April 8, 2008

Honorable Daniel E. Shearouse
Clerk of the Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

Re: *Daubert* and SCRE, Rule 702

Dear Mr. Shearouse:

I am writing in response to the Court's invitation of March 19, 2008; and I request that you also note my desire to be heard on July 9. 2008.

I am mindful of the laudable initiative of the courts to insure that the ultimate result in the litigation process is not contaminated by the influence of what is believed by some to be "junk science." I am mindful of the rulings in *Daubert v Merrell Dow Pharm*, and *Kumho Tire Co*. I am mindful that the *Daubert* concerns were shared by our Court which adopted an alternative solution in *State v Council*. I am mindful that the *Council* analysis has evolved to include yet another layer in *State v White.*

I am also mindful that we should never fear to have our heads in the clouds as we "reach for the stars" in our effort to achieve the ideal; provided however, that our feet never leave the ground, and that the rules we ultimately adopt do not actually operate to obstruct justice in a world that is real.

The rules as proposed will be beneficial in ten per cent of the cases at the expense of the remaining ninety per cent. The overwhelming numbers of cases involving experts are injury cases where physician's opinions are grist for the mill of justice. The treating physician has been appropriately afforded special recognition by virtue of his training, experience, and familiarity with the patient (*SCRCP*. Rule 30(i)). The rules as proposed do not provide for this exception and will require an additional major layer of work for that small remaining number of physicians who are patient advocates, and who are willing to become involved in the litigation process. The net result will be an insurmountable hurdle for the litigant and a change in the role of the court from "gate keeper" to arbiter of persuasiveness.

At a time when the entire world is struggling to find a meaningful forum for the just resolution of their problems one with another, and with their governments, we remain alone in that community by having an open courthouse door for anyone with a grievance; a forum that does not presume one's grievance is without merit, but rather allows the individual to hear that determination from his peers. To the extent that we continue to close the courthouse door, we invite violence in the streets, as it is in the rest of the world.

Sincerely yours,

WILLIAM H. EHLIES, II

/he

DANIEL F. BLANCHARD III
dblanchard@rrhlawfirm.com

April 23, 2008

The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
P.O. Box 11330
Columbia, SC 29211

Dear Mr. Shearouse:

I am submitting this letter in response to the Court's request for written comments involving the proposed amendment to Rule 703 of the South Carolina Rules of Evidence. It is my understanding that the Court is considering whether or not to amend our current state rule so as to make it identical to the corresponding federal rule of evidence, which was amended in 2000.

As a preliminary matter, it appears that the proposed amendment to Rule 703, which was published in the recent advance sheets, contains a typographical error. Specifically, the proposed language to be added to the end of the second sentence of the current rule should read "in order for the opinion **or** inference to be admitted. . . ." instead of "in order for the opinion **of** inference to be admitted. . . ."

Also, I previously authored a short article that was published in the May/June 2002 edition of the *South Carolina Lawyer* involving our current state rule. I simply wanted to bring this article to the Court's attention as it contemplates changes to the current rule. As summarized in the article, numerous courts and scholars have debated the wisdom of the amended federal rule. Although I certainly agree that our Supreme Court needs to clarify our current state rule, I am not completely convinced that the federal rule is preferable to our current rule. I hope the article will be of some benefit to the Court.

Thank you for your consideration of this letter. With best personal regards, I am

Sincerely,

Daniel F. Blanchard, III

Encl.

Published in 13 S.C. LAW. 14 (May/June 2002).

## SOUTH CAROLINA EVIDENCE RULE 703: A BACKDOOR EXCEPTION TO THE HEARSAY RULE?

By Daniel F. Blanchard, III

In 1995 the South Carolina Supreme Court promulgated the South Carolina Rules of Evidence, which largely track the counterpart Federal Rules of Evidence. Rule 703, which is a verbatim copy of the then existing federal rule, permits an expert witness to offer an opinion based upon factual information or hearsay that has not been admitted in the proceedings. That rule provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

S.C. R. EVID. 703. The note to the rule states that it makes Aclear that an expert may rely on facts or data in giving an opinion which are not admitted in evidence or even admissible in evidence.@ S.C. R. EVID. 703 note.

Despite the simplicity of allowing experts to base their opinions on documents or information not otherwise admissible in evidence, the text of the rule leaves an important question unanswered: If an expert reasonably relies upon factual information or hearsay testimony (that is otherwise inadmissible) to justify his opinion, should the court admit the underlying factual information or hearsay as evidence or allow its disclosure to the jury? The answer to this question is increasingly important given the proliferation of expert testimony in modern litigation. The various courts and commentators who have analyzed this issue have rendered divergent views on the subject. This article summarizes the various alternatives to resolving this question, highlights the pros and cons of each approach, and analyzes recent South Carolina appellate opinions that addressedBbut failed to resolveBthis issue.

### I. Alternative Solutions.

A few courts and commentators have adopted a restrictive approach that simply allows the expert to identify in general terms the extrinsic factual information or data that he used as a basis for his opinion; however, the information itself is not admitted in evidence for any purpose (assuming, of course, that it is not independently admissible under a hearsay exception or other evidentiary rule). Further, under this approach, the expert is prohibited from reading the information to the trier of fact or making detailed disclosure of it during his testimony. *See*, *e.g.*, *People v. Campos*, 38 Cal. Rptr. 2d 113 (Ct. App. 1995); *First Southwest Lloyds Ins. Co. v. McDowell*, 769 S.W.2d 954 (Tex. Ct. App. 1989); Ronald L. Carlson, *Collision Course in Expert Testimony: Limitations on Affirmative Introduction of Underlying Data*, 36 U. FLA. L. REV. 234 (1984).

An advantage of this approach is that it prohibits a party from using an expert as a conduit for admitting information that violates accepted hearsay rules and, therefore, discourages a party from feeding otherwise inadmissible factual information to an expert in the hopes of bringing those facts to the jury=s attention. Additionally, in criminal cases, it ensures that a defendant=s constitutional right to confront adverse witnesses is preserved. However, a downside of this approach is that it deprives the jury of the facts and detailed information which the expert relied

upon in forming his opinion. If the expert is prevented from disclosing these facts to the jury, it could undermine the persuasive force of his opinion. The jury needs the facts underlying the expert=s opinion to make a fully informed decision as to the validity of the expert=s conclusions. Indeed, allowing jurors to blindly accept an expert=s opinion based on his apparent credibility, while simultaneously depriving the jury of the factual basis for his opinion, arguably shifts the jury=s fact-finding role to the expert.

A majority of jurisdictions and commentators have charted a less restrained course that allows the underlying factual information to be admitted for the limited purpose of showing the basis for and explaining the expert=s opinion; however, the information is *not* treated as substantive evidence and a jury must be given a limiting instruction explaining the information=s restricted use. *See*, *e.g.*, *United States v. 0.59 Acres of Land*, 109 F.3d 1493 (9th Cir. 1997); *Brennan v. Reinhart Institutional Foods*, 211 F.3d 449 (8th Cir. 2000); *Henry v. Brenner*, 486 N.E.2d 934 (Ill. App. Ct. 1985); JoAnne A. Epps, *Clarifying the Meaning of Federal Rule of Evidence*, 36 B.C. L. Rev. 53 (1994). Under this view, the expert=s reliance upon inadmissible evidence does not alter the evidentiary character of the material. Instead, the courts merely allow the introduction of this background information for the limited purpose of explaining the expert=s opinion. This view comports with the principle that out-of-court statements are hearsay only when offered to prove the truth of the matter asserted. *See* S.C. R. EVID. 801(c). If an out-of-court statement is offered merely to show the basis for an expert=s conclusions or the matters upon which the expert has relied, it is not offered for the truth of the matter asserted and is not hearsay.

In 2000, after South Carolina=s adoption of Rule 703, Congress amended the federal rule to effectively embrace this approach, with the caveat that the trial judge must employ a balancing test before admitting the underlying factual information. A sentence was added to the end of federal Rule 703 providing that A[f]acts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert=s opinion substantially outweighs their prejudicial effect.@ FED. R. EVID. 703. The comment accompanying the amendment explains that A[i]f the otherwise inadmissible information is admitted under this balancing test, the trial judge must give a limiting instruction upon request, informing the jury that the underlying information must not be used for substantive purposes.@ FED. R. EVID. 703 note. South Carolina has not adopted this amendment to its version of Rule 703.

An advantage of the majority approach is that it gives the jury the facts and detailed information which the expert relied upon in forming his opinion, thereby allowing the jury to make a fully informed decision as to the validity or persuasiveness of the expert=s conclusions. Further, because the underlying facts are not treated as substantive evidence and the jury is so instructed, this approach reduces the temptation to use Rule 703 as a back door exception to the hearsay rule. Because of the information=s limited admissibility, a party cannot prove an essential element of his case by relying on hearsay materials admitted solely to explain the basis for his expert=s opinion.

However, despite the theoretical benefits of this approach, commentators have sharply criticized it as being illogical and unworkable in practice. One commentator states:

> Thus, on the one hand, the jury may consider the facts or data upon which the expert based her opinion to assess the weight to be given to that opinion. Yet, on the other hand, the jury, when deciding whether to arrive at the same conclusion, cannot accept what the expert relied upon as true. In reaching its own conclusion, the jury can rely only upon the product of that evidenceBthe expert=s opinion. If this practice sounds like judicial double talk, it is. . . .

Admitting an expert=s opinion, but not its basis, is illogical because one cannot accept an opinion as true without implicitly accepting the facts upon which the expert based that opinion. The value of any conclusion necessarily is tied to and dependent on its premise. Consequently, if in forming an opinion someone assumes that certain facts are true, the acceptance of that opinion necessarily involves the acceptance of those assumed facts. Compounding the absurdity of the [majority approach] is the court=s allowing the expert to recite the underlying basis, and then instructing the jury not to accept the recited facts as true (even though the expert did), but to consider those facts only in assessing the value of the expert=s opinion. This instruction is pure fiction; it cannot be done. Even if the instruction=s distinction logically were possible, jurors likely would not be capable of performing such mental gymnastics.

Paul R. Rice, *Inadmissible Evidence as a Basis for Expert Opinion Testimony: A Response to Professor Carlson*, 40 VAND. L. REV. 583, 584-85 (1987) (footnotes omitted). Other courts and scholars have similarly questioned the efficacy of instructing juries to listen to the inadmissible testimony as the basis for the expert=s opinion but not to treat it as substantive evidence. *See*, *e.g.*, *Gong v. Hirsch*, 913 F.2d 1269, 1273 n.4 (7th Cir. 1990); Edward J. Imwinkelried, *The ABases@ of Expert Testimony: The Syllogistic Structure of Scientific Testimony*, 67 N.C. L. REV. 1, 12 (1988); L. Timothy Perrin, *Expert Witness Testimony: Back to the Future*, 29 U. RICH. L. REV. 1389, 1401 (1985).

Some courts and commentators follow a liberal approach that allows the underlying factual information to be admitted as substantive evidence (i.e., for the truth of the matter asserted) as long as it was reasonably relied upon by the expert in forming his opinionsBin effect, recognizing a *de facto* hearsay exception. *See*, *e.g.*, *United States v. Rollins*, 862 F.2d 1282 (7th Cir. 1988); *Stevens v. Cessna Aircraft*, 634 F. Supp. 137 (E.D. Pa.), *aff=d*, 806 F.2d 254 (3rd Cir. 1986); Rice, *supra*, at 584. This approach has received criticism because of the potential for abuse. As one scholar argues, this approach allows Aall manners of raw and unexpurgated hearsay@ to be Adumped into the record@ by having an expert Arely upon@ it in forming his opinions. Ronald L. Carlson, *Is Revised Expert Witness Rule 703 a Critical Modernization for the New Century?*, 52 U. FLA. L. REV. 715, 716 (2000).

However, in a provocative law review article, Professor Paul Rice argues that the underlying factual information should qualify as an exception to the hearsay rule (and, therefore, be admitted as substantive evidence) provided that courts properly screen the expert=s testimony to ensure compliance with the mandate of Rule 703Bthat the information or data be of the Atype reasonably relied upon by experts in the particular field.@ Rice, *supra*, at 587-91. Under this view, as long as the court is satisfied that the expert witness possesses sufficient expertise and qualifications, that he actually relied upon the factual information in forming his opinion, that the factual information is the type of information reasonably relied upon by those in the particular field to form opinions, and that the expert actually applied his expertise to evaluate the reliability of the otherwise inadmissible evidence, then the underlying factual information is admissible as substantive evidence. As stated by Professor Rice, A[i]f courts properly scrutinize expert testimony to ensure that each expert has used her special talents in screening the facts upon which she has relied,@ then Ano justification exists for precluding the finder of fact from hearing and using those facts supporting an opinion to the same extent as the expert.@ Rice, *supra*, at 590-91.

**II. The South Carolina Cases.**

In two cases decided after South Carolina=s adoption of Rule 703, the South Carolina Court

of Appeals grappled with the question involving the proper role of the supporting factual information once an expert=s opinion is deemed admissible. Unfortunately, the Court failed to provide a definitive resolution. *State v. Slocumb*, 521 S.E.2d 507 (S.C. Ct. App. 1999); *Hundley ex rel. Hundley v. Rite Aid of South Carolina, Inc.*, 529 S.E.2d 45 (S.C. Ct. App. 2000). Indeed, the opinions in *Slocumb* and *Hundley* appear to have separately embraced two of the competing approaches for resolving this problem as summarized above.

*State v. Slocumb.*

The opinion in *Slocumb* appears to fall in line with the majority view. In that case, two psychiatrists testified that they relied upon a MRI report prepared by another doctor in formulating their opinions and, over objection, the contents of the report were admitted in evidence. 521 S.E.2d at 519. On appeal, the Court of Appeals seems to hold that, under Rule 703, when an expert reasonably relies on hearsay to form an opinion, the underlying hearsay is admissible in evidence for the limited purpose of explaining the basis for the expert=s opinion, but it is not substantive evidence. *Id.* at 518 (quoting treatise stating that A[f]acts, data or opinions reasonably relied upon under Rule 703 may be disclosed to the jury on either direct or cross-examination to assist the jury in evaluating the expert=s opinion by considering its bases . . . even if the facts, data or opinions have not themselves been admitted and thus may not be considered for their truth@). The Court held:

> The admission of the contents of the report during the direct-examination of Dr. Schwartz-Watts and Dr. Morgan is seemingly inconsistent with its exclusion during Dr. Merikangas=s cross-examination. However, unlike Dr. Merikangas, both Dr. Schwartz-Watts and Dr. Morgan had relied on the MRI report in formulating their opinions. As such, they were not mere conduits of hearsay information. *During their testimonies the report was not admitted for the truth of the matter asserted, as it had been during Dr. Merikangas's testimony. Rather, it was offered as a basis of their opinions as permitted under Rule 703, SCRE.*
>
> Because the erroneous admission of the MRI report during Dr. Merikangas's cross-examination was cumulative to the properly admitted evidence, the error was harmless.

*Id.* at 519 (emphasis added). The *Slocumb* opinion does not specifically address the necessity of giving a limiting instruction to the jury, but its holding suggests that the opponent of the evidence would be entitled to such an instruction advising the jury that the MRI report was not admitted for the truth of the matter asserted therein (i.e., it was not substantive evidence), but was admitted merely to assist the jury in evaluating the basis for the expert=s opinion. *See* S.C. R. EVID. 105. Of course, the expert=s opinion would be substantive evidence.

*Hundley ex rel. Hundley v. Rite Aid of South Carolina, Inc.*

In *Hundley*, without mentioning its prior opinion in *Slocumb*, the Court appears to have followed the third approach outlined above. In that case, over objection, the plaintiff=s economist was allowed to disclose to the jury the amount of the plaintiff=s anticipated future medical expenses as calculated in a life care plan that a third party had prepared for the plaintiff and which was never admitted in evidence. The Court=s opinion suggests that the plaintiff offered no other evidence besides the figures in the life care plan (as relayed to the jury through the economist=s expert testimony) to prove the amount of the anticipated future medical expenses.

The defendants argued that by permitting the expert to relay to the jury the amount of the future medical costs Athe trial court erred by allowing the expert, under the guise of Rule 703, to act as a >conduit= for inadmissible hearsay.@ 529 S.E.2d at 50. The defendants further maintained that Athe figures were not the type of data relied upon by economists, but were instead foundational facts

which must be separately proved.@ *Id.* In ruling that the expert properly disclosed to the jury the figures contained in the life care plan (even though the plan itself was inadmissible hearsay) and presumably finding that these figures (as disclosed by the expert) constituted substantive evidence sufficient to justify the jury=s award of future medical expenses to the plaintiff, the Court stated:

> Dr. Wood rendered his opinion as to the economic damages sustained by the Hundleys, which included the present value of future medical and related costs. To render his opinion, he relied upon cost information contained in the Life Care Plan. As to the costs associated with future care, he testified that he could have obtained the figures himself, but the information contained in the plan was of the type normally relied upon by experts in his field in rendering an opinion. Based upon this foundation, the trial court allowed the testimony. We see no abuse of discretion.
>
> In this case, the contested cost components were not opinions of others. The information was easily ascertainable, and would have been no less hearsay had the economist made the inquiry from the health care providers himself. Indeed, we see no distinction between this information and the other information necessary to a present day value calculation, such as inflation rates, wage rate tables, and life expectancy tables. . . .
>
> In reaching this conclusion, we disagree with the defendants= assertion that Dr. Wood was a Amere conduit@ to introduce evidence which had already been ruled inadmissible as hearsay. . . . In each of [the cases cited by the defendants] the evidence was excluded because it did not meet the criteria set forth under Rule 703. It was not information upon which an expert in the field would reasonably rely in reaching an opinion and/or did not form the basis of the expert=s own opinion. Here, the evidence does meet the criteria set forth under Rule 703.

*Id.* at 51-53 (citations omitted). Interestingly, the *Hundley* Court analogizes a life care plan to statistical and mortality tables. The latter are commonly admissible under recognized exceptions to the hearsay rule. *See* S.C. R. EVID. 803(17) (market reports and commercial publications); S.C. CODE ANN. ' 19-1-150 (mortality tables). However, the former does not seem to fall under any such hearsay exception. Therefore, the analogy is not entirely convincing.

The *Hundley* Court apparently allowed the hearsay evidence (the figures in the life care plan) to be admitted as substantive evidence because it found that the plaintiff=s expert had reasonably relied upon those figures in forming his opinions. 529 S.E.2d at 52-53 (ADr. Wood testified that the cost figures contained in the Life Care Plan were the type of information relied upon by experts in the field of economics, and the court determined that reliance to be reasonable. . . . [W]e find [the case law cited by the defendants] readily distinguishable, because in each of these cases the expert attempted to testify to hearsay which did not form a part of the basis for a valid opinion.@). The Court was sufficiently satisfied that the figures in the life care plan were of the Atype reasonably relied upon by experts in the particular field@ of economics and that the plaintiff=s economist had actually relied upon those figures; therefore, the Court admitted the underlying factual information as substantive evidence. Dictum in a South Carolina Supreme Court opinion also could be construed to support this approach. *State v. Hutto*, 481 S.E.2d 432, 433 (S.C. 1997) (AAt the outset, we note it is well-settled that an exception to the rule prohibiting hearsay exists when it is used by an expert.@).

Neither *Slocumb* nor *Hundley* acknowledges or debates the competing approaches for resolving the question of whether Rule 703 allows an expert=s underlying factual information and data to be admitted as substantive evidence or revealed to the jury. As summarized above, several alternatives have been proposed with accompanying pros and cons. Although the holdings in

*Slocumb* and *Hundley* suggest that the factual information and data relied upon by an expert witness in formulating his opinion is admissible, they seemingly adopt inconsistent rationales. Consequently, it is uncertain whether the underlying factual information constitutes substantive evidence sufficient to survive a summary judgment or directed verdict motion or whether it is admissible merely to explain the basis for the expert=s opinion. If the underlying factual information is considered substantive evidence, then the Courts have effectively recognized a backdoor exception to the hearsay rule.

Daniel F. Blanchard, III is a member of the Charleston law firm of Rosen, Rosen & Hagood, LLC.

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April 10, 2008

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

***RE: Proposed New Rules***

Dear Sir:

In the response to an invitation to comment on the proposed new rules, I would offer the following:

Proposed Rule 26(c) – This rule is a very burdensome and oppressive to the parties in some respects. While the rule contemplates being able to comply within 300 days after filing the action, most Scheduling Orders provide that experts will have to be named much sooner than that, usually within 90 days after the case is filed. It is almost impossible to have the expert give his full statement or opinions, until all other fact discovery has been completed. This is particularly true in very complicated products liability and professional liability cases, as the facts are being developed as the case is progressing. Maybe if the rule provided that the expert need not be named and these requirements weren't required until after all fact discovery has been completed, then the rule would make sense. It is a very burdensome rule that, frankly, can not be complied with in all respects. In addition, a lot of experts do not keep a diary of the cases they have acted as experts in for the proceeding four (4) years. Some don't keep those records at all and simply go by memory. The big problem as I've mentioned is the Scheduling Orders and how they will conflict with this rule. Data and other information relied upon by the witness in forming his opinions usually are not known until most of the facts have been fully developed. This is especially true of the exhibits that might be used in support of the expert's opinions.

I might add that this rule is very similar to the federal rule and that is precisely why most attorneys have tried to avoid Federal Court. Last year, all federal judges, including magistrates, only heard 34 cases. This burdensome rule, I suspect, is the main cause for attorneys not wanting to get into Federal Court. I would also suspect that because of these requirements in any sizeable case, the attorneys are going to be burdening the trial court with petitions to be relieved from these requirements since they are almost impossible to comply with within the Scheduling Order.

Except with statute of limitations problems, the plaintiff can more readily comply with this rule since he can wait until all of this information has been gathered from his experts before he even files suit. This rule is highly burdensome to the defendant because the deposition of the plaintiff's experts has to be taken before the defendant can even determine what kind of expert it might need to defend itself in the lawsuit. Most Scheduling Orders only give 30 to 60 days after the plaintiff's attorney has listed its expert for the defendant to list its experts for rebuttal. This does not allow sufficient time for the defense to receive the experts' reports, take his deposition, hire experts and be in a position to provide the information required under proposed Rule 4(c) and its subsections. Most experts in the larger cases are involved in numerous lawsuits throughout the country and to obtain the information needed under Rule 4 (c) and its subsections takes a large amount of time. The remedy if these rules have to be passed is to only require the naming of experts much later in the proceedings after all fact witnesses have been discovered and deposed. Many experts rely on the testimony of the witnesses to form their opinions and they can not possibly anticipate what the fact witnesses are going to testify to in most instances. Interrogatory responses are never adequate and most attorneys dodge the questions concerning fact witnesses by stating simply the witness will testify as to the occurrence as mentioned in the Complaint or something that is very vague and non-specific.

These are practical matters, but ones that cause us great concern about the passing of this rule.

Respectfully submitted,

F. Barron Grier, III

FBG, III/mas

**Mark Sanford**
Governor

**SOUTH CAROLINA**
DEPARTMENT OF COMMERCE

**Joe E. Taylor, Jr.**
Secretary

April 17, 2008

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

Re: Proposed Rule Amendments

Dear Mr. Shearouse:

I am writing in support of the proposed amendments to South Carolina's Rules of Criminal Procedure, Rules of Civil Procedure and Rules of Evidence.

While I am not an attorney, I have been in business in South Carolina for over 25 years. That experience and the exposure I have had to existing and prospective companies in my capacity as Secretary of Commerce have taught me that one of the most valuable aspects of a business-friendly environment is some level of predictability and stability in situations that may otherwise create lots of uncertainty.

My understanding is that South Carolina is one of the few states that have not yet adopted uniform evidentiary and procedural standards in its state courts with regard to the admission of expert testimony, even though those standards have been embraced by the federal courts since 2000. The absence of these standards, which promote predictability and some level of stability in the uncertain realm of litigation, allows for inconsistent legal decisions that undermine what most view as a very business-friendly environment in our state.

As the top salesman for the State of South Carolina, I look for each and every angle from which I can sell our state as the best place to do business anywhere. The proposed amendments to the South Carolina rules are an important step forward because, among other things, they would provide for consistent treatment of expert qualification issues that should facilitate consistent decision making by judges and juries. That result will make my job easier and be in the best interest of South Carolina.

Sincerely,

Joe E. Taylor, Jr.

JET/jr/km/vw

April 30, 2008

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

Dear Mr. Shearouse:

I am writing in support of the proposed amendments to South Carolina's Rule of Criminal Procedure, Rules of Civil Procedure and Rules of Evidence.

This week the U.S. Chamber's Institute for Legal Reform released its annual *State Liability Systems Ranking Study* conducted by The Harris Poll. This study is the benchmark against which businesses, elected officials, the media, and other opinion leaders measure their state's legal climate. Last year, South Carolina ranked 37th. This year South Carolina fell six positions and now ranks 43rd among all fifty states in the fairness of its litigation environment. The losers of these results are the citizens and business of this state.

One of the main missions of the South Carolina Chamber of Commerce, which represents more than 5,000 businesses and 600,000 employees, is to increase per capita income for all South Carolinians. In order to achieve this goal, South Carolina must have laws and rules that create a pro-business climate to attract, grow and retain businesses. Adopting the proposed amendments to the rules dealing with expert testimony will help create predictability and stability in litigation in our state, which is needed if we are to continue to grow businesses and create jobs.

Also, uniform evidentiary and procedural standards with regard to the admission of expert testimony would provide for consistent treatment of expert qualification issues that facilitate uniform decision making by judges and juries. This would help create a system that is predictable and fair for all.

Thank you for taking the time to consider the business community's position on this matter. I hope you will agree that adopting the proposed amendments dealing will expert testimony rules is in the best interest of everyone.

Sincerely,

S. Hunter Howard, Jr.
President and Chief Executive Officer

May 1, 2008

Hon. Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: Comments on Proposed Changes Concerning Expert Witnesses and Testimony

Dear Mr. Shearouse:

I am in support of all proposed changes to procedures governing the use of expert witnesses that are being proposed.

I am especially glad to see the requirement of a written report being included in the proposed changes. In my experience, I have encountered numerous "hired witnesses" that use the lack of a written report as a gamesmanship tool. I always require a written report. I practice only in construction litigation and having a report gives fair warning of what is complained of, whether defects or delay claims. I recently had a case that my client's expert identified a number of code violations in a written report. The other side requested our engineer's load calculation upon which he based his report. The other party then sat silent, knowing my client was going to spend significant amounts of money to make repairs based on our engineer's findings. Not until late in litigation did I discover that the other side's engineer was going to offer testimony that our engineer's load calculation was in error. At the deposition, the said engineer threw this out as an issue he would offer an opinion on. He did not have any substance or specifics on how the other engineer's calculation was in error, but he would go back and look at his records to get the details, which would be too late for use at the trial. While the new rule will not eliminate this problem, it would reduce the bogus game playing. These types of experts pull these types of stunts all the time. It is frustrating and you really can't pin them down. If they are required to put their opinions in writing, at least it levels the playing field and reduces the game playing. I strongly support these proposed amendments and would encourage a move to making all experts at all times required to put their opinions in writing.

Sincerely,

Thomas E. Dudley, III

April 28, 2008

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, SC 29211

Dear Mr. Shearouse:

We are writing both as members of the South Carolina Bar Association and Chair of the Greater Columbia Chamber of Commerce Board of Directors and General Counsel of the Greater Columbia Chamber of Commerce. We wish to offer our support of the proposed amendments to the South Carolina Rules of Civil Procedure, Rules 16 and 26; South Carolina Rules of Criminal Procedure, Rule 5; and South Carolina Rules of Evidence, Rules 701, 702, and 703. The proposed amendments to these Rules would bring them in line with current state case law (s*ee State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999)) and the Federal Rules of Civil and Criminal Procedure and Rules of Evidence as amended in 2000.

The opinions of expert witnesses have become increasingly important to judges and juries as the evidence in cases has become more complex from a scientific, mathematic, and business standpoint. The federal courts, through a series of opinions (the most notable being *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786 (1993)), wrestled with establishing criteria to ensure that "expert opinions" come from witnesses who truly have the ability, training, and experience to opine on the subject matter at issue and that the issue is one in which such testimony is needed by the court or jury. Our state Supreme Court appears to be wrestling with the same issues. *State v. Council*, *id.* We suspect the state's trial courts are likewise trying to deal with these difficult and often complex issues in a fair and equitable manner.

The adoption of the proposed amendments to the Rules dealing with expert testimony would appear to be in the best interest of both the parties involved in litigation and those who must make the ultimate factual and/or legal determinations in a civil or criminal legal proceeding. We, therefore, fully support the Supreme Court's review of the applicable Rules and amending those Rules as proposed which will provide a much more reliable process for using expert testimony.

With best regards, we remain

Very truly yours,

Charles T. Speth II
Chair
Greater Columbia Chamber of Commerce

John B. McArthur
General Counsel
Greater Columbia Chamber of Commerce

**John R. McCravy, III**
Board Certified
National Board of Trial Advocacy

Greenwood Office:
1629 By-Pass 72 NE
Greenwood, SC 29649
(864)388-9100
(864)388-9104 - Facsimile

April 28, 2008

TO THE COURT:

Pursuant to your Request for Written Comments dated March 19, 2008, we humbly submit our response as follows:

Having maintained an active trial practice for over 20 years in our good State, I would like to make some general comments concerning the proposed amendments which would in essence, adopt the federal rules on expert disclosure.

I have found the federal rules in this regard to be overly burdensome. There are adequate safeguards in the present rules that guarantee disclosure of experts and allow for depositions. The imposition of additional time lines adds requirements that often do not reflect the realities of litigation. This can lead to additional motions for extensions of time lines, thereby adding to the judicial burden as well as setting attorneys up for more potential liability.

Thanking you in advance for your consideration, I am

Respectfully,

John R. McCravy, III

Concurring:

______________________________
Jon E. Newlon, Esquire

______________________________
Jason L. Sturkie, Esquire

The Honorable Daniel E. Shearouse

Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, Sc 29211

May 15, 2008

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 111330
Columbia, SC 29211-1330

Re: Expert witness testimony

Dear Dan:

Enclosed please find the original and seven copies of the comments received by the South Carolina Bar House of Delegates for forwarding to the Court. Because of the expected diverse opinions among lawyers, the House chose to receive comments from individual members of the Bar's Practice and Procedure Committee rather than seek a single position on the draft amendments.

Sincerely yours,

Robert S. Wells
Executive Director

enclosures

Below are the comments gathered from Practice and Procedure Committee members regarding the Court's recent proposed rule changes pertaining to expert testimony. Four Committee members responded to the request for comment.

**Comment 1**

As a member of the South Carolina Bar Practice and Procedure Committee, it is my understanding that our committee has given members an invitation to comment on the proposed amendments to Rule 5 of the Rules of Criminal Procedure, Rules 16 and 26 of the Rules of Civil Procedure, and Rules 701, 702, and 703 of the Rules of Evidence.

I would like to take this opportunity to give only a brief summary of my position on the matters of the proposed changes to the Rules of Civil Procedure and Rules of Evidence. Unless I specifically refer to a specific portion of the Rules, I will be referring to the proposed amendments in general.

It is clear that the purpose of the above-referenced proposed amendments is to take discretion away from the trial judge in determining whether or not certain expert witness testimony would be of assistance to the jury in determining factual issues. Unfortunately, a judge at a hearing months in advance of a trial will not have the ability to have heard the facts and testimony as presented at the actual trial to assist him/her in determining whether or not the proposed expert's testimony would be of assistance to the jury. It would seem to me that the trial judge is in a much better position to determine whether or not expert opinion on the topic is beneficial to the jury.

Furthermore, the proposed rules significantly limit the ability of one to be an expert in a field that may be unusual or in a subject area that traditionally has not had experts before the court system. It would seem that such "unusual" subject matters would be the very areas in which experts would be necessary to assist the jury. Additionally, if the proposed expert is in an area not subject to significant testing and review, that would go to the weight of the expert's opinion and not to its admissibility. These rules take away from the province of the jury the ability to hear such testimony and use their judgment to weigh the evidence and credibility of this evidence. The proposed amendments would further limit the admissibility of experts who may be an expert based on their experience and education alone and who have not been subject to certain "peer review." It has been my experience that such experts prove to be of much more assistance to the jury than some who attempt to make their opinions "scientific." Certainly, the judge should have the discretion and ability to determine these matters.

Finally, as to the proposed changes to Rule 703 of the Rules of Evidence, I would be critical of it for the same reasons as indicated above. Rule 703 would also purport to limit the judge's discretion as to what testimony by the expert is admissible regarding otherwise inadmissible evidence. There are many exceptions to the hearsay rule to allow it to be admitted because it offers assistance to the jury in determining important matters. In the very same way, otherwise inadmissible evidence by an expert should be admitted within the judge's discretion without a rule otherwise barring it because it could

very much assist the jury in understanding how the expert formed his/her opinion and that opinion is based on evidence of which they may have otherwise been unaware. This again would go to the weight of the evidence. Jury instructions can cure an issue with any weight placed on such evidence. We have traditionally given much faith to jury instructions to cure other issues and I am unaware of any reason why that should not happen with regards to this subject matter.

In sum, I have not heard of nor been informed that there is an "expert crisis" to require such amendments to our rules. Simply because the federal rules exist the way they do for experts does not mean that is correct way that South Carolina State Courts should operate. We have declined to adopt the federal rules verbatim for many good reasons and certainly this is one of the rules that should allow discretion and trust to remain with the judge and jury.

**Comment 2**

Please allow this to serve as a general comment to the proposed Rule changes regarding expert witnesses for consideration by the House of Delegates.

In general, I am in favor of the proposed changes. I believe that greater certainty and disclosure of information on experts will assist counsel and litigants in preparation of their cases. I believe the proposed changes are thorough and well thought out.

The addition of the new Rule 16(d) is a very positive item. A pretrial hearing on experts can make a trial move more efficiently. I believe that the new Rule 16(d) provides a fair process for everyone to know what expert testimony will be presented at trial.

The disclosure requirement of the new Rule 26(c) will better allow people to know what testimony is to be presented by a proposed expert. It could also potentially save costs by reducing the need to depose a witness whose opinion is well documented by the report. I also believe that coordinating the disclosure date and the ADR deadline is also well thought out. This allows parties time to resolve a case before the expense of experts is incurred.

The modification of the evidentiary rules (701, 702, and 703) to mirror the Federal Rules will also assist in disputes regarding experts as it will allow for reference to Federal cases interpreting the rule. This larger body of interpretive authority will assist the courts in properly applying the rules.

This is in response to the decision of the Practice and Procedure Committee that it would not take a formal position on the proposed rules changes, but instead provide opportunity for its members to collect comments for consideration of the House of Delegates in its determination of whether the Bar should take a position.

**Comment 3**
Please allow this to serve as a general comment to the proposed Rules changes regarding expert witnesses and expert testimony for consideration by the House of Delegates.

## I. Rule 16(d), SCRCP

I am generally in favor of Rule 16(d) as proposed. The qualification of an expert witness and the competency of expert testimony are matters that are better resolved well before the commencement of trial. Determining the admissibility of expert testimony as a preliminary matter would not only assist counsel in his trial preparation, it would certainly assist the court in streamlining trial presentation.

The chief concern I have with this proposed rule change arises in connection with abusive litigation practices. The Rule as proposed requires a pretrial hearing upon the request of any party. The mandatory nature of the proposed rule could foster its abuse. First, the mandatory pretrial hearing will add expense to already costly litigation. Second, mandatory pretrial hearings will demand the court's time and attention. To curb its abuse, Rule 16(d) should incorporate some enforcement mechanism comparable to Rule 37.

Presumably, sanctions for the abuse of Rule 16(d) would be made available through Rule 11. However, neither the proposed rule nor its commentary makes explicit reference to Rule 11.

I urge the House of Delegates to incorporate language into proposed Rule 16(d) that makes explicit reference to Rule 11 or to some other enforcement mechanism, so that the legitimate purposes of the proposed rule are preserved, and so that the proposed rule's abuses do not go unpunished.

## II. Rule 26, SCRCP

I am in favor of Rule 26 as proposed.

## III. Rule 5(h), SCRCrimP

Proposed Rule 5(h) appears to be a codification of the current practice, rather than the adoption of a new or modified rule of procedure, and so I am generally in its favor.

## IV. Rule 701, SCRE

Generally, I am in favor of this Rule as proposed. I would suggest that subpart (c) be clarified to mirror the language of Rule 702, since that is the rule to which subpart (c) refers. I would suggest that subpart (c) be amended to read: "(c) do not require scientific, technical, or other specialized knowledge within the scope of Rule 702." The language of proposed subpart (c) as written could lead to unnecessary confusion, which can easily be avoided by using language that parallels the standards and language of 702.

**V. Rules 702 & 703, SCRE**

I am in favor of both Rules as proposed.

* * * * *

In conclusion, I am in favor of these proposed Rules, as they bring more certainty and clarity to the matter of expert witnesses and the admissibility of their testimony. Because litigation has become so dependent upon experts, resolving issues of competency as early as possible favors counsel, who must rely upon the experts' opinions, the courts, who must assess the admissibility of those opinions, and litigants, who must finance litigation every step of the way.

