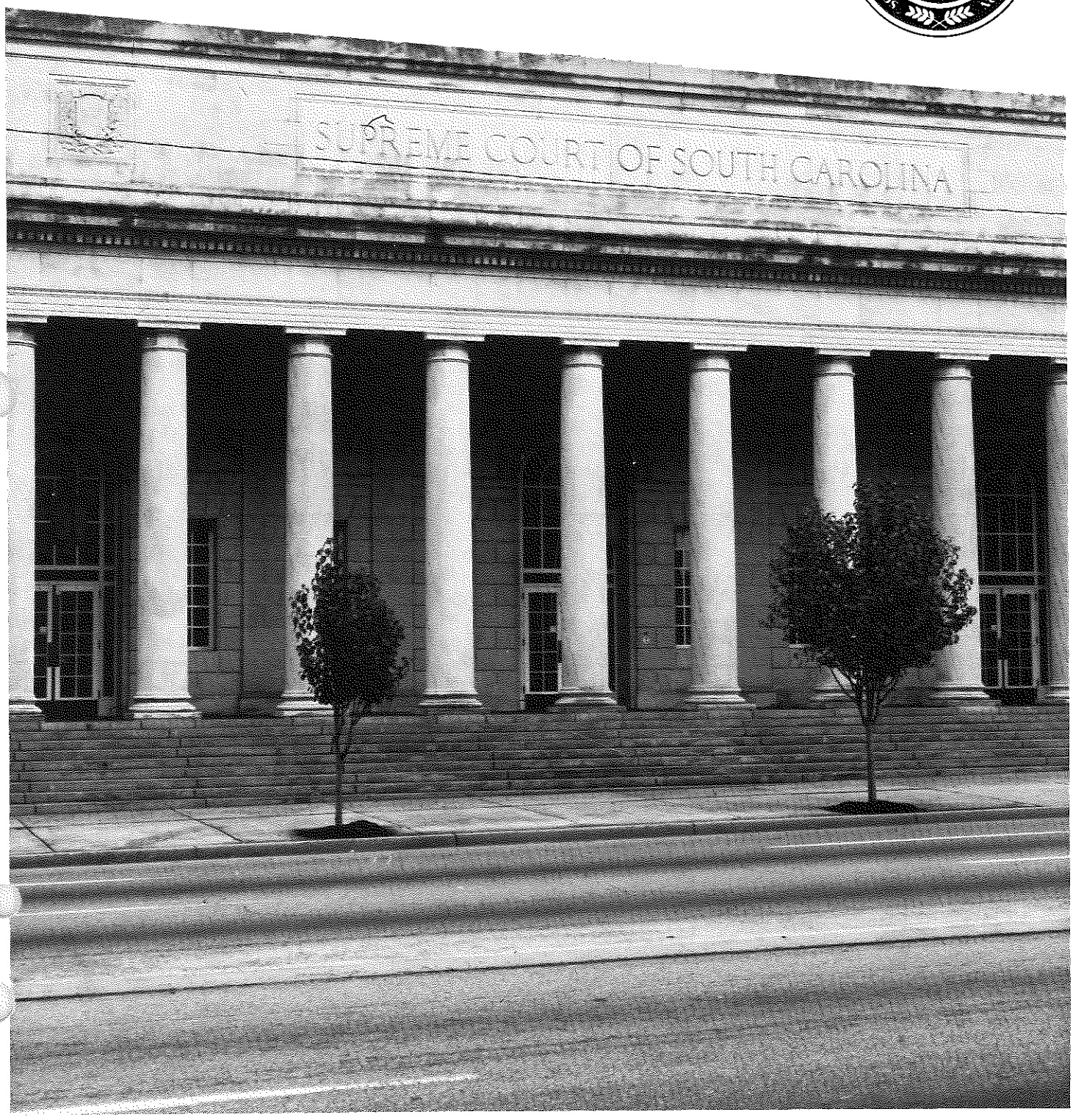
THE DEFENSE LINE

SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

VOLUME 17 NO. 4
FALL, 1989



PRESIDENT'S PAGE

Frank H. Gibbes, III
SCDTAA President

Through the years the South Carolina Defense Trial Attorneys Association has prospered because of the substantial time and effort which our membership has devoted to the business of the association. This year is no exception. Many people have contributed in a substantial way to the successes we have enjoyed.

Our association now has eighteen working committees. Each serves an important function. Each is chaired by a member of the association's Executive Committee.

In the past committee work was all too often performed by the committee chairperson acting alone. This year one of our primary goals was to involve more members of our association in the actual work of the association. Through our membership survey we identified people who were willing to devote time and effort to the work of the association. Through able leadership from our committee chairmen we got a lot of help from these people in getting this year's work done. Of significance a great deal of help came from the newer members of our association.

It is difficult to thank everyone in appropriate fashion for the work that has been done. The committees that oversee our day-to-day business have performed in capable fashion. These include the Amicus Curiae Committee - David Norton; the Judiciary Committee - George James; the Membership Committee - Bill Coates; the Practice and Procedure Committee - Bill Lynn; the DRI Committee - Steve Morrison; the Finance Committee - Bill Grant; the Ethics Committee - Albert James; and the By-Laws Committee - Tom Boulware. Our secretary, Glenn Bowers, has also contributed in demonstrable fashion to the good of our association.

Special thanks go to three of our committees. The Legislative Committee, chaired by Hugh McAngus, has devoted substantial time to assuring that our voice is heard in the Legislature. The Public Information Committee, chaired by Charlie Ridley and John Wilkerson, has given generously of itself in developing a long-term program to improve the public image we enjoy as defense attorneys. The *Defense Line* Committee, chaired by Jack Barwick and Will Davidson, continues to produce a publication that rivals any produced by any comparable organization anywhere.

A top priority identified in our membership survey was to continue to provide quality educational programs for our membership and the bar at large. Our Programs Committees-Joint Meeting, chaired by Kay Crowe; and Annual Meeting, chaired by Mike Wilkes - and our Seminar Committee, chaired by Jack McCutcheon and Bill Sweeny - have more than met this goal.

Finally, we would be remiss if we did not give special credit to the Conventions Committee chaired by Tom Wills, and to Carol Davis, Nancy Cooper, and the other members of Carol's staff who have made our meetings the enjoyable occasions that they are. As important as the work of our substantive committee is, I personally still find the primary benefit of our association to be the fellowship and friendships that we develop at our Joint and Annual Meetings.

Two committees remain - Long Range Planning, chaired by Mark Wall, and Nominating, chaired by Carl Epps. In many senses these two committees are responsible for the future of our association. I encourage each of you who has a keen interest in our future leadership and our future goals to contract Carl and Mark to share your thoughts on how we might improve as we look toward the 1990's.

VOLUME 17, NO. 4 FALL 1989

. . . LOOKING BACK . . .

In the August, 1979, issue of THE DEFENSE LINE, President BRUCE SHAW pointed toward our Twelfth Annual Meeting scheduled for Hilton Head Inn, October 25, 1979. Invitations were extended to the State and Federal Judiciary for a program which included Professor CHARLES ALLEN WRIGHT and Chief Judge CLEMENT HAYNESWORTH, JR. as speakers. CARL "BUTCH" EPPS, Program Chairman, promised a stimulating program. BOB IRWIN was still in Greenwood, WALTER T. COX, JR. was holding Common Pleas in Greenville.

Twenty years ago, our Association published its first Annual Report. The roster of members numbered 144. Our first President was B. ALLSTON "BAM" MOORE, JR., President, H. GRADY KIRVEN, Vice-President, HAROLD W. JACOBS, Secretary-Treasurer, and the Executive Committee, C. WESTON HOUCK, H. FRANK PLAXCO and E. W. MULLINS, JR. Senator WILLIAM P. BASKIN chaired the Legislative Committee. E.W. MULLINS, JR. chaired the Educational Committee. JAMES W. ALFORD chaired the Entertainment Committee. We were off and running.

The Defense Line is a regular publication of the South Carolina Defense Trial Attorneys' Association. All inquiries, articles, and black and white photos should be directed to Nancy H. Cooper, 3008 Millwood Avenue, Columbia, SC 29205, 1-800-445-8629.

DRI REPORT

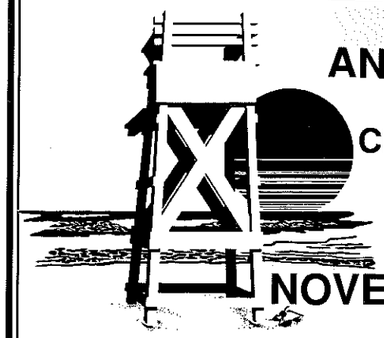
Carl B. Epps, III
State Chairman

Our state has enjoyed a long history of active involvement in the Defense Research Institute. Ed Mullins recently completed his term as one of DRI's most visible Presidents. He busied himself with improving the relationships between state associations of defense lawyers and DRI, and spoke to more civic minded organizations than any other President. Steve Morrison is a Past Regional Vice-President and is currently a Board Member of DRI. He has been an active speaker at DRI seminars and is also a member of DRI's Young Lawyers Committee. Dewey Oxner is presently the DRI Treasurer as well as the Chairman of the Budget Committee. He is the architect behind the recent redesigning of DRI's regions and has made many other contributions to DRI's success. Ed, Steve and Dewey's efforts have reflected well on our Association.

