S.C. Defense Trial Attorneys' Association

Volume 26 Number 4 ▸ Winter, 1998

The DefenseLine

CLIENT ALERT!

Should We Invite Santa to the Company Christmas Party?

http://www.scdtaa.com

President's Letter

by John Wilkerson

As Bill Davies begins to enjoy his term as Immediate Past President, it is appropriate to reflect upon the progress made by the Association under his administration. The past year will be remembered as the beginning of new and expanded leadership opportunities for the membership. Realignment of election districts resulted in an increase in the size of the Executive Committee and more balanced representation from areas where the membership is most concentrated. Appointment of non-board co-chairs of standing committees allowed more participation in the work of the Association and promoted development of future leaders. (Most of the newly elected members of the Executive Committee served in that capacity.) Perhaps the most significant new initiative, however, has been the creation of Substantive Law Committees. Opportunities for professional development in specific areas of practice through the work of these committees will allow our organization to become more relevant to specialized practitioners and generalists alike. These and other accomplishments warrant recognition and deserve our enthusiastic support. Personally, and on behalf of the Association, I would like to thank Bill Davies and the countless others who made last year one of our best ever.

Beginning a new year gives us an opportunity to build upon the hard work and creativity of past leaders, as well as to find new ways of serving our membership. Certainly, fiscal responsibility will remain a high priority. Although a dues increase seems inevitable, we will continue to seek ways to generate revenue and become more efficient in our programs. Reynolds Williams and Richard Hinson have agreed to coordinate a statewide seminar this year. Watch your mail for further details on what promises to be a timely topic with interesting speakers.

Another new program will be led by Darryl Smalls—a new member of the Executive Committee. He has been appointed chair of the newly formed New Lawyers Committee, whose mission will be to reach out to other new (less than ten years experience) defense lawyers. (Who says the SCDTAA never does anything new?). Darryl's committee will also assume responsibility for maintaining the organization's Website. (www.scdtaa.com—check it out!!).

Expanding and strengthening the Substantive Law Committees is a primary goal this year. Frankie Marion will coordinate this effort and work closely with the committee chairs. Everyone should have received the Membership Interest Survey which invites participation in one or more of these committees. If you have not already done so, please take advantage of this opportunity to become involved in the work of your Association.

Elsewhere in this issue appears a report on third party audits and billing guidelines implemented by many of our insurance clients. Certainly these and other developments have placed a strain on the relationships between defense counsel and our traditional client base. Larry Orr has agreed to chair an Industry Relations/ Ethics Committee charged with the responsibility of recommending the appropriate response to this crisis by our organization. The Membership Survey seeks your input on this issue, and you are also invited to call Larry with any constructive suggestions.

Thank you for the opportunity to serve as your President. Please call me with your comments and ideas. I appreciate the enthusiastic support every member has given when asked to participate in the activities of the Association.

UPCOMING SCDTAA MEETINGS

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

ANNUAL MEETING
November 4 - 7, 1999
The Cloister • Sea Island, GA

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Ten Years Ago

Our Association's Annual Meeting ten years ago was held at Kiawah and marked the Twentieth Anniversary of our Association. The new officers elected were **FRANK H. GIBBES, III** of Greenville, President; **MARK H. WALL** of Charleston, President-Elect; **GLENN BOWERS** of Columbia, Secretary; **WILLIAM M. GRANT, JR.** of Greenville, Treasurer; **CARL B. EPPS, III**, immediate Past-President. The South Carolina Workers Compensation Commission at that time consisted of **TOM MARCHANT, III, VIRGINIA CROCKER, WILLIAM CLYBURN, VERNON F. DUNBAR, A. VICTOR RAWL** and **HOLMES C. DREHER. HAROLD JACOBS** of Columbia was named recipient of the First Annual Hemphill Award sponsored by our Association. This award was given in honor of the late United States District Judge **ROBERT W. HEMPHILL**. This award was presented for distinguished and meritorious service to the legal profession and to the public.

Twenty Years Ago

Our Association's Annual Meeting was held at Kiawah Island Resort on October 27-30, 1978. This meeting marked the end of the term of **MARK W. BUYCK, JR** as President and the ascension of **R. BRUCE SHAW** as President. Other officers were **BARRON GRIER**, President-Elect; **BOBBY HOOD**, Secretary-Treasurer; **BILL GRANT** of Greenville was the winner of the Golf Tournament, and **THERON COCHRAN** and **WILLIAM M. HAYGOOD, III**, both of Greenville, won the Mens Doubles in Tennis. This meeting marked ourT 10th Anniversary.

Thirty Years Ago

December 8, 1968, the first South Carolina Defense Conference was held at the Adventure Inn at Hilton Head with 81 lawyers and 38 claims managers attending. At that meeting **BEN "BAM" MOORE** reported on the organization of the South Carolina Defense Attorneys just a few weeks before that meeting. Seventy-five lawyers joined the South Carolina Defense Attorneys at that conference.

Proposed Revisions to Federal Rules of Evidence

On October 22nd, LCJ[1] President Steve Morrison delivered strong testimony supporting proposed rule revisions to the Federal Rules of Evidence relating to experts when he testified at recent hearings sponsored by the Federal Judicial Conference. Morrison, a defense practitioner and partner in the Columbia, South Carolina law firm of Nelson Mullins Riley and Scarborough, emphasized the importance of the proposed amendments to Rules 701-703 which he said "helps ensure that expert testimony provides some minimum characteristics of reliability and reaffirms the gatekeeper function of the court" to block the admission of junk science evidence. Not surprisingly, an ATLA witness preceding Mr. Morrison opposed virtually all of the proposed revisions.

LCJ supports the evidence rule revisions which clarify the scope of *Daubert* and include provisions limiting lay witness testimony to opinions or inferences which "are not based on scientific, technical, or other specialized knowledge." Additional hearings are scheduled and all comments must be received by February 1st.

In addition to circulating revisions pertaining to expert evidence, The Judicial Conference Advisory Committee on Civil Rules previously circulated for public comment proposed revisions to Rule 26 on Discovery. Copies of both the discovery and expert evidence proposed revisions as well as the Morrison Testimony can be obtained from LCJ at (202) 429-0045.

Pending discovery proposals would:

- Establish uniformity in disclosure rules;
- Facilitate early judicial intervention in the management of discovery for some cases; and,
- Emphasize proportionality in discovery.

