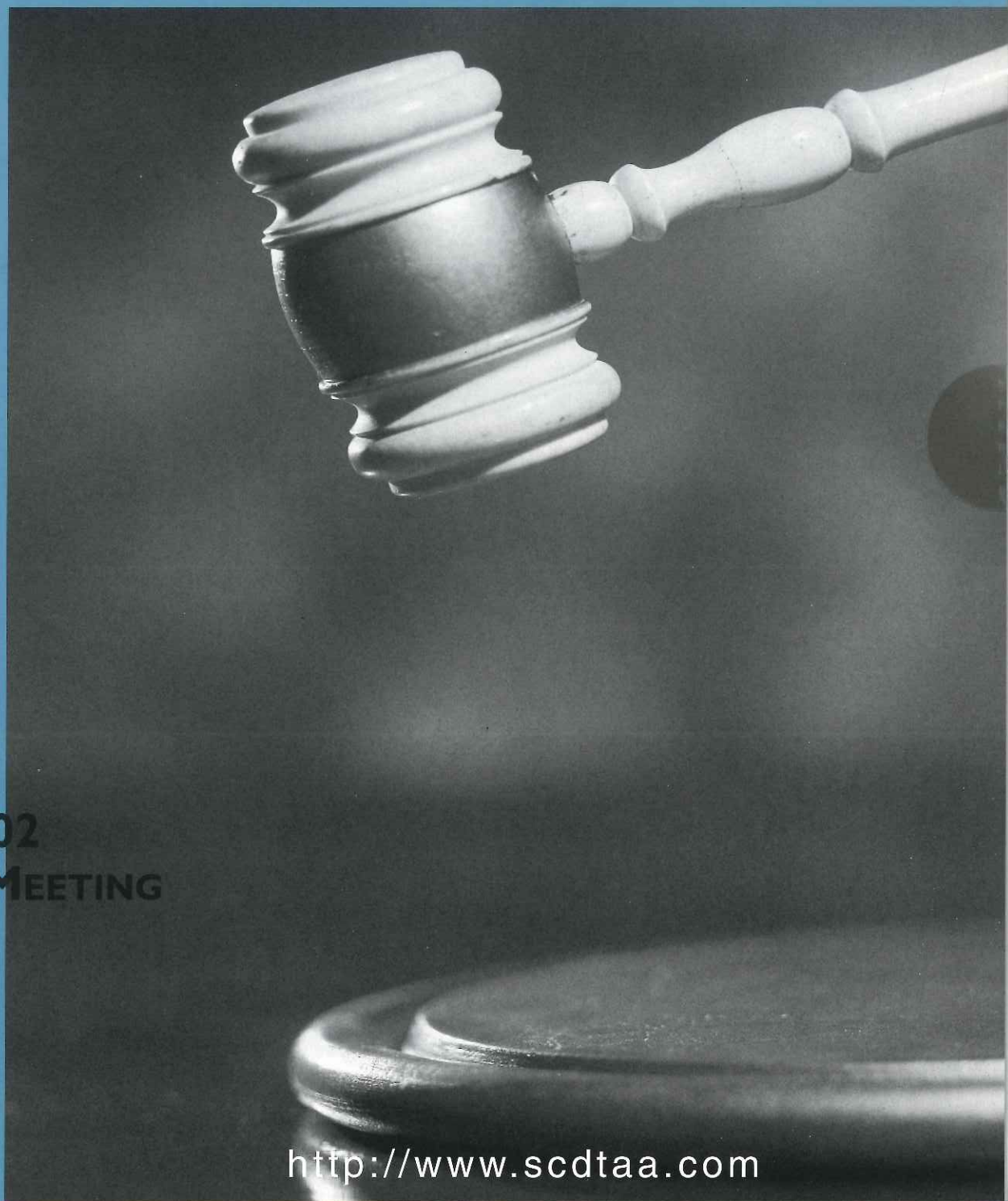


# THE DefenseLINE



**2002  
ANNUAL MEETING**

<http://www.scdtaa.com>

# 2002 SCDTAA Annual Meeting

## Château Élan • Braselton, GA

### November 7-10, 2002

by G. Mark Phillips

This year's Annual Meeting will feature a celebration of the SCDTAA's thirty-fifth anniversary. We plan to honor our Past Presidents and we ask that all of them plan to attend.

This year's meeting will be at the Château Élan Winery and Resort near Atlanta. The resort features some excellent golfing, dining, and lodging opportunities. We anticipate that a full host of state and federal judges will attend.

On Friday morning, November 8, there will be a special breakfast in honor of the Past Presidents. It will be attended by several federal judges who, later that morning, will lead a panel discussion of Past Presidents regarding the evolution, challenges, and benefits of civil defense practice in South Carolina. Also that morning, Sonny Seiler, the Savannah lawyer who played the judge in *Midnight in the Garden of Good and Evil*, will address our group. We also plan to

hear from University of Georgia trial advocacy specialist Ron Carlson.

On Saturday, November 9, one of our speakers will be Lane Young of the Hawkins & Parnell firm, whose talk on legal malpractice will comprise our ethics hour. Also that morning, we expect to hear from Chief Justice Toal or her designee on the State of the Judiciary. We also plan to present DRI President Elect Sheryl Willert. Our feature presentation on Saturday will be a panel discussion, moderated by Phil Lader, of South Carolina Governors.