I would like to encourage each member of our Association to join DRI. The DRI, with over 17,000 members, is the largest national association of attorneys specializing in civil defense litigation. Members receive the monthly *For The Defense* which offers its readers articles on the latest in defense-oriented substantive law and practice. Additionally, each year members receive several issues of *Plaintiff's Strategy Quarterly* and several monographs of in-depth examinations of specialized defense law topics. Recent monograph titles have included *Toxic Tort Litigation* and *Civil RICO Claims.*

DRI puts on approximately 15 seminars a year throughout the country. Members receive a special registration rate, and unlike bar association programs, DRI seminars concentrate solely on the defense aspects of the practice.

DRI's litigation support services, available to members, include the expert witness index, the brief bank, the arbitration service, and individual research service. A reasonable fee is charged for such services. The Expert Witness Index is a computerized nationwide index of both adverse and defense experts from a wide variety of medical and technical fields. Members can request background information on specific experts or can request the names of experts in a particular area. The Index has over 15,000 entries on file.



ANNUAL MEETING

Cloister, Sea Island, Georgia

NOVEMBER 2-5, 1989

The Twenty-Second Annual Meeting of the Association will be held November 2-5, 1989 at The Cloister, Sea Island, Georgia. This meeting should be one of our best ever. The Cloister is one of our most popular meeting sites. This year's educational program will include the following:

The State of the Judiciary - The Honorable George T. Gregory, Jr., Chief Justice, South Carolina Supreme Court.

A Lecture in Two Parts: The U.S. Supreme Court and the Federal Rules of Evidence; and A Wrongful Death Case: Videotape Demonstration - Professor Stephen A. Saltzburg, Class of 1962 Professorship at the University of Virginia Law School; former Reporter on the Federal Rules of Evidence and the Federal Rules of Criminal Procedure; Author, *Federal Rules of Evidence Manual* and *A Modern Approach to Evidence;* co-Author, *Evidence in America,* with Joseph.

A panel of judges from the United States District Court for the District of South Carolina will participate in a discussion with Prof. Saltzburg concerning U.S. Supreme Court evidence decisions, motions in limine, and opening statements.

Defense of TMJ Claims - Michael J. Kreisberg, D.D.S.: Director of the Atlanta Center for Craniofacial Pain and Temporomandibular Joint Disorders; Dr. Kreisberg has lectured at various dental schools and meetings, and at a Georgia Defense Lawyers Association meeting, and has published numerous articles concerning orofacial pain and TMJ disorders.

Current Issues in Workers' Compensation, Including Sexual Harrassment Claims and Mental Injury Caused by Non-Physical Stressors - The Hon. Virginia L. Crocker, Commissioner, South Carolina Workers' Compensation Commission.

The Law of National Security: A Prosecutor's Perspective of Espionage Cases and Spy Exchanges - John Martin, Esquire, Chief, Internal Security Section, U.S. Department of Justice. Mr. Martin's presentation will follow the coffee break during our Saturday program. His presentation will be very interesting to both lawyers and their spouses, and will include a video tape of an actual spy exchange; so invite your spouses to join us for this.

Another portion of the program will include a topic concerning trial advocacy which will be announced when the speaker's availability has been confirmed.

The Annual Program also will include the presentation of the Robert W. Hemphill award which honors an attorney "who has been instrumental in developing, implementing, and carrying through the objectives of the S.C.D.T.A.A."

A full social program is planned with a cook-out on Friday night and a dance featuring "Second Nature" Saturday night. These are only two of the special features this year, in addition to our golf and tennis tournaments. For those who don't want to play either of those sports, we are planning a little fishing, which surely will generate some interesting "stories". The ladies will be treated to a presentation on sterling silver and Mexican "treasures."

The Brief Bank maintains briefs of value to the defense community from previously litigated cases. Members can order briefs by case file number or request a search for briefs on specific legal issues.

By joining DRI, its members also support the organization's liaison activities with defense groups at the state and local level, its amicus program, and its public relations efforts to provide a voice of reason in a non-legal world that too often assumes plaintiff's lawyers speak for all trial lawyers.

Under a new program, membership in DRI is an even greater bargain for first-time members who have been admitted to the bar for less than five years. Such individuals can join DRI for $75 (versus the regular yearly rate of $110) and also receive a certificate for a free DRI seminar.

If you are not a member of DRI please join. Your money will be well spent.

SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION
TWENTY-SECOND ANNUAL MEETING
NOVEMBER 2-5, 1989
THE CLOISTER, SEA ISLAND, GEORGIA

AGENDA

Thursday, November 2, 1989

3:00 to 5:00 p.m.	Executive Committee Meeting
3:00 to 6:00 p.m.	Registration
5:00 to 6:00 p.m.	Nominating Committee Meeting
6:30 to 7:00 p.m.	First Time Attendees Reception
7:00 to 8:00 p.m.	Welcome Reception
	Evening on Your Own

Friday, November 3, 1989

8:40 to 8:45 a.m.	Welcome - **FRANK H. GIBBES, III, Esq.** President, SCDTAA
8:45 to 12:00 noon	Educational Sessions
10:00 to 11:30 a.m.	Ladies Program
12:30 p.m.	Golf Tournament
1:30 p.m.	Tennis Tournament
7:00 to 8:00 p.m.	Cocktail Reception
8:00 to 11:00 p.m.	Seafood Cook-out

Saturday, November 4, 1989

8:00 to 8:30 a.m.	SCDTAA Annual Meeting
8:30 to 12:00 noon	Educational Sessions
	Afternoon on Your Own
6:30 to 7:30 p.m.	Cocktail Reception
7:30 to 9:00 p.m.	Dinner in the Main Dining Room
9:00 p.m. to 1:00 a.m.	Dancing to the Music of "Second Nature"

Sunday, November 5, 1989

11:00 a.m. to 12:30 p.m.	Farewell Bloody Mary Break
	Departure

RECENT DECISIONS

CONTRIBUTION ARISE! SOUTH CAROLINA CONTRIBUTION AMONG TORTFEASORS ACT

Robert Bernstein, Esquire
Turner, Padget, Graham & Laney

In *Lightner v. Duke Power Co. v. Ford New Holland, Inc.,* Civil Action No. 3:89-422-16 (July 21, 1989), the Honorable Karen L. Henderson clarified an ambiguity in the recently enacted South Carolina Contribution Among Tortfeasors Act, S.C. Code Ann. §15-38-10 *et seq.* (hereinafter the "Contribution Act"). The Contribution Act provided that it was applicable to "those causes of action arising or accruing on or after April 5, 1988." The court held that a cause of action for contribution arises, not on the date that contribution is sought, but on the date of the commission of the underlying tort. Thus, a party may make a claim for contribution from a joint tortfeasor only where the occurrence which creates the liability of any and all potential defendants occur on on after April 5, 1988.

The plaintiff in *Lightner* was an employee of the maintenance department of a local school district. In his complaint, the plaintiff alleged that he and a coworker were mowing a field near a school on October 7, 1986, when the co-employee's mower ran over a large bolt, propelling it through the mower exit chute and striking the plaintiff in the back. The plaintiff alleged that the bolt had been left in the field near a telephone pole by a repair crew of Duke Power Company, and sued Duke Power Company in negligence for leaving the bolt in the field; failing to inspect the field for debris; and failing to warn as to the presence of the bolt. Duke Power denied any negligence, and asserted a third-party complaint against Ford Motor Company. Duke Power claimed that the actions of Ford, who manufactured the tractor and mower which propelled the bolt, was the proximate cause of plaintiff's injury. Duke Power thus contended that if it was liable to the plaintiff, Ford was liable in indemnity to it, since Ford had allegedly placed a defective product into the stream of commerce. Duke Power's indemnity claim was based in common law, and on theories of strict liability in tort, warranty and negligence.

In the alternative, Duke asserted that the Contribution Act entitled it to contribution from Ford. Although the accident occurred prior to the April 5, 1988 effective date of the Act, Duke Power asserted that a cause of action for indemnity does not arise, by statute, until after a tortfeasor has paid more than its proportionate share of liability. Accordingly, Duke Power reasoned that the "cause of action" for indemnity arose and accrued as of a date after April 5, 1988, and a cause of action for contribution could be asserted.[1] The District Court ruled that neither indemnity nor contribution causes of actions could be asserted by Duke Power.