**Comment 4**

My comment pertains to proposed Rule 26(b)(4)(D), which states:

~~(C)~~ **(D)** A party may depose a person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required pursuant to subsection (B), the deposition may not be conducted until the report is provided. Upon the request of the party seeking discovery, unless the court determines otherwise for good cause shown, or the parties agree otherwise, a party retaining an expert who is subject to deposition shall produce such expert in this state for the purpose of taking his deposition, and the party seeking discovery shall pay the expert a reasonable and customary fee for time and expenses spent in travel and in responding to discovery and upon motion the court may require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert. *Provided that* the testimony of an expert witness may not be admitted if compensation is contingent on the outcome of a claim, defense, or case with respect to the testimony being offered.

In my opinion, the Court should reject the last sentence that begins “Provided that. . .” I do not believe this provision is necessary or appropriate for several reasons.

First, in my experience, most experts, whether they are testifying for plaintiff or defendant, typically are not paid on a contingent basis. Experts are paid on an hourly basis and reimbursed for expenses. I do not recall meeting any who were willing to work on a contingent basis, although I suppose they exist. Therefore, it does not seem this provision is necessary at all.

Second, most parties would strive not to pay an expert on a contingent basis because it would open the door to legitimate questions that could impugn the expert’s testimony and perceived objectivity. Again, this provision simply is not necessary.

Third, this sentence would appear to prohibit a party not only from using an expert witness whose fee is admittedly contingent, but also could prohibit the testimony of an expert witness who may not be paid until *after* the party prevails at settlement or trial. I can easily foresee a party objecting to an expert's testimony at trial on the ground that the expert has not yet been paid anything for his past work on the case by that party, and so the expert's fee actually is contingent even though based on an hourly rate.

Fourth, the issue of compensation is easily and adequately handled by the required disclosures about compensation. An expert who is paid on a contingency basis can expect to face the appropriate questions at deposition and trial about his fee arrangement.

Fifth, a party should be free to retain an expert paid on a contingency basis if the party chooses to do so. Hiring an expert is nearly always an expensive proposition. A party with limited ability to pay an attorney and experts necessary to prosecute his case should have the right and ability to hire an expert paid on a contingency basis, if the party and his counsel decide that is the best course of action.

Sixth, our civil justice system recognizes that many people would go unrepresented if they had to pay an attorney by the hour in every case. Attorneys are routinely employed on a contingency basis in certain cases. I see no difference in allowing experts to be similarly employed on a contingency basis, if a party and his lawyer have decided it is the right thing to do.

I urge the Court to strike the final sentence of this subsection and not include it in the Rules.

May 15, 2008

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, South Carolina 29211

Re: Proposed Rule Amendments

Dear Mr. Shearouse:

I am writing in support of the proposed amendments to South Carolina's Rules of Criminal Procedure, Rules of Civil Procedure and Rules of Evidence.

The rule of law is important for many reasons, not the least of which has to do with predictability and certainty. When the rule of law is respected, individuals and businesses are able to plan their conduct in conformity with the law. Ultimately, the predictability and certainty of the law promotes a sphere of autonomy within which individuals can act without fear of judicial interference. Thus, predictability promotes stability and rational decision making by individuals and businesses alike.

In South Carolina's state courts, it often is difficult for judges and juries to render consistent legal decisions because there are few consistent standards governing the admissibility of expert testimony, particularly scientific testimony. South Carolina's rules, in their current form, do not provide a clear procedural command requiring our trial courts to evaluate and rule on the admissibility of expert testimony before trial. As a result, the existing process does not ensure needed predictability and certainty in the admissibility of expert evidence.

In South Carolina, our federal courts have rigorously applied both the case law and the new federal rule to develop a well established body of precedent in a short period of time. South Carolina's state courts, on the other hand, have lagged far behind with trial courts continuing to apply more ad hoc standards with little chance of real appellate review. Ad hoc rules make for ad hoc outcomes which destroy needed predictability and certainty in the law.

The proposed amendments to South Carolina's rules are an important step forward because they would provide for consistent treatment of expert qualification issues. By requiring disclosure of expert opinions in a timely manner and establishing uniform substantive criteria for admissibility, the proposed amendment would help restore the courts' rightful gate-keeping function regarding admissibility of expert testimony.

Thank you for your consideration.

With best regards,

Duncan S. McIntosh
Vice President & General Counsel

DSM/tas

REPLY TO:

**Edward W. Laney, IV**

ewl@tpgl.com
Writer's Direct Dial: (803) 227-4233
Direct Fax: (803) 400-1504

May 22, 2008

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, South Carolina 29211

Re: Proposed Amendments to Expert Evidence Rules

Dear Mr. Shearouse:

I am writing in support of the proposed amendments to our expert evidence rules. The proposed changes would bring more certainty to an area of the law that has confounded many and will be beneficial to judges, lawyers and litigants alike. I applaud the court for taking this step forward in the development of South Carolina jurisprudence.

In particular, the reports required by Rule 26, SCRCP, will be of benefit to all concerned. The parties and their attorneys by virtue of the reports will have a clear understanding of the opinions of experts and the grounds for the opinions. The reports also will eliminate disclosure of experts on the eve of trial, which too often is the case under current practice. The proposed rule provides an element of flexibility to the process in that the parties or the court can establish a different schedule for expert disclosures other than the default provision provided by the rule.

The pre-trial hearing provided by Rule 16, SCRCP, will be of great benefit as well. Time constraints often make it impractical to have an adequate hearing on the admissibility of expert testimony at trial. Further, an earlier resolution of the admissibility of expert testimony likely will promote judicial economy. Hearings on expert testimony should lead to early resolution or disposal of some cases that otherwise would not occur until rulings were made at trial. Again, the proposed rule provides flexibility. A hearing is not required in every case but only upon motion of a party.

Most importantly, the proposed changes to Rule 702, SCRE, set forth clear standards for the admissibility of expert testimony. This would bring South Carolina in line with the federal courts and the trend among the states. The rule as proposed will provide trial judges a solid framework for determining when expert evidence is admissible.

Finally, the proposed change to Rule 703, SCRE, gives guidance in what has been a very problematic area regarding expert testimony. The current rule can be abused in an attempt to introduce evidence that otherwise would be inadmissible. The proposed rule still leaves the trial court with the ability to admit such evidence where there is a substantial reason to do so.

Once again, I commend the court for furthering the development of our expert evidence rules. I appreciate being given the opportunity to submit comments on the proposed changes.

Sincerely,

TURNER, PADGET, GRAHAM & LANEY, P.A.

Edward W. Laney, IV

EWL:skc

June 3, 2008

Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

RE: Proposed Amendments to Expert Evidence Rule

Dear Mr. Shearouse:

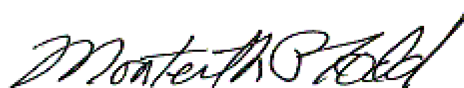
This letter is written to express my support for the proposed amendments to our expert evidence rules. In my years of practice, I have learned that clients hate surprises. These proposed rules should help reduce surprises to lawyers and their clients. Specifically, the reports required by proposed South Carolina Rule of Civil Procedure 26 will provide parties with an understanding of the claims and defenses in the case and should reduce surprises.

Monteith P. Todd
mtodd@sowell.com
DD 803.231.7837

Most importantly, the proposed rule changes to Rule 7.02 S.C.R.E. set forth standards for the admissibility of expert testimony which will bring the South Carolina courts in line with the federal courts and many of the more progressive state courts. This rule requires that expert testimony comply with good scientific standards and provides judges with a framework for determining when expert testimony or evidence is admissible.

I commend the Court for the development and proposal of these rules for use in South Carolina.

Yours truly,



Monteith P. Todd

MPT:rco

**June 4, 2008**

**The Honorable Daniel E. Shearous**
**Clerk of Court**
**Supreme Court of South Carolina**
**P.O. Box 11330**
**Columbia, South Carolina 29211**

**Re: Proposed Rule Amendments**

**Dear Mr. Shearous:**

**As principal sponsor of H. 3725, the Reliability in Expert Testimony Standards Act, I am writing in support of the proposed amendments to South Carolina's Rules of Criminal Procedure, Rules of Civil Procedure and Rules of Evidence regarding expert testimony.**

**After reviewing the legislation and the proposed rules' changes and speaking with legal and industry representatives, I believe the proposed rules' changes will produce a fair and reliable standard for all parties. One concern voiced by a number of parties was predictability among the courts while maintaining judicial discretion. I believe the proposed rules' changes will address these issues and promote judicial economy and ensure uniformity and consistency regardless of the forum in which a matter is being litigated.**

**If you or any member of the Court has any questions or concerns, please do not hesitate to contact me.**

**Sincerely,**

**Liston D. Barfield**

Comments from
South Carolina Board of Registration for Professional Engineers and Surveyors

The South Carolina Board of Registration for Professional Engineers and Surveyors offers the following comments to proposed SCRCP 16(d) and SCRCrimP 5, as they pertain to the qualification of experts in the fields of engineering and surveying and the method of determining that the expert's testimony satisfies those requirements of Rules 702, 703, and 704, SCRE.

The State of South Carolina requires, as a matter of law and public policy, that persons who practice engineering and surveying in this state be licensed to do so. The constitutional and statutory prerequisites to licensure are set out in South Carolina Code Sections 1-18-40 and 40-1-10. The decision to require a license to practice engineering and surveying is based upon findings by the General Assembly

1. that unregulated practice can endanger the health, safety, or welfare of the public, and
2. that the practice requires specialized skill or training and public needs and will benefit by assurances of initial and continuing professional and occupational ability.

The State of South Carolina relies upon licensure to assure that professionals providing a service requiring engineering and surveying education, training, and experience, or professionals holding themselves out as engineers and surveyors in this state, both meet initial and continuing professional standards and are accountable for their professional and ethical conduct while engaged in practice in the state. 2000 Act 311 as amended, codified as §40-22-2 et seq. This is very similar to the requirements for licensure of attorneys and the requirement that any lawyer who provides or offers to provide legal services in South Carolina be subject to the disciplinary authority of the State of South Carolina. Rule of Professional Conduct 8.5.

To assure the public health and safety, the State of South Carolina requires licensees to learn the profession of engineering and surveying through education and apprenticeship and to demonstrate their knowledge and skills by examination. S. C. Code 40-22-220 Licensees maintain their skills both by practice and by participation in continuing education. S.C. Code 40-22-240. Engineers and Surveyors who provide expert testimony to the tribunals of the state should demonstrate, at a minimum, the same knowledge and skills and be held to the same professional and ethical standards as those who design the buildings about which they opine.

Because of the findings concerning the public policy of this State, it is appropriate for the Supreme Court, by rule, to determine that when a person appears before a tribunal in this state and presents him or herself as an expert in the practice of engineering and surveying, that the witness be licensed in the state, have the same credentials and be subject to the same professional and ethical oversight as local licensed engineers and surveyors.

If the South Carolina Board of Registration for Professional Engineers and Surveyors can provide additional information which would be helpful to the Court, we can be reached through our administrator at the following address, Jan Simpson, Post Office Box 11597, Columbia, South Carolina, 29211, simpsonj@llr.sc.gov, 803-896-4412.

# Comments from the South Carolina Board of Architectural Examiners

The South Carolina Board of Architectural Examiners offers the following comments to proposed SCRCP 16(d) and SCRCrimP 5, as they pertain to the qualification of experts in the field of architecture and the method of determining that the expert's testimony satisfies those requirements of Rules 702, 703, and 704, SCRE.

The State of South Carolina requires, as a matter of law and public policy, that persons who practice architecture in this state be licensed to do so. The constitutional and statutory prerequisites to licensure are set out in South Carolina Code Sections 1-18-40 and 40-1-10. The decision to require a license to practice architecture is based upon findings by the General Assembly

1. that unregulated practice can endanger the health, safety, or welfare of the public, and
2. that the practice requires specialized skill or training and public needs and will benefit by assurances of initial and continuing professional and occupational ability.

The State of South Carolina relies upon licensure to assure that professionals providing a service requiring architectural education, training, and experience, or professionals holding themselves out as architects in this state, both meet initial and continuing professional standards and are accountable for their professional and ethical conduct while engaged in practice in the state. 1998 Act 424, codified as §40-3-5 et seq. This is very similar to the requirements for licensure of attorneys and the requirement that any lawyer who provides or offers to provide legal services in South Carolina be subject to the disciplinary authority of the State of South Carolina. Rule of Professional Conduct 8.5.

To assure the public health and safety, the State of South Carolina requires licensees to learn the profession of architecture through education and apprenticeship and to demonstrate their knowledge and skills by examination. S. C. Code 40-3-230 Licensees maintain their skills both by practice and by participation in continuing education. S.C. Code 40-3-250. Architects who provide expert testimony to the tribunals of the state should demonstrate, at a minimum, the same knowledge and skills and be held to the same professional and ethical standards as those who design the buildings about which they opine.

Because of the findings concerning the public policy of this State, it is appropriate for the Supreme Court, by rule, to determine that when a person appears before a tribunal in this state and presents him or herself as an expert in the practice of architecture, that the witness be licensed in the state, have the same credentials and be subject to the same professional and ethical oversight as local licensed architects.

If the South Carolina Board of Architectural Examiners can provide additional information which would be helpful to the Court, we can be reached through our administrator at the following address Jan Simpson, Post Office Box 11419, Columbia, South Carolina, 29211, simpsonj@llr.sc.gov, 803-896-4412.

June 5, 2008

WILLIAM C. CLEVELAND
ATTORNEY AT LAW
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Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

RE: Proposed Changes to South Carolina Rules of Civil Procedure and South Carolina Rules of Evidence

Dear Mr. Shearouse:

I am the head of our firm's business litigation practice group, having practiced as a litigator for thirty-three years. I am writing to support the adoption of the recently proposed changes to South Carolina Rules of Civil Procedure 16 and 26 and South Carolina Rules of Evidence 702 and 703. I believe the proposed Rule changes provide a balanced, fair and appropriate duty on all parties who use expert testimony to notify the other parties of the qualifications of the expert, the opinions to be advanced and the bases for those opinions. The proposed changes to Rule 16 offer a much needed procedure for parties to learn in advance of trial what expert opinions will be admitted during the trial of the case.

My experience is that complex cases, where substantial claims are present, are the most difficult to resolve. The proposed Rule amendments will allow all parties to be better prepared to address the claims or defenses in the case and to evaluate the testimony that will be admitted at trial. That will promote resolution of cases before trial and better trial of those cases that are not resolved.

Thank you for the opportunity to comment on the proposed changes.

Very truly yours,

BUIST MOORE SMYTHE MCGEE P.A.

William C. Cleveland

WCC/cve

{01252009.}

June 4, 2008

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, South Carolina 29211

RE: Proposed amendments to Rule 5 of the South Carolina Rules of Criminal Procedure, Rules 16 and 26 of the South Carolina Rules of Civil Procedure, and Rules 701, 702, and 703 of the South Carolina Rules of Evidence.

Dear Mr. Shearouse:

I am opposed to the proposed rules changes in regard to expert testimony proposed by the Supreme Court. I have looked at the proposed changes and below I have set forth reasons that I think the changes are unnecessary.

South Carolina has a well settled and effective set of comprehensive rules and case law that work to ensure that valid, reliable scientific testimony is presented to courts. All lawyers, parties to lawsuits, and judges are very familiar with this established set of rules and case law. We do not need these rules and laws replaced with uncertainty with new rules.

The argument that the new rules will prevent unreliable testimony on "junk science" is without merit. We do not have a problem with the admission of expert evidence in South Carolina. South Carolina judges apply the Council/Jones test, which provides sufficient guidance to our trial courts and litigants as to when to admit expert evidence. Under Council, to determine whether the underlying science of an expert's testimony is reliable, the court already looks at several factors, including: 1) publications and peer review of techniques; 2) prior application of method to the type of evidence involved in the case; 3) quality control procedures used to insure reliability; and, 4) consistency of method with recognized scientific laws and procedures. This is precisely the sort of predictability and certainty the non lawyer business groups say we need. The proponents of the rules change have created a conundrum: Can you create a system that provides predictability by removing the current well known system with a system that is untested and therefore inherently unpredictable?

The businesses that are proponents of this change claim that our state loses business because it "is not a Daubert state." In 2006, the "Small Business and Entrepreneurship



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Council" ranked South Carolina 11th among entrepreneur friendly states. On its website, the South Carolina Commerce Department makes the following claim: "South Carolina is one of the most business friendly states in the nation and continues to be the destination for companies to locate and expand." The assertion, that there is no predictability in our rules of evidence and this lack of predictability is scaring off business, is completely untrue and as such can not serve as a factual basis for just changing the established and familiar rules of evidence in a way deliberately designed to hurt the citizens, the consumers, and small business people in favor of large out of state corporations.

Contrary to assertions by non lawyer business crowds, only 10 states in the country currently adopt Daubert or Kuhmo Tire in their entirety, and a majority of states addressing the issue either limit its application or reject it outright like South Carolina's current evidentiary rules. Groups who have testified and spoken openly against any change in the rules of evidence regarding expert testimony in state court include South Carolina Attorney General, the South Carolina solicitors, criminal defense lawyers and small business groups.

These rule changes will require any expert giving testimony in any case to prepare a written report and be subject to extensive and time consuming challenges regardless of their qualifications or their experience as experts in other court proceedings. Examples of cases that will be impacted include: Family Court cases (including property or business valuation, equitable apportionment, divorces, abuse and neglect cases, custody or adoption); Probate Court (including cases involving valuation of assets, or competency); simple personal injury cases in which the treating physician or a police officer offers expert testimony; all environmental contamination cases; small business disputes involving testimony of accountants or economists; and all construction disputes, often including mechanics lien cases and contract cases.

The proposed rule changes work an incredible disadvantage to the party seeking relief. For example, pretrial rulings may not occur until right before the trial begins. If a plaintiff's expert is excluded at that time, the plaintiff will not have an expert and be unable to proceed. The case will likely be dismissed. If a defense expert is excluded immediately before trial, the defense of the case is not eliminated and can still proceed forward in their case.



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This will make litigation more time consuming and delayed. These rule changes create a whole new set of hearings on qualifications of the experts before the actual merits of someone's case can be heard. This will only add to the backlog of cases going

to trial and those on appeal, thereby requiring more court time and the resulting increased expense.

This will take away the rights of people and businesses to have juries decide their disputes in favor of an appointed or elected judge deciding the matter on collateral issues.

The proponents of this scheme are basing their excuses on false premises. There is no evidence that the current system is flawed or that it affects the state's economy at all. In fact, this rules change would create massive case costs and extra court burdens that are unnecessary.

Thank you for your time and consideration in this matter.

Sincerely,

S. Randall Hood
Attorney at Law

SRH

June 6, 2008

Honorable Daniel E. Shearouse
Clerk of the Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: Proposed Rule Amendments

Dear Mr. Shearouse:

I am writing in support of the proposed amendments to South Carolina's Rules of Criminal Procedure, Rules of Civil Procedure, and Rules of Evidence. As a member of the South Carolina Bar for over 30 years, I have tried cases in both our state and federal courts, and have substantial experience dealing with expert witnesses in litigation. The proposed amendments to our rules of procedure and evidence rules will bring our state court procedure in line with the procedure followed in federal courts, and will provide more uniformity and predictability regarding issues relating to the testimony of experts.

By adopting and applying the provisions contained in the federal court Rule of Civil Procedure 26 requiring expert reports and the clear procedural and substantive standards governing the admissibility of expert testimony in federal court, as established by the cases of *General Electric Co. v. Joiner*, *Kumho Tire Co., Ltd. v. Carmichael*, and *Daubert v. Merrell Dow Pharmaceuticals*, South Carolina law dealing with the admissibility of expert testimony will be greatly improved, in my opinion. Currently, our rules and case law do not provide as clear guidance to our trial judges as the federal rules and authorities.

I was recently involved in the defense of the case of *Avondale Mills, Inc. and Factory Mutual Ins. Co. v. Norfolk Southern Corporation and Norfolk Southern Railway Company*, a large, complex case pending before the Honorable Margaret B. Seymour in federal court in Columbia. We engaged in substantial discovery and four weeks of trial in this case, which involved claims by Avondale Mills and Factory Mutual arising out of the January 6, 2005 derailment of a Norfolk Southern train in Graniteville, South Carolina and resulting release of chlorine gas from a ruptured tank car. A number of expert witnesses were retained by the parties, all of whom were required under the federal rules to prepare written reports, and rebuttal or surrebuttal expert reports were prepared by a number of these experts. This enabled the

parties to know in advance what expert testimony they would be required to meet, and as a result of *Daubert* hearings and pre-trial rulings made by Judge Seymour, the parties knew what expert testimony would be allowed and what expert testimony was excluded.

Significantly, Judge Seymour's rulings dealt with both scientific issues and testimony by experts who were "experience-based". Although many believe only scientific issues or so-called "junk science" should be addressed under *Daubert,* the United States Supreme Court made clear that the court's role in excluding improper expert testimony applies to experience-based experts as well, contrary to our current South Carolina law. In my opinion, much of the illegitimate expert testimony offered by parties is offered by experience-based experts, and this is an issue our rules and case law need to address directly. In one instance in the Avondale Mills case, a textile expert who was well-qualified to express expert opinions was properly excluded because he attempted to offer opinions without a sufficient factual basis relating to the issues in the case. In my opinion, experience-based experts are often allowed to testify even though they do not have an adequate factual basis for their opinions, or alternatively, do not have the requisite experience to render the opinions they proffer.

Under our state court procedure, even if the trial judge is diligently attempting to assess the expert testimony presented by the parties, our rules and judicial precedents do not provide clear guidance regarding the standards to be applied in assessing expert testimony. Requiring adherence to the clear procedural and substantive standards governing the admissibility of expert testimony which have been proposed will enhance the ability of our state court judges to perform the "gate keeper" function which is so helpful under the federal system.

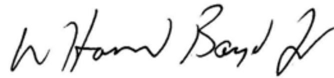
The requirement of written reports under proposed revisions to SCRCP 26 will also be extremely helpful to those of us litigating cases. It is frustrating to be unfairly surprised at trial by new opinions or to learn late in the case at an expert's deposition that he or she has a new opinion which had not previously been disclosed. Under our current state court procedure, too often this late expert testimony is allowed, and there really is no clear guidance to our state court trial judges as to whether to allow or exclude these opinions. Many times, the trial judge makes the decision to allow the testimony. Under the proposed amendment to Rule 26, these situations should be avoided in the future, and opinions which have not been disclosed in writing in compliance with the deadlines established by the court or under the rule will not be allowed and parties will not be unfairly surprised by late new expert testimony presented by an opponent.

There is no legitimate reason which has been expressed in opposition to the requirement of an expert report. Any additional costs associated with the preparation of a report will be more than offset by the efficiencies provided by enhanced uniformity, predictability and certainty in the court's rulings on the admissibility of expert testimony. Further, in some cases, the requirement of a written report will obviate the need for the other side to take an expert's deposition, if the report is sufficiently clear and not substantially disputed, or may reduce the number of experts an opponent needs to retain because the written reports make clear that certain issues will not be in dispute.

I appreciate the court's consideration of these proposed rule amendments, and enthusiastically support the adoption of these amendments to our rules of procedure and evidence.

Sincerely,

GALLIVAN, WHITE & BOYD, P.A.



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WHB,Jr/lsb

June 6, 2008

The Honorable Daniel E. Shearouse

Clerk of Court

Supreme Court of South Carolina

Post Office Box 11330

Columbia, South Carolina 29211

RE: Proposed Amendments To Rule 5 of the South Carolina Rules of Criminal

Procedure, Rules 16 to 26 of the South Carolina Rules of Civil Procedure, and

Rules 701, 702 and 703 of the South Carolina Rules of Evidence

Dear Mr. Shearouse:

I wish to voice my opposition to the above-referenced proposed Amendments. My Practice generally consists of representing individuals who have been injured by the negligence of others. The majority of the individuals that I represent see a family physician, are referred to physical therapy, and occasionally see a specialist for a second opinion or further treatment. My clients= medical bills are usually less than $10,000.00.

Occasionally, litigation is necessary to resolve my clients= claims. On those occasions, current procedures and law relative to expert witness testimony are satisfactory, being neither overly burdensome to the litigants nor to the Judiciary.

I feel that the proposed Amendments to the above-referenced Rules are unnecessary, and that those Amendments will be financially burdensome to the average litigant and cumbersome to the Judiciary. To require expert medical doctors to author reports will not only be financially burdensome to the litigants, but it will also create an atmosphere where family physicians will not treat patients in litigation in an effort to avoid the requirements of the new proposed Rules. The modification of our Rules to allow video trial depositions of expert treating doctors was a great idea. The currently proposed notion of requiring detailed reports is not.

As an Attorney with over twenty (20) years of practical experience litigating cases in our Circuit Courts, I strongly feel that our Judiciary is very knowledgeable and fair in qualifying expert witnesses. Further, our South Carolina juries are very good at weighing expert opinion testimony in arriving at their decisions. I am afraid that the proposed Amendments will unfairly burden the Judiciary and clog up the Judicial process with unnecessary expert qualifications and strip the jury of its traditional role in evaluating testimony.

In response to concern or criticism that might allege that Ajunk science@ is being submitted to our juries, I feel that our current case law which allows judges to apply the Council/Jones Tests to be sufficient guidelines to our trial Courts to exclude expert evidence where the underlying science of an expert=s testimony is unreliable. I see no reason for South Carolina to become a Daubert State. Our Courts are backed up enough.

Respectfully submitted,

Michael A. Maucher

S.C. Bar No.: 3694

MAM/tgb

June 9, 2008

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The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P. O. Box 11330
Columbia, SC 29211

RE: Proposed Amendments to SC Expert Evidence Rules

Dear Mr. Shearouse:

I am writing in support of the proposed amendments to South Carolina Rules of Civil Procedure 16 and 26 and Rules 701, 702, and 703 of the South Carolina Rules of Evidence. The proposed changes would bring needed predictability to an area of the law that has been a problem for litigants and judges.

The proposed expert disclosures required by Rule 26, SCRCP would be very helpful. The parties and their attorneys by virtue of the reports would have a clear understanding of the opinions of experts and the grounds for the opinions. The reports also would eliminate disclosure of experts on the eve of trial. Similar rules have been in effect in our federal courts for some time, and case preparation there has benefited from rules requiring early and full disclosure of expert opinions. The proposed rule provides an element of flexibility to the process in that the parties or the court can establish a different schedule for expert disclosures other than the default provision provided by the rule.

The pre-trial hearing provided by Rule 16, SCRCP, would also be a step forward. Time constraints often make it impractical to have an adequate hearing on the admissibility of expert testimony at trial. We need a predictable and consistent rule as to how and when expert evidence should be challenged. Further, earlier resolution of the admissibility of expert testimony likely would lead to quicker resolution or disposal of many cases. Again, the proposed rule provides flexibility. A hearing is not required in every case but only upon motion of a party.

Most importantly, the proposed changes to Rule 702, SCRE, set forth clear standards for the admissibility of expert testimony. This would bring South Carolina in line with the federal courts and the trend among the states. The rule as proposed and relevant case law will provide trial judges with clear standards for reliability and admissibility to apply in their gatekeeper role.

The proposed change to Rule 703, SCRE, gives guidance in what has been a problematic area regarding expert testimony. The proposed rule still leaves the trial court with the ability to admit such evidence where there is a substantial reason to do so.

I thank the court for considering the proposed changes in our expert evidence rules. I appreciate being given the opportunity to submit comments on the proposed changes.

Yours very truly,

BUIST MOORE SMYTHE MCGEE P.A.

*HENRY B. SMYTHE, JR.*
Henry B. Smythe Jr.

HJR/ksh

ANN W. SPRAGENS
SR. VICE PRESIDENT, SECRETARY
AND GENERAL COUNSEL

June 6, 2008

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, South Carolina 29211

Re: Proposed Rule Amendments

Dear Mr. Shearouse:

I am writing in support of the proposed amendments to South Carolina's Rules of Criminal Procedure, Rules of Civil Procedure and Rules of Evidence.

The rule of law is important for many reasons, not the least of which has to do with predictability and certainty. When the rule of law is respected, individuals and businesses are able to plan their conduct in conformity with the law. Ultimately, the predictability and certainty of the law promotes a sphere of autonomy within which individuals can act without fear of judicial interference. Thus, predictability promotes stability and rational decision making by individuals and businesses alike.

Unfortunately in South Carolina's state courts, it often is difficult for judges and juries to render consistent legal decisions because there are few consistent standards governing the admissibility of expert testimony, particularly scientific testimony. Furthermore, South Carolina's rules, in their current form, do not provide a clear procedural command requiring our trial courts to evaluate and rule on the admissibility of expert testimony before trial. As a result, the status quo does not provide adequate safeguards to ensure needed predictability and certainty in the admissibility of expert evidence.

Recognizing the risk of inconsistent judicial outcomes resulting from inconsistent evidentiary standards, the federal courts in the 1980s and 1990s took steps to limit the admissibility "expert" testimony of dubious value. In deciding three important cases – *General Electric Co. v. Joiner, Kumho Tire Co., Ltd. v. Carmichael, and Daubert v. Merrell Dow Pharmaceuticals* – the United States Supreme Court established clear procedural and substantive standards governing the admissibility of expert testimony. In 2000, the Federal Rules of Evidence were amended to codify the holdings of the Court's expert evidence case trilogy.

In South Carolina, federal courts have rigorously applied both the trilogy and the new federal rule developing a well established body of precedent in a short period of time. South Carolina's state courts, on the other hand, have lagged far behind with trial courts continuing to apply more ad hoc standards with little chance of real appellate review. Ad hoc rules make for ad hoc outcomes which destroy needed predictability and certainty in the law.

The proposed amendments to South Carolina's rules are an important step forward because they would provide for consistent treatment of expert qualification issues. By requiring disclosure of expert opinions in a timely manner and establishing uniform substantive criteria for admissibility, the proposed amendment would help restore the courts' rightful gate keeping function when it comes to admissibility of expert testimony. Such amendments would be a very positive change and we hope they are adopted.

Sincerely,

Ann W. Spragens

AWS:ljh

cc: Robert Herlong

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June 11, 2008

The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, SC 29211

RE: Proposed Rule Changes

Dear Mr. Shearouse:

I am submitting these comments to urge adoption of the proposed amendments to Rules 16 and 26 of the South Carolina Rules of Civil Procedure and Rules 701, 702 and 703 of the South Carolina Rules of Evidence.

Coupled with the availability of a pre-trial hearing under the amendments to Rule 16, the amendments to Rule 26 are extremely important in further preventing "trial by ambush" and will clarify the limits on expert testimony in the event of a trial. It will also focus the parties on the admissibility of opinions and, thus, facilitate resolution of the cases by settlement as parties will be able to accurately assess the strengths and weaknesses of their cases.

In many cases, a hearing will not be necessary as the expert is a treating physician, for example, and the parties will have no difficulty in knowing the limits and substance of the expert's testimony. Our able trial judges will prevent abuse of the requests for hearings.

However, the provision for a hearing upon the request of a party and the changes to the South Carolina Rules of Evidence will be extraordinarily beneficial to the judicial process in South Carolina. The report required by Rule 26(c), if given in accordance with the spirit and the letter of the rule, may eliminate many depositions. This will save the litigants time and money. The report will also be useful by a party in litigation to determine whether the provisions of Rule 702 or 703 are triggered.

The combination of the amendments will do much to eliminate so called "junk science" from prolonging litigation and, in some cases, eliminating the necessity of a trial. The proposed rule changes will provide South Carolina's trial judges with the pre-trial ability to limit or eliminate expert testimony. This ability to make pre-trial determinations concerning the admissibility of

expert evidence will be conducive to pre-trial resolution of cases and will make for more orderly trials.

The impact of these rule changes will be most helpful in eliminating the "junk science" that has bedeviled our court system for years. Jurors should hear opinions that are based upon sound research and generally scientifically or medically-accepted principles and methods. As noted above, the required (if requested by a party) hearing on the admissibility of expert evidence will be a great facilitator, not only in making a trial more streamlined in the admission of opinions that are proper, but also in facilitating a pre-trial resolution of the issues as the parties will be able to know what opinion evidence will be available to a jury.

Expert evidence is now commonplace in most of the litigation pending in state and federal courts. As is well known, the Federal Rules of Civil Procedure and Evidence have been in place for some time governing the admission of expert evidence. Also, the federal system has the experience and many published opinions giving insight into the factors to be considered before experts are allowed to testify before a jury. South Carolina needs to join this trend. Our state judges would have this body of experience to rely upon in weighing the factors to be considered before allowing a proffered expert to testify. The rules would also help govern what out-of-court evidence an expert would be allowed to utilize. Good decision-making by juries means that they must hear good, reliable evidence.

South Carolina needs to join the mainstream approach to expert testimony. The amendment to these rules would make uniform the standards and considerations to be applied before expert testimony could be presented to a jury. It should not simply be left to a jury in a single case to have the burden of deciding what is "good science." A "good cross examination and exploration into the expert" simply is not an adequate substitute for an experienced trial judge to determine the boundaries and, indeed, the admissibility of expert evidence.

I also hereby request to be heard at the July 9, 2008, hearing to be held on these matters.

Very truly yours,

R. Bruce Shaw

RBS:rdb

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**Frank R. Macchiaverna**
**Resident Vice President**
**Public Affairs**

June 6, 2008

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, South Carolina 29211

Dear Mr. Shearouse:

I am writing on behalf of Norfolk Southern Corporation (NS) to support the proposed amendments to South Carolina's Rules of Criminal Procedure, Civil Procedure and Rules of Evidence.

NS is proud of is extensive and substantial history in the State of South Carolina. In 2005, we noted our 175 year anniversary of operations in South Carolina. Today, our facilities serve important utilities such as the Duke power plant and South Carolina Electric & Gas. We serve major industries operating in South Carolina and making important contributions to the State's economy. Major corporations such as BMW, Michelin Tire, International Paper, Mead Westvaco, Bridgestone/Firestone are served by NS in South Carolina. We also serve many distribution and chemical companies along the Port of Charleston, in addition to NS owned and served industrial parks in Greenville, Columbia and Charleston. Today, NS employs nearly 600 people in South Carolina.

As a major corporation serving key portions of the South Carolina economy, and an extensive history in the State, NS is keenly interested in ensuring that judicial rules promote certainty and predictability. Unfortunately, we have found that in South Carolina's state courts, it is often difficult for judges and juries to render consistent legal decisions due to the lack of consistent standards governing the admissibility of expert (and particularly scientific) testimony. More specifically, the current rules do not provide clear procedural guidance to trial courts requiring the evaluation of the admissibility of expert evidence before trial.

The federal courts have clearly recognized the risk of inconsistent judicial outcomes resulting from inconsistent evidentiary standards, and throughout the '80's and '90's, took steps to limit the admissibility of "expert" testimony of dubious value. The United States Supreme Court

established clear procedural and substantive standards regarding the admissibility of expert testimony in three important cases – *General Electric Co. v. Joiner, Kumno Tire Co., Ltd. v. Carmichael, and Daubert v. Merrell Dow Pharmaceuticals.* The Federal Rules of Evidence have been amended to codify those decisions. While federal courts in South Carolina have rigorously applied the standards established by the Supreme Court and the amended rules of evidence, the state courts have no comparable guidance. As a result, state courts have applied varying ad hoc standards, resulting in inconsistent outcomes.

The proposed amendments to South Carolina's rules represent an important step toward ensuring consistent treatment of expert qualification issues. The proposed requirement of disclosing expert opinions in a timely manner and establishing uniform substantive criteria for admissibility will help establish consistency throughout the State. It will also help restore the courts' rightful gate keeping function when it comes to admissibility of expert testimony.

Sincerely,

Frank Macchiaverna

June 10, 2008

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, South Carolina 29211

Re: Proposed Rule Amendments

Dear Mr. Shearouse:

We are writing in support of the proposed amendments to South Carolina's Rules of Criminal Procedure, Rules of Civil Procedure, and Rules of Evidence.

The rule of law is important for many reasons, not the least of which has to do with predictability and certainty. When the rule of law is respected, individuals and businesses are able to plan their conduct in conformity with the law. Ultimately, the predictability and certainty of the law promotes a sphere of autonomy within which individuals can act without fear of judicial interference. Thus, predictability promotes stability and rational decision making by individuals and businesses alike.

Unfortunately in South Carolina's state courts, it often is difficult for judges and juries to render consistent legal decisions because there are few consistent standards governing the admissibility of expert testimony, particularly scientific testimony. Furthermore, South Carolina's rules, in their current form, do not provide a clear procedural command requiring our trial courts to evaluate and rule on the admissibility of expert testimony before trial. As a result, the status quo does not provide adequate safeguards to ensure needed predictability and certainty in the admissibility of expert evidence.

Recognizing the risk of inconsistent judicial outcomes resulting from inconsistent evidentiary standards, the federal courts in the 1980s and 1990s took steps to limit the admissibility of "expert" testimony of dubious value. In deciding three important cases – *General Electric Co. v. Joiner, Kumho Tire Co., Ltd. v. Carmichael, and Daubert v. Merrell Dow Pharmaceuticals (The "Trilogy")* – the United States Supreme Court established clear procedural and substantive standards governing the admissibility of expert testimony. In 2000, the Federal Rules of Evidence were amended to codify the holdings of the Court's expert evidence case Trilogy.

In South Carolina, federal courts have rigorously applied both the Trilogy and the new federal rule developing a well established body of precedent in a short period of time. South Carolina's state courts, on the other hand, continue to apply more ad hoc standards with little opportunity for real appellate review.

