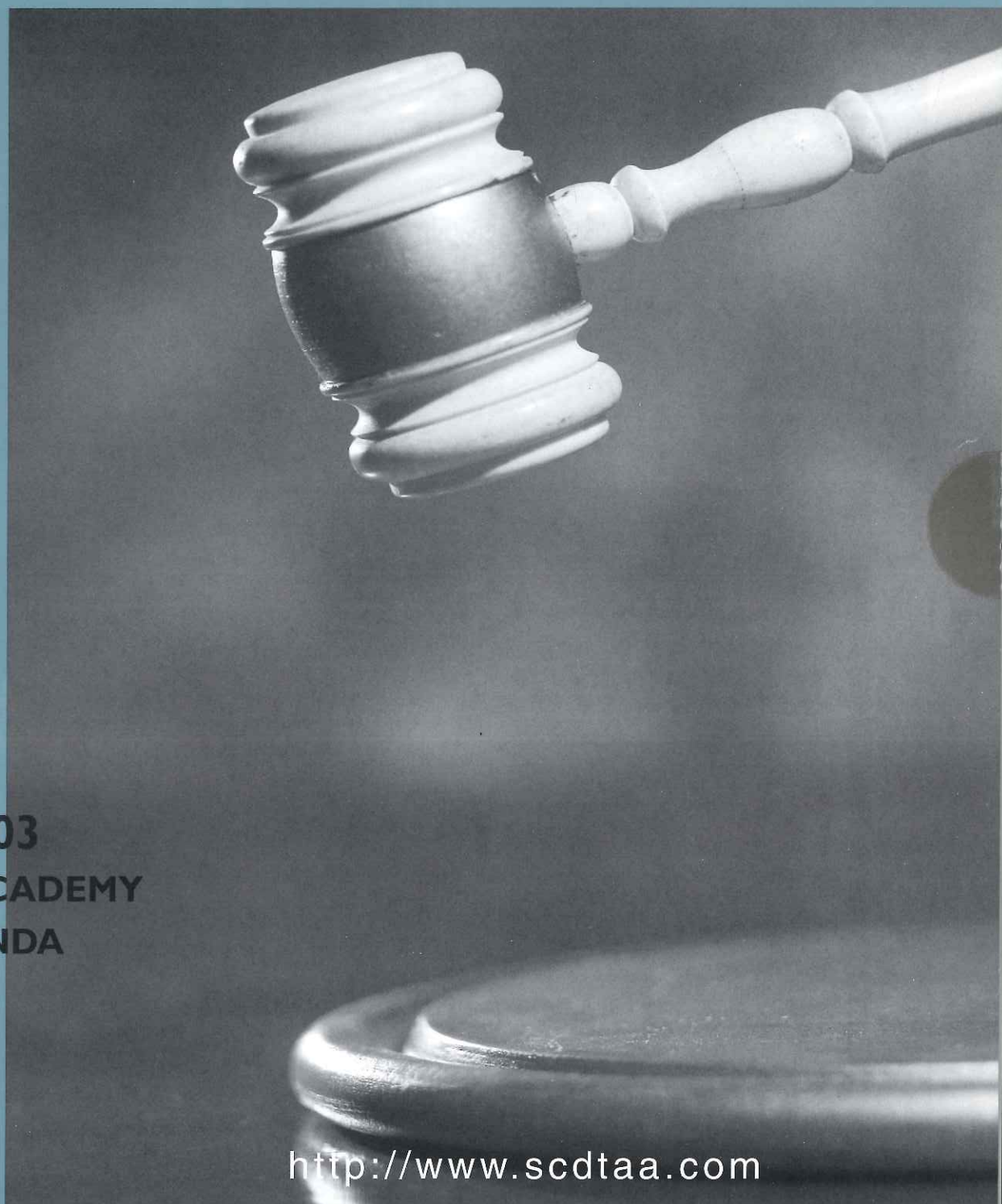


# THE DefenseLINE



**2003  
TRIAL ACADEMY  
AGENDA**

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## 2003 SCDTAA Trial Academy Agenda

June 18 - 20, 2003 • Charleston, SC

### Wednesday, June 18, 2003

9:00-9:15	Welcoming remarks
9:15-9:45	Depositions/Motions in Limine Pre-Trial Considerations
9:45-10:30	Jury Selection/Opening Statements
10:30-10:45	Break
10:45-12:30	Breakout (Opening statement Skills)
12:30-1:15	Lunch on your own
1:15-2:30	Direct and Cross Exam of Lay Witnesses/Exhibits
2:30-3:15	Ethical Approach to Trial from the Circuit Bench Perspective
3:15-3:30	Break
3:30-4:45	Breakout (Direct/Cross skills –Lay Witnesses)
4:45-5:30	Trial of MIST Case

### Thursday, June 19, 2003

9:00-10:00	Protecting the Record on Appeal
10:00-10:15	Break
10:15-11:15	Direct and Cross Exam of Expert Witnesses/Exhibits
11:15-12:30	Breakout (Direct/Cross/Exhibits Skills – Expert Witnesses)
12:30-1:30	Lunch on your own
1:30-2:30	Evidence/Objections/Questions
2:30-2:45	Break
2:45-3:45	Closing Arguments/Post Trial Motions
3:45-5:00	Breakout (Closing Argument Skills)
5:00-5:30	Remarks on Ethics and Professionalism for Defense Lawyers
5:30-6:30	Breakout Session Leaders & Academy staff available for questions
6:30	Dinner and Cocktails

### Friday, June 20, 2003

9:00-4:30	Mock Trials – Charleston County Judicