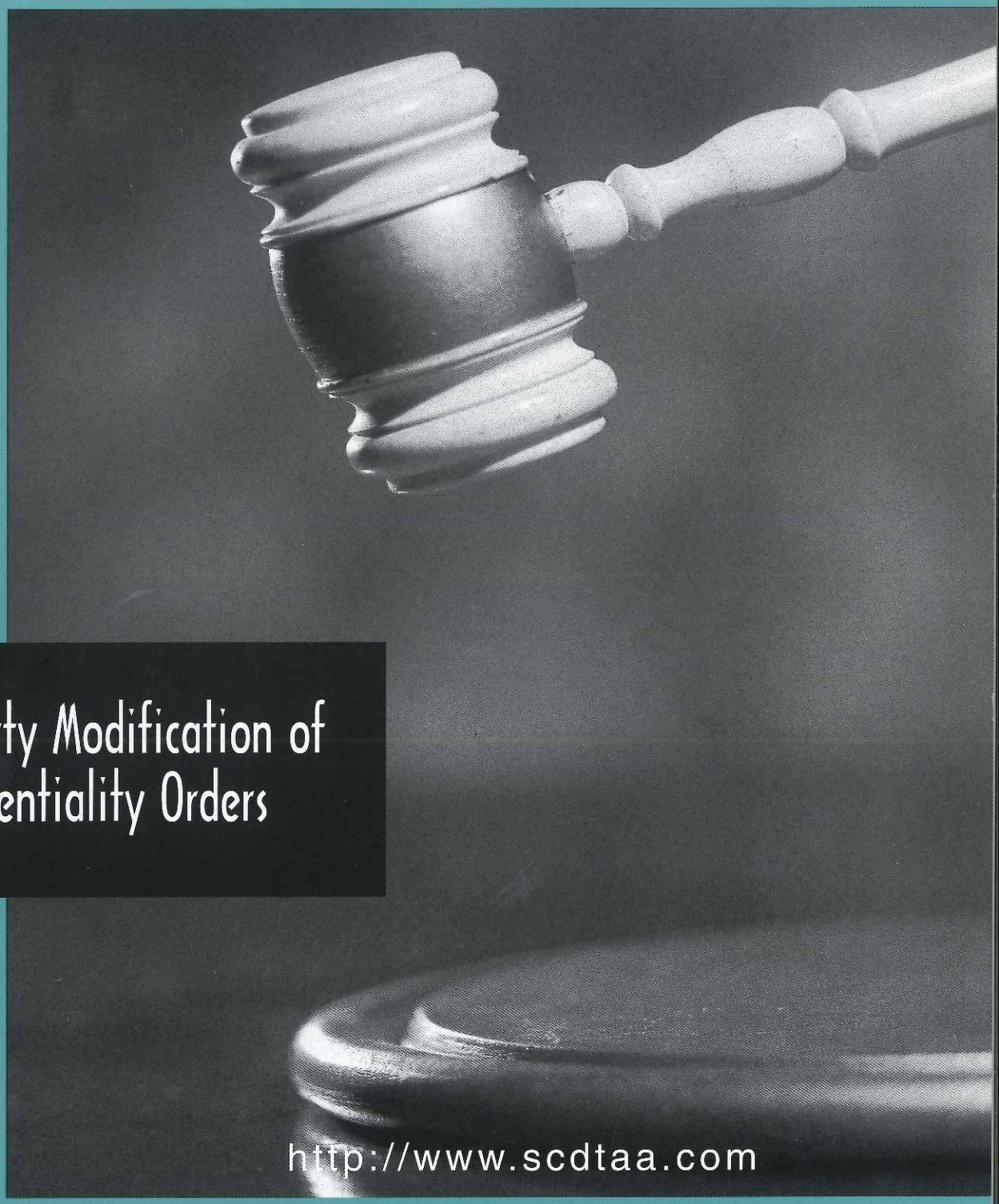
The DefenseLine



Third Party Modification of Confidentiality Orders

http://www.scdtaa.com

summer

TO THE SEA

fall

For Additional Meeting Information Check Out SCDTAA's Website
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The DefenseLine

Ten Years Ago

MARK H. WALL of Charleston, assumed his duties as president of our Association. EDWARD WADE MULLINS, JR. was pictured and honored as the recipient of the Second Annual Hemphill Award. Plans were underway for the Joint Meeting with the Claims Managers scheduled for the Grove Park Inn, Asheville, NC, July 26 - 28, 1990.