The proposed amendments to South Carolina's rules, therefore, are an important step forward because they would provide for consistent treatment of expert qualification issues. By requiring disclosure of expert opinions in a timely manner and establishing uniform substantive criteria for admissibility, the proposed amendments would help restore the courts' rightful gate keeping function when it comes to admissibility of expert testimony, and they would promote much needed predictability and certainty in this area of the law.

Sincerely,

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The Honorable Daniel E. Shearouse
June 10, 2008

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The Honorable Daniel E. Shearouse
June 10, 2008

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The Honorable Daniel E. Shearouse
June 10, 2008

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*ALEX SANDERS*
***Attorney at Law***
***19 Water Street***
***Charleston, South Carolina 29401***

June 9, 2008

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, South Carolina 29011

Dear Dan:

I write in support of the proposed amendments to South Carolina Rules of Civil Procedure 16 and 26, as well as the proposed amendments to South Carolina Rules of Evidence 802 and 703.

When I began practicing law almost fifty years ago, law was practiced by ambush, and trials were games of blind man's bluff. For all practical purposes, I withdrew from the active practice of law twenty-five years ago. When I returned to the practice in 2003, the first thing almost every lawyer rushed to tell me was that the practice of law had changed. They expressed the idea as a dreary lament. "You don't understand," they said balefully, "the practice of law has changed for the worse."

Having had the opportunity to step back from the practice of law for a while, I found upon my return that the practice had indeed changed but for the better. The innovations brought about by the modern rules have given us a much better process than ever existed before. The amendments now proposed to Rules 16 and 26, as well as Rules of Evidence 702 and 703, will improve the process further.

I have found over the years that the better prepared litigants are, the fairer and more just the outcome of a trial. The full exchange of information contemplated by the proposed changes and an orderly, known procedure for determining the admissibility of expert testimony will, in my opinion, serve to improve the trial process and, thereby, give us a clearer path to obtaining just results.

Thank you for your consideration.

Sincerely,

Alex Sanders

Brent O.E. Clinkscale
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June 10, 2008

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: Proposed Rule Amendments

Dear Mr. Shearouse:

It is with pleasure that I write you in support of the proposed amendments to the South Carolina Rules of Criminal Procedure, Rules of Civil Procedure, and Rules of Evidence. My practice is mainly business litigation, and I have been involved in many cases, both in state and federal court. I have had numerous experiences with expert witnesses in both courts, and I fervently believe that the new rule changes will bring more predictability and uniformity.

I have read several letters submitted to the Court in support of the proposed amendments, and I support the notion that the amendments would move South Carolina jurisprudence forward in a substantial way by providing consistency with Federal Rules of Evidence 701, 702, and 703 and the federal jurisprudence which clarifies and supports these rules. The clarity and consistency the amendments bring to our state court jurisprudence will provide litigants a needed predictability which will strengthen the effectiveness of our alternative dispute resolution options and lead to better decisions by juries and judges.

I request the opportunity to be heard on July 9 when the Court considers the proposed amendments.

Sincerely,

**WOMBLE CARLYLE SANDRIDGE & RICE**
***A Professional Limited Liability Company***

Brent O.E. Clinkscale

BOEC:yf

June 9, 2008

Honorable Daniel E. Shearouse
Clerk of the Supreme Court of South Carolina
P. O. Box 11330
Columbia, SC 29211

Re: Proposed Rule Amendments

Dear Mr. Shearouse:

I am writing in support of the proposed amendments to South Carolina's Rules of Criminal Procedure, Rules of Civil Procedure, and Rules of Evidence. I have been involved in cases in both state and federal courts during my more than thirty years as a litigation attorney and have had substantial experience dealing with expert witnesses in both courts.

The proposed amendments to the rules of procedure and evidence will bring much-needed uniformity and predictability to litigants facing expert testimony in state court. It would be a giant step forward for the South Carolina state courts to be governed by Federal Rules of Evidence 701, 702 and 703 and the incorporated holdings of the Supreme Court's expert evidence trilogy (*General Electric Co. vs. Joiner, Kumho Tire Co., Ltd. v. Carmichael, and Daubert v. Merrell Dow Pharmaceuticals*). The adoption of these rules would offer trial judges greater guidance and clearly establish the judge's role as a gate-keeper in ruling on the admissibility of proffered expert testimony. Further, by adopting the federal standards for the admissibility of expert testimony, South Carolina courts and attorneys would have ready access to an already well-established body of law that our courts in their gate-keeping role could apply.

South Carolina's current expert admissibility standard in many cases is in fact no standard at all, but rather a license for most expert testimony to be admitted "for what it's worth". Not only are our current standards considered the most lenient in the country, but they also insure that there is no uniformity or predictability – which should be the hallmarks of the rule of law. What is needed is more certainty and adopting the United States Supreme Court's expert evidence trilogy is an easy fix to a broken system.

I appreciate the court's consideration of these proposed rule amendments and enthusiastically support the adoption of these amendments to our rules of procedure and evidence. Many people mistakenly believe that issues of "junk science" mostly come up in toxic tort cases. My firm recently represented Norfolk Southern Railway Company in a commercial dispute filed by Avondale Mills in Federal Court arising out of the January, 2005 train derailment and chlorine spill in Graniteville, South Carolina. This was a highly complex commercial case and the *Daubert* motions filed by both the plaintiff and the defendant greatly assisted in identifying the witnesses and issues for trial.

A number of comments submitted by others have suggested that the current state court standards for the admissibility of evidence are not broken, do not need to be fixed, and to do otherwise would add complexity and expense to litigating cases in state court. These same arguments were made in 1984 when the South Carolina Supreme Court first adopted South Carolina's Rules of Civil Procedure. The Rules of Civil Procedure abolished the old Code Pleading system and essentially made South Carolina's procedural rules identical to the federal rules. I think that time has shown that having virtually identical state and federal procedural rules has made the practice of law less complicated and less expensive. Making the rules for expert testimony identical will likewise over time prove to make the practice of law less complicated and with more reliable results.

Sincerely,

GALLIVAN, WHITE & BOYD, P. A.

Daniel B. White

DBW/atb

GREENVILLE | CHARLESTON COLUMBIA FLORENCE

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June 12, 2008

**VIA HAND DELIVERY**

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
1231 Gervais Street
Columbia, SC 29211

Re: Proposed Amendments to Rules 16 and 26 of the South Carolina Rules of Civil Procedure and Rules 701, 702, and 703 of the South Carolina Rules of Evidence

Dear Mr. Shearouse:

Having been actively involved in trial practice for 30 years and having seen the migration from Code pleading to the Rules of Civil Procedure to the federal practice for addressing expert witness testimony, I am writing in support of the proposed amendments to the South Carolina Rules of Civil Procedure and Rules of Evidence as they apply to expert witness testimony in South Carolina Courts.

While our Supreme Court has over the years set forth criteria to guide trial courts in considering the admissibility of expert testimony, the application of those criteria has, frankly, been inconsistent. Despite a trial judge's best efforts to interpret and apply the common law criteria to determine expert testimony admissibility, there is still a wide gap in what one state court judge may admit when compared to another under essentially the same facts. Having attempted to challenge an expert's qualifications or opinions in state court, I have found that the current practice does not give a clear procedure about when and how to make this challenge. Some trial judges have considered an expert's qualifications or the reliability of that opinion on a motion in limine, but clearly most judges favor hearing the testimony at trial before making a decision on admissibility. This practice, in many instances, causes unnecessary expense to the client or forces cases to trial that would otherwise be resolved by settlement or pretrial motions. This is true regardless of which side of the case one finds themselves representing.

With the development of the more stringent federal standards that started with the U.S. Supreme Court's decision in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), the dichotomy between the federal system and our state courts has become more dramatic. The federal system by requiring more precision in the disclosure of expert opinions has resulted in more reliable information being presented to judges and juries and the exclusion of faulty opinions prior to trial. The federal court practice also requires both plaintiff and defendant to prepare their cases completely before they get to the trial stage.

As the notes to proposed changes to Rule 26 of the South Carolina Rules of Civil Procedure indicate, the disclosure procedure will be substantially similar to the federal rules. With this change, the trial bar can expect similar results as in the federal court if these proposed rules are

accepted - more consistency and predictability in the disclosure of experts and in the acceptance (or rejection) of their testimony. The potential of trial by ambush (which has been used by both sides of the bar) will be minimized. Adoption of these rule changes will also help reduce forum shopping both intra- and inter- state. Knowing that the standard for expert disclosure and opinion admissibility is based on essentially the same standard as practiced in federal court, will result in greater reliability in assessing expert issues in state courts. Adoption of these rule changes will give greater predictability to litigants both within South Carolina and beyond if a party is involved in multi-state litigation.

The proposed changes to Rules 701, 702, and 703 of the Rules of Evidence and the adoption of the comments to the Federal Rules of Evidence would also be a welcomed change. With adoption of any standard, consistency most often follows. Here, with the large body of law available from the federal court system to use as a guide, consistency in applying these rules by state judges should be immediate.

With Civil cases becoming more and more specialized, there is a greater reliance on expert opinions in preparing and presenting cases. Clear procedural and substantive standards governing the admissibility of expert testimony benefit both the Bench and Bar. With adoption of the proposed changes to the Rules of Civil Procedure and the Rules of Evidence, not only will there be a body of law for the Bench to follow but practically, trial lawyers will have a clearer expectation of how an expert will be treated since the federal court and our state courts will apply the same standards.

My only concern in adopting these changes is that only “substantial” cases will be brought because it will be too expensive to bring “small” cases. This is certainly true in the federal court system. By design the federal system is off limits unless a claim has a “value of $75,000” (assuming federal jurisdiction is based on diversity of citizenship.) 28 USC § 1332. It would not be acceptable for those with legitimate claims to be unable to have access to our state court system because their claim is not “worth the cost.” The right to a trial and trial by jury is the bedrock of our civil justice system. We must be vigilant in protecting that right. Consequently, it might be advisable to have a value below which these disclosure rules would not apply. This type of limitation is comparable to the interrogatory restriction in Rule 33(b)(8). Despite this concern, I am very much in favor of the proposed rule changes.

For these reasons, I commend to you and support the proposed expert evidence law.

Sincerely,

W. Francis Marion, Jr.

WFMjr/sdm

Honorable Daniel Shearouse
Clerk of Court
Supreme Court of South Carolina
P. O. Box 11330
Columbia, SC 29211

**RE: Purposed Amendments to Rule 5 of the South Carolina Rules of Criminal Procedure, Rule 16 and 26 of the South Carolina Rules of Civil Procedure and Rule 701, 702, and 703 of the South Carolina Rules of Evidence**

Dear Mr. Shearouse:

This letter is in opposition to the proposed Rules changes to the South Carolina Rules of Criminal Procedure, Rules of Civil Procedure and Rules of Evidence. There appears to be a movement afoot designed to make the Court system of our State an extremely harsh and inhospitable place for ordinary citizens. By adopting these proposed rules changes, only those citizens who can afford long delays, a time consuming appeals process and multiple backup experts will enjoy the privilege of presenting their disputes to a jury of their peers.

Under South Carolina law a trial judge looks at several factors, including: (1) publication and peer review of techniques; (2) prior application of the method to the type of evidence involved in the case; (3) quality control procedures used in insure reliability; and (4) consistency of method with recognized scientific laws and procedures to determine whether an expert's testimony is reliable. The groups that wish to deny a citizen's rights to a jury trial say that this procedure is unreliable and results in the admissibility of junk science and run away verdicts. Where are the run away verdicts? Where is the case involving junk science? I submit that South Carolina has a proven track record of fair verdicts based on the facts as admitted by our trial judges and the law as issued by the Legislature and Courts. The introduction of new hurdles and financial barriers will not only have the effect of barring citizens from our courts but will also inject a new element of unpredictability, delay, and higher costs into litigation.

It seems that the underlying reason being floated for an overhaul of our rule system is that our State is falling behind its neighbors in attracting economic development. During his re-election campaign, Governor Sanford crisscrossed the State touting a record of two billion dollars ($2,000,000,000.00) in new economic investment in South Carolina during the preceding year. According to the "Small Business and Entrepreneurship Counsel", in 2006 South Carolina ranked eleventh (11$^{th}$) among entrepreneur friendly states, ahead of neighboring states, Tennessee, Georgia and North Carolina. Apparently some sectors of our State believe that if wrongs are unable to be redressed in South Carolina then business will thrive. This is a pretty scary thought.

By this letter, I am speaking not only of the harm to our Civil Justice System, but also to the Family Courts, Criminal Courts, and Probate Courts of our State. The South Carolina Attorney General, our State Solicitors, our criminal defense attorneys, as well as small business groups have all spoken out in opposition to these proposed rules changes. Solicitors and defense attorneys will have to jump through new hoops, thereby delaying justice. Family Court litigants will have to have their accountants, economists, and psychologists submit expensive and burdensome pre-trial reports in order to have their testimony admitted. In short these new rules will make litigation more time consuming and expensive. The changes would create a set of hearings on qualifications of experts before ever going to court. Obviously, this will only add to the back log of cases going to trial as well as those on appeal. The result being will be more court time and more money. The power to tax is the power to destroy. These new rules are a tax on the time and pocketbooks of the citizens of South Carolina.

Thank you for the opportunity to express my fervent belief that these proposed Rules changes inure to the determent of our people. I will be happy to meet with you to discuss this matter further.

Sincerely,

**Ayers, Smithdeal & Bettis, PC**

Joseph C. Smithdeal

REPLY TO:

**Elbert S. Dorn**

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June 9, 2008

Honorable Daniel E. Shearouse
Clerk of the Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

Dear Mr. Shearouse:

Please accept this as my response and comments to proposed rule changes requested by the Supreme Court in its Notice of March 19, 2008. Additionally, I request permission to testify at the public hearing scheduled for July 9, 2008.

Both as a private attorney who has practiced for over twenty years and as immediate past-President of the South Carolina Defense Trial Attorneys Association, I enthusiastically endorse the proposed changes to Rules 16 and 26, SCRCP, and Rules 701, 702, 703, and 704 of the South Carolina Rules of Evidence. As an attorney whose practice focuses on product liability, pharmaceutical and other complex litigation, these rule changes are extremely important for several reasons enunciated herein. Although I have testified before both the House and Senate subcommittees considering proposed legislative changes to the expert standard, I am supportive of the Supreme Court's rule changes as the best and most judicious method of accomplishing the goals embodied in the proposed legislation.

Briefly, there are several core reasons that the rule changes should be adopted as proposed:

(1) Conformity – The South Carolina Rules of Procedure and Evidence are modeled on the companion Federal Rules and the proposed changes amount to an update of subject evidentiary rules, whose federal counterparts were amended in 2000 by Congress. This is a logical step to bring current Rules 701-704, SCRE, and their related provisions.

(2) Practicality – While the Council/Jones test has great potential to achieve the desired balance on expert testimony, the proposed rule changes afford our bench and bar with tremendous precedent to assist in the often complex and esoteric task

of considering expert testimony. Our judiciary is already over-burdened, and with the aid of a laptop, ample authority and precedent from across the country can be instantly accessed to guide the trial courts.

(3) Predictability – Finally, the adoption of the proposed Rules would afford much more predictability on the key question of expert testimony, which often serves as the foundation for product liability and other complex litigation. Enhanced predictability will make mediation of such cases much more fruitful, whereas currently, mediation is often bogged down by the open issue of expert qualification and admissibility. I sincerely believe the rule changes will foster settlement and relieve our courts of many complex trials.

I genuinely appreciate the Supreme Court's consideration to these comments and respectfully look forward to an opportunity to further expand on them at the public hearing on July 9, 2008.

Very truly yours,

TURNER, PADGET, GRAHAM & LANEY, P.A.

Elbert S. Dorn

ESD:wh

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**Ellen M. Fitzsimmons**
Senior Vice President – Law &
Public Affairs & General Counsel

June 6, 2008

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, South Carolina 29211

Re: Proposed Rule Amendments

Dear Mr. Shearouse:

I am writing in support of the proposed amendments to South Carolina's Rules of Criminal Procedure, Rules of Civil Procedure and Rules of Evidence.

CSX Transportation ("CSX") operates a 21,000 mile rail network that serves customers in 23 states, including South Carolina. CSX's goal is to be a good neighbor in all the communities in which it operates and to have the highest standards in its dealings with the public, employees and customers.

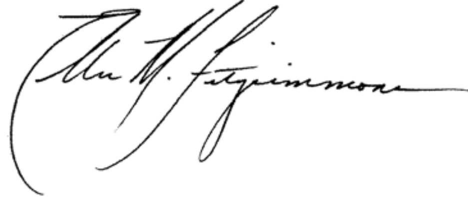
Today, CSX does business in an increasing litigious society and is the target of more lawsuits than ever before in every state in which it operates. Not all of the lawsuits have merit, but each has associated costs - not only to CSX, but, when combined with the litigation costs faced by other corporate defendants, also to America's global competitiveness. In this harsh litigation environment, the judicial system must strive to provide a fair forum to resolve disputes.

In addition to there being more litigation today, it is also more complex. The science that is part of many lawsuits is likewise more complex and more specialized. This requires that experts play an increasingly central role assisting judge and jury with reaching the right result. CSX therefore commends the South Carolina Supreme Court for studying its rules with respect to the admissibility of expert testimony and urges the Court to adopt the proposed changes.

In CSX's experience, the *Daubert* standard favors neither plaintiffs nor defendants. Rather, it provides an important tool to weed out scientific evidence that is not reliable and not relevant to the case at hand. CSX believes that adopting the *Daubert* standard will greatly assist South Carolina trial judges in guarding against the misuse of scientific testimony. Similarly, the proposed rule changes requiring disclosure of expert opinions in a timely manner will also help ensure that trials are fair so that sound decisions are reached.

Again, CSX applauds the Court's attention to these important issues and encourages the Court to adopt the proposed revisions.

Very truly yours,



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June 4, 2008

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, South Carolina 29211

Re: Proposed Rule Amendments

Dear Mr. Shearouse:

As members of the Senate Judiciary Subcommittee which held hearings on S. 687, the Reliability in Expert Testimony Standards Act, we feel it is important to submit written comments in support of the proposed amendments to South Carolina's Rules of Criminal Procedure, Rules of Civil Procedure and Rules of Evidence.

As you know, the subcommittee held two hearings on S. 687 and heard several hours of testimony from persons on all sides of the issue, including representatives of the South Carolina Defense Lawyers' Association, the South Carolina Trial Lawyers' Association, the South Carolina Bar Association, the Attorney General's Office and the Commission on Prosecution Coordination. After listening to the testimony presented at the subcommittee, it is our belief that the proposed amendments to the Rules would bring uniformity and predictability to South Carolina Courts and assist the court in streamlining the expert qualification aspect of any proceeding. Consistency in the treatment of expert qualifications would bring stability and a sense of fairness for individual and corporate litigants.

We look forward to the Court's decision and reviewing any proposed rules' changes submitted to the General Assembly at the appropriate time. If we can provide additional information or be of service to the Court in any way, please do not hesitate to contact us.

Sincerely,

Larry A. Martin

cc: Raymond E. Cleary, III

June 10, 2008

**HAND DELIVERED**

The Honorable Daniel E. Shearouse
Clerk of the Supreme Court of South Carolina
1231 Gervais Street
Columbia, South Carolina 29201

Re: Proposed Amendments to South Carolina Rules of Evidence, Rules of Criminal Procedure, and Rules of Civil Procedure

Dear Mr. Shearouse:

On behalf of the South Carolina Solicitors' Association, I write in opposition to the proposed amendments to the South Carolina Rules of Evidence, Rules of Criminal Procedure, and Rules of Civil Procedure.

The Association objects to the amendments to the Rules of Evidence, particularly Rule 702, because they are unnecessary, more restrictive, and more cumbersome than the current rules. Despite the claims of a few to the contrary (before the Subcommittees of the Judiciary Committees of the South Carolina Senate and House of Representative on similar legislation and in comment letters already received and posted by the Court), South Carolina already has uniform evidentiary and procedural standards for the qualification of experts and the admissibility of expert evidence that sufficiently and uniformly guide our state judges in the exercise of their discretion.

A change in the procedural and evidentiary standards used for the qualification of expert witnesses and admission of expert evidence will undoubtedly result in the inability of parties to use some witnesses and evidence that they could use under the current standards. This causes us concern due to the ability of criminal defendants to challenge their convictions through both motions for new trial based upon after-discovered evidence (in the Court of General Sessions under the Rules of Criminal Procedure) and collateral attacks (in the Court of Common Pleas under the Rules of Civil Procedure). Will defendants be able to obtain relief based upon the fact that, under the new rules, either the expert who testified against them at trial would not be qualified or the expert's evidence would not be admissible? Those questions will have to be litigated. Also, under the proposed amendments, a different standard would be used in post-conviction relief hearings to qualify the experts who testify then about what was or was not done pre-conviction or what should have or should not have been done pre-conviction (including issues related to the defense's failure to object to experts and expert evidence presented by the prosecution, as well as the defense's use

or failure to use experts). This raises serious concerns and conflicts that are unnecessary given the fact that South Carolina already has standards in place that work. For that reason, we also oppose the amendments to the Rules of Civil Procedure.

Despite the discretionary phrasing of the amendment to Rule 5, SCRCrimP, the amendments to the Rules of Evidence will, as a practicality, require hearings on the qualifications of expert witnesses and the admissibility of expert evidence. While such hearings are currently commonplace, the new standards are certain to increase the number of hearings and lengthen the hearings because of the new factors to be considered by the trial court and the fact that criminal defendants will want to (and, undoubtedly, should) challenge the admissibility of long-admitted types of expert evidence under the new standards. This will wreak havoc on an already overburdened criminal court calendar.

We also oppose the amendment to Rule 5, SCRCrimP. Currently, the prosecution is not entitled to any discovery related to expert evidence from the defense unless the defendant requests disclosure under Rule 5(a)(1)(C) or (D) and, even then, only to "results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, which the defendant intends to introduce as evidence in chief at the trial or which were prepared by a witness whom the defendant intends to call at trial when the results or reports relate to his testimony." Rule 5(b)(2). It is common practice for defense attorneys to instruct the experts they consult not to provide them with written reports or documentation because, without such documentation, they do not have to notify the prosecution of the witness or the witness' evidence. If the Court is inclined to amend Rule 5, the Solicitors would request that subsection (b)(2) be amended to require that, if the defense plans to call any experts in its case-in-chief, the defense must disclose not only any written reports, but also the identity of any expert witness and a summary of the expert's evidence if no written report is prepared. This amendment would not only allow the prosecution to have the full benefit of any hearings on the admissibility of such evidence under the proposed amendment to Rule 5, but also ensure that the prosecution is prepared to address the scientific area presented through the defense's expert and thus support the truth-finding function of the criminal justice system. Such a provision would not deprive the defendant of any constitutional rights.

In conclusion, the Association opposes the proposed amendments to the Rules of Evidence, Rules of Criminal Procedure, and Rules of Civil Procedure because we believe that they will require more judicial resources (personnel and courtroom time), impose significant financial and other burdens upon litigants, and not result in any greater uniformity and consistency than that already afforded by the current Rules. Please also accept this as our request to appear and be heard at the July 9, 2008, public hearing.

Sincerely,

Jay Hodge
President, South Carolina Solicitors' Association

cc: The Honorable Judicial Circuit Solicitors

June 10, 2008

**VIA HAND DELIVERY**
The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
1231 Gervais Street
Columbia, SC 29201

Dear Mr. Shearouse:

This letter is submitted on behalf of the South Carolina Defense Trial Attorneys' Association in response to the Court's request for written comments regarding the proposed amendments to Rules 16 and 26 of the South Carolina Rules of Civil Procedure and Rules 701, 702, and 703 of the South Carolina Rules of Evidence. We appreciate the opportunity to comment on our support of the Court's proposal.

As a starting point, these amendments are evenhanded and favor neither the plaintiff Bar nor the defense Bar in the prosecution of a civil suit in a South Carolina Court of Common Pleas. As evidenced by the vigorous expert motion practice utilized by both the plaintiff and the defendants in the case of Avondale Mills, Inc. v. Norfolk Southern, et al., Civil Action No. 1:05-cv-02817 before Judge Margaret Seymour earlier this year, the Bar as a whole will recognize benefits from these amendments. More importantly, these rule changes create consistency and predictability as to the treatment of expert evidence, which, for litigants, translate into fairness. The adoption of these amendments provides a framework for a consistent approach to expert evidence both during discovery and trial.

## Proposed Amendments to South Carolina Rules of Civil Procedure

### Rule 16(d)

The requirement of a pretrial hearing to challenge expert evidence upon motion of a party establishes a needed procedural mechanism. To date, the Circuit Courts have treated challenges to expert evidence in different ways and at different stages in the life of a lawsuit because there is no guidance as to how and when expert evidence should be challenged. The adoption of this amendment establishes a procedure to be followed by the Circuit Court when expert testimony is challenged. This amendment would bring the now routine federal court practice of holding pretrial Daubert hearings into practice in Circuit Court. Often, Circuit Courts address a challenge to the admissibility of an expert's qualifications or opinions just prior to the expert taking the stand when these issues are better resolved before the start of trial. In most instances, these mid-trial hearings do not result in a thorough consideration of the expert's qualifications or opinions because of the constraints imposed by the timing of the hearing. This frequently results in the expert being allowed to testify. By adopting the mandatory pretrial hearing on qualifications and admissibility of an expert's opinion, it would establish a consistency and a

predictability as to when expert issues would be addressed by a court, as well as make trials proceed more efficiently.

Contrary to the assertion of some critics, the adoption of the Court's amendment to Rule 16 will not open the floodgates and inundate the Bench with numerous motions prompted by the changes to the Rules of Civil Procedure and the Rules of Evidence. Not every expert or opinion is subject to a successful attack, and the decision to make a motion to request a Rule 16(d) hearing will remain a tactical decision by counsel. However, the amendment will give practitioners a procedure to challenge expert testimony in advance of trial in the appropriate case with some certainty as to when the issue might be decided.

**Rule 26**

The proposed amendment to Rule 26, which substantially adopts the federal rule on expert witness disclosures, would end the inconsistent practices in the circuit court of if and when expert witness disclosures are required. Currently, the only disclosures that take place are by virtue of either a scheduling order jointly entered into by the parties or discovery posed by a party. Several commentators to these amendments both pro and con acknowledge that discovery requests often do not result in the type of expert disclosures that are necessary in order to fully evaluate a case or prevent one side from being sandbagged. This amendment would require South Carolina litigants to disclose their expert opinions in the same manner as they are currently required in the federal court.

By adopting this amendment and requiring timely disclosure of an expert's identity and opinions, both plaintiffs and defendants would be given fair notice of the claims and defenses of their opponents and facilitate preparations for trial. No longer can expert opinions be tendered shortly before trial or supplemented. Instead, counsel will have some certainty they have received all expert opinions necessary to evaluate a case for settlement or trial. While some may argue that mandatory disclosures add an additional expense to litigation, in reality, what disclosures do is require litigants and counsel to prepare their case for settlement or trial and earlier disclosures result in cost savings rather than a flurry of activity at the end.

While some comments in opposition to this amendment suggest the changes to Rule 26 will unduly burden experts, the fact is that most experts operate comfortably within the federal court guidelines. Likewise, most practitioners have dealt with the federal rules for some time (dating back to the disclosures required under the former Local Rule 16(b)) and the amendments would not constitute a substantial change in practice.

**Proposed Amendments to South Carolina Rules of Evidence**

We believe that the cause of civil justice would be well served by the amendment of the Rules of Evidence. As an initial matter, these amendments would adopt the amended Federal Rules of Evidence 701, 702, and 703, which incorporate the holdings of the Supreme Court's expert evidence trilogy. The adoption of the Court's proposed amendments would offer trial judges more guidance and clearly establish the judge's gatekeeper role in ruling on the reliability

of proffered expert testimony. In other words, these amendments would provide South Carolina's Bench and Bar with an already developed, fluid body of law to guide the Trial Court in its gatekeeping analyses and offer counsel some uniformity in the rules to be applied. This larger body of interpretive authority will assist the Courts in properly applying the rules.

Furthermore, in practice, circuit courts have not consistently complied with its gatekeeping responsibilities to all experts. For example, the South Carolina Court of Appeals held in State v. White, 372 S.C. 364, 642 S.E.2d 607 that non-scientific expert testimony need not meet the Jones test. By adopting these amendments and effectively adopting the Daubert trilogy, all expert opinions, including those offered by social science and experience-based experts, would now be required to satisfy the same requirements. The proposed amendments to the Rules of Evidence would also allow our Courts to draw on the vast federal precedent as to expert evidence, in much the same way our Courts have since the adoption of the Rules of Civil Procedure.

Currently, the expert evidence body of common law is limited, and originates principally from General Sessions cases. In many instances, these cases have dealt with specific areas of expert testimony which are not necessarily translatable to the types of expert issues raised in Common Pleas cases, which can range from engineering to economics to medicine to social science. An adoption of these amendments provides our judiciary with a ready-made body of law, which addresses a myriad of expert topics that would not be otherwise available in South Carolina jurisprudence. By adopting the Court's amendments, those concerns would be eliminated. One need only look to the catalog of case law found at www.daubertontheweb.com to see the breadth and extent of areas in which Daubert-based decisions have gone to analyze various types of expert testimony.

The fear expressed by some that these amendments will radically alter the landscape of South Carolina trial practice are unfounded. One need only look to the federal experience to see that the changes to expert witness evidence have not resulted in an opening of the floodgates to expert evidence challenges nor have they prevented a litigant from having access to the courthouse. Additionally, the "states' rights" position advocated by some opponents which suggests that South Carolina should avoid following the dictates of a federal court are without merit. The notion that these amendments would constitute "federal intervention" which must be resisted is not a basis upon which these amendments should be rejected.

In summary, the proposed amendments are an important step forward, and will benefit both the Bench and the Bar. We urge the adoption of all.

Sincerely,

Gray T. Culbreath

GTC:tmv

TURNER PADGET
TURNER PADGET GRAHAM & LANEY P.A.

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REPLY TO:

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June 10, 2008

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, South Carolina 29211

Re: Proposed Rule Amendments Relating to Expert Testimony

Dear Mr. Shearouse:

I am writing in response to the Court's notice dated March 19, 2008 inviting comments regarding proposed changes to the South Carolina Rules of Civil/Criminal Procedure and Evidence relating to expert testimony. I wholeheartedly endorse the proposed rule changes and urge their adoption in the published form.

One major shortcoming of current procedures is the lack of a mandate to the Circuit Court to conduct pretrial hearings on the admissibility of expert testimony. Early rulings will remove some of the uncertainty that often predominates the pretrial period, which will force the parties to more objectively evaluate their positions at an earlier phase of the proceedings, undoubtedly resulting in more pre-trial settlements.

The proposed rules will promote fairness for all parties to litigation and do not have the potential to favor one side or the other. The deadline for disclosure of expert witnesses as well as their anticipated opinions will reduce the risk of gamesmanship that is sometimes encountered when a party waits until the last minute to identify experts. In cases without scheduling order deadlines, this can damage the fairness of the proceedings. While I ordinarily find myself on the defense side of civil disputes, the improved efficiency and consistency will undoubtedly promote fairer treatment of all litigants.

The proposed rules governing the admissibility of expert testimony will make clear the trial court's "gatekeeper" function, and will reduce the use of the familiar ruling "the objection goes to the weight rather than the admissibility of the testimony and is therefore overruled." Clear guidance to the trial bench is needed in this important area, where lack of clarity poses a



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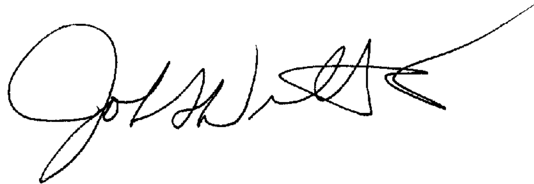
risk of jury confusion and misdirection. Adoption of the federal rules on this important subject brings with it the clear guidance provided by the substantial body of case law that has developed in the federal system. Any uncertainty relating to the application of current case law regarding the standard to be applied to non-scientific expert evidence will also disappear.

In summary, I strongly believe the proposed rules will substantially aid the bench, bar, and litigants in their search for truth through the litigation process. I respectfully urge the Court to adopt the entire proposal.

Respectfully submitted,

TURNER PADGET GRAHAM & LANEY, P.A.



John S. Wilkerson, III

JSW/adh

June 10, 2008

Honorable Daniel E. Shearouse
Clerk
Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

RE: Request for Written Comments
Amendments to Rule 5, SCRCrimP, Rules 16 and 26, SCRCP
and Rules 701, 702, and 703, SCRE under Consideration

Dear Mr. Shearouse:

A legal aid lawyer accepts a small case on behalf of an indigent client who is being sued over an unpaid repair bill. After initial discovery the attorney discovers that a central issue in the case will be the value of an automobile after the performance of shoddy repair work that rendered it inoperable. In order to prove the case, the attorney must hire an expert to render an opinion of the value of the car and the price of the repairs necessary to make it operable. The lawyer knows a mechanic who has given him an opinion in the past for a set fee when all he had to commit to was a deposition at his place of business and a trial if one proved necessary. However, under the new rules, he must prepare a written report, be available to rebut the opposing party's expert report, attend a deposition, a pre-trial hearing, and finally the trial of the matter. As a result, he must either charge more for his services, or simply choose to quit providing expert opinions due to the burden it places on his repair business.

On behalf of South Carolina Appleseed Legal Justice Center, we write to oppose the changes to the above referenced rules. Appleseed zealously advocates on behalf of low income South Carolinians for access to justice. The proposed rule changes would *further* restrict access to the courts for people with limited means. As it stands, an indigent plaintiff or defendant seeking the assistance of a non-profit legal aid corporation is unable to pay the costs of expert witness fees and expenses. Likewise, non-profit legal aid corporations cannot afford to front those costs to the client in every case. As such, cases which do not generate fees, or in which the reimbursement of costs hinge on the discretion of the trial judge may go unheard despite very compelling facts.

Under the proposed rule changes, the costs associated with expert testimony are increased significantly. By mandating pre-trial review of expert testimony in proposed

Rule 16(d), parties to an action are forced to pay additional time and travel expenses for their own experts. Requiring written reports in addition to depositions (which are already available under the existing rules) further increases the expense and time required of expert witnesses. Provisions providing for rebuttal reports do not *mandate* additional expert time and expense, but they do put the party who cannot afford it at a significant disadvantage.

The inevitable result of these rule changes is to further restrict access to South Carolina courts, and by extension to justice, for South Carolina citizens with legitimate claims and defenses, but without the resources necessary to pursue them. It is the position of South Carolina Appleseed that the supporters of these changes are seeking that result and we strongly urge the court to reject these changes as unfair, unnecessary and contrary to the ideal that all Americans have equal access to justice.

This Court has recently embarked on a noble, necessary and welcomed effort to enhance access to justice for South Carolinians with the creation of the South Carolina Access to Justice Commission. The commission's goal, to make the courts of South Carolina *more* accessible, will further open the court house door for the poor in South Carolina. These proposed rule changes could hinder that effort. The proposed rule changes should be rejected or in the alternative, considered within the context of the commission's work to avoid widening the court house door with one hand but blocking the entrance with the other.

Respectfully Submitted,

Stephen Suggs
Sue Berkowitz
South Carolina Appleseed Legal Justice
Post Office Box 7187
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(803) 779-5951 (fax)

June 5, 2008

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, South Carolina 29211

RE: Proposed amendments to Rule 5 of the South Carolina Rules of Criminal Procedure, Rules 16 and 26 of the South Carolina Rules of Civil Procedure, and Rules 701, 702, and 703 of the South Carolina Rules of Evidence.

Dear Mr. Shearouse:

I am writing expressing my opposition to the proposed rule changes for the following reasons:

1. Groups who have testified and spoken openly against any change in the rules of evidence regarding expert testimony in state court include South Carolina Attorney General, the South Carolina solicitors, criminal defense lawyers and small business groups. There is simply no need for any change;

2. These rule changes will require any expert giving testimony in any case to prepare a written report and be subject to extensive and time consuming challenges regardless of their qualifications or their experience as experts in other court proceedings. Examples of cases that will be impacted include: Family Court cases (including property or business valuation, equitable apportionment, divorces, abuse and neglect cases, custody or adoption); Probate Court (including cases involving valuation of assets, or competency); simple personal injury cases in which the treating physician or a police officer offers expert testimony; all environmental contamination cases; small business disputes involving testimony of accountants or economists; and all construction disputes, often including mechanics lien cases and contract cases.

3. The proposed rule changes work an incredible disadvantage to the party seeking relief. For example, pretrial rulings may not occur until right before the trial begins. If a plaintiff's expert is excluded at that time, the plaintiff will not have an expert and be unable to proceed. The case will likely be dismissed. If a defense expert is excluded immediately before trial, the defense of the case is not eliminated and can still proceed forward in their case.

4. This will make litigation more time consuming and delayed. These rule changes create a whole new set of hearings on qualifications of the experts before the actual merits of someone's case can be heard. This will only add to the backlog of cases going to trial and those on appeal, thereby requiring more court time and the resulting increased expense.

5. This will take away the rights of people and businesses to have juries decide their disputes in favor of an appointed or elected judge deciding the matter on collateral issues.

6. The proponents of this scheme are basing their excuses on false premises. There is no evidence that the current system is flawed or that it affects the state's economy at all. In fact, this rules change would create massive case costs and extra court burdens that are unnecessary.

As a lawyer of some 15 years, the proposed changes will create greater problems and inefficiencies, than our present system that is working properly.

Sincerely,

Richard A. Hricik

June 5, 2008

**VIA FACSIMILE (803) 799-1041**

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, South Carolina 29211

RE: Proposed amendments to Rule 5 of the South Carolina Rules of Criminal Procedure, Rules 16 and 26 of the South Carolina Rules of Civil Procedure, and Rules 701, 702, and 703 of the South Carolina Rules of Evidence.

Dear Mr. Shearouse:

I oppose the proposed amendments to Rule 5 of the South Carolina Rules of Criminal Procedure, Rules 16 and 26 of the South Carolina Rules of Civil Procedure, and Rules 701, 702, and 703 of the South Carolina Rules of Evidence.

Very truly yours,
**Smith & Griffith, LLP**

John P. Griffith

JPG/rkl

June 16, 2008

The Honorable Daniel E. Shearouse
Clerk Of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Dear Mr. Shearouse:

Thank you for the invitation to submit written comments concerning the proposed modifications and amendments to Rule 5 of the South Carolina Rules of Criminal Procedure, Rule 16 and 26 of South Carolina Rules of Civil Procedure, and Rule 701, 702 and 703 of the South Carolina Rules of Evidence. Having had an opportunity to review the proposed changes to these rules, I must respectfully submit to the court that such changes are not needed. First and foremost, I believe that the proposed changes being contemplated by the court would throw up many new hurdles in the way of litigants in order to get their cases resolved in court. As a practicing Plaintiff's lawyer for 26 years, I can only say that the rules of court have become more complicated and more cumbersome, and also, more expensive and time consuming to apply than when I first began the practice of law. I believe that many of the new rules which seek to address the admissibility of expert testimony and under what circumstances expert testimony will be admitted in court are already dealt with fairly and adequately under our existing rules of court, including the wide discretion of the trial judge to either admit or exclude expert testimony based upon existing case law, including *State v. Counsel* and the *Jones test*.

Furthermore, I believe that requiring an expert to prepare a report in every case is unnecessary, unduly burdensome, and will be more expensive than it should be in many cases, including many small personal injury cases, family court cases and others. An expert's deposition is almost always taken, and defendants and plaintiffs can fully discover what an expert's testimony will be.

The current existing rules and case law allow an expert's testimony to be admitted or not based upon whether or not a judge believes the testimony is reliable under *State v. Counsel* and the *Jones test*. These motions are regularly being brought, and ruled upon by the learned trial judges of this State. Moreover, vigorous cross-examination and motions to exclude expert testimony based upon its unreliability are the most appropriate ways to deal with an expert whose testimony may be suspect. Throwing up additional hurdles and expense to ordinary citizens is unfair, especially when large insurance companies and corporations can afford these expenses more readily than ordinary citizens.

For all of these reasons, I respectfully submit that the court should leave in place the existing rules, which are more than adequate to deal with the admissibility of expert's testimony.

Respectfully submitted,

Frederick I. Hall, III

FIH,III/ps

June 10, 2008

**Hand Delivered**

The Honorable Daniel E. Shearhouse
Clerk of the Supreme Court of South Carolina
1231 Gervais Street
Columbia, South Carolina 29201

Re: Proposed Amendments to South Carolina Rules of Evidence, Rules of Criminal Procedure, and Rules of Civil Procedure

Dear Mr. Shearhouse:

On behalf of the South Carolina Attorney General's Office ("SCAG's office"), I'm writing in opposition to the proposed amendments to the Rules of Evidence and Rules of Criminal Procedure. This office is not taking a position on the proposed changes to the Rules of Civil Procedure.

The SCAG's office objects to the proposed changes to Rule 5 of the South Carolina Rules of Criminal Procedure. This office has cases that require our lawyers to travel extensively across the state. As the Prosecution Coordination Commission has pointed out this rule change will likely increase the number and length of these hearings. Increasing the number of pre-trial hearings our attorney's travel to would put a great financial burden on this office in attorney time, mileage expenses and per diem. If our attorneys are spending more time preparing for, traveling to and attending pre-trial hearings they will not be available to try other cases. This will create a greater backlog in the court system.

Additionally, we concur with the Prosecution Coordination Commission's comments on the proposed change to Rule 5 of the South Carolina Rules of Criminal Procedure.

Based on the foregoing, we would ask the Court not to make any changes to Rule 5.

Sincerely,

Bryan P. Stirling
Deputy Attorney General

BS/ac

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June 16, 2008

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, South Carolina 29211

RE: Proposed amendments to Rule 5 of the South Carolina Rules of Criminal Procedure, Rules 16 and 26 of the South Carolina Rules of Civil Procedure, and Rules 701, 702, and 703 of the South Carolina Rules of Evidence.

Dear Mr. Shearouse:

As you are probably aware, my law firm represents many South Carolinians who have been the victims of products liability, pharmaceutical, medical malpractice, and other personal injuries. We have represented South Carolinians for years and many of these cases require expert testimony in order to bring these cases to successful resolution.

As you are aware, our firm also represents many clients from across the country. One of the reasons my firm is located in South Carolina is because we are proud of the South Carolina judicial system, and proud of the way South Carolina treats its citizens. Our justice system works and we are a great example for the rest of the country. South Carolina is representative of a fair justice system which allows business and entrepreneurship to thrive, and balances the rights of its citizens. In 2006, the "Small Business and Entrepreneurship Council" ranked South Carolina eleventh among entrepreneur-friendly states, ahead of neighboring states and obviously many others.

The South Carolina judicial system works well now, and although the legislature has recently been interested in tort reform and creating legislation to change the rules referenced above, we are convinced that we are more at ease that the legislature is willing to leave the decision making up to the court, which cannot be swayed by political public opinions of the day.

Clearly, this is a system that is not broken and does not need fixing. Groups which testified and spoke openly in the legislature include the South Carolina Attorney General, South Carolina solicitors, criminal defense lawyers, small business groups, and firms which represent South Carolina citizens.

The proposed rule changes as currently written will serve an incredible disadvantage to parties seeking relief. Plaintiffs may be left without experts on the eve before trial, with their cases dismissed, especially within the months that follow right after changing of the rules when the courts are responding to the rule changes.

Not only may Plaintiffs be prejudiced, but also litigation will become more time-consuming, delayed, and more expensive. The proposed changes will require a new set of hearings before the merits of the case are heard. The effect will be backlog of cases going to trial, more appeals, and thus more court time resulting in increased expense. Courts which will be affected no doubt will include family court cases, property and business valuation cases, equitable appointment cases, divorces, abuse and neglect cases, custody and adoption cases, probate cases, and personal injury cased. Cases where a treating physician or police officer offers testimony will be affected. Environmental contamination cases, small business disputes involving testimony of accountants or economists, and all construction disputes often involving mechanic's lien cases and contract cases will also be affected.

Under the Rules of Court today, South Carolina prevents unreliable testimony or "junk science." There is not a problem with the admission of expert evidence in South Carolina. Today, when determining whether the underlying science of an expert's testimony is reliable, the court already looks at important factors including publication and peer review techniques, prior application of method to the type of evidence involved in the case, quality control procedures to ensure reliability, and consistency of method with recognized scientific laws and procedures. The system

we have in place today provides predictability and certainty that the politically motivated groups say we need. Creating a new system that is untested is inherently unpredictable.

If there were a problem in the courts and South Carolina were suffering, then we would be working to try to institute change, but that does not appear to be the case today. In running one of the largest law firms in the state, one of my mottoes is, "if it's not broken, we don't try to fix it." Clearly, this is the case in South Carolina with the proposed rule changes, and I implore upon you to not take the rights of people and business to have juries decide their disputes in favor of an appointed or elected judge deciding the matter on collateral issues by adopting the rules as proposed.

If you have any questions or concerns, or if I may be of any assistance to you, please feel free to call on me.

Sincerely,

Joseph F. Rice

JFR:mhb
P:\FACT1\All\Jrice\Misc\Correspondence\Shearhouse1.doc

June 9, 2008

Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

Re: Proposed rules changes

Dear Members of the Supreme Court:

The purpose of my letter is to inform you regarding my strong opposition to the proposed amendments to the Rules of Civil Procedure regarding expert witness testimony. I have practiced law in South Carolina for twenty (20) years. I have represented both plaintiffs and defendants in courts all over South Carolina. I believe our Circuit Court Judges do an excellent job in preventing unreliable testimony. In my experience, unqualified experts are not allowed to testify at trial. Further, the Appellate Court system adds a layer of security should an unqualified expert be allowed to testify.

I strongly believe that the proposed rules changes are being advocated by supporters of tort reform. Medical negligence is my primary area of focus. The perception that there are numerous frivolous lawsuits against doctors is a myth. It is also a myth that doctors are leaving South Carolina in large numbers to practice medicine in other states. The number of physicians has increased steadily over the last twenty (20) years.

I also strongly believe that the proposed rule changes will have a chilling effect on a plaintiff's right to a jury trial. It will make litigation more expensive, complex and time consuming. The proposed rule changes will further burden the plaintiff in all types of cases and make the playing field far from even.

In summary, I believe our current system is excellent and has the appropriate safeguards in place. Thank you for your consideration of my letter.

Yours very truly,

Marion S. Fowler, III, M.D., J.D.

MSFIII/lwg

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June 5, 2008

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, South Carolina 29211

RE: Proposed amendments to Rule 5 of the South Carolina Rules of Criminal Procedure, Rules 16 and 26 of the South Carolina Rules of Civil Procedure, and Rules 701, 702, and 703 of the South Carolina Rules of Evidence.

Dear Mr. Shearouse:

Our court system is charged with seeking out the truth and rendering justice. The proposed amendments to our rules of civil procedure, criminal procedure and evidence will greatly inhibit the noble purposes for which the system was founded.

Before our Supreme Court makes major changes in our rules of civil procedure and evidence I think it is important that the justices ask the question, "who thinks that we need significant changes to our rules as they presently exist?" I can tell you that such a move is not being spearheaded by the civil plaintiff's or defense bar, the 16 circuit solicitors, the criminal defense bar, or the judges who regularly interpret and apply these rules. I think if you look hard enough you will find that this move is being championed by those people who do not work in our judicial system and who do not understand our great state and the reality of its business climate.

The Rules of Civil Procedure, Criminal Procedure and Evidence as they now exist are effective and supported by well-settled case law. We do not need change just for change's sake, particularly when it brings with it uncertainty as to the interpretation of these proposed rules.

The small business owner or the individual who calls upon our court system for the redress of a wrong begins the process at a disadvantage when confronting a well-heeled corporation or the government in court. These proposed rule changes will have the real-world effect of further disenfranchising the people who most need the courts to seek out the truth and render justice. During my legal career I have represented plaintiffs and defendants in civil matters ranging from adoptions to zoning disputes. I have tried

criminal cases ranging from traffic offenses to murder. No substantive case in Family Court, Probate Court, the Court of Common Pleas, the Court of General Sessions, or those before the Workers' Compensation Commission and other administrative bodies will be exempt from the burden of added time and expense in having to deal with the expert qualification issues these proposed changes would mandate. Our current rules coupled with the common sense of our judges and the South Carolinians who sit on our juries are quite adequate to insure that our courts are not flooded with "junk science". Judges now must follow a well-established protocol to determine if the underlying science of an expert's testimony is reliable. Why would we want to trade that for a system that is untried, unpredictable and thereby likely unreliable?

I urge the Court to maintain the status quo as being in the best interest of all South Carolinians. As the old saying goes, "if it ain't broke, don't fix it."

Thank you for your consideration of this most serious matter.

Sincerely,

*Fletcher M. Johnson, Jr.*

Fletcher M. Johnson, Jr.

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Robert M. Turkewitz

June 6, 2008

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, South Carolina 29211

Re: Proposed Amendments to Expert Evidence Rules

Dear Mr. Shearouse:

As trial lawyers who actively practice in both federal and state court, we are writing in opposition to the proposed amendments to the South Carolina Rules of Civil Procedure, Rules 16 and 26; South Carolina Rules of Criminal Procedure, Rule 5; and South Carolina Rules of Evidence, Rules 701, 702, and 703. The proposed amendments will not substantively alter what expert testimony is allowed in court but they will increase the costs of litigation and create redundancy that will consume valuable court time.

Initially, anyone who believes South Carolina lacks uniformity in evidentiary and procedural standards is not familiar with our current system. All state trial courts uniformly apply the standards of Rule 702, SCRCP, as well as the judicial precedent interpreting that rule, to expert testimony. Before admitting expert evidence, a trial judge in Charleston will evaluate the same list of objective criteria as a trial judge in Greenville.[1] The proposed alterations do not *create* uniform standards—they merely *change* the substance of the uniform standards. As a result, no new predictability or certainty about admissibility would be created.

As a practical matter, the adoption of the proposed amendments will also not alter whether experts will be allowed to testify. That is because our current procedural standard is already "designed to prevent the fact finders from being misled by the aura of infallibility surrounding unproven scientific methods." *See State v. Morgan*, 326 S.C. 503, 485 S.E.2d 112

[1] For example, (1) The publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures. *See State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999).

(Ct. App. 1997). Our courts have time and again recognized that the goal of the proposed amendments has already been accomplished under our current standards. We would ask proponents of the amendments to identify one reported case in South Carolina that would have come to a different conclusion about the admissibility of expert testimony under the proposed rules as opposed to our current system. We are not aware of any.

We oppose these proposed amendments because they place undue procedural expenses upon our court system as well as the accident victims we represent. In a lawsuit, the plaintiff, defendant, and court system have many divergent objectives. The proposed changes will benefit one side (the defendants) by adding significant expenses to litigation for the other side (the injured) while consuming the valuable court time of our judges. In the letters submitted to the Court to date, it would appear that not one plaintiff's trial lawyer has written in support of the amendments while at the same time not one civil defense trial lawyer has written in opposition. Any fair amendment would expect mixed support.

The following typical example of our current process as opposed to the proposed process is illustrative of the shift in burdens and costs. Our firm has had the opportunity to litigate on behalf of persons injured in accidents caused by 18-wheel tractor trailers in both state and federal court. This type of litigation routinely involves a variety of expert testimony. In either court system, the plaintiff begins the case by hiring an accident re-constructionist to determine how the wreck occurred and establish who was at fault. If it is determined that the tractor trailer caused the collision, litigation is commenced and discovery is conducted in part to determine if the violation of any state or federal regulation contributed to the accident (for example, an expert would be needed to address a trucker driving in excess of the federal limits on hours of service). Also, if the victim has permanent injuries that will require lifelong treatment, a life care planner is hired to put together a life care plan outlining the plaintiff's future care needs. Finally, an economist is hired to calculate the present value of the life care plan as well as whatever other financial loss, such as earnings, may have occurred.

Under our current state rules, the plaintiff will bear the cost of paying each of these experts to be prepared for trial. A defendant is entitled to serve discovery to determine the support for the experts' opinion. After getting discovery, should the trucking company desire to depose any of these experts, the defendant bears the cost of paying the expert to appear for a deposition. When the trial date arrives, the plaintiff pays the experts to appear. The defendant then has the opportunity object to the expert's testimony, and the trial judge rules on the expert's admissibility using the already-existing uniform criteria we discussed above.

Under Proposed Rule 16(d), in addition to paying for the expert to be prepared for and appear at trial, a plaintiff will have to pay an expert to attend a separate hearing well before trial at which time the defendant will have a second opportunity for cross-examination. Additionally, defendants will be able to shift the burden of deposition costs to plaintiffs in the guise of a Rule 16(d) hearing. In many cases, rather than paying for a deposition, a defendant can demand a Rule 16(d) hearing and thereby get a free opportunity to cross-examine the plaintiff's expert on the record on the court's valuable time. For example, experts such as economists that calculate lost earnings (who are rarely deposed by defendants when they perform routine basic

calculations) can be challenged and the plaintiff will have to pay to have the economist come to testify at a hearing. Treating physicians such as emergency room doctors are regularly given priority during a trial so as to accommodate our medical professionals. With a proposed Rule 16(d) hearing date, such flexibility will not exist. It is difficult enough to time a trial so that a physician can attend. Yet under the proposed amendments, a defendant will be able challenge a doctor's qualifications or opinions and create the additional burden on the plaintiff of risking the loss of critical testimony because a medical professional may not be able to leave work to attend a hearing at a specific time and date, possibly in a county far away.

Our judges will also be unduly burdened. Because our state system differs from the federal system which assigns a case from beginning to end to the same judge, rotating state judges unfamiliar with a case will have to spend time educating themselves about a case for these Rule 16(d) hearings. Months later at trial, a different judge will have to become fully informed about the case. Furthermore, there are no safeguards to deter a party from renewing a motion to exclude an expert and explain why the prior judge purportedly erred. The defendant will be able to modify its position in response to the prior judge's ruling as a second bite at the apple. Counsel can also attempt to convince the judge the expert should be excluded for previously unaddressed reasons. Furthermore, unlike the federal court system, our state civil procedure rules also do not require briefing to be made prior to a hearing. An attorney attempting to defend his expert against challenge will not have the right to know why an expert is being challenged prior to the hearing.

It is important to note that in the real world the burdens of such hearings do not fall equally on plaintiffs and defendants. Since plaintiffs carry the evidentiary burden, defendants do not have to offer their own life care planners or economists. Such experts can be effectively cross-examined by defense counsel without the necessity of hiring their own experts. Also, a defendant rarely will have the myriad of medical experts many seriously injured victims have to put forth. Again, it is not a coincidence that the comments to date from the plaintiff's bar have objected to these amendments while those on the other side have offered support.

Having read the letters posted already on the Court's website, we would also like to point out a recurring erroneous argument made by those in favor of the rule changes. **The proposed amendments will not make South Carolina more attractive to manufacturing businesses that fear product liability lawsuits**. That is because the law of the state where an injury occurs – not the state where the product was manufactured – controls in such lawsuits. For example, if BMW in Greenville produced a car that injured a man in Michigan, then BMW is going to be sued in Michigan with Michigan court rules applying. Conversely, if Ford designs and builds a car in Detroit that is responsible for an injury in South Carolina, then the suit against Ford would be in our court system with our civil procedure rules applying. Since the proposed rules are biased against injured persons, the proposed rules would actually increase the costs of litigation to our courts and fellow citizens for the benefit of foreign defendants, while offering no increase in the attractiveness of our state to commerce.

Our South Carolina judges have not been allowing "junk science" into our court rooms. Arguing otherwise in support of these amendments should be offensive to our judiciary. We again ask the proponents of the amendments to point to one example of "junk science" in a South Carolina reported case. Our current standards provide clear and uniform guidance on the

admittance of reliable expert testimony. The only real impact of the proposed amendments would be to increase the costs of litigation for plaintiffs while occupying significant court time with motions that will be reheard later at trial. The proposed amendments should not be adopted.

Respectfully,

Terry Richardson

Dan Haltiwanger

# LAW OFFICES OF LEE & SMITH, P.A.

Michael R. Lee (✣ † )
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June 16, 2008

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

**RE: Proposed amendments to Rule 5 of the South Carolina Rules of Criminal Procedure, Rules 16 and 26 of the South Carolina Rules of Civil Procedure, and Rules 701, 702, and 703 of the South Carolina Rules of Evidence**

Dear Mr. Shearouse:

I would like to express my strong opposition to the proposed rule changes referenced above. South Carolina currently has a very predictable and reliable method of determining whether expert testimony has merit. South Carolina judges apply the Council/Jones test which provides sufficient guidance to trial courts and litigants concerning the admission of expert evidence.

The proposed rule changes require an expert giving testimony in any case to provide a written report and be subject to extensive and time consuming challenges regardless of his or her qualifications or experience as an expert in other court proceedings. This requirement becomes particularly onerous in small cases. A simple personal injury case could end up costing the plaintiff much more in expert witness fees and expenses than could ever be recovered in the case. Some states, such as North Carolina, allow for the recovery of attorneys' fees and expert witness fees in smaller cases; however, South Carolina does not have any such provisions. The proposed amendments would make it virtually impossible for a plaintiff to bring a small personal injury lawsuit and recovery anything after payment of attorneys' fees and expert witness fees. Additionally, the rule changes would create a whole new set of hearings on qualifications of the experts before the actual merits of someone's case could be heard. This will make litigation more time consuming and delayed.

Proponents of the new rules changes claim that the changes are needed in order to allow South Carolina to compete with other more "business-friendly states." However, only 10

states in the country have adopted Daubert or Kuhmo Tire rules in their entirety, and the majority of states addressing the issue either limit its application or reject it outright.

There is simply not a problem with South Carolina's current method of admitting expert testimony. The proposed amendments referenced above are unnecessary and would lead to excessive litigation and delay for litigants. I strongly urge the court to reject these proposed amendments.

Very truly yours,

**LAW OFFICES OF LEE & SMITH, P.A.**

Scott A. Beckey, Esquire
SAB/bt

June 10, 2008

Honorable Daniel E. Shearouse
Clerk
Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

RE: Request for Written Comments
Amendments to Rule 5, SCRCrimP, Rules 16 and 26, SCRCP
and Rules 701, 702, and 703, SCRE under Consideration

Dear Mr. Shearouse:

In response to the Court's request of March 20, 2008, for written comments regarding amendments the Court is considering in relation to the above-stated rules, I write in opposition to these amendments. It is my opinion that the amendments are unnecessary based upon the current rules of procedure and expert standards articulated in our case law. It is also my opinion that the proposed changes will have a severe detrimental effect on certain types of cases and will negatively impact the party with the burden of proof without regard to the merits. In short, access to justice may be denied solely based upon economic considerations that are an unintended consequence of these amendments. Additionally, the proposed changes create a formality in the criminal courts that I believe will increase the costs to the State that will ultimately be passed on to its citizen's in increased taxes or loss of services in other areas.

It is my opinion that applying the substance of the expert requirements of federal courts which primarily deal with fewer cases, both civil and criminal, and civil cases of larger values[1], on our system that must accommodate large and small civil claims as well as will contests, divorces, juvenile matters and land disputes, will create economic barriers that may impair access to justice by many citizens of this State. The economies of scale alone may allow these amendments to be used not as a shield to protect our courts from less than credible expert testimony, but as a sword to prevent or disadvantage persons, looking to our court system to right a wrong.

Many members of our Bar have or are providing comments on the proposed amendments. To avoid unneeded duplication I make reference to the letter of today's

[1] Cases removed on the basis of diversity must meet a threshold of an amount in controversy greater than $75,000.00. 28 U.S.C. §1332.

date by John Nichols, Esquire for a detailed analysis of our current law and the proposed amendments.

I urge the Court to refrain from implementing the rules changes under consideration because these rules have the potential to make all cases involving an expert witness more costly and complex, resulting in a potential economic barrier to justice.

Sincerely,

Carl L. Solomon

SOUTH CAROLINA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

June 8, 2008

The Honorable Daniel E. Shearouse
The South Carolina Supreme Court
P.O. Box 11330
Columbia, South Carolina 29211

Re: Public Comment – Proposed Changes to Rule 5, SCRCrimP and Rules 701, 702, and 703, SCRE

The South Carolina Association of Criminal defense Lawyers (SCACDL) opposes the proposed changes to Rule 5, SCRCrimP and Rules 701, 702, and 703, SCRE. Please allow me to elaborate.

First, the new Rule 703 would adopt Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). Adherence to State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979) has served South Carolina well. Abandoning Jones and adopting Daubert has the potential of creating time consuming and potentially costly litigation.

Second, the new Rule 5 gives the trial judge discretion to hold a pre-trial hearing "to determine whether a witness qualifies as an expert and whether the expert's testimony satisfies the requirements of Rules 702, 703 and 704, SCRE." The new Rule 16(d), SCRCP contemplates this hearing to take place well before the actual trial, and it assumes that the new Rule 5 contemplates a similar procedure. Because of current practice in General Sessions Court, including Solicitor Control of the docket, there currently is not a procedure for conducting this pre-trial hearing.

Third, SCACDL is concerned that prosecutors could use the new Rule 5(h) as a tool to discover defense evidence and strategy prior to trial. Allowing the State discovery in this manner would be a huge departure from the limited discovery provided to the State under the current Rule 5.

Fourth, the new provisions would apply in Magistrate and Municipal Courts. The additional time needed to conduct the pre-trial hearings would further delay the already overburdened dockets in these courts. The impact in DUI cases alone could be enormous.

Finally, SCACDL is concerned about the impact of the new rules in capital cases. In addition to prosecutors using the new Rule 5(h) as a tool to discover defense evidence

including mitigation evidence, the new Rule 703 would severely limit a capital defendant's right to present mitigation evidence if the facts and data relied upon by the experts are not disclosed to the jurors. In particular, the new rule could hinder a capital defendant's ability to use expert testimony to present social history evidence which is expected by the ABA Guidelines for Capital Defense and Wiggins v. Smith, 539 U.S. 510 (2003).

SCACDL, accordingly, urges the Supreme Court not to adopt the proposed changes to Rule 5, SCRCrimP and Rules 701, 702, and 704, SCRE.

With kindest regards I remain,

Very truly yours,

Leland B. Greeley
President

June 5, 2008

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, South Carolina 29211

RE: Proposed amendments to Rule 5 of the South Carolina Rules of Criminal Procedure, Rules 16 and 26 of the South Carolina Rules of Civil Procedure, and Rules 701, 702, and 703 of the South Carolina Rules of Evidence.

Dear Mr. Shearouse:

I have read and reviewed the above proposed amendments and wish to express my opposition to their adoption.

I have practiced law for over 25 years. I am unaware of any problem with the system we have now regarding experts and their method of qualification. The proposed rule changes add another level of complexity to the already complex business of representing people injured through no fault of their own. The proposed rule changes will mean thousands more billable hours by defense attorneys in motions, hearings, and challenges, which will ultimately be bourn by the Defendant client, business, or the insurance company funding the litigation.

I understand that proponents of this rule are largely big business interests and insurance companies that want to make it as difficult as possible to bring a claim for legitimate injuries and claims in South Carolina. We are already a business friendly state, and new businesses are opening and arriving on a daily basis, unimpaired by any rules regarding expert witnesses, so far as I can tell.

Access to our court system – justice - seems to be getting harder and harder for the average person every day. **We should not make our court system harder to access, nor should we make our litigation process more complicated and expensive than it is already.** Please note my comment AGAINST the proposed rule changes.

Yours very truly,

Dennis H. Smith

June 9, 2008

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, South Carolina 29211

RE: Proposed Amendments to Rule 5 of the South Carolina Rules of Criminal Procedure, Rules 16 and 26 of the South Carolina Rules of Civil Procedure, and Rules 701, 702, and 703 of the South Carolina Rules of Civil Evidence

Dear Mr. Shearouse:

I am writing to voice my opposition to proposed amendments to the South Carolina Rules of Civil Procedure which relate to new rules regarding expert testimony.

I believe that South Carolina has well settled law and effective existing rules and case law that more than assure that any scientific testimony presented to courts is adequate. All of our lawyers and judges are very familiar with these rules and case law as they exist and it is my opinion we do not need new rules and laws which will most certainly be subject to uncertainty and take many years before everyone understands them to the extent the current rules are now understood.

It is my opinion this new set of rules is nothing more than disguised "tort reform" fostered upon the court system by the business community under the veil of trying to make South Carolina more business friendly.

It is my understanding that the Attorney General of South Carolina, solicitors, the criminal defense lawyers and all small business groups are opposed to these changes.

I have been practicing for 41 years and have seen many changes over that course of time. A lot of these changes, while for the good, have made litigation more time consuming and delayed. These proposed changes, if enacted, will further delay the implementation of justice in not only personal injury cases but business cases where the litigants need to have their matters resolved. I would respectfully request that the Court not implement these proposed rules.

Respectfully submitted,

James R. Gilreath

June 10, 2008

Honorable Daniel E. Shearouse
Clerk
Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

RE: Request for Written Comments
Amendments to Rule 5, SCRCrimP, Rules 16 and 26, SCRCP
and Rules 701, 702, and 703, SCRE under Consideration

Dear Mr. Shearouse:

In response to the Court's request of March 20, 2008, for written comments regarding amendments the Court is considering in relation to the above-stated rules, I write in opposition to these amendments. They are unnecessary, burdensome, and will result in unneeded increased costs in even the most ordinary of cases. They will also result in a loss of court access by those who are unable to afford these increased costs, and whose cases may not justify the added expense these rules will foster. Finally, despite assertions to the contrary, the proposed amendments are not even-handed, and will impact the party with the burden of proof more drastically than the party who is defending the issue that is the subject of expert testimony.

Also, please consider this letter a notification to you of my intent to speak at the public hearing on July 9, 2008.

By way of background, I have been a member in good standing with the South Carolina Bar since November 1985. Since 1993, I have co-authored with the Honorable Alex M. Sanders and the Honorable Deborah Neese *The Trial Handbook for South Carolina Lawyers* currently published by Thomson West Publishing Company. I have also authored several other publications through the South Carolina Bar and have spoken at a number of seminars sponsored by the Bar and several other organizations affiliated with the practice of law. I am a past president of the South Carolina Chapter of the Federal Bar Association, and am currently the president of the South Carolina Association for Justice, formerly known as SCTLA. I write to you, however, as a private practitioner who is involved with the South Carolina state trial and appellate judiciary on a regular basis, and as a person who is concerned that the courts of this state remain accessible to all litigants.

**The Changes Under Consideration are Unnecessary**

The changes the Court is considering are unnecessary. Apart from baseless stories reported by the Chamber of Commerce and its proponents, there has been no widespread call for any radical overhaul of the rules governing expert witnesses in South Carolina state courts. The very few reported appellate decisions in the last nine (9) years demonstrate that South Carolina trial judges are not having any specific difficulty applying the analysis this Court set forth in *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999) (adhering to *State v. Jones*, 273 S.C. 723, 259 S.E.2d 120 (1979)). *See*, *e.g.*, *State v. Ramsey*, 345 S.C. 607, 550 S.E.2d 294 (2001) (affirming the trial court's decision to admit DNA evidence under the "*Council/Jones*" analysis); *State v. White*, 372 S.C. 364, 642 S.E.2d 607 (Ct. App. 2007) (affirming the trial court's decision to admit "dog tracking" evidence under the "*Council/Jones*" analysis).

This Court has repeatedly adhered to the *Council/Jones* test, which includes the Court's requirement that judges in South Carolina are to apply the analysis in their roles as gatekeepers. *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 658 S.E.2d 80 (2008) (the Court noted its jurisprudence emphasizes the role of the trial court as the gatekeeper in determining both the qualifications of an expert and whether the expert's testimony will assist the trier of fact); *Wilson v. Rivers*, 357 S.C. 447, 593 S.E.2d 603 (2004), note 5

(Court noted that even though a witness may be an expert in biomechanics, the trial judge still must address the question of whether the underlying science of biomechanics is reliable to determine what injuries could have been caused by a particular accident); *State v. Jones*, 343 S.C. 562, 541 S.E.2d 813 (2001) (Court held "barefoot insole impression" evidence insufficient to meet the *Council/Jones* requirements that: (1) the technique be published and peer-reviewed; (2) the method has been applied to this type evidence; and (3) the method be consistent with recognized scientific laws and proceedings); *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 331-332, 534 S.E.2d 672, 677-678 (2000) (Court noted that equating a repressed memory to merely "forgetting" ignores advances in the understanding of the human mind, and although "it is not a precise science and many matters cannot be determined, for example, with the certainty of an engineering problem or mathematical equation in a products liability lawsuit ... the same can be said about many cases involving a 'battle of experts,' which is why courts and legislatures have developed rules of evidence and principles regarding the admissibility of scientific and technical testimony"); *State v. Mahoney*, 344 S.C. 85, 544 S.E.2d 30 (2001) (affirming trial court's exclusion of polygraph evidence where the proponent did not present evidence that would have met the *Council/Jones* test); *State v. Frazier*, 357 S.C. 161, 592 S.E.2d 621 (2004) (Court held trial court should have admitted testimony based upon "Photo Lineup Study" conducted at Wofford College proffered to impeach the reliability of the identification procedure used by officers).

The rule changes being considered, like the legislation the Chamber pursued in the General Assembly during the 2007-2008 legislative session, are largely solutions in search of a problem that simply does not exist in South Carolina. These changes are not needed.

## The Specific Changes Under Consideration Will Result in Unnecessary Costs to the System

Each change this Court is considering will increase costs to the system, both for the judiciary and the parties before the courts. Pursuant to Rule 81,

SCRCP, the changes under consideration would apply in family court (*see also* Rule 2(a), SCRFC), probate court and magistrate's court (insofar as they are not inconsistent with the statutes and rules governing those courts). The changes to the SCRCP would also apply to Post-Conviction Relief (PCR) and Sexually Violent Predator (SVP) cases as those matters are within the circuit court's civil jurisdiction. Rule 81, SCRCP. The Court should consider the increased economic impact at every level of the judiciary that would arise from the adoption of these changes.

I shall address each proposed change *seriatim*:

**A. Rule 16(d), SCRCP**

The change to Rule 16(d) would <u>mandate</u> a pretrial hearing upon motion of a party. This change is both unnecessary and very costly, and will require considerable additional court time.

Currently under Rule 16(a), SCRCP, a trial judge may, in his or her discretion, hold the very pretrial hearing the change would make mandatory. The trial judge may use the Rule 16(a) hearing to (a)(1) simplify issues, (a)(4) limit the number of experts, (a)(7) dispose of pending motions, or (a)(8) consider "such other matters as may aid in the disposition of the action." Under this framework, the trial judge may use his or her discretion to decide whether a pretrial Rule 702-703, SCRE, hearing is advisable where requested by a party. The change under consideration, however, removes this discretion and requires the hearing.

Furthermore, the change will require that the party with the burden of proof be prepared to pay an expert for additional preparation time and numerous court appearances. For instance, if an issue before a family court involves the valuation of a business for which a CPA is needed, the change to Rule 16(d) would require the family court to schedule extra court time for the pretrial hearing on a challenge to the CPA's qualifications, methodologies, and results in advance of trial. Furthermore, each party would incur the additional expense of paying the expert for the time to prepare for the hearing and the

time for appearing before the court on this narrow issue. These expenses would be incurred a second time when the expert is brought to trial (assuming the expert survives the initial challenge).

If expert testimony is proffered in a child abuse or neglect case, the State will have to make some provision for additional funds to pay its experts for this hearing preparation and appearance, and to assist indigents who must be allowed to present counter expert evidence in defense of the claims by the Department of Social Services. Each party will incur the added significant expense of this pretrial hearing.

Small businesses or individuals that are in litigation over matters such as mechanics' liens, construction defects, or even dissolution disputes will find the added expense of an additional pretrial hearing overly burdensome and, at times, preclusive of just claims. *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 658 S.E.2d 80 (2008) (use of experts in stucco litigation).

Landowners and governmental entities involved in condemnation cases routinely use expert witnesses regarding valuation of the property being taken by the government. This extra level of hearings will add significant and unnecessary costs to these mostly routine cases. *E.g.*, *Burroughs & Chapin Co., Inc. v. South Carolina Dept. of Transp.*, 352 S.C. 535, 574 S.E.2d 751 (Ct. App. 2002) (use of experts to value timber in condemnation case); *South Carolina Dept. of Transp. v. Richardson*, 335 S.C. 278, 516 S.E.2d 3 (Ct. App. 1999) (use of expert to value property being condemned); *Ravan v. Greenville County*, 315 S.C. 447, 434 S.E.2d 296 (Ct. App. 1993) (use of expert toxicologist in inverse condemnation case); *Hamilton v. Martin*, 270 S.C. 223, 241 S.E.2d 569 (1978) (use of expert to assess fair rental value for purposes of dividing payment for condemnation).

Litigants who find themselves in disputes over competency or other matters heard in probate court will see the increased costs hamper their ability to present expert evidence on those matters. Valuation and competency questions often arise before the probate court, and this rule change would require an additional pretrial hearing as to expert evidence proffered by each

side to the dispute. *See*, *e.g.*, *In re Campbell*, 367 S.C. 209, 625 S.E.2d 233 (Ct. App. 2006) (noting S.C. Code Ann. § 62-5-407(b) requires appointment of a disinterested physician to give expert opinions regarding appointment of conservator for allegedly incompetent adult); *Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 578 S.E.2d 329 (2003) (expert opinion related to mental capacity may be considered on the issue of undue influence); *Rembert v. Gressette*, 318 S.C. 519, 458 S.E.2d 552 (Ct. App. 1995) (expert evidence from attorney and CPA used to evaluate trust for accounting purposes); *Cartee v. Lesley*, 286 S.C. 249, 333 S.E.2d 341 (Ct. App. 1985) (court admitted expert testimony relative to rental value of property owned by estate).

In an SVP case, both the State and the defendant whose freedom is at issue (and who must be provided an adequate defense) will bring their "battle of the experts" before the court twice: Once in this pretrial hearing, and the second time at trial. The costs associated therewith will have to borne by the taxpayers of this State. *E.g.*, *Care and Treatment of Beaver v. State*, 372 S.C. 272, 642 S.E.2d 578 (2007) (qualified expert necessary to evaluate whether defendant is a sexually violent predator).

In a PCR case, particularly where a *White v. State* review is had, the State and the applicant may face additional expenses where the matter before the court involves some issue over expert evidence presented at the trial (*e.g.* blood-spatter evidence, DNA, ballistics, fingerprinting). <u>*See*</u> *Von Dohlen v. State*, 360 S.C. 598, 602 S.E.2d 738 (2004) (issue of competency in death penalty trial).

In a personal injury case, a physician who offers expert causation evidence will have to make himself or herself available to appear at the pretrial hearing and again at trial. *E.g.*, *Campbell v. Paschal*, 290 S.C. 1, 347 S.E.2d 892 (Ct. App. 1986) (physician practiced at a military hospital, was plaintiff's orthopedic surgeon, and participated in over a hundred medical board reviews for injured Marines; this experience, plus physician's medical expertise and training as a physician treating military personnel, qualified him to give an opinion as to the probability of plaintiff's discharge from miliary service);

*Daniels v. Bernard*, 270 S.C. 51, 240 S.E.2d 518 (1978) (chiropractor admitted to testify as to future consequences of injury).

These examples may appear extreme, but they are in fact possible in the everyday routine of the courts of this State. The bottom line is that this mandatory pretrial hearing pursuant to the change in Rule 16(d) will have the effect of chilling valid claims or defenses in matters brought by private litigants as well as the State of South Carolina. At times it is difficult enough to persuade an expert to appear in court once, much less twice.

### B. Rule 26(b), SCRCP

The change in Rule 26(b)(4)(C), SCRCP, would require a party to disclose to other parties the identity of all persons to be used as experts at trial. This is redundant to the current requirement of Rule 33(b)(6), SCRCP, which is a standard interrogatory available in all cases.

The change under consideration for Rule 26(b)(4)(C) then mandates that each expert prepare a written report in advance of trial. Again, the same considerations adhere to this requirement as those that apply to the pretrial hearing requirement under Rule 16, discussed above. In every example set forth above, the litigants will experience the additional expense of paying the expert to prepare the report set forth in the amended rule. The requirement that rebuttal reports be submitted within thirty (30) days of the initial report will cause parties to incur the added expense of paying the expert to expedite that report, or the difficulty of not being able to timely supply such reports.

The changes under consideration also require that the report contain “all exhibits to be used as a summary of or support for the opinions.” This means that parties will have to pay for preparation of trial exhibits at the time the expert prepares the report. Again, this is an added and unnecessary cost in advance of the trial of a case.

Furthermore, this proposal is a radical departure from prior practice before the court of common pleas as well as the probate courts, family courts

and magistrate courts of this State. This change will, in essence, make a "federal case" out of the most routine matter before each of these courts, and could result in unfair preclusion of claims or defenses in each court.

The amendment to Rule 26 (b)(4)(D) permits a deposition of the expert in advance of trial. This is redundant to current Rule 30(a)(1), SCRCP, which allows any party to take the

deposition of any person after the action is commenced, and to the existing Rule 26(b)(4)(C), which requires a party to make an expert available for deposition.

The amendment to Rule 26(b)(4)(D) also creates a rule of exclusion if the expert's testimony is contingent upon the outcome of the case. Again, this exclusionary rule is unnecessary since such an arrangement would be discoverable, and the opposing party could use this fact to impeach the expert's evidence on the grounds of bias. Yet the amendment would prevent a jury from considering the credibility or weight of any of the expert's testimony because the expert's payment is contingent upon the outcome.

C. Rule 5, SCRCrimP

The amendment to Rule 5, SCRCrimP, being considered by the Court permits a trial court to hold a pretrial hearing similar to the changes to Rule 16, SCRCP, under consideration. This amendment is unnecessary and would add significant costs to the criminal justice system.

To begin with, the amended Rule would require a criminal defendant to present a portion of his or her defense in advance of trial. The Fifth Amendment of the United States Constitution provides that a criminal defendant may not be required to offer evidence in his or her defense. Jurisprudence thereunder establishes that a criminal defendant may not be compelled to offer evidence except to meet the burdens under an affirmative defense. This amended rule, however, may require a criminal defendant to identify evidence beyond that which is covered by the existing version of Rule 5(b), SCRCrimP.

Additionally, any experts proffered by the State in its attempt to carry its heavy burden of proof would be subject to the defendant's request for a pre-trial hearing on the expert's qualifications and the reliability of the expert's testimony. While the court of general sessions would have discretion under the rule to hold the hearing or not hold the hearing, the court's failure to do so may impact the criminal defendant's due process rights and right to a fair trial. A cautious trial judge will feel compelled to hold a hearing any time the case involves any issue of scientific or technical matter, including DNA, blood typing, ballistics, fingerprinting, fiber analysis, hair analysis, dog handling, or intoxication.

### D. Rule 701, SCRE

The amendment to Rule 701, SCRE, under consideration does not substantially change the substance of the existing rule. As such, the changes are unnecessary except to clarify the verbiage in the existing rule.

### E. Rule 702, SCRE

The changes to Rule 702, SCRE, under consideration reflect changes Congress adopted in 2000 to the Federal Rules of Evidence. These changes were in response to *Daubert* and *Kumho Tire*, as indicated by the notes to the 2000 Amendments to the FRE.

It is alarming that this Court would incorporate by reference the "comments to the 2000 amendments to the federal rule...." If the Court is referring to the notes following those amendments, those notes are lengthy and reflect adherence to *Daubert*, *Kumho Tire*, *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), and cases from various federal district and appellate courts. This is a vast departure from this Court's previous jurisprudence, discussed above, which joins those jurisdictions who reject the *Daubert*/*Kumho Tire* analysis, and this Court's adoption of the *Council*/*Jones* test.

The changes under consideration bring South Carolina closer to joining those jurisdictions who follow *Daubert* and *Kumho Tire* rather than those jurisdictions, like North Carolina, that have specifically rejected those cases. (See the Miltenberg article discussed below and attached as **Exhibit D**). I urge the Court to reject this change, particularly the adoption of the Committee Notes to the amendments as well as the GAP report attached thereto.

### F. Rule 703, SCRE

The changes to Rule 703, SCRE, under consideration also reflect changes Congress adopted in 2000 to the FRE. The changes also alarmingly adopt the comments to the 2000 amendments. The same concerns expressed above regarding Rule 702 apply with equal force to this amendment, particularly the adoption of the notes by reference.

The change would preclude an expert from disclosing inadmissible data upon which he or she relies. Consider the handicap this puts on many witnesses. For example, a life care planner who relies on interviews with the family, with treating physicians, and with medical product vendors will no longer be able to testify regarding that data and the opinion will be meaningless. An engineer in a construction defect case will not be able to disclose any information gained from interviewing witnesses who were on the scene. A psychiatrist in a competency hearing would be unable to repeat the substance of interviews with family members, coworkers or event the testator herself in testifying about competency.

This change is unnecessary, and will lead to unwieldy application in the most routine of matters. I urge the Court to reconsider the wisdom of this amendment and to reject it in favor of maintaining the current rule.

## Those In Favor of Adopting the Rule Changes Rely on Misinformation

I read with interest some of the written comments this Court has received in support of these changes, many of which are proffered by members of the

business community and Commerce Secretary Joe Taylor. In his comments, Mr. Taylor asserts that businesses are seeking "some level of predictability and stability in situations that may otherwise create lots of uncertainty." This same "talking point" appears in several of the other letters this Court has received. It is a false assertion that this Court should reject.

I have attached a chart which lists the press releases Mr. Taylor's Commerce Department has published just in 2008, and the comments Mr. Taylor and Governor Marshall Sanford repeatedly make to the general public and to the business community about the current environment in South Carolina. **(Exhibit A).** These press releases may be read in their entirety at the Department's Web Site:

http://www.sccommerce.com/resources/pressreleasesannouncements.aspx

The Site also mentions that 2007 was a "record-breaking year" for attracting new and expanded business to South Carolina, and describes South Carolina as a "preferred location in which to do business." (**Exhibit A**, last item, p. 14). These public assertions tend to belie the claim that businesses are bypassing South Carolina because the judiciary somehow lacks predictability.

Mr. Taylor also baldly asserts that South Carolina "is one of the few states that have not yet adopted uniform evidentiary and procedural standards in its state courts with regard to the admission of expert testimony, even though those standards have been embraced by the federal courts since 2000." This statement is incorrect for two reasons: (1) South Carolina did in fact adopt uniform evidentiary and procedural standards with the adoption of the SCRE in 1995, and the subsequent decision in *State v. Council* and its progeny, discussed above, and (2) insofar as Mr. Taylor's statement implies that only a few states have rejected the *Daubert*/*Kumho Tire* analysis, the statement is just plain wrong.

The truth is that most states that have addressed the issue have, in fact, rejected the federal standards set forth in *Daubert*, *Kumho Tire*, and their

progeny. I have attached a chart for the Court's consideration which addresses 28 jurisdictions previously represented to the General Assembly of South Carolina as having adopted *Daubert* by statute or rule. Actual research reveals a different story altogether (12 of those states adopted *Daubert*, 6 of the states adopted a modified version of *Daubert*, and 10 of the states rejected *Daubert* entirely – of the 18 states who adopted *Daubert* or some form thereof, 6 declined to follow *Kumho Tire*). **(Exhibit B).** I have also provided a chart which addresses 30 jurisdictions in which the claim was made that *Daubert* was referenced in a statute or rule; again, actual research reveals a different story, and the number is closer to five (5) states that make such a reference. (**Exhibit C**).

Mr. Taylor next states that "[t]he absence of these standards, which promote predictability and some level of stability in the uncertain realm of litigation, allows for inconsistent legal decisions that undermine what most view as a very business-friendly environment in our state." This statement lacks any basis in fact, and neither Mr. Taylor nor any other proponent of these changes points to any specific "inconsistent legal decisions" that have undermined Mr. Taylor's ability, as "top salesman for the State of South Carolina," to recruit new or expanded business in this state. Again, I would refer the Court to Mr. Taylor's Web Site on which Mr. Taylor lists thirty-two (32) separate press releases since January 1, 2008, in which either he or Governor Marshall Sanford announce new or expanded business in South Carolina with large capital investment and job creation. **(Exhibit A).**

Finally, I have attached for the Court's consideration an article by Ned Miltenberg, Esquire, of the Center for Constitutional Litigation, PC. Mr. Miltenberg's article sets forth a cogent argument in support of maintaining the current standards and not turning to the federal system, particularly as construed by *Daubert* and *Kumho Tire*. **(Exhibit D).**

**Conclusion**

If this Court adopts the Rule changes under consideration, South Carolina's courts will become trial courts for the wealthy and the elite, and

those individuals and small businesses who cannot afford to vindicate their rights will lose complete access to our courts. All cases, including a number of cases brought by the State of South Carolina, will become more complex and costly, and more court time will be required to address the additional hearings mandated by the amendments. I urge the Court to decline each of the changes the Court has announced it is considering.

Thank you for your time and consideration. I look forward to seeing you at the public hearing on July 9, 2008.

With kind personal regards,

John S. Nichols

# Exhibit A

| | Date | Press Release Title | Investment and Job Creation | Statement by SCDOC Secretary Taylor |
|---|---|---|---|---|
| **1.** | 1/07/08 | "Lowcountry Paver Expands in S.C. Presence, Opens Facility in Georgetown" | $5 million investment 40 new jobs | "Our state's economy is giving more businesses the tools necessary to grow innovative industries. Lowcountry Paver is the Southeast's leading manufacturer of concrete pavers, pool coping, and retaining walls. **This company's expansion in South Carolina is a testament that our business-friendly climate and access to markets are creating opportunities throughout the state.** Thanks to the team efforts of local and state officials, Georgetown County will benefit from this investment," said Joe Taylor, Secretary of Commerce. |
| **2.** | 1/25/08 | "American Yuncheng Plate Making, Inc. Announces Facility in Spartanburg, S.C." | $10 million investment 120 new jobs | "American Yuncheng Plate Making is a company with a strong international presence. **The company's decision to locate its first North American operation in South Carolina is further indication that our state continues to be a preferred location to do business and a national leader in jobs created by foreign direct investment.** Thanks to the team efforts of local and state officials, Spartanburg County will benefit from this investment," said Joe Taylor, Secretary of Commerce. |
| **3.** | 1/31/08 | "Richard Fritz, Inc. Announces New Facility in Duncan, S.C." | $6 million investment 63 new jobs | "Richard Fritz is a long-time automotive supplier with a strong European presence. **The company's decision to locate in South Carolina is speaks to the strength of our state's automotive sector, business climate, and workforce**. Richard Fritz is a welcomed addition to Spartanburg County and the state's business community," said Joe Taylor, Secretary of Commerce. |

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| **4.** | 2/12/08 | "Achieva Rubber Corporation Announces Facility in Cowpens, S.C." | $880,000 investment 10 new jobs | "Achieva Rubber focuses on high quality tire production and its new facility in South Carolina will allow the company to reach customers along the east coast. **The company's decision to locate in South Carolina further demonstrates that our state's business-friendly climate, market access, and quality infrastructure are growing the economy and creating jobs for South Carolinians**," said Joe Taylor, Secretary of Commerce. |
| **5.** | 2/14/08 | "CSC Expands IT Support Capabilities in South Carolina" | IT company 300 new jobs | "CSC is a global company providing advanced technology solutions to its customers in industry and government. **The company's decision to expand its presence in South Carolina is a testament to the area's highly skilled workforce and the state's business climate**," said Joe Taylor, Secretary of Commerce. "Thanks to our strong partnership with the Central S.C. Alliance and the team efforts of local and state officials, Blythewood will benefit tremendously from this expansion with high-tech jobs." |
| **6.** | 2/19/08 | "Bunting Graphics, Inc. to Locate Sales and Manufacturing Operations in Pageland, S.C." | Tranfer of 15 employees adding 35 new jobs | "Bunting Graphics is a nationally recognized manufacturer with the expertise to fabricate towering neon illuminated aluminum and steel graphics and create custom architectural interior signage. **The company's decision to locate in South Carolina speaks to the state's business-friendly climate and strength of our manufacturing sector.** This investment will benefit Pageland now and in the years ahead," said Joe Taylor, Secretary of Commerce. |

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| **7.** | 2/20/08 | "Lift Technologies, Inc. to Expand Operations in Westminster, S.C. and Create 50 New Jobs" | $5 million investment 50 new employees | "Lift Technologies is a global leader in its field. **Their growth in Oconee County signifies the strength of the state's business environment and the area's workforce**. Thanks to the team efforts of local and state officials, this investment will positively impact Oconee County now and in the years ahead," said Joe Taylor, Secretary of Commerce. |
| **8.** | 2/20/08 | "CTNA Corporate Headquarters to Move to SC in 2009" | Moving Corp HQ from Charlotte to SC $11 million investment 750 employees | Secretary of Commerce Joe Taylor added, "The Continental Corporation is a leading worldwide automotive supplier with manufacturing and research facilities in 27 countries. **The company's decision to locate their corporate headquarters in South Carolina is a strong testament to the state's business-friendly climate.** Thanks to the commitment and work of state and local officials, South Carolina has gained a valued new member of the state's business community. We look forward to a long and constructive partnership in the years ahead." |
| **9.** | 2/21/08 | "IntraBond Corporation Announces New Facility in Clarendon County " | Manufactures building construction components | "As businesses work smarter to develop strategic locations, South Carolina continues to be an ideal choice. IntraBond is a manufacturer with an international presence. As the company looked to expand its international and domestic market, our state's quality infrastructure, **business-friendly climate**, and skilled workforce made South Carolina a preferred location. Thanks to the team efforts of the state and local officials, Clarendon County will benefit from this investment," said Joe Taylor, Secretary of Commerce. |

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| **10.** | 2/26/08 | "Koerber LLC to Locate its First North American Facility in Laurens County" | First production facility outside of Germany<br>$10 million investment<br>70 new jobs | No comment from Mr. Taylor, but the following from Governor Sanford:<br>"As we work to compete in today's global economy, our state's ability to attract international investment is increasingly important. **Today's news certainly speaks to our success in that regard**, as well as to our efforts to enhance the state's economic soil conditions to promote industry growth and job creation. We remain committed to continuing these efforts to create jobs and opportunity for more South Carolinians," said Gov. Mark Sanford. |
| **11.** | 3/11/08 | "BMW Announces Plant Expansion in South Carolina" | $750 million investment<br>500 new jobs | "BMW's expansion in South Carolina will have a tremendous impact on the region and the entire state. We expect to see new suppliers come to the state and existing suppliers grow as a result of this announcement and that means new jobs and lots of new supplier jobs all over South Carolina. BMW is truly the nucleus of a job creating machine," said South Carolina Secretary of Commerce Joe Taylor. "Thanks to Josef Kerscher, Frank-Peter Arndt, and the entire team at BMW for their continued commitment to South Carolina. We look forward to a long and prosperous relationship for many more years to come." |
| **12.** | 3/12/08 | "Shaw Industries Group, Inc. to Expand its Lexington County Operations" | $60 million investment<br>350 new jobs | "Shaw Industries is the world's largest carpet manufacturer. It is a company with a recognized commitment to customer satisfaction, innovation, and strong corporate citizenship. **Their decision to expand in South Carolina is evidence that our state's business-friendly climate is again working to grow businesses and create opportunities for more South Carolinians.** Thanks to the team effort of local and state officials, Lexington County will benefit from this investment," said Joe Taylor, Secretary of Commerce. |

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| **13.** | 3/14/08 | "URS Washington Division Opens Nuclear Energy Headquarters in South Carolina" | The center will provide a complete range of licensing, design, engineering, procurement, and construction services for new nuclear generation facilities as well as for critical stages in the development of nuclear fuel cycle facilities<br>400 new jobs | "The Washington Group has a strong history in South Carolina. URS' Washington Division is a leading provider of engineering, construction, and management services to businesses and governments worldwide with South Carolina's division being largest of its kind in the world. **The company's decision to expand its operations in our state and locate its commercial nuclear energy engineering and construction headquarters here speaks positively to South Carolina's ability to attract this type of industry and will yield substantial results for the state.** Thanks to URS and the Washington Division for its continued commitment to South Carolina," said Joe Taylor, Secretary of Commerce. |
| **14.** | 3/18/08 | "Integrated Healthcare Solutions to Locate in Lancaster County | Facility will provide electronic medical and practice management solutions investment of $470,000<br>35 new jobs | "Integrated Healthcare Solutions delivers an array of healthcare information solutions for hospital and physician practices and has been recognized as a best-in-class provider for its services. **The company's decision to locate in South Carolina demonstrates the strength of our workforce and the diversity of our economy.** Thanks to the team effort of state and local officials, this investment will bring new high-paying jobs that will have a lasting impact on Lancaster County," said Joe Taylor, Secretary of Commerce. |

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| **15.** | 3/19/08 | "Master Precision Global Announces New Facility in SC" | Michigan based manufacturer - 40 years New manufacturing and distribution facility $7.25 million investment 120 new jobs | "Master Precision Global is a leader in the plastic molding industry. The company is committed to providing high value and cost effective solutions to all its customers. **Their decision to expand in South Carolina is evidence that our state's business-friendly climate is again working to grow businesses and create opportunities for more South Carolinians.** Thanks to the team effort of local and state officials, Spartanburg County will benefit from this investment." Joe Taylor, Secretary of Commerce. |
| **16.** | 3/20/08 | "Rader Companies to Locate Domestic Offices in Woodruff, S.C." | Relocation of corporate headquarters 25 new jobs | "By joining forces, Jeffrey and Rader will have more than 150 years of combined experience in the industrial equipment marketplace. **This announcement is another sign that the state's business-friendly climate and skilled workforce are working to attract new jobs and investments to South Carolina.** Thanks to the efforts of state and local officials, Spartanburg County will benefit from this investment," said Joe Taylor, Secretary of Commerce. |
| **17.** | 3/25/08 | "Manhattan Holdings, LLC Announces Expansion in Clarendon County" | Parent company for a collection of businesses focused on the manufacturing and distribution of wood moldings and millwork products throughout the US $2.5 million investment 65 new jobs | "The Manhattan family of companies is a leading supplier of moldings and millwork products. **The decision to expand operations in South Carolina speaks volumes to our state's business-friendly climate, quality infrastructure, and dedicated workforce.** Thanks to the team efforts of local and state officials, Clarendon will benefit from this investment," said Joe Taylor, Secretary of Commerce. |

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| **18.** | 3/31/08 | "Performance Fabrics and Fibers Expands in Williamsburg County" | Specialty nonwoven manufacturer<br>42 new jobs | "Performance produces nonwoven cloth with the capability to engineer cloth to meet its customers' specific needs. **The company's decision to expand its presence in South Carolina speaks favorably to the state's business-friendly climate and skilled workforce.** Thanks to the team efforts of state and local officials, Williamsburg County will benefit from this expansion," said Joe Taylor, Secretary of Commerce. |
| **19.** | 4/3/08 | "ITECH South to Locate Manufacturing Facility in Oconee County, Create 95 Jobs" | Broad based molding services<br>$5 million investment<br>95 new jobs | "ITECH has the ability to service its customers from design through manufacturing and product completion. **The company's decision to locate in South Carolina speaks to the strength of our workforce and business climate.** Thanks to the team efforts of state and local officials, Oconee County will benefit from this investment now and in the years ahead," said Joe Taylor, Secretary of Commerce. |
| **20.** | 4/4/08 | "Kaydon Announces Additional Investments in Sumter County" | $6.9 million investment<br>$4.5 million additional<br>35 new jobs plus 10 additional | "Kaydon is North America's leading supplier of wind turbine bearings. The company has been a strong corporate citizen in South Carolina for more than 30 years. **Their decision to continually expand operations in Sumter County is a strong reflection of both the positive strengths of the state's workforce and business-friendly climate.** Thanks to the continued efforts of local and state officials, Sumter County will benefit from this investment now and in the years ahead," said Joe Taylor, Secretary of Commerce. |

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| **21.** | 4/16/08 | "Domtar Paper Company expands Fort Mill operations" | Pulp and paper company<br>$1 million investment<br>90 new jobs | "Domtar is the largest producer of freesheet paper in North America and a world leader in production capacity. **The decision to establish and grow their operations in South Carolina is a testament to the state's business-friendly climate and quality workforce.** Domtar's expansion demonstrates their continued commitment to South Carolina and that our state is one in which companies can thrive," said Joe Taylor, Secretary of Commerce. |
| **22.** | 4/18/08 | "Olympic Steel, Inc. Announces Facility in Sumter County" | 54 year old steel processing firm<br>$10 million investment<br>65 new jobs | Secretary Joe Taylor added, "Olympic Steel is a leading U.S. steel service center with over 50 years experience. **The company's decision to locate in South Carolina is a strong testament to our state's market access and quality infrastructure.** Thanks to the team efforts of state and local officials, Sumter County will benefit from this investment now and in the future." |
| **23.** | 4/22/08 | "Sandvik, Inc. Announces Expansion in Oconee County" | Manufacturer of metal forming products<br>$47.5 million investment<br>92 new jobs | "Sandvik is a high-tech engineering group manufacturing advanced products throughout the world. **The company's decision to expand here is testament that the state's business-friendly climate and skilled workforce are working to grow existing industries and attract investments that will positively impact the state and local economy with new jobs.** Thanks to the team efforts of state and local officials, this investment will benefit Oconee County now and in the years ahead," said Joe Taylor, Secretary of Commerce. |

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| **24.** | 4/23/08 | "FPL Food LLC Announces New Location in Lexington County" | Beef processor $4.29 million 100 new jobs and transfer of employees from Augusta | "FPL Food is committed to the highest standards of food safety and is a company with an excellent reputation as being a strong corporate citizen in the communities in which it operates. **FPL's decision to locate here is a testament that our state's business-friendly climate is working to attract investment that will positively impact the state and local economy with new jobs.** We welcome FPL Food to the state's business community and look forward to a long and mutually beneficial relationship in the years ahead," said Joe Taylor, Secretary of Commerce. |
| **25.** | 5/6/08 | "Platronics Seals Announces Facility in Spartanburg County" | New production facility $2 million investment 20 new jobs | "Platronics Seals has a 40-year history of manufacturing quality products to satisfy its customers demands. We are pleased they have chosen to locate in Spartanburg. **The company's decision to move operations to South Carolina is evidence that our state's business-friendly climate and skilled workforce are attracting new investments and jobs to South Carolina.** Thanks to the team effort of local and state officials, Spartanburg County will benefit from this investment," said Joe Taylor, Secretary of Commerce. |

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| **26.** | 5/9/08 | "Roseburg Forest Products Invests in Orangeburg County" | Family-owned manufacturer of lumber, particleboard, softwood plywood, engineered wood products, and specialty panels; owns land and facilities in the northwest and southeast United States; established in 1936 by the Ford family. $49 million investment | "Orangeburg County continues to present great opportunities for attracting new investment and growing its existing industries. Roseburg Forest Products manufactures, with state-of-the-art, vertically-integrated facilities, products that exceed the industry's highest structural standards. **The company's decision to expand its presence in South Carolina speaks strongly to our state's favorable business climate and we look forward to a long and prosperous relationship with them in the years ahead**," said Joe Taylor, Secretary of Commerce. |
| **27.** | 5/13/08 | "Cross Country Home Services to Locate Customer Care Facility in Anderson " | New customer care facility $3 million investment 350 new jobs | "Cross Country Home Services is a leading provider of home warranties, service plans, and assistance programs with nearly 30 years of experience and major national and regional clients. **Their decision to locate in Anderson County is another sign that our state's business-friendly climate is working to attract investment that will positively impact the state and local economy with new jobs.** Thanks to the team efforts of state and local officials, Anderson County will benefit from this investment," said Joe Taylor, Secretary of Commerce. |

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| **28.** | 5/14/08 | "South Strand Contractors Announces Expansion in Georgetown County" | Expand distribution operation and build new facility<br>$1.5 million investment<br>20 new jobs | "South Strand Contractors is a growing company that provides high-quality products and service. **Their decision to expand operations in Georgetown County is another indication that both the state's business-friendly climate and skilled workforce are spurring economic activity and encouraging growth among our existing businesses.** Thanks to the efforts of local and state officials, Georgetown County will benefit from this investment," said Joe Taylor, Secretary of Commerce. |
| **29.** | 5/14/08 | "Ahlstrom to Expand Operations in Bishopville " | Producer of engineered fiberglass products for wind energy, marine, and transport industries<br>$11.7 million investment<br>56 new jobs | "Ahlstrom is a global leader in the manufacturing of fiber-based materials and Ahlstrom Specialty Reinforcements in Bishopville is producing an innovative product with promising future growth potential. **Their decision to expand in South Carolina is a testament that the state's business-friendly climate and skilled workforce are working to attract investments that will positively enhance the state's economy with new jobs.** Thanks to the team efforts of state and local officials, Lee County will benefit from this investment," Joe Taylor, Secretary of Commerce. |
| **30.** | 5/16/08 | "Carolina AAC, LLC to Locate New Facility in Marion County " | New manufacturing facility<br>$17 million investment<br>40 new jobs locally; the company will be a catalyst for creating numerous "green" construction jobs throughout the Southeast | "Carolina AAC is bringing to the state an innovative product to meet its customers' needs while providing an energy efficient alternative to commonly-used building supplies. South Carolina's strategic location and quality infrastructure will allow Carolina AAC to service its customers throughout the Southeast. The company is a welcome addition to the state's business community and we look forward to a long and mutually beneficial relationship in the years ahead," said Joe Taylor, Secretary of Commerce. |

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| **31.** | 5/21/08 | "Life Stone Materials Announces Operations in Anderson County " | New manufacturing facility $5.5 million investment 45 new jobs | "Life Stone Materials provides high-quality, advanced fabrics for a range of applications including life-saving technologies. We are pleased that Life Stone Materials has chosen to locate its operations in Anderson County. **This investment is a testament that the state's skilled workforce and business-friendly climate are working to attract advanced manufacturing jobs throughout South Carolina.** Thanks to the team effort of local and state officials, Anderson County will benefit from this investment now and in the years to come," said Joe Taylor, Secretary of Commerce. |
| **32.** | 6/3/08 | "H.J. Heinz Company to Locate Manufacturing Facility in Florence" | Global food manufacturer New food manufacturing facility $105 million investment (*The State*, June 4, 2008, p. A11) 350 new jobs at pay above the county's average of $14.24 per hour | "Heinz is one of the world's leading marketers of branded foods to retail and foodservice outlets. **The company's decision to locate in our state further demonstrates that South Carolina's business-friendly climate, access to markets and workforce are working favorably to attract more marquee names to our state.** Thanks to the team efforts of local and state officials, the entire Pee Dee area will benefit from this investment and the state will gain a valued new member of the business community," said Joe Taylor, Secretary of Commerce. |
| **33.** | 1/14/08 | "S.C. Department of Commerce Announces a Record-Breaking Year in 2007" | Commerce Secretary Joe Taylor credited Gov. Mark Sanford's efforts to enhance the state's business climate for much of the success in 2007. "South Carolina's business-friendly climate, quality infrastructure, and skilled workforce continue to strengthen the state's ability to recruit new investment and high-paying jobs. Gov Sanford's commitment to business fundamentals with efforts like workers' comp reform, tort reform, and income tax relief have propelled our ability to attract new investments from world-class companies and grow the state's existing businesses," said Joe Taylor, Secretary of Commerce. "**Commerce's 2007 totals reaffirm that South Carolina is a preferred location in which to do business. Additionally, we continue to see growth in new areas and an unprecedented amount of world-renowned companies choosing to locate here and bringing with them jobs and investments that will have a lasting impact on our state's economy**." | |

# Exhibit B

*Daubert* announced that the adoption of Rule 702, Fed.R.Evid., replaced the more restrictive "*Frye*" test for admitting scientific expert evidence, and the Court set forth certain factors for trial judges to use in deciding whether to admit that evidence. In *Kumho Tire*, the United States Supreme Court extended *Daubert* beyond scientific evidence to include **all** expert testimony-i.e., testimony based on technical and other specialized knowledge. Hence, the restrictive rule would apply in civil, criminal, family, probate and some administrative cases, and would greatly increase the cost of litigation, both to the Judicial Department and to litigants.

According to **90 A.L.R. 5th 453 (2001)**, twenty-eight (28) states had adopted *Daubert* or a similar test. This article is outdated and is simply **wrong**, as set forth below:

| **STATE** | ***DAUBERT* STATUS** | | | ***KUMHO TIRE* STATUS (Not Applicable where *Daubert* not adopted)** | **COMMENTS** |
|---|---|---|---|---|---|
| | *YES* | ***LTD*** | *NO* | | |
| Alaska | | ✔ | | *Rejected* | *Marsingill v. O'Malley*, 128 P.3d 151 (Alaska 2006) (limited to scientific evidence only, and does not apply to "experience-based" opinion evidence); *Marron v. Stromstad*, 123 P.3d 992 (Alaska 2005) (explicitly rejecting the extension of *Daubert* suggested in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999)). |
| Arkansas | | ✔ | | Adopted | *Coca-Cola Bottling Co. of Memphis, Tennessee v. Gill*, 352 Ark. 240, 100 S.W.3d 715 (2003) (adopting *Daubert* and *Kumho Tire*); *Regions Bank ex rel. Estate of Harris v. Hagaman*, 79 Ark.App. 88, 84 S.W.3d 66 (Ct. App. 2002) (noting *Daubert* and *Kumho* applicable only to "novel" evidence, theory or methodology). |
| Colorado | | | ✔ | N/A | Has **NOT** adopted *Daubert*. See attachment. |
| Connecticut | ✔ | | | Declined to address | *Daubert* adopted in *State v. Porter*, 241 Conn. 57, 698 A.2d 739 (Conn. 1997); Cf. State *v. Sorabella*, 277 Conn. 155, 891 A.2d 897 (2006) (issue whether to extend *Daubert* and adopt *Kumho Tire* not preserved; Court refused to address it); *State v. West*, 274 Conn. 605, 877 A.2d 787 (2005) (Court declined to decide whether to adopt *Kumho Tire*'s extension of *Daubert* beyond scientific evidence). |

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| Delaware | ✔ | | | Adopted | *Daubert* adopted in *M.G. Bancorporation, Inc. v. Le Beau*, 737 A.2d 513 (Del. Supr. 1999) |
| Idaho | | | ✔ | N/A | Has **NOT** adopted *Daubert*. See *Weeks v. Eastern Idaho Health Services*, 143 Idaho 834, 153 P.3d 1180 (2007). (Attachment) |
| Indiana | | | ✔ | N/A | Has **NOT** adopted *Daubert*. See *Shafer & Freeman Lakes Environmental Conservation Corp. v. Stichnoth*, 877 N.E.2d 475 (Ind. App. 2007), attachment. Trial court "may" apply *Daubert* factors, but federal rule not controlling. |
| Iowa | | | ✔ | N/A | Has **NOT** adopted *Daubert*. See *Leaf v. Goodyear Tire & Rubber Co.*, 590 N.W.2d 525 (Iowa 1999), attachment. Trial court "may find *Daubert* factors useful," but federal rule not controlling. |
| Kentucky | | ✔ | | Rejected | *Daubert* adopted as described in *Debruler v. Com.*, 231 S.W.3d 752 (Ky. 2007) for scientific evidence only. |
| Louisiana | ✔ | | | Adopted | *Daubert* adopted in *State v. Foret*, 628 So.2d 1116, 1121 (La. 1993) |
| Maine | | | ✔ | N/A | *Daubert* specifically declined, as described in *Searles v. Fleetwood Homes Of Pennsylvania, Inc.*,878 A.2d 509 (Me. 2005) |
| Michigan | ✔ | | | Adopted | *Gilbert v. Daimler-Chrysler Corp.*, 470 Mich. 749, 781; 685 NW2d 391 (2004) (Michigan has "effectively" adopted *Daubert*); *Woodard v. Custer*, 476 Mich. 545, 719 N.W.2d 842 (2006) (*Daubert* and *Kumho* adopted by rule change). |
| Mississippi | ✔ | | | Adopted | *Treasure Bay Corp. v. Ricard*, 967 So.2d 1235 (Miss. 2007) |
| Montana | | ✔ | | Rejected | Court applies *Daubert* "only where the introduction of 'novel scientific evidence' is sought." *State v. Price*, 339 Mont. 399, 171 P.3d 293 (2007). |
| Nebraska | ✔ | | | Adopted | *State v. Gutierrez*, 272 Neb. 995, 726 N.W.2d 542 (2007). |
| New Mexico | | ✔ | | Rejected | Trial court "may" consider *Daubert* factors, as described in *State v. Fry*, 138 N.M. 700, 126 P.3d 516 (2005); *State v. Lente*, 138 N.M. 312, 119 P.3d 737 (Ct. App. 2005) (noting New Mexico has not adopted the holding of *Kumho* and thus the analysis is limited to scientific evidence). |

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| North Carolina | | | ✔ | N/A | The Court expressly rejected *Daubert* in *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 597 S.E.2d 674 (2004). See attachment. |
| Ohio | ✔ | | | Adopted | *Terry v. Caputo*, 115 Ohio St.3d 351, 875 N.E.2d 72 (2007). |
| Oklahoma | ✔ | | | Adopted | *Christian v. Gray*, 2003 OK 10, 65 P.3d 591 (2003). |
| Oregon | | | ✔ | N/A | Court rejected *Daubert* in *State v. O'Key*, 321 Or. 285, 899 P.2d 663 (1995), and adhered to prior state precedent. |
| Rhode Island | | | ✔ | N/A | The Court declined to follow *Daubert* in *DiPetrillo v. Dow Chemical Co.*, 729 A.2d 677 (R.I. 1999). |
| South Carolina | | | ✔ | N/A | The Court expressly rejected *Daubert* in *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999) |
| South Dakota | ✔ | | | Adopted | *Burley v. Kytec Innovative Sports Equipment, Inc.*, 737 N.W.2d 397 (S.D. 2007) |
| Tennessee | | | ✔ | N/A | *McDaniel v. CSX Transp., Inc.*, 955 S.W.2d 257 (Tenn. 1997) (Court declined to expressly adopt *Daubert*, but found the nonexclusive list of factors useful in the analysis) |
| Texas | ✔ | | | Adopted | *E.I. du Pont de Nemours and Co., Inc. v. Robinson*, 923 S.W.2d 549 (Tex. 1995) |
| Vermont | ✔ | | | Adopted | *USGen New England, Inc. v. Town of Rockingham*, 177 Vt. 193, 862 A.2d 269 (2004); also adopted *Kumho Tire* (rule applies to all expert testimony). |
| West Virginia | | ✔ | | Declined to adopt | *State ex rel. Jones v. Recht*, 655 S.E.2d 126 (W. Va. 2007), adopted for scientific evidence only; *State v. Leep*, 212 W.Va. 57, 569 S.E.2d 133 (2002) (Supreme Court declined to adopt *Kumho Tire*). |
| Wyoming | ✔ | | | Adopted | *Cooper v. State*, 174 P.3d 726 (Wyo. 2008) |

| TOTAL | **12** **Adopted *Daubert*** | **6** **Adopted modified version of *Daubert*** | **10** **Rejected *Daubert* entirely** | **12** Adopted *Kumho Tire* 4 Rejected *Kumho Tire* 2 Declined to adopt *Kumho Tire* 10 Not applicable since the state rejected *Daubert* | While **18** of the purported **28** States have adopted *Daubert* in some form, **5** of those states limit the holding in some fashion. Furthermore, only **12** of the **28** states have also adopted the *Kumho Tire* extension of *Daubert* beyond scientific evidence.<br><br>Importantly, **10** of the States listed as having adopted "*Daubert* or similar test" in fact reject *Daubert* in favor of reliable State rules. |
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# Exhibit C

The chart provided indicates that there are 29 States "with references in statute or rule annotations to refer to *Daubert* for construction, instruction, & interpretation." This is a misleading statement. Often annotators for publishers West Group or Michie decide to reference *Daubert* or *Kumho Tire* on their own, or to reference cases that may mention *Daubert* or *Kumho Tire* but some of these States expressly rejected the analysis of both cases. It is dangerous to view those references as anything more than an expression by an unofficial commentator unless you pull the case and read it.

Turning to each of these 29 states, only three (3) actually reference *Daubert* by statute: Alabama, Arkansas and Georgia. Only Georgia has adopted a scheme similar to S. 687, but there are significant differences. Alabama limits application of *Daubert* to DNA evidence, and Arkansas limits the requirements of *Daubert* to workers' compensation cases (interestingly, other states have rejected the application of *Daubert* in workers' compensation cases because the rules of evidence do not apply in those cases).

The following surveys 30 states (those 29 plus Michigan) and notes whether there is any reference to *Daubert* in a statute or rule, and whether any changes to the various versions of Rule 702 have been done by Rule Amendment.

| State | Statute | Case law | Constitutional Challenge? |
|---|---|---|---|
| Alabama | "Expert testimony or evidence relating to the use of genetic markers contained in or derived from DNA for identification purposes shall be admissible and accepted as evidence in all cases arising in all courts of this state, provided, however, the trial court shall be satisfied that the expert testimony or evidence meets the criteria for admissibility as set forth by the United States Supreme Court in *Daubert, et. ux., et. al., v. Merrell Dow Pharmaceuticals, Inc.*, decided on June 28, 1993."<br><br>Ala. Code Ann. § 36-18-30 (1975 & Cum. Supp.) (Adopted Acts 1994, 1st Ex. Sess., No. 94-804, p. 109, § 11). | *Barber v. State*, 952 So.2d 393 (Ala. Crim. App. 2005) ("with respect to expert scientific testimony on subjects other than DNA techniques governed by § 36-18-30 , *Frye* remains the standard of admissibility in Alabama"). | Only challenged once, but the challenge was abandoned. *Smith v. State*, 677 So.2d 1240 (Ala. Cr. App. 1995), footnote 1. |
| Alaska | There is **no** statute in Alaska referencing *Daubert* for construction, instruction & interpretation. | | |

<table>
<tr><td>Arkansas</td><td>Ark. Code Ann. § 11-9-705 (d) (2006) (in workers' compensation cases, "Expert testimony shall not be allowed unless it satisfies the requirements of Federal Rule of Evidence 702 with annotations and amendments, that is, Daubert v. Merrell-Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), and Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999).")</td><td>This subsection has not been construed.</td><td>This subsection has not been challenged.</td></tr>
<tr><td>California</td><td colspan="3">There is no statute in California referencing Daubert for construction, instruction & interpretation.</td></tr>
<tr><td>Connecticut</td><td colspan="3">There is no statute in Connecticut referencing Daubert for construction, instruction & interpretation.</td></tr>
<tr><td>Delaware</td><td colspan="3">There is no statute in Delaware referencing Daubert for construction, instruction & interpretation.</td></tr>
<tr><td>Florida</td><td colspan="3">There is no statute in Florida referencing Daubert for construction, instruction & interpretation (West's F.S.A. Bar Rule 6-26.2(b)(2) governs specialization under Florida Bar Rules, and uses "a Daubert hearing" as an example of an "adjudicated decision" in a patent case).</td></tr>
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| Georgia | Ga. Code Ann. § 24-9-67.1 (f) (2005)<br>"It is the intent of the legislature that, in all civil cases, the courts of the State of Georgia not be viewed as open to expert evidence that would not be admissible in other states. Therefore, in interpreting and applying this Code section, the courts of this state may draw from the opinions of the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137 (1999); and other cases in federal courts applying the standards announced by the United States Supreme Court in these cases." | This subsection has been addressed but not specifically construed. | *Nathans v. Diamond*, 282 Ga. 804, 654 S.E.2d 121 (2007) (Supreme Court refused to address most constitutional challenges because not preserved for review; only challenge addressed was *ex post facto* claim arising out of retroactive application, and Court found because the statute is procedural, not substantive, it may be applied retroactively). |
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| Kentucky | There is **no** statute in Kentucky referencing *Daubert* for construction, instruction & interpretation. Rule 702, KRE, was amended by Supreme Court Order 2007-02, eff. 5-1-07, which adopted the 2000 amended version of Rule 702, Fed.R.Evid. | | |
| Louisiana | There is **no** statute in Louisiana referencing *Daubert* for construction, instruction & interpretation. | | |
| Maryland | There is **no** statute in Maryland referencing *Daubert* for construction, instruction & interpretation. In fact, the Committee Note to Md. Rules 5-702 provides: "**Committee note**: This Rule is **not** intended to overrule *Reed v. State*, 283 Md. 374 (1978) and other cases adopting the principles enunciated in *Frye v. United States*, 293 F. 1013 (D.C. Cir.1923). The required scientific foundation for the admission of novel scientific techniques or principles is left to development through case law. Compare *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786 (1993)." (Emphasis added). | | |
| Massachusetts | There is **no** statute in Massachusetts referencing *Daubert* for construction, instruction & interpretation. | | |
| Michigan* | This state was not listed on the chart. However, Michigan amended its Rule 702, MRE, to adopt the 2000 amendments to Rule 702, Fed.R.Evid. | | |

<table>
<tr><td>Mississippi</td><td>There is no statute in Mississippi referencing Daubert for construction, instruction & interpretation. Rule 702, MRE, was amended effective May 29, 2003, to mirror the 2000 amendments to Rule 702, Fed.R.Evid. The amendment included the following official comment:<br><br>COMMENT<br><br>* * *<br><br>As has long been the practice in Mississippi, Rule 702 recognizes that one may qualify as an expert in many fields in addition to science or medicine, such as real estate, cotton brokering, auto mechanics or plumbing. Boggs v. Eaton, 379 So.2d 520 (1980); Early-Gary, Inc. v. Walters, 294 So.2d 181 (Miss. 1974); Ludlow Corp. v. Arkwright-Boston Mfrs. Mut. Ins. Co., 317 So.2d 47 (Miss. 1975). Rule 702 is the standard for the admission of expert testimony from such other fields as well as for scientific testimony. <u>See</u> Kuhmo Tire Co., Ltd. v. Carmichael, 526 U.S. 137 (1999).<br><br>By the 2003 amendment of Rule 702, the Supreme Court clearly recognizes the gate keeping responsibility of the trial court to determine whether the expert testimony is relevant and reliable. This follows the 2000 adoption of a like amendment to Fed. R. Evid., 702 adopted in response to Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). It is important to note that Rule 702 does not relax the traditional standards for determining that the witness is indeed qualified to speak an opinion on a matter within a purported field of knowledge, and that the factors mentioned in Daubert do not constitute an exclusive list of those to be considered in making the determination: Daubert's "list of factors was meant to be helpful, not definitive." Kuhmo, 526 U.S. at 151. <u>See</u> <u>also</u> Pepitone v. Biomatrix, Inc., 288 F. 3d 239 (5th Cir. 2002).</td></tr>
<tr><td>Montana</td><td>There is no statute in Montana referencing Daubert for construction, instruction & interpretation.</td></tr>
<tr><td>Nebraska</td><td>There is no statute in Nebraska referencing Daubert for construction, instruction & interpretation.</td></tr>
<tr><td>Nevada</td><td>There is no statute in Nevada referencing Daubert for construction, instruction & interpretation.</td></tr>
<tr><td>New Mexico</td><td>There is no statute in New Mexico referencing Daubert for construction, instruction & interpretation.</td></tr>
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| New York | There is **no** statute in New York referencing *Daubert* for construction, instruction & interpretation. |
| North Carolina | There is **no** statute in North Carolina referencing *Daubert* for construction, instruction & interpretation. There was a North Carolina Court of Appeals case that discussed *Daubert*, but it was reversed by the Supreme Court of North Carolina. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 597 S.E.2d 674 (2004) ("North Carolina is not, nor has it ever been, a *Daubert* jurisdiction.") |
| Oklahoma | There is **no** statute in Oklahoma referencing *Daubert* for construction, instruction & interpretation. |
| Oregon | There is **no** statute in Oregon referencing *Daubert* for construction, instruction & interpretation. |
| South Dakota | There is **no** statute in South Dakota referencing *Daubert* for construction, instruction & interpretation. |
| Tennessee | There is **no** statute in Tennessee referencing *Daubert* for construction, instruction & interpretation. The Official Comment to Rule 702, TN R E Rev. provides:<br><br>2001 ADVISORY COMMISSION COMMENT<br><br>The *Frye* test no longer exists in Tennessee. In *McDaniel v. CSX Transportation, Inc.*, 955 S.W.2d 257 (1997), the Tennessee Supreme Court listed five nonexclusive factors taken from the federal case of *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993):<br><br>"(1) whether scientific evidence has been tested and the methodology with which it has been tested;<br>"(2) whether the evidence has been subjected to peer review or publication;<br>"(3) whether a potential rate of error is known;<br>"(4) whether, as formerly required by Frye, the evidence is generally accepted in the scientific community; and<br>"(5) whether the expert's research in the field has been conducted independent of litigation."<br><br>[Comment adopted effective July 1, 2001.] |
| Texas | There is **no** statute in Texas referencing *Daubert* for construction, instruction & interpretation. |

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| Utah | There is **no** statute in Utah referencing *Daubert* for construction, instruction & interpretation. However, effective November 1, 2007, Utah's Rule 702, URE, was amended as follows:<br><br>(a) Subject to the limitations in subsection (b), if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.<br><br>(b) Scientific, technical, or other specialized knowledge may serve as the basis for expert testimony if the scientific, technical, or other principles or methods underlying the testimony meet a threshold showing that they (i) are reliable, (ii) are based upon sufficient facts or data, and (iii) have been reliably applied to the facts of the case.<br><br>(c) The threshold showing required by subparagraph (b) is satisfied if the principles or methods on which such knowledge is based, including the sufficiency of facts or data and the manner of their application to the facts of the case, are generally accepted by the relevant expert community.<br><br>The "Advisory Committee Note" to the Rule notes Utah retains limited features of the *Frye* test. |
| Vermont | There is **no** statute in Vermont referencing *Daubert* for construction, instruction & interpretation. Effective July 1, 2004, Rule 702, VRE, was amended to adopt the 2000 version of Rule 702, Fed.R.Evid. |

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| Virginia | There is **no** statute in Virginia referencing *Daubert* for construction, instruction & interpretation.<br><br>Va. Code Ann. § 8.01-401.1 (1994) was amended in 1994, and provides:<br><br>In any civil action any expert witness may give testimony and render an opinion or draw inferences from facts, circumstances or data made known to or perceived by such witness at or before the hearing or trial during which he is called upon to testify. The facts, circumstances or data relied upon by such witness in forming an opinion or drawing inferences, if of a type normally relied upon by others in the particular field of expertise in forming opinions and drawing inferences, need not be admissible in evidence.<br><br>The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.<br><br>To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals or pamphlets on a subject of history, medicine or other science or art, established as a reliable authority by testimony or by stipulation shall not be excluded as hearsay. If admitted, the statements may be read into evidence but may not be received as exhibits. If the statements are to be introduced through an expert witness upon direct examination, copies of the statements shall be provided to opposing parties thirty days prior to trial unless otherwise ordered by the court. |
| West Virginia | There is **no** statute in West Virginia referencing *Daubert* for construction, instruction & interpretation. |
| Wisconsin | There is **no** statute in Wisconsin referencing *Daubert* for construction, instruction & interpretation. |

# Exhibit D

**The Darker Side of *Daubert:* Why States Should Not Adopt It**

by Ned Miltenberg[1]

Tort Areform@ advocates are persistently pressing state courts to adopt a new and tougher standards for the admissibility of expert testimony, ones modeled on the standards created by the *Daubert* trilogy. There are many reasons why state courts should resist that call. One of the best and most frequently overlooked reason is that the *Daubert* trilogy enormously increases the workload of judges, which state court systems can ill afford, particularly at a time when they are being whipsawed by increasing case filings and declining budgets. This section of this Monograph explores that issue.

1 Ned Miltenberg is Senior Litigation Counsel for the Center for Constitutional Litigation, P.C (ACCL@).. He graduated from Cornell University in 1973, where is took Honors in both Economics and History, and graduated with Honors from the University of Michigan Law School in 1984, where he served as an editor of the Journal of Law Reform. He joined the CCL=s predecessor after clerking for the Hon. William B. Bryant, Chief Judge of the U.S. District Court for the District of Columbia. He has counsel or co-counsel on nearly two dozen briefs to the U.S. Supreme Court since 1992, many of *Daubert*-related issues.

Although a few state courts quickly voiced enthusiasm for *Daubert* and adopted its principles and criteria as their own, that initial ardor has not only cooled, it has been completely reversed. Thus, the current trend in state courts now is clearly against adopting *Daubert*. The reason most often offered by these courts is straightforward: whatever benefits *Daubert* may bring, it imposes far greater burdens on over-worked state judges and under-resourced and over-stretched state court systems. Thus, in the last few years, the Supreme Courts of Illinois,2 North Carolina,3 and Arizona4 have joined those of California,5 New York,6 Florida, Pennsylvania, Michigan, New Jersey, and many other states, in spurning *Daubert.* According to a recent study by the Reporter for the Uniform Rules of Evidence, Univ. of Oklahoma Law Professor Leo H. Whinery, only 16 states have clearly Aadopt[ed] the *Daubert* . . . standard for admissibility,@ while 19 states Astill adher[e] to the *Frye* standard.@7 Significantly, the 19 states that have declined to adopt *Daubert* are not small or insignificant ones, as they include 55% of the U.S. population.8 This is especially important because although

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2 *Donaldson v. Central Illinois Public Service Co.*, 767 N.E.2d 314 (Ill. 2002).

3 *Howerton v. Arai*, 597 S.E.2d 674 (N.C. 2004).

4 *Logerquist v. McVey,* 1 P.3d 113 (Az. 2000)

5 *People v. Leahy,* 882 P.2d 321, 325 (Cal. 1994)

6 *People v. Wesley,* 633 N.E.2d 451, 454 & n. 2 (NY 1994).

9 Prof. Leo H. Whinery, *Expert Testimony Trends in State Practice* (1999), SF78 ALI-ABA 149, 176-182 (April 26, 2001). *See* S. Taub, *The Legal Treatment of Recovered Memories*, 17 J. Legal Med. 183, 204 (1996) (AA number of state courts, including some in states having rules of evidence modeled closely on the Federal Rules, have refused to replace the *Frye* rule with the *Daubert* standard, arguing that the *Frye* test ensures that scientific evidence will meet a minimum level of reliability without placing an impossible burden on judges.@).

8 1999 *Statistical Abstract of the U.S* .(150, 248,000 out of 272,945,000 people live in those 19 states).

federal cases garner far more publicity, most law in made in the states, where 98% of all cases, civil and criminal, are litigated.[9]

Remarkably, since 1998 a rare judicial consensus has emerged -- among judges both liberal and conservative, both federal and state, and both appellate and trial B including such jurists as U.S. Supreme Court Chief Justice William Rehnquist, Arizona Supreme Court Chief Justice Charles E. Jones, U.S. Court of Appeals Judge Alex Kozinski, and U.S. District Court Judge Jack B. Weinstein (the author of the most widely used treatise on federal evidence law, WEINSTEIN ON EVIDENCE). This judicial consensus is matched by virtual unanimity among all of the leading evidence scholars (such as Charles Alan Wright, Margaret Berger, Kenneth W. Graham, G. Michael Fenner, David Faigman, Margaret G. Farrell, Stephen Saltzburg, Daniel J. Capra, and Edward Imwinkelried), among prominent philosophers of science, economists, and even among tort reform advocates (such as former U.S. Attorney General Dick Thornburgh) B that *Daubert* has proved to be too difficult, time-consuming, burdensome, and costly for courts to apply.

*Daubert=s* burdens fall even harder on state courts, which, even in the best of times, lack the resources enjoyed by their federal counterparts, and now face seemingly endless rounds of budget cuts that have compelled them to furlough court employees,

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9 Justice Joseph T. Walsh, *The Evolving Standards of Admissibility of Scientific Evidence*, 36 JUDGES J. 33, 36 (1997). *See also* G. Weimer, *Expert Evidence: What You Don=t Know About Daubert Can Hurt You*, 24 JUN Vt. B.J. & L. Dig. 51, 53 (1998); F. Woodside, *Evidence Problems:* Daubert *and Beyond*, CA11 ALI-ABA 101, 107 (July 28, 1995).

postpone raises and promotions, and cancel educational conferences, and even suspend the constitutionally guaranteed right to trial by jury.[10]

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10 As the American Bar Association has noted: AStates are experiencing their worst budget crises since the Depression,@ with Afunding for our state courts ... particularly at risk,@ as A[t]he funding crisis exerts a disproportionate impact on the judicial system.@ ACuts in court funding have resulted in: closings of courtrooms - and entire courthouses in some states - and shortened hours of operations; increased filing fees; elimination of key court staff - including probation officers, security personnel, court interpreters, clerks, and legal counsel for indigent defendants; routes to alternative justice, such as drug courts and mediation programs, being greatly circumscribed or eliminated; and, in at least one jurisdiction, civil jury trials have been delayed indefinitely.@ ABA, *State Court Funding Crisis*, http://www.abanet.org/jd/courtfunding/talkingpts.html (avail. 12/1/03).

Judicial doubts about how easily and how cost-effectively courts could manage *Daubert=s* commands began before the print was dry on that decision. In his dissenting and concurring opinion in that case, Chief Justice William Rehnquist cautioned that while:

> I defer to no one in my confidence in federal judges, . . . *I am at a loss to know what is meant when it is said that the scientific status of a theory depends on its "falsifiability," and I suspect some of them will be, too.* I do not doubt that Rule 702 confides to the judge some gatekeeping responsibility in deciding questions of the admissibility of proffered expert testimony. *But I do not think it imposes on them either the obligation or the authority to become amateur scientists* in order to perform that role.11

Significantly, Chief Justice Rehnquist=s opinion was joined by one of his most liberal and most experienced colleagues, Justice John Paul Stevens.

Judge Jack B. Weinstein, an unabashed Aliberal@ and the author of the most widely used treatise on evidence, quickly echoed Justices Rehnquist and Stevens, explaining that: A[m]any federal judges believe, as I do that, *Daubert* has made their lives more difficult@ because, A[a]fter all, we're not scientists.@12 The federal judges assigned to apply the Supreme Court=s edict in *Daubert* once that case was remanded to the U.S. Court of Appeals for the Ninth Circuit were equally doubtful about the ability of lay judges to carry out *Daubert*=s mandate. Writing for a unanimous panel, Judge Alex Kozinski, who, as a founding member of the conservative Federalist Society, had long campaigned against Ajunk science,@ warned that:

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11 539 U.S. at 600-01 (Rehnquist, C. J., & Stevens, J., concurring in part, and dissenting in part) (emphasis added).

12 R. Sherman, "*Junk Science" Rule Used Broadly; Judges Learning Daubert*, Nat=l L.J., Oct. 4, 1993, at 3 (quoting U.S. District Judge Weinstein of the Eastern District of New York) (emphases added).

> *Federal judges ruling on the admissibility of expert scientific testimony face a far more complex and daunting task in a post-Daubert world than before*. The judge's task under *Frye* is relatively simple: to determine whether the method employed by the experts is generally accepted in the scientific community. *Daubert* . . . puts federal judges in an uncomfortable position. The question of admissibility only arises if it is first established that the individuals whose testimony is being proffered are experts in a particular scientific field. . . . *[T]hough we are largely untrained in science and certainly no match for any of the witnesses whose testimony we are reviewing, it is our responsibility to determine whether those experts' proposed testimony amounts to "scientific knowledge," constitutes "good science," and was "derived by the scientific method." The task before us is more daunting still when the dispute concerns matters at the very cutting edge of scientific research*, where fact meets theory and certainty dissolves into probability. As the record in this case illustrates, scientists often have vigorous and sincere disagreements as to what research methodology is proper, what should be accepted as sufficient proof for the existence of a "fact," and whether information derived by a particular method can tell us anything useful about the subject under study.
>
> Our responsibility, then, unless we badly misread the Supreme Court's opinion, is to resolve disputes among respected, well-credentialed scientists about matters squarely within their expertise, in areas where there is no scientific consensus as to what is and what is not "good science," and occasionally to reject such expert testimony because it was not "derived by the scientific method."13

In the ten years since *Daubert* was decided, more and more judges have joined this swelling chorus. For example, when U.S. Senator John Cornyn (R. Tex) was a member of Texas Supreme Court he protested that *Daubert* Athrusts judges, by and large untrained in science, into the inappropriate role of amateur scientists.@14 A New York state trial judge came to the same conclusion, writing recently that:

13 *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1315-16 (9th Cir. 1995) (emphases added).

14 *E.I. du Pont de Nemours and Co., Inc. v. Robinson* 923 S.W.2d 549, 560 (Tex. 1995) (Cornyn, J. [now U.S. Senator (R. Tex)], dissenting).

> after serving eighteen years on the bench, including a significant amount of involvement in judicial training and education (both as a student and a faculty member), and after an additional eighteen years as a practicing lawyer and judicial law clerk involved almost daily in the court system, this writer is convinced that *few judges possess the academic credentials or the necessary experience and training in scientific disciplines* to separate competently high quality, intricate scientific research from research that is flawed.15

Scores of other federal and state judges have come round to the same view,16 as have and dozens of legal scholars.17

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15 G. Marlow, *From Black Robes to White Lab Coats,* 72 St. John's L. Rev. 291, 333 (1998) (emphasis added).

16 *See, e.g..,Ruiz-Troche v. Pepsi Cola of P.R. Bottling Co,*, 161 F.3d 77, 81 (1st Cir. 1998) (AFew federal judges are scientists, and none are trained in even a fraction of the many scientific fields in which experts may seek to testify."); S.Grossman, *Judicial Panel Discussion on Science and the Law*, 25 Conn. L. Rev. 1127, 1128 (1993) (Ajudges are in the courtroom is because they didn't want to study science.@); Judge Walsh, *Evolving Standards,* 36 Judges= J. at 33 (*Daubert* made judges= burdens Amore difficult@).

19 *See, e.g.,* J. Conley, *The Science of Gatekeeping,* 74 N.C. L. Rev. 1183 (1996) (noting Aa widely shared judicial perception that *Daubert* has made the trial courts' >gatekeeping= burden far more onerous that it used to be.@); C. Powell, *Does Daubert Make a Difference?*, 12 Ga. St. U. L. Rev. 577, 596 (1996) (same); *Development in the Law -- Confronting the New Challenges of Scientific Evidence*, 108 Harv. L. Rev. 1481, 1488-90, 1492-98 (1995) ( the "theoretically appealing" criteria of testability and falsifiability are too complicated for courts to apply); P. Milich, *Controversial Science in the Courtroom,* 43 Emory L.J. 913, 919 (1994) (while "[m]ost federal judges are bright individuals," the complexities of much scientific litigation are beyond their mastery in terms of "deciding what is or is not good science"); E. Swift, *One Hundred Years of Evidence Law Reform*, 88 Cal. L. Rev. 2437, 2468 (2000) (ATaken together, *Joiner* and *Kumho Tire* cordon off an area of judicial decision making . . . that is exceedingly complex and difficult@).

Although a vast majority of the nation=s leading evidence scholars (and academic specialists in the philosophy and economics of science), agree that *given enough time* most judges could master most *Daubert*-related issues in most cases, they also agree that it is practicably and fiscally impossible for any person, be it judge, juror, or professor, to master all the diverse disciplines and subject matters that *Daubert, Joiner*, and *Kumho Tire* require lay judges to master, particularly multiple intellectual disciplines in different fields, week in and week out. Thus, although there is no reason why a lay judge cannot understand how to distinguish methodologically valid and reliable DNA analyses, epidemiological surveys, or air pollution modeling reports from invalid and unreliable analyses, surveys, and reports B if the judge is allowed enough time and resources B there is no evidence that judges are being given enough time and resources to master any one subject, and certainly not sufficient time and resources to understand what epidemiologists, toxicologists, and pharmacologists are proposing to testify about in a toxic tort case one week, what forensic accountants are proposing to talk about in a securities fraud case the next week, and what aerospace engineers are proposing to opine about in a products liability case the following week. For these reasons alone, *Daubert* is much more than *Frye*.

As Professors David L. Faigman, David H. Kaye, Michael J. Saks, and Joseph Sanders (the co-authors of the widely-used multi-volume treatise, MODERN SCIENTIFIC EVIDENCE), have explained, AThe gatekeeper's job changed, and it became more difficult. . . . Judges are now expected to bring some critical judgment, informed by knowledge of the way empirical propositions are tested, to expert evidence

admissibility decisions, . . . making a judge's job intellectually more demanding.@18

Philosophers of science have reached the same conclusions.19

18 D. Faigman, *et al.*, *How Good is Good Enough?: Expert Evidence Under Daubert and Kumho,* 50 Case W. Res. L. Rev. 645, 655-56 (2000). *See also* G. Fenner, *The Daubert Handbook*, 29 Creighton L. Rev. 939, 950-51 (1996) (what Amakes the trial judge's job much more difficult under *Daubert*@ than under *Frye* is that Aunder *Frye*, the trial judge could hear testimony from various experts in the field on the subject of whether the particular scientific evidence was generally accepted within that field, decide which of those experts he or she believed, and rule on the evidence. Now, the judge has to decide whether the reasoning is sound within the framework of the scientific method, not just whether others in this field of expertise generally find the reasoning sound within the framework of the scientific method.@ *See also* 22 C. Wright *et al.*,FEDERAL PRAC. & PROC. ' 5168.1, at 86-87 (Supp.1998) (A[T]he *Daubert* opinion offers no convincing rationale for a special test for the admissibility of expert scientific testimony. . . . [It] appears politically naive about the "methods and procedures" of both science and evidentiary admissibility. . . . Multi-factored, "flexible" tests . . . are more likely to produce arbitrary results than they are to produce nuanced treatment of complex questions of admissibility.@); E. Imwinkelried, *Should the Courts Incorporate A Best Evidence Ruling Into the Standard Determining the Admissibility of Scientific Testimony?*, 50 Case W. Res. L. Rev. 19, 46 (1999)(*Daubert* too Adaunting@ to lay judges); D. Capra, *The Daubert Puzzle*, 32 Ga. L. Rev. 699, 703 (1998) (same).

19 *See, e,g.,* J. Borenstein, *Science, Philosophy, and the Courts,* 13 St. Thomas L. Rev. 979, 979, 999-1000 (2001) (AScientific testimony tends to pose an especially difficult challenge for the court system, because, . . . due to theoretical and practical problems associated with the *Daubert* factors, it is difficult for judges to assess and weigh the value of these factors when faced with proffered expert testimony. A); M. Mason, *The Scientific Evidence Problem: a Philosophical Approach*, 33 Ariz. St. L.J. 887, 892 (1999) (AThe collection of difficult terms and the duties *Daubert* imposes on trial judges has left many judges reeling.@); B. Leiter, *The Epistemology of Admissibility,* 1997 BYU L. Rev. 803, 815, 817 (1997) (*Daubert* Amakes unrealistic demands on the epistemic capacities of the adjudicatory process@); E. Cheng*, Thomas S. Kuhn and Courtroom Treatment of Science Evidence*, 15 Temp. Envtl. L. Tech. J. 195, 198 (1996) (Athe *Daubert* standard requires the courts to do the impossible: that is, to directly evaluate the validity and reliability of science even while simultaneously depending upon it to both understand the science itself and to resolve a question of fact.@).

Moreover, there is a broad consensus that the cure devised for these reducing the dangers posed by the supposed epidemic of Ajunk science@ BA*Daubert* hearings@-- has proved much worse than the disease, even if the disease is widespread, which many doubt.20 As one experienced federal judge noted, because *Daubert* makes it "more important than ever for the trial court to take an active role in the presentation of expert testimony,@ it may Agreatly lengthen and complicate assessment of [such] testimony.@21 A[G]iven the complex factual inquiry required by *Daubert,* courts will be hard-pressed in all but the most clear-cut cases to gauge the reliability of expert proof on a truncated record.@22 Federal courts, and those state courts that are required to apply *Daubert*, have found that in order to develop something more than a Atruncated record,@ multi-day and even multi-week evidentiaryA*Daubert* hearings@are not merely an occasional option but an everyday necessity.

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20 *See* Kenneth J. Chesebro, *Galileo's Retort: Peter Huber's Junk Scholarship*, 42 Am. U.L. Rev. 1637, 1650-86 (1993).

21 Judge Charles R. Richey, *Rule 16 Revised, and Related Rules*, 233 ALI-ABA 363. 376 (1994).

22 *Cortes-Irizarry v. Corporacion Insular De Seguros*, 111 F.3d 184, 188 (1st Cir.1997). *Accord Padillas v. Stork-Gamco, Inc.*, 186 F.3d 412, 417 (3d Cir. 1999); *Kemp ex rel. Wright v. State*, 809 A.2d 77, 86 (N.J. 2002).

Those hearings are not only becoming a virtual certainty in nearly every case,23 but are also becoming increasingly time-consuming and costly. Indeed, Professors Margaret Berger (co-author of the widely used treatise WEINSTEIN ON EVIDENCE), Edward J. Imwinkelried (co-author of the leading treatise on SCIENTIFIC EVIDENCE), and Stephen A. Saltzburg (the Reporter for and a member of the Advisory Committee on the Federal Rules of Criminal Procedure and a member of the Advisory Committee on the Federal Rules of Evidence) have confessed that they have been:

> astounded by the number of civil cases during the past several years in which opponents of expert testimony . . . have been permitted to impose *huge burdens on the judicial system* by filing blunderbuss motions asserting that the other side's expert testimony is inadmissible. These motions lead to the filing of voluminous memoranda in which the lawyers for both sides try their case on paper. Often, the parties then request, and may be granted, live hearings (so-called "*Daubert hearings") which resemble mini-trials and can last days, even weeks.*@24

Defense lawyers and tort reform advocates like former Attorney General Dick Thornburgh have been equally Aastounded.@25

These *Daubert* hearings consume vast amounts of judicial resources,26 impose "immense burdens" on both trial and appellate judges,27 and have left many judges Areeling.@28 As one prominent Texas state judge and *Daubert* scholar has explained:

23 According to Joe S. Cecil, Project Director, Program on Scientific and Technical Evidence, Division of Research, Federal Judicial Center (FJC), and chief editor of the FJC=s REFERENCE MANUAL ON SCIENTIFIC EVIDENCE (2d ed. 2000), A[o]ver three quarters of the judges (77%) indicated that commonly held a *Daubert* hearing on evidence admissibility.@ Carol Krafka, Joe S. Cecil, et al., *Judge and Attorney Experiences, Practices* and *Concerns Regarding Expert Testimony in Federal Civil Trials*, 8 Psychol. Pub. Pol=y & L. 309, 325 (2002). *See* Ralph D. Gants, *Daubert/Lamigan: Making the Gate Swing Smoothly*, 47 Boston Bar J. 8, 9 (March/April 2003) (*Daubert* hearings often Aevolve into mini-trials that greatly burden the time of the court.@); Charles R. Richey, *Rule 16 Revised, and Related Rules*, 233 ALI-ABA 363. 376 (1994) (because *Daubert* makes it "more important than ever for the trial court to take an active role in the presentation of expert testimony,@ it may Agreatly lengthen and complicate assessment of [such] testimony.@)

24 Brief of Margaret A. Berger, Edward J. Imwinkelried, & Stephen A. Saltzburg as Amicus Curiae in Support of Respondents in *Kumho Tire Co., Ltd. v. Carmichael* (No. 97-1709), 1998 WL 739321 (10/20/98) at 20 (emphases added).

25 *See* D. Thornburgh, *Junk Science-The Lawyer's Ethical Responsibilities*, 25 Fordham Urb. L.J. 449, 456 (1998) (Afederal courts have been confronted with seemingly endless questions as they struggle to determine what evidence is admissible under the rules articulated in *Daubert.*@); N. Campbell, *Encouraging More Effective Use of Court-Appointed Experts*, 67 Def. Couns. J.196, 207 (2000) (*Daubert* hearings have become Aincreasingly costly and protracted@); *Conning the IADC Newsletters*, 69 Def. Couns. J. 517, 532 (Oct. 2002) (*Daubert* hearings imposes a new Aonus on the trial judge.@).

26 P. Goss, *Clearing Away The Junk: Court-appointed Experts,* 56 Food & Drug L.J. 227, 230 (2001).

27 K. Atikian, *Nasty Medicine*, 27 Loy. L.A. L. Rev. 1513, 1514 (1994).

28 M. Mason, *The Scientific Evidence Problem: a Philosophical Approach*, 33 Ariz. St. L.J. 887, 892 (2001).

> *Daubert hearings consume too much time and judicial resources . . . and limit a trial court's time for the actual trial*, while increasing the number and duration of hearings. *Daubert . . . hearings can last many days, in addition to the time spent by a judge reviewing memoranda, publications, and data in fields for which they may have little or no training*.[29]

In light of the above, and in light of the facts that: *(1)* an ever-growing Anumber of state courts, including some in states having rules of evidence modeled closely on the Federal Rules, have refused to replace the *Frye* rule with the *Daubert* standard, arguing that the *Frye* test ensures that scientific evidence will meet a minimum level of reliability without placing an impossible burden on judges,@[30] and *(2)* as a general rule, state trial courts have fewer resources than are available to federal courts to conduct *Daubert* inquiries and hold *Daubert* hearings,[31] the last thing state courts need to do is to burden themselves with *Daubert* inquires and *Daubert* hearings.

As Alfred V. Covello, Chief Judge of the U.S. District Court for the District of Connecticut, bluntly described the effect of such *Daubert* inquiries and hearings: AIt is like somebody hit you between your eyes with a two-by-four.@[32]

Consensuses are rare in the law and they ought be heeded, no matter how late in the day they come. Indeed, as Justice Felix Frankfurter once noted: "Wisdom too often never comes, and so one ought not to reject it merely because it comes late."[33] The clear consensus is that state courts do not need to burden themselves with additional hardships.

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29 Judge Harvey Brown*, Procedural Issues Under Daubert*, 36 Hous. L. Rev. 1133, 1150, (1999) (emphasis added). *See also* R. Gants, *Daubert/Lamigan: Making the Gate Swing Smoothly*, 47 Boston Bar J. 8, 9 (March/April 2003) (*Daubert* hearings often Aevolve into mini-trials that greatly burden the time of the court.@).

30 S. Taub, *The Legal Treatment of Recovered Memories*, 17 J. Legal Med. 183, 204 (1996).

31 Unlike federal district judges, who have from two to four full-time lawyers on staff as clerks, and who enjoy access to extensive libraries, and to additional staff if necessary, most state appellate court judges ordinarily share access to a single staff attorney or rely on part-time law students. State district court judges have even fewer resources.

32 *Judicial Panel Discussion on Science and the Law*, 25 Conn. L. Rev. 1127, 1144 (1994) (quoting Judge Covello).

33 *Henslee v. Union Planters Nat. Bank & Trust Co.*, 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting).

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June 5, 2008

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, South Carolina 29211

RE: Proposed amendments to Rule 5 of the South Carolina Rules of Criminal Procedure, Rules 16 and 26 of the South Carolina Rules of Civil Procedure, and Rules 701, 702, and 703 of the South Carolina Rules of Evidence

Dear Clerk Shearouse,

I am a practicing attorney in Florence County. My practice is centered around litigation since I was admitted to the Bar in November of 1977. Over the years, I have represented insurance companies, large corporations in defense of claims brought against them, medical malpractice, both in defending the medical provider and the aggrieved patient. I have been a special prosecutor in several criminal cases. There are numerous sexual and child abuse cases in Family Court in which I was involved. I was also a municipal court judge. Finally, I have represented numerous claimants who had been injured by reason of wrongful conduct.

During the thirty years of my practice, it has been well apparent to me that South Carolina has comprehensive rules and case law which provide safeguards to any expert testimony. What changes have been done to our civil procedure in evidentiary law has been "fine tuned" by rulings from the Supreme Court with little activity of the legislature.

I can say in Florence County that we have not had any "runaway" or other so-called outlandish jury verdicts. This applies not only to the Florence County Court of Common Pleas, but also to the Florence Division of our United States District Court. A small group of greedy corporations and businesses are trying to change our legal system to affect favorable changes to them but put the party seeking relief at an incredible disadvantage, whether they are the criminal and family law prosecution or personal injury litigants.

Rather than "streamline" our process, these proposed rules will require additional rulings and costs which will increase the cost of litigation, not only to plaintiffs and governmental lawyers, but also to these corporations as well.

I am continually amazed at how politicians can distrust juries in civil cases but have absolute confidence in a jury delivering a death penalty verdict. They are the same men and women in our community that are hearing evidence and bringing in verdicts which are fair and reasonable.

I would urge the Supreme Court to maintain the present civil and evidentiary laws that are working well in serving the public good.

Thank you very much for your consideration.

With warmest personal regards, I remain,

Sincerely,

Rodney C. Jernigan, Jr.

RCJ/dc

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June 10, 2008

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, South Carolina 29211

RE: Proposed Amendments to Rule 5 of the South Carolina Rules of Criminal Procedure, Rules 16 and 26 of the South Carolina Rules of Civil Procedure, and Rules 701, 702, and 703 of the South Carolina Rules of Evidence.