LCJ members view the proposed revisions as bringing greater value to the discovery process. Circulation of the proposed amendments on discovery follows a lengthy review process by the Judicial Conference and ongoing efforts by LCJ and supporting defense organizations to provide meaningful input into those deliberations. Defense bar efforts have included those of Stephen Morrison, who, on behalf of special DRI "Working Group on Discovery" supported many of the changes to discovery, which were ultimately ingrained into the referenced proposals. The major objectives supported by the DRI Working Group included proposals designed to achieve uniformity in discovery, disclosure, limit its scope and achieve more focused discovery based on claims and defense rather than subject matter.

Both LCJ and DRI have provided additional comments regarding proposed changes to discovery and expert evidence rule revisions. Jack Trigg, a partner with the Denver, Colorado law firm of Wheeler, Trigg & Kennedy, chairs the LCJ Procedural Rules Committee.

Talking Points*

- Discovery Reform is Necessary.
- Proposed Discovery Reforms Represent a Step Forward.
- Disclosure Amendments.
- Uniformity of Rules Should Be Supported.
- Narrowing the Scope of Discovery is a Laudable Goal.
- Discovery Limits Do Not Go Far Enough.

* (These Talking Points are for use in development of original submissions and cover only portions of the proposed revisions to civil rules pertaining to discovery. Those individuals wishing to submit comments should develop them based on a more thorough understanding of the proposed revisions and actual litigating experiences.)

Footnote

[1] Lawyers for Civil Justice is a national coalition of defense trial lawyers and corporate counsel.

A complete copy of Mr. Morrison's testimony and additional information on the talking points are available. Please contact SCDTAA Headquarters at (803) 252-5646 or (800) 445-8629.

Client Alert!

"Should We Invite Santa to Deliver Presents Again at Our Annual, Company Christmas Party?"

by Thomas R. Haggard

Several of our clients have inquired about the legal and public relations implications of inviting Santa Claus to their annual Christmas parties. The firm appointed a high-powered and vastly overpaid task force to research and evaluate the matter. Their conclusion is this: Santa Clause is a legal and PR disaster waiting to happen.

"Sweatshop" Conditions

Although it is hard to imagine this on the North Pole, we have reason to believe that the goods Mr. Claus distributes are being manufactured by foreign nationals under "sweatshop" conditions. Whatever Mr. Claus is paying his workers, if anything, it is surely less than what a equivalent worker in the United States would make.

For your company to condone such exploitation may not be illegal, but it will certainly have unfortunate public relations consequences. Remember Kathy Lee Gifford.

Disability Discrimination

Moreover, we understand that most of these workers have height-related disabilities that Mr. Claus has refused to reasonably accommodate (as by lowering the workbench), requiring them instead (according to photos in our possession) to stand on dangerous three-legged stools while they work.

Illegal Importation

Because of the unconventional manner in which Mr. Claus travels, it seems highly unlikely that he has paid any of the import duties on his goods.

If your company gets involved in the chain of distribution, you could be liable for these duties.

Products Liability

We understand the North Pole has no product safety statutes or regulation. Mr. Claus' goods (mainly toys) probably do not satisfy stringent American product safety rules. If a child of an employee is injured as a result of a defective toy supplied by Mr. Claus through you, a Barbie Doll with an "attitude" for example, your company could face enormous liability.

Illegal Immigration

Our immigration lawyers checked with the Immigration and Naturalization Service. They have no record of granting Mr. Claus a visa to enter the United States, for any reason. Your company could thus face enormous liability for harboring an illegal alien.

The Sled

Mr. Claus apparently travels in a nine-reindeer powered flying sled. This mode of transportation could cause many serious legal difficulties, as follows:

- The Federal Aviation Administration advises that this is an unlicensed, unapproved, experimental aircraft. Mr. Claus will be subject to prosecution and the statute also imposes fines on "any landing facility that encourages or permits the arrival or departure" of such an aircraft. This is **your** company we are talking about.
- As an aircraft coming in from a nontreaty-alliance country, Mr. Claus' sled is also subject to interception by the United States Air Force. Moreover, under defense and national security laws dating back to the War of 1812, you (personally) and your company could be tried for treason and espionage, because of this illegal and arguably hostile invasion of United States air space.
- Even if Mr. Claus does get his aircraft licensed and cleared with the Defense Department before the visit, as he approaches your facility he will still be in violation of FAA regulations that prohibit flying below 1,000 feet in populated areas.
- Finally, the FAA advises us that one small, nose-sized red light at the front of an aircraft does not satisfy federal lighting requirements.

The Reindeers

We discovered several problems associated with the reindeers.

- Mr. Claus' name for one of the reindeers

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violates the copyright and trademark laws – "*Comet*," to be exact.

- Another name is sexually suggestive and may violate your policy against sexual harassment – "*Vixen*," to be exact.
- Finally, the animal rights activists will undoubtedly protest the exploitation of wild animals outside their natural habitat. This could cause your company no small degree of embarrassment.

Other Animal Rights Concerns

A published account indicates that on one visit Mr. Claus was "dressed all in fur." This is simply inviting massive protests from the animal rights activists. Do you want a spray-paint war to erupt at your Christmas party?

His Arrival At Your Facility

This published account also indicates that Mr. Claus' arrival at one particular destination was so unconventional and caused "such a clatter" as to wake up and terrify local residents. This may well violate local noise ordinances, for which you might be liable. Intentional infliction of emotional distress is another possibility to consider.

Mr. Claus modus operandi is first to land on the roofs of residences and facilities that he visits. This raised enormous legal problems.

- If uninvited, it constitutes trespass. If, after leaving your facility, he visits nearby homes, the residents may blame you.
- Unless your roof is surrounded by guard railing, for Mr. Claus to work up there will violate the Occupational Safety and Health Act. Do you intend to install an expensive railing on the building where the party is held?
- If Mr. Claus falls off the roof, he will undoubtedly sue your company.

Next, Mr. Claus attempts entry to the residence or facility by going down a chimney. This too raises serious legal problems.

- If uninvited, this constitutes breaking and entering. Again, what is he going to do after he leaves your facility? Your active involvement in the visit of Mr. Claus to the area might indicate that you have engaged in a conspiracy to break and enter.
- Unless Mr. Claus is a licensed chimney sweep, his activities will probably be in violation of the local fire ordinances. Your use of such an unlicensed chimney sweep will also subject you to heavy fines.