INDEMNITY

Citing *Atlantic Coast Line Railroad Company v. Whetstone,* 243 S.C. 61, 132 S.E.2d 172 (1963), the court noted that a party may not seek indemnity if any personal negligence of his own joined in causing the injury. Thus, in the absence of a contractual or legal relation between the parties, an action for indemnity could not be maintained. *McCain Manufacturing Corp. v. Rockwell International Corp.,* 695 F.2d 503 (4th Cir. 1982).

The court noted that Duke Power could not assert a right to indemnity under negligence, warranty, or strict liability theories. Duke Power had suffered no injury to its person or property, only the potential of suffering economic loss (i.e., a potential judgment in favor of the plaintiff). Since intangible economic loss is not recoverable in a negligence action, no claim could be asserted by Duke Power against Ford under this theory. *2000 Watermark Association, Inc., v. Facilities, Inc.,* 784 F.2d 1183 (4th Cir. 1986). Furthermore, the strict liability statute protects only against physical harm to a user or consumer. Since it was neither a user nor a consumer of the tractor and since it suffered no physical harm, Duke Power was not entitled to assert a cause of action in strict liability. Finally, S.C. Code Ann. §36-2-318 extends a warranty to any natural person who uses, consumes, or is affected by the goods, and whose person or property is damaged thereby. Since Duke Power did not use or consume the mower, and since it suffered no damage to its person or property, Duke Power could not seek indemnity under a theory of breach of warranty.

CONTRIBUTION

The Contribution Act "applies to those causes of action arising or accruing on or after the effective date of this act" [i.e., April 5, 1988]. Uniform Contribution Among Tortfeasors Act, 1988 S.C. Acts 432, §10 (1988). The court recognized the ambiguity in the phrase "those causes of action arising or accruing on or after the effective date of this act." If the "cause of action" refers to the date of the underlying tort which gives rise to the action against the original defendant, only those torts occurring after April 5, 1988 could give rise to indemnity among joint tortfeasors. In the alternative, if the "cause of action" refers to the date when a joint tortfeasor may enforce a right of contribution, the statute may apply to any case where a tortfeasor, after April 5, 1988, has paid more than his proportionate share of liability to a tort victim. The legislative history of the Contribution Act offers no guidance in resolving this ambiguity.

Judge Henderson noted that much of the Contribution Act was derived from the Uniform Contribution Among Tortfeasors Act, which has been adopted in substantially similar form by other states. Though the courts which have considered it are split on the issue, the majority of such decisions conclude that the "cause of action" for contribution arises when the underlying tort is committed. The court, citing *Shiflet v. Eller,* 228 Va. 115, 319 S.E.2d 750 (1984), distinguished between a "cause of action" and a "right of action." A "cause of action" is the legal wrong committed against a complaining party, while the "right of action" refers to the right to sue on the cause of action. The cause of action is an inchoate right, while the right of action - i.e., the right to seek redress - may arise at a later date. Since the legal wrong committed by a tortfeasor is complete at the time of the underlying tort, the inchoate cause of action for indemnity arises among joint tortfeasors as of the date of the commission of the tort. Under the facts in *Lightner*, although the right to actually sue for indemnity - i.e., the "right of action" - did not arise until after April 5, 1988, the "cause of action" for indemnity among tortfeasors arose at the time of the injury to the plaintiff, on October 7, 1986. Since the "cause of action" in the *Lightner* case

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RECENT DECISIONS

(Continued from page 6)

arose prior to the effective date of the Contribution Act, contribution could not be claimed by Duke Power.

Had the court accepted Duke Power's argument that a cause of action for indemnity arises at the date of the right to sue thereon, considerable uncertainty could have been imposed upon existing judgments. Theoretically, a tortfeasor could have been held responsible for a tort committed seventeen years before. For example, if a tort was committed in 1973 by two tortfeasors, John Doe and Richard Roe, the plaintiff could have sued John Doe within the six year statute of limitations and recovered a judgment in 1979. Since a judgment by lien is valid for ten years, payment of the judgement John Doe may not have occurred until 1989. Since a suit for contribution may be brought within one year of the discharge of the common liability of the tortfeasor, John Doe could theoretically have brought a contribution suit against Richard Roe in 1989 to impose liability for a tort occurring in 1973.

By ruling that a cause of action for contribution arises at the time of the underlying tort, the court has imposed a bright line rule delineating the right to seek contribution. Simply stated, if a tort is committed upon a plaintiff prior to April 5, 1988, a defendant may not seek contribution from a tortfeasor who was not named in the original action. If such a tort is committed on or after April 5, 1988, however, a named defendant may utilize the South Carolina Contribution Among Tortfeasors Act in an effort to spread the common liability.

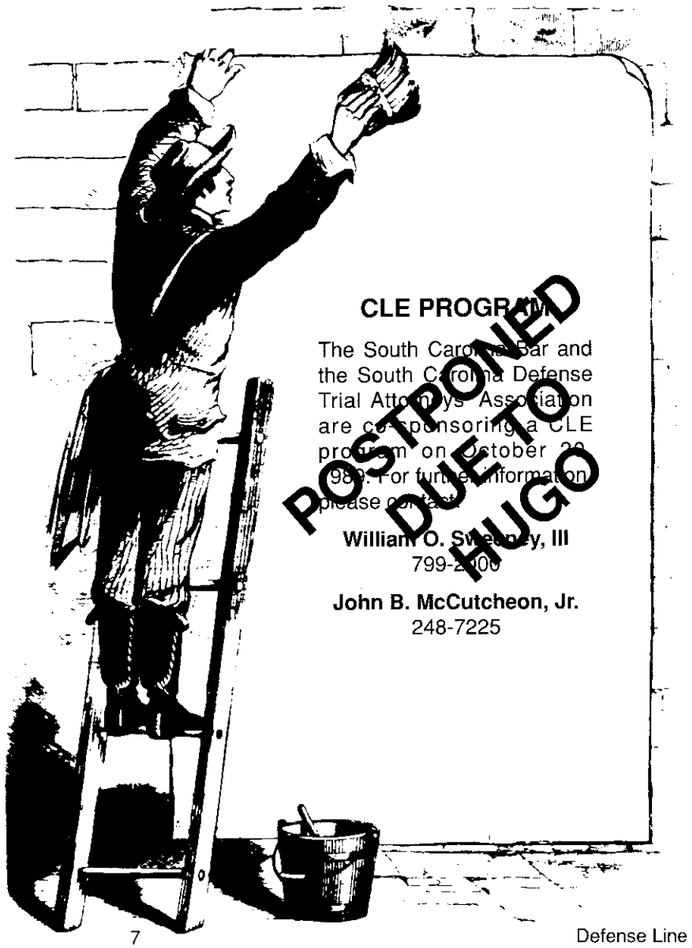
[1]S.C. Code Ann. §15-38-20(B) provides that the right of contribution exists only in favor of a tortfeasor who has paid more than his pro rata share of the common liability. It could be argued therefore, that the third-party complaint seeking contribution was improper since Duke had not paid any amount to the plaintiff. Rule 14, Federal Rules of Civil Procedure, allows the joinder of a party who "is or may be" liable to the third-party plaintiff. Since a joint tortfeasor may be liable to a named defendant for contribution, federal courts have consistently allowed a third-party complaint to be asserted against a joint tortfeasor who might be liable for indemnity. *See* 6 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* §1448 (1971).

CIRCUIT JUDGE LIMITS EXPERT'S FEES...

Susan P. McWilliams
Nexsen Pruet Jacobs & Pollard

A Richland County Circuit CourtJudge recently slashed the statement rendered by a plaintiff's alleged human factors expert sent to counsel for defendants in connection with the expert's deposition. The case involved a rear-end collision in which the plaintiff's deceased died when her car rear-ended defendant's truck, which was attempting to merge onto rush hour traffic on I-20. The plaintiff intended to call the human factors expert to testify that the plaintiff's deceased's actions were reasonable under the circumstances. The expert, who hailed from Wisconsin, flew to Columbia for his deposition, which lasted all of an hour and fifteen minutes. The expert subsequently rendered a statement for $2,877.50, which included some 15-1/2 hours of time spent travelling from Wisconsin to Columbia and back, charged at his hourly rate of $120.00 and totalling approximately $1,800.00.

Defendants moved for a discovery order pursuant to Rule 26(c), requesting that the Court limit their responsibility to a reasonable fee. After a hearing on the motion, Judge Edward B. Cottingham issued his Order reducing the expert's statement. Judge Cottingham stated that the court has broad discretion in determining what is a reasonable fee for an expert witness. He then ruled that it was "patently unfair to require defendants to be responsible for excessive fees," and that the statement for $2,877.50 for a one and a half hour deposition was unreasonable. The court determined that reasonable compensation to the expert was the hours spent in actual preparation and deposition time, his actual air fair costs and other expenses attended thereto. However, the court disallowed the travel time charges.