Twenty Years Ago

President BARRON GRIER held his first Executive Committee Meeting and it was reported that we had $1,908.57 in the checking account, $12,826.94 in the savings account. The claims managers reported their new officers were JOHN DUNN, President, RALPH CHAMBLEE, Vice-President. T. EUGENE ALLEN, III, was undertaking to prepare an expert witness bank for members of SCDAA.

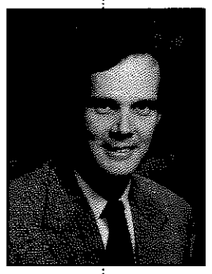
Thirty Years Ago

The Annual Joint Meeting of the South Carolina Defense Attorneys' Association and Claims Managers Association of South Carolina was held at the Sheraton Fort Sumter Hotel in Charleston, SC, March 27 and 28, 1970. H. GRADY KIRVEN, President of SCDAA, and President HUGH HARLESS of the CMSCA, welcomed the attendees. REID A. CURTIS, Vice-President of DRI, spoke on Excess Liability. This was followed by a panel discussion chaired by CHARLES H. GIBBS with panelist REID A. CURTIS, WILLIAM A. HORGER, and C. DEXTER POWERS and J.D. TODD.

On Saturday morning, JACKSON L. BARWICK, JR. introduced KIRK M. McALPHIN of Atlanta who spoke on "Fees and Billing." This was followed by a panel discussion on fees and billing with H. SIMMONS TATE, JR., Moderator, Panelist KIRK McALPHIN, REID CURTIS, W. CARL DUNN, DON THOMPSON, SAUNDERS M. BRIDGES and ANDREW B. MARION.

President's Letter

by W. Francis Marion, Jr.



Association, Education and Inspiration. Association, Education and Inspiration.

Recently, I attended a meeting where the speaker kept repeating these words in describing the purpose of that meeting. The more he repeated these words, the more I realized this was the purpose of our Association as well.

Association.

In the late 1960's, a handful of defense lawyers gathered in Columbia to address changes in the law prevalent at the time, to share experiences and to help each other meet client needs. Not long thereafter, the group expanded and in 1969 the South Carolina Defense Attorneys' Association was established. While much has changed in the practice of law since 1969, the fundamental reasons for establishing our Association have remained steadfast.

Before the advent of computers and e-mail, the only way for defense attorneys to share information on a local basis was to meet at least annually. As Carey Doyle later told me, in his vernacular, the Annual Meeting is where the "same ole sob's" could get together and share.

In today's legal climate, we all know that with a stroke of the keyboard, a message can be sent to thousands of people. Practices are more portable. Daily, we hear of practice groups leaving a larger firm and creating a new smaller one. It would be easy to discount the need for face to face meetings, when other communication is so readily available, but in truth, the need to regularly meet in a group is even more important.

In the last decade, there has been significant growth, not only in our organization, but nationwide in defense associations. The Texas Association Defense Counsel, for example, grew almost 50% in the last 3 years, while Virginia membership grew by 30%. The Defense Trial Council of Indiana has grown by almost 126% over the last several years. DRI membership has grown 25% to nearly 22,000 members.

News travels at the speed of light. Daily we are bombarded with new cases, new issues and new dilemmas. Without time for reflection, thoughtful and measured responses become a rarity. The Annual Meeting provides that opportunity. Whether in a golf cart, on a tennis court, over a cool drink, or at a meal, it is more important now than ever to find the time to share experiences with our brethren from different firms. It is a great time for the "same ole sob's" to get together.

Education.

It was recognized in 1969 that there was a need to share, not only experiences, but to have seminars educating membership on new developments and trends in the law. With emerging theories in product liability law and the Uniform Commercial Code, the small group of defense lawyers recognized, long before mandatory CLE, the critical need for continuing education.

