S.C. Defense Trial Attorneys' Association

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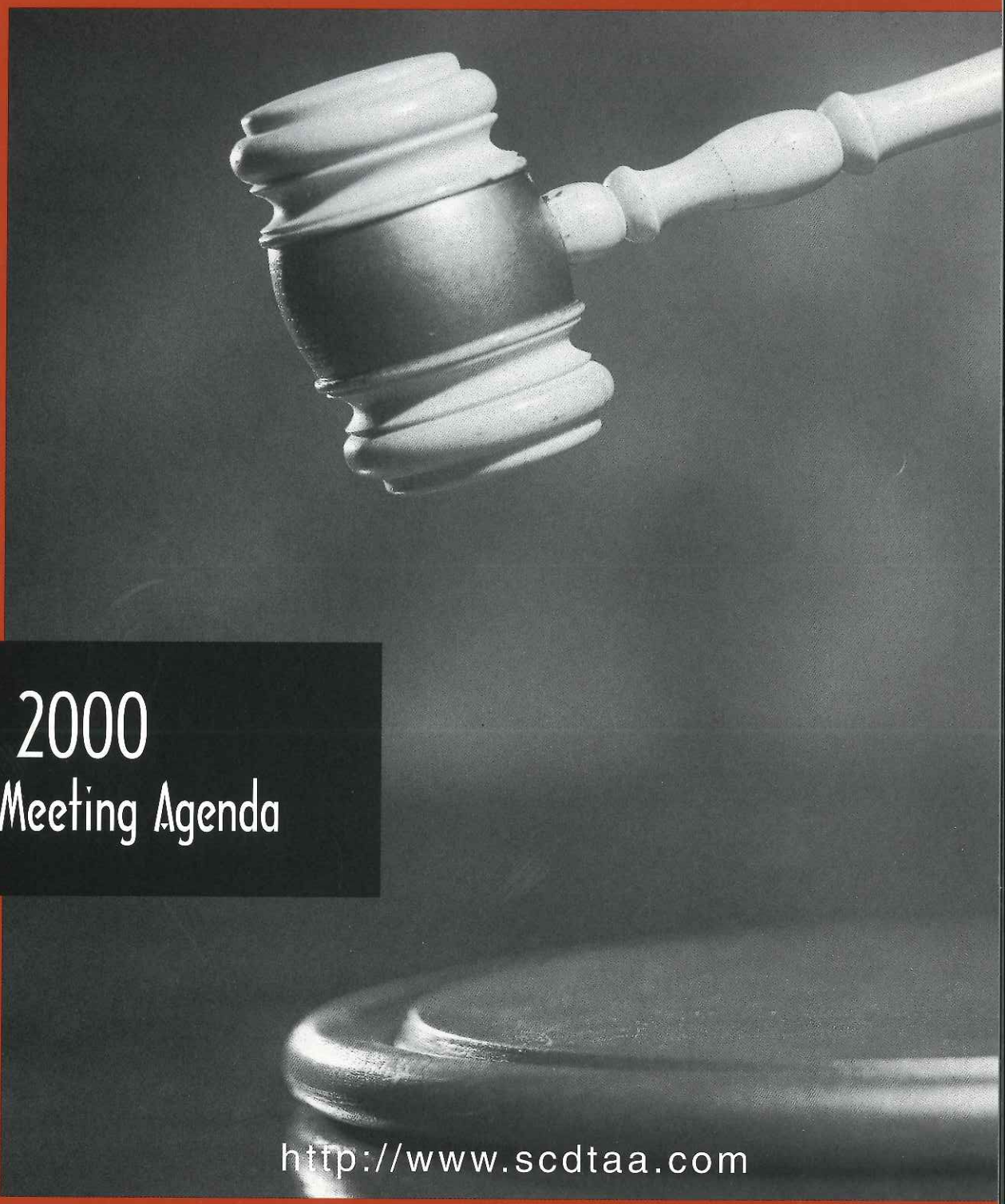
The DefenseLine



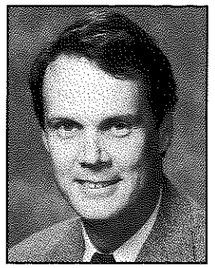
2000 Annual Meeting Agenda

http://www.scdtaa.com

President's Letter

by W. Francis Marion, Jr.

Change



Over the years we have witnesses, sometimes fierce competition, between balancing the practice of law with the business of law. We have seen the changes. We know more are on the way so how will we react?

Being a lover of boats, open water and fishing, I thought a fish story might be appropriate.

Many years ago, Captain Counsel ran a successful charter business. He had many happy clients. He charged them a fee for taking them to the best fishing holes. Some days he caught many fish, other days few. But all understood the risks of charter fishing. While sometimes disappointed with the results, his clients knew what to expect. Captain Counsel had several who helped him with his charter business, but his most faithful was his first mate, Trusty.

Trusty was in charge of making sure there were appropriate baits, that the tanks were topped off and attended to the details of making sure the boat was in tip top shape. The world was right. The Captain, the Mate and the clients were happy. As Captain Counsel became successful and grew, he hired other mates to handle specific jobs on the boat. Quite naturally, the costs of his charters went up, but his success at catching the biggest fish also increased. One customer asked if the Captain could slow the boat so the boat would not use so much fuel and lower the costs. The Captain agreed. After all, this was his customer, but the Captain pointed out, the ride would take longer. "So be it", said the customer. The ride took longer, the engines used less fuel per hour, but the trip took twice as long and actually used more fuel. Nevertheless, the trip was a success. They caught fish.

On the next trip, the customer asked if Trusty could assist the Captain in running the boat. It seemed much more reasonable for the captain to focus on catching fish and not worry about steering the boat – the mate could do that. The Captain frowned, but again, this was the customer and he still was the Captain. He chose the fishing holes and showed how to get there. It made little difference if the mate worked the throttles and held the steering wheel. Later the customer observed that it appeared the Captain was using too many baits for the amount of fish he was catching. Perhaps he should use a different technique. Again, the Captain frowned. He was in charge of the boat and where to fish but this was a client request. They caught fish and all survived.

On the next trip, the customer stated he would pay the fee provided they only take a certain number of baits, Trusty ran the boat and the Captain purchased the latest technology so they could get to a designated hole much more quickly and much more efficiently and still catch fish. The Captain snarled, but again this was the customer. He changed his electronics and then asked for a raise in fee to cover the added costs. "No", said the customer. "We are still fishing and this is part of that cost. To help you with this task, however, I will monitor how you use your boat, thereby saving you money to pay for these costs", the customer offered. The Captain's brow was heavy, he still owned the boat, and could designate fishing spots, but Mate Trusty now ran the boat and monitored the Captain's activities for the customer. Life was not good, but they still caught fish.

On the next trip, the customer informed Captain that it was taking too much time for him to monitor the efficiency of the fishing trip, therefore, he had asked an outside group of number crunchers to help monitor the trip. The Captain's brow was knitted, he snarled. Captain Counsel realized some of his fellow Captains had chosen not to take customers like this and some captains had even quit. But Captain Counsel loved fishing, so he agreed. He stood at the helm, watched the water, pointed out where he thought they should go and waited to see if the customer agreed that this was really a task for Captain Counsel, or better suited for Mate Trusty, who was actually steering the boat. Nevertheless, they still caught fish, but the Captain was never quite sure how much the customer would pay.

Finally, the number crunchers decided that the fishing business was not so bad and proposed they and the Captain merge their resources to become the Multi-Dogfish Partnership or MDP. They assured the Captain that through this merger he would have more customers that paid better and they would monitor his services. "Hummmm", the Captain thought . . . So goes the practice of law. The moral of the story is

A) Be careful who you mate with,

B) Never let clients tell you how to fish,

C) Always steer your own boat,

D) Go to the Annual Meeting of the South Carolina Defense Trial Attorneys' Association, November 2 through 5th and see how others are approaching these issues, or

E) All of the above.

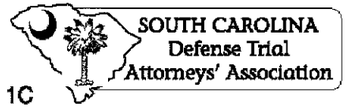
The DefenseLine

New Logo Gets Split Decision

The times they are a changing and so is the look of the SCDTAA. Carol Masciarelli of All-State Legal has generously given her time to create several new logo designs for our organization. The logos were on display at the Joint Meeting in Asheville and attendees had an opportunity to vote for their favorite. Here are the 3 finalists. It is not too late to cast your vote. Send your vote and comments to aimee@jee.com or vote on line at www.scdtaa.com.

1B

1C



3B

Association Business

Thanks for our Successes

by Frankie Marion

July was a very busy month for the our Association, but also very successful. My thanks go out to those involved in making the Trial Academy and the Joint Meeting resounding successes.

A special thanks goes to Matt Henrikson and John T. Lay and Aimee Hiers, our Executive Director, for their masterful organization of the Trial Academy. Having not been involved in the Trial Academy in several years, I was reminded what an undertaking it is. Not only must the Chairmen find attorneys to volunteer to teach young attorneys and Judges who are willing to give their free time to hold mock trials, but they must assemble and coordinate approximately 100 people to act as jurors and witnesses. Matt, John and Aimee, not only performed this task, but performed it very successfully. I have received kudos for each of them from the students involved. Again, my heartfelt appreciation to Matt, John and Aimee.

If you missed the Trial Academy, you had an opportunity at redemption if you attended the Joint Meeting. If you did not attend, you missed one of the best meetings in many years. Jay Courie and Elbert Dorn did a fantastic job of putting together, not only an interesting educational program, but one that was accentuated with appropriate sponsors. (If this were not enough, I actually won a door prize). It could not been a better meeting. Again, my special thanks to Jay Courie and Elbert Dorn for their outstanding effort in putting together a very successful meeting.

Also, let me again thank both Justice Toal and Justice Pleicones for their remarks at the Joint Meeting. Justice Toal highlighted how the Supreme Court is tackling some of the recurrent problems in our state trial system. Under her leadership, there is no question the problems she outlined will be addressed and improved. Justice Pleicones explained several trends he foresaw in cases dealing with technology issues. It is always good to have a feel for what the Supreme court has on its mind.

If you missed the Trial Academy and the Joint Meeting, you have one more chance at redemption. The Annual Meeting will be held at Kiawah November 2 through 5th. Sam Outten and his committee have again put together a extraordinary program with speakers from around the nation who will address issues affecting all of us. Sam and Moose Phillips mentioned they have so many good speakers, "we do not know how to schedule all of them." What a problem!

I look forward to seeing all of you at the Annual Meeting.

Successful Joint Meeting

by Jay Courie

The 33rd Annual Joint Meeting of the South Carolina Defense Trial Attorneys' Association and the Claims Managers Association of South Carolina was a tremendous success. Chief Justice Toal provided wonderful insight into her goals for our State Court system including electronic filing and advances in technology. Associate Justice Pleicones reflected on his years on the trial bench and his thoughts as he begins his tenure on the Supreme Court. The Breakout sessions were very informative and gave members an opportunity to get together to discuss hot topics in their individual practice area. New to this year's conference was an exhibit hall with vendors showcasing many of the latest advances in technology. Everyone seemed to greatly enjoy the excitement and information that our unique group of exhibitors brought to the meeting. As always, the golf tournament, tennis tournament and the rafting made for a wonderful Friday afternoon. If you missed this years meeting, mark your calendar now to join us next year at the always beautiful Grove Park Inn - July 26-28, 2001.

2000 Annual Meeting

Kiawah, SC • November 1-4, 2000

This year's Annual Meeting planners have truly placed a major emphasis on informative yet entertaining speakers and presentations. For instance, former S.C. Court of Appeals Chief Judge Alex Sanders will present perspectives in his usual relaxed, enjoyable, message-centered way. The ethics hour will be presented by way of "Ethics in the Movies", a collage of movie scenes which put lawyers into compromising situations. A discussion of the legal-ethical issues will then be led by SCDTAA Past President Tom Wills. We will have a most colorful speaker and enjoyable personality in Mario Ciano, the Managing Partner of Reminger & Reminger in Cleveland. Mr. Ciano, a highly sought speaker, represents hospital systems and will speak on healthcare law. Paul Cavender, a product liability trial attorney from the Lange Simpson firm in Birmingham, will discuss ways to develop and tell a story to trial juries in big damages cases. Another keynote session will be a "Point-Counterpoint" discussion of multidisciplinary practice. Two views of this innovation will be presented by DRI President-Elect Neil Goldberg and DRI Past President Steve Morrison. We will also have judicial panel discussions by federal and state judges, an address from a Supreme Court Justice, and substantive law breakout sessions.

The social program will be equally entertaining. There are world class golf and tennis opportunities on Kiawah Island. There will also be an opportunity to go salt water fishing. For those wanting a quieter weekend, you will have the beach to yourself. There are now many more dining opportunities in the Kiawah-Seabrook area for dinner. Try one after the President's cocktail party on Thursday evening, November 2. We will all enjoy a big cookout on Friday evening and a generously-stocked hospitality room all weekend. We will end our Saturday with a big banquet and dance and will enjoy noted regional band The Maxx.

We also plan some more interactive entertainment during the banquet and hope that everyone will make this event the highlight of their weekend.

