



Atlantic Legal Foundation

R E P O R T

JUNE 1997

ALF Continues Its Fight Against The Admissibility of Junk Science

Unique among all public interest legal foundations, ALF has a group of distinguished scientists on its Advisory Council to work with and advise it regarding issues involving the interface of science and the law. Moreover, when that involvement is on an *amicus* basis, ALF has been and is able to represent not only its distinguished scientists but also other distinguished scientists, including Nobel laureates, enlisted by ALF's scientists.

The principal objective of ALF's scientists is to insure, wherever possible, that proper or good science is admit-

ted into evidence and not evidence that is methodologically or otherwise flawed. ALF's first foray into the science arena occurred in 1993 when it filed an *amicus* brief on behalf of 18 scientists, including six Nobel laureates, in the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals*, in which ALF argued that scientific evidence to be admissible should be peer reviewed and published. In its opinion the Supreme Court cited to and quoted from ALF's brief.

Subsequently, ALF has played a very active and decisive role in helping to shape the law with respect to claims that exposure to electromagnetic fields causes cancer. Recently, ALF has appeared on behalf of a number of distinguished scientists in the California Supreme Court twice and in New York

Supreme Court to argue that scientifically there is no real showing of a causal connection between EMFs and cancer. In *Covalt v. San Diego Gas & Electric Co.* the California Supreme Court agreed with ALF in affirming the dismissal of plaintiff's EMF claims and in *Vaughters v. Con Edison* the New York Supreme Court also agreed with ALF, citing at great length to ALF's brief. The second California case is still pending.

Recently, ALF filed another brief in the U.S. Supreme Court in a sequel to *Daubert*. This case, *Joiner v. General Electric, et.al.*, concerns the standard of

not show a causal relationship between breast implants and the systemic diseases claimed by women who have had breast implants. ALF is on the look-out for the appropriate case in which to appear.

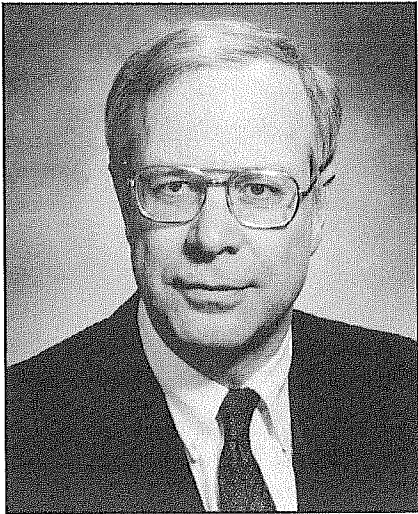
ALF is proud of the contributions its scientists have made to the growing awareness by courts that they must admit into evidence only scientific opinion which is proper and methodologically sound. ALF shall continue to participate in matters involving the interface of science and the law to prevent the admissibility of "junk" science.

The principal objective of ALF's scientists is to insure, wherever possible, that proper or good science is admitted into evidence and not evidence that is methodologically or otherwise flawed.

Table of Contents

<i>ALF Elects Two New Board Members</i>	2
<i>Challenge to NYC Affirmative Action Program Proceeding on Schedule</i>	2
<i>President's Report</i>	3
<i>NEA Use of Dues Needs to Be Challenged</i>	3
<i>ALF to Honor Donald Rumsfeld</i> ...	4
<i>Vassar College Harassment Policy Decision Appealed</i>	4
<i>ALF Names Two New Members to Its Advisory Council</i>	5
<i>Justice Department's Manipulation of Nassau County Police Exam Challenged</i>	6

ALF Elects Two New Board Members



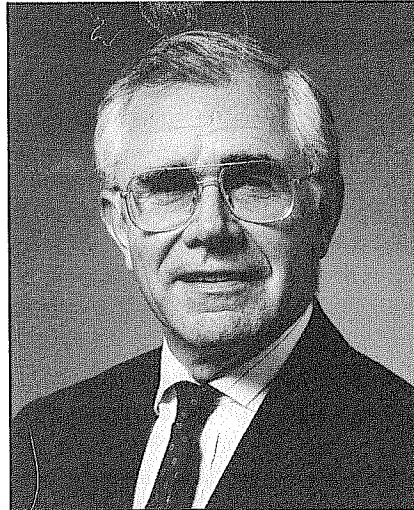
George Frazza

ALF recently elected two outstanding lawyers to its Board of Directors. They are George Frazza, for many years the General Counsel of Johnson & Johnson, and Howard Rudge, the current General Counsel of DuPont.

Mr. Frazza was appointed General Counsel of Johnson & Johnson in 1978 and was elected a member of Johnson & Johnson's Executive Committee in

1987. He currently is of counsel to the New York City firm of Patterson, Belknap, Webb & Tyler.

Mr. Frazza is the chairman of the 53,000 member Business Law Section of the American Bar Association and co-chair of the American Arbitration Association's large Complex Case Program. He is past president of the Association of General Counsel. Mr.



Howard Rudge

Frazza is also actively involved with the New York Stock Exchange's Legal Advisory Committee, New York State and City Bar Associations, Practicing Law Institute, Foundation for American Communications, and Food and Drug Law Institute.

Mr. Frazza received his B.A. degree from Marietta College and his L.L.B. from Columbia Law School.

Mr. Rudge joined the Legal Department of DuPont in 1960. In 1990 he was made a Vice President of DuPont and in March 1994 he was named Senior Vice President and General Counsel.

Mr. Rudge currently serves on the Board of Overseers of Widener Law School. He is active in the American Bar Association and the American Corporate Counsel Association.

Mr. Rudge received his B.A. degree from Bucknell University and J.D. degree from George Washington University in 1964.

ALF is delighted to welcome both Mr. Frazza and Mr. Rudge to its Board of Directors and looks forward to their active participation in ALF's consideration and deliberation of new legal activities.

Challenge to NYC Affirmative Action Program Proceeding on Schedule

As described in earlier ALF Reports, ALF is challenging the utilization or set-aside aspect of New York City's affirmative action program on behalf of a small Staten Island contractor who, though low bidder, lost out on three New York City construction contracts because of the City's affirmative action program.

The City's affirmative action program is based on a so-called disparity study which was commissioned in 1990. The study was

submitted in January 1992 and the City instituted its affirmative action regula-

The study is seriously flawed for a number of reasons, including the fact that the study considers all construction firms with one employee to be "available" to do any type of construction project without any consideration of the size of the firm or the size of the project...

tions shortly thereafter. ALF has now submitted its expert's report which severely criticizes the disparity study and

its methods. Basically, the study attempts to show that the City underutilizes minority and women-owned business enterprises and therefore concludes that the City discriminates against such groups. The study is seriously flawed for a number of reasons, including the fact that the study considers all construction firms

with one employee to be "available" to do any type of construction project
continued on page 5

President's Report



Douglas Foster

As I contemplate my retirement as president of ALF at the end of this year, I have a number of memories and some thoughts, a few of which I would like to share with you.

First, there is a role for the public interest legal foundation in today's litigious society. Often, an individual or several individuals or a small company or an as-

sociation needs legal redress or needs to establish a principle and yet cannot afford the extraordinary costs of most litigations. Here is where the public interest legal foundation can step in and take on the individual's or company's cause without the expense of legal fees.

Second, the public interest legal foundation can bring to a court's attention, in an *amicus* role, the views and opinions of non-parties as neutral observers of the issues before the court. They can add to the dialogue before the court without the normal constraints imposed on the parties.

Third, the never ending passage and promulgation of statutes and regulations have caused a manifold increase in the amount of litigation in this country. The Americans with Disabilities Act, for example, has spawned many lawsuits. There are many other examples, including the mountain of lawsuits involving race, sex or age discrimination. The end results are a less civil society, a much more expensive workplace and a decreasing willingness to accept responsi-

bility for one's actions and deficiencies.

