



THE DefenseLINE



The Honorable Matthew J. Perry, Jr.
speaking at the SCDTAA Annual Meeting

President's Message

by John T. Lay



Wow! What a year! The last year was exciting and productive for our organization. We accomplished much: revitalization of the joint meeting, record judicial attendance and participation at our annual meeting and the continuation of our commitment to be at the forefront of legislation affecting our organization's members. Donna Givens' leadership this past year was incredible and she has made it so that this year is off to a great start. I promise I will try to continue the significant momentum created during Donna's tenure.

Our organization has significant obstacles ahead that we must address head-on.

These extraordinarily difficult economic times are frightening for all of us and have brought into focus our need as an organization to remain not only relevant but to be indispensable to our membership. We understand that we are competing for dollars as an organization. Our members have options to participate in other organizations, national organizations, but as President of this organization I, along with the entire SCDTAA board, are committed to bringing you enhanced services and to making our voices heard on any legislation that will have an impact on our pocketbooks or that will affect our quality of life.

There are several significant issues upon which I will focus over the next year. First, captive law firms have become a big issue nationally and are beginning to make their presence felt in South Carolina. It is my belief that the judicial system is better served where the client and law firm are separate.

While I understand that there are many wonderful and talented lawyers participating in captive law firms, in my view better service and better representation is typically provided to the insurance carrier when there is a distinct line of demarcation. We are keeping our eye on how this captive law firm trend develops and will be seeking our membership's counsel as to how to proceed on this issue.

Second, there is a concern among the defense bar that we are losing the art of trying cases. Lawyers simply do not try many cases today for many reasons. It is important that we make sure younger lawyers have the type of legitimate first-hand courtroom experience needed to represent our clients effectively. One of the ways we as an organization are ensuring that these skills are properly developed is by providing a trial school for young lawyers. As you all know, we have run the trial academy for 18 years. This year we are attempting to increase the number of students allowed to enroll. Currently, we have designated 24 spots but we would like to see this number increase to at least 28. Since its incep-

tion, more than 400 participants have come through the trial academy. It is important that we keep this educational tool in place and continue to enhance and improve it.

Third, a major concern is the commodization of the legal industry on the defense side. As many of you know, insurance companies and corporations increasingly treat the law profession as just another vendor, causing an erosion of the attorney/client relationship. This type of mindset affects our quality of life and can affect our pocketbooks. We must look for ways to change this dynamic and educate our clients on the value that we bring to their businesses. I encourage all of you to provide me any insights, recommendations, or suggestions on how we, in South Carolina, can improve our situation in this area.

Finally, it is my belief that diversity, race and gender, in our organization needs to be increased significantly. We have made tremendous strides in increasing our female participation and as noted, we just finished a wonderful year with Donna Givens as our President. However, it is my belief that we need a more diverse group of members, to include lawyers from a variety of minority groups.

It is important to me that we truly focus on what we assert to be one of our core values as an organization – membership that reflects the values of our clients and the citizens of South Carolina. To live up to this value, we must increase our participation by minority lawyers.

On the more traditional front, in July we will be headed to our joint meeting at the beautiful Grove Park Inn. Sterling Davies, Alan Lazenby and William Brown will lead our efforts to continue to make this a fantastic meeting. Molly Hood was the head of the joint meeting committee last year and initiated a focus on family. We are going to continue that focus to make sure that all members, especially our younger members, can bring their families to this event. We will have a children's program both nights and we intend again to have a BBQ with all of the claims managers.

As for the annual meeting, Glenn Elliott, Catherine Templeton and Bill Besley are in the process of making plans for our trip to The Westin, in Savannah, Georgia. The Westin was recently renovated, has a great spa and a nearby golf course. Please mark your calendars now for what we believe will be a terrific meeting.

I am very excited and honored to lead this organization. I understand that many defense lawyers are very concerned about the current economic crisis and how it may affect us. Please know I will do everything in my power to make sure that we, as an organization, assist with any problems that arise.

Now, let's get moving on a great New Year!

Letter From The Editors

by Wendy J. Keefer and Erin D. Dean

As we start a new year, we wish to thank our membership for all the contributions to this publication over the past several years. Your help allowed us to make our organization's publication relevant and useful, not only to SCDTAA members, but to our judges. We look forward to more of your articles, firm news, verdict reports and other information.

Moreover, as we begin this new year it is worthwhile to celebrate the ability of both our leadership and the leadership of our country to transition power smoothly.

Every four to eight years, the United States experiences this peaceful change from one President and Administration to another. Such an event is not seen in many other parts of the world, where power shifts are often achieved through force and violence. Regardless whether an individual's favored candidate won the election, this formal and civilized event should be cherished and never taken for granted. The history of such smooth transitions of leadership within our governmental structure trickled down to all forms of governance.

Indeed, each year SCDTAA welcomes a new president and a different slate of officers. These individuals are aided in their tasks by past office holders, future office holders and the general membership. As you will note upon reading the brief history of SCDTAA included in this issue, the organization's founding principle is to support the success of the defense bar. Shared experiences – both with the

organization and within each of our practices – is the association's greatest asset, no less than shared experience is our country's and its governors' greatest asset. Just as in each branch and level of government, however, it is the overall members who determine the ultimate success of this fine group of lawyers.

Our organization is full of great leaders, as well as team players, all of whom work together year after year. Likewise, SCDTAA is full of outstanding and accomplished members. It is only through the contributions of all of us that the association will continue to thrive and be a benefit to us all.

The Defense Line is one area in which this full participation of members and support of the leadership proved a resounding success. As we welcome a new President and the other incoming SCDTAA officers, we look forward to sharing with you another mutually beneficial year. As in the past, please contribute to the benefit of others by contributing to this publication and by giving your time and input in the many great events and undertakings of the South Carolina Defense Trial Attorneys' Association.



Wendy J. Keefer



Erin D. Dean



The 2009 Officers: Gray T. Culbreath, *Treasurer*; Molly H. Craig, *Secretary*; John T. Lay, Jr., *President*; Donna S. Givens, *Immediate Past President*; and T. David Rheney, *President Elect*

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SCDTAA President Lay named to the faculty of prestigious IADC Trial Academy

John T. Lay, Jr., an Ellis, Lawhorne & Sims, P.A. shareholder and litigation attorney, has been selected to serve on the faculty of one of the most prominent national trial attorney educational programs in the country, the International Association of Defense Counsel (IADC) Trial Academy. The 10-day academy is held at Stanford University.

The IADC Trial Academy is among the oldest and most prestigious continuing education programs for defense trial attorneys. The intensive program combines faculty instruction and demonstration with student participation. It attracts young attorneys from top U.S. law firms seeking to enhance their defense trial advocacy skills. The faculty is composed of trial lawyers with extensive trial experience from different geographic regions and diverse practices across the country.

Lay is member of the Ellis Lawhorne Litigation and Dispute Resolution Practice Group and focuses his practice in the areas of litigation and appellate practice. He earned his Juris Doctor from the University of South Carolina School of Law in 1991. He is a member of the South Carolina Bar, Richland County Bar Association and Federal Bar Association. He was named as the new President of the SCDTAA at the Annual Meeting in November. Lay was named to two sections of the 2009 edition of Best Lawyers in America®, Commercial Litigation and Product Liability Litigation. Lay also was recognized as a 2008 South Carolina Super Lawyer.

Four Collins & Lacy Attorneys Named To 2009 'Best Lawyers in America'

Collins & Lacy, PC is pleased to announce that Joel W. Collins, Stanford E. Lacy, Gray T. Culbreath, and Ellen M. Adams have been selected for inclusion in the 2009 edition of The Best Lawyers in America. Mr. Collins was selected for his work in White Collar Criminal Defense. Stan Lacy has been selected for his achievements in Workers' Compensation. Mr. Culbreath's selection was based on his achievements in the practice areas of Commercial Litigation and Product Liability Litigation. Ms. Adams was selected for her work in the area of Workers' Compensation Law.

Elbert Dorn joins Nexsen Pruet; Expands Business Litigation Practice Group

Nexsen Pruet, LLC is pleased to announce that Elbert Dorn has joined the firm as a member.

Dorn has more than 20 years of trial experience and devotes his practice to products liability, pharmaceutical and class action litigation. Dorn has

broad experience in handling complex commercial litigation. He has represented several pharmaceutical companies, petroleum companies and acted as coordinating counsel for one of the big three automotive companies.

"Elbert combines decades of trial experience with a broad understanding of how to handle complex commercial litigation," said board chairman Leighton Lord. "His work on products liability, pharmaceutical and class action cases strengthens our ability to serve our clients throughout the Southeast."

He is a past president of the South Carolina Defense Trial Attorneys' Association.

Dorn received his B.A. from the University of South Carolina and his J.D. from the University of South Carolina School of Law. He is a native of Greenwood and continues to reside there. He is married and the father of 4 children.

Collins & Lacy Announces Three New Shareholders

Collins & Lacy, PC is pleased to announce that attorneys Christian E. Boesl, Suzanne Boulware Cole, and Christopher M. Adams have been named shareholders of the South Carolina firm. Christian Boesl practices in the firm's Columbia office in the areas of workers' compensation, employment law, and products liability. He also maintains an active practice pursuing alternative dispute resolution for his clients. Suzy Cole practices in the firm's Greenville office where her practice focuses on workers' compensation. Chris Adams practices in the Columbia office where his focus includes general civil litigation with a concentration in construction law, products liability, premises liability, criminal defense, and catastrophic injury.