Schedule of Events

Thursday, November 2, 2000

3:00 - 5:00 p.m.	Executive Committee Meeting
4:00 - 6:00 p.m.	Registration
5:00 - 6:00 p.m.	Nominating Committee Meeting
7:00 - 8:00 p.m.	President's Welcome Reception
	Dinner on your own

Friday, November 3, 2000

8:00 a.m. to 12:00 p.m.	Late Registration
8:00 to 9:00 a.m.	Coffee Service
8:15 to 8:30 a.m.	Welcome and Announcements *W. Francis Marion, Jr., President - SCDTAA*
8:30 to 9:15 a.m.	Current Issues in Health Care Litigation *Mario C. Ciano -* *Managing Partner, Reminger & Reminger*
9:15 to 9:45 a.m.	State Judges Panel
9:45 to 10:00 a.m.	Coffee Break
10:00 to 10:45 a.m.	Perspectives from a Former Chief Judge *Honorable Alex M. Sanders, Jr.*
10:45 to 11:15 a.m.	Communicating the Client's Story *Paul C. Cavender -* *Lange, Simpson, Robinson & Somerville, L.L.P.*
11:15 to 12:00 noon	Substantive Law Breakouts A. Employment Law B. Healthcare Law C. Products Liability
12:30 p.m.	Golf Tournament - *Chuck Turner, Chairman*
1:00 p.m.	Fishing
2:30 p.m.	Tennis Tournament - *Jeff Ezell, Chairman*
7:00 to 8:00 p.m.	Cocktail Party Dinner at Mingo Point

Saturday, November 4, 2000

7:45 to 8:45 a.m.	Coffee Service
8:00 to 8:30 a.m.	SCDTAA Annual Business Meeting/DRI Report
8:30 to 9:30 a.m.	Ethics Hour: Ethics in the Movies *Thomas J. Wills, IV, Wills & Massalon*
9:30 to 10:00 a.m.	Federal Judges Panel
10:00 to 10:15 a.m.	Coffee Break
10:15 to 10:30 a.m.	State of the Judiciary
10:30 to 11:15 a.m.	Status of Multidisciplinary Practice Proposals *Neil A. Goldberg, Saperston and Day, PC President ,* *Defense Research Institute*
11:15 to 12:00 p.m.	Substantive Law Breakouts A. Workers' Compensation B. Insurance and Torts C. Commercial Litigation D. New Lawyers Section
	Afternoon on Your Own
7:00 to 8:00 p.m.	Cocktail Reception
9:00 p.m. to 1:00 a.m.	Dinner and Dancing with The Maxx (Black Tie Optional)

Recent Order

Court of Common Pleas
Case No. 98-CP-8-896

State of South Carolina
County of Dorchester

Wyatt N. Whitlock and Sandra B. Whitlock, Plaintiffs

v.

Econ-o-bug, Peggy Erbe, Coldwell Banker O'Shaughnessy, Advantage Inspections, Timothy V. Haynes, Individually and Doing Business as Advantage Inspections, Defendants.

Order Granting Summary Judgment to Defendants Peggy Erbe and Coldwell Banker O'Shaughnessy

Defendants Peggy Erbe ("Erbe") and Coldwell Banker O'Shaughnessy ("Coldwell Banker") filed and served their Motion and Memorandum for Summary Judgment on March 24, 2000. Argument on that Motion was heard by this Court on April 12, 2000. For the reasons stated below, the Court GRANTS the Summary Judgment Motion of Defendants Erbe and Coldwell Banker.

The record before the Court is complete. It specifically includes the depositions of Plaintiffs Wyatt Whitlock and Sandra Whitlock, both of which were taken on July 27, 1999 and November 22, 1999, the deposition of the Plaintiffs' liability expert, G. Allen Moore, taken on November 22, 1999, and various exhibits to the depositions.

The facts underlying this case are not in dispute. The Plaintiffs contracted to purchase their Summerville home on December 7, 1996 for $108,500.00. This home was marketed by moving Defendants Erbe and Coldwell Banker. Erbe and Coldwell Banker were dual agents for the Plaintiffs and the seller, all as contemplated by Section 40-57-137 (N)(4)(S.C. Ann.).

During the six week period before the Plaintiffs contracted to by their home, some $25,442.06 in repairs were provided to them, well before they closed on the home, by Peggy Erbe of Coldwell Banker.

The Plaintiffs contracted to purchase the home on December 7, 1996 and ultimately closed this purchase on January 30, 1997. During the interim time, the Plaintiffs engaged home inspector Advantage Inspections. The home inspector, Timothy Haynes, issued a follow-up inspection report on January 1, 1997. Mr. Haynes had been asked to comment on some prior termite damage that was noted under the house by Econ-O-Bug. In Mr. Haynes' follow-up inspection report dated January 1, 1997, he specifically noted that wood members in the sub-floor of the house had some termite damaged but that this damage was not sufficient to warrant any repair or replacement. He also indicated recent repairs to the termite damage below the house. These repairs had been conducted in October and November of 1996 by Dynatech. Mr. Haynes specifically indicated that the wood members and sub-structure of the house were sound. The Plaintiffs were specifically aware of this report well before the January 30, 1997 closing on their home. On or before the closing on their home, the Plaintiffs received a Dynatech estimate to repair the sub-floor.

Plaintiff Sandra Whitlock earned a Master's Degree and works as a school teacher. Plaintiff Wyatt Whitlock is college educated and is a supervisor at Airborne Express. Mr. Whitlock has testified that he supervises, either directly or indirectly, from six to sixty other persons. When the Plaintiffs closed on their home, they were represented by counsel, Peter Wyckoff.

During the closing, the Plaintiffs specifically signed an official South Carolina Wood Infestation Report. As indicated on the S.C. - prepared CL-100 Form, Wyatt and Sandra Whitlock specifically acknowledged that they reviewed and received the CL-100 report. This report specifically indicated previous infestations of subterranean termites, prior subterranean termite treatment, evidence of wood-destroying fungi, and evidence of excessive moisture conditions in the crawlspace. This report further indicated visibly damaged wooden members and it recommended that the structure be completely evaluated.

The Plaintiffs' Complaint sounds only in negligence against Defendants Erbe and Coldwell Banker. The basic allegation is that Defendant Erbe failed to disclose material defects that existed within the home. Peggy Erbe was therefore alleged to have made negligent misrepresentations. The law is clear on the duties owed by a buyer's agent. Section 40-57-137(K)(S.C. Ann) specifically discusses the duties owed by a buyer's agent. "A buyer's agent is not obligated to discover latent defects in property or to advise his clients on matters outside the scope of his real estate expertise. A buyer's agent, his company, and the broker-in-charge are not liable to a seller for providing the seller with false or misleading information if that information was provided to the licensee by his client and the licensee did not know or have reasonable cause to suspect the information was false or incomplete" 40-57-137(K)(S.C.Ann).

The S.C. Court of Appeal's reasoning in *Nine v. Henderson* 437 S.E.2d 182 (S.C. App. 1993) is instructive. The facts underlying that case are remarkably similar to those in the present case. The Plaintiff in *Nine v. Henderson* sued for breach of warranty and fraud because of the seller's alleged failure to disclose termite damage. In *Nine v. Henderson*, the Plaintiff was provided with wood-infestation reports which expressly notes, as here, previous infestation of termites and evidence of prior termite treatment. The Plaintiffs in this case had precisely the same knowledge. Before purchasing their home, the Whitlocks were aware of previous structural repairs of $25,442.06, of previous termite infestations and repairs, and of existing termite damage to the sub-floor of their home. Despite receiving these reports and having an opportunity to read them, the Whitlocks nevertheless elected to close on their home. The Whitlocks closed on their home after reviewing and signing the CL-100 termite report and the follow-up inspection report performed by Timothy Haynes of Advantage Inspections.

The Whitlock's real estate agent, Erbe and Coldwell Banker, had no obligation to discover latent defects in the subject home or to advise the Whitlocks on matters outside the scope of their real estate expertise. Section 40-57-137(K)(S.C. Ann.). The duties of Erbe and Coldwell Banker are clearly established by statute. Under the facts of this case, which are undisputed, Defendants Erbe and Coldwell Banker have satisfied their duties. The Plaintiff's Complaint does not allege anything more than negligent concealment of material conditions by Erbe and Coldwell Banker. Under the reasoning of *Nine v. Henderson* and under the plain language of Section 40-57-137(K)(S.C. Ann.), Defendants Erbe and Coldwell Banker have breached no duty to the Plaintiffs. Whatever notice of termite damage that was in possession of Erbe and Coldwell Banker was made well-known to Plaintiffs Wyatt and Sandra Whitlock.

WHEREFORE, the Motions for Summary Judgment by Defendants Peggy Erbe and Coldwell Banker O'Shaughnessy Realty are hereby GRANTED.

The Honorable Jackson V. Gregory
Judge, S.C. Court of Common Pleas
April 19, 2000
Summerville, South Carolina

U.S. Supreme Court Makes Proving Discrimination Easier

by William H. Floyd, III,

Discrimination in the work place is against the law. That is nothing new. What is new, however, is how someone proves that he or she has been discriminated against because of race, age, national origin, sex, creed, religion, color, or disability. In a ruling issued this summer in *Reeves v. Sanderson Plumbing Products, Inc.*, the United States Supreme Court clarified how to prove discrimination and, according to most experts in the field, made it easier for the disgruntled employee.

Fired For Recordkeeping Problems

According to the facts of the case, Reeves was a 57 year old supervisor who had worked for 40 years for Sanderson Plumbing Products, Inc., a manufacturer of toilet seats and covers in Mississippi. Reeves' supervisors, who were younger than Reeves, criticized him for his managerial style and the accuracy of his attendance reports for the employees working in his department. After auditing the attendance reports, the company discharged Reeves for "intentionally falsifying company pay records."

Reeves sued the company for age discrimination. At trial he proved that he was more than 40 years old (the minimum age required for statutory protection); that he was "qualified" for his job as supervisor of the "hinge room;" that he was discharged; and that his job either remained open or was filled by someone younger. This proof is known as a "prima facie" case.

The company responded by establishing "legitimate, non-discriminatory" reasons for discharging Reeves, namely falsifying pay records. What happened next eventually led the Supreme Court to rule for Reeves.

"Too Damn Old"

Through evidence presented at trial, Reeves challenged the company's reason for his discharge as being false or pretextual. He did this in many ways, such as showing that he had actually maintained accurate attendance records, explaining that he had been hospitalized during some of the days when errors supposedly occurred, and establishing that the company had been inconsistent when dealing with similar attendance problems. Reeves also testified that his boss had made age-derogatory remarks to him at other times, like he "was so old [he] must have come over on the Mayflower" and that he "was too damn old to do [his] job."

Reeves won his case during the jury trial. In turn, the Company appealed, and the appeals court overturned the jury verdict for Reeves. Applying a legal standard recognized by some, but not all of the appellate courts, the Fifth Circuit Court of Appeals concluded that the company, not Reeves, should win, because Reeves had failed to prove that the company's explanation was false and that age was the real reason for his discharge. This standard is known as "pretext plus."

Rejection of "Pretext Plus" Standard

Reeves appealed to the U.S. Supreme Court and won. The Court ruled for Reeves and rejected the pretext plus standard. The Court held that "a plaintiff's *prima facie* case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." In other words, the Court required less proof from Reeves, and looking ahead to future cases, less proof from other potential plaintiffs.

Until the Court's decision in *Reeves*, appellate courts (including the Fourth Circuit) insisted on proof meeting the pretext plus standard, which plaintiffs in many cases found too difficult to overcome. The Supreme Court in *Reeves* made it easier for plaintiffs to prove that they were discriminated against, because they no longer must prove both that the employer's explanation is false and that age was the real reason. Once a plaintiff has established a *prima facie* case and disproved the employer's proffered reasons, a judge or jury may infer discrimination. This same standard will apply most likely to other types of discrimination cases involving race, sex, and other protected categories. It will also allow more discrimination cases to be tried before a jury rather than being dismissed before trial.

Conclusion

In some respects, *Reeves* and its subtleties may mean more to attorneys for plaintiffs and

Continued on page 9

New Lawyers Committee

by Darryl Smalls

The New Lawyers Committee was formed in 1999 to encourage and foster the exchange and dissemination of knowledge and ideas relating to the issues affecting new lawyers. Incidental to this activity, but no less important, is service to the organization, fellowship, networking and the development of lasting friendships.

The overall organization benefits from increased membership, identifiable future leaders, contagious enthusiasm and a fortified, dynamic and healthy DTAA for the future.

Stimulate and Facilitate the Participation of the New Lawyer

The New Lawyer's Committee will provide a structure within which one can overcome the inhibitions inherent in the position of the recently admitted, less experienced, members of the profession. New Lawyer's participation should account for and confront the issues of job pressures, time commitments and resources of a practitioner at that level. One goal is to eradicate the "newcomer syndrome". A number of techniques serve that purpose while stimulating participating of the DTAA. Interested New Lawyers should be given positions in the substantive committees of DTAAs. This can be accomplished through appointing liaisons or junior chairs to various committees.

Increase Speaking/Publishing Opportunities for Young Lawyers

New Lawyers have fewer opportunities to speak and write than the more experienced members of the bar. Lack of experience does not equate with lack of ability or knowledge as to all topics. New Lawyers need an outlet to write and speak. The DTAA creates that opportunity. The DTAA presents programs, hold annual conventions, and/or maintains a speaker's bureau through which members prepare and present papers or respond to invitations to speak at events of other organizations.