Weight Problems

Mr. Claus' apparent girth also poses several problems in regard to the roof landing and attempted chimney entry:

- Are you sure your roof will support his weight? If the roof collapses, injuring Mr. Claus and your employees below, your company could face enormous liability.
- Since being overweight may be a disability under the Americans With Disabilities Act, which requires reasonable accommodation, your company may have to modify all the chimneys on the building in which the party is held, making them large enough for Mr. Claus to go down.
- And if Mr. Claus gets stuck in a chimney, he will undoubtedly sue you for something.

Substance Abuse

Mr. Claus seems to have serious substance abuse problems.

- The published report referred to earlier indicates that on a typical visit "his cheeks [are] like roses, his nose like a cherry." And what does that tell you? A little too much John Barleycorn, perhaps? So, after he leaves your little party and crashes into a Boeing 747, you may have some host liability problems.
- The report also indicates that Mr. Claus has been seen "laying his finger aside of his nose." And you know what that might suggest! The federal seizure statutes have recently found to be constitutional. If Mr. Claus is arrested for sniffing cocaine at your party, your company might well become a fully-owned subsidiary of the FBI.

Tobacco Use

It is well known that Mr. Claus smokes an ill-smelling "stump of a pipe." Since most of you maintain a smoke-free work environment, this could pose a significant problem.

Age Discrimination Concerns

If you decide not to invite Mr. Claus to your party this year, in your communication to or regarding him, please do not refer to the subject as "a little **old** driver," as did one published account. We understand that the settlement was in the millions.

Conclusion

It is a sad, litigious, over-regulated world that we live in. But our concern is only for you. We do not want you to be involved in the massive Santa Claus, class-action litigation that is bound to ensue.

And one final word: Why do you want to give your employees a Christmas party anyway – or Christmas day off, for that matter? As the great, great-uncle of the senior partner of this firm once said, "Bah, humbug!" So, keep your legal business coming our way and have a Happy Holiday Season yourself.

Recent Order

In the Court of Common Pleas, C.A. No. 98-CP-23-2097, for the State of South Carolina, County of Greenville. Sherry Brown, Employee, Claimant/Appellant, vs. BiLo, Inc., Employer and Self-Insurer, Defendant/Respondent.

Order Affirming the Workers' Compensation Commission

This is an appeal from the South Carolina Workers' Compensation Commission Order filed June 11, 1998. After a careful review of the record, and after hearing arguments, I conclude that the Decision and Order of the South Carolina Workers' Compensation Commission should be affirmed. For the reasons stated below, the claimant's appeal is dismissed with prejudice.

Statement of the Case

Claimant/Appellant Sherry Brown (hereinafter "claimant") sustained a work injury resulting in a hernia on or about June 23, 1994. She underwent hernia surgery which resulted in some complications resulting in neuropathy of the right lower extremity. Claimant moved to Pennsylvania. Defendant/Respondent Bi-Lo (hereinafter "defendant") agreed to continue to provide treatment in Pennsylvania. In 1997, a question arose regarding whether the medical treatment sought by claimant for subsequent falls was related to the work injury. In response, claimant filed a Form 50 requesting a hearing to obtain medical treatment for injuries relating to her falls.

Defendant's representatives attempted to contact the treating physicians regarding the nature of claimant's condition and the cause of her alleged falls. To assist in this effort and in the medical management of this case, defendant retained the services of Judith A. Foriska, R.N. of Intracorp in Pennsylvania. By his December 11, 1997 letter, claimant's counsel warned Ms. Foriska not to discuss the claimant's condition with the treating physicians and threatened legal action if she did not comply with his wishes. Claimant's counsel also wrote similar letters on or about December 11, 1997 to the treating physicians in Pennsylvania advising them not to communicate with defendant's representatives and not to engage in or respond to any ex parte communications, special questions, correspondence, or communications from defendant's representatives. In his January 7, 1998 letter, Dr. Brian Boyle refers to a letter received from claimant's counsel and indicated he would not respond to defendant's representatives because of such correspondence.

Pursuant to South Carolina Workers' Compensation Regulation 67-215 and Rule 26, S.C.R.C.P., defendant submitted a written motion for an order requiring claimant's attorney to cease and desist from obstructing contact between defendant's representatives and the treating physicians. Also, pursuant to Regulation 67-613, defendant moved for postponement of the hearing scheduled for January 21, 1998 to allow for additional discovery on the pertinent medical issues necessitated by the action of claimant's counsel. By Order dated January 20, 1998, Commissioner Catoe granted defendant's motion. Claimant filed a Form 30 Requesting Commission Review.

On April 30, 1998, the Appellate Panel of the Commission heard oral argument on claimant's request for review. By its Order dated June 9, 1998, the unanimous Appellate panel issued a detailed Order affirming the Single Commissioner's Order. Specifically, the Appellate Panel set forth the specific statutory provisions and regulations in the Act relating to communications with physicians and ordered claimant's counsel to cease and desist from obstructing contact between the treating physician and the defendant's representatives. The Appellate Panel also ordered that the hearing scheduled for January 21, 1998 was postponed and will be sent to the Judicial Department to be rescheduled. Finally, the Appellate Panel ordered that the Single Commissioner's Order was interlocutory and not appealable.

Claimant appealed to this Court. Defendant moved to dismiss the claimant's appeal on the grounds the order was interlocutory and not

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appealable. Claimant contended the Order was an injunction and, therefore, directly appealable. The Honorable Joseph Watson heard oral argument and denied the Motion to Dismiss the appeal. On September 28, 1998, the undersigned heard oral argument from the parties on the merits of the appeal.

Issue

Did the single commissioner properly order claimant's counsel to cease and desist from obstructing contact between defendant's representatives and the treating physicians?