As always, there will be plenty of opportunities for relaxation, golf, visits with colleagues and judges, and fine dining. We plan to have a wine tasting on Friday evening. Our banquet on Saturday evening will be followed by a dance to the sounds of *The Fabulous Kays*.

Do plan to join us for this weekend, the feature event of the SCDTAA's year.

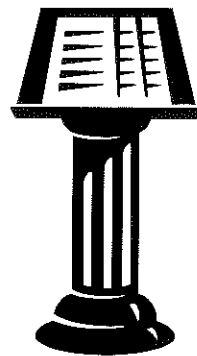
## Tentative Agenda

### Thursday, November 7, 2002

12:30 p.m.	Golf Tournament
3:00 p.m. to 5:00 p.m.	Executive Committee
5:00 p.m. to 6:00 p.m.	Nominating Committee
7:00 p.m. to 8:00 p.m.	Welcome Reception
	Dinner on your own
12:30 p.m.	Tennis Tournament and Other Activities
7:00 p.m. to 8:00 p.m.	Cocktail Reception
	Dinner on your own

### Friday, November 8, 2002

7:30 a.m. to 8:15 a.m.	Past Presidents' Breakfast
8:15 a.m. to 8:30 a.m.	Welcome and Announcements <i>Mills Gallivan, President</i>
8:30 a.m. to 9:30 a.m.	Trial Advocacy (or related topic) <i>Ron Carlson, Professor - University of Georgia</i>
9:30 a.m. to 10:15 a.m.	Federal Judges Panel Discussion with Past Presidents
10:15 a.m. to 10:30 a.m.	Coffee Break
10:30 a.m. to 10:45 a.m.	Pro Bono Project - Wills for Heroes <i>Anthony Hayes, Esquire</i>
10:45 a.m. to 12:00 noon	Midnight in the Garden of Good and Evil - The Real Case <i>Frank "Sonny" Seiler, Esquire</i>
8:00 a.m. to 8:30 a.m.	SCDTAA Business Meeting
8:30 a.m. to 9:30 a.m.	Ethics Hour <i>Lane Young, Esquire Hawkins &amp; Parnell, Atlanta, Georgia</i>
9:30 a.m. to 10:15 a.m.	Governor's Panel
10:15 a.m. to 10:30 a.m.	DRI President - <i>Sheryl Willert, Esquire Seattle, Washington</i>
10:45 a.m. to 11:00 a.m.	State Judiciary Address
11:00 a.m. to 12:00 a.m.	Substantive Law Breakout
7:00 p.m. to 8:00 p.m.	Cocktail Reception
8:00 p.m. to 12:00 a.m.	Dinner/Dance with music by "The Fantastic Kays" (black tie optional)



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Donna Seegars Givens  
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G. Mark Phillips

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# THE DefenseLINE

#### 2002 ANNUAL MEETING

#### Tentative Agenda

#### H. MILLS GALLIVAN

#### President's Letter

#### 2002 JOINT MEETING RECAP

#### Down From the Mountain

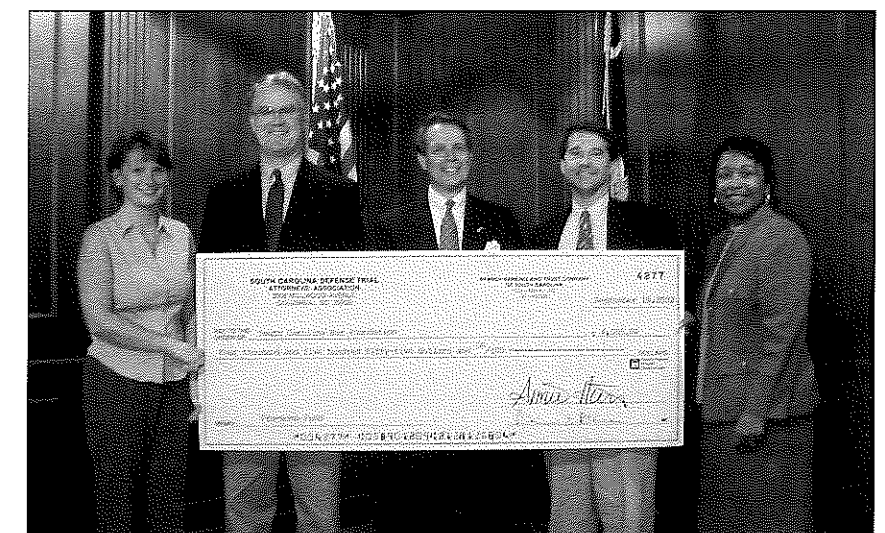
#### MEMBER PROFILE

#### Dewey Oxner

#### COLUMN

#### Discovery for Defense Lawyers

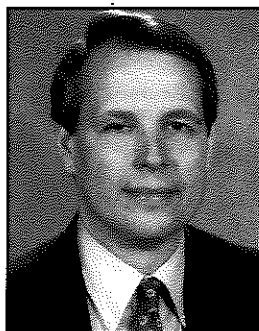
## SCDTAA presents a check to the South Carolina Bar Foundation Pro Bono program



1 to r: Aimee L. Hiers, SCDTAA Executive Director; David G. Traylor, Jr., SCDTAA Pro Bono Committee Chair; H. Mills Gallivan, SCDTAA President; Lana H. Sims, Jr., Vice President South Carolina Bar Foundation, Inc.; Faith R. Rivers, Esq., Executive Director South Carolina Bar Foundation, Inc.