Increase Membership in the DTAAs

The practice of law for a defense lawyer admitted to practice ten years or less is too often a lonely endeavor. This group of practitioners is the most poorly represented in the DTAAs across the country. When tangible benefits, such as speaking and publishing are within the grasp of the New Lawyers, there is a benefit to the firm through publicity and training. Hopefully, these positive experiences will lead to increased membership in the DTAA.

Identification of Future Leaders

New lawyers are enthusiastic, competent, capable and driven people. These people seek opportunities to work for the good of the organization and showcase their own talents. The New Lawyers Committee is a garden from which to harvest tomorrow's leaders of the DTAA.

Enhance the Experience of All Members of the DTAA

New Lawyers hold their own breakout sessions where they speak, network and become contributors to that committee. The liaison or young members want the opportunities to work and will accept tasks that alleviate the pressures and responsibilities of the chairs, increasing the effectiveness and efficiency of the DTAA.

The Committee welcomes the participation by all new defense attorneys. Please contact Darryl D. Smalls at 803-376-9578 with any questions. Please join the new lawyers at the annual meeting for a reception and breakout session on Trial Litigation Skills.

Continued from page 8

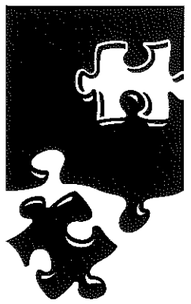
defendants, but in the long run, companies should consider the implication of *Reeves* and take some preventative measures, such as:

- disciplinary actions should be for real, honest reasons and not the product of convenient after thought;
- documentation of disciplinary events should accurately match the particular offense;
- disciplinary actions should be fairly and consistently administered; and
- supervisors should be trained about the various discrimination laws and why inane comments, like "he's too damn old," are never appropriate.

Evidence Matters

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

Relying on Attorney-Client Privilege: Standin' on Shaky Ground?



When the Federal Rules of Evidence were first floated as trial balloons by the advisory committee on March 31, 1969, rule 501 was followed by additional rules which set forth specific evidentiary privileges. After a hue and cry from special-interest groups (all of whom wanted their own special privileges), the committee proposed the present rule, which was sufficiently vague to be politically acceptable by Congress. As it stands, the federal courts decide evidentiary privileges based upon federal law, but follow state privilege law in diversity trials or when state law otherwise controls the rules of decision. In the South Carolina courts, of course, rule 501 essentially provides that the United States Constitution, the South Carolina Constitution, relevant statutes, and the common law control privileges.

In the everyday practice of law, attorney-client privilege often is cited as a mantra to withhold information bearing even slightly upon law practice. Deposition questions about when a client first appeared at a lawyer's doorstep or whether the lawyer referred the client to a doctor are objected to upon this basis. However, the privilege is construed narrowly, and a lawyer who does not zealously guard the privilege might discover that it has disappeared before his or her very eyes.

The Basic Rules

First, do not assume that just because a federal court from another circuit upholds a communication as privileged that the Fourth Circuit also will do so. Similarly, the Fourth Circuit and South Carolina courts sometimes differ on whether attorney-client privilege applies. (The privilege is not favored by the federal courts)[1] Actually, with the spare language of rule 501, it is not surprising that *applying* attorney-client privilege is much more difficult than *understanding its elements*. The Fourth Circuit Court of Appeals set forth the basic rules in *In Re Grand Jury Subpoena*:[2]

> "The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law." "[W]hen the privilege applies, it affords confidential communications between lawyer and client complete protection from disclosure." However, since it impedes the full and free discovery of the truth, the attorney-client privilege "is to be narrowly construed" and "recognized 'only to the very limited extent that . . . excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.'" As such, it applies only to "[c]onfidential disclosures by a client to an attorney made in order to obtain legal assistance," and " '[t]he burden is on the proponent of the attorney-client privilege to demonstrate its applicability."[3]

The test for the attorney-client privilege is this:

> The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney is informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.[4]

The South Carolina appellate courts have held a determination of whether the privilege exists is for the trial judge.[5] The privilege does not apply to furtherance of ongoing criminal activity[6] or a fraudulent scheme, for continuous tortious conduct, or information that the client intended would later be disclosed to others.[7] It is the client's privilege and survives his death. The mere fact that a lawyer is employed at the defense firm representing the defendant is not conclusive.

Attorney-Client v. Work-Product Privilege

Remember that although they often overlap, attorney-client and work-product privileges are based upon slightly different grounds. Work-product privilege protects a lawyers's mental impressions, notes, and theories about how the case will be tried. It does not require one lawyer to investigate and prepare a case in depth, then allow the adverse attorney to get a free ride by utilizing the fruits of his labor. Thus, even if a communication does not fit within attorney-client privilege, it might be privileged work product.

Just How Strictly Is the Privilege Construed?

Sometimes very. Remember that in the federal courts, the privilege is not favored. In the Fourth Circuit, there is no presumption of confidentiality from the mere fact that an attorney-client relationship existed.[8] Consider a case in which Lawyer A was being represented by a law firm where Lawyer B practiced primarily negligence law. While under investigation for criminal activities, Lawyer A tells Lawyer B that he had perjured himself and about other crimes he had committed. (One of the conversations took place while they were driving to a CLE seminar in Columbia.) The Court of Appeals for the Fourth Circuit held that because of the personal nature of the conversations and other factors, the conversations were not privileged.[9] In one Rhode Island case, the court noted that statements made in front of a law student in the lawyer's office were not within the privilege, unless he were acting as a clerk.[10]

Waiver

The privilege must be waived voluntarily. Speaking for the South Carolina Court of Appeals, Judge Shaw held in *Marshall v. Marshall* [11] that inadvertently leaving a lawyer's letter in the glove compartment of someone else's car does not waive the privilege.[12] However, the Fourth Circuit has cited case law for the proposition that inadvertent disclosure might constitute waiver,[13] apparently because failure to take precautions might reflect upon a lack of intent to keep communications confidential. Remember that the client's exact words need not be disclosed; if the substance of the client's words are used, the privilege is waived.[14]

Communications, Not Facts

The privilege applies only to confidential communications, not what the client knows.[15] Take, for example, a client who, during a deposition-preparation meeting, heard her attorney say that the adverse party had a conviction for murder. In the deposition, the client may not be asked, "What did *your lawyer say to you* about my client's criminal record?" However, the client may be asked, "What do you *know* about my client's criminal record?"