Shortly after the inception of the Association, two meetings were established, the Joint Meeting in Asheville and the Annual Meeting in the fall. While both meetings provided continuing legal education, the Annual Meeting was, and is, geared to continuing education for lawyers. The roster of the speakers and participants read like a list of Who's Who. In the state the size of South Carolina, it is truly amazing that the Association has had U.S. Supreme Court Justices, national political figures, and internationally renowned authors as speakers. But not satisfied, the Association has continued to evolve.

In the last three years, substantive law committees have been developed to address specific needs of practice groups. The Association has not stopped there. As we all know, it is difficult for young lawyers to get hands on courtroom experiences. Recognizing this fact, the Association began the Trial Academy. This Academy has been highly successful in exposing young lawyers to practical problems that all of us face in the courtroom. The success of this program rests entirely on the shoulders of volunteers in our organization who are willing to give 2 and 3 days to lecture and teach. Having personally been involved in the Trial Academy for a number of years, I can report that as an instructor, I have gotten much more out of the Trial Academy than did the students (some of my close friends might not be surprised with that statement).

The Association is not willing to rest on its laurels with the success of its existing programs. As part of it's challenge, the Long Term Planning committee is thinking of ways to restructure existing programs, or create new initiatives that will benefit the membership. I suspect that the leaders of the Association in 1969 did not dream that the organization would provide the services and benefits to its members that it does today. My hope is that in 30 years the same can be said.

Inspiration.

The first year I was asked to go to the Annual Meeting I was ecstatic, but did not know what to expect. The few lawyers who I knew at the time welcomed me and introduced me to older lawyers. I was in awe. I had heard about many of these lawyers' trial skills and the cases they had won, but for me it was, frankly, a thrill. I suspect the "older" lawyers thought it was nothing more than idle conversation, but for me, I kept saying the same question to myself, "Gosh, why didn't I think of that?" At this past Annual Meeting, the shoe was on the other foot.

At the 1999 Meeting, I attended a Young Lawyers' breakout session to hear comments from the newest members of our Association. It was a great experience (and a little bit of a frightening one as well). These young lawyers expressed gratitude in being exposed to an excellent educational program and being given the opportunity to talk with older lawyers. Remembering how I felt when I attended my first meeting, it was a shock to realize I was now being lumped into the category of "old lawyers". It did, however, make me again appreciate the value of having experienced trial lawyers actively involved in the Association to share, what may be to the older lawyers fairly trivial or common experiences, with younger lawyers. In fact, one of their requests, was for the older lawyers to do a seminar at the Annual Meeting giving hands on practical tips for trying cases. To honor that request, part of our Annual Meeting in 2000 will be to have "older lawyers" give practical hands on experiences for handling various aspects of trial. This will be a great opportunity for the more experienced lawyers to inspire younger lawyers and, in the process, rekindle our own enthusiasm for our chosen profession.

We know intuitively, but perhaps it is time to again recognize openly, that our organization serves a valuable purpose for the lawyers of this state. There is no question the SCDTAA, through its educational programs and meetings, inspires its members. Despite the pitfalls that will befall us all during the year; it is reassuring to know that certain things remain steadfast... Association, Education and Inspiration.

Third Party Modification of Confidentiality Orders

John A. Massalon
Wills & Massalon

Concerns about the public disclosure of confidential or proprietary information permeate much of today's civil litigation practice. Those concerns are most prevalent among Defendants who conduct business on a regional or national basis, and who participate in litigation in multiple forums. Previously, civil litigants enjoyed some measure of privacy. Communications among litigants and other interested parties in different venues was often difficult. Likewise, public records were not readily accessible. However, advances in technology such as e-mail and internet access to public records have eliminated many of those barriers and raised client sensitivity to issues of confidentiality.

The limitations on the scope of discovery set forth in the state and federal rules of procedure provide little protection for confidential information. Often much of the information considered private or proprietary by a client does not qualify for protection under the common law attorney-client privilege or the work product privilege set forth in Rule 26(b)(3). Attorneys faced with a discovery request for business information and a client who is reluctant to disclose the information will often object to the request as irrelevant.

Typically, objections to relevance in discovery are not viewed favorably from the bench. The scope of discovery is broadly defined in Rule 26(b)(1) to include any matter relevant to the subject matter of the pending action, regardless of whether it is a claim or defense and regardless of which party has raised the claim or defense. Further, the final sentence of Rule 26(b)(1) makes it clear that the concept of relevance in discovery is much broader than the concept applied at trial. Specifically, the Rule provides that "[i]t is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears to be reasonably calculated to lead to the discovery of admissible evidence."

Based upon the foregoing considerations, the entry of a protective order has evolved into the preferable approach to preserve the integrity of confidential information. Rule 26(c)(7) provides that the court in which an action is pending may issue a protective order "that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way...." While a protective order may be obtained by motion, many are also the result of an agreement among the litigants.[1] "Frequently, these take the form of 'umbrella' protective orders that authorize any person producing information to designate that which is confidential as protected under the order."[2] Such orders are "used so frequently that a degree of standardization is appearing."[3]

The Manual for Complex Litigation recognizes this fact and provides a suggested form for a consent confidentiality order.[4] That form order provides in pertinent part:

- That any party may designate a document as confidential pursuant to the order;
- That stamped confidential documents may only be disclosed to counsel for the parties, persons with prior knowledge of the document, court officials, and persons who sign a non-disclosure agreement;
- Any party, or other person allowed to intervene by the court, may challenge the confidential designation;
- A party desiring to introduce confidential information at trial or a hearing must give prior notice to the producing party which may move to have the evidence received *in camera* or under other conditions to prevent unnecessary disclosure;
- Stamped confidential documents which are filed must be filed under seal;
- Confidential documents may not be used for any purpose other than the pending litigation; and
- Confidential documents must be returned to the producing party at the conclusion of the litigation.[5]

However, the entry of a protective order does not resolve all concerns regarding the confidentiality of business or proprietary information. "Once entered, protective orders need not remain in place permanently, and they are not immutable in their terms."[6] A party to the litigation may make a motion to modify or dissolve the order, and the court possesses the inherent authority to alter protective orders previously entered.[7] Additionally, a stranger to the litigation may file a motion pursuant to Rule 24(b) to intervene for the limited purpose of seeking materials encompassed by a protective order.[8]

The reaction to third party motions challenging protective orders has been mixed. In *Martindell v. International Telephone and Telegraph Corporation*, 594 F.2d 291(2nd Cir. 1979) the court took a restrictive approach. The parties to that action took depositions pursuant to a court-approved confidentiality agreement which provided that the depositions would only be made available to the parties and would not be used for any other purpose.[9] Subsequently, the United States of America, which was not a party to the litigation, sought access to the depositions for use in its investigation of possible criminal activity.[10] The District Court denied that request and the United States appealed.[11]

On appeal the United States Court of Appeals for the Second Circuit upheld the lower court's decision. In so doing, the Court of Appeals balanced the public interest as stated in Rule 1 of securing the "just, speedy and inexpensive" determination of civil actions against the public interest of having information available to law enforcement.[12] After considering those factors the Court held that "absent a showing of improvidence in the grant of a Rule 26(c) protective order or some extraordinary circumstance or compelling need, ..., a witness should be entitled to rely upon the enforceability of a protective order against any third parties, including the Government, and that such an order should not be vacated or modified merely to accommodate the Government's desire to inspect protected testimony for possible use in a criminal investigation, either as evidence or as the subject of a possible perjury charge."[13]

A much more liberal treatment of a third party motion to modify a protective order is apparent in *Wilk v. American Medical Association*, 635 F.2d 1295 (7th Cir. 1980). That action was filed in the Northern District of Illinois by a group of chiropractors who alleged that the American Medical Association and other medical associations and physicians had combined to eliminate the practice of chiropractic. At the outset, a blanket protective order had been entered by the Court upon the motion of the Defendants without opposition from the Plaintiffs.[14] Subsequently, a similar action was filed in New York and the Plaintiffs in the New York action filed a motion to intervene in the Illinois action for the purpose of accessing the materials encompassed by the protective order.[15] The District Court denied the motion to intervene based upon reasoning similar to that used in *Martindell* and the intervenors appealed.[16]