Legal Experts Urge State Legislators to Examine Punitive Damages Legislation

WASHINGTON, D.C. – Alan Morrison, director of the consumer litigation organization Public Citizen, and Washington University Law School Dean Dorsey Ellis, told state legislators attending the National Conference of State Legislatures (NCSL) annual meeting in Tulsa, Oklahoma, that changes in punitive damages legislation would be better handled through state legislative action than through the judiciary.

Ellis, a recognized expert in the area of punitive damages law, said, "Many state legislatures have become active and have enacted or have considered statutes that would limit or modify the process for assessing punitive damages. One of the areas Mr. Morrison and I agree on is that there is a great deal of room for legislation, and that the [state] legislative forum is the appropriate forum for dealing with a number of these problems."

"One of the things a responsible legislator should do is to start looking at the issue of punitive damages, whether or not you are taking steps, because it seems to me that the legislature is a more appropriate forum than the State Courts," said Morrison, a member of the American Bar Association Action Commission to Improve the Tort Liability System. According to Morrison the possibility of a future Supreme Court ruling in favor of limiting punitive damages awards is unlikely and it is incumbent upon both the judicial and legislative branches of state government to address this issue.

Once restricted to only the most egregious acts, punitive damages are awarded over and above compensatory and non-economic damages to punish a defendant who exhibits willful, wanton or malicious conduct with intent to harm. During the past decade massive punitive damages awards have become commonplace and reform has become a state legislative issue because of the increasing randomness of these massive awards in civil cases.

According to both Ellis and Morrison, problems affecting the way in which punitive damages are awarded include possible due process violations; juries determining awards based upon emotion, caprice or prejudice; defendants being assessed punitive damages multiple times for the same alleged misconduct; and standards of evidence not requiring the jury to find it highly probable that the defendant acted with willful, wanton or malicious intent to harm.

The question of due process violations has been peripherally addressed by the United States Supreme Court in *Browning-Ferris Industries, Inc.* v. *Kelco Disposal, Inc.* According to Morrison, who was associated counsel with the plaintiffs [Kelco] in this case, "The Supreme Court decided one issue and one issue only on punitive damages. It decided that the 8th Amendment prohibition against excessive fines does not apply when the state, through it court system, allows an award of punitive damages regardless of the amount to be entered against a defendant. But the opinions also made it clear that there are other Constitutional avenues that the Court has not foreclosed."

One of these avenues, Morrison continued, "is procedural due process. Basically, the objection here is not so much that the jury awarded too many dollars, but that it went off without any kind of guidance whatsoever. It [the jury] just went back and 12 people, or six people, decided, 'Well, I think $3 million is enough,' if someone said no, then $2 million is enough. If somebody said, $5 million, then they ended up with $3.5 million. The courts are very concerned about runaway juries having no control over what amount is proper punitive damages."

Typically, according to Morrison, juries are told to "go decide what you think is fair under all the circumstances." These instructions leave juries with no other choice than to make decisions based upon their own feelings toward the defendant.

According to Dean Ellis, one way to avoid juries making decisions based upon prejudice, caprice or emotion is to bifurcate the trial. Bifurcation refers to two proceedings. One, to determine liability and compensatory and non-economic damages, and the second to determine punitive damages. Ellis said, "Confusion of juries can be ameliorated by not only dividing trials to determine amounts of compensatory and punitive damages, but to determine whether or not punitive damages should even be assessed. Both Morrison and Ellis voiced their support for a bifurcated system.

The problem of lay juries understanding civil standards of evidence and knowing which to apply in awarding punitive damages is one of the most difficult hurdles for supporters of punitive damages reform. According to Dean Ellis, civil procedure standards of evidence are typically "preponderance of the evidence" or "clear and convincing." Determining misconduct by a "preponderance of the evidence" means that a jury must find only that it is more likely than not that a fact is true – or a 51 percent probability. Raising the evidence standard to "clear and convincing" that a fact is very probably true, (a high degree of certainty).

According to Ellis, "We use these standards to convey to the jury the degree of confidence that they should have in the correctness of their judgment before they reach a decision."

"On the clear and convincing evidence point," said Morrison, "my sense is that the law is definitely moving in that direction. I support the clear and convincing evidence standard." Since 1986 approximately ten states have raised their standards of evidence for punitive damages to "clear and convincing."

Since 1986, 26 states have enacted punitive damages reform legislation including limiting awards, allowing for two-phase trials to first determine liability and second to determine punitive damages, and raising the standards of evidence among other provisions. These states include Alabama, Alaska, Arizona, California, Colorado, Florida, Georgia, Idaho, Illinois, Iowa, Kansas, Kentucky, Minnesota, Missouri, Nevada, New Hampshire, New Jersey, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Texas, Utah and Virginia. In addition, changes in punitive damages law were debated before 16 state legislatures during the 1989 state sessions.

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Agnus M. Lawton (51)
W. Jefferson Leath, Jr. (112)
Judith A. Leatherwood (112)
Flo S. Lester (102)
George E. Lewis (101)
John P. Linton (95)
Susan B. Lipscomb (81)
Donald T. Locke (47)
James . Logan, Jr. (105)
Wade H. Logan, III (51)
Richard M. Lovelace (65)
George K. Lyall (77)
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H. Sam Mabry, III (47)
Francis M. Mack (90)
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Joseph E. Major (61)
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John P. Mann (99)
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E. Warren Moise (39)
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Francis P. Mood (96)
Steven T. Moon (45)
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David L. Moore, Jr. (64)
John T. Moore (75)
Leslie A. Moore (74)
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L. Elaine Mozingo (5)
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H. Fletcher Padget, Jr. (101)
Samuel F. Painter (81)
Susan C. Pardue (78)
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Jonathan P. Pearson (83)
G. Mark Phillips (52)
Carl E. Pierce, II (52)
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E. Douglas Pratt-Thomas (108)
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J. Gail Rahn (108)
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Allen L. Ray (88)
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Joseph A. Rhodes, Jr. (44)
Donald V. Richardson, III (90)
Charles B. Ridley, Jr. (91)
Edward P. Riley, Jr. (77)
Edward P. Riley, Sr. (77)
Nancy B. Riley (75)
Richard W. Riley (77)
Ronald E. Robbins (9)
D. Clay Robinson (93)
David W. Robinson, II (93)
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Robert E. Salane (5)
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H. Donald Sellers (47)
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M. Jeffrey Vinzani (92)
Theodore Von Keller (103)
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Mark H. Wall (92)
Susan Taylor Wall (51)
Shawn D. Wallace (112)
Bradish J. Waring (112)
Thomas Waring (51)
Samuel C. Waters (94)
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M. M. Weinberg, Jr. (106)
M. M. Weinberg, III (106)
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Stephen S. Wilson (104)
Thomas D. Wise (108)
Deborah W. Witt (75)
Linda Wohlbruck (75)
George B. Wolfe (75)
Robert P. Wood (94)
William B. Woods (16)
Bradford W. Wyche (110)
M. Baker Wyche, III (83)
David R. Wylie (44)
Steven M. Wynkoop (75)

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Erroll Anne H. Yarbrough (77)
J. Rutledge Young, Jr. (112)
Kenneth E. Young (77)
Kenneth R. Young, Jr. (111)

C. Dexter Powers

Tribute

C. Dexter Powers of Florence died on July 22, 1989 at the age of 68. He was born in Greenville, Mississippi and moved to Greenville, South Carolina where he attended public schools. He was a graduate of the Citadel and the University of North Carolina Law School. He served in the U.S. Army during 1942 to 1946 and was a retired major in the U.S. Army Reserves.

He was admitted to the South Carolina Bar in 1948 and entered the practice of law in Florence with the firm of Royall and Wright which later became Wright, Scott, Blackwell and Powers.

Most of his entire practice was spent in defense trial work in the various counties of the Pee Dee and in federal court. He was an avid trial lawyer. In his recent years a large part of his practice involved defense of professional malpractice claims.

He was active in the early organization of the S.C. Defense Trial Attorneys Association and served as President of the Association in 1976. He served as member of the S.C. Supreme Court Character and Fitness Committee from 1978 to 1988. He served as President of the Florence County Bar Association in 1970. He had also served as Chairman of the Florence City-County Building Commission.

He was survived by his wife, Lydia L. Powers and their two sons, Kevin W. Powers and Alan L. Powers, both of Florence and Charles D. Powers of California, Mary Gregg Donaldson of Australia and Virginia Shoen of Spartanburg.

His presence in the trial courts of the Pee Dee will be missed by the many litigation attorneys, both of the plaintiff's and defendant's bar, with whom he had contact over a career of 41 years.

Transfer of Obligation in Structured Settlements

Thomas G. Allen, CLU, ChFC

Structured Financial Associates, Inc.

There appears to be some confusion about the motivation to use transfer of obligation, or Uniform Qualified Assignments, in arranging structured settlement annuity contracts in personal injury settlements. This article will attempt to point out the advantages and disadvantages of transfer of obligation for both defendants and claimants.