Standard of Review

S.C. Code Ann. Section 1-23-380 (A) (6) provides:

> The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inference, conclusions or decisions are:
>
> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) affected by other error of law;
> (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Findings and Conclusions

I find that the Commission properly ordered the claimant's counsel to cease and desist from obstructing contact between the treating physicians and defendants representatives. The claimant's reliance on the recent case of *S.C. Board of Medical Examiners v. Hedgepath*, 325 S.C. 166, 480 S.E.2d 724 (1997), and *McCormick v. England*, 328 S.C. 627, 494 S.E.2d 431 (Ct. App. 1997), is misplaced. Both cases recognized the existence of a physician's duty of confidentiality. Those courts held that a physician violates his ethical duty of confidentiality by revealing patient confidences where the revelation was neither compelled by law (i.e. subpoena or statute) nor consented to by the patient. *Hedgepath*, 480 S.E.2d at 726; *McCormick*, 494 S.E.2d at 435. In *Hedgepath*, the Court of Appeals agreed with the following construction of the regulation regarding patient confidences:

> A physician acts ethically when she maintains patient confidences, <u>and when she provides confidential information to others as required by law or as authorized by the patient.</u>

480 S.E.2d at 726 (underline added). Similarly, in the *McCormick* decision, the Court of Appeals held that:

> "...an actionable tort lies for a physician's breach of the duty to maintain confidences of his or her patient <u>in the absence of a compelling public interest or other justification for the disclosure.</u>

494 S.E.2d at 437 (underline added). The *McCormick* Court further reasoned:

> Patients have the right to be candid in their disclosures of private information to their physicians without fearing this information will be disseminated throughout the community. <u>However, this right is not absolute and must give way when disclosure is compelled by law or is in the best interest of the patient or others.</u>

494 S.E.2d at 439 (underline added).

Thus, while physician/patient confidentiality is worthy of some protection, the patient's right to confidentiality is not absolute. Rather, by definition, a physician does not violate his ethical duty of confidentiality by revealing medical information where the revelation is compelled by law (i.e. subpoena or statute).

The South Carolina Workers' Compensation statutes and regulations compel a physician to provide employers with all medical information and facts communicated to them during their treatment of an employee. South Carolina Workers' Compensation Regulation 67-1301(A) provides in relevant part:

> A medical practitioner or treatment facility shall furnish upon request all

medical information relevant to the employee's complaint of injury to claimant, the employer, the employer's representative, or the Commission.

As such, in workers' compensation cases, physicians are compelled by Regulation 67-1301(A) to reveal all medical information "upon request" to the employer or the employer's representative. No such compulsion existed for the information provided by the physicians in *Hedgepath* or *McCormick*, both cases involving divorce actions. Thus, in workers' compensation cases, a physician does not breach his duty of confidentiality when providing medical information to an employer or its representative, but rather, is compelled by law to provide such information. Because no breach exists, I can find no basis for recognizing a ban on ex parte communications between the treating physicians and defendant's representatives in this workers' compensation case.

The South Carolina Workers' Compensation statutes further require that information provided by a claimant to physicians in Workers' Compensation cases is not privileged and must be furnished to defendants:

1. S.C. Code, Ann. Section 42-15-80 provides in relevant part: "No fact communicated to or otherwise learned by any physician or surgeon who may have attended or examined the employee, or who may have been present at any examination, shall be privileged, either in hearings provided for by this Title or any action at law brought to recover damages against any employer who may have accepted the compensation provisions of this Title."
2. S.C. Code, Ann. Section 42-15-95 provides in relevant part: "All existing information compiled by a health care facility...pertaining directly to a Workers' Compensation claim must be provided to the insurance carrier, the employer, the employee, their attorneys, or the South Carolina Workers' Compensation Commission, within fourteen days after receipt of written request...if a treatment facility or physician fails to send the requested information within forty-five days after receipt of the request, the person or entity making the request may apply to the Commission for an appropriate penalty payable to the Commission not to exceed $200.00."

Thus, in South Carolina, our Legislature and Commission has determined that information provided to treating or examining physicians in Workers' Compensation cases must be disclosed to employers and their representatives upon request. The *Hedgepath* and *McCormick* Decisions recognized the physician's duty of confidentiality was distinct from the issue of whether the physician could be legally compelled to reveal the pertinent medical information. The *Hedgepath* Court wrote:

> The terms "privilege" and "confidences" are not synonymous, and a professional's duty to maintain his client's confidences is independent of the issue whether he can be legally compelled to reveal some or all of those confidences, that is, whether those communications are privileged.

480 S.E.2d at 726; *McCormick, supra*, 494 S.E.2d at 434. Here, the existence of the physician's duty of confidentiality is not at issue. Rather, the issue is whether the physicians are legally compelled by the Workers' Compensation Regulations and Statutes to reveal the pertinent medical information. As shown above, the statutes and regulations require disclosure to the employer or its representatives upon request.

Regulation 67-1301(A) provides that the physician "shall furnish upon request all medical information relevant to the employee's complaint of injury." S.C. Code Ann. Section 42-15-80 provides that "[n]o fact communicated to or otherwise learned by any physician...shall be privileged". S.C. Code Ann. Section 42-15-95 provides that "all existing information" must be provided. There is nothing in the statutes and regulation indicating the facts "communicated" and/or the medical "information" is limited to formal discovery or

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written records. While the Workers' Compensation Act is to be liberally construed, the courts are not justified in so construing it as to do violence to a specific requirement of the Act. *See Wallace v. Campbell Limestone Co.*, 198 S.C. 196, 17 S.E.2d 309 (1941); *Teague v. Appleton Co.*, 221 S.C. 52, 68 S.E.2d 878 (1952); *see also Brown v. Martin*, 203 S.C. 84, 26 S.E.2d 317 (1943) (while the Act is to be liberally construed, words should be given their established legal meaning or the meaning which the Legislature intended). Here, I find that informal communications between defendants and the treating physicians in workers' compensation cases are proper when relating to information relevant to the injury and claim.[1]

In its Order filed June 9, 1998, the Commission interpreted the above quoted statutes and regulation as allowing contact, including contact involving ex parte communications, meeting, correspondence, and answering questions in written or oral form between the treating physician and the representatives of the employer or carrier. The South Carolina Workers' Compensation Commission is charged by the Legislature with administering the Workers' Compensation Act and promulgating all regulations necessary to implement the provisions of the Act. S.C. Code Ann. Section 42-3-10 *et. seg.*; S.C. Code Ann. Section 42-3-30. When there is a question of interpretation of a statute or regulation and the administration of the law, the Court should give deference to the opinion of the agency and should not overturn a determination of the agency absent cogent reasons. *See Gilstrap v. S.C. Budget & Control Bd.*, 310 S.C. 210, 423 S.E.2d 101 (1992); *see also Greystone Catering Co., Inc. v. S.C. Dept. of Revenue & Taxation*, 326 S.C. 551, 486 S.E.2d 7 (Ct. App. 1997) (court cannot overturn agency's construction absent a cogent reason); *Emerson Elec. Co. v. Wasson*, 287 S.C. 394, 339 S.E.2d 118 (1986) (statutory construction by an agency is entitled to most respectful consideration and should not be overturned absent compelling reasons); *see e.g., Brown v. Owen Steel Co., Inc.*, 316 S.C. 278, 450 S.E.2d 57 (Ct. App. 1994) (the Court affirmed the Commission's interpretation of Regulation 67-507 by agreeing that an employer may stop temporary disability payments as of the date of maximum medical improvement as indicated by a plain reading of the regulation rather than also requiring the employer to establish the employee is no longer disabled). Here, the Commission's interpretation of its own regulation and the statutes that it is assigned to administer is entitled to such deference. The Commission has vast experience in administering the Workers' Compensation Act and is in the best position to understand the potential effects of a ban on ex parte communications.

Claimant relies on the North Carolina Court of Appeals Decision of *Salaam v. N.C. Dept. of Transp.*, 122 N.C. App. 83, 468 S.E.2d 536 (1996), and *Crist v. Moffat*, 326 N.C. 326, 389 S.E.2d 41 (1990). First, the *Salaam* Decision relies upon the North Carolina common law recognized in *Crist* which prohibits unauthorized ex parte contacts. No such rule exists in South Carolina. South Carolina Workers' Compensation Regulation 67-1301 compels disclosure of information to employers. There was no mention in *Salaam* or *Crist* that a similar regulation existed in North Carolina. Second, North Carolina has a statutory physician-patient privilege. No such privilege exists in South Carolina. *See Peagler v. Atlantic Coast Line Railroad*, 232 S.C. 274, 101 S.E.2d 821 (1958). Even though the *Salaam* decision did not rely upon the North Carolina statutory privilege, the refusal of the South Carolina Courts and Legislature to recognize or enact such a privilege suggests that South Carolina does not intend to follow the North Carolina rules affecting the physician/patient relationship. While the policy considerations in *Crist* and *Salaam* may have merit, these considerations do not alter the clear language and intent of the South Carolina Workers' Compensation statutes and regulations to provide for equal access to the information from treating physicians.

A ban on ex parte communications would be inconsistent with the intent of the South Carolina Worker's Compensation Act. The Act is a form of social legislation by which both the employer and employee surrender certain benefits previously enjoyed under the common law in exchange for other benefits provided under the Act. *Bagwell v. Ernest Burwell, Inc.*, 227 S.C. 168, 87 S.E.2d 583 (1955). The Act involves a compromise of interests for the overall benefit of both employers and employees. Under the Act, the employee is not required to establish fault of the employer in order to obtain benefits. The employer has complete immunity from tort liability, defined and limited exposure for the payment of scheduled benefits, the right

to choose the treating physician under S.C. Code Ann. Section 42-15-60, and the right to obtain medical information relevant to the employee's treatment. One of the primary goals of the Act is to provide speedy compensation to injured workers. *See Parker v. Williams & Madjanik, Inc.*, 275 S.C. 65, 267 S.E.2d 524 (1980) (trade off approach to Workers' Compensation under which employees injured in course of employment are assured of speedy compensation and employer is assured of immunity from tort actions by employee has benefited not only employee and employer, but society as well). To achieve this purpose, the Legislature and Commission have intentionally streamlined the flow of medical information so that benefits can be provided quickly to injured employees on compensable claims.[2]

A ban on ex parte communications between the treating physicians and the employer or its representatives would severely undermine the goal of quickly and efficiently providing benefits. If employers and carriers were only allowed access to physicians through consent of the claimant or through formal discovery methods, then the entire compensation system would be hampered. The process of obtaining essential information such as diagnosis, causation, temporary disability, maximum medical improvement, and extent of permanency would be more costly and significantly delayed while formal discovery methods, such as depositions or interrogatories, were implemented. The Workers' Compensation Act is concerned with substantive rights and liabilities of the employee and employer. *Sellers v. Daniel Constr. Co.*, 285 S.C. 484, 330 S.E.2d 305 (1985). Unlike the Rules of Civil Procedure designed specifically to provide rules and requirements for litigated cases, the primary purpose of the Workers' Compensation Act is not litigation but rather to establish an efficient and fair system for distributing benefits to injured workers in compensable cases. The claimant's suggestion that interrogatories could be used in lieu of ex parte communications is not realistic for the vast majority of cases where no attorney involvement exists. If an ex parte ban was recognized, benefits in many cases would be delayed pending discovery on issues of causation and treatment.

The determination of benefits in contested cases would be significantly delayed because the caseload at the Commission would increase significantly given that simple cases could no longer be handled expeditiously by employers and carriers. Furthermore, physicians would be required to spend more time testifying in depositions to provide the relevant information. Finally, the claimants and their counsel would have the tactical advantage of having exclusive access to the treating physicians outside of formal discovery.

Conclusion

For the foregoing reasons, the Single Commissioner's Order and the Full Commission's unanimous affirmation are affirmed.

Honorable Thomas J. Ervin,
Presiding Circuit Court Judge
Greenville, SC
This 14th day of October, 1998

Footnotes

[1] Even if physicians were not compelled to disclose "patient confidence" to employers or carriers in workers' compensation cases, it is doubtful that the information sought regarding causation, disability, maximum medical improvement, and permanency would involve "patient confidences." Rather, the information sought involves the physicians' opinions on essential issues regarding the claimant's condition.

[2] The intent of the Legislature to achieve the goal of quickly providing benefits to injured workers based on the quick and free access of information from the treating physicians is demonstrated by the 1996 amendment of S.C. Code Ann. Section 42-9-260. As amended, S.C. Code Ann. Section 42-9-260 allows an employer to begin making payments of compensation within the first 150 days from the date the injury is reported and further allows the payments to be terminated if, among other reasons, the employee has returned to work, a good faith investigation reveals grounds for denial, the employee has been released by the treating physician to work without restriction and the employer offers comparable employment, the employee has been released by the treating physician to limited duty work and the employer provides some suitable work, or the employee refuses medical treatment. The employee can contest the termination of benefits by requesting a hearing which must be held within 60 days of the request. This expedited process set forth in the amended statute requires and assumes the employer and its representatives will have quick access to the information provided by the treating physicians. A ban on ex parte communications between the treating physician and the employer or its representatives would undermine the implementation of this new statutory procedure designed to expedite benefits and the decision making process of the employer and its representatives.