The Seventh Circuit reversed the District Court and granted the intervenors access to the discovery materials.[17] Interestingly, the Seventh Circuit also invoked the mandate of Rule 1 to justify its decision.[18] However, rather than focusing on the economy achieved in the initial dispute through the entry of an order which ensured the free flow of discovery materials and minimized discovery disputes, the Court in *Wilk* emphasized that the resolution of the subsequently filed action would be expedited by the disclosure of the confidential information.[19]

Specifically, the Court held "that where an appropriate modification of a protective order can place private litigants in a position they would otherwise reach only after repetition of another's discovery, such modification can be denied only where it would tangibly prejudice substantial rights of the party opposing modification."[20] The *Martindell* decision was distinguished on the ground that the intervenor in that action was the United States which had access to investigatory resources not available to private litigants.[21]

The South Carolina Supreme Court addressed this issue in *Davis v. Jennings*, 405 S.E.2d 601 (S.C. 1991). Following a settlement, the trial court entered orders dismissing the case and sealing the record.[22] Shortly thereafter, *The Charlotte Observer* filed a motion to intervene

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Third Party Modification of Confidentiality Orders

for the purpose of challenging the protective order.[23] The trial court denied the motion to intervene, and the newspaper appealed that decision.[24]

First, the Supreme Court determined that a motion to intervene was the proper procedure to challenge the order and that the motion was filed in a timely manner.[25] Because the newspaper was denied intervenor status by the trial court, the merits of its challenge to the protective order had not been addressed by the lower court. Accordingly, the Supreme Court remanded the case with instructions to the trial court to make specific findings weighing "the need for secrecy against the right of access."[26] Further, the Court held that in striking that balance the "[f]actors to be considered may not be limited to, but should include: the ensuring of a fair trial; the need for witness cooperation; the reliance of the parties upon confidentiality; the public or professional significance of the lawsuit; and the harm to parties from disclosure."[27] The flexible approach suggested by the Court in *Davis* is generally in accord with the "prevailing approach" to third party attempts to modify or overturn protective orders.[28]

Because the case law is sparse on this issue, it is not possible to make any firm predictions as to the treatment to be accorded such a motion in any given set of circumstances. Protective orders remain a useful tool for facilitating the exchange of discovery and according protection to confidential information. Nevertheless, in using such orders and counseling clients, counsel should be aware that they are not an absolute guarantee of privacy.

The author would like to acknowledge the research and editing assistance provided by Allen L. DuPre for this article.

Footnotes

[1] 8 Wright, Miller & Marcus, *Federal Practice & Procedure*, Civil 2nd Section 2035 (1994).
[2] *Id.*
[3] *Id.* citing *Zenith Radio Corporation v. Matsushita Electric Indus. Co.*, 529 F2d. 866 (D.C.Pa. 1981).
[4] *Manual for Complex Litigation*, Third Section 41.36 (West Pub. Co. 1995).
[5] *Id.*
[6] 8 Wright, Miller & Marcus, *Federal Practice & Procedure*, Civil 2nd Section 2044.1 (1994).
[7] *Id.*
[8] *Id.*, citing, *United Nuclear Corp. v. Carnford Insurance Co.*, 905 F.2d 1424 (10th Cir. 1990); *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775 (1st Cir. 1988); *Meyer Goldberg, Inc., v. Fisher Foods*, 823 F.2d 159 (6th Cir. 1987); *Martindell v. Interntional Tel. & Tel. Corp.*, 594 F.2d 291 (2nd 1979).
[9] *Martindell*, 594 F.2d at 292.
[10] *Id.* at 293.
[11] *Id.*
[12] *Id.* at 295-296.
[13] *Id.* at 296.
[14] *Wilk*, 635 F.2d at 1296.
[15] *Id.*
[16] *Id.* at 1297.
[17] *Id.*. at 1299.
[18] *Id.*.
[19] *Id.*
[20] *Id.*
[21] *Id.* at 1300
[22] *Davis*, 405 S.E. 2d at 602.
[23] *Id.*.
[24] *Id.*
[25] *Id.* at 603.
[26] *Id.* at 604
[27] *Id.*
[28] 8 Wright, Miller & Marcus, *Federal Practice & Procedure*, Civil 2nd Section 2044.1 (1994).