A Qualified Assignment allows the defendant insurance carrier (assignor) to assign its obligation to provide future payments to a third party (assignee) and there by releases the assignor from the obligation to provide the future payments. Typically the third party assignee is an affiliate of the life insurance company providing the annuity.

The advantage of transfer of obligation to the defendant insurance carrier is the transfer of contingent liability to provide future payments to the claimant in the event that the life insurance company defaults. There is a cost for third party ownership, which is approximately $500.00, charged by the assignee.

Some defendant insurance carriers avoid the use of transfer of obligation by setting minimum standards for the life insurance companies they approve for structured settlements (typically A.M. Best rating of A+ and size category VIII) and, when using approved life companies, don't feel transfer of obligation is necessary.

From the claimant's perspective, transfer of obligation is often resisted because he feels that, by not allowing transfer of obligation, they have two entities standing behind the periodic payments: the life insurance company and the defendant insurance carrier.

Since the claimants status, in order to avoid constructive receipt of the annuity payments, is that of a general creditor of the defendant insurance carrier, the only entity standing behind the promise of payments is the defendant insurance carrier. If the defendant insurance carrier were to become insolvent, the life insurance company could be instructed to redirect the payments from the claimant to other creditors of the defendant insurance carrier. With transfer of obligation, as long as the life insurance company is solvent, payments would continue to the claimant even if the defendant insurance carrier were to become bankrupt.

Because of the cyclical nature of the property and casualty business some observers feel that a property and casualty company is more likely to become financially unstable than a life insurance company. Claimants might be wise to prefer to have their future payments backed by a large life insurance company with an A.M. Best & Company rating of A+ instead of guaranteed by a small defendant insurance carrier with questionable financial stability.

The Understanding of the Justice

NORMAN H. FUDGE, Atlanta.

Back before the automobile replaced the horse and mule as a means of transportation, a country lawyer rode a mule to a justice of the peace court in a rural section of Georgia. The day being extremely hot, court was held out-of-doors under a large tree. Fastening the reins to a branch of the tree, the attorney proceeded with the trial of his case. In the course of his final argument, the attorney was several times interrupted by his mule pulling at his coattails. Finally, in extreme exasperation, the perspiring advocate said, "I know you understand, mule, but I'm trying to make His Honor understand."

Opinions and Stories of and from The Georgia Courts and Bar collected and arranged by Berto Rogers, Member of the Georgia and New York Bars.

Limiting Discovery through Protective Orders

by Rjean K. Knowles and C. Robert Vote

In almost all litigation in which a plaintiff alleges personal injury or commercial loss caused by a defective product, the attorney defending the manufacturer is confronted with broad and often burdensome discovery requests for documents and records. The method in which counsel handles discovery requests will undoubtedly have an impact on other discovery in the case and may have implications on evidentiary rulings at trial. At the very least, a proper response to a discovery request may be a useful tool in giving the court a preview of objections that will be raised at trial.

This article will discuss the role of the defense attorney in limiting or controlling discovery proceedings through Rule 26(c) protective orders. It will focus on the scope, use, and enforcement of protective orders, as well as appropriate sanctions for their violation.

Scope of Discovery

Federal Rule of Civil Procedure 26(b)(1) is the cornerstone for obtaining discovery in federal actions. It provides that:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. . . .

Obviously, the word "relevant" plays an important part in the entire discovery process. The term relevant may be "the single most important word in Rule 26(b)..." Wright & Miller, *Federal Practice and Procedure: Civil,* §2008. Black's Law Dictionary defines relevant as "applying to the matter in question; affording something to the purpose." "Questions of relevancy are so infinite in the variety of their legal factual settings that they defy efforts at systematic treatment." 4 *Moore's Federal Practice,* §26.56[1].

It is generally recognized that "the question of relevancy is to be more loosely construed at the discovery stage than at the trial." Wright & Miller, *Federal Practice and Procedure: Civil,* §2008. Since the precise boundaries of the Rule 26 relevance standard will obviously depend on the context of the particular situation, "the determination of relevance is within the district court's discretion." *Stewart v. Winter,* 669 F.2d. 328, 331 (5th Cir. 1982).

Discovery will be allowed "if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." *Dunbar v. United States,* 502. F.2d. 506 (5th Cir. 1974). Discovery should be allowed "where there is any possibility that the information sought may be relevant to the subject matter of the action." *Cox v. E.I. Dupont de Nemours & Co.,* 38 F.R.D. 396, 398 (D.S.C. 1965).

Naturally, the relevancy of the material sought is dependent upon the cause of action asserted by the plaintiff. For example, in a products case alleging defective design, a defendant can expect to receive requests which may include, among other documents, complaints from other customers, customer lists, engineering drawings, meeting minutes, financial records, market surveys, patent information, customer service files, et. cetera. Regardless of whether they are admissible as evidence, some of these documents may have adequate relevancy to compel their discovery. And even though they may be inadmissible, use of the documents during the discovery and pretrial phases by opposing counsel may have a detrimental effect on the good will of the manufacturer, regardless of the outcome of the lawsuit. Defendant's counsel must be prepared to limit the production of such potentially damaging documents.

Discovery Limitations

While Rule 26 broadly defines the scope of discovery, it also affords some relief against certain discovery requests. Specifically, Rule 26 (b)(1) was amended in 1983 to permit a court to limit discovery where: (1) it is redundant or could be performed in a more cost-efficient manner; (2) there has been ample opportunity to obtain the information; or (3) it is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The purpose these amendments, as explained by the Advisory Committee on Rules in its Notes, is to "address the problem of discovery that is disproportionate to the individual lawsuit. . ."

Even prior to the limitations imposed by the 1983 amendment, courts had expressed concern about discovery abuse. For instance, in *Edwards v. Gordon & Co.,* 94 F.R.D. 584, 585 (D.D.C. 1982), the court commented:

> . . . with the Federal Rules of Civil Procedure changes in 1980 there has developed a far greater concern about discovery abuse and the burden and expenses of extensive discovery. This is an appropriate concern whether the party subject to the discovery is an individual or a business or a corporate enterprise, which will undoubtedly pass on its costs to the consumers. . .

Courts are interested in protecting parties from unreasonable or burdensome discovery requests. In a class-action suit in which potentially millions of documents were requested, the court implied that if the relevance of the information sought is questionable, and compliance would be unduly burdensome, the request will be denied. *Stewart v. Winter,* 669 F.2d. 328, 332 (5th Cir. 1982). See also 4 *Moore's Federal Practice,* §26.56[1] (borderline relevancy and burdensome compliance may act in combination to support an objection to production).

Rule 26 deals generally with the scope of discovery and applies to all discovery methods. On the other hand, Federal Rule of Civil Procedure 34 specifically permits a party to request the inspection of documents and things, and permits entry upon land for inspection and other purposes which are relevant to the lawsuit. Embedded within Rule 34 is the requirement that the desired documents or items be "designated" by the requesting party.

Two schools of thought have attempted to define how broadly the Rule 34 request may be stated. One requires that the "particular" documents must be called for. *United States v. American Optical Co.,* 2 F.R.D. 534 (S.D.N.Y. 1942). The other allows the request to be named by "categories." *Bunch v. General Motors*

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Corp., 9 F.R.D. 682 (E.D.Tenn. 1950).

Taking advantage of the Rule 34 option to request entry upon land, the plaintiff in *Belcher v. Bassett Furniture Industries, Inc.,* 588 F.2d. 904 (4th Cir. 1978), sought to roam through defendant's plant to make inquiry of any supervisors or employees. Defendant objected on the basis that the request was too broad, unsafe, burdensome, and that it resembled a roving deposition. The court agreed with defendant, stating that a request for entry onto a party's premises entails greater risks and burdens than a mere production of documents, and therefore a greater inquiry into the necessity for which inspection was unwarranted.

In *Maritime Cinema Service Corp. v. Movies En Route, Inc.,* 60 F.R.D. 587 (S.D.N.Y. 1973), an anti-trust action, defendant objected to interrogatories requesting documents on the basis that the interrogatories were burdensome, overbroad, and that they requested commercial information. The court found that a request for information going back four years was not overbroad, but that a request for the identity of "all persons" was overbroad and instructed that only names of persons with "knowledge of the relevant facts" be provided.

The *Maritime* court rejected the "burdensome" argument because, in antitrust litigation, "the burden or cost of providing the information sought is less weighty a consideration than in other cases." It noted that the burden can be reduced by giving the plaintiff access to the documents and requiring it to select the relevant documents. But see, *Flour Mills of America, Inc. v. Pace,* 75 F.R.D. 676, 682 (E.D.Okla. 1977), where the court noted that a broad statement that the information sought is available from a mass of documents is not sufficient to satisfy the aims of discovery.

Rule 34(b) provides that:

> The party upon whom the request is served shall serve a written response within 30 days after the service of the request . . . The response shall state . . . that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reason for objection shall be stated.