Fourth, the concept of affirmative action has been greatly misused and distorted. It has become often a numbers game. Ever since the 1971 decision in *Griggs v. Duke Power* of the U.S. Supreme Court the theory of disparate impact has been established. This theory essentially translates equality of opportunity into equality of result. As a result hiring in the public workplace in particular must reflect the ethnic make-up of the population at large regardless of the qualifications of

the candidates. Merit and quality have suffered to the detriment of all of us.

Finally, the interface of science and the law has greatly increased. As a result we must be constantly on guard that good or proper science is admitted into evidence and improper or methodologically flawed science is kept out.

I leave you with those few thoughts. I have enjoyed my twelve years as president of ALF and I thank all of you for your support.

*Often, an individual...
needs legal redress or needs
to establish a principle
and yet cannot afford
the extraordinary costs
of most litigations.
Here is where the public
interest legal foundation
can step in...*

NEA Use of Dues Needs to Be Challenged

Under several U.S. Supreme Court decisions, including *Beck* and *Aboud*, unions are prohibited from using any portion of union dues for political purposes. If unions use union dues to support certain political candidates or to espouse certain political positions, the unions are required by law to refund to agency fee members that portion of their dues which were used for political purposes. The unions, and in particular the teachers' union,

have been ignoring the law.

At the most recent meeting of its Board of Directors, ALF was authorized to locate agency fee members of New York State's teachers' union who would serve as plaintiffs in a challenge to the political use of their dues by the union. ALF has been seeking such plaintiffs and in that connection is working closely with the Individual Rights Foundation.

This is a significant issue because no

one should be forced to give money to political candidates whom they do not support or political causes with which they disagree. Moreover, the unions should not be allowed to flaunt the law as set down by the Supreme Court. ALF shall continue to seek viable teacher plaintiffs on whose behalf ALF will then commence a legal action against the teachers' union.

ALF to Honor Donald Rumsfeld



Donald Rumsfeld

Each year ALF honors someone who best exemplifies the principles of our free enterprise system. This year marks the 10th anniversary of this award. ALF is delighted to present the award this year to Hon. Donald Rumsfeld who has been an outstanding contributor to this

nation's achievements in both the public and private sectors.

In 1962 Mr. Rumsfeld was elected to the U.S. House of Representatives from Illinois for the first of his four terms. In 1973 he served as U.S. Ambassador to NATO and thereafter served in President Ford's administration as Chief of Staff of the White House and a member of the President's Cabinet and then from 1975 to 1977 he served as Secretary of Defense, the youngest in our country's history.

After twenty years of public service, Mr. Rumsfeld left Washington, D.C. to lecture at Princeton University's Woodrow Wilson School of International Affairs and at Northwestern University's Kellogg Graduate School of Management. From 1977 to 1985 he served as CEO, President and then Chairman of G.D.

Searle & Co. and from 1990 to 1993 as Chairman and CEO of General Instrument Corporation. Currently, Mr. Rumsfeld serves as non-executive Chairman of the Board of Directors of Gilead Sciences, Inc. He also serves as a member of the Board of Directors of such outstanding companies as Gulfstream Aerospace Corp., Kellogg, Sears, Roebuck and Co., and Tribune Co.

Mr. Rumsfeld is a 1954 graduate of Princeton University. He served in the U.S. Navy from 1954 to 1957 as a Naval Aviator. Mr. Rumsfeld has received a number of honors during his career, including the Presidential Medal of Freedom, the nation's highest civilian award.

Prior honorees have included William Simon, Walter Wriston, Al DeCrane, Carla Hills and Steve Forbes.

*Donald Rumsfeld
has been an
outstanding contributor
to this nation's
achievements in
both the public and
private sectors.*

Vassar College Harassment Policy Decision Appealed

In ALF's September 1996 Report, there was an article concerning ALF's representation of Professor Boris Simkovich who was fired by Vassar College for alleged violations of its harassment policy. ALF brought an Article 78 proceeding on behalf of Professor Simkovich, challenging Vassar's harassment policy and the lack of due process received by the Professor at the hands of Vassar.