Dear Mr. Shearouse:

Founded on April 28, 2003, Motley Rice LLC is one of the nation's largest plaintiffs' litigation firms. Motley Rice attorneys gained global recognition for their pioneering work on behalf of asbestos victims, the State Attorneys General in their landmark litigation against Big Tobacco, and the 9/11 families in their groundbreaking lawsuit against terrorist financiers. Today, with nearly 70 attorneys and hundreds of staff, the firm continues to forge new and challenging class action and complex litigation, including various products liability cases; occupational disease and asbestos bankruptcy; aviation and other transportation disasters; environmental issues such as lead paint; medical malpractice and defective drugs; human rights litigation; and securities fraud cases such as institutional investor and derivative cases. Armed with the resources, willingness and experience, Motley Rice perseveres for those who seek justice and seeks to give back to the legal industry and our communities.

It has come to our attention that the Supreme Court of South Carolina is considering a set of proposed amendments to the Rules of Civil Procedure and evidentiary proceedings regarding expert testimony. We, like countless others, are of the opinion that South Carolina has a well settled and effective set of comprehensive rules and case law that work to ensure that valid, reliable, scientific testimony is presented to courts. All lawyers, parties to lawsuits, and judges are very familiar with this established set of rules and case law and have adhered to requirements without difficulty as participants in the adversarial process without unnecessary incident. Amendments to the rules would only frustrate the intent of their application which is to allow trial judges the flexibility to admit reliable expert testimony.

In South Carolina, the ultimate question for a trial judge is whether both sides will have a fair opportunity to test the validity of the experts' results; if not, an experts' results may be

excluded. However, "[I]t is not up to a judge, even after *Daubert*, to scrutinize expert testimony so strictly that only the *perfect expert* will be permitted to testify."[1] This issue has been specifically addressed in cases such as *Paoli Railroad Yard PCB Litigation* where the court correctly noted that "the reliability standard of Rules 702 and 703 is somewhat amorphous" and there is "a significant risk that district judge will set the threshold too high and will in fact force plaintiffs to prove their case twice."[2] That is exactly the proposition presented in the proposed amendments.

The argument that the new rules will prevent unreliable testimony based on "junk science" is without merit. Although we agree that "junk science" has no place in the courtroom, it should be stressed that the role of the trial judge is that of gatekeeper, not "super-expert." By employing the proposed amendments, trial judges are, in essence, being asked to assume a role which requires them to scrutinize experts in such a way as to exclude all but the "perfect" expert testimony. South Carolina judges currently apply the *Council/Jones* test, which provides sufficient guidance to courts and litigants as to when to admit expert evidence. Under *Council*, to determine whether the underlying science of an expert's testimony is reliable, the court looks at several factors, including: 1) publications and peer review of techniques; 2) prior application of method to the type of evidence involved in the case; 3) quality control procedures used to insure reliability; and, 4) consistency of method with recognized scientific laws and procedures. This is precisely the sort of predictability and certainty the non-lawyer business groups say we need. The proponents of the amendments have created a conundrum which begs the question: Can you create a system that provides predictability by removing the current well-known system with a system that is untested and therefore inherently unpredictable?

Contrary to assertions by non-lawyer business groups, only ten states in the country currently adopt *Daubert* or *Kuhmo Tire* in their entirety, and a majority of states addressing the issue either limit its application or reject it outright like South Carolina's current evidentiary rules. In his 2003 article, "How do you know that you know?"[3], Judge Robert M. Young pointed out that South Carolina's current standard provides a sufficient framework for admitting scientific evidence and is not that different from the supposedly "predictable" standard pushed by the non-lawyer business crowds.

The current plea for change is another example of corporate greed disguised as "tort reform." The businesses that are proponents of this change fail to recognize that as recently as 2006, the "Small Business and Entrepreneurship Council" ranked South Carolina 11th among entrepreneur-friendly states, ahead of neighboring states Tennessee (13th), Georgia (25th), and North Carolina (40th).[4] Moreover, on its website, the South Carolina Commerce Department makes the following claim: "South Carolina is one of the most business-friendly states in the

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[1] Daniel J. Capra, *The Daubert Puzzle*, 32 Ga. L. Rev. 699 (1998).
[2] *Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 736, 739 (3d Cir. 1994)
[3] Hon. Roger M. Young, *How do you know what you know? A judicial perspective on* Daubert *and* Council/Jones *in determining the reliability of expert testimony in South Carolina*, South Carolina Law., Nov. 2003, at 28.
[4] See http://www.sbccounsil.org/content/display.cfm?ID=1986.

nation and continues to be the destination for companies to locate and expand." Coincidently, the South Carolina Commerce Department boasts "South Carolina is one of the most business-friendly states in the nation and continues to be the destination for companies to locate and expand." Furthermore, their "2006 Activity Report" proudly displays that over 14,460 new jobs were created and the "Top Ten Job Creations" were all investments by out-of-state business.[5] Therefore, the actual image is far from the façade projected that our unpredictable rules are scaring off business. South Carolina has and continues to welcome new business without the stigma of "tort happy" litigants.

Groups who have testified and spoken openly against any change in the rules of evidence regarding expert testimony in state court include the South Carolina Attorney General, solicitors, criminal defense lawyers, and small business groups. The collective voice of these groups of individuals who are actively engaged in litigation, surpass the best efforts of the South Carolina Chamber of Commerce which makes a solitary cry for change like a spoiled child.

Not only do the current rules have no effect on new and existing business, but as far as litigation is concerned, the proposed rule changes would work an incredible disadvantage of time and money to the party seeking relief. For example, pretrial rulings may not occur until right before the trial begins. If a plaintiff's expert is excluded at that time, the plaintiff will not have an expert and be unable to proceed and the case will likely be dismissed. However, if a defense expert is excluded immediately before trial, the defense of the case is not eliminated and can still proceed forward in their case.

Although the amendments propose a method for accelerating a determination on expert admissibility, ironically, the proposed changes will make litigation more time consuming. These rule changes create a whole new set of hearings on qualifications of the experts before the actual merits of someone's case can be heard. This will only add to the backlog of cases going to trial and those on appeal, thereby requiring more court time and the resulting increased expense. The impediment unnecessarily requires that the court and the parties will be forced to undergo a trial before the trial. As the court in *Cortes-Irizarry v. Corporacion Insular* expressed: "We do not in any way disparage such practices; we merely warn that the game sometimes will not be worth the candle." [6] The *Cortes-Irizarry* court addressed the plaintiff's argument that a *Daubert* analysis is improper in the context of summary judgment by correctly noting a "trial setting normally will provide the best operating environment for the triage which *Daubert* demands."[7] The court most sensibly concluded that "given the complex factual inquiry required by *Daubert,* courts will be hard-pressed in all but the most clear-cut cases to gauge the reliability of expert

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[5] On February 8, 2008, *The State* newspaper ran an article on the front page entitled "*Massive trade center planned*," which reported a $100 million investment in the first phase of I-26 by an investment group called World Trade City Orangeburg, LLC, with ties to China and the United States. The article also reported that a Dubai company had purchased land along I-95, near Santee, for a construction project which included $700 million in buildings and employment of 5,500 people by 2015.
[6] See *Cortes-Irizarry v. Corporacion Insular,* 111 F.3d 184, 188 (1st Cir. 1997).
[7] *Id.*

proof on a truncated record." Overall, the trial court must be careful "not to exclude debatable scientific evidence without affording the proponent of the evidence adequate opportunity to defend its admissibility." [8]

As Professor Daniel J. Capra, the Reporter to the Judicial Conference Advisor Committee on the Federal Rules of Evidence, stated in *The Daubert Puzzle*, "the gatekeeper function should most often be suspended until the trial of the case. Any attempt to create a sufficient record from which reliability may be assessed at the early summary judgment stage would unnecessarily expand the summary judgment proceeding into a full-blown trial on the reliability issue." [9]

The current South Carolina Rules regarding expert testimony provide more than adequate guidance to trial judges in that they make clear that the trial judge has the front-line responsibility to determine the reliability of all expert testimony. Although this is a great responsibility, applying the current rules, that task has been simplified. Relying upon the evidentiary record, including expert reports, depositions, and the literature that supports the expert opinions, a court is more than capable of evaluating the admissibility of expert testimony without a hearing. So long as the expert's opinions provide defendants with a fair basis to challenge through cross-examination and the presentation of contrary evidence, the basic tools of the adversary process are satisfied.[10] The current Rules do not prohibit a flexible, expertise-dependent analysis of reliability; indeed, the rules promote a flexible approach in the true spirit of adversarial proceedings. Therefore, no amendment to the rules is necessary.

Furthermore, the proposed amendments will take away the rights of people and businesses to have juries decide their disputes in favor of an elected judge deciding the matter on collateral issues. Adversarial proceedings and the right to a jury trial are one of the most guarded fundamental rights of American citizens. As such, the Supreme Court of South Carolina should be mindful that "the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system."[11]

> Any vagueness or tentativeness in the testimony were "matters properly to be tested in the crucible of the adversary proceedings; they are not the basis for truncating that process." In other words, if an expert provides enough objective factors to indicate that they are not speculating, and they employ a methodology that was basically the same as what they ordinarily employ in their professional lives, *Daubert* is satisfied. If the expert is held to a higher standard than that, plaintiffs would be unfairly deprived of a jury trial (and the prosecution would suffer an undue burden in criminal cases).[12]

The proponents of this scheme are basing their reasons on false premises. There is no

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[8] *Id.*
[9] *The Daubert Puzzle* at 757.
[10] David G. Owen, *A Decade of Daubert,* 80 Denv. U. L. Rev. 345, 370-371.
[11] *The Daubert Puzzle* at 735-36.
[12] *The Daubert Puzzle* at 15.

evidence that the current system is flawed or that it affects the state's economy at all. In fact, the unfavorable change would create massive case costs and extra court burdens that are unnecessary.

As a pioneer plaintiff's litigation firm, Motley Rice is dedicated to litigating today for a better tomorrow. We advocate for individuals that have no voice in the judicial process and would continue to suffer in silence to the chagrin of their constitutional rights. It is our belief that South Carolina's courts are currently well equipped under the existing rules to ensure that scientific evidence is properly before the court and we urge the Supreme Court of South Carolina to not adopt the Proposed Amendments currently under consideration.

With kind regards, I remain,

Sincerely yours,

Ronald L. Motley

RLM/man

# LAW OFFICES OF LEE & SMITH, P.A.

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June 6, 2008

The Honorable Daniel E. Shearouse
Clear of Court
Supreme Court of South Carolina
PO Box 11330
Columbia, South Carolina 29211

RE: Proposed amendments to Rule 5 of the South Carolina Rules of Criminal Procedure, Rules 16 and 26 of the South Carolina Rules of Civil Procedure, and Rules 701, 702, and 703 of the South Carolina Rules of Evidence.

Dear Mr. Shearouse:

I am writing a strong opposition to the proposed rules changes listed above. We do not have a problem in South Carolina with unreliable testimony or "junk science." South Carolina judges apply the Council/Jones test under which provided sufficient guides to our trial courts and litigants as to when to admit expert evidence. Under Council, the proponents of the rules change have created a conundrum: Can you create a system that provides predictability by removing the current well-known system with a system that is untested and therefore inherently unpredictable?

This is the latest attempt from large corporations and business interests to try to change the rules in their favor when it comes to litigating disputes in South Carolina courts. Their claim is that because South Carolina is not a "Daubert" state that we are losing business out to other states. This is simply not true. In 2006, the "Small Business and Entrepreneurship Council" ranked South Carolina 11th among entrepreneur-friendly states, ahead of neighboring states Tenessee (13th), Georgia (25th), and North Carolina (40th). On it's website, the South Carolina Commerce Department makes the following claim: "South Carolina is one of the most business-friendly states in the nation and continues to be the destination for companies to locate and expand." Currently, only 10 states in the country adopt the Daubert or Kuhmo Tire rules in their entirety. The majority of states addressing the issue either limit its application or reject it outright like South Carolina's current evidentiary rules. Changes in these rules are unnecessary and unwise. Requiring written reports to be subject to extensive and time consuming challenges prior to trial will increase the costs of expert witnesses to the plaintiffs and litigants at all levels of the court system, resulting in litigation being more time-consuming, delayed and more expensive. This will only add to the backlog of cases going to trial and those on appeal.

In closing, these rules changes are unnecessary because South Carolina has a proven, strong system of determining the reliability of expert testimony. These changes are being promoted by big corporations and business interests solely for the purpose of expanding their current courtroom advantage, making it more difficult for injured victims to recover from responsible parties. I strongly urge the court to see through these attempts from corporate interests and refuse to make unnecessary rules changes simply to benefit defendants.

Sincerely,

Law Office of Lee & Smith, P.A.

Richard J. Smith, Esquire
RJSjdw

THE LACOMBE
LAW FIRM

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June 5, 2008

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, South Carolina 29211

RE: Proposed amendments to Rule 5 of the South Carolina Rules of Criminal Procedure, Rules 16 and 26 of the South Carolina Rules of Civil Procedure, and Rules 701, 702, and 703 of the South Carolina Rules of Evidence.

Dear Mr. Shearouse:

I am a civil litigator practicing in Mt. Pleasant, South Carolina, and I am writing to state my opposition to the proposed Rules changes described above.

South Carolina's present rules and case law ensure that reliable scientific testimony is presented to our Courts. South Carolina lawyers and judges are familiar with these established rules and case law and we have not experienced problems with "junk science" coming into our courtrooms. We do not need our present system of rules and case law, which has been working effectively, to be replaced with new rules and possible unforeseen problems associated with the new rules. What is not broken should not be fixed.

The argument that the new rules will prevent unreliable testimony on "junk science" is without merit. We do not have a problem with the admission of expert evidence in South Carolina. South Carolina judges apply the Council/Jones test, which provides sufficient guidance to our trial courts and litigants as to when to admit expert evidence. Under Council, to determine whether the underlying science of an expert's testimony is reliable, the court already looks at several factors, including: 1) publications and peer review of techniques; 2) prior application of method to the type of evidence involved in the case; 3) quality control procedures used to insure reliability; and, 4) consistency of method with recognized scientific laws and procedures. This is precisely the sort of predictability and certainty the non-lawyer business groups say we need. The proponents of the rules change have created a conundrum: Can you create a system that provides predictability by removing the current well-known system with a system that is untested and therefore inherently unpredictable?

The proposed rule changes are another example of corporate greed disguised as "tort reform". The businesses that are proponents of these changes claim that our state loses

business because it "is not a Daubert state." In 2006, the "Small Business and Entrepreneurship Council" ranked South Carolina 11th among entrepreneur-friendly states, ahead of neighboring states Tennessee (13th), Georgia (25th), and North Carolina (40th). On its website, the South Carolina Commerce Department makes the following claim: "South Carolina is one of the most business-friendly states in the nation and continues to be the destination for companies to locate and expand." The assertion, that there is no predictability in our rules of evidence and this lack of predictability is scaring off business, is completely untrue and as such can not serve as a factual basis for just changing the established and familiar rules of evidence in a way deliberately designed to hurt the citizens, the consumers, and small business people in favor of large out of state corporations.

Contrary to assertions by non-lawyer business crowds, only 10 states in the country currently adopt Daubert or Kuhmo Tire in their entirety, and a majority of states addressing the issue either limit its application or reject it outright like South Carolina's current evidentiary rules.

Groups who have testified and spoken openly against any change in the rules of evidence regarding expert testimony in state court include South Carolina Attorney General, the South Carolina solicitors, criminal defense lawyers and small business groups.

These rule changes will require any expert giving testimony in any case to prepare a written report and be subject to extensive and time consuming challenges regardless of their qualifications or their experience as experts in other court proceedings. Examples of cases that will be impacted include: Family Court cases (including property or business valuation, equitable apportionment, divorces, abuse and neglect cases, custody or adoption); Probate Court (including cases involving valuation of assets, or competency); simple personal injury cases in which the treating physician or a police officer offers expert testimony; all environmental contamination cases; small business disputes involving testimony of accountants or economists; and all construction disputes, often including mechanics lien cases and contract cases.

The proposed rule changes work an incredible disadvantage to the party seeking relief. For example, pretrial rulings may not occur until right before the trial begins. If a plaintiff's expert is excluded at that time, the plaintiff will not have an expert and be unable to proceed. The case will likely be dismissed. If a defense expert is excluded immediately before trial, the defense of the case is not eliminated and can still proceed forward in their case.

This will make litigation more time consuming and delayed. These rule changes create a whole new set of hearings on qualifications of the experts before the actual merits of someone's case can be heard. This will only add to the backlog of cases going to trial and those on appeal, thereby requiring more court time and the resulting increased expense.

These rule changes will take away the rights of people and businesses to have juries decide their disputes in favor of an appointed or elected judge deciding the matter on collateral issues.

The proponents of this scheme are basing their excuses on false premises. There is no

evidence that the current system is flawed or that it affects the state's economy at all. In fact, this rules change would create massive case costs and extra court burdens that are unnecessary.

Thank you for your consideration of the issues raised in this letter.

Very truly yours,

Deborah C. Rush

**Nelson Mullins**

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June 16, 2008

**Hand Delivered**

The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, SC 29211

RE: Proposed Amendment to Rules of Court Regarding Expert Testimony

Dear Mr. Shearouse:

I am writing to express my support for the adoption of the proposed amendments to the court rules regarding expert witnesses. If adopted, these changes will provide a new level of certainty and reliability that has been lacking in South Carolina courts.

Certainty – knowing in advance the proof that will be presented at trial so that preparation can be made to address it – and Reliability – knowing that the proof presented will be based on valid and sound scientific or technical principles and analysis – would seem to be fundamental to any rational judicial system. However, these basic concepts can be lost if the rules governing disclosure and admissibility of expert proof are not clear and uniformly enforced.

The disclosure requirements of the proposed rules are reasonable. The timing of the disclosures is left to the discretion of the court, as it is today under the court's authority to set discovery schedules. Absent such an order, the three hundred (300) day limit in the amendment provides ample time for the parties to disclose their experts' identity, opinions, and basis. The disclosure requirements will promote certainty. Parties will know what to expect sooner. Parties will have specific disclosures that will allow them to prepare to defend or settle a case.

The admissibility rules provide the scientific reliability for which the federal system is now well known. It has been suggested that application of proposed Rule 702 there has proven complex – that judges are not equipped to decipher the jargon and rubrics of scientific, medical or technical fields. However, the analytical framework of Rule 702 is not unfamiliar to judges and lawyers.

Rule 702 allows only four grounds for objection to an expert opinion. The first is expert qualifications. The Rule provides that a witness must be "qualified by knowledge, skill, experience, training or education." This standard is not new to South Carolina courts.

Rule 702 also provides three new substantive grounds for objection. The opinion must be based on reliable principles and methods [702(2)], sufficient factual data must be available to be applied to those principles and methods [702(1)], and those facts must be reliably applied to the principles and methods [702(3)]. This analysis is not unlike that taught in law school. A sound legal principle is the starting point for any reliable legal analysis. Sufficient facts must be known in order to reliably reach a conclusion. Even if sufficient facts are known, inaccurate application of the facts to the legal principle provides a legally unreliable result.

Legal arguments are rejected by judges and judicial decisions are overturned by judges every day using this same method of evaluating the soundness of legal reasoning as Rule 702 provides for evaluating scientific proof. All that the amendments to Rule 702 do is require judges to apply that same analysis to scientific reasoning that is presented in their court rooms. Judges in other states and in the federal system have proved that the formula works to provide needed reliability.

Another significant and positive change in the rules is the pretrial procedure for settling the issue of scientific reliability. The rules clearly impose a gate keeping role on the court. This role is not discretionary. Efforts by judges to abdicate this role in the federal system have been met by prompt reversals.[1] The structured pretrial process that expedites the court's gate keeping role will assure that the gate keeper function is consistently applied.
This rule is not burdensome. Lawyers will be required to work closely with expert witnesses to understand the experts' opinions, to consider the evidentiary basis for each of the factual underpinnings of those opinions and to disclose those in carefully written disclosures. Though the written disclosure is a new requirement, the work described above is not. These are the things lawyers must do to offer competent and persuasive testimony of experts under the current

[1] See *McClain v. Metabolife International, Inc.*, 401 F/3d 1233 (11th Cir. 2005), where the trial court stated:

> Trying to cope in this case without a pharmacological, or a medical, or a chemcical, or a scientific background, the court cannot fully and fairly appreciate and evaluate the methodology employed by either of these witnesses as they reached the conclusions they reached, conclusions that a jury could not reach without some expert opinion testimony. Neither can the court fully appreciate or evaluate the criticisms made by the defendant of the proposed testimony of these witnesses, especially when the criticisms do not come form competing proposed experts. This court does not pretend ot know enough to formulate a logical basis for a preclusionary order that would necessarily find, as a matter of law, that these witnesses cannot express to a jury the opinions they articulated to the court.

The Eleventh Circuit, reversing the district court said:

> Although the trial court conducted a *Daubert* hearing, and both witnesses were subject to a thorough and extensive examination, the court ultimately disavowed its ability to handle the *Daubert* issues. This abdication was in itself an abuse of discretion.

rule. The requirement of a written report may actually obviate the need for expensive depositions in some cases.

I urge the Court to adopt the proposed amendments as a reasonable first step toward creating more certainty and reliability in our court system. I also request the privilege of addressing the court at the public forum on July 11, 2008.

Very truly yours,

Joel H. Smith

JHS:dmf

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June 5, 2008

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, South Carolina 29211

RE: Proposed amendments to Rule 5 of the South Carolina Rules of Criminal Procedure, Rules 16 and 26 of the South Carolina Rules of Civil Procedure, and Rules 701, 702, and 703 of the South Carolina Rules of Evidence.

Dear Mr. Shearouse:

Please consider this letter a written comment regarding the above-captioned rule changes.

My law practice is virtually 100% civil litigation. It involves, primarily, the representation of Plaintiffs, whether they be individuals or entities. The practice is located in the small town of Darlington, South Carolina. There are no other "new" lawyers I know of in Darlington. There are also no other "young" lawyers that I know of in Darlington.

When I say "new" or "young", I mean that I graduated from law school in 2000 and am 39 years old.

Other lawyers who had practices in Darlington have either moved their offices to Florence, or some other larger town, become a judge, are running for other full-time public office, or are otherwise semi-retired and not fully engaged in the practice of law.

A small town solo practitioner seems to be a dying breed.

While I am proud to be a lawyer, and make a comfortable living, it is not easy, and involves working six or seven days a week, unyielding frugality, creativity, and ingenuity, etc. I represent people who are often times injured or wronged by more powerful individuals, professions or entities in our society, and who otherwise may not be able to obtain representation because their cases are unique or different.

Unfortunately, since the promulgation of "tort reform", the Medical Malpractice Act, caps for pain and suffering, the expert affidavit requirement, and similar developments that have occurred since I graduated from law school, it has become that

much more difficult to represent people who really do need representation, and who really have been victimized and injured, physically and/or economically.

While I have always had to turn away some of these people telling them that although they had a real injury, and were truly wronged, the cost-benefit analysis was not in their favor, since the aforementioned "tort reform", there are many more that I must turn away. These people have no remedy, nor relief, and, oftentimes, I was their last best hope. The proposed rule changes to the South Carolina Rules of Evidence will compound this problem dramatically.

Already, the costs involved in litigating a case of any complexity are prohibitive; the brain injury case requiring two security experts, a life care planner, an economist, and a neuropsychologist with approximately $60,000 in costs prior to settlement; the trip and fall over a mat case that required an architectural expert, engineering expert, forensic carpet expert, and lab technician at a cost of approximately $20,000 before settlement, etc. These cases will become that much more cost prohibitive, and, quite frankly, simply will not be pursued.

Thus, there will be an entire class of people who will just lose their right to recompense, and justice, because they will not be able to find a lawyer who is willing to take their case because they have not been catastrophically injured with huge medical bills, especially since the caps for pain and suffering have been instituted (in addition to the restrictive and relatively new "10 times" actuals rule of thumb when it comes to punitive damages awards).

As it is, neither I, nor many of my colleagues, are willing to litigate in federal court because of the rules that South Carolina seeks to adopt. It is both time, and cost, prohibitive to comply with those rules.

Thus far, I have spoken primarily about the extra costs that will be involved in complying with the new rules, but there will also be a significant amount of time involved as well. This will make cases that are brought even more difficult to settle since the lawyer will want to get the value of his time out of the case.

In addition to all of the above, South Carolina has sufficient rules, and they have never posed any problem in any case that I have been involved in.

I anticipate that the consequences of the rule changes, whether anticipated or unanticipated, will be that lawyers such as myself, who already are increasingly rare and, quite honestly, on the verge of extinction, will become extinct. I anticipate that small town law offices will become shuttered, and that people will be unable to find legal representation in their own home towns. I anticipate that an entire generation and way of practicing law, which is already in danger and either has, or may, become extinct, will indeed become extinct. I further anticipate that as these rule changes, in connection with tort reform, percolate through the system and society, people will become even more

despondent, hopeless, angry and increasingly hostile towards their government, generally, and the civil justice system and lawyers, specifically.

As indicated earlier, as it is, I must turn away a great number of people who have legitimate injuries, and who have been genuinely wronged, because the cost-benefit analysis simply is not in their favor. These people must live with these injuries knowing that the wrongdoer remains untouched, and will not be brought to justice in a civil court of law.

I beg of you not to change the rules as proposed.

With Kindest Regards, I am

Sincerely,

WILLIAM J. TUCK, PA

By: /s/

William J. Tuck

WJT/dtj

June 5, 2008

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, South Carolina 29211

RE: Proposed amendments to Rule 5 of the South Carolina Rules of Criminal Procedure, Rules 16 and 26 of the South Carolina Rules of Civil Procedure, and
Rules 701, 702, and 703 of the South Carolina Rules of Evidence.

Dear Mr. Shearouse:

Please note my opposition to the above referenced proposed amendments to our Rules.

In the last decade or so we have seen a constant erosion of the rights of victims through means such as summary judgment and arbitration. Moreover, the costs of litigation have risen steadily.

South Carolina citizens who by happenstance become victims do not deserve more onerous burdens in order to have a day in Court and some small measure of justice.

Respectfully Yours,

/s/

Mitchell Byrd # 1067

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June 9, 2008

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
PO Box 11330
Columbia, SC 29211

RE: Proposed Amendments to Rules 16 and 26 of the South Carolina Rules of Civil Procedure and Rules 701, 702, and 703 of the South Carolina Rules of Evidence

Dear Mr. Shearouse:

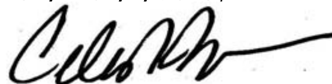
Thank you and the Court for the opportunity to express my support for the proposed revisions to the South Carolina's procedural and evidentiary rules as they apply to the use of expert testimony in cases litigated in South Carolina's court system. As a civil litigator with The McNair Law Firm, I offer my comments regarding the effect of the proposed changes on civil litigation only. Because I will also have the honor of testifying before the Court regarding these proposed amendments, I offer only a brief summary of my position on these proposals herein.

Simply stated, these proposed amendments to South Carolina's Rules of Civil Procedure offer a welcome change regarding the disclosure of and admissibility of expert opinions in civil litigation. If and when adopted, the proposed changes to Rules 16 and 26 of the Rules of Civil Procedure will provide plaintiffs and defendants alike with a fair, calibrated way to identity the experts proffered by their opponents. Most significantly, the requirements that the proposed opinions of experts be disclosed in a timely manner and that trial courts hold hearings as to an expert's qualifications and the potential admissibility of his or her opinions at trial will provide South Carolina litigants with predictability and permit the courts to properly oversee the use of expert evidence.

Further, the proposed amendments to Rules 702 and 703 of the Rules of Evidence will provide litigants, counsel, and courts alike with helpful guidance as to when and how expert evidence should be permitted at trial. These changes, which expressly acknowledge the already developed body of law in federal courts (including Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993), and its progeny), will provide South Carolina's trial judges with greater guidance and definition as to their function as "gate-keepers" as to expert evidence, as well as to the litigants in areas of testimony appropriate for opinion testimony.

These proposed amendments will enhance civil litigation in South Carolina's courts. I look forward to meeting with you regarding these amendments. Please allow this letter to serve as my request to be heard on this issue on July 9, 2008.

Very truly yours,



Celeste T. Jones

CTJ/pkj

Gibson Law Firm
Post Office Box 45
Anderson, SC 29622

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, South Carolina 29211

Re: Opposition to Proposed Rule Changes

Dear Mr. Shearouse:

I oppose the proposed rule changes because they will place an additional burden on plaintiffs and further limit access to justice with little or no benefit to any legitimate litigant interest. My understanding is that the co-equal judicial branch of government has been coerced into changing the rules by the legislature's initiative last year to limit the experts who can testify in South Carolina. The proponents behind the rash of judicial reforms that have swept the country are not easy to identify, but anyone experienced in the judicial field will likely admit that the reforms generally benefit business at the expense of individual litigants. The interests of justice and its protector, the judicial branch, lie with the opposition to the co-opting of the judicial branch by commercial interests.

Many people are already denied just compensation for their injuries simply because their losses are not sufficient to compensate the attorneys for the extraordinary effort required to pursue the cases against well-financed defendants and their insurance companies. The New England Journal of Medicine reported that an insurance industry review of their files by their own experts found medical malpractice resulting in death or serious bodily injury in 60 percent of the cases filed against their insureds. The same study showed that the insurance companies won complete victories at trial in 25 percent of the cases despite the fact that their own experts found medical negligence. I would suspect that the difficulty for victims of injustice in many other areas of litigation is similar. To the extent that the new rules place further burdens on the victims or makes their just compensation less likely, these rules will make justice that much less likely for all South Carolinians.

Most cases are not frivolous and those that are frivolous are addressed by the current rules and case law. I am aware of no study that demonstrates that South Carolina courts are significantly burdened by frivolous cases or that experts who testify in this state are prone to espousing positions outside of the mainstream of their fields.

The requirement that all experts prepare a written report will add to the already outrageous cost of expert opinions. In a recent case I handled, the experts charged 20-40 times the South Carolina median hourly wage. These costs are borne unjustly by victims when the cases are successful or by attorneys when the cases fail. In either case, adding additional costs to the litigant will further reduce the access of South Carolinians to justice with little or no benefit to the litigants. As shown by the above-referenced study in the New England Journal of Medicine, many legitimate victims of negligence are denied just compensation under the current rules and a failure of justice by the Courts does not mean that the case should not have been presented to the Court for redress.

While it may be true that the additional costs caused by the proposed rules will be proportionally small

compared to the current costs associated with litigation, each additional burden on the victims makes justice less likely and less just. Compensation to victims should not be reduced by expenses when there is no serious question as to liability. The proposed rules allow no cost-benefit analysis; it is a burden to every litigant regardless of benefit and regardless of merit.

Furthermore, the rules may give a serious unwarranted advantage to Defendants who can be expected to argue that an expert cannot deviate from their written reports. Proposed rule Rule 26(b)(4)(C) requires that the written report must include ``(1) a statement of all opinions to be expressed and the basis and reasons for them; (2) the data or other information relied on by the witness in forming his opinions; (3) all exhibits to be used as a summary of or support for the opinions". Opposing counsel will undoubtedly club the victims and their experts with every slight deviation of the expert or the mention of any fact that is not in the written report as a basis for their opinions. I would expect immediately after the rules are implemented that the defense bar will argue that expert opinions are not admissible as a result of deviations from the written reports.

More questions arise also concerning the effects of the proposed rules. Will litigants appeal decisions on the basis of perceived deviations from the expert reports? How much of a deviation from the written reports or how much supplementation to the written report after the 300-day limitation is allowed? If additional evidence is discovered after the 300-day due date for the report, will the expert be prohibited from using the evidence regardless of it's probative value? If an expert determines that additional facts adds further support for the the expert's opinion, which he or she did not realized prior to the 300-day due date, or which he was alerted to by the Defense's protestations, will the expert be prohibited from testifying about the additional supporting facts? Legitimate victims seem to be in jeopardy of being unjustly denied compensation as a result of this rigid rule.

Overall, I simply do not believe there is sufficient reason to tamper with the rules and I see little or no benefit to South Carolinians as a result of the proposed rule changes. This rigid rule deprives the very competent judiciary of the necessary discretion to do justice to the legitimate victims in South Carolina.

Sincerely

Kurt D. Gibson

R

Email: john@griffithlawyer.com

June 19, 2008

The Honorable Daniel E. Shearouse
Supreme Court of South Carolina
P O Box 11330
1231 Gervais St.
Columbia, SC 29211

**RE: Opposition to Rule Changes Regarding Experts**

Dear Mr. Shearouse:

There is no need to change the rules involving expert witnesses in South Carolina. Many fact witnesses are asked to give expert opinions regarding the subject matter of a lawsuit. For example, in auto accident cases the treating physician must be asked, in their [expert] medical opinion, whether the injury was "most probably" caused by the collision. It is unreasonable for the court to expect these fact witness experts, such as treating physicians who are not professional witnesses, to keep records of all trial and deposition testimony given within the past 4 years or to write a detailed written expert reports, and to keep current detailed C.V.s available. They are dragged into the cases as witnesses with expertise and will be less likely to participate if these requirements are added. Possibly there is a distinction the court can make between these experts and "retained experts," but when will the distinction be made and what will the guiding rules for this be. The opposing party can be expected to challenge every expert of any kind with the proposed new rule changes. Is the expert retained if they are paid more than the standard $25.00 witness fee and mileage for their time involved in testifying in the case? If a doctor is subpoenaed to testify in a deposition or trial only to be paid the $25.00 witness fee and mileage, can you expect the doctor to give unhelpful testimony in revenge or to avoid further subpoenas to testify? Even worse, doctors may refuse to treat injured persons who may have a lawsuit or claim involved with the injury. Finally, sometimes a fact witnesses may be qualified as experts regarding some of their testimony and only be testifying per subpoena. This witness with expertise may be unwilling to do anything not compelled by a subpoena. Will the proposed rule allow such fact witnesses to be compelled by subpoenas to give the required written expert opinion, C.V., and list of cases testified in deposition or court during the past 4 years? For instance, could a criminal defendant require this is the SLED lab technician in a drug case as his possible expert or of the coroner/ medical examiner in a murder case?

The argument that the new rules will prevent unreliable testimony on "junk science" is without merit. We do not have a problem with the admission of expert evidence in South Carolina. South Carolina judges apply the Council/Jones test, which provides sufficient guidance

to our trial courts and litigants as to when to admit expert evidence. Under Council, to determine whether the underlying science of an expert's testimony is reliable, the court already looks at several factors, including: 1) publications and peer review of techniques; 2) prior application of method to the type of evidence involved in the case; 3) quality control procedures used to insure reliability; and, 4) consistency of method with recognized scientific laws and procedures. This is precisely the sort of predictability and certainty the non-lawyer business groups say we need. The proponents of the rules change have created a conundrum: Can you create a system that provides predictability by removing the current well-known system with a system that is untested and therefore inherently unpredictable? Contrary to assertions by non-lawyer business crowds, only 10 states in the country currently adopt Daubert or Kuhmo Tire in their entirety, and a majority of states addressing the issue either limit its application or reject it outright like South Carolina's current evidentiary rules.

The proposed rule changes work an incredible disadvantage to the party with the burden of proof in cases which require expert testimony. For example, pretrial rulings may not occur until right before the trial begins. If a plaintiff's expert is excluded at that time, the plaintiff will not have an expert and be unable to proceed. The case will likely be dismissed. If a defense expert is excluded immediately before trial, the defense of the case is not eliminated and can still proceed forward in their case.

We already have a well settled and effective set of comprehensive rules and case law that work to ensure that valid, reliable scientific testimony is presented to courts. All lawyers, parties to lawsuits, and judges are very familiar with this established set of rules and case law. We do not need these rules and laws replaced with uncertainty with new rules.

Very truly yours,
**Smith & Griffith, LLP**

John P. Griffith

JPG/

Email: john@griffithlawyer.com

June 20, 2008

The Honorable Daniel E. Shearouse
Supreme Court of South Carolina
P O Box 11330
1231 Gervais St.
Columbia, SC 29211

**RE: Opposition to Rule Changes Regarding Experts**

Dear Mr. Shearouse:

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We already have a well settled and effective set of comprehensive rules and case law that work to ensure that valid, reliable scientific testimony is presented to courts. All lawyers, parties to lawsuits, and judges are very familiar with this established set of rules and case law. We do not need these rules and laws replaced with uncertainty with new rules.

Very truly yours,
**Smith & Griffith, LLP**

John P. Griffith

JPG/

June 10, 2008

Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

RE: Request for Written Comments Regarding Amendments to Rule 5 of the SCRCrimP, Rules 16 and 26 of the SCRCP, and Rules 701, 702, and 703 of the SCRE

Dear Mr. Shearouse:

I am writing to you in response to the Court's request of March 20, 2008, for written comments regarding amendments the Court is considering in relation to the above-stated rules. For reasons further explained below, I write in opposition to these amendments. Please also consider this letter a notification to you of my intent to speak at the public hearing on July 9, 2008.

My interest in this matter comes from having been an active member of our State's trial bar for over twenty years. I have been honored to have the opportunity to be involved in the judicial system in a number of different roles. After serving as law clerk to the Honorable Frank Eppes, I joined the Fifth Judicial Circuit Solicitor's Office as an Assistant Solicitor. Later, after working for several years in private practice, I was named United States Attorney for the District of South Carolina from 1993 to 1996. Since then I have been in private practice with an emphasis on complex civil and criminal litigation. I also am a member of the South Carolina Bar Association, the Richland County Bar Association, the South Carolina Criminal Defense Lawyers Association, the Association of Former United States Attorneys, and am currently the President-Elect of the South Carolina Trial Lawyers Association.