Substantive Law Committee Reports

Workers' Compensation Subcommittee

by Michael E. Chase, Committee Chairman
Turner, Padget, Graham & Laney, P.A.

As your chairman for 2000, I am pleased to announce that Grady L. Beard of Sowell, Todd, Laffitte, Beard & Watson, L.L.C., Columbia, South Carolina has been appointed Vice Chairman, and Walter H. Barefoot of Turner, Padget, Graham & Laney, P.A., Florence, South Carolina has been appointed to the new position of Meetings Director, for 2000. Joining Grady, Walt and me on the Workers' Compensation Substantive Law Committee this year are the following attorneys:

J. Russell Goudelock, II
Harry B. Gregory, Jr.
Joseph Hubert Wood, III
Ernest G. Lawhorne
Reginald M. Gay
Alton L. Martin, Jr.
Harold J. Willson, Jr.
Erroll Anne Hodges
Dan Addison
William Douglas Gray
Kirsten Barr
Patrick C. Fant, III

The Workers' Compensation Substantive Law Committee is charged with the responsibility for organizing workers' compensation CLE opportunities at both SCDTAA meetings. The Joint Meeting with the Claims Managers Association will be held July 27 - 29, 2000 at the Grove Park Inn in Asheville, North Carolina, and the Annual Meeting will be held November 2 - 4, 2000 at Kiawah Island.

The Workers' Compensation breakout sessions at the Joint Meeting typically include roundtable discussions between claims managers and defense attorneys concerning hot button issues in claims handling and litigation. Also, opportunities for fellowship with existing and potential clients as well as your fellow Association members throughout the weekend are plentiful.

The Annual Meeting historically has provided an opportunity for workers' compensation defense practitioners to interact with the Chairman of the South Carolina Workers Compensation Commission in both a CLE and social setting. Also, the Workers' Compensation breakout sessions at this meeting frequently attract Circuit Court and Appellate Court Judges. As an added perk, summary workers compensation case law updates for the year are provided.

The Committee may also develop special projects. In this regard, please look for upcoming information on an Internet communication project sponsored by the Committee this year. This project will involve the organization and implementation of an electronic communication network among workers' compensation defense practitioners who are members of the SCDTAA.

Last, all SCDTAA workers' compensation practitioners are encouraged to become more active with our Committee. The Committee can only be responsive to the members of the association if needs or suggestions are brought to the attention of the committee. Therefore, please feel free to contact me, Vice Chairman Beard, Meeting Director Barefoot, or any member of the Workers' Compensation Substantive Law Committee with any comments or concerns that you have.

Products Liability Subcommittee

by Gray T. Culbreath, Committee Chairman
Collins & Lacy, P.C.,

The Products Liability Committee enters the new millennium on a high note having conducted a successful breakout seminar at the Annual Meeting at the Cloister. The Products Liability Committee is comprised of SCDTAA

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members who practice products liability law in state and federal courts in South Carolina. In order to serve the Committee members and the SCDTAA membership as a whole, the Committee will present a program at the joint meeting in July and a breakout session at the Annual Meeting in November. In addition, the Committee will submit an article to the Defense Line during the course of the year touching on timely issues involving products liability practice in South Carolina. In that regard, I encourage all SCDTAA members to submit to myself or the members of the Committee any suggestions for articles or presentations as well as copies of any orders or unpublished cases that may be significant to products liability practice in South Carolina.

I encourage all members of the Association to join the Products Liability Committee. The current members of the Committee are: H. Simmons Tate, Jr.,Wade H. Logan, III, Elizabeth Henry (Babes) Warner, Ronald B. Cox, Chris J. Daniels, Kurt M. Rozelsky, M. Dawes Cooke, Jr.