In March, in a very perfunctory opinion, a judge of the New York State Supreme Court in Dutchess County dismissed Professor Simkovich's Article 78

proceeding. He failed to address the issue of the harassment policy and its ambiguity. He also failed to address ad-

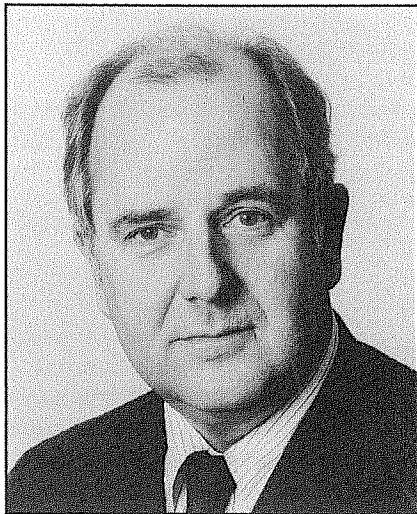
*...the harassment policy is vague and ambiguous and
under its terms most professors would probably
be fired because most teachers as a pedagogical method
tend to intimidate their students...*

equately a number of the due process complaints and clearly did not read the transcripts of the testimony before the Vassar College hearing panel.

ALF intends to appeal the decision to the Appellate Division for the Second

Department. Among other things, ALF will argue that the decision of the Vassar College hearing panel was arbitrary and capricious and against the weight of evidence. ALF will also argue that the harassment policy is vague and ambiguous and under its terms most professors would probably be fired because most teachers as a pedagogical method tend to intimidate their students and that is essentially what was alleged in the case of Professor Simkovich.

ALF Names Two New Members to Its Advisory Council



Alfred Ferguson

ALF recently named Alfred Ferguson, a partner in the New Jersey law firm of McCarter & English, and Michael Gough, Director of Science and Risk Studies at the Cato Institute in Washington, D.C., to its Advisory Council.

Mr. Ferguson received his B.A. degree from Yale University in 1958 and his L.L.B. from Yale in 1963. After graduation he clerked for the Hon. Robert B. Anderson, Chief Judge, U.S. District Court for the District of Connecticut and Second Circuit Court of Appeals.

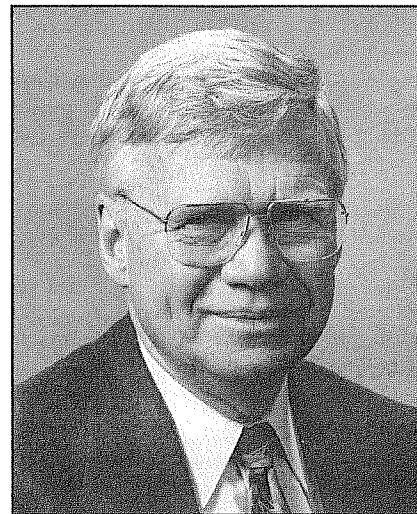
Thereafter he joined McCarter & English where he became a partner in 1969.

Mr. Ferguson is a litigator, specializing in business, real estate, zoning and planning law. He previously was chairman of the New Jersey State Bar Association Section of Land Use Law.

Dr. Gough received his B.A. degree from Grinnell College and his PhD in Biology from Brown University. He was an assistant professor of Microbiology at Baylor College of Medicine and Associate Professor of Microbiology at the State University of New York at Stonybrook.

In 1977 Dr. Gough joined the Congressional Office of Technology Assessment where he served until 1985. Subsequently, he was the Director of the Risk Science Institute, a Project Director at Environ Corporation, and Director at the Center for Risk Management, Resources for the Future. From 1987 through 1990 he chaired the Department of Veterans Affairs Advisory Committee on Health-Related Effects of Herbicides and from 1990 through February 1996, he chaired the Department of Health and Human Services Committee for Review and Oversight of the United States Air Force Study of the Health Effects of Agent Orange. He joined the Cato Institute in January, 1996.