Thus, the defendant may make its first attempt to preclude or control discovery by setting forth its objections to the plaintiff's request. Permissible objections include that the documents requested are irrelevant, privileged, work product, confidential,or proprietary, or that the request is vague, burdensome, or overbroad. At the time an objection is made, the defendant may also apply for a protective order under Rule 26(c).

After objections are made, if the party seeking discovery still wishes to obtain the documents, he may bring a motion to compel production, under Rule 37. Then, if he has not already done so, the party objecting to the production may file a crossmotion for a protective order. Regardless of whether the motion before the court is in the form of a motion to compel or a motion for a protective order, Rule 37 provides that the prevailing party may apply to the court for attorney's fees and expenses.

The Nature of Protective Orders

Federal Rule of Civil Procedure 26(c) allows the court to recognize the concerns of a party opposing certain discovery requests while offering the requesting party an opportunity to pursue discovery of "relevant" information. It offers the best protection to a defendant wishing to restrict discovery:

> Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . .

The rule then specifies eight "types" of protective orders, beginning with a flat denial of discovery.

Rule 26(c) requires that the party seeking a protective order make the motion in the court where the action is pending or where the deposition is to be taken.

It has been said that "Rule 26(c) was adopted as a safeguard for the protection of parties and witnesses in view of the almost unlimited right of discovery given by Rule 26(b)." Wright & Miller, *Federal Practice and Procedure: Civil,* §2036. The Second Circuit noted that one of the purposes served by a protective order is "to prevent discovery from being used as a club by threatening disclosure of matters which will never be used at trial." *Joy v. North,* 692 F.2d. 880, 893 (2d. Cir. 1982).

It is interesting to note that even the parties seeking discovery may request a protective order. In fact, in one case the court placed the burden of drafting an adequate protective order on the party seeking discovery. *Morrison v. Denver,* 80 F.R.D. 289 (1978).

The protections afforded by the rule range from holding that discovery may not be had, to specifying the manner in which discovery may be had or used. *Otero v. Buslee,* 695 F.2d. 1244 (10th Cir. 1982): *Farnsworth v. Procter & Gamble Co.,* 758 F.2d. 1545 (11th Cir. 1985). The court has wide discretion in determining the scope and effect of discovery. *Sanders v. Shell Oil Co.,* 678 F.2d. 614 (5th Cir. 1982) (documents sealed and plaintiffs prohibited from communicating contents); *Essex Wire Corp. v. Eastern Electric Sales Co.,* 48 F.R.D. 308 (E.D.Pa. 1969). In *Maritime Cinema Service Corp., supra,* the court issued a protective order limiting the scope of the request; it required that the information be provided only to plaintiff's counsel, could be used for purposes of the present litigation only, and must be placed under court seal.

Because it would be impossible to list every conceivable protection, the court need not be limited to the eight protections listed in Rule 26(c). Wright & Miller, at §2036, point out that: "a court may be as inventive as the necessities of a particular case require in order to achieve the benign purposes of the rule."

Deciding how to protect a party is not an easy task and courts have taken the issue seriously. For instance, in *Delong Corp. v. Lucas,* 138 F.Supp. 805, 809 (S.D.N.Y. 1956), the court stated:

> The protective order rule empowers the court in the interest of justice to control the degrees of disclosure of information by a weighing of the respective rights, that is, on the one hand the right of the plaintiff to a liberal examination and on the other, the right of the defendant to a protective order. Equity and fairness have prompted the foregoing disposition. It is the fervent hope of this court that the parties will approach compliance with this decision in a spirit of cooperation and thus spare themselves from future time-consuming applications to the court for directions and clarification.

Since a protective order which restricts release of information may infringe upon First Amendment interests, courts generally will "grant such an order only when essential to shield a party from significant harm or to protect an important public interest." *Doe v. District of Columbia,* 697 F.2d. 1115, 1119 (D.C.Cir. 1983). Because of the high standard, the scope of the protective order must be no broad-

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er than necessary to achieve the purpose. Thus, the proposal and drafting of an appropriate order must be no broader than necessary to achieve the purpose. Thus, the proposal and drafting of an appropriate order must be performed with careful restraint.

Is "Good Cause" Enough?

The explicit standard for obtaining a protective order is set forth in Rule 26(c), which requires that the party show "good cause." The motion must include "specific allegations" rather than "conclusory statements." Wright & Miller, *supra,* at §2025.

The Fifth Circuit affirmed entry of a protective order which prevented third parties from inspecting or copying any documents filed with the court in the matter absent an express order of the court. The court found that the party requesting the protective order had presented numerous specific examples of harm that would result if the information was disclosed. *United States v. United Fruit Co.,* 410 F.2d. 553, 557 n.11 (5th Cir. 1969). The Eighth Circuit has required "a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements. . ." *General Dynamics Corp. v. Self Manufacturing Co.,* 481 F.2d. 1204, 1212 (8th Cir. 1973), quoting Wright & Miller, *supra,* at §2035. See *Kamp Implement Co. v. J.I. Case Co.,* 630 F.Supp. 218 (D.Mont. 1986).

One court, relying upon the experience of the Federal Trade Commission in dealing with sensitive commercial data, has put a sharper edge on the definition of good cause: "In this court an applicant will have to demonstrate that disclosure of allegedly confidential information will work a *clearly defined and very serious injury* to his business." *United States v. International Business Machines Corp.* 67 F.R.D. 40, 46 (S.D.N.Y. 1975) (emphasis in original).

Another court refused to grant a protective order when the defendants failed to show how they would be placed at a competitive disadvantage disclosure of the requested information. *Essex Wire Corp., supra,* 48 F.R.D. at 311. The court found that divulging the information would not work a "clearly defined injury to defendants."

In spite of the rule's requirement of "good cause," federal courts have generally imposed a more demanding test for granting a protective order, utilizing a "balancing of interests" approach. See, *Farnsworth v. Procter & Gamble Co.,* 758 F.2d. 1545, 1547 (11th Cir. 1985); *Dow Chemical v. Allen,* 672 F.2d. 1262, 1277 (7th Cir. 1982); *Richards of Rockford, Inc. v. Pacific Gas & Electric Co.,* 71 F.R.D. 388 (N.D.Cal. 1976); *Andrews v. Eli Lilly & Co.,* 97 F.R.D. 494, 497 (N.D.Ill. 1983); and *General Dynamics, supra,* 481 F.2d. at 1212. This approach balances the requesting party's interest in obtaining the information against the other party's interest in keeping the information confidential.

In *Farnsworth,* Procter & Gamble (P&G) sought the names and addresses of women who participated in a study on Toxic Shock Syndrome conducted by the Center for Disease Control (C.D.C.). P&G intended to use the information to discredit the study and to contacted theparticipants. While the C.D.C. has not guaranteed confidentiality to the participants, it was concerned with the potential impact on future studies if the personal information were disclosed. The C.D.C. had provided P&G with all other research information, approximately 34,000 documents, and had contact the participants to see if they would consent to have their names released. The names of consenting persons were released to P&G.

The Eleventh Circuit found that the trial court had properly ruled that C.D.C.'s interest in maintaining the confidentiality of the participants' names outweighed P&G's discovery interests. In doing so, it found that disclosure could "seriously damage" voluntary reporting which is necessary for the C.D.C. to fulfill its purpose of protection of the public's health, 758 F.2d.at 1547. Further, P&G had already been provided with voluminous records, only deleting the names and addresses, the C.D.C. had offered to send questionnaires to the women, and P&G had names of fifty of the women.

The court concluded that the district court had broad discretionary power to issue a protective order, that it had considered all relevant arguments and that, absent error, its determination would be affirmed. See also *United States v. Cook,* 795 F.2d. 987, 991 (Fed. Cir. 1986). *Farnsworth* is especially worth examining because the court in the protective order goes beyond the ordinary restrictions regarding the release of information, to prohibiting contact with persons who have information relevant to the law suit.

In *Doe v. District of Columbia,* the federal appellate court found that a protective order was appropriate; however, it took exception to the breadth of the district court's order. *Doe* involved alleged misconduct against prisoners by prison officials. The district court issued a protective order preventing the prison's attorneys from discussing information obtained during discovery. The court found that there could be substantial harm in the form of retaliation against prisoners if the information was released. It further found that the order was limited to designated areas; however, it concluded that an order could have been entered which would be effective in preventing retaliation while not infringing on consultation between prison officials and their attorneys.

Two other cases have prohibited or restricted the type of contact a party may have with potential witnesses or persons with relevant information. In *Volkswagenwerk Aktiengesellschaft v. Westburg, 260* F.Supp. 636 (E.D.Pa, 1966), a dispute arose between the plaintiff automobile manufacturer and the defendant automobile retail dealer. The court granted defendant's request for a protective order prohibiting all communication with its customers by the plaintiff, in order to maintain the defendant's goodwill among its customers. However, the court also stipulated that, if at a later stage contact became necessary, a limited amount would be permitted.