Update on Third-Party Audits and Billing Guidelines

Relationships between defense counsel and the insurance industry are becoming more strained with the increased use of third-party audit services and billing guidelines. Most defense firms blame the current tension on a perceived loss of trust by carriers toward their attorneys. The carriers to some extent acknowledge that fact, but contend such cost containment strategies are necessary in order to remain competitive in the insurance marketplace. At the recent DRI Annual Meeting in San Francisco, representatives of the insurance industry and state and national defense bar leaders engaged in open debate over this crisis. This report attempts to summarize the issues raised in those discussions and the response of the organized defense bar.

Insurance Industry Perspective

Outside counsel coordinators from several major carriers were in attendance and made presentations. The bottom line of their position was summed up by one representative who asserted: "What's good for the industry is good for outside counsel." It is clear that economic factors are driving the move toward outside audits and case handling guidelines. These factors include intense competition for the premium dollar, lower anticipated returns on investments, and stockholders' demand for higher profits. Legal expenses are a large percentage of the bottom line, and it is clear that the industry will move forward toward it's goal of cutting legal expenses and improving the quality of legal services. The defense bar must realize, however, that the concept of "quality" embraced by the insurance industry is quite different from the way it has been measured in the past.

While ensuring compliance with billing guidelines is often cited as the primary reason for audits, many of the comments focused on other perceived benefits of auditing legal bills. The industry views the data-gathering potential to be as important as the actual cutting of bills. It seems to be generally recognized in the industry that once outside counsel "learn to fully comply" with billing guidelines, the initial cost savings audits are yielding will level off. At that point, the data that has been gathered through the use of various coding systems will become of paramount importance.

The industry representatives tacitly acknowledged that the data being gathered will be used in the future to establish "reasonable and customary" charges which will set a basis for challenging time entries—much like the concept of managed care that the medical profession has faced for years The data will soon be available for evaluation of efficiency, base cost analysis, and a basis for developing new pricing structures. In the future the most cost-efficient firms , as measured by these tools, will clearly obtain a competitive advantage. Those defense firms that can develop new ways to practice more efficiently, through technology or otherwise, will stand out and prosper.

The industry is obviously very interested in alternative pricing structures (flat rates, etc.), but the representatives indicated that moving too quickly to that pricing model without sufficient data was essentially "putting the cart before the horse." One of the representatives warned that defense attorneys should prepare themselves for the "death of the billable hour." They promised a major push in that direction once the industry feels it has developed sufficient data to objectively evaluate other pricing models.

The representatives acknowledged that the transition process toward "objective evaluation" was proving to be painful, but made no apologies. The decline in personal relationships between lawyers and claim representatives seems to be part of the master plan and a long term positive by-product from their perspective. One representative warned that "it is a bad bet for law firms to focus their business plans on personal relationships." It is clearly believed by the industry that the marginal benefit obtained

by high-priced creative lawyers is not worth the cost. Firms will be increasingly subject to objective evaluation by higher authority within the company who will not be impressed by a firm's win-loss ratio or long term relationships nearly as much as by the firm's overall cost efficiency.

Response of Defense Bar Leadership

The response of the organized defense bar throughout the country, including DRI, has been to promote dialogue instead of declaring war. DRI has formed a "Blue Ribbon Committee" whose charge is to develop a leadership strategy on these issues. Their primary activity to date has been to act as a clearinghouse for information. They have gathered and summarized each of the ethical opinions that have been generated throughout the country and made that information available for the DRI membership.

A subcommittee of the Insurance Law Committee is working on a set of proposed uniform case handling and billing guidelines to present to the industry as a whole. At least one state organization has already drafted proposed uniform guidelines and is circulating that draft among its members. The "Pressure on the Profession" project is also publishing articles that will hopefully advance the dialogue.

Defense practitioners are obviously concerned over the ethical considerations raised by these insurance industry initiatives. Many state ethics opinions have been rendered relating to the possible waiver of the attorney-client privilege created by third-party audits. Stringent billing guidelines have also been challenged as an unethical restriction upon the independent judgment of counsel. The insurance industry seems to accuse defense firms of having "fabricated" this ethical dilemma and does not give it much credence. They obviously recognize that attorneys cannot act contrary to controlling ethical rulings, but take the position that many of the opinions are not binding since most are denominated as "advisory." They also try to distinguish their individual programs from the ones being reviewed by the state bar committees. Some carriers are considering purchasing the software and bringing the system "in house" if necessary to satisfy ethical concerns. Some audit companies have responded by obtaining "opinion letters" from law professors and other scholars stating that the auditing process does not violate ethical standards.

Throughout the controversy, everyone agrees that there is no "silver bullet," that can easily resolve these significant problems. Most defense bar leaders caution, however, that dialogue, not warfare, seems to be the best response by the state and national organizations.

A Loyal Client

Berto Rogers, Social Circle

The late Claude Peebles of Social Circle used to tell of a defendant in a nearby town asking for a delay when his case was called for trial, saying his lawyer from Atlanta was coming down to defend him and should arrive any minute. The judge granted the delay.

After the noon recess the judge called the defendant up before the bench and asked if his lawyer had arrived. The defendant said he had not, but assured the judge he should be there any minute now.

The judge said, "We have only one more case to try and when we finish that you will have to go on trial. If you wish, I will appoint a lawyer to defend you."

The defendant asked, "From where?"

The judge said, "From the local bar, from the gentlemen you see inside the rail."

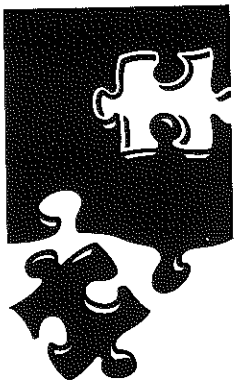
The defendant looked them over carefully and asked, "Is that all I got to pick from?"

"Yes," the judge said.

"Well, Judge," the defendant said, "you go on with the next case and if my lawyer ain't got here by the time you git through with it I think I'll just plead guilty."