Parker Poe Announces Attorneys Recognized as Best Lawyers in America

Parker Poe Adams & Bernstein, L.L.P. is please to announce the following attorneys who were recognized in The Best Lawyers in America, 2009 edition: Susan Taylor Wall, Charleston Office, in the area of Professional Malpractice; Ronald J. Tryon, Columbia Office, in the area of Commercial Litigation; and James L. Werner, Columbia Office, in the areas of Commercial Litigation and Construction.

Twenty-Three Turner Padgett Attorneys Chosen for Inclusion in the 2009 Best Lawyers in America.

Charleston Office:

- John K. Blincow, Medical Malpractice
- Elaine H. Fowler, Real Estate
- John S. Wilkerson III,
Professional Malpractice Law

Columbia Office:

- Michael E. Chase, Workers' Compensation
- Danny C. Crowe, Alternative Dispute Resolution, Municipal
- John E. Cuttino, Construction Law
- Charles E. Hill, Medical Malpractice
- Lanneau W. Lambert, Jr., Banking Law
- Curtis L. Ott, Commercial Litigation & Product Liability Litigation
- Steven W. Ouzts, Mass Tort Litigation, Product Liability Litigation
- Thomas C. Salane, Insurance Law
- Franklin G. Shuler, Jr., Alternative Resolution & Labor and Employment
- W. Duvall Spruill, Commercial Litigation

Florence Office:

- Richard L. Hinson, Alternative Dispute Resolution
- J. René Josey, Appellate Law, Non-White and White-Collar Criminal Defense
- Michael G. Roberts, Tax Law
- J. Munford Scott, Jr., Tax Law
- John M. Scott, III, Tax Law

Greenville Office:

- Vernon F. Dunbar, Workers' Compensation
- Eric K. Englehardt, Alternative Dispute Resolution
- William E. Shaughnessy, Workers' Compensation
- Timothy D. St. Clair, Intellectual Property

Myrtle Beach Office:

- R. Wayne Byrd, Commercial Litigation

Molly Hughes Cherry named to Board of S.C. Womens Lawyers' Association

Nexsen Pruet is pleased to announce that Member (partner) Molly Hughes Cherry has been named to the Board of Directors of the South Carolina Womens Lawyers' Association. Ms. Hughes practices in the firm's Charleston office and concentrates her practice in the areas of employment and labor law, insurance bad faith defense, insurance litigation, business disputes and professional liability. She has been certified as a Specialist in employment and labor law by the South Carolina Supreme Court.

Turner Padget Attorney Approved as Circuit Court Mediator

Turner Padget Graham & Laney, P.A. is pleased to announce that Thomas Kennaday has recently been approved by the South Carolina Board of Arbitrator and Mediator Certification as a Circuit Court Mediator. Mr. Kennaday is special counsel in Turner Padget's Columbia office. He practices in complex civil litigation, including automotive product liability, toxic torts and construction litigation, consumer class actions, and business litigation.

Collins & Lacy Welcomes Claude T. Prevost

Collins & Lacy, P.C. is pleased to announce that Claude T. Prevost has joined the firm as an associate in the practice areas of Commercial Litigation, Construction, and Premises Liability. Claude was a cum laude graduate of Wofford College, where he received his degree in Business Economics in 2005. He received his Juris Doctor from the Charleston School of Law in 2008. During law school, Claude served as a summer intern for The Honorable Sol Blatt, Jr. in Charleston in 2006. During the summer of 2007, Claude served as a summer intern for The Honorable Bristow Marchant in Columbia while also working as a law clerk for Collins & Lacy. Claude performed 300 hours of Pro Bono work during law school prior to joining Collins & Lacy in 2008.

Turner Padget Elects Two New Shareholders

Turner Padget Graham & Laney, P.A., a leading South Carolina business law firm, has elected Nicholas W. Gladd and Richard S. Dukes as shareholders. Mr. Gladd is based in the firm's Columbia office. He concentrates his practice in the area of product liability. He represents manufacturers and designers in litigation concerning products liability claims and class action lawsuits. Mr. Dukes is based in the firm's Charleston office. His practice is focused on complex business litigation, shareholder litigation, financial fraud and securities litigation and arbitration, class action defense. Mr. Dukes also frequently defends professionals in malpractice and fiduciary duty claims.

Nexsen Pruet Elects New Member

Nexsen Pruet announces that Dennis Lynch has been elected a Member (partner) of the firm.

Dennis Lynch (Columbia) practices in the firm's business and commercial litigation group. The majority of his practice is devoted to complex civil and antitrust litigation as well as trucking and transportation law and litigation. He also practices in the area of governmental litigation.

Collins & Lacy Welcomes Jonny McCoy

Collins & Lacy, P.C. is pleased to announce that Jonny McCoy has joined the firm as an associate in the practice area of Workers' Compensation. McCoy received his undergraduate degree in Marketing from The University of South Carolina in 2005. He graduated from The University of South Carolina School of Law in 2008. As an undergraduate, McCoy served as a Student Senator for the Darla Moore School of Business. While in law school, he worked as a law clerk for Collins & Lacy and was a member of Phi Delta Phi legal fraternity.

McAngus Goudelock & Courie Opens New Office in Myrtle Beach, SC, Welcomes Robert Calamari and Dominic Starr

McAngus Goudelock & Courie is pleased to announce the opening of its Myrtle Beach office in the Parkway Office Plaza, located at 1107 48th Avenue North, Myrtle Beach, SC.

“We are excited about our new presence in Myrtle Beach and look forward to becoming an integral part of the Grand Strand legal and business community,” said Jay Courie, MG&C’s managing partner.

The Myrtle Beach office will be MG&C’s fourth location in South Carolina, bringing the firm’s total number of offices to six. Attorneys Dominic A. Starr and Robert C. Calamari have joined the firm’s Myrtle Beach office as members, each bringing more than 15 years of experience to the MG&C litigation team.

Mr. Starr’s practice focuses on business and tort litigation, product liability and pharmaceutical and medical device defense. He holds a bachelor’s degree from the University of Pennsylvania and graduated from the Emory University School of Law. Mr. Starr is admitted to practice before the 4th U.S. Circuit Court of Appeals and the U.S. District Court for the District of South Carolina.

Mr. Calamari’s practice focuses on construction litigation, general litigation and product liability. He holds a bachelor’s degree from Duke University and graduated from the University of Toledo College of Law. Mr. Calamari represents clients in all state and federal courts in South Carolina and North Carolina.

Turner Padget names Jonathan Hammond as member of Litigation Team

Turner Padget Graham & Laney, P.A. has named Jonathan D. Hammond as a member of the Litigation Team. Mr. Hammond is based in the firm’s Greenville office. His experience includes matters involving personal injury, premises liability, construction defects and general civil litigation.

He is a member of the Greenville County and South Carolina Bar Associations and the United States District Court for the District of South Carolina. Mr. Hammond earned his J.D. from the University of South Carolina School of Law in 2001. In 1998 he graduated cum laude from Presbyterian College. After completing a judicial clerkship with the Honorable Margaret B. Seymour of the United States District Court for the District of South Carolina, Jonathan entered private practice in the area of civil litigation.

McAngus Goudelock & Courie, LLC Welcomes Barrett Burley

McAngus Goudelock & Courie is pleased to announce that Barrett Burley has joined the firm’s Columbia office. His practice focuses on workers’ compensation matters.

Barrett graduated from Clemson University with a Bachelor of Science degree in management and a Juris Doctor from the University of South Carolina School of Law. He is a member of the American Bar Association, South Carolina Bar Association, Richland County Bar Association, and South Carolina Defense Trial Attorneys’ Association.

Turner Padget Adds Catherine Hood Kennedy as Special Counsel in Business Group

Turner Padget Graham & Laney, P.A. is pleased to announce that Catherine Hood Kennedy has joined the firm as Special Counsel in its Business Group. Ms. Kennedy is based in Turner Padget’s Columbia office and will focus her practice in estate planning, estate administration and litigation, and alternative dispute resolution.

“Catherine is a terrific complement to the firm’s Business Group and her arrival strengthens our ability to serve clients across the state with complex estate planning and litigation matters,” said Michael G. Roberts, Manager of the firm’s Business Transactions Group. “Beyond that, her experience as a former probate judge who is certified in alternative dispute resolution further augments our ability to provide arbitration and mediation services in a variety of cases, particularly those that are probate-related.”

Ms. Kennedy arrives to the firm with a wealth of knowledge in estate planning, probate administration and litigation. As the former Judge of Probate for Richland County, her judicial experience provides an excellent foundation for her statewide litigation practice. In addition, Ms. Kennedy is certified as a Specialist in Estate Planning and Probate Law by the Supreme Court of South Carolina, and is a certified civil court mediator and arbitrator. As part of Turner Padget’s Business Group, she will serve clients throughout South Carolina with complex estate planning and administration needs. Ms. Kennedy will provide counseling and representation in the areas of estate and gift taxation, wills, trusts, estate and trust administration, fiduciary representation and counseling, charitable remainder trusts, generation-skipping tax planning, family partnerships and limited liability companies.

Prior to joining Turner Padget, Ms. Kennedy was with Nelson Mullins Riley & Scarborough LLP. She is a member of the South Carolina Bar, its House of Delegates, its Elder Law Committee, and its Estate Planning, Probate and Trust Law Section, where she serves as secretary. She is currently a member of the Estate Planning and Probate Law Specialization Advisory Board to the South Carolina Supreme Court’s Commission on Continuing Legal Education and Specialization. Ms. Kennedy has been listed among The Best Lawyers in America since 2007.

She earned both her bachelor’s and law degrees from the University of South Carolina.

Richardson Plowden Announces New Shareholders

Richardson Plowden & Robinson, P.A. announces that Drew H. Butler and Lydia L. Magee have become shareholders of their firm.

Additionally, Emily R. Gifford has been named to the editorial board of the ABA Tort Trial and Insurance Practice Section’s TortSource publication.

The South Carolina Defense Trial Attorneys' Association - Here's How It Started!

by H. Mills Gallivan

Have you ever wondered how this organization was started? Who saw the need for an organization? Who did the work needed to get things moving and finally to formalize the idea? What visions did the "founding fathers" have for us? Here is at least part of the story...

At the Second Annual Claims Managers Luncheon on April 26, 1968, one of the topics for discussion was "Is There a Need for an Organized Defense?" Harold Jacobs (future president of our organization and Hemphill Award winner) was on the panel with two representatives of industry and Senator Bill Baskin. Ben Scott Whaley, President of the South Carolina Bar Association, was a special guest at that meeting.

Subsequently on August 2, 1968, the Claims Supervisor/Lawyers Insurance Committee of the Claims Managers Association met in Columbia to discuss whether a Defense Research Institute of South Carolina was thought to be necessary. It was decided that some liaison would be desirable between the claim supervisors of the insurance industry and defense lawyers. It was suggested that if this seemed desirable to the insurance industry as a whole, the time was right for the development of such an organization.

As a result of these discussions, Ben Alston Moore, Jr. (future president and Hemphill Award winner) sent a letter stating that Jack Barwick (then President of the Claims Managers Association and subsequently president of our association and recipient of the Hemphill Award; only person to hold both presidencies) was extremely anxious to have defense attorneys attend the meeting of the claims managers at Hilton Head during the first or second week of December. Attendance by lawyers at the meetings of the Claims Managers Association was normal at that time. It was expected that many defense counsel would be present at the December meeting and that this would be a good time to advertise and formalize an organization.

The initial meeting to discuss forming a new organization occurred on October 24, 1968 in the conference room at the South Carolina Bar Association. Ben Moore took the lead and invited Harold Jacobs, Rem Parler, Weston Houck, Robert F. Plaxico, Grady Kirven, C. Walker Limehouse, Eugene C. Cushman and Ed Mullins to this meeting. Only Harold Jacobs, Grady Kirven, Ed Mullins and Ben Moore actually attended. It was decided that proposed by-laws would be drafted for the new organization which

would be called the South Carolina Defense Attorneys' Association. A meeting was held on November 14. Those present elected the initial slate of officers: President – Ben Moore, Vice-President – Grady Kirven, Secretary-Treasurer – Harold Jacobs, Executive Committee – Weston Houck (3 years), Bob Plaxico (2 years) and Rembert Parler (1 year). Memberships were to be solicited with initial dues of \$20 per year.

The Annual Meeting of the Claims Managers was held on December 8, 1968 at the Adventure Inn on Hilton Head. One of the topics was "The Need for a Defense Organization in South Carolina." A panel with presentations by Ben Moore as South Carolina State Chairman for DRI and two officers of the Georgia Defense Lawyers Association was chaired by Louis Howell. Attendance included eighty-one lawyers and thirty-eight claims managers. Approximately seventy-five lawyers joined the new defense lawyers' organization at that meeting.

While the 1968 meeting occurred after the small group organized the Defense Attorneys, the first joint meeting of the Defense Attorneys with the Claims Managers after the former became a sizable organization occurred in December 1969 again at Hilton Head. At that meeting, Grady Kirven spoke on "The South Carolina Defense Attorneys' Association – Present and Future." Ed Mullins (future president of our organization and DRI and Hemphill award winner) gave a talk concerning "South Carolina Defense Lawyers and Claims Management." The tradition of joint meetings started early in our history.

The next 30 years have seen significant changes in the practice of law and in the organization including a name change to the present South Carolina Defense Trial Attorneys' Association. The latter was as a result of some in the media and elsewhere perceiving that the South Carolina Trial Lawyers Association included all those who tried cases. While we remain committed to be a liaison between the insurance industry and the defense bar, we have expanded our activities in many other areas.

We can thank the pioneer defense lawyers mentioned in this article for their foresight and efforts. We certainly must thank Jack Barwick for assisting in the formation of the organization before he became one of its leaders and stalwart supporters, for his continuing efforts in its behalf, and for maintaining the files which have provided the information contained in this brief history.

Irreverent (and Possibly Irrelevant) Recollections of Our Past SCDTAA

by Anonymous

Elsewhere in this publication you will find a learned discussion written by Mills Gallivan of how this organization was founded. Mills has presented you with a factual and well researched article on how your organization was started. This article, however, is aptly titled and is much less formal, although it is alleged that the facts contained herein are correct.

There have been allegations that this organization was formed by Ed Mullins, Harold Jacobs, and Dewey Oxner, among others, because they wanted to become President and build their resumes. Whatever the intent, all of these folks became outstanding early presidents of the organization and without them, and some others, it would never have become as successful as it has been. Jack Barwick, another pioneer mentioned in Mills' material, not only became the only person to lead both the SCDTAA and the Claims Managers Association, he also served as informal photographer and wrote The Defense Line for many years with little or no help.

It might amaze some of you to learn that when the annual meetings were held at Hilton Head, the venue was the William Hilton Hotel. At the time this was the only hotel on Hilton Head Island.

One annual meeting was held in Savannah, Georgia. Part of that meeting was a boat cruise from one of the islands to downtown Savannah. During that cruise it has been alleged that an unnamed federal judge took certain liberties with the wife of one of your past presidents. That past president allegedly offered to throw the federal judge off the boat. He was restrained by two of your other past presidents solely because they had cases pending before the federal judge involved. It is interesting to note that we have never had another annual meeting in Savannah ... until 2009.

Following the annual meeting in Savannah, Bruce Shaw took over as President of the organization. At the time the only bank account that the organized had was overdrawn by \$19. Bruce decided that the members should contribute to at least bring the account to a zero balance. He paid \$9 and allowed another young lawyer in his office to pay \$10 to bring it to that zero balance. Democracy has not always ruled within the organization.

The first annual convention that this organization held at The Cloisters on Sea Island was also the first, or among the first, convention ever held at that facility. The program chairman for that meeting had to separately negotiate the cost of each stuffed mush-

room because there were no convention menus. It rained much of that convention and the truck bringing the band, Second Nature, to the main dining room doors completely destroyed the front lawn of The Cloister. The program chairman was quite concerned but The Cloister never contacted us with a request that we repay them for re-sodding that lawn. At another annual meeting there, it is alleged that the formal dinner-dance was the only occasion at this staid and historic facility at which two large screen televisions were installed to show the Carolina and Clemson football games in the ballroom during the festivities.

There have been many noted speakers for annual meetings of our organization. Among them was Charles Allen Wright, who at the time was one of the co-authors of the leading federal practice hornbook. Charlie Wright sort of adopted our organization and invited himself to speak at several sequential meetings. His presentations were always learned and well received. Professor Wright was also a member of the NCAA Football Infractions Committee. Any of you University of Georgia fans who would like to know the background of Vince Dooley never being sanctioned by that organization would find it an interesting story. The ongoing conflict between Charles Allen Wright of the NCAA Football Infractions Committee and Karen Dukes, wife of David Dukes and ardent Clemson fan (not necessarily in that order), is well documented in the history of your organization.

Hospitality suites became the big thing at the annual meetings in the 1980s. Past Presidents Bruce Shaw, Mark Wall, Glen Bowers and Bob Carpenter were normally intimately involved. Usually, the hospitality suite was an adjunct of the rooms occupied by these respected members of the bar. Late nights were expected. During one of these discussions about the status of justice in South Carolina, one of your future presidents drove a golf cart over the seawall and into the surf. The organization avoided having to pay for cleaning the sea water from the golf cart.

One of your past presidents, Hugh McAngus, claims that he was responsible for the hospitality suite during one of the meetings. In fact, the hospitality suite was located in the room adjacent to his hotel room. At a quite reasonable hour, he locked the door to the hospitality suite and went to bed. Several hours later, he heard a commotion outside

the door. When he refused to get up to open the door, it is alleged that at least three of your past presidents broke the door down so that they could have access to the hospitality of the organization. The usual suspects were involved - allegedly.

The early Joint Meetings with the SC Claims Managers' Association in Asheville were quite different from today's meetings. At the time, the major clients of defense firms were insurance companies. There would be almost as many representatives of insurance companies at the meetings as lawyers. Every lawyer had to go to protect his own clients (and possibly steal the clients of someone else). Alcohol was much more prominent as an entertainment form at that time. Numerous individuals who normally enjoyed only Milwaukee's Best, had nothing but Brandy Alexanders for three days. A past president reminded me of the old standby function on the last day of our meetings. We always had what was called the "Hit the Road" Bloody Mary Party on Sunday mornings of the annual meeting and after the program ended during the joint meetings...really stupid for a bunch of lawyers! Alcohol can still play a role in meetings. It has been reported that at a recent Joint Meeting, one of the present members of the present Executive Committee suddenly and without warning found himself and one of his partners on the end of the boom of a construction crane being used to make an addition to the Grove Park Hotel. It is rumored that the police may have been involved.

Early Joint Meetings at Asheville usually included an evening at Bill Stanley's Barbecue in downtown Asheville. World renowned cloggers demonstrated their talents and then introduced our members to the nuances of this happy dance. The beer and barbeque were wonderful and everyone had a good time. The organization was a welcome visitor to Mr. Stanley's facility until it was shut down by the city, allegedly for some health infraction.

At one time in its past, the Grove Park facility, which we have used all but one year in our visits to Asheville, was not particularly "guest friendly" for conventions. In fact, one young lawyer who arrived at about midnight on the Thursday night of the beginning of the convention, with a written confirmation of a room reservation, was told that his room had been rented to someone else. After a rather extensive, pointed and loud discussion, this young lawyer demanded the home phone number of the manager of the hotel. His lawyerly talents were stretched to their extreme limits, but he eventually obtained the number. After a discussion about his plan to bring his wife and himself to the manager's home for lodging that evening, the hotel manager somehow found a room for Steve and Gail Morrison.

Past President Bob Carpenter designed the first SCDTAA logo which was used for many years. He was also a member of a small band which provided great political and legal commentary at our meetings

through songs containing lyrics of contemporaneous import.

You may not know that one of our annual meetings was picketed by a union and made the news in all of the three television stations then active in Charleston. The meeting was at Kiawah. The reason for the picketing was a major portion of our program. This involved a mock workers' compensation hearing in which the claimant allegedly suffered from the then newly popular disease, byssinosis, allegedly caused by the inhalation of cotton trash dust in textile mills. Commissioner Dawson Addis acted as hearing commissioner for the case. Isadore Lourie, a state senator (and noted claimant's counsel) played the part of the claimant's lawyer. Dr. Forde McIver (a board certified pulmonologist, national expert in asbestos lung disease cases and a real ham) served as the claimant. The defendant was represented by a young, very talented workers' compensation defense attorney who also wrote the script but who shall remain nameless because of modesty. The South Carolina Brown Lung Association picketed the facility, and actually carried signs that were not complimentary to our organization or our efforts.

Your organization is the only one of the national defense organizations that has ever invited all of its state and federal judges to meetings. The judges provide a wonderful pool of experience and knowledge for all of us to enjoy. This is the only opportunity for young and old lawyers to socialize with some of the judges who regularly decide our cases. Some of the judges have also provided us with wonderful memories. Past President Moose Philips is well known for entertaining judges and members at his family home on Kiawah Island. Some have alleged that they recall seeing a federal judge drive off at 2:30 in the morning in his Cadillac, waiving his "to go" bottle of Irish whiskey out the window. There are others who claim that they recall seeing a very dapper federal judge playing the drums with the band at our formal dinner dance or leading the singing around the piano in the lobby.

Everyone that has been a member of this organization has their own recollections. Some of them might be memories of particular gems that they have obtained from learned presentations. Others might recall famous people, including the two United States Supreme Court Justices who have spoken at past meetings. Almost everyone will remember the wonderful people that they have met at these gatherings. Our meetings are grand opportunities for our young lawyers to get to know the older members of the bar as well as our judiciary. There is no other organization that makes these advantages available to our firms. Hopefully, we will all allow the younger lawyers with whom we work to enjoy these same opportunities.

2008 Annual Meeting Recap

November 13 - 16

Ritz Carlton, Amelia Island, FL

by Curtis L. Ott

We still do not know how she did it. Somehow, somehow, outgoing President Donna Givens coordinated with the National Aeronautics and Space Administration to arrange a space shuttle launch during Friday night's oyster roast and Low Country boil dinner. Standing on the edge of the dunes, we all gazed across the Atlantic Ocean in awe as Space Shuttle Endeavour blazed through the partly cloudy sky. Like the overall meeting, it was an experience we will remember for a long time.

Donna officially opened the events with the President's Reception on Thursday evening in the

courtyard of the fabulous Ritz Carlton, Amelia Island. Great food accompanied warm greetings and laughter as we enjoyed each other's company. Later, many members of our state and federal judiciary joined SCDTAA members for dinner at the wonderful restaurants at the resort and surrounding areas. The following morning, we were treated to Secretary Richard W. Riley's timely comments on the recent election to begin the CLE program. Secretary Riley provided his personal insights into the challenges facing President Elect Barack Obama as he transitions into the White House. Next, Graham Powell moderated a judicial panel on the implementation of

Continued on next page



this year's South Carolina Supreme Court Order regarding the Multi-Week Trial Docket for the Ninth, Fourteenth, and Fifteenth Judicial Circuits. We were fortunate to have Judge Clifton Newman, who is the designated Presiding Judge of the Multi-Week Trial Docket for 2009, as well as Judge Michael Baxley, Judge Deadra Jefferson, and Judge Carmen Mullen offer their comments about the practicalities of administering this new program.

The agenda continued with substantive law breakouts in Auto/Torts, Products Liability, Workers' Compensation, and Managing Partners. We owe special thanks to Johnston Cox, Ed Lawson, John Hudson, Jr., Daniel Hayes, Mills Gallivan, Jay Courie, Gray Culbreath, and incoming President John T. Lay, Jr., for leading these discussions. Thursday's session concluded with Donna moderating a federal judges panel with Chief Judge David Norton, Judge Henry Floyd, and Judge Weston Houck. We were grateful to hear these judges' perspectives on practicing in federal court and how our members can avoid common pitfalls. Following the morning program, glorious sunshine welcomed participants in the afternoon activities that included golfing, horseback riding, backwater fishing, riding a horse drawn carriage on a historical tour of Amelia Island, and wine tasting. The aforementioned oyster roast and Low Country boil dinner, highlighted by Space Shuttle Endeavour, brought Friday to a dramatic close.

Saturday's CLE program started with Ron Wray moderating a judicial panel on lawyer civility. Judge Perry Buckner, Judge Markley Dennis, Jr., and Judge Jack Early, III, represented the State Judiciary, and Judge Henry Floyd and Judge Margaret Seymour appeared for the federal bench. All of these jurists provided keen insights from the bench regarding how attorneys can best fulfill their ethical obligations

The Executive Committee seeks the input of the members regarding any potential cases worthy of an Amicus Brief on behalf of the Association. If you know of a situation where the interest of Association members or a particular client would benefit please contact the Amicus Committee.

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of civility toward both opposing counsel and the judiciary.

The following portion of the program is difficult to capture with words. Suffice it to say that the awe with which we watched the space shuttle launch the previous evening was surpassed by the awe with which we watched the Honorable Matthew J. Perry, Jr., and clung to his every word. Judge John Few generously committed to introduce Judge Perry. This past July, Judge Few treated us to an extraordinary talk titled "The Courage of a Lawyer" at the SCDTAA Joint Meeting. Judge Few skillfully continued this theme as he highlighted the innumerable accomplishments of Judge Perry during his military service, education, litigation career, leadership during the Civil Rights Movement and as a federal court judge. Judge Perry then thrilled the audience as he recounted in his deep voice many details and wonderful stories about his life. The long standing ovation only partially expressed our gratitude to Judge Perry for sharing his life experiences with us and our pride in the important role a fellow South Carolinian played during a critical time in our nation's history.

Next, Gray Culbreath spoke regarding effectively challenging experts in state court. Our Association owes a tremendous debt of gratitude to Gray for his tireless work in the effort to promote fairness and uniformity in this area. Our final topic was the impact of gender bias in the courtroom presented through a judicial panel moderated by Pamela Roberts. Through her work with the American Bar Association, Pamela effectively summarized the national perspective concerning participation by women in private practice and as jurists. Chief Judge Kaye Hearn, Judge Seymour, and Judge Michelle Childs kindly donated their time to serve as panelists and offered their unique experiences as female jurists in South Carolina.

After another round of enjoyable afternoon activities, we congregated for the black tie dinner and dance on Saturday evening. The sounds of Atlanta Rhythm & Groove entertained us and inspired many to hit the dance floor. The banquet also marked the passing of the gavel from Donna to John T. as he was installed as President. David Rheney was elected President Elect, Gray Culbreath will serve as Treasurer, and Molly Craig, our newest officer, will be Secretary.

Our Association, again, would like to thank all of our speakers and the many members of the judiciary who attended and greatly contributed to a wonderful weekend. As always, special thanks are owed to our Association's Executive Director, Aimee Hiers. We hope that everyone will mark their calendars for November 5-8, 2009, when we will assemble at The Westin Savannah Harbor Golf Resort & Spa in Savannah, Georgia, for next year's Annual Meeting. Finally, we thank Donna for her leadership and service that culminated in a spectacular annual meeting. We still do not know how she did it.

Judicial Profile of The Honorable Clifton Newman

by Jocelyn Newman, Esq.

My relationship with Judge Newman began long before he was elected to the bench. When I met him, he was a young lawyer, fresh out of law school and a partner in his own firm, Belcher & Newman. It was November 3, 1977 when I, his daughter, was born. Since that time, I have observed Judge Newman in his many roles – as a son, a husband, a father, a friend, a lawyer, a judge, and a fellow member of the bar. And now I am, like the rest of the Bench and Bar, learning from him as he tackles the challenge of managing and presiding over South Carolina’s Multi-Week Trial Docket for the Ninth, Fourteenth, and Fifteenth Judicial Circuits.

Judge Newman, a native of Williamsburg County, was inspired to become an attorney while playing the role of an attorney in a high school play centered around the infamous *Brown v. Board of Education* school desegregation case. He attended and graduated from Cleveland-Marshall College of Law in 1976 and practiced law in Ohio for several years before returning to South Carolina, his home, in 1982. In 2000, he was elected to the Circuit Court bench, a dream that he had for many years. Two of his four children are practicing attorneys – me, a civil defense attorney, and Brian DeQuincey Newman, an Assistant Solicitor for the Fifth Judicial Circuit.

Judge Newman is known in the legal community as a calm, easy-going, confident man with an excellent judicial temperament. I know him as a family man who is interested in history and his ancestry, and who always makes an effort to learn something about everyone he meets.

When I caught up with him to ask a few questions, I found him walking along the beach that morning before holding court in Horry County. He said that he was enjoying the allure of the ocean while contemplating the day ahead and the various legal issues that he would face in the next construction defects case.

Questions

You have been assigned to handle the Multi-Week Docket’s pilot program this year. How do you feel about the challenge?

I think it’s an excellent opportunity to dispose of cases that would otherwise linger on the docket.

The regular court docket is not designed to accommodate cases of this nature because judges are assigned to weekly terms of court. This causes scheduling hardships for both attorneys and judges. The Multi-Week Docket addresses this issue. In some cases, actions have been pending for nearly ten years, which leads to frustration for everyone involved. This program helps to resolve those cases and eliminate that frustration.



The program requires you to manage the dockets in Horry, Charleston and Beaufort Counties. How are you able to handle that?

It’s definitely a juggling act. It’s difficult and requires special attention, but it’s manageable. For example, this month while waiting for jury deliberations in Horry County I was conducting status conferences for cases pending in Beaufort and Charleston Counties. The status conferences allow for issues to be addressed that, in many cases, can lead to case settlement. Each of these cases also has a case management order with rigid deadlines, which are also very useful.

Another topic of concern within the profession is diversity on the bench. What are your feelings about diversity?

This is an issue of major concern given the makeup of the state’s population and the people that are affected by what goes on in the courtroom. Most people believe increased diversity to be an admirable objective but problems arise in accomplishing it. Diversity is always touted as a goal but when it’s time to make choices, somehow other factors become more important. However, I believe that there has been a slight improvement in the

process thanks to a number of lawmakers in the General Assembly being adamant about making improvements.

What about the profession in general? How can we increase diversity amongst lawyers and law firms?

We are in changing times, which started with the election of our new President. Law firms need to begin to embrace diversity for its benefits, which I believe will begin to happen during President Obama's administration. For example, I recently tried a case in which ten of the twelve jurors were women. It would have been great to have more female lawyers participating in the case to relate to the jurors.

What advice would you give (or have you given) to your children (your son and daughter) about the practice of law?

Try to find your niche. Find an area of the law that you're interested in and become proficient at it, all while being well-versed in the law in general. Accept the law for what it is and the dedication that it takes to be the best. Also, don't be afraid to try a case! In spite of your nervousness, you can identify with the jury on some level because it's new to them too and they are just as nervous. Too many lawyers are afraid to accept challenges. My final piece of advice... don't be afraid to call your dad if you need help!

Jocelyn Newman is the daughter of Judge Newman and is an Associate at Richardson Ploewden & Robinson, P.A., a civil defense firm with offices in Columbia and Myrtle Beach. Ms. Newman's practice focuses on general litigation and governmental relations. She can be reached at (803) 253-8716 or jnewman@richardsonploewden.com.

Mid-Atlantic Region of DRI Holds Dinner

by H. Michael Bowers

The Mid-Atlantic Region of DRI held a regional dinner on October 22, 2008, at the New Orleans Cooking School during the Annual Meeting of DRI in New Orleans. The Mid-Atlantic Region is made up of South Carolina, North Carolina, Virginia, Maryland and the District of Columbia. On hand were the DRI State Representatives as well as officers and other members from each local organization. Also, former DRI Presidents Bob Scott of Maryland and Richard Boyette of North Carolina were in attendance. The group was presented with a "New Orleans" cooking lesson and great food along with a history of New Orleans cuisine.



Multi-Week Dockets: A Pilot Project

by D. Jay Davis, Jr. and Christine K. Toporek

The Supreme Court of South Carolina has issued an Order establishing a Multi-Week Trial Docket for the Ninth, Fourteenth and Fifteenth Judicial Circuits. Beginning January 1, 2009, for a “trial period” of one year, the Court established this multi-week Trial Docket for these three circuits. The Presiding Judge over this docket is The Honorable Clifton Newman. If this Order is extended beyond 2009, the Presiding Judge position will rotate on a yearly basis, much like Chief Administrative duties are now rotated among judges in a given circuit.

According to the Court, this order was issued to address the “heavy concentration of complex litigation cases, many of which involve resort construction projects with numerous parties and attorneys” and the length of time these cases were pending due to the length of trials and the need for a date certain. However, the order applies to any case that will take more than one week to try.

The Mechanics of the Multi-Week Docket

If a case qualifies as multi-week then referral to this docket is *mandatory*. All cases assigned to this docket will be declared complex and assigned to Judge Newman. This Order creates a separate trial docket for these complex cases. While cases referred to the multi-week docket will still appear on the master roster, they will no longer appear on the general common pleas trial docket.

This docket will run on a four month cycle. As of January 2009, there will be a term of court rotating through each test county. The first term was in Horry County (January 2009), then followed by Beaufort County (February 2009), and finally in Charleston County (March 2009). The April 2009 term is dedicated to “non-jury issues, status conferences, discovery hearings, administrative matters and chambers weeks” which will be scheduled among the three circuits at the discretion of Judge Newman. This rotation will repeat in the same fashion again in May 2009 and September 2009.

According to Judge Newman, the four week structure is not conducive to setting date certain trials. That being said, he is cognizant of scheduling difficulties and attorneys potentially having to try cases back to back. He is addressing this on a case by case basis. The Court strongly encourages contact with the court prior to the multi-week term if you have problems that must be addressed with your case. However, it does not seem likely at this point that

date certain trials are going to be a regular part of this docket.

There are three ways cases can be placed on this docket or removed from this docket – (1) upon the motion of any party, (2) *sua sponte* by the Chief Administrative Judge for the circuit or (3) *sua sponte* by the Presiding Judge of the Multi-Week Docket. As the case proceeds, if it appears the case is going to be less than one week, the matter may be removed from the multi-week docket and returned to the general common pleas trial docket upon the motion of a party or *sua sponte* by the Chief Administrative Judge or Presiding Judge. However, the converse is not true as the order expressly prohibits “last minute” transfers from the general docket to the multi-week docket.

Scheduling and Case Management Orders

The scheduling orders for multi-week cases must include a requirement of mediation prior to trial, regardless of whether the case has previously been mediated. In addition the Order also addresses carrier participation in mediation by its express terms:

The scheduling order will require that all attorneys, parties, and insurance representatives with full settlement authority be **present** at the mediation. Full settlement authority shall be defined as, in the case of the insurance carrier, “an individual who is empowered with the decision to offer a settlement sum *up to the existing demand of the Plaintiff or the policy limits of coverage, whichever is less.*” Full settlement authority for any party means the party individually or a representative who has binding authority to make a final decision for that party.

Additionally, all multi-week cases must have in place a Case Management Order. This order should set forth “deadlines, rights and responsibilities of counsel and parties, and other guidelines necessary to the efficient disposition of the case.” The Scheduling Order and Case Management Order can be combined in one document. In Charleston County, for example, there is a standard Multi-Week Trial Docket Case Management and Scheduling Order.

In an interview with Judge Newman, the Court has indicated that continuances will generally not be granted absent special circumstances. The court is also unlikely to alter or extend the time lines in the Case Management and scheduling Orders absent

Continued on next page

special circumstances. The initial approach of the Court is to strictly enforce case management orders because of the need to move these older cases.

However, the Supreme Court did grant the authority to the Presiding Judge to “*limit or modify* the application of the South Carolina Rules of Civil Procedure to ensure the timely progress and conclusion of the cases pending.” Examples of these modifications could include: limiting the availability of continuances, postponements, and time protection for counsel; addition of new parties; use of Rule 40, SCRCF for the removal of cases from the docket, “and other procedural applications that may delay the trial of the case.” Once your case is assigned to this docket, all issues and motions will be decided by Judge Newman, or to whomever he designates to resolve motions.

Implications for the Bar

Mediation – It appears the intent of the Court is to require meaningful mediation of these cases prior to a multi-week trial even if they have already been mediated. The order requires a person with appropriate authority to be present at this mediation. The order is silent as to “in person” attendance of adjusters at mediation of multi-week cases. Accordingly, some carriers may still want to attend by telephone. Further, it appears that this Order may place an obligation on Plaintiff’s counsel to communicate a demand prior to mediation so that a person with “appropriate authority” can participate.

Scheduling Issues – Pursuant to this Order, any case on the multi-week docket is eligible for trial for a period of one month. Further, all that is required is 24 hours notice to the parties that the case is going to be called. On its surface, it seems that this 24 hour notice requirement is somewhat inconsistent with the idea of effective management of complex, multi-week cases. The bench is probably going to find it difficult and expensive to require expert witnesses, out of state parties, and out of state witnesses to be available for a complete 30 day period on 24 hour notice.

This approach will be very cost burdensome on the parties as travel expenses will be significant. It may also affect the parties’ ability to adequately prepare the multiple witnesses that will necessary to a multi-week case. This can be a particularly difficult issue when dealing with physicians, construction related expert witnesses, and/or possibly closing busy practices or businesses on very short notice.

Hopefully, these issues will be addressed by the Court at the beginning of the term and date certain trials will be considered as the pilot program progresses. All attorneys want their witnesses in the courtroom testifying live in person and well prepared. The court certainly needs to clear its docket of old cases. Perhaps some use of date certain trials or perhaps weekly terms may balance the needs of the Court and the burden on the parties and help address these difficult issues.

Fortunately, status conferences are being conducted as needed, in phone or in person by Judge Newman, and he has indicated a willingness to work with the parties on these difficult issues. Unfortunately, the reality of this docket as it stands

now is that experts may have to be deposed and their deposition played for or read to the jury in lieu of live testimony.

Jury Selection and Availability: At this time, the juries are being selected from the regular panels summoned to jury duty during existing terms of court in these counties. For example, in Charleston County, the Multi-Week Roster will draw its juries from the weekly panel of jurors brought in for regular Common Pleas and General Sessions terms of court. A new panel arrives every Monday pursuant to the scheduled terms of court. Jury panels may not be available for all four weeks, but Judge Newman has indicated a willingness to pick two juries from the weekly panel if there is no jury summoned for one of the weekly terms.

Procedurally, the first multi-week jury will be pulled from this weekly panel. Once a multi-week trial is complete (whether by verdict or settlement) the jury panel will return the following day and a new jury will be struck for the next case on the Multi-Week Roster. Ultimately, if a case settles during the week, the Clerk of Court’s office will notify the panel to return and new jury will be seated for the next case on the multi-week roster...just like the regular trial roster.

This makes it highly likely that attorneys on the multi-week roster will have to attend the qualification of the jury panel every Monday until their case is called. In addition, the court has indicated that it would like all jury charges for cases set to be tried during the term submitted early on to the Judges clerk.

Summary of Key Changes

- Trials more than one week must be transferred to this docket.
- Judge Newman or his selected Judge will decide issues in the case after transfer.
- Date certain trials are unlikely and Case Management Orders are to be strictly enforced absent special circumstances.
- Mediation required with all parties and adjusters with appropriate authority “present” and regardless of whether the case has already been mediated.
- Trial date is 24 hours notice over a 30 day period.
- Case is designated as complex.
- The Docket will run on a four month cycle.
- The Chief Administrative Judge is to issue a scheduling and case management order prior to the arrival of Judge Newman for his four week term.

The idea of a multi-week docket has great potential. There will certainly be growing pains during this first year, but the potential to allow the effective administration of these cases is sorely needed and an excellent idea. Hopefully, the Bench and Bar will work together to fine tune the system to balance the needs of all such that the Court will be able to dispense of these cases in a timely and efficient matter while balancing the difficult, expensive and time consuming nature of presenting complex, multi-week cases.

A Minor Assignment

by William G. Besley and Jennifer E. Thomas

“Senior Partner just settled a case on the courthouse steps and wants me to draw up the settlement papers,” Flea Bailey, Jr., a first year associate, said to the junior partner, heading out the door of the courthouse.

“What else did he tell you?” Junior Partner asked.

“Nothing, he was on his way to the Defense Trial Attorneys’ meeting and he was in a hurry.”

“Well,” Junior Partner replied, “if our client is the one paying the money, you will need to get a Release from the Plaintiff. You will also need to make sure to get a correct settlement check. How much money is involved?”

“It can’t be much,” Flea answered, “because he said it was a minor settlement!”

“Are you sure he didn’t mean it was a ‘minor’s’ settlement, in other words, involving a minor under the age of eighteen?”

Flea sheepishly asked, “What’s the difference?”

“A great deal” responded Junior Partner. “It may have to be approved by a Court depending upon how much money is involved.

“You need to look at the Probate Code. Under § 62-5-433, the jurisdiction of a minor settlement is determined by the amount of the claim. “Claim” means the net or actual amount accruing to or paid by the minor as a result of the settlement. Therefore, you have to subtract any attorney’s fees and expenses from the total settlement amount before you know what court has jurisdiction.

“For claims over \$25,000.00, Circuit Court has jurisdiction and appointment of a conservator is required. The conservator is to be appointed pursuant to § 62-5-402. For claims not exceeding \$25,000.00, both the circuit court and probate courts have concurrent jurisdiction. For these claims, if a conservator has been appointed, the conservator may settle the claim without court approval. If no conservator has been appointed, the guardian ad litem must seek court approval, and payment must be made in accordance with § 62-5-103, which prevents payment of any sum over \$10,000.00 per year to anyone other than a conservator or clerk of court. Typically, the Plaintiff’s attorney will have one of the Minor’s parents act as guardian. Make sure that a guardian has been appointed. With regard to structured settlements, if the settlement is over \$10,000.00 but the minor will not receive more than \$10,000.00 per year while a

minor, it is generally not appropriate to appoint a conservator. If the claim does not exceed \$2,500.00, it can be made without court approval and without the appointment of a conservator, in accordance with Section 62-5-103.

“The proceeding is initiated by filing a petition in the appropriate court in the county where the minor resides or in the county in which the suit is pending. The petition must contain (a) all pertinent facts of the claim, (b) any payments made, (c) attorney fees, (d) expenses, (e) the reasons that the petitioner believes the proposed settlement should be approved, and (f) a statement regarding notice requirements. If the claim exceeds \$25,000.00, the verified petition has to have a statement that in the petitioner’s opinion, the proposed settlement is in the best interests of the minor. You should also include a proposed order approving the settlement and authorizing the appropriate party to execute a Receipt and Release, upon payment. Be sure and have the petitioner sign a Verification of the Petition. There is a South Carolina Supreme Court Order regarding the revised minor settlement procedure (dated July 23, 2008) that sets forth the procedures to follow.”

“Wow,” Flea exclaimed, “I never knew so much was involved.”

“Well,” Junior Partner sagely explained, “sometimes minor settlements are not so minor.”

“So how do I get started?”

“Well, you should call the Plaintiff’s attorney and get the breakdown of fees and expenses, for example medical bills. That way, you can do some quick math and figure out which court has jurisdiction. Then, you should draft the verified Petition, Order of Settlement, and Receipt and Release.”

“Hold on, hold on,” Flea said, scrambling for a legal pad and a pen.

“Then you or the other attorney should set up a hearing in front of the correct court. Be sure and send him copies of your documents prior to the hearing, so that you can work out any problems with the documents.”

“Then what?”

“At the hearing, the judge (or you) will ask the Guardian some questions. He will probably want to talk to the minor and the minor’s other parent, too. Once the judge is satisfied that the settlement is in the best interests of the Minor and that the settle-

Selecting and Vetting Your Client's Expert Witness

by John T. Lay, Jr. and Shaun C. Blake

As any litigator will attest, expert witnesses often are the most critical witnesses in a lawsuit. A good expert witness retained early in the litigation can help a litigator navigate the evidentiary landscape of a case from the inception of the case to the closing argument. Furthermore, at trial, juries provide substantial weight to the testimony that an expert provides to them. The gravitas that "experts" carry with them into the courtroom should not be underestimated, and prudent litigators ensure that all experts, even their own, are worthy of that gravitas by properly vetting and selecting experts well in advance of trial.

As early as possible in a case, you should identify whether an expert witness will be needed to present your client's case or to defend your client's position. One question that is helpful in identifying this need is whether expert testimony is necessary to establish an element of which your client bears the burden of proof. Also, consider whether your opponent has engaged an expert, or whether they will need to engage an expert to meet the burden of proof. Finally, even if you do not need an expert to testify, consider whether a consulting expert can help you frame discovery, prepare for depositions, and proceed to trial with the tools you may need for success.

In some cases, the need for expert testimony is obvious. For instance, expert testimony is required, often pursuant to statute, to establish causation in professional misconduct or malpractice cases. Doctors and psychologists are needed to establish matters such as bodily condition and mental capacity. Expert testimony from appraisers or other experts experienced in a related field is needed to establish the value of services, personal property, and real property. Similarly, experts with relevant knowledge or experience are needed to establish business custom and trade usage. As a general rule, you will need to employ expert testimony to establish factual matters that are scientific in nature or not commonly known to jurors.

Find the Right Expert Early

The key to effectively employing experts is to start early. Experts can help from the outset of the case by developing themes. Remember that your expert may have discovery needs too, and often you will need to conduct this discovery in a tight time frame.

For instance, unless you are under a scheduling order that states otherwise, all parties must disclose their experts for trial, including the written report described in FRCP 26(a)(2)(B), at least ninety days before the case is to be ready for trial. Moreover, rebuttal experts must be presented thirty days after the opposing party's disclosure. Since you will need to help develop your expert's testimony, which can take a lot of time, getting paired up with your expert early is key to meeting these discovery deadlines and using discovery to your advantage.

However, looking for an expert can take time. Therefore, knowing where to find them is important. In many cases, the best place to start looking for an expert is with your client because they are often involved in the field where an expert is needed. Also, check for references in case law stemming from your region or involving your parties. Do not forget to check with colleagues around the office or in the area. Finally, you should be aware that there are a number of internet based services that will help you find an appropriate expert, often for a fee that is charged to the expert rather than you.

Websites for Locating Expert Witnesses:

- www.mlegal.com
- www.expertpages.com
- www.oshc.com/experience.htm
- www.experts.com
- www.tasanet.com
- www.teklicon.com
- www.nocall.org/links/expertwitness.html
- <http://catalog.loc.gov>
- www.llrx.com/columns/expert.htm

When looking for an expert, try to find one that is the total package – an expert with both a high level of education and a lot of real world experience. Jurors often respond better to someone saying, "I've been an accountant in this industry for 20 years and I think the defendant's financial statements are in accordance with GAAP and industry standards," rather than, "I've taught accounting for 20 years and I think the defendant's financial statements are in accordance with GAAP and industry standards." Do not retain an expert just because she is well-published. Remember that the jury may be indifferent to this fact. Furthermore, numerous

publications may increase the likelihood of contradiction, providing your opponent fodder for cross-examination.

An effective communicator will carry more weight with the jury than someone who is just well-published. Therefore, once you have found an expert that looks good on paper, imagine how he or she will come across in the courtroom. Consider speaking abilities, confidence in the witness' own knowledge, and ability to explain complicated topics in a way that everyone can understand them. Communication skills are key, and if that physicist cannot express herself in layman's terms to you, she likely will struggle in front of a jury.

While you are communicating with the witness to test his communication skills, keep your eyes out for some red flags. Be wary of agreeable experts – experts that quickly agree with you may quickly agree with your opponent when the facts are presented in a different light. Also, talk to the witness about his testifying experience. Even if a witness appears qualified on paper, it is very risky to use an expert that has never been on the witness stand. At the same time, determine if the witness is a “hired gun,” because professional experts will be easily impeached by your opposing counsel.

Websites to Confirm whether a Witness Has Been Excluded

- www.dauberttracker.com
- www.medxonline.com
- www.lexis.com
- www.westlaw.com

Look Beyond the Expert's CV

To avoid a nightmare on the witness stand, and potentially a malpractice claim, scrutinize your candidate as you would your opponent's expert. If your client can establish that you “failed to exercise the degree and skill commonly possessed by a member of the legal community” in selecting an expert witness, which results in the dismissal of a meritorious claim, then they may succeed in establishing legal malpractice based on your failure to vet the witness you selected. See *Dimond v. Kazmierczuk & McGrath*, 15 A.D.3d 526 (2005); *Costanzo v. Pennsylvania Turnpike Com'n*, 50 Pa. D. & C.4th 414 (2001). First, you should double-check your expert's credentials were possible, such as confirming licensure or education with the appropriate boards and schools. There are a number of online services that can verify credentials. Moreover, most schools will verify degrees over the phone.

Websites for Confirming Expert Credentials

- www.degreechk.com
- www.docboard.org/docfinder.html
- www.avvo.com

Some notorious cases of falsified credentials have

hit the media in the past few years:

- Major League Baseball's handpicked steroids expert falsified his resume for congressional hearings in 2005, which resulted in even more skepticism from Congress.

- In 2006, an “expert” toxicologist of over 30 years was found to have entirely falsified his resume; by one estimation, he testified in over 4,000 DUI cases throughout his career, many of which are now being reviewed.

- A federal judge recently threw out a jury verdict in favor of Merck after it came to light that a cardiologist testifying in the Vioxx cases had misrepresented his credentials.

- In 2001, a D.C. police officer who testified in thousands of drug cases was found to have falsified his resume, causing a number of convictions to be overturned and was an embarrassment to attorneys on both sides of the bar who had used his services.

Second, review the published works that your experts include in their curriculum vitae and ask for copies of non-published works. Confirm your expert's authorship of the writings found on the curriculum vitae. When you are going through these materials, take time to look for bias or potential contradiction in these works as well. Also, search for unlisted writings that may be embarrassing or discrediting to your witness.

Additionally, you may consider checking to see if the expert is a party to any pending litigation. Public records and the internet are great resources to use to perform vetting on your witness. If the expert maintains any websites, review the history of these sites. Furthermore, many experts utilize social networking sites such as LinkedIn or Facebook. If these sites do not reflect that your witness is who he claims to be, then steer clear of him.

Table 4:

Social and Professional Networking Websites for Vetting Experts

- www.linkedin.com
- www.xing.com
- www.ryze.com
- www.ecademy.com
- www.yorz.com
- www.myspace.com
- www.facebook.com

These additional efforts, though time-consuming and tedious, are well-worth the security they provide your client and you. There is no question that your client can sue an expert who ultimately proves to be a fraud or professionally negligent. However, that expert may be able to drag you into court along with him. In *Forensis Group, Inc. v. Frantz, Townsend & Foldenauer*, 29 Cal.Rptr.3d 622 (2005), a claimant sued his expert witness for professional negligence

Continued on next page

**FEATURE
ARTICLE
CONT.**

stemming from his work in a wrongful death case. The Court of Appeals allowed the expert to maintain an equitable indemnification cross-claim against the hiring attorney to share in the fault for the case's dismissal. Therefore, in order to get the best result for your client and avoid the risk of a malpractice claim, be sure that the expert you retain is appropriate, qualified, and honest.

EXPERT CHECKLIST

- Do you need an expert to fully prove your case or dispute an element of your opponent's case?
- Do you fully understand what you hope to accomplish by having an expert?
- Have you checked a variety of locations for the right expert?
- Will your expert be able to satisfy Daubert and FRE 702 and 703?
- Does the expert you have chosen meet your specific needs?
- Is your expert too agreeable?
- Does the expert have good communication skills?
- Have you thoroughly scrutinized the expert as you expect your opponent to do?

**FEATURE
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CONT.**

**A Minor Assignment
Cont. from page 17**

ment is proper, he will look at your proposed Order. Be sure to look at the Code so that your Order will include all necessary information. Assuming it is done correctly, the judge will probably sign it, therefore requiring the execution of a proper receipt and release, upon payment of the settlement proceeds.

"You and the Plaintiff's attorney will need to have the Release executed, and you will need to give them the check. Section 62-5-103 will tell you how the check should be made payable."

"Great, thanks!" Flea headed for his car, pulled the parking ticket off of the windshield, threw it into the back seat, and drove to the office.

The following Friday, Senior Partner came to Flea's desk. "Son, I've reviewed the papers that you have drafted for the minor settlement. Have you set up a hearing?"

"Yes, sir,"

"Good work. Oh, by the way, I hope you didn't have any big weekend plans... You handled this so well, I want you to review the law and draft the necessary documents for the approval of a wrongful death settlement for me by Monday!"

- Have you confirmed all of their credentials?

Conclusion

When a client approaches you with a case that involves elements that will require expert testimony, the search for the right expert should begin as soon as possible in the representation. Finding the right expert takes advanced planning and thoroughness, and flipping through the CV's of familiar experts will rarely result in locating the best expert for your client's needs. With a little extra research, you can be assured that you have fulfilled your professional obligations to your client and have positioned your case to achieve the best results.

About the Authors

John T. Lay, Jr. is a shareholder with the firm of Ellis, Lawhorne, & Sims, P.A. in Columbia, S.C. John's practice focuses on commercial litigation, product liability, financial services litigation, and legal malpractice.

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Case Notes

State

Eadie v. Krause, Op. No. 472 (S.C. Ct. App. Dec. 22, 2008)

Plaintiff was injured on the job while working for a commercial industrial maintenance business doing concrete repairs for Home Depot. The injury occurred as the result of an automobile accident that happened while Eadie was picking up materials in Atlanta, Georgia for repair work to be performed in Charlotte, North Carolina. An Anderson, South Carolina resident, Eadie retained South Carolina counsel Krause to handle workers' compensation and personal injury claims related to the accident.

Krause filed paperwork related to workers' compensation claims in South Carolina, North Carolina and Georgia. Complete – Eadie's purported employer – was a Tennessee corporation so Tennessee counsel was retained to handle the filing for benefits in that state. In the Tennessee proceedings, Complete and Home Depot moved for summary judgment based on the assertion that Eadie was not an employee. In the alternative, Complete asserted that by filing for benefits in three other states, Eadie made a binding election of remedies and was not entitled to recovery in Tennessee. The Tennessee courts agreed and granted summary judgment on the claim against Complete based on this election of remedies and in favor of Home Depot based on the fact that Eadie was not an employee of that defendant corporation. Eadie appealed this decision via the Tennessee workers' compensation system, but the decisions were upheld based on the South Carolina workers' compensation filings, paired with the pursuit of the S.C. claim via the taking of depositions and request for a hearing. Eadie then filed the present case against Krause and his law firm alleging malpractice – namely the filing for South Carolina benefits and the active pursuit of that claim to the detriment of Eadie's Tennessee claim.

In assessing whether Krause's actions constituted a breach of his duty to Eadie and whether any such breach proximately caused the alleged damage (the preclusion of Tennessee benefits), the South Carolina courts must accept the Tennessee courts' interpretation and application of that state's election of remedies law. This State's courts, however, must review the actions of Krause in light of the law at the time the decision was made to file for benefits in this State. Prior to the Tennessee courts' decisions on Eadie's claim, the law in that state held that an

employee injured in another state who filed a claim or obtains a workers' compensation award in that other state or who actively pursues such a claim in a venue that has jurisdiction is barred from a subsequent claim in Tennessee. The trial court concluded that the South Carolina Workers' Compensation Commission did not have jurisdiction over the claim filed here because Complete lacked the requisite number of South Carolina employees. That decision was not appealed. Instead, the South Carolina Court of Appeals decision must accept that conclusion as the law of the case. That being the case, Krause could not have foreseen Tennessee's decision in this case – which decision was contrary to prior decisions – and did not breach any duty owed to Eadie.

Stringer v. State Farm Mutual Automobile Insurance Company, Op. No. 447 (S.C. Ct. App., Dec. 23, 2008)

Stringer was insured by State Farm in connection with a 1984 Chevrolet truck. On July 31, 2002, Stringer was in an accident while driving that truck. Earlier in 2002, Stringer paid State Farm \$424.76 for a six month policy on the truck, said policy period running from February 15, 2002 to August 15, 2002. During the policy period, policy adjustments resulted in an additional premium owed of \$47.25. Notices of this additional premium were mailed to Stringer, including a July 11 cancellation notice that required payment of the additional premium by July 29, 2002 to avoid cancellation. Stringer failed to pay the additional premium and the policy was cancelled.

When Stringer informed his insurance agent of the accident, the agent told Stringer that if he then paid the \$47.25, the policy would provide uninterrupted coverage. That payment was made and a Form FR-10 was provided by the agent to Stringer. State Farm, however, denied that coverage was in place at the time of the accident. Stringer then filed this action alleging, in relevant part, that coverage for the accident did exist. The circuit court, though dismissing Stringer's other claims, agreed that Stringer had uninterrupted coverage, including coverage on July 31, 2002. The Court of Appeals agreed.

The court's decision rested in part on the insurance agent's, an agent of State Farm, both providing Form FR-10 to Stringer evidencing coverage and accepting consideration – the additional premium payment – for that coverage. An insured has a right to rely on representations made by an employee of his insurance company regarding coverage.

Garnett v. WRP Enterprises, Inc., et al., Op. No. 26566 (S.C. Nov. 24, 2008)

Cindy Garnett was injured in an automobile accident involving Bierdie Williams. Williams was driving a car rented from Thrifty Car Rental. At the time the car was rented, Williams elected to purchase additional insurance coverage with a limit of \$100,000/\$300,000. Thrifty conceded Williams had \$1,000,000 of coverage, but contended that a policy issued to it by Philadelphia Insurance Company provided \$100,000/\$300,000 coverage. Philadelphia denied that the insurance provided such coverage and instead contended the policy provided merely the state required minimum coverage limits of \$15,000/\$30,000 for the rental of Williams. The South Carolina Court of Appeals disagreed but the South Carolina Supreme Court reversed, finding in favor of Philadelphia.

The policy between Thrifty and Philadelphia provided that where the rental contract provided the renter with minimum financial responsibility limits the Philadelphia policy provided limits of \$15,000/\$30,000. Where, however, "the rental contract provided the renter with limits in excess of the minimum state financial responsibility laws," the applicable limits of the Philadelphia policy were

\$100,000/\$300,000. The rental contract between Williams and Thrifty, by its express terms, actually provided that the supplemental coverage obtained by Williams provided him with "a separate policy providing excess coverage . . ." The Court determined that the language referencing a separate policy did not fall within the terms of the Philadelphia higher coverage because the additional insurance obtained by Williams was not provided by the rental contract itself but expressly by a separate policy.

Federal

Palisades Collections, LLC v. Shorts, Op. No. 08-2188 (4th Cir. Dec. 16, 2008)

This case presented the Fourth Circuit with the following issue of first impression: whether a party joined as a defendant to a counterclaim may remove a case to federal court solely because the counterclaim satisfies the jurisdictional requirements of the Class Action Fairness Act. The Court answered this question in the negative finding no basis for such removal either in the general removal statute, 28 U.S.C. 1441, or the removal provisions of the Class Action Fairness Act, 28 U.S.C. 1453.

The SC Bar Foundation's Oral History Program: The Honorable Matthew J. Perry

In continuation of its Oral History Program, the SC Bar Foundation was invited to capture the remarks of The Hon. Matthew J. Perry (with introduction by The Hon. John C. Few) during the SCDTAA's November meeting.

The Foundation will post the video on its Web site in the near future, however, copies of the DVD are also available from the Foundation.

The SCDTAA encourages members who would like to have a copy to request one from the Bar Foundation's Executive Director, Shannon Willis Scruggs.

The Foundation provides the DVD free of charge, however, we recommend that a minimum contribution of \$100 accompany your request.

Your contribution may be made via mail or at www.sctaa.org.

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Verdict Reports

Type of Action: Construction

Injuries alleged:

Negligence and breach of warranty

Name of Case:

MCE Properties, LLC v. SRA, Inc.

Court: (include county):

Greenville County Court of Common Pleas

Case number: 06-CP-23-04677

Tried before: Judge

Name of Judge: G. Edward Welmaker

Amount: Defense verdict

Date of Verdict: 12/24/08

Demand: \$230,000

Highest offer: N/A

Most helpful experts: (name, title, and city)

Alan Campbell, P.E., Charleston, S.C.

Attorneys for defendant (and city):

Giles M. Schanen, Jr. & Steven E. Buckingham
Nelson Mullins Riley & Scarborough, LLP
Greenville, S.C.

Description of the case: On December 24, 2008, Giles Schanen, Jr. and Steven Buckingham of Nelson Mullins Riley & Scarborough, LLP, obtained a ruling in favor of a defendant subcontractor in a construction case that was tried non-jury before the Honorable G. Edward Welmaker in the Greenville County Court of Common Pleas.

The plaintiff is the owner of a Toyota dealership in Greer, South Carolina. During the dealership's construction, the defendant obtained a subcontract to install synthetic stucco on the exterior of the dealership. The defendant installed the synthetic stucco over a two-month period in 2003. Following completion of construction, the plaintiff began to experience moisture intrusion problems at the dealership. The plaintiff filed suit against the defendant, alleging claims of negligence and breach of warranty. The plaintiff contended that the moisture intrusion issues were caused by the deficient installation of the synthetic stucco, and could be remedied only through a complete removal and reinstallation of the synthetic stucco. The plaintiff sought damages of approximately \$230,000 for the removal and reinstallation, and claimed that it was entitled to additional damages for diminution of the value of the dealership.

At trial, the defendant presented evidence that its work was done in accordance with the applicable construction drawings, manufacturer's details, and industry standards. The defendant also presented

evidence that any moisture intrusion issues were the result of work performed by other tradesmen that was completed prior to the defendant beginning its work on the job. On December 24, 2008, the Court issued an order ruling in favor of the defendant. The Court's order found that the defendant's work did not breach any warranty or legal duty, and was not the cause of the moisture intrusion issues at the dealership.

Alan Campbell, P.E., of Charleston, South Carolina, was an expert witness for the defense. *MCE Properties, LLC v. SRA, Inc.*, 06-CP-23-04677.

Type of Action: Premises Liability

Injuries alleged: Personal Injury

Name of Case:

Jonathon M. Lilly, Angela Denise Lilly, and Jonathon M. Lilly, Jr. v. Home Depot, U.S.A., Inc.

Court: (include county): USDC, Beaufort Division

Case number: 9:06-1969-CWH

Tried before: Jury

Name of Judge: The Honorable Weston C. Houck

Amount: 0

Date of Verdict: December 1, 2008

Demand: \$1,000,000.00

Highest offer: \$200,000.00

Most helpful experts:

James G. Baldwin, M.D. (Charleston)

Attorneys for defendant:

Molly H. Craig, Chilton Grace Simmons
and C. Tyson Nettles (Charleston)

Description of the case: While shopping for doors in one of the Defendant's stores, the Plaintiff began inspecting doors lying on a display rack. In the process, the Plaintiff pushed several doors up on their edge, and then stepped into the display without securing the doors he had pushed up. A door weighing approximately sixty pounds fell on him. Plaintiff thereafter underwent two spinal surgeries. The case was initially filed in state court and Home Depot removed the case to the United States District Court for the District of South Carolina in early July 2006. At trial, Plaintiff presented evidence of substantial injuries to his spine and lower back and his herniated disc diagnoses. Plaintiff has not worked since the accident five and a half years ago and is not expected to work in the future. The Plaintiff alleged he is now addicted to pain killing drugs as a result of the accident. Plaintiff failed to prove liability, including the display rack design was unreasonable.

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July 23 - 25

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ANNUAL MEETING

November 5 - 8

The Westin Savannah Harbor Resort

Savannah, GA

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