A particularly inventive approach was taken in *Commodity Futures Trading Commission v. Rosenthal & Co.,* 74 F.R.D. 454 (E.D.Ill. 1977). The plaintiff was ordered to submit a written questionnaire designed to elicit information from the defendant's customers to the court for approval prior to mailing.

Several courts have afforded protection to customer lists (in accordance either with Rule 26(c) or other procedural safeguards). See, e.g., *American Oil Co. v. Pennsylvania Petroleum Products Co.,* 23 F.R.D. 680 (D.R.I. 1959), in which the court held that disclosure of customer lists must be limited to counsel and such persons as counsel might engage to assist him in preparation for trial; and *Shawmut, Inc. v. American Viscose Corp.,* 11 F.R.D. 562 (S.D.N.Y. 1951), in which the court limited the number of customers to be contacted by the requesting party and opined that full disclosure of customer lists would be "unreasonable and oppressive." When IBM objected to disclosing trade secrets and customer lists, the court in *United States v. International Business Machines Corp.,* 67 F.R.D. 40, 49 (S.D.N.Y. 1975) answered that the more current the list, the more valuable a trade asset it becomes. So apparently time plays an important role in determining the relevance

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of the matter and therefore, the protection was granted.

Annoyance and embarrassment to the defendant may be sufficient grounds to justify a protective order, so long as the defendant can "demonstrate that the embarrassment will be particularly serious . . . to succeed, a business will have to show with some specificity that the embarrassment resulting from dissemination of the information would cause a significant harm to its competitive and financial position." *Cipollone v. Liggett Group, Inc.* 785 F.2d. 1108, 1121 (3rd Cir. 1986).

The *Cipollone* opinion contains a valuable discussion of the administration of protective orders in complex litigation, in which hundreds — or even thousands — of documents are sought to be protected. The document-by-document approach, in which the defense bears a heavy burden to prove the confidential nature of each and every document, may be appropriate in cases where the defense has indiscriminately applied the "confidential" label to every piece of paper in its possession. The better approach in most complex cases, however, is for the court to construct a broad "umbrella" protective order upon a threshold showing of good cause by the defense. The plaintiff can then indicate precisely which documents it believes not to be confidential, and the defendant must justify the protection for those specific documents. See *Kamp Implement Co. v. J.I. Case Co., supra,* in which the court laid down a similar procedure for the dissemination of allegedly confidential documents.

Duration of Protective Orders

Trial practitioners should be aware that a protective order issued before trial affords protection after trial. In *National Polymer Products, Inc. v. Borg-Warner Corp.,* 641 F.2d. 418 (6th Cir. 1981), defendant's materials were made the subject of a protective order during discovery, preventing plaintiff from revealing the contents of the documents or using them "for any purpose other than for preparation and trial of his action. . ." *Id.* at 420. After the trial, some of the defendant's materials were used by plaintiff's counsel in offering a seminar. Defendant brought a motion for contempt for failure to comply with the protective order. It was undisputed that the information which plaintiff's counsel used in its seminar was made public at trial. The trial court found the plaintiff's counsel's actions to be violative of the protective order and enjoined plaintiff from any further disclosure of the protected information.

The Sixth Circuit acknowledged that: "An important purpose of a pre-trial protective order is to preserve the confidentiality of materials which are revealed in discovery but not made public by trial." *Id.* at 424. The rationale is that discovery may require disclosure of information neither relevant nor admissible at trial. See, *Reliance Insurance Co. v. Barron's,* 428 F.Supp. 200, 202 (S.D.N.Y. 1977).

The *Reliance* court noted that the protective order could have been drawn to require confidential information to be submitted under seal at trial, that defendant could have requested *in camera* proceedings, or that the protective order could have been reasserted at trial. But defendant took none of these steps. The court concluded that absent a clearly-expressed intent that the protective order extend beyond discovery, First Amendment rights to disclosure of publicly expressed information must take precedence over continuing confidentiality; to do otherwise would constitute a prior restraint.

There is a heavy presumption against the constitutional validity of prior restraints, but there may be factors or considerations that weigh against the presumption. For instance, counsel should consider — and be prepared to argue — whether disclosure may jeopardize his party's right to fair administration of justice, whether disclosure will actually impair the legitimate business interest of defendant, and whether the purpose of disclosure would clearly be an abuse of the discovery process. *National Polymer,* 641 F.2d. at 424. These factors must be part of a balancing test; i.e., defendant's interest in preserving confidentiality versus plaintiff's interest in disseminating material and others' interest in receiving it.

The *National Polymer* ruling indicates that it may be prudent to either renew an existing protective order at the time of trial, requesting *in camera* proceedings at trial regarding confidential documents, or to initially draft the protective order to circumscribe use of the documents at trial. In any event, matters subje at trial cannot be divulged at a later time.

Documents or information compiled outside the discovery process concerning the same subject matter governed by a protective order are not subject to court jurisdiction. *Seattle Times Co. v. Rinehart,* 467 U.S. 20 (1984); *Bridge C.A.T. Scan Associates v. Technicare Corp.* 710 F.2d. 940 (2d. Cir. 1983).

However, documents which are the subject of a protective order limiting a party's use of the information to the present lawsuit cannot be used by a party in subsequent litigation. *Harris v. Amoco Production Co.,* 768 F.2d. 669 (5th Cir. 1985); *Iowa Beef Processors, Inc. v. Bagley,* 601 F.2d. 949 (8th Cir. 1979). In *Martindell v. International Telephone Corp.,* 594 F.2d. 291, 295 (2d Cir. 1979), the court stated:

> Unless a valid Rule 26(c) protective order is to be fully and fairly enforceable, witnesses relying upon such orders will be inhibited from giving essential testimony in civil litigation, thus undermining a procedural system that has been successfully developed over the years for disposition of civil differences. In short, witnesses might be expected frequently to refuse to testify pursuant to protective orders if their testimony were to be made available to the Government for criminal investigatory purposes in disregard of those orders.

In sum, whether disclosure should be required seems to depend on a balancing of the competing interests; the availability of evidence and to the adequacy of the protective measures. There is no absolute privilege for trade secrets or confidential commercial information, only a possibility of safeguards. Justice Holmes said in a very old case: "It will be understood that if, in the opinion of the trial judge, it is or should become necessary to reveal the secrets to others it will rest in the judge's discretion to determine whether, to whom, and under what precautions, the revelation should be made." *E.I. DuPont de Nemours Powder Co. v. Masland,* 244 U.S. 100, 103 (1917).

Sanctions to Enforce Court Orders

"Without adequate sanctions the procedure for discovery would be ineffectual." Wright & Miller, *Federal Practice and Procedure: Civil* §2281. Federal Rule of Civil Procedure 37(b) empowers judges to impose sanctions if there has been a violation of a discovery court order. The court "possesses broad inherent power to protect the administration of justice by levying sanctions in response to abusive litigation practice." *Penthouse International, Ltd. v. Playboy Enterprises, Inc.,* 663 F.2d. 371, 386 (2d. Cir. 1981), citing *Roadway Express Inc. v. Piper,* 447 U.S. 752. As described in *Cine Forty-Second Street Theatre Corp. v. Allied Artists*

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Pictures Corp., 602 F.2d. 1062, 1066 (2d. Cir. 1979):

> [Rule 37] provides a spectrum of sanctions. The mildest is an order to reimburse the opposing party for expenses caused by the failure to cooperate. More stringent are orders striking out portions of the pleadings, prohibiting the introduction of evidence on particular points and deeming disputed issues determined adversely to the position of the disobedient party. Harshest of all are orders of dismissal and default judgment.

It is well recognized that the purpose of imposing sanctions is twofold: "to penalize those whose conduct may be deemed to warrant such a sanction, [and] to deter those who might be tempted to such conduct in the absence of such a deterrent." *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643 (1976). "The typical pattern of sanctioning that emerges from the reported cases is one in which delay, obfuscation, contumacy, and lame excuses on the part of litigants and their attorneys are tolerated without any measured remedial action until the court is provoked beyond endurance." Rhodes, Ripple & Mooney, *Sanctions Imposable for Violations of the Federal Rules of Civil Procedure,* Federal Judicial Center, at p. 85 (1981).

When sanctions are being considered, the propriety of the discovery order is no longer an issue. The only question at that time is assessing a sanction that is "just;" this requirement "represents the general due process restrictions on the court's discretion." *Insurance Corp. of Ireland, Ltd., v. Compagnie des Bauxites de Guinee,* 456 U.S. 694, 707 (1982). The problem presented to the courts is the lack of guidelines provided for ascertaining the appropriate sanction as well as when a sanction should be applied. How much aggravation should a court have to endure before deciding to punish parties?

The United States Supreme Court upheld the extreme sanction of dismissal under Rule 37(b)(2)(C) in *National Hockey League v. Metropolitan Hockey Club, Inc., supra.* The plaintiff had failed to fully answer crucial interrogatories for seventeen months, despite several extensions of time before and after the deadline and several admonitions by the court, with commitments and promises by plaintiff to perform. The trial court concluded that plaintiff's actions were a "callous disregard of responsibilities counsel owe to the Court and to their opponents," and that the actions constituted "flagrant bad faith. . ." 427 U.S. at 640. The Third Circuit reversed. The Supreme Court, in reversing the Third Circuit, stated with regard to the sanction of dismissal that "the most severe in the spectrum of sanctions . . . must be available . . . in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent." 427 U.S. at 643. "If parties are allowed to flout their obligations, choosing to wait to make a response until a trial court has lost patience with them, the effect will be to embroil trial judges in day-to-day supervision of discovery, a result directly contrary to the overall scheme of the federal discovery rules." *Dellums v. Powell,* 566 F.2d. 231, 235 (D.C.Cir. 1977).

Several courts imposing sanctions have discussed the amount of willful disobedience involved when deciding the harshness of the sanction. In *Penthouse International, Ltd., v. Playboy Enterprises, Inc., supra,* the Second Circuit affirmed the trial court's dismissal of Penthouse's complaint. Playboy had requested documents, including specific financial statements and projections regarding advertising revenue, pursuant to Federal Rule of Civil Procedure 34. Penthouse was obliged, by court order, to produce these documents; but over the next several years, through a variety of devious tactics, it failed to do so. Playboy moved the district court, pursuant to Rule 37(b), for sanctions in the form of dismissal of the action based upon Penthouse's failure to comply with the court's order. The court granted the motion. After a thorough review of the facts, the appellate court affirmed the dismissal, and stated (663 F.2d. at 388):

> If Penthouse's failure to make discovery pursuant to the court's March 22 order stood alone against a background of compliance in all other respects, the harsh sanction of dismissal might not be justified . . . But it would be excessively formalistic to view the defiance of the order in isolation rather than against the background of Penthouse's prolonged and vexatious obstruction of discovery with respect to closely related and highly relevant records, its budgets, advertising revenue projections and cash flow projections, which Penthouse kept from Playboy and from the court during the pretrial and trial of the case through prejurious testimony of its top officials and false representations to the court by its counsel.

In *Al Barnett & Son, Inc. v. Outboard Marine Corp.*, 611 F.2d. 32 (3d. Cir. 1979), plaintiff had failed to extract and produce information from its records as ordered by the court. After first issuing a Rule 37(b)(2)(B) sanction, the court dismissed the complaint under Rule 37(d) when the plaintiff failed to appear for depositions. On appeal, the Third Circuit held that unlike Rules 37(a) and (b), Rule 37(d) does not require a direct order by the court prior to imposing penalties.

In *David v. Hooker, Ltd.,* 560 F.2d. 412 (9th Cir. 1977), the court-ordered assessment of costs and attorney fees against a party that failed to answer court-ordered interrogatories within the specified time. The court stated that: " 'willfulness' continues to play a role . . . in the choice of sanctions." 560 F.2d. at 420. Another court struck part of a defendant's pleadings for his refusal on two occasions to answer interrogatories in a specific manner. See *General Dynamics Corp. v. Selb Manufacturing Co.,* 481 F.2d. 1204, 1215 (8th Cir. 1973), *cert. denied,* 414 U.S. 1162 (1974). The *General Dynamics* court, noting that striking pleadings is a rather harsh sanction, stated that "non-compliance must be due to [defendant's] own fault, willfulness or bad faith in order to justify [the sanction]." 481 F.2d. at 1211.

One of the most harsh sanctions, incarceration for contempt, was employed by the court in *Hodgeson v. Mahoney,* 460 F.2d. 326 (1st Cir. 1972). The defendant refused to comply with a court order directing him to answer interrogatories and provide payroll records. The court initially ordered sanctions of attorney fees and $100 a day for each day of continued non-compliance. When those sanctions failed to coerce the defendant into compliance, incarceration was ordered.

Another court was more understanding when it reversed a lower court's exclusion of evidence for a party that was unable to supply the requested information. See *Dorsey v. Academy Moving & Storage, Inc.* 423 F.2d. 858 (5th Cir. 1970).

Enforcing Protective Orders

Relatively few courts have addressed the specific question of sanctions for violation of a protective order. In *Falstaff Brewing Corp. v. Philip Morris, Inc.,* 89 F.R.D. 133 (N.D.Cal. 1981), the defendants had requested and received a pro-

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tective order for more than 1,000 pages of confidential documents during discovery. The protective order commanded that plaintiffs and their counsel not disclose the documents to anyone. All documents were to be returned to defendant within ninety days of conclusion of the action.

Plaintiff's counsel failed to return the documents in accordance with the protective order, and defendants asked the federal district court to hold plaintiffs in contempt. The court issued an order allowing defendant's counsel, at plaintiff's expense, to investigate the circumstances. While the investigation did not reveal the documents, it was discovered that plaintiff's former counsel had delivered the documents to plaintiff when they withdrew from representing plaintiff.

Given the flagrant disregard and violation of the protective order, the *Falstaff* court ordered plaintiff to pay a $10,000 fine; a refund would be considered if all of the documents were returned within ninety days. Additionally, the court ordered that if the documents were found, they were to be returned with no copies made. The court warned that plaintiffs were prohibited from disclosing or using any information, or further contempt proceedings would be held. All together, the plaintiffs were ordered to pay $27,184.68.

In deciding to impose sanctions on the plaintiffs, the Northern California court relied on the deterrence rationale set forth in *National Hockey League, supra.* In considering the seriousness of the matter, the judge noted that: "In thousands of actions throughout the federal court system, millions of documents have been and are being produced in reliance on the binding force of protective orders." *Falstaff,* 89 F.R.D. at 135. The court went on to state that because of the vast amount of these documents, " a tendency may have developed to take them for granted and to treat compliance with them cavalierly."

On appeal, the Ninth Circuit reversed the contempt order against the plaintiffs. *Falstaff Brewing Corp. v. Miller Brewing Co.,* 702 F.2d. 770 (9th Cir. 1983). While the district court took the position that a party is responsible for compliance, the appellate court found that the primary effect of the contempt order was to punish the plaintiffs and to deny plaintiffs due process. In Judge Alarcon's view, the Contempt order, being criminal in nature, was an abuse of discretion. In addition, the Ninth Circuit determined the plaintiffs

were unable to violate the protective order since the order was directed to plaintiff's counsel, not plaintiff.

The obvious question arising from the Ninth Circuit holding is: who would receive the sanction — the party, the attorney — or perhaps both? Note that Judge Wallace dissented from his two colleagues. He opined that the contempt order was civil, not criminal, and an entirely appropriate sanction against the plaintiffs.

Another court has discussed the possible results of a violated protective order. In *Liberty Folder v. Curtiss Anthony Corp.,* 90 F.R.D. 80 (S.D.Ohio 1981), the defendants were concerned that plaintiffs had a propensity to misuse confidential commercial information in the past. The plaintiffs had requested, *inter alia,* names of defendant's distributors, dealers, and vendors who manufacture products sold by defendant and customers. The plaintiffs proposed a protective order limiting access to the information to plaintiff's counsel, limiting the number of copies, and limiting use of the information to the present litigation.

The Ohio federal court dismissed defendant's concerns by stating "[I]f the information is used for any proposes other than the prosecution of the instant litigation, then the proposed protective order would be deemed violated, and Defendants would have their rights thereunder." *id.* at 84. This is helpful, but as one court noted: "If at the end of this litigation defendant prevails, but in the meantime has made public property of valuable secret formulae, the victory will have been a costly one" *Chemical & Industrial Corp. v. Druffel,* 301, F.2d. 126, 129 (6th Cir. 1962).

There have been cases where the sanction has been issued against the attorneys. In *United States v. Sumitomo Marine & Fire Insurance Co., Ltd.,* 617 F.2d. 1365 (9th Cir. 1980), counsel for the United States persisted in delaying his responses to interrogatories. The district court imposed a $500 sanction against him; still, he continued to respond slowly to the court's request. After he failed to respond to defendant's motion for further sanctions, the court ordered the United States be precluded from introducing evidence of its damages.

Conclusion

While at times it seems that the Federal Rules of Civil Procedure open a wide door to plaintiffs seeking discovery of company records and other documents, there are procedures available to preclude, limit, and/or control the discovery process. Counsel should be aware of the ramifications of discovery requests both with regard to pending litigation and to client's business and good will.

In most instances where a request requires the dissemination of confidential records, defendant can ask for and receive a protective order to guide the production of records, use of the records, and in some cases controlling the manner in which parties conduct further discovery. It is up to counsel to urge the court to be as creative as necessary to protect the particular interests of his or her client.

Once a protective order is established, the parties should not treat it lightly. The possible sanctions for violation of the order are within the discretion of the court, and may include dismissal or default judgment.

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