Privilege v. Confidentiality

When a communication is protected by an evidentiary privilege, a lawyer may not disclose it on the witness stand, through response to a subpoena, or in discovery. If it is merely confidential, it must be disclosed if under oath in a deposition or at trial. The duty of confidentiality applies to situations other than when a lawyer must disclose information under compulsion of law.[16]

An attorney must hold in confidence much about the client and her contact with the law office. But this does not mean that this information is privileged. "'Not every communication within the attorney-client relationship is privileged."[17] Whereas the lawyer might be required to keep secret the date of the client's initial visit, the reason for the visit, and related matters, this does not mean that these matters are privileged. On the contrary, when subpoenaed and called upon to testify about such information on the

Continued on page 12

Continued from page 11

witness stand or in response to discovery requests, the lawyer must disclose it. Moreover, the date of a visit is not a "communication."

Common Matters Not Within the Privilege

As a general rule, neither the amount of the fee, the identification of payment by case file name, nor the general purpose of the work done by the lawyer is protected by attorney-client privilege. This is because ordinarily no confidential professional communications are revealed by this information.[18] The same rule applies to the client's identity, which is usually not privileged, except in limited circumstances discussed below. It has been held that the date a lawyer was initially contacted by a client also is non-privileged.[19] Routine transmittal letters without confidential information have been held to be non-privileged.[20] When a client has made an attempt to employ a lawyer, but the lawyer refused because of a conflict of interest, the fact that the lawyer was contacted is not privileged.[21] Prisoners consulting jailhouse lawyers enjoy no attorney-client privilege.[22] In an unpublished opinion carrying no precedential weight, the South Carolina Court of Appeals held in a personal injury case that when a plaintiff's lawyer referred a client to a doctor, this referral was not necessarily related to legal services; thus it was not within attorney-client privilege.[23]

On Advice of Counsel

When a party bases a defense or claim upon advice by her lawyer and discloses the lawyer's legal advice, she may waive the privilege.[24] Some courts might go further and hold that when a party states that, based on advice of counsel, it believed its legal position was reasonable, the door has been opened into confidential communications.[25]

Joint-Defense Rule

When different lawyers representing different clients put forth a joint defense in a case, do they waive attorney-client privilege by disclosing confidential information to one another? The Fourth Circuit has recognized a joint defense rule and apparently extended it to other privileges such as work-product privileges.[26] More properly called the "common interest rule," it appears broad enough to include plaintiffs' communications to one another in separate actions[27] and even parties to *potential* actions.[28] When privileged information is shared between persons under the common-interest rule, it may not be waived without the consent of *all who share the privilege*.[29] The South Carolina courts apparently have not ruled on this issue.

Experts

Merely because an expert is hired by the client's lawyer does not mean that the client's confidential statements to the expert are protected. In deciding whether attorney-client privilege extends to such situations, the judge first is required to decide if the communication is privileged, and if so, to then balance two factors: (1) the need of the lawyer for the non-lawyer's assistance in effectively representing his client, and (2) the increased potential for inaccuracy in the search for truth if the trier of fact is deprived of a valuable witness.[30]

When an expert examines a client solely to advise the lawyer and help him effectively understand technical issues, the client's disclosures to the expert are privileged.[31] Similarly, when an attorney employs a physician to examine the defendant and make recommendations regarding a treatment program to be used in plea negotiations, admissions to the psychiatrist are within the privilege,[32] at least when the client assumed that his statements would not be disclosed during plea negotiations.[33]

On the other hand, a psychiatrist who was hired to help choose a jury after watching the accused testify on the stand, reading his medical records, and analyzing his test results shared no confidential relationship with the defendant. Thus, he could be called by an adverse party to rebut expert testimony regarding the insanity defense.[34] Admissions made during a court-ordered mental health examination may not be used as impeachment evidence.[35]

What About When a Client Wants Me to Negotiate Anonymously With the IRS?

Can a client hire a lawyer to negotiate with, for example, the IRS or a prosecutor while keeping the client's identity a secret? Probably not in the Fourth Circuit. There is a narrow exception that would appear to allow this: "To the general rule is an exception, firmly bedded as the rule itself. The privilege may be recognized when so much of the actual communication has already been disclosed that identification of the client amounts to disclosure of a confidential communication."[36] Having once stated that exception, the Fourth Circuit appears to repeat it.

In fact, in *In Re Grand Jury Subpoenas* [37] the Fourth Circuit held that "[a]lthough other circuits have, at times, indicated a willingness to protect a client's identity or fee information because disclosure would either implicate the client in the very criminal activity for which legal advice was sought, or supply the "last link" in an existing chain of incriminating evidence likely to lead to the client's indictment, *we have rejected those exceptions*.[38] In other words, it appears that a client may not rent the privilege by hiring a lawyer to make anonymous disclosures of crimes and torts.

Corporate Counsel

In the federal courts, attorney client privilege is not limited to communications to corporate counsel by only higher echelon, "control group" employees. When the attorney is gathering information to advise the corporation from employees about matters within the scope of their employment, the matter likely is privileged.[39] The United States Supreme Court will apply the privilege on a case-by-case basis. Care should be taken not to confuse corporate counsel with counsel for the individual officers or executives of the corporation. When a corporation's general counsel is involved and acting for the corporation, there might be no attorney-client privilege between the lawyer and an individual officer, at least not for the officer's personal legal matters. For example, in *Ross v. Medical University of South Carolina*,[40] the Supreme Court of South Carolina noted that attorney-client privilege was inapplicable to communications between MUSC's general counsel and a vice president: "Moreover, General Counsel was acting in a representative capacity for MUSC, and not as counsel for Vice President."

Some Slip Ups and Mistakes by Lawyers

Although the opportunity rarely is seized by an opposing lawyer, attorneys are sometimes careless with the privilege. Voluntary disclosure of privileged information to a third party waives the privilege as to all communications between the client and lawyer about the same subject.[41] The presence of a third party necessary to assist in the legal matter such as an interpreter, investigator, or secretary is probably within the privilege, disclosure of confidences around a stranger will waive it.[42] So when a witness or even a family member arrives with the client for the initial interview, care should be taken to have the client debriefed/advised first before the third party is invited into to the meeting room.[43] The same should apply to the boyfriend who came to offer "moral support."[44] Even when a client's father or mother is extremely interested in the case, remember that attorney-client privilege nonetheless can be waived by including them "in the loop." For example, a lawyer who writes a letter to a client's father about the case's status and discloses confidential information will waive the privilege, even if the father is a guarantor of the client's fees.[45] The courts might look differently about the presence of a parent in the room if he or she is a guardian-ad-litem, or the child is very young or disabled.[46] Remember that your client will assume that it is acceptable for family members to be in the room, unless *you* tell them otherwise. Finally, be careful before letting a client refresh his memory with documents containing privileged

Continued on page 14

Continued from page 13

communications before testifying;[47] the privilege might be waived.