If you are interested in joining the Committee, submitting an article or suggesting a topic, please contact one of the Committee members or myself, Gray T. Culbreath, Committee Chairman, Collins & Lacy, P.C., gculbreath@collinsandlacy.com, (803) 255-0421.

Employment Law Subcommittee

by Scott Justice, Committee Chairman
Haynsworth, Baldwin, Johnson and Greaves, L.L.C.

As one of the first substantive law committees organized several years ago, our membership has expanded rapidly. At our breakout session at the Cloister during the 1999 annual meeting, we had over thirty people in attendance. This continued a trend of increased interest in this substantive committee at each of the summer and fall meetings. Activities planned for 2000 include submission of an article for The Defense Line, breakout sessions at the summer Joint meeting and the fall Annual meeting, and possibly a CLE or meeting on assisting our members on obtaining their specialization certificate.

Anyone interested in joining this committee or participating in the breakout sessions are encouraged to contact Scott Justice at (803) 799-5858. We hope 2000 brings as much interest and increase in the numbers of employment lawyers in the SCDTAA as we experienced in 1999.

Editor's Note: This the first of a series of articles to introduce the substantive law committees of the Association.

Forms of Law

Opinions and Stories of and from the Georgia Courts and Bar by Berto Rogers

Justice LOGAN E. BLECKLEY, in *Cochran v. State*, 62 Ga. 731.

Opinion:

Those who are impatient with the forms of law ought to reflect that it is through form that all organization is reached. Matter without form is chaos; power without form is anarchy. The state, were it to disregard form, would not be a government, but a mob. Its action would not be administration, but violence. The public authority has a formal embodiment in the state, and when it moves, it moves as it has said by its laws it will move. It proceeds orderly, and according to pre-established regulations. The state, though sovereign, cannot act upon the citizen in a different manner from that which the laws have ordained. It cannot inflict capital punishment without first trying the prisoner according to law. There is no dispensing power. Courts have none. Courts are bound by the law no less than the prisoner at the bar.

Evidence Matters

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

British Civil Trials

Just imagine. There you are, standing erect before the learned trial judge, resplendent in your powdered wig and stunning black gown. Throughout the gallery, the local barristers and solicitors of London whisper as they watch you, the august American trial legend, visiting in England to plead your client's cause before the court. The adverse barrister's knuckles rap pocketa-pocketa on the ancient wooden counsel table, showing her irritation at the prospect of being bested by you "in her house." You perform a brilliant direct examination of your client and sit down. The other barrister rises and moves to introduce the harmful written statement of a nun currently in France, one which destroys your case. But this is too easy, you think. "I object. Hearsay!," you shout. "As your honor knows, the hearsay rule is the very cornerstone of Anglo-American jurisprudence." Does the judge answer, "Well and truly stated" in response to your declamation? No? Try, "Knucklehead, sit down and shut up!" Welcome to modern English evidence law.

Why should we concern ourselves with English evidence law? For one reason, British common law *is* the law in the state courts of South Carolina, unless inconsistent with our jurisprudence: "All, and every part, of the common law of England, where it is not altered by the Code or inconsistent with the Constitution or laws of this State, is hereby continued in full force and effect in the same manner as before the adoption of [Section 14-1-50]."[1] For another reason, the British attempts to reform and modernize evidence law can be a guide to our own courts. As they revise their trial rules and experiment with new ways of trying cases, American trial lawyers can benefit from their lessons learned.

Most of the evidence rules are essentially the same in England as in South Carolina. The English legal writers sometimes quote American decisions and commentators. There are some interesting differences though.

I. Hearsay

The most striking difference in our two sets of rules deals with hearsay. Colin Tapper, author of a British treatise on evidence, notes that although Wigmore "regarded the hearsay rule as the 'most characteristic rule of the Anglo-American law of Evidence,' [British jurists] Lord Reid[2] and Lord Diplock[3] judicially catagoriz[ed] it as absurd."[4] In fact, Scotland *abolished* the rule against hearsay in 1988 for civil trials,[5] and it is discretionary in all South African trials. The English courts follow it to some extent, but there is a recognized need to reform the hearsay rule. Generally witnesses testify orally as here, although written witness statements also may be used. As noted by British solicitor John Pritchard,[6] "Under the new [English] rules, . . . witness statements will stand as evidence in chief unless otherwise ordered."