As a trial lawyer, I am constantly faced with the fact that as the modern world becomes increasingly complex, more and more issues in legal disputes cannot be resolved without utilizing expert witnesses that provide specialized knowledge. As a result, cases today are often won or lost based on the admissibility of expert testimony. Thus, the Court's proposed

amendments to the rules will have an enormous effect on the outcome of legal controversies. I write to you today in opposition to these amendments for the reasons listed below.

**COST**

Proposed amendment to Rule 16 of the South Carolina Rules of Civil Procedure would allow, upon motion of a party, a "pretrial hearing to determine whether a witness qualifies as an expert and whether the expert's testimony satisfies the requirements of Rules 702, 703 and 704, SCRE." Given the other proposed amendments, this amendment essentially allows parties to request a state-law equivalent to a federal "*Daubert* hearing." These hearings can last anywhere from a few of days to a few weeks and will exponentially increase litigation costs to all parties. Most disturbingly, however, is that these costs will be most burdensome to "the little people," i.e., individuals involved in the court system that may not have the disposable income to be able to afford a pre-trial, *Daubert*-type hearing. For example, in Family Law cases, the cost of a divorce will greatly increase if the parties need pre-trial hearings to qualify their experts for equitable apportionment, business/home valuation, etc. Any time a party wishes to put forth an "expert witness" to testify to some relevant portion of the trial, opposing counsel can file a motion to disqualify the witness and potentially "outspend" the other party into settlement.

**EFFICIENCY**

While dispositive expert testimony motions can save parties considerable time and effort, if granted at a relatively early stage, these motions can only improve efficiency to the extent that the motions are meritorious. However, very often they are not and thus the net effect of a motion that gets denied is a decrease in efficiency for everyone involved. Defense counsel does not file losing motions without reason – they file them because they are acting rationally in the best interests of their clients, given the *Daubert*-induced regime. Under that regime, there is almost no downside to raising even relatively weak *Daubert* objections. Defense counsel will be paid for their work, the motion may stick, and even if it doesn't, the motion may "educate the court" and/or intimidate the opposition. At the very least, a motion will usually force plaintiff's counsel, who is typically paid on contingency, to devote substantial time and resources to responding. Defense counsel's only real disincentive to file *Daubert* motions (apart from the client's possible unwillingness to pay for them) may be that a sufficiently weak one might damage counsel's credibility with the court and in practice that does not seem to represent a compelling deterrent.

**USE AS A TACTIC**

*Daubert* and the federal rule have been beneficial in preventing "bad science" cases that were seen before the rule in the early 1980's; there was no effective vehicle to challenge the unreliable expert. However, today *Daubert* has become a tool or tactic, such as the filing of a form *Daubert* challenge to all of the opposing experts. Those types of unmeritorious challenges are grossly inefficient, abusive, and can result in mini-trials and satellite litigation. In addition, South Carolina has an effective test for the admission of expert evidence, the *Council/Jones* test, which

currently provides excellent guidance to our trial courts and litigants as to when to admit expert evidence.

**CONFUSION AND LACK OF CLARITY**

Under the federal/*Daubert* rule, whether testimony is evaluated under the *Daubert* scientific criteria or the *Kumho* standard for admissibility of nonscientific testimony presents itself in a large number of commercial litigation matters and is often both dispositive of the matter and decided with error. Allowing nonscientific damages testimony to be evaluated under *Daubert's* scientific testing regimen almost guarantees its exclusion, and additional expense and expertise are required to argue the distinction between science and nonscience in order to have nonscientific damages testimony admitted. Some kinds of expert testimony are simply not capable of being tested. An immediate result is that if the opponent of such testimony can convince the court that (1) the Daubert factors for scientific testimony apply and (2) that the testimony has not met the Daubert criteria because it has not been subjected to "the rigors of scientific testing," the testimony will be excluded regardless of its quality, effectively reading the words "technical and other" out of Rule 702. The test used in South Carolina, the *Council/Jones* test, looks at several factors, including: 1) publications and peer review of techniques; 2) prior application of method to the type of evidence involved in the case; 3) quality control procedures used to insure reliability; and 4) consistency of method with recognized scientific laws and procedures. The test currently used in South Carolina is used by judges for both scientific and nonscientific evidence and causes less confusion than the federal rule and provides litigants with more predictability.

**JUDICIAL INEFFICIENCY**

Recent studies by the Federal Judicial Center and the RAND Institute have concluded that judges are much more likely since *Daubert* to scrutinize expert testimony before trial and then to limit or exclude expert testimony. Such scrutiny only educates and aids the Court if the same judge hearing the *Daubert* motion will ultimately preside over the trial of the case. Of course, in South Carolina where judges rotate through the circuits, each judge will have to review the entirety of the transcript of any *Daubert* hearing that had taken place prior to a trial to be sufficiently educated regarding the case and the issues resolved previously. As a result, *Daubert* would create great judicial inefficiencies because, unless by the luck of the draw the same judge is assigned a case for trial, at least two judges will have to spend considerable time on *Daubert* related motions.

**LENGTH OF TRIALS**

The *Daubert* process is less disruptive in federal court where much of the trial work is conducted by the assigned judge, where status conferences on pre-trial issues are routine and often lengthy, and judges have multiple federal law clerks and numerous staff to assist them with front-loaded pre-trial matters. However, in the South Carolina State court system, most of the pre-trial issues

are dealt with by judges "riding circuit" who may not be the judges who hear the trial (See "Judicial Efficiency" section) and who have limited staff and an exponentially larger case load. Requiring pre-trial hearings on expert witnesses will overload the dockets, clog the courts, and increase the time it will take parties to get through a trial.

**IMPACT ON POTENTIAL EXPERTS**[1]

Ironically, the federal rules on expert testimony may be making reputable scientists leery of participating in the legal system. That a judge, who possibly has some incorrect or unsophisticated views about science, has the power to exclude the scientist as an expert witness and make some cutting remarks in print while doing so, may be enough to convince some scientists that they do not wish to be involved with the legal system. And they may also for similar reasons decline to undertake research related to litigation. On the remand of *Daubert*, Judge Kozinski of the Ninth Circuit added as a factor for courts to consider in assessing reliability, whether the expert's research was conducted expressly for the purpose of testifying and suggested that unless science is conducted independently of litigation, it is not likely to amount to "good science." But often the need for research does not become apparent until litigation begins. Judge Kozinski's assessment puts another potential obstacle in plaintiffs' path by perhaps driving out of the courtroom good scientists who do not want to be castigated as hired guns.

**CONCLUSION**

While it may seem that the Court's adoption of the proposed Rule changes will improve the quality of expert testimony in our courts, it will have several less desirable effects. An exponential increase in trial costs will ensure that individuals and small businesses will be precluded from having their day in court, not due to a weakness in their case but solely due to the depth of their pockets. Cases will become longer and more complex, clogging an already over-taxed court system. In sum, the Court's adoption of the proposed Rules would irreparably harm our court system and limit access to justice, an unintended but imminent consequence. Thus I urge the Court to decline adoption of the proposed Rule changes.

Thank you for your time and consideration. I look forward to seeing you at the public hearing on July 9, 2008.

With sincerest regards,

J. P. Strom Jr.

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[1] Excerpted from Margaret A. Berger, JD, "What Has a Decade of Daubert Wrought?" American Journal of Public Health, Vol 95, No. S1, S59-S65 (July 2005).

Marjorie Powell
Senior Assistant General Counsel

PhRMA

July 3, 2008

Honorable Daniel E. Shearouse
Clerk of Court
P.O. Box 11330
Columbia, S.C. 29211

Dear Mr. Shearouse:

I write on behalf of the Pharmaceutical Research and Manufacturers of America ("PhRMA") to provide PhRMA's comments regarding the proposed changes to South Carolina Rules of Civil Procedure 16 and 26, and South Carolina Rules of Evidence 701, 702, and 703.[1] PhRMA strongly supports those proposed changes, which would align the South Carolina Rules with the rules governing expert testimony in federal and the majority of state courts.

PhRMA also suggests that the Notes to these rules include additional language beyond that currently proposed, clarifying that South Carolina courts should look to directly comparable federal case law when interpreting the new South Carolina Rules. A significant body of federal case law applying the nearly identical federal standards would provide important guidance to South Carolina courts.

## I. Background

PhRMA represents the country's leading pharmaceutical research and biotechnology companies, which are devoted to inventing medicines that allow patients to live longer, healthier, and more productive lives. PhRMA companies lead the way in discovering new cures for a range of diseases and illnesses. PhRMA members alone invested an estimated $44.5 billion in 2007 in discovering and developing new medicines. PhRMA, *R&D Spending by U.S. Biopharmaceutical Companies Reaches Record $58.8 Billion in 2007*, *at* http://www.phrma.org/news_room/press_releases/us_biopharmaceutical_companies_r&d_ spending_reaches_record_$58.8_billion_in_2007/(Mar. 24, 2008). Research by all of America's pharmaceutical and biotechnology research companies was a record $58.8 billion in 2007. *Id.*

Over the past seven years, America's pharmaceutical research companies have consistently invested around 18 percent of their sales in research and development, which is as much as five times more than the average U.S. manufacturing firm,

[1] Similar changes have been proposed for South Carolina Rule of Criminal Procedure 5.

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according to the Congressional Budget Office. *Id.* The societal benefits from such investment are undeniable. For example, one study found that survival times for patients with metastatic breast cancer improved during the 1990s, thanks to new medicines. PhRMA, *Pharmaceutical Industry Profile 2008*, at 29, *available at* http://www.phrma.org/files/2008%20Profile.pdf.

PhRMA's members appreciate the importance of reliable scientific evidence and expert testimony based on reliable scientific methods. Federal standards, which the majority of the states have now adopted, have helped ensure that junk science cloaked in the guise of expert testimony is excluded from courts. PhRMA supports the proposed changes to South Carolina's Rules, which would achieve that same goal in South Carolina's courts.

## II. South Carolina Should Change Its Expert Witness Law

To date, South Carolina has declined to adopt the expert rules that are applied by the majority of state courts and in federal court. *See, e.g.*, *State v. Council*, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (S.C. 1999). These rules originated with the U.S. Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The *Daubert* decision directed federal court judges to perform a "gatekeeping" role to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." 509 U.S. at 589. In fulfilling that gatekeeper role of deciding whether expert testimony is reliable enough for court, the Supreme Court directed judges to examine the same types of factors that scientists in the field consider in determining whether scientific knowledge is reliable:

- Whether the theory or technique "can be (and has been) tested." *Id.* at 593.
- Whether the "theory or technique has been subjected to peer review and publication." *Id.*
- "[T]he known or potential rate of error" in the theory "and the existence and maintenance of standards controlling the technique's operation." *Id.* at 594.
- "General acceptance" within the relevant community. *Id.*

While this standard was initially developed for science testimony, it has subsequently been applied to all expert testimony. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999).

The primary purpose of this *Daubert* standard is to exclude "junk science," or unreliable testimony presented as scientific certainty by an expert, who is often selected to impress a jury with his or her credentials. Expert witnesses enjoy unusual powers in

court: they can rely on evidence that could not be presented to a jury by other witnesses; they may give opinions that other witnesses could not give; and they may even testify about facts about which they do not have firsthand knowledge. *See* S.C. R. Evid. 702-704; *Daubert*, 509 U.S. at 592. To ensure that experts properly exercise these powers, every court sets standards designed to ensure that faulty expert testimony does not taint the integrity of the judicial system and the fairness of trials. Beginning with the *Daubert* decision, courts have acted as gatekeepers to ensure that judicial integrity and courtroom fairness are not undermined through the use of junk science at trials.

In addition to safeguarding the integrity and fairness of the judicial process, *Daubert* standards ensure that lawsuits do not wrongly impact the availability of beneficial products and services, such as those produced by PhRMA's members. For example, the *Daubert* rule was first created in a case involving Bendectin, a popular morning sickness drug. In October 1979, the *National Enquirer* falsely linked Bendectin with birth defects. David E. Bernstein & Jeffrey D. Jackson, *The Daubert Trilogy in the States*, 44 Jurimetrics J. 351, 460 (2004). Thousands of lawsuits followed, supported by unreliable expert theories about how Bendectin caused birth defects. Later "studies proved that Bendectin has no measurable reproductive risks to the mother or the fetus." Robert Brent, *Medical, Social, and Legal Implications of Treating Nausea and Vomiting of Pregnancy*, 186 Am. J. Obstetrics & Gynecology S262, S262-63 (2002). These studies came too late to prevent Bendectin's withdrawal from the market, depriving women of an effective treatment for morning sickness.

"The flexible *Daubert* inquiry gives the district court the discretion needed to ensure that the courtroom door remains closed to junk science while admitting reliable expert testimony that will assist the trier of fact." *Amorgianos v. National R.R. Passenger Corp.*, 303 F.3d 256, 267 (2d Cir. 2002). Since *Daubert's* adoption, judges around the country have used this flexible standard to allow testimony that (even if the judge does not agree with it) passes fair standards of reliability, while excluding expert testimony that is unreliable. For example:

- One court ruled that expert testimony was not reliable because it was based only on "subjective belief or unsupported speculation." *Weisgram v. Marley Co.*, 169 F.3d 514, 521 (6th Cir. 1999) (quoting *Daubert*, 509 U.S. at 590). An expert had tried to testify that a heater caused a fire, but the expert "formulated his theory knowing practically nothing about the Weisgram heater, or any other baseboard heater for that matter," and he had "performed no tests to determine whether it was even theoretically possible" for the heater to fail as he claimed it had. *Id.* at 520-21.

- Another court rejected expert testimony linking a fall with fibromyalgia, because the testimony was based on "conjecture, not deduction from scientifically-

validated information." *Black v. Food Lion, Inc.*, 171 F.3d 308, 313 (5th Cir. 1999).

- Yet another court excluded expert testimony because "[t]he medical community does not generally recognize" the connection the excluded experts alleged. *McClain v. Metabolife*, 401 F.3d 1233, 1239 (11th Cir. 2005). The court also found that the experts drew "speculative conclusions about Metabolife's toxicity from questionable principles of pharmacology." *Id.* at 1240.

As noted by one Judge, this *Daubert* standard of requiring reliable expert testimony is "the recent trend" in state courts. Leslie Southwick, *Recent Trends in Mississippi Judicial Rule Making: Court Power, Judicial Recusals, and Expert Testimony*, 23 Miss. C. L. Rev. 1, 15 (2003). To date, at least twenty-eight other states have adopted the *Daubert* standard or a virtually identical standard.[2]

South Carolina should join these states by adopting the proposed changes to the South Carolina rules.

## III. <u>The Proposed Changes to the South Carolina Rules Will Ensure That Only Reliable Expert Testimony Is Used in South Carolina Courts</u>

The proposed changes to the South Carolina Rules will align South Carolina's expert law with the federal *Daubert* standard and with the standard used in the majority of other state courts. Specifically, the proposed changes to the South Carolina Rules of Evidence would make them virtually identical to the corresponding Federal Rules of Evidence, including by adopting the Notes that accompany the Federal Rules. The South Carolina Rules of Civil Procedure would also be amended to align more closely with the Federal Rules of Civil Procedure.

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[2] *See State v. Coon*, 974 P.2d 386 (Alaska 1999); *Farm Bureau Mut. Ins. Co. of Arkansas v. Foote*, 14 S.W.3d 512 (Ark. 2000); *People v. Schreck*, 22 P.3d 68 (Colo. 2001); *State v. Porter*, 698 A.2d 739 (Conn. 1997); *Bowen v. E.I. DuPont de Nemours & Co.*, 906 A.2d 787 (Del. 2006); *Carnell v. Barker Mgmt.*, 48 P.3d 651 (Idaho 2002); *Steward v. State*, 652 N.E.2d 490 (Ind. 1995); *Leaf v. Goodyear Tire & Rubber Co.*, 590 N.W.2d 525 (Iowa 1999); *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575 (Ky. 2000); *State v. Foret*, 628 So.2d 1116 (La. 1993); *Searles v. Fleetwood Homes of Pa., Inc.*, 878 A.2d 509 (Me. 2005); *Gilbert v. DaimlerChrysler Corp.*, 470 Mich. 749 (Mich. 2004); *Mississippi Transp. Comm'n v. McLemore*, 863 So.2d 31 (Miss. 2003); *State Board of Healing Arts v. McDonagh*, 123 S.W.3d 146 (Mo. 2003); *State v. Bowman*, 89 P.3d 986 (Mont. 2004); *Smith v. Colo. Organ Recovery Sys.*, 694 N.W.2d 610 (Neb. 2005); *State v. Alberico*, 861 P.2d 192 (N.M. 1993); *State v. Goode*, 461 S.E.2d 631 (N.C. 1995); *State v. Hartman*, 754 N.E.2d 1150 (Ohio 2001); *Christian v. Gray*, 65 P.3d 591 (Okla. 2003); *State v. O'Key*, 899 P.2d 663 (Or. 1995); *DiPetrillo v. Dow Chem. Co.*, 729 A.2d 677 (R.I. 1999); *State v. Hofer*, 512 N.W.2d 482 (S.D. 1994); *McDaniel v. CSX Transp.*, 955 S.W.2d 257 (Tenn. 1997); *E.I. DuPont De Nemours & Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995); *State v. Kinney*, 171 Vt. 239 (Vt. 2000); *State ex rel. Weirton Med. Ctr. v. Mazzone*, 584 S.E.2d 606 (W. Va. 2003); *Alexander v. Meduna*, 47 P.3d 206 (Wyo. 2002).

These changes would give South Carolina state judges the same power to exclude unreliable scientific testimony that South Carolina federal judges now enjoy. Federal judges in South Carolina and within the Fourth Circuit have routinely excluded unreliable testimony, including:

- The district court in *Morehouse v. Louisville Ladder Group*, No. 3:03-887-22, 2004 U.S. Dist. LEXIS 21766 (D.S.C. June 28, 2004) rejected unreliable expert testimony on the cause of a ladder's failure. The expert refused to use any of five generally-accepted and reliable methods to test his theory; the test he did perform "did not bend the ladder leg in the same way that the accident ladder leg was bent following Plaintiff's accident"; and the expert refused to account for other potential causes of the damage to the ladder. *Id.* at *14, *16-17.

- The Fourth Circuit affirmed the exclusion of expert testimony on a medical device because the opinion "makes little sense in light of [the expert's] own concession." *Cooper v. Smith & Nephew*, 259 F.3d 194, 201 (4th Cir. 2001). Moreover, the expert failed to consider other potential causes, even though "[t]he medical literature in peer-reviewed journals" pointed to another possible cause. *Id.* at 202.

Current expert standards in South Carolina state courts give judges less freedom to exclude this type of unreliable expert testimony. The current South Carolina rules have been characterized as "more liberal" than even the standard applied by state courts that refuse to apply federal gatekeeping rules. *Council*, 335 S.C. at 17, 515 S.E.2d at 517; *see also In re Act No. 385 of 2006*, 2006 S.C. LEXIS 287, at *2 (S.C. Aug. 24, 2006) (noting that "no South Carolina statute or court rule has ever embraced the higher scrutiny applied as a pre-requisite for the admission of expert testimony enunciated in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)"). Indeed, current standards arguably allow judges to accept evidence that is "not even generally accepted outside the courtroom." *State v. Jones*, 273 S.C. 723, 731, 259 S.E.2d 120, 124 (1979).

The proposed changes to the South Carolina Rules would give judges greater power to exclude unreliable testimony and junk science, while still allowing juries to hear reliable expert testimony. They would also give the litigants the right to ensure that these powers are exercised in a timely manner, by requiring fair hearings on these types of expert issues within a specific time period. In modifying South Carolina's rules in this fashion, the changes would also eliminate the potential for contradictory rulings depending on whether the claim is pending in a South Carolina state or federal court. PhRMA therefore urges that the changes be adopted.

## IV. An Additional Change to the Amendment Notes Would Provide Further Benefits

While the proposed changes to the rules would provide most of the benefits of *Daubert* to South Carolina's courts, PhRMA proposes an additional change to the Notes to the 2008 Amendments to the Rules that would fully harmonize South Carolina's expert witness rules with those in the federal courts. Specifically, PhRMA proposes that the Notes to the 2008 Amendments for South Carolina Rule of Civil Procedure 16 and South Carolina Rule of Criminal Procedure 5 explicitly state that South Carolina state courts should be guided by *Daubert* and cases that apply *Daubert*, using language adapted from the proposed legislation regarding *Daubert* in pending bills S. 687 and H.R. 3725.

PhRMA proposes that this modification be implemented by adding two sentences to the Notes to the Amendments for those rules, as follows, with the additional text in bold:

- Note to 2008 Amendment, South Carolina Rule of Criminal Procedure 5: "The amendment, similar to Rule 16, SCRCP, as amended in 2008, gives the trial court discretion in holding a pretrial hearing to determine the qualifications of an expert and whether the expert's testimony meets the requirements of Rules 702, 703, and 704, SCRE. **In interpreting and applying those standards, the courts of this State should be guided by the opinions of the Supreme Court of the United States in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137 (1999), and their progeny. In addition, the courts of this State may draw from other precedents binding in the federal courts of this State applying the standards announced by the Supreme Court of the United States in the foregoing cases.**"

- Note to 2008 Amendment, South Carolina Rule of Civil Procedure 16: "This amendment adds new subsection (d), requiring the court, upon motion of a party, to hold a pre-trial hearing on the admissibility of expert testimony proffered by any other party. The new subsection also requires the court to apply the standards set forth in Rules 702, 703 and 704 of the South Carolina Rules of Evidence, and to abide by the requirements of Rule 52(a), SCRCP, that findings and conclusions be set forth in the trial court's ruling. **In interpreting and applying those standards, the courts of this State should be guided by the opinions of the Supreme Court of the United States in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137 (1999), and their progeny. In addition, the courts of this State may draw from other precedents binding in the federal courts of this State applying**

**the standards announced by the Supreme Court of the United States in the foregoing cases.** Subsections (d) and (e) are renumbered accordingly."

Georgia recently adopted a similar approach. *See* Ga. Code Ann. § 24-9-67.1(f) (2007) ("It is the intent of the legislature that, in all civil cases, the courts of the State of Georgia not be viewed as open to expert evidence that would not be admissible in other states. Therefore, in interpreting and applying this Code section, the courts of this state may draw from the opinions of the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137 (1999); and other cases in federal courts applying the standards announced by the United States Supreme Court in these cases.").

PhRMA recommends that the Notes to the 2008 Amendments to the rules include this additional language to reinforce the fact that South Carolina's courts can and should draw upon the substantial law that has developed under *Daubert* as they implement the new South Carolina standards.

## V. Conclusion

PhRMA strongly supports the proposed changes to the South Carolina Rules to align South Carolina's expert witness standards with those of the federal courts and the majority of the state courts. The proposed changes, if adopted, would substantially strengthen the ability of South Carolina courts to prevent unreliable expert testimony that would mislead juries.

PhRMA also proposes an addition to the Notes for Civil Procedure Rule 16 and Criminal Procedure Rule 5, to make clear that South Carolina courts should be guided by the decisional law that has developed under *Daubert* and its progeny. This change would further help ensure that litigants do not taint South Carolina courts with expert evidence that would be disallowed in other state and federal courts, by aligning South Carolina's doctrine with the federal doctrine even more closely and by allowing South Carolina's courts to remain in step with the most recent developments in *Daubert* law.

Very truly yours,

Marjorie E. Powell

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July 2, 2008

**Via UPS**
The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
1231 Gervais Street
Columbia, South Carolina 29201

**Re: Comments to Proposed Amendments to Rule 5 of the South Carolina Rules of Criminal Procedure; Rules 16 and 26 of the South Carolina Rules of Civil Procedure; and Rules 701, 702, and 703 of the South Carolina Rules of Evidence**

Dear Mr. Shearouse:

The Washington Legal Foundation (WLF) hereby submits these comments in response to this Court=s Request for Written Comments regarding proposed amendments to the South Carolina Rules of Criminal Procedure, Civil Procedure, and Evidence. WLF supports these amendments as a further means of ensuring the reliability of expert testimony and promoting objectivity in the litigation process. In 2000 the U.S. Supreme Court adopted similar revisions to the Federal Rules of Evidence. These revisions have proved useful in providing flexible guidelines to the district courts in ensuring that expert testimony is both reliable and relevant.

**Interests of WLF**

WLF is a national non-profit public interest law and policy center based in Washington, D.C., with supporters nationwide, including litigants and attorneys who practice in the South Carolina courts. WLF engages in litigation on a wide variety of legal issues. In particular, WLF has devoted substantial resources over the years through litigation and publishing to the promotion of civil justice reform, including tort reform. WLF has appeared as *amicus curiae* in both federal and State courts to address the gatekeeping function of judges with respect to the admission of expert testimony. *See, e.g., Kumho Tire Co. v. Carmichael,* 526 U.S. 137 (1999); *General Electric Co. v. Joiner,* 522 U.S. 136 (1997); *Daubert v. Merrill Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993); *Lockheed Litigation Cases,* 126 Cal. App. 4th 271 (2005), *review dism=d*, 2007 Cal. LEXIS 13244 (Cal. Nov. 1, 2007).

WLF has also appeared in numerous South Carolina legal proceedings to address a variety of civil litigation issues. *See, e.g., Farmer v. Monsanto Corp.,* 353 S.C. 553 (2003); Comments to Proposed Amendment of Local Rule 5.03, U.S. District Court for the District of South Carolina (filed Sept. 30, 2002).

**Background: *Daubert* and its progeny**

In 1923, the U.S. Court of Appeals for the District of Columbia Circuit decided *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). *Frye*=s Ageneral acceptance test@ became the leading validation standard on expert witness qualification requirements for over fifty years, in both federal and State courts. In *Daubert*, 509 U.S. at 589, the U.S. Supreme Court repudiated the general acceptance test. The Court stated that the general acceptance test was superseded when Congress adopted the Federal Rules of Evidence (FRE). *Id.* Under the new test Athe trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.@ *Id.* The Court stated that FRE 702=s reference to Ascientific@ knowledge indicates that Aan inference or assertion must be derived by the scientific method.@ *Id.* at 590. The Court went on to hold that if an expert testifies based on scientific knowledge that is designed to assist the trier of fact in determining a fact issue, then a court must make Aa preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and [] whether that reasoning or methodology properly can be applied to the facts in issue.@ *Id.* The Court subsequently indicated that Athe law grants a district court the same broad latitude when it decides *how* to determine reliability as it enjoys in respect to its ultimate reliability determination.@ *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 143 (1997) (emphasis added). While the *Daubert* decision specifically dealt with scientific knowledge, the Court stated in *dicta* that ARule 702 also applies to >technical or other specialized knowledge.=@ *Daubert*, 509 U.S. at 590 n.8. Six years later in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999), the Court explicitly applied the *Daubert* standard to all expert testimony.

The Court=s decision in *Daubert* was largely a response to the overwillingness of many court to admit expert testimony without regard to its reliability. The decades prior to *Daubert* were marked by increasingly frequent use of Aprofessional@ consulting specialists paid to testify as expert witnesses on a party=s behalf. David G. Owen, *A Decade of Daubert*, 80 Denv. U. L. Rev. 345, 351 (2002). While many experts were qualified and competent to testify on the agreed upon issue, Aothers advertised a willingness to testify, for a fee, on the defectiveness . . . of just about anything, >from toys to airplanes.=@ *Id.* Based largely on this explosion in the use of expert testimony, new lawsuits were filed Abased on novel, untested, abstract, and occasionally quite fantastic theories of science and technology, propounded by >experts= who sometimes were dubiously qualified to testify on issues on which they claimed expertise.@ *Id.* at 353. This trend led the U.S. Supreme Court to undertake a re-evaluation of expert testimony and, in particular, *Frye=s* general acceptance test.

Rather than focusing on whether an expert=s scientific method is generally accepted, *Daubert* directed federal courts to focus on whether a scientific method is viable and has been scientifically tested. *See* Edward J. Imwinkelried, *The Next Step After Daubert: Developing a Similarly Epistemological Approach to Ensuring the Reliability of Nonscientific Expert Testimony*, 15 Cardozo L. Rev. 2271, 2277 (1994). Thus, the Court shifted the focus from an inquiry into the

*general acceptance* of the method to an inquiry into the acceptance of the *validity* of the method. *See id.* Under this new standard, the trial judge performs an important role as the gatekeeper, assessing the validity of the particular method. The judge is not required scrutinize the expert=s testimony for flaws. Daniel J. Capra, *The Daubert Puzzle*, 32 Ga. L. Rev. 699, 736 (1998). Rather, A[t]he task of the gatekeeper after *Daubert* is to assure that the expert reached her opinion by the same avenues that the expert uses in her day-to-day work.@ *Id.* By rigorously scrutinizing a method on its merits, the *Daubert* test can be highly effective in preventing improperly manipulated data from reaching a jury. *See* David G. Owen, *A Decade of Daubert*, 80 Denv. U. L. Rev. 345, 351 (2002).

**Proposed SCRE 702**

The Federal Rules of Evidence were amended in 2000 to incorporate the principal rulings of the U.S. Supreme Court in its trilogy of expert witness decisions: *Daubert*, *Joiner*, and *Kumho Tire.* South Carolina=s proposed amendments are similar to these FRE amendments. The proposed changes to the South Carolina rules move the trial judge into a position of gatekeeper, directly assessing the reliability of expert testimony. *See* Daniel J. Capra, *The Daubert Puzzle*, 32 Ga. L. Rev. 699, 703 (1998) (evaluating proposed changes to the Federal Rules of Evidence). The proposed amendments to Rule 702, South Carolina Rules of Evidence (SCRE), provide that an expert may testify if A(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.@ WLF supports these changes, which are consistent with the U.S. Supreme Court=s rationale in *Daubert*. Although *Daubert* provided factors for courts to use in evaluating reliability, it explained that the ultimate responsibility for determining reliability rests with the trial court judge. *See Daubert,* 509 U.S. at 593B94 (The factors set forth in *Daubert* include (1) whether the technique or theory can be tested; (2) whether the technique or theory has been subject to peer review or publication; (3) the potential rate of error; (4) the existence and maintenance of standards controlling the technique=s operation; and (5) whether the theory or technique has been Agenerally accepted@ within the scientific community).

In drafting the amendments to FRE 702, the advisory committee noted that it was important Ato draft a rule that squarely places the responsibility for determining reliability with the trial court. And it is important to establish at least some general guidelines for a trial court to use B guidelines that are consistent with the general goal of *Daubert* to exclude experts who are operating in litigation differently than they would operate in their professional lives.@ Daniel J. Capra, *The Daubert Puzzle*, 32 Ga. L. Rev. 699, 765 (1998) (quoting Advisory Committee on Evidence Rules, Draft Minutes of the Meeting of October 20 B 21, 1997, at 6.). FRE 702 was amended to incorporate the goal of *Daubert* but still provide some flexibility to the trial courts. *Id.* at 757. The rule requires both a reliable methodology and a reliable application to the facts of the particular case. *Id.* Thus, FRE 702 provides trial courts with the ability to apply the *Daubert* factors without unreasonably

mandating inflexible tests for analyzing a given method. Although the amended rule places trial judges in the more complex role of gatekeeper, the effect of the amended rule is to ensure the evaluation of expert testimony based on its merits.

In the interests of providing increased assurances that only reliable expert testimony is admitted into evidence, WLF recommends that the Court adopt the proposed amendments to SCRE 702. Requiring trial judges to undertake an evaluation of the merits of the specific method employed by a proposed expert witness, followed by an evaluation of witness=s application of his/her method to a particular set of fasts, will do much to ensure that Ajunk@ science is not placed before the jury. Proposed SCRE 702 is an important step in maintaining an objective forum.

**Proposed SCRE 703**

The proposed amendments to South Carolina Rule of Evidence 703 are virtually identical to the amendments to FRE 703 adopted in 2000. The proposed change is narrow, addressing an expert=s reliance on facts not otherwise admissible into evidence. *See* Daniel J. Capra, *The Daubert Puzzle*, 32 Ga. L. Rev. 699, 773 (1998). The current version of SCRE 703 is somewhat ambiguous and, over the years, has been used to evade limits imposed by the hearsay rule. *See* Daniel F. Blanchard, *A Backdoor Exception to the Hearsay Rule?* 13 S.C. Law 15 (2002). Abuses have included referencing reports not in evidence, reading from reports not in evidence, or, in extreme cases, introducing outside reports into evidence. *See* Daniel J. Capra, *The Daubert Puzzle*, 32 Ga. L. Rev. 699, 723 (1998). Because the finder of fact is charged with weighing the evidence, and hence the credibility of the evidence, disagreement arises in differentiating between the improper admission of hearsay evidence and the proper admission of evidence used to support an expert=s credibility. Some argue that all supporting information on which the expert relied should be admitted with a limiting instruction. Daniel J. Capra, *The Daubert Puzzle*, 32 Ga. L. Rev. 699, 735 (1998). Others argue that only the sources of information should be disclosed, not the contents of the inadmissible information. *Id.* Professor Daniel Capra, the reporter to the Judicial Conference Advisory Committee on the Federal Rules of Evidence, explored the dilemma and concluded that A[t]he best way to permit an expert to rely on inadmissible information while preventing the abuse of Rule 703 as a de facto hearsay exception, is to balance the probative value of the evidence for its proffered purpose against the risk of prejudicial effect, confusion, and delay.@ *Id.* at 778. The balancing approach advocated by Professor Capra was incorporated into the Federal Rules of Evidence in 2000. WLF supports that approach and urges its adoption by the Court.

Similar to proposed SCRE 702, proposed SCRE 703 leaves much to the discretion of the trial judge. While the proposed rule prevents disclosure of prejudicial information, the rule does not provide guidelines as to when information should be deemed prejudicial. *See* Ronald L. Carlson, *Is Revised Expert Witness Rule 703 a Critical Modernization for the New Century?* 52 Fla. L. Rev. 715, 743 (2000). Rather, it simply provides that Athe proponent of disclosure will have the burden

of demonstrating that the probative value of the information in assessing the expert=s opinion substantially outweighs the prejudicial effect.@ *Id.* By requiring proponents of disclosure to make a case for admission to the trial judge, the admission of prejudicial hearsay evidence will be appropriately restricted. Because every case presents unique features, it is not realistic for proposed SCRE 702 to attempt to provide comprehensive guidance regarding when the probative value of hearsay evidence substantially outweighs its prejudicial effect. Rather, the contours of the dividing line can best be worked out by means of case-by-case delineation in the courts. *Id.*

The proposed amendment nonetheless serves to advance *Daubert=s* goal of preventing unreliable expert testimony from reaching the jury. Proposed SCRE 703 would eliminate A[s]elf-serving, bolstering, and corroborative assertions from hearsay sources, when sought to be invoked by a trial expert on his own behalf. . . .@ Ronald L. Carlson, *Is Revised Expert Witness Rule 703 a Critical Modernization for the New Century?* 52 Fla. L. Rev. 715, 740 (2000). AThe rule endeavors to ensure that reliable and probative information comes before the trier of fact on one hand, and to minimize the risk of prejudice resulting from the jury=s potential misuse of the information on the other.@ *Id.* at 742B43.

**Proposed SCRE 701**

Proposed SCRE 701 would add language to preclude opinion testimony by a lay witness whenever the trial judge determines that the opinion is not reliable unless the witness possesses requisite knowledge, skills, or experience. The rule would subject all individuals testifying on scientific, technical, or other specialized knowledge to the reliability requirements imposed under proposed SCRE 702. Apart from the obvious reliability concerns, proposed SCRE 701 also addresses the concern that Aa litigant with a witness who is qualified on a technical matter could [also evade the] pretrial disclosure requirements by calling the witness as a layperson.@ Daniel J. Capra, *The Daubert Puzzle*, 32 Ga. L. Rev. 699, 769 (1998). While the South Carolina Rules of Evidence already restrict the admissibility of opinion testimony requiring Aspecial knowledge, skill, experience, or training,@ proposed SCRE 701 bolsters those restrictions by explicitly referencing the Rule 702 standards and by addressing the issue of experts testifying as lay witnesses. *See, e.g., Murphy v. Jefferson Pilot Communication Co.*, 364 S.C. 453, 465B66 (S.C. App. 2005).

**Other Proposed Changes**

The proposed changes to Rule 5 of the South Carolina Rules of Criminal Procedure and Rule 16 of the South Carolina Rules of Civil Procedure would mandate that the trial judge, if requested to do so by a party, conduct a pretrial hearing on the admissibility of expert testimony and to provide written findings regarding his/her reasons for admitting or excluding the testimony. WLF wholeheartedly endorses these proposals; they ensure that the issue of admissibility is given careful consideration and facilitate appellate review of the admissibility determination. The proposed changes to Rule 26 of the South Carolina Rules of Civil Procedure are also commendable; by regularizing the production of information regarding a party=s expert witnesses, they reduce the likelihood of squabbling at trial over the adequacy of pre-trial disclosures.

**Conclusion**

The Washington Legal Foundation thanks the Court for the opportunity to comment on the proposed rule changes. For the foregoing reasons, WLF urges the Court to adopt the changes as proposed. Maintaining an objective forum for litigants to settle disputes is a central goal of any state judiciary system. By adopting the proposed rules, South Carolina will ensure that evidence admitted at trial is both relevant to the case at hand and reliable. The proposed rules further South Carolina=s goal of promoting an objective and effective judicial system.

Respectfully submitted,

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/s/ Richard A. Samp
Richard A. Samp
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