Conclusion

Attorney-client privilege is cited loosely and used to withhold disclosure of many matters that are not protected. Often the privilege and the duty of confidentiality are confused, for example when matters not involving "communications" are erroneously believed to be privileged. Remember that the privilege is *narrowly* construed, and it is not favored by the federal courts. You have a duty to take steps to protect it such as ensuring that friends and family are not allowed into the loop so that a client's communications remain privileged. Remember that if you have been lax with confidential communications, your zealous advocate has the right, and possibly even the duty, to use those errors to her client's advantage. What you don't know can hurt your client - and you.

Footnotes

1 *In Re Grand Jury Proceedings*, 727 F.2d 1352, 1355 (4th Cir. 1984)(citing *Herbert v. Lando*, 441 U.S. 153 (1979)).

2 *In Re Grand Jury Subpoena*, 204 F.3d 516, 520 (4th Cir. 2000); *see also State v. Love*, 275 S.C. 55, 271 S.E.2d 110 (1980)(discussing the privilege).

3 *Grand Jury Subpoena*, 204 F.3d at 519-520 (citations omitted).

4 *Id.* at 523 n.1.

5 *See Love*, 275 S.C. 55, 271 S.E.2d 110.

6 *Grand Jury Proceedings*, 33 F.3d at 348.

7 *Grand Jury Proceedings*, 727 F.2d at 1356.

8 *See Grand Jury Proceedings*, 33 F.3d at 354.

9 *See United States v. Tedder*, 801 F.2d 1437, 1442-43 (4th Cir. 1986).

10 *See Wartell v. Novograd*, 48 R.I. 296, 137 A. 776, 53 A.L.R. 365 (1927).

11 *Marshall v. Marshall*, 282 S.C. 534, 320 S.E.2d 44 (Ct. App. 1984).

12 *Id.* at 538, 320 S.E.2d at 46-47.

13 *See In Re Grand Jury Proceedings*, 727 F.2d at 1356 (citing *Suburban Sew 'n Sweep, Inc. v. Swiss-Bernina, Inc.*, 91 F.R.D. 254, 258-59 (N.D. Ill. 1981)).

14 *Grand Jury Proceedings*, 33 F.3d 342, 354 (4th Cir. 1994).

15 *Upjohn Co. v. United States*, 449 U.S. 383, 395-96 (1980).

16 *S.C. App. Ct. R. 1.6 comment.*

17 *Ross v. Medical Univ. of S.C.*, 317 S.C. 377, 384, 453 S.E.2d 880, 884 (1994)(quoting *State v. Doster*, 276 S.C. 647, 651, 284 S.E.2d 218, 220 (1981)).

18 *In Re Grand Jury Subpoena*, 204 F.3d 516, 520 (4th Cir. 2000).

19 *See Condon v. Petacque*, 90 F.R.D. 53 (N.D. Ill. 1981)(statute-of-limitations case).

20 *See* 81 Am. Jur. 2d *Witnesses* Section 371, at 339-40 (1992).

21 *State v. Conyers*, 268 S.C. 276, 233 S.E.2d 95 (1977).

22 *See, e.g., State v. Owens*, 309 S.C. 402, 424 S.E.2d 473 (1992).

23 *See Brown v. Lanneau*, Unpublished Op. No. 95-UP-067 (S.C. Ct. App., filed March 20, 1995). *Cf. Vinson v. Hartley*, 389 S.C. 389, 398, 477 S.E.2d 715, 719-20 (Ct. App. 1996) (noting that plaintiff in auto-accident case saw attorney before seeking medical care and that plaintiff then was referred by attorney to medical providers).

24 *See, e.g., Hunt v. Blackburn*, 218 U.S. 464, 470-71 (1888); *U. S. Fire Co. v. Asbestospray*, 182 F.3d 201, 212 (3d Cir. 1999).

25 *See Chevron Corp. v. Pennzoil*, 974 F.3d 1156 (1992).

26 *See Grand Jury Subpoenas*, 902 F.2d 244, 248-49 (4th Cir. 1990).

27 *See Schachar v. American Academy of Ophthalmology*, 106 F.R.D. 187 (N.D. Ill. 1985)(cited in *Grand Jury Subpoenas*, 902 F.2d at 249).

28 *See In Re LTV Sec. Litigation*, 89 F.R.D. 595 (N.D. Tex. 1981)(cited in *Grand Jury Subpoenas*, 902 F.2d at 249).

29 *Grand Jury Subpoenas*, 902 F.2d at 248 (emphasis added).

30 *State v. Hitopoulus*, 279 S.C. 549, 309 S.E.2d 747 (1983)(citing *Edney v. Smith*, 425 F. Supp. 1038 (E.D. N.Y. 1976)).

31 *State v. Thompson*, 329 S.C. 72, 495 S.E.2d 437 (1988).

32 *Id.*

33 *Id.*

34 *State v. Smith*, 286 S.C. 406, 334 S.E.2d 227 (1985).

35 *State v. Myers*, 220 S.C. 309, 67 S.E.2d 506 (1951).

36 *NLRB v. Harvey*, 349 F.2d 900, 905 (4th Cir. 1965). *See also McDonald v. Berry*, 243 S.C. 453, 134 S.E.2d 392(1964)(recognizing that identity usually not within privilege except in exceptional circumstances; however, when address given confidentially, it may be within the privilege).

37 204 F.3d 516 (4th Cir. 2000).

38 *Id.* at 523 (emphasis added)(citing *In Re Grand Jury Matter*, 926 F.2d at 352).

39 *Upjohn Co. v. United States*, 449 U.S. 383 (1980).

40 317 S.C. 377, 453 S.E.2d 880 (1994).

41 *See Marshall v. Marshall*, 282 S.C. 534, 320 S.E.2d 44 (Ct. App. 1984).

42 *Marshall*, 282 S.C. 534, 320 S.E.2d 44.

43 *See Cafritz v. Koslow*, 167 F.2d 749, 751 (D.C. Cir. 1948)(sister in room waives privilege); *State v. Gordon*, 197 Conn. 413, 504 A.2d 1020 (1985)(wife).

44 *See People v. Doss*, 161 Ill. App. 3d 258, 514 N.E.2d 502 (1987)(presence of friend who offers moral support waives privilege).

45 *See Marshall*, 282 S.C. 534, 320 S.E.2d 44.

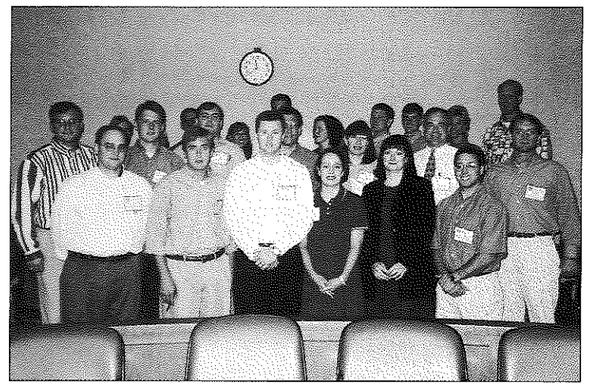
46 *See Bowers v. State*, 29 Ohio St. 542, 546 (1876)(mother's presence in attorney's office for meeting with young daughter did not waive privilege).