# President's Letter

by H. Mills Gallivan



I recently heard a couple of morning DJ's going through a list of things that you would never hear a Southerner say. My personal favorite from the list was: "Duct tape won't fix that". I tend to agree that anything that will hold a Winston Cup racecar together at 200 miles per hour is pretty handy stuff. Unfortunately, we all know that there are certain problems in life that duct tape cannot fix. As defense lawyers, we deal with these

types of problems on a daily basis. Throughout this state, South Carolina defense trial attorneys are applying their legal knowledge, practice skills and trial experience to creatively solve the problems of their clients. During this year, I have had the pleasure of seeing, on a first-hand basis, the high degree of professionalism exhibited by the members of our organization as they go about the business of resolving problems for their clients. I am convinced that the defense trial bar in South Carolina is unparalleled in its excellence.

During the last year, the South Carolina Defense Trial Attorneys' Association has progressed in a number of ways. This is due, in a large part, to the unselfish hard work of a very talented Executive Committee, a great Executive Director, and a number of hardworking volunteers from our Association. I would like to briefly recount some of our recent activities.

## A. WILLIAM ROBERTS, JR. & ASSOCIATES COURT REPORTING

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In July, our organization was asked to comment on a proposed amendment to the Federal District Court's local rules which would prohibit court-ordered secrecy agreements. Our Association, through our Practices and Procedures Committee, provided to Judge Joe Anderson and the other Federal District Court Judges our thoughts and comments on why a ban on secrecy agreements was not in the best interest of either the court system or the public. We are continuing to work on this issue as Judge Joe Anderson has asked for additional comments until September 30, 2002. I would further encourage you to write to the Clerk of Court for the District of South Carolina and provide your own opinions on this issue. In addition, we have provided to Chief Justice Toal a copy of our comments to Judge Anderson. The Supreme Court is considering proposing a similar ban.

The Trial Academy this year was a resounding success. We provided 24 young lawyers with basic trial skills training and for the first time, we provided the students with videotapes of their arguments and trials. We continue to feel that the training of young defense trial attorneys is one of the most important missions of our Association.

Our Association is revitalizing and reconstituting its Young Lawyers Division. Under the leadership of Richard Hinson, we had 16 young lawyers attend the Joint Meeting in Asheville. All of these young lawyers were first time attendees. These young lawyers are the life-blood of our association and they exhibited incredible enthusiasm to become more involved. I am convinced that these young lawyers and others like them are the "duct tape" which can be applied to many of the challenges facing our organization.

We had an outstanding Joint Meeting in Asheville. Your Executive Committee is continuing to work on reshaping the attendance at this meeting. Our attendance of lawyers was at a recent high. We also experienced a significant increase in attendance of non-lawyers. We are continuing our efforts to include risk managers, corporate counsel, self-insureds, and out-of-state claims managers as a part of this meeting. The Joint Meeting Committee worked very hard to provide the membership with an outstanding program and an extremely enjoyable meeting.

Our Pro Bono Committee continues to make progress. At our Joint Meeting in Asheville, we had another silent auction. This event raised \$4,500.00 which will be donated to the South Carolina Bar Foundation and designated for pro bono legal services for children. In only its second year, the pro bono auction more than doubled the proceeds which

# Hemphill Award Call for Nominations

## 1. Eligibility

(a) The candidate must be a member of the South Carolina Bar and a member or former member of the South Carolina Defense Trial Attorneys' Association. He or she may be in active practice, retired from active practice or a member of the judiciary.

(b) The current officers and members of the SCDTAA Executive Committee at the time the award is made are not eligible.

## Criteria/Basis for Selection

(a) The award should be based upon distinguished and meritorious service to the legal profession and/or the public, and to one who has been instrumental in developing, implementing and carrying through the objectives of the SCDTAA. The candidate should also be one who is or has been an active, contributing member of the Association.

(b) The distinguished service for which the candidate is considered may consist either of particular conduct or service over a period of time.

(c) The candidate may be honored for recent conduct or for service in the past.

## Procedure

(a) Nominations for the award should be made by letter, with any supporting documentation and explanations attached. A nomination should include the name and address of the individual, a description of his or her activities in the Association, the profession and the community and the reasons why the nominee is being put forward.

(b) The Hemphill Award Committee shall screen the nominees and submit its recommendation to the Executive Committee of the Association. "The Hemphill Award Committee shall be comprised of the five (5) officers of the Association, and chaired by the immediate Past President."

(c) The Hemphill Award shall be made in the sole discretion of the Executive Committee, when that Committee deems an award appropriate, but not more frequently than annually.

**Please submit nominations by October 18, 2002**

**Contact Aimee at SCDTAA Headquarters  
(800) 445-8629 • Fax (803) 765-0860  
aimee@jee.com**



## President's Message

Cont. from page 4

we will be donating to fund pro bono legal activities. In addition, the Executive Committee is studying for adoption, a new pro bono program which we are hoping to have in place by the end of the year.

In my initial President's letter, I stated that we would have our new website up and running by the end of the year. While it looks close, it would appear that the new website will be functional before the Annual Meeting this year. The Executive Committee has approved the transfer of our website to Westlaw. Westlaw is moving forward with the redesign our website. We anticipate that it will be more user friendly in its new form. We also feel that this will benefit the Substantive Law Committees in their work, as they will have access to list serves which will be very helpful in dealing with the day-to-day practice problems faced by our members.

The Defense Line is now working in conjunction with our Substantive Law Committees. In the future, the substantive articles and orders in each issue will be provided on a specific topic by one of our Substantive Law Committees. This will assure that The Defense Line is providing cutting-edge articles to our members.

Our Annual Meeting Committee has in place an all-star program for our November meeting at the Château Élan. As you can see from the meeting report in this issue, we have nationally recognized speakers on very timely topics. The Château Élan promises to be a superb venue for our meeting. We anticipate a great turnout for this meeting and I hope to see you at Château Élan. Come join us in celebrating the 35th anniversary of our association and honoring all of our past presidents.

Finally, I would like to thank the members of the SCDTAA for allowing me to serve as President this year. I specifically want to thank the hardworking members of the Executive Committee and Aimee Hiers, our Executive Director. It has been a pleasure to work with such talented people. I am excited about the future of the Association. I believe that it will continue to be a very viable and vital organization in the coming years. If you have not been involved in our organization, I would encourage you to become more involved. I am confident that our incoming President, Steve Darling, and our Executive Committee will continue to lead the South Carolina Defense Trial Attorneys' Association to new heights.

Oh yeah, has anyone seen that roll of duct tape I had in my briefcase when I took this job last November?

# DOWN FROM THE MOUNTAIN

## RECAP OF THE SCDTAA AND CMASC 2002 JOINT MEETING

by Jeffrey D. Ezell

*OK, ok, I'm late – again – but who knew that deposition was going to take that long. The kids are safely in the hands of their grandparents – God only knows how spoiled they'll be when we get back, but I can't worry about that right now, the Executive Committee meeting started 15 minutes ago, I'm standing still in traffic on I-26, blah, blah, blah...just another day in the life of a defense attorney.*

*Alright, I see the mountains now, that's a good sign. Here's our exit; maybe I'll make enough of the Executive Committee meeting that I won't look too terribly slack.*

*OK, we're approaching the right turn for the Grove Park Inn. "Yes, dear. I realize that this is your car and it doesn't take curves as well as my car – I'll try and be more careful" (never mind that I've been taking every corner on two wheels since we got off the Interstate – just take deep breaths and things will be OK).*

*I see the slate roof of the Grove Park, great! Now all I have to do is randomly select a wing to sprint down and hope it just happens to be the one where our meeting is being held. Seems like I remember it was Suite X in the Sammons wing or the Vandersammons wing, or something like that. Anyway, I think somebody famous got drunk in there once – Ernest Hemmingway or Eleanor Roosevelt, anyway, I'm sure I'll find it eventually.*

*I pull into the driveway and jump out of the car before it comes to a complete stop. "Sorry, honey –*

*here's \$20 to tip the bellman to take our bags to the room" (OK, odds are she'll tip him \$5 from her purse and pocket the \$20, but given the ride she just endured, I can hardly blame her).*

*OK, I see the SCDTAA Registration Desk and they see me – they also must see the desperation on my face. Without a word, they point me down the hall and I pick up the pace. I run into the first open door I see and hope it's the meeting.*

*But I look around – am I in the right place? I see someone who looks a little like Phil Kilgore, but that can't be him – I mean Phil works at Ogletree – and this guy has a beard! Across the room is another guy who bears a slight resemblance to Steve Darling, but this guy has a goatee! Am I in the wrong place! Have I unwittingly rushed into some radical, left-wing, plaintiff's bar meeting.*

*Time for more deep breaths. I scan the room some more hoping to find confirmation that I'm not completely lost. There's someone who looks like Donna Givens – still pretty, and – thank God – not sporting any facial hair. I feel a little more at ease. Then I see a guy that looks like Sam Outten, – another good sign – but I still need final confirmation.*

*Ah, there it is. Four seats down, I see a guy I've known since grade school in a situation he's been in since not long after grade school. I know I'm in the right place when I see Moose Phillips, leaned back in his chair, smiling from ear to ear. The SCDTAA Joint Meeting 2002 has begun.*

All kidding aside, the 2002 Joint Meeting was another in what is fast becoming a long line of success stories for the Association. With 110 lawyers, 32 claims managers, 6 Workers Compensation Commissioners, and innumerable (and immeasurably patient) spouses and significant others in attendance, we climbed the mountains to Asheville poised to commiserate, educate, and relax – all within the space of three action packed days.

Thanks in large part to the work of Phil Kilgore (the aforementioned beard notwithstanding) and John T. Lay, the core program was filled with entertaining and informative speakers. Actual attendance at the General Sessions was at an all time high, and I think every attendee gained valuable knowledge to take back "down the mountain".