Evidence Matters

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



THINGS BETTER OFF LEFT UNSAID:

AVOIDING MISTRIALS BY AVOIDING DUMB QUESTIONS

About two millennia ago, Publilius Syrus admitted, "I have often regretted my speech, never my silence."[1] That's still good advice for a trial lawyer. Sometimes it's better to be safe than sorry and to avoid questions about dangerous topics. Especially when you just flew your client and his expert in from Alaska. Although there are probably exceptions to any rule, including those given below, here are some potential mine fields through which to tread carefully.

A. Isn't It a Fact, Sir, that You're a Homosexual/Wife Beater/Child Molester/Hare Krishna Adherent/Devil Worshiper?

The Fourth Circuit Court of Appeals has accepted without the need for extensive argument that implications of homosexuality and abuse of women unfairly prejudice a defendant.[2] Furthermore, it has noted that no evidence could be more inflammatory or prejudicial than claims of child molestation, and the court has mentioned a special sensitivity to prejudice in cases where a defendant subscribes to an unpopular religion such as the Hare Krishna sect.[3] Other courts have held similarly regarding devil worship and belief in the occult,[4] although such evidence sometimes is admissible for other purposes.[5]

B. That Hotshot Lawyer the Defendant/Plaintiff Hired Is One of The Best Around, So Watch Out for Her

Although a little bit of picking on the other lawyer is probably inevitable (and possibly well deserved), don't do it unnecessarily. Remarks about a lawyer's standing in the legal community or that because she is such an excellent trial lawyer therefore she might make the jurors disbelieve the facts are objectionable.[6]

C. I Really Believe My Client. No, I Really Do.

Yeah, right. At any rate, a lawyer may not bolster his client's credibility by stating he would believe his client or a particular witness over other witnesses.[7]

D. The Big, Rich Client With All the Silk-Stocking Lawyers

Comments about the other party's size and wealth are improper. The same goes for the fact that he has used his money to retain numerous expensive attorneys and experts,[8] however much they might be overcharging him.

E. Burden and Cost of Litigation on the Poor, Pitiful Plaintiff

A plaintiff may not comment on its heavy burden in prosecuting her claim against the big, rich client with all the lawyers,[9] however true it might be.

F. The Taxpayers Will Have to Foot the Bill

A claimant's lawyer should not argue to the jury that the taxpayers, rather than the defendant, will have to pay the costs if it returns a defense verdict.[10]

G. The Defendant is a XZIPVXX!!

Racial prejudice might indicate a bias against a party or a witness. On the other hand, statements containing graphic language distasteful to normal sensibilities, epithets, or slurs (such as a racial slur) may be excluded under rule 403 when they have little relevance.[11]

H. The Adverse Party's New Trial Clothes

We've all seen it. The scrofulous, scurrilous renegade slug who previously slid into his deposition now has metamorphed at trial into a well-tailored, clean-shaven butterfly. Evidence of a party's physical appearance is admissible when relevant,[12] for example to show his strength in a proper case, for identification, or when pertinent to his damages in a civil trial.[13] However, impeachment of a party by attempting to show that he cleaned up his act to make the jury think he's "something he's not" is properly

excluded under rule 403.[14]

I. You Heard That Other Lawyer: She Had More Objections Than Carter Has Little Liver Pills

It has been held in another jurisdiction that a lawyer's objections to harmful evidence and an insistence that the case be tried according to the rules of law cannot be commented upon by the adverse party in closing statements.[15]

J. The Witness's Psychiatric History

Cross-examination about a witness' psychiatric history can only be done when required in the interests of justice. Such questioning, especially when of only minimal probative value, is manifestly unfair, unnecessarily demeaning, and often causes much collateral matter to be introduced into the trial. Thus, forbidding a party to cross-examine a witness about a psychiatric history may be proper in many cases under rule 403.[16]

K. Sexual Activity

In civil cases, federal rule 412(b)(2) allows evidence of the plaintiff's sexual behavior or predisposition only if it meets a balancing test similar to, but more stringent than, rule 403. Similarly, when a defendant is accused of a sexual assault, other evidence showing his deviant sexual nature might be excluded under rule 403 because of its potentially inflammatory nature.[17]

L. Well, the Judge Said . . . .

The Court of Appeals for the Fourth Circuit has held that judicial findings of fact entered in state court from another case involving some of the same parties are not public records for purposes of rule 803 and should be excluded under rule 403 in a subsequent federal trial.[18] This is because such findings might be given undue weight by the jury and create a substantial danger of unfair prejudice to the adverse party.[19]

M. Impeachment by a Criminal Conviction Identical to the Act for Which the Defendant Is Presently Being Tried

When the previous conviction is for the same offense as the one for which the accused is on trial, the judge "generally will not permit the Government to prove the nature of the offense."[20] This is because to do so would cause the accused unfair prejudice.[21] A similar rule applies to co-defendants who have pleaded nolo contendere or been convicted arising out of the criminal activity for which the defendant is being tried.[22]

N. The Defendant Ain't From Around Here

When used to prejudice a jury by painting an adverse party as an outsider, evidence that he is from another state can be unfairly prejudicial, in poor taste, and should be avoided.[23]

Footnotes

[1] Publilius Syrus, *Maxim* 1070 (1st Century B.C.).

[2] *See United States v. Ham*, 998 F.2d 1247, 1252 (4th Cir. 1993). For a state case on this topic, see *State v. Diddlemeyer*, 296 S.C. 235, 371 S.E.2d 793 (1988). *See also United States v. McMillon*, 14 F.3d 948 (4th Cir. 1994)(sexual preference inadmissible under rule 608).

[3] *See Ham*, 998 F.2d at 1252-53.

[4] *See State v. Kimbrell*, 84 N.C. App. 2d 59, 351 S.E.2d 801 (declining to reverse, although noting that such evidence should have been excluded under rules 610 and 403), *rev'd*, 320 N.C. 788, 360 S.E.2d 691 (1987)(although not specifically mentioning rule 403, court reversed citing prejudicial effect of devil-worship evidence); *People v. Brown*, 107 Ill. App. 3d 576, 437 N.E.2d 1240 (1982)(witchcraft accusations properly excluded because unrelated to crime charged). *Cf. Commonwealth v. Atkinson*, 364 Pa. Super. 384, 528 A.2d 210 (1987)(recent pretrial publicity regarding defendant's connection with satanic cults inherently prejudicial).

[5] *See State v. Waterhouse*, 513 A.2d 862 (Me. 1986) (admissible to show identity and intent); *Commonwealth v. Chuck*, 227 Pa. Super 612, 323 A.2d 123 (1974) (discussing relevance to witness's competency).