47 *See, e.g., Wheeling-Pittsburgh Steel Corp. v. Underwriters Lab., Inc.* 81 F.R.D. 8 (N.D. Ill. 1978).

2000 SCDTAA Trial Academy

by Matt Henrikson and John T. Lay

This summer, twenty-three lawyers from defense firms across the state participated in the 11th Annual SCDTAA Trial Academy in Columbia. Designed for lawyers who have been practicing between two and five years with limited first chair trial experience, the program consists of two days of speakers and workshops at the law school followed by a day long mock trial at the Richland County Judicial Center before sitting Circuit Court judges and live juries of eight to twelve lay persons.



Speaking on the basic elements of trial preparation and trying civil cases, the academy students heard from trial veterans like Wilburn Brewer, Vicky Eslinger, Ernie Nauful, Tim St. Clair, and Buster Davis. Supreme Court Justice Costa Pleicones, a long time friend of the academy, addressed strategies for preserving the record on appeal during trial, and SCDTAA Immediate Past President John Wilkerson gave a very affirming talk on being a defense lawyer as the practice moves into the 21st Century. It is the quality of the speakers who have made themselves available for the Academy over the years that makes the program as valuable a teaching tool as it is. The Academy provides young defense lawyers the benefit of the wisdom and experience of the best trial lawyers in our state in a forum that would simply be unavailable otherwise. Following each speaker presentation, the students, who were divided into twelve trial teams, met in groups of four in workshops where they practiced the skills just addressed. Each workshop was led by an experienced defense lawyer who gave constructive criticism to each student and helped the groups prepare for their roles in the mock trial. Following Thursday's program, the students met with the judges, speakers, workshop leaders, and Academy staff for cocktails at the Summit Club.

The mock trial this year was loosely based on the Bounaconti v. The Citadel case tried in Charleston fifteen years ago. Modified to simplify the issues, it was basically a medical malpractice case involving the decision to allow a college athlete to play with a neck injury. The trials are designed to be as realistic as possible, and witnesses included actual football coaches and football officials, as well as several of your Executive Committee members playing the father and various doctor's roles. Exhibits included x-rays, photo blowups, a video tape of the injury, NCAA rules, warning labels, and helmets. Most trial teams called four or five witnesses, so each student had several chances to direct and cross both lay and expert witnesses. Taking the trials very seriously, the judges hear motions in limine, take sidebars, and decide on motions for directed verdict, sometimes dismissing peripheral parties on legal grounds. Some juries have deliberated for more than an hour and have returned with questions. Of the six trials this year, four ended in defense verdicts while two ended in verdicts for the plaintiff ranging from $500,000 to $1,000,000 with reductions for comparative negligence.

One of the most valuable aspects of the Academy is the ability for the students to get feedback and criticism from the judges and members of the juries following the verdicts. Presiding over the trials this year were Judges Henry McKellar, Tommy Cooper, Ernest Kinard, Marc Westbrook, Alison Lee, and Billy Keesley.

Continued on page 16

Continued from page 15

The very generous gift of their Fridays to the Academy by these and other Circuit Court judges in past years has, simply put, made the Academy possible. Without the trial judges and juries to make the mock trials realistic, the learning experience would be incomplete and far less meaningful.

Matt Henrikson of Barnwell, Whaley, Patterson & Helms, and John T. Lay of Ellis, Lawhorne & Sims were this year's Academy co-chairs, but the success of the program owes itself to the speakers, judges, workshop leaders, witnesses and jurors. The bulk of the preparation for the Academy was this year done by new SCDTAA Executive Director Aimee Hiers and Leslie Stewart, a legal assistant at Ellis, Lawhorne & Sims. They recruited and coordinated about 100 volunteers who played witness roles and sat as jurors. This was a massive effort which included feeding and arranging downtown parking for that number, as well as managing courtroom assignments as witnesses played different roles in more than one trial and were called in varying order. Aimee and Leslie deserve the thanks of everyone involved with the Academy.

Plans are being made for next year's Trial Academy and another all-star lineup of speakers is expected. Registration for the limited number of spaces will be in early 2001.

To SCTAA From Trial Academy Attendees

I would like to take this opportunity to let you know how valuable the Trial Academy was for me. When I passed the Bar exam I felt that I had finally cleared the last hurdle. Like most new lawyers, I was familiar with the elements of various causes of actions, or at least knew where to look them up, and had a fairly decent grasp of the rules of evidence. However, it didn't take long for me to realize that being an effective trial attorney is not a skill which can be learned simply from reading a book or listening to a lecture. Indeed, as I have been told on various occasions, the only way to learn this skill is by trial and error. The opportunity to try a case without having to worry too much about the errors, led me to enroll in the SCDTAA Academy.

The goal of the Academy is to provide participants an opportunity to learn about and practice the various aspects of a defense case and then apply this learning by participation in a one day mock trial. The speakers provided valuable instruction in such areas as pre-trial motions, opening statements, direct and cross examination, closing statements and how to protect the trial record. Break out sections, held after each unit of instruction, allowed an opportunity to hone our skills in the various areas of the defense case.

One of the most enjoyable aspects of the Academy was the mock trial held on the last day. Through the efforts of the SCDTAA, Judges from both the Federal and State Courts, volunteered their time to preside over each trial. In addition, SCDTAA members, and people from the community, agreed to act as parties, witnesses and jurors. The efforts of everyone involved created an enjoyable yet realistic learning experience. I would like to thank everyone who volunteered their time to make the July 2000 Trial Academy a success and would strongly recommend the SCDTAA Trial Academy to any defense attorney interested in improving their courtroom skills

Sincerely,
R. Douglas Mellard
Bogoslow, Jones, Stephens & Duffie, P.A

What a wonderful opportunity the Trial Academy provided! (Even if you did give myself and my partner, Tom Chase, the Plaintiff's case.) My sincere thanks to all the speakers and participants, from the witnesses to the jurors and judges who gave of their time to provide a true courtroom experience. True to its billing, the Academy offered something for the novice to the seasoned trial attorneys. I particularly enjoyed the feedback that Judge Keesley gave us after our trial was completed. It is no wonder that the Academy has been a success for ten years now. I fully anticipate that the skills and techniques we discussed will benefit me for years to come as a trial attorney.

Once again, thank you for a quality program from start to finish.

Yours truly,
Sherry L. Boswell
Haynesworth, Marion, McKay & Guerard, L.L.P.

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