For the first year, we invited all seven of the South Carolina Workers' Compensation Commissioners, and six of them were able to attend. Three of the attendees were recent appointees, and the opportunity to mix and mingle with the newest Commissioners, as well as the veterans, allowed workers' compensation practitioners like yours truly a chance that we have not enjoyed in a number of years. The presence of the Commissioners also helped boost attendance among the workers' compensation section of the Association, and, hopefully, will continue to do so in the future.

Other items of note include the overwhelming success of the silent auction. Thanks to all of you who helped collect or donate items for auction, and thanks even more to those of you who got out your

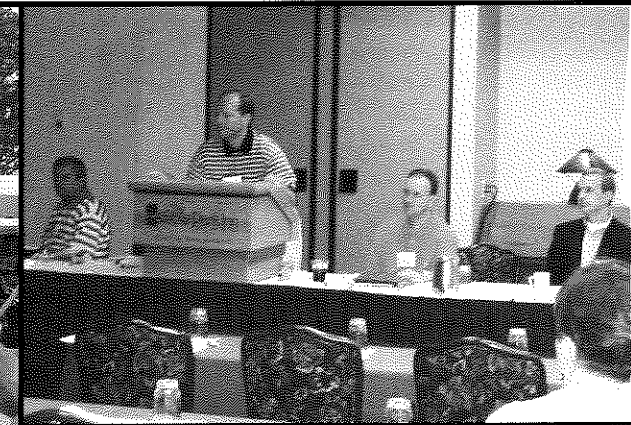
checkbooks and made purchases. The auction took in over \$4000 that the Association will put towards the South Carolina Bar Foundation Pro Bono program – which has been of benefit to the Association, and the public at large, for several years now.

So what else can you say to wrap up a meeting like this? I know that I truly enjoyed working on this year's meeting, but John T. Lay and Phil Kilgore deserve the lion's share of the credit – at least as far as the Association's role goes. Each of them did yeomen's jobs in tracking me down for conference calls as my glamorous practice took me along the scenic two-lane roads of rural South Carolina, where cell phone service often gets pretty sketchy (sorry, guys – I promise I wasn't hanging up on you, it's just that Iva, South Carolina is not a "hub" of cell phone towers).

Finally, and as usual, the true "brains" and "brawn" behind the success of the meeting – and therefore the person who deserves the biggest "thanks" – is Aimee Hiers. She tolerated numerous vague (and

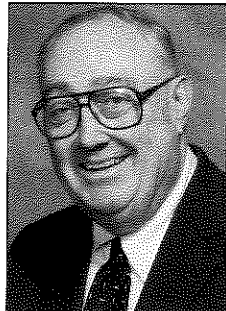
sometimes conflicting) sets of directions from three lawyers who are all too busy for their own good, and always did so with a smile. (At least I assumed she was smiling – I mean she sounded like she was smiling, but we were on the phone, so the possibility certainly exists that there may have been some silent "sign language" involved – but I suspect John T. and Phil would agree that we probably deserved it). Aimee worked tirelessly and earnestly, both before, during, and after the meeting. (She's probably the first person in the history of the Grove Park "Spa" to actually encourage a massage therapist to "hurry up" because she had things to do).

So, having now rambled much longer than anyone probably cared for me to, let me simply say that I hope each of you that attended the meeting found it worthwhile and rewarding. If so, please encourage others to attend next year. This meeting is only as good as those that participate, and to those that participated this year – the Co-Chairs say "thanks", because you truly made our efforts worthwhile.



# Member Profile: Dewey Oxner

by John A. Massalon



The Defense Line is pleased to feature Dewey Oxner in this issue. Dewey served as the president of the South Carolina Defense Trial Attorneys' Association from 1973 to 1974. Taking over the presidency in the fifth year of the Association's existence, he was instrumental in shaping the organization as we know it today. He was the recipient of the Robert W. Hemphill Award in 1993 for his many contributions to the Association.

Dewey graduated from Washington & Lee University in 1956, and enrolled in law school at the University of South Carolina in the fall of that year. After receiving his LLB in 1959, Dewey was admitted to the South Carolina Bar, and he was hired as an associate with Haynsworth, Perry, Bryant, Marion, & Johnstone in Greenville. Since then his firm has experienced many changes. Notable was the merger with the Charleston firm of McKay & Guerard to form Haynsworth, Marion, McKay & Guerard. Dewey served as the Chief Executive Officer of the

newly created firm from 1995 to 1998. More recently his firm merged with Sinkler & Boyd to form Haynsworth Sinkler Boyd, PA with offices in Greenville, Columbia, Charleston and Florence. Throughout those changes, Dewey has been a constant source of integrity, stability and professionalism for the members of his firm and its clients.

His practice concentrates on cases involving complex issues such as medical device and pharmaceutical products liability. However, Dewey is best known for his work defending professional liability suits, especially those involving physicians and hospitals. Haynsworth Sinkler Boyd serves as general counsel for the Greenville Hospital System which is South Carolina's largest healthcare system. As part of that representation, Dewey handles the defense of litigation involving patient care issues, medical staff issues, and contested administrative matters.

Dewey does not limit his professional activities to the SCDTAA. He served on the Board of Governors of the South Carolina Bar from 1995 to 2000, and as president from 2000 to 2001. Dewey is also an active member of the Defense Research Institute, for which he has served as both Secretary and Treasurer. He served as president of the Greenville County Bar Association in 1985. He is also a member of the International Association of Defense Counsel, the Federation of Insurance Counsel, the American Board of Trial Advocates, the American College of Trial Lawyers, and the Judicial Conference for the Fourth Circuit.

The expanded scope of discovery has been the most significant change in the practice of law since Dewey was admitted to the bar. Currently he spends most of time preparing written discovery requests and responses, preparing for depositions, and performing research about the expert witnesses hired by his adversaries. Dewey regularly meets with colleagues over breakfast to discuss defense strategies and effective ways to address expert witnesses during discovery. He feels that the Association offers similarly valuable opportunities to exchange ideas during the Joint Meeting each July and the Annual Meeting every November. Additionally, Dewey sees the annual Trial Academy as a good innovation and an invaluable resource to the Association's newer members. The current leadership of the Association appreciates Dewey's kind words and are proud to have the opportunity to build on his legacy.

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# Discovery for Defense Lawyers

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

This is the first of a series of articles on discovery in civil cases. Discovery plays a tremendous part in which party prevails in the litigation, whether the case is tried or settled. Rather than writing about generalized discovery that might be applicable to any case, this column will concentrate upon discovery for defendants. As much as possible, it will focus upon helping young defense lawyers, although it might be of some help to the crusty trial veterans also. I would appreciate e-mails with comments, tips, and suggestions at [ewm@grimcab.com](mailto:ewm@grimcab.com).

## Driving the Case Through Discovery: Strategy and Some Guidelines

There are written and unwritten rules. I still remember some of the heated disputes that arose during my first depositions, primarily because I didn't know the unwritten rules. Maybe this column can help you avoid some of those disputes. Remember that the discovery techniques and practices described here are my own. To every rule is an exception, and I do not follow these rules in every case. Be adaptable. Also, remember to keep in mind that opinions differ about the issues discussed below, including those of some attorneys in my law firm. Excellent trial attorneys may conduct discovery exactly opposite to the ways suggested in these rules. In all cases, follow the instructions of the lawyer at your firm supervising you.

### Rule 1: Order of Discovery: Lock & Load

In the United States courts, certain disclosures must be made immediately. Once this is done, however, the Federal and South Carolina Rules of Civil Procedure provide that discovery may be done in any order, and that use of one discovery procedure does not mean that another cannot be used. Thus, a deposition can be taken before interrogatories are sent, and vice versa. I recommend that the following order be followed once the initial disclosures are made:

First, send written discovery (interrogatories and requests for production). This includes supplemental interrogatories asking about the specifics of the transaction, such as questions about the alleged defects in a product, injuries claimed, prior similar physical problems, conversations, and the like. Once they are answered, the witness is locked down on

most of the important facts and you are loaded with information. At trial when the plaintiff attempts to avoid an untruth claiming she made a slip of the tongue in the deposition, you can impeach her again by showing that her written discovery answers (which were done on a separate day) were consistent with the deposition testimony. I virtually never depose the plaintiff until I have the written answers to discovery.

Next, depose the plaintiff. There is disagreement about whether the plaintiff's records should be subpoenaed before or after the plaintiff's deposition. Only after <sup>1</sup> the deposition do I subpoena records, unless there are special reasons to do it earlier, such as time constraints.

Third, notice the fact witnesses' and expert witnesses' <sup>2</sup> depositions, unless the fact witnesses' depositions were done on the same day as the plaintiff's deposition.

Finally, when there is a loss-of-consortium suit by the plaintiff's spouse, or if the spouse will testify at trial, save the spouse's deposition until shortly before trial. This allows you to present follow-up questions to someone very close to the plaintiff. Thus you may do wrap-up discovery with any special questions <sup>3</sup> you need answered and get testimony for impeachment.

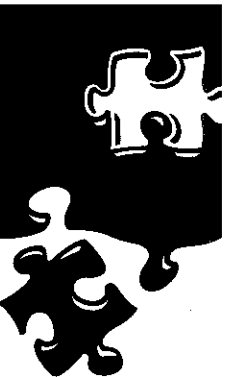
### Rule 2: Setting Up Depositions

It is common courtesy to have a paralegal or secretary set up depositions at a time convenient to other lawyers and to doctors. Don't just notice depositions without checking first to see if the time is convenient, unless an emergency is involved. Always try to set up depositions of students after school hours.

### Rule 3: Who May Attend a Deposition?

As a general rule, the public has the right to attend a trial and access to the court file. Not so for a deposition. The United States Supreme Court stated in *Seattle Times Co. v. Rhinehart* <sup>4</sup> that "pretrial depositions are not public components of a civil trial. Such proceedings were not open to the public at common law and, in general, they are conducted in private as a matter of modern practice. Much of the information that surfaces during pretrial discovery may be unrelated, or only tangentially related, to the underlying cause of action." <sup>5</sup>

This does not mean the transcript is confidential, only that unless there is some special reason <sup>6</sup> for others to be at the deposition, they probably have no



"right" to be in the room. This would include friends, spouses, "moral supporters," and the like. If the person who wants to attend is a witness (i.e., a potential deponent), however, he is not automatically excluded by the parties' request, and if the lawyers cannot reach an agreement about the matter, a court order might be sought to deal with the problem.<sup>7</sup>

The best practice is that, if you have someone you would like to attend the deposition, call the other lawyer and ensure there is no objection. It is generally understood that potential witnesses should be excluded from depositions. If there is disagreement about whom should attend, then you may apply to the court for an order.