Dr. Gough has published more than



Michael Gough

20 papers in molecular biology. His more than 40 publications in public policy have centered on cancer risk assessment and policy and dioxin risks. Dr. Gough is on the editorial board for *Risk Analysis*. His book *Dioxin, Agent Orange* was published in 1986.

ALF is delighted to welcome Mr. Ferguson and Dr. Gough to its Advisory Council and looks forward to their advice with respect to ALF's legal and scientific activities.

Challenge to NYC Affirmative Action Program Proceeding on Schedule

continued from page 2

without any consideration of the size of the firm or the size of the project or whether the firm has the capacity to do the particular job or even whether such firms ever previously bid on City jobs. Similar disparity studies have been struck down in Philadelphia, Columbus, Ohio and Dade County, Florida, among

other places.

It is ALF's intention to move for summary judgment within the next few weeks. We hope to level the playing field in the construction industry and lay bare the myth of discrimination founded on a distorted and methodologically flawed disparity study.

The *Report* is published by Atlantic Legal Foundation, a nonprofit public interest legal center, tax-exempt under I.R.C. Sec. 501 (c)(3), advocating traditional American values in the courts.

Atlantic Legal Foundation
205 East 42nd Street, Ninth Floor
New York, New York 10017
(212) 573-1960

and

3544 N. Progress Ave.
Harrisburg, Pennsylvania 17110
(717) 671-5966

Justice Department's Manipulation of Nassau County Police Exam Challenged

To satisfy its devotion to the numbers game with respect to the hiring by local governments of policemen and firefighters the Justice Department has manipulated or emasculated the tests given to police and fire candidates. No more dramatic example of this intrusion has occurred than in Nassau County on Long Island, New York. There, the Justice Department helped design a test for police officer candidates that was to have as least adverse impact as possible without sacrificing job validity. The test originally consisted of 25 parts, including a number of cognitive parts. However, when the test was administered and the results reflected that only a few Blacks and Hispanics passed, the Justice Department dropped the cognitive parts, except for

reading comprehension which was made pass/fail and also required that the candidate only had to read better than the lowest one percentile of the current Nassau County police officers. This resulted in a greater number of

exam. The action was commenced in the United States District Court for the Eastern District of New York.

This is a significant case because the Justice Department is seeking to manipulate or water down other police exams throughout the country and if the Justice Department is successful, it will result in a noticeable diminishment in the qualifications of police officer candidates. The safety of our citizens is too im-

The safety of our citizens is too important for the Justice Department or anyone else to play the numbers game to satisfy some abstract theory...

portant for the Justice Department or anyone else to play the numbers game to satisfy some abstract theory that every ethnic or racial group must be represented in police and fire departments in the same percentages that they appear in the particular community.

Blacks and Hispanics who passed the test; however, it essentially destroyed the job validity component of the test.

ALF is representing approximately 70 candidates who took the Nassau County police exam, asserting that their equal protection and due process rights have been violated by the Justice Department's manipulation of the police

exam. The action was commenced in the United States District Court for the Eastern District of New York.

Atlantic Legal Foundation, Inc. is a nonprofit public interest legal foundation incorporated in Pennsylvania. It is a Section 501(c)(3) organization and contributions are tax deductible.

Atlantic Legal Foundation charges no fees for the services it renders. Your contributions will be used to help defend private rights, free enterprise and sound economic development.

Contributions may be mailed to either office of

Atlantic Legal Foundation

205 E. 42nd St., 9th Floor
New York, NY 10017

(or)

3544 N. Progress Ave.
Harrisburg, PA 17110

Yes, we would like to support **Atlantic Legal Foundation**. Our check for the following tax deductible contribution is enclosed.

- Contributor:** \$10-99
- Affiliate:** \$100-499
- Associate:** \$500-999
- Supporter:** \$1,000-2,499
- Sustainer:** \$2,500-4,999
- Sponsor:** \$5,000 and above

Name: _____
 Title: _____
 Company: _____
 Address: _____
 City: _____
 State: _____ Zip: _____
 Telephone: (_____) _____