II. Impeaching One's Own Witness, and Party Admissions

The rule against impeaching one's own witness, no longer viable in the United States or South Carolina courts, still applies in England. Also, a party must have personal knowledge of an admission,[7] unlike under Federal and South Carolina Rules of Evidence 801.

III. Raising One's Hand to Take the Oath

Witnesses usually do not raise their hands to take the oath to testify in England. Witnesses may do so under the Oaths Act, however, and in Scotland they still do raise their hands.

IV. Barristers and Solicitors

In South Carolina during the 1800s, lawyers licensed to practice in the law courts were called attorneys, but they were called solicitors in the equity courts. Two separate bar examinations were given. In England, a distinction still persists, and with certain exceptions, only a barrister has the right of audience in the higher courts.

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V. Juries

The jury is possibly our greatest inheritance from English jurisprudence. However, juries have fairly well been phased out in English civil trials, except in limited circumstances. As summed up by Colin Tapper, "In civil cases there is hardly ever a jury."[8]

VI. Discovery

In June of last year, the English civil system was shaken up, largely resulting from reforms by Lord Woolf, the Master of Rolls. A single set of procedural rules replaced the various other sets. More pre-action discovery is allowed than before. Previously pre-action discovery was limited to personal-injury cases, but this restriction has been removed.

VII. Delay Between Filing and Trial

Before the recent reforms, a five year wait before trial was not uncommon. Sometimes cases took as long as ten years to reach trial. Under the new reforms, the plan is to have claims up to 15,000 pounds (about $24,000.00) tried within 30 weeks (71/2 months) in a one-day trial.

VIII. Experts

In America, the first recorded use of experts was in the 1665 Bury St. Edmonds witch trials. Although some experts still appear to base their opinions upon the supernatural, their use has been a mainstay in American and British trials ever since. The new English rules persuade the court and parties to appoint a single, jointly instructed expert. As noted above, expert reports are frequently allowed as evidence, and the English rules also suggest that the expert not attend trial unless there is a good reason to do so.

IX. Trial and Appellate Court System

The weightier cases are heard by the High Court. This court is centered at the Royal Courts of Justice in London, but there are district registries in other major towns and cities. The county courts (one in almost every town) deal with smaller cases.

Appeals from either the High Courts or the county courts are to the Court of Appeal. From the Court of Appeal, the appeal goes directly to the House of Lords, the highest court in the United Kingdom. In addition, the Privy Council (essentially the House of Lords) decides appeals from some commonwealth countries; it sits on Downing Street near the Prime Minister's residence. If a matter concerns European Community law, it may be referred to the European Court of Justice.

Footnotes

[1] S.C. Code Ann. Section 14-1-50 (Law. Cop-op. 1976). For cases citing the British common law pursuant to Section 14-1-50, see *McNeill V. Sunited States*, 519 F. Supp. 283 (D.S.C. 1981); *State v. Carson*, 274 S.C. 316, 26 S.E.2d 918 (1980).

[2] *See Myers v. DPP*, 2 All E.R. 881, 884 (1964), App. Cas. 1001, 1009 (1965).

[3] *See Jones v. Metcalfe*, 3 All E.R. 205, 208, 1 W.L.R. 1286, 1291 (1967).

[4] Colin Tapper, *Cross and Tapper on Evidence* 593 (8th ed. 1995) [hereinafter *Cross and Tapper*].

[5] In Scotland, the Scottish Law Commission's recommendation that the hearsay rule be abolished in civil trials was accepted and enacted into Section 2 of the Civil Evidence Act of 1988. *Cross and Tapper, supra* note 4, at 598.

[6] Mr. Pritchard is a former law professor at the University of Kent at Canterbury and is a licensed solicitor. I thank Mr. Pritchard and his wife Shirley Pritchard, an English barrister, for their assistance in reviewing this column.

[7] *Cross and Tapper, supra* note 4, at 645-46.

[8] *Id.* at 6.

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