An adjuster may or may not be entitled to attend a deposition in a case where she is neither a witness nor a party representative (although I have never had anyone object to this). Because an adjuster's firsthand view of the plaintiff might speed settlement, common sense shows that the adjuster should be allowed to attend, however.

If there is a real potential for physical danger, such as unreasonably hard feelings between the parties (or a party and a lawyer), I recommend that whether by agreement or court order, a law enforcement officer be present at the deposition.

#### **Rule 4. Subpoenaing People and Records**

Assume that many doctors will not send you the "complete" file when you subpoena them. Check the documents you receive to confirm that the doctor's staff did not send you just those documents that they "think you want."

If you send a lawyer a subpoena for his file from another case, use common courtesy and call first. Make it clear that you want nothing privileged, and if he declines to turn over the file without a motion, remember that he is probably just afraid of getting sued if he produces something improperly. A call generally is not required for most medical doctors, hired-gun expert witnesses, or others who regularly receive subpoenas.

Be careful when sending South Carolina state subpoenas to other jurisdictions. The procedures for domesticating them in other states vary. Moreover, ethical problems may arise from sending non-domesticated South Carolina state subpoenas to another jurisdiction.

#### **Rule 5. Err in Favor of Full Disclosure in Answering Discovery Requests**

Even if you can't argue it at trial, remember the golden rule, and answer discovery requests as you would like them answered for you. Also, I put plaintiffs' recorded statements (or transcripts) in a special category. If I have a recorded statement of the plaintiff in my file, I always send the plaintiff's lawyer a copy - even if no written discovery has been sent to me, or if the deadline for answering the requests for production has not yet run.

If you have answered discovery in common pleas

court and the case is transferred to magistrate's court, err in favor of continuing to update the discovery, or otherwise confirm with the other lawyer that you will no longer update discovery answers.

#### **Rule 6. Routine Motions for Costs in Connection With a Discovery Motion**

I have one rule about this: I don't. Not unless the other party has been extraordinarily improper or when specifically directed to do so by my client.<sup>8</sup> Even then, I put on the record that the motion for costs is against the adverse party, not its lawyer. Even worse, never make a motion for costs against the other lawyer, no matter how much you want to, unless directed to do so by your client or the lawyer's conduct is so egregious that it is virtually grounds for disbarment: you might think that you're being a hard-driving litigator, but you're really just a jerk. Judges routinely deny these motions, and all you have in your pocket is a rain check for payback. As a general rule, your client will be better served by your cooperation with the adverse lawyer, even if he is a worm, than fighting with him. In the future, when the client has a problem and needs a favor from the plaintiff's lawyer, the goodwill you have created may save it tens of thousands of dollars over the \$25 or so it may have received in costs.

#### **Rule 7. Discovery Versus Evidence**

Just because documents are produced in response to a request for production does not mean they are admissible, non-hearsay, or even authentic. If you want authentic copies of documents, you must style your requests to produce to ask for truthful and accurate copies of the documents, or do so by way of requests for admission.

Do an evidence check about one or two months before trial to make sure that you can use discovery to solve any remaining evidence problems. Pay particular attention to whether you can show all elements of rule 803(6), the business records exception to the hearsay rule.

#### **Rule 8. Stipulate, Stipulate, Stipulate**

Many discovery and evidence problems can be solved with a simple stipulation. Make the effort and use a little creativity. Many times, if you have biting impeachment evidence in the records (e.g., harmful admissions in the patient medical histories, inconsistent statements in experts' letters, etc.), you might stipulate with the plaintiff's lawyer for purposes of trial that you waive the hearsay rule for documents produced during discovery (reserving any other objections).<sup>9</sup> This allows the plaintiff to avoid the expense of calling experts and you the benefit of impeachment. It is my experience that the defendant comes out better in this scenario because: (1) the impact of reading a medical report (as opposed to the testimony of a live witness) is minimal, but (2) impeachment material in the records can be very effective.

#### **Rule 9. Use Common Courtesy and Don't Assume the Other Lawyer Is a Common Cur**

I recall an occasion when I had my paralegal call a young defense lawyer and ask to fax a complaint in a case pending in another county (several hours away), related to the one I am defending. He first asked why I wanted it, informed her that it "was a matter of public record," and then said he'd "check with his client, but . . ." He never sent it. I got it from the plaintiff's lawyer two weeks later.

When you are a new lawyer, your caseload will be light and you naturally can devote more time to each file. As your career progresses, your caseload may become overwhelming. Judge Hicks Harwell sometimes speaks in his courtroom of the need for courtesy among lawyers, and I wish more lawyers could hear him talk.

For example, just because an adverse lawyer does not answer your discovery requests on the 30th day does not mean she is a common cur. Remember that we do not live in a perfect world. She might be in the middle of a trial or otherwise overwhelmed. Give her a call and try to spur her on. Of course, you also will come into contact with some lawyers who simply are slack and will never answer discovery until the day of a motion hearing. For these special characters, it is fair to send them a letter on the 30th day with a motion respectfully asking that if they do not respond in a week, you will file the motion.

Other problems will arise. When a lawyer requests that a deposition be rescheduled or for additional time to answer discovery, do so gracefully.

On more than one occasion, every lawyer will arrive at a deposition, only to learn that it was cancelled without notice. Take it in stride. I was once in a case where a lawyer flew to Tampa, spent the night in a hotel, and appeared at the site of the deposition the next morning, only to learn that inadvertently he had not been given notice of the cancellation. He was gracious about it. If he can be forgiving about that fiasco, certainly you can be too. However, a telephone call confirming all out of town depositions should be done before getting in the car to leave your office.

#### **Rule 10. Requests to Admit**

One of the most abused discovery devices are responses to requests to admit. Many lawyers simply deny the requests to admit when they ask for admissions harmful to their case. This is an ethical violation, not to mention creating needless cost and work for all involved. But there is some Old Testament justice to this, and experienced trial lawyers know better. The plaintiff's refusal to admit things that you know you can prove will allow for extremely effective impeachment at trial. The plaintiff may be cross-examined about the denials, or you may publish them during your case as party admissions.

#### **Rule 11. Don't Embarrass the Other Lawyer in Front of the Judge or Her Client**

In most scenarios, you should use great discretion about disclosing offhand comments made to you by the other lawyer. Much joking goes on during discov-

ery. A lawyer might say, "I don't believe my own client," "My case is a dog," "I know the judge will deny my motion," or things of this sort. The possibilities are endless. In most cases, it's bad form to embarrass the other attorney with his offhand comments in open court or during pretrial hearings.

Be especially careful about embarrassing the other lawyer in front of her client too. This does not apply to legal matters that you naturally must put on the record, such as objecting because of a failure to give notice of a matter or putting on the record that your adversary did not answer discovery requests despite numerous letters. In many cases, the chips must fall where they may in court, and you have no choice. But if it can be avoided and there is no prejudice to your client, don't point out the other attorney's errors in front of the client unless necessary.

*In the Next Issue: Taking a Plaintiff's Deposition in a Personal-Injury Case*

#### **Footnotes**

1 With most standard discovery requests, you usually will have a duty to supply, before the deposition, copies of documents received pursuant to subpoenas. By subpoenaing the plaintiff's records and providing them to her before the deposition, you are merely helping her to prepare for the deposition. Adjusters sometimes do not understand this principle and ask you to subpoena the records immediately. Explain to the adjuster the problems with this approach.

Let me note that some experienced and excellent attorneys believe that subpoenas should be sent out before the plaintiff's deposition; this is because they prefer to have the benefit of the information in the records for use at the plaintiff's deposition. You will not find my Rule 1 in the Ten Commandments, so take the approach you think best for your client.

2 I offer the following comment from E. Scott Moise, Esq., who is not always correct, but is in this case:

[A]lways depose the plaintiff's experts last unless you know they don't have a viable theory and you want to go ahead and file a motion for summary judgment. If you depose them too early, they ALWAYS say something like "my opinions may change if I get more information later." If you depose them late enough in the case, they can't use that. Also, deposing experts is expensive. If the case is going to settle, you might save your client a ton of money by trying to settle before those depositions.

3 There are many questions that arise during discovery after the plaintiff's deposition but which only the plaintiff or her spouse likely will be able to answer. Delaying on the spouse's deposition will give you one last chance to get this information.

4 467 U.S. 20 (1984).

5 *Id.* 467 U.S. at 33.

6 If the deponent suffered from a physical or emotional condition such that he might need assistance (and the attending person were not a potential witness), or were a young child, these might be good reasons for allowing the non-party to attend.

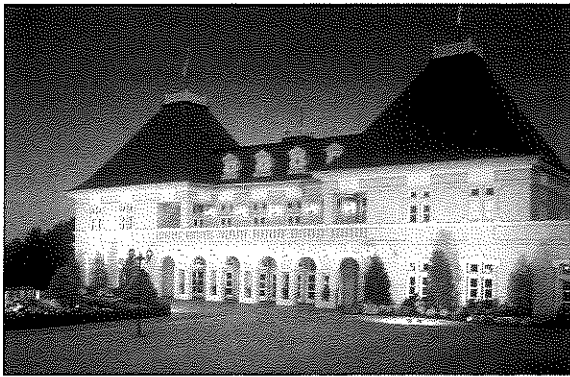
7 Fed. R. Civ. P. 30 (C) advisory committee note.

8 In some cases, it is perfectly proper to make a costs motion for extraordinary expenses that could have been avoided. There is nothing improper about a motion for your client's mileage costs, if he were required to drive to South Carolina for a deposition from another state and the plaintiff's lawyer would not agree to delay it, do it by telephone, etc. These are not acrimonious matters, just business ones.

9 As a general rule, I only stipulate that the documents may be read to the jury, not admitted.

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