[6] *See State v. Lunsford*, 318 S.C. 241, 456 S.E.2d 918 (Ct. App. 1995)(citing 88 C.J.S. *Trial* Section 185, at 368 (1955)).

[7] *See Ellison v. Pope*, 290 S.C. 100, 348 S.E.2d 367 (Ct. App. 1986).

[8] *See Howard v. State Farm*, 316 S.C. 445, 450 S.E.2d 582 (1994) (comments about amount of money and resources devoted toward litigation by adverse party, attorney's standing in community, number of adverse lawyers involved, number of doctors and experts hired by adversary, and money required by plaintiff to prosecute case are improper and may require reversal). *Accord Smith v. Travelers Ins. Co.*, 438 F.2d 373, 375 n.2 & accompanying text (6th Cir.), *cert. denied*, 404 U.S. 832 (1971)(cited in *City of Cleveland v. Peter Kiewit Sons' Co.*, 624 F.2d 749 (6th Cir. 1980)).

[9] *See Howard*, 316 S.C. 445, 450 S.E.2d 582. *Accord Peter Kiewit*, 624 F.2d at 757 (citing *Draper v. Airco, Inc.*, 580 F.2d 91, 95 (3d Cir. 1978); *Eisenhauer v. Burger*, 431 F.2d 833, 837 (6th Cir. 1970)).

[10] *Cf. Peter Kiewit*, 624 F.2d 749 (complained of by the appellant although not directly addressed in the holding).

[11] *See State v. Gilchrist*, S.C. Ct. App. Op. No. 2784, filed Jan. 19, 1998 (citing *United States v. Kallin*, 50 F.3d 689 (9th Cir. 1995)).

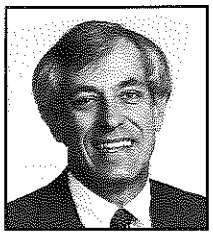
[12] *State v. Kelsey*, S.C. Sup. Ct. Op. No. 24801, filed June 6, 1998 (citing 29 *Am. Jur.* 2d *Evidence* Section 560, at 627 (1994)).

[13] 29 *Am. Jur.* 2d *Evidence* Section 560, at 627 (1994)(cited in *Kelsey*).

[14] *Kelsey*, S.C. Sup. Ct. Op. No. 24801.

[15] *See State v. Lunsford*, 318 S.C. 241, 456 S.E.2d 918 (Ct. App. 1995)(citing *Cummings v. Tweed*, 195 S.C. 173, 10 S.E.2d 322 (1940)); *Phillips v. Chase*, 201 Mass. 444, 480, 87 N.E. 755, 758 (1909), *writ of error dismissed* 216 U.S. 618 (1910)(quoted in 1 Kenneth S. Broun et al., *McCormick on Evidence* Section 74.1, at 277 n.3 and accompanying text (4th ed. 1992)).

Continued on page 16



Past President's Letter

by William S. Davies, Jr.

I would like to thank all of the members of the South Carolina Defense Trial Attorneys' Association for the opportunity to serve as your president during 1998. I have enjoyed all aspects of the year including the various very challenging issues we addressed. The hard working, thoughtful and enthusiastic work of the officers and members of the Executive Committee made the year one I will always remember with pleasure. My thanks go to each of you especially. I also owe thanks to MaryAnn Crews, Carol Davis, Nancy Cooper and all the staff at Eubanks and Associates. They have been very helpful to all of us.

Our association partially funds a trip to what is now the DRI Annual Meeting for our president and president-elect. John Wilkerson and I attended this year's meeting. As in the past with regional and annual DRI meetings, I found the sessions particularly helpful and interesting regarding the opportunities for state and local defense organizations to make a difference in our profession. I have encouraged all of next year's officers and Executive Committee to attend the annual meeting next year.

Organizations such as ours face more challenges at this time than in past years. There is more competition for CLE and seminar dollars. There is the continued need to balance any time outside the office against the opportunity to get additional client work. Our life just seems more hectic.

However, professional organizations such as ours offer a tremendous amount of benefit to practitioners, the profession and the communities in which we live and work. This association offers the added advantage of an opportunity to meet and get to know our state and federal trial and appellate judges at the annual meeting. The association needs your help now more than ever. Please be active in 1999 and support John Wilkerson, your new president, as well as all the other officers who will lead us to the close of the 1900s. Again, I have enjoyed my time with the association. It is a vibrant organization with many promising projects. It will serve all of us well in the next century. In closing, I want to thank all the members for one more thing...the opportunity to be your Immediate Past President. I am looking forward to it!

Evidence Matters

Continued from page 15

[16] *See United States v. Lopez*, 611 F.2d 44, 45-47 (4th Cir. 1979).

[17] *See State v. Nelson*, S.C. Sup. Ct. Op. No. 24778, filed April 6, 1998.

[18] *See Nipper v. Snipes*, 7 F.3d 415, 417-18 (4th Cir. 1993).

[19] *See id.* at 418. In *Nipper* South Carolina Circuit Judge Frank McGowan's order repeatedly referred to misrepresentations, failure to disclose important information, and participation in a conspiracy by a party. The order was admitted into evidence against the same party in another trial in federal court. *Id.* at 416.

[20] *United States v. Boyce*, 611 F.2d 530, 530 n.1 (4th Cir. 1979)(emphasis added).

[21] *Id.* The *Boyce* court cited *United States v. Wilson*, 556 F.2d 1177, 1178 (4th Cir. 1977) on this issue.

[22] *United States v. Basic Construction Co.*, 711 F.2d 570, 574 (4th Cir. 1983)(cautioning that far better to simply tell jury that co-defendants' cases have been "disposed of without saying how" and that they should not consider that matter, particularly as evidence of guilt). *See also United States v. Curry*, 512 F.2d 1299 (4th Cir. 1975)(prejudice by co-defendant's nolo contendere plea cured by instruction).

[23] *See Smith v. Travelers Ins. Co.*, 438 F.2d 373, 375 n.2 & accompanying text (6th Cir.), *cert. denied*, 404 U.S. 832 (1971)(cited in *City of Cleveland v. Peter Kiewit Sons' Co.*, 624 F.2d 749 (6th Cir. 1980)(reversing for repeated appeals to passion and prejudice of jury regarding defendant's position as large, multi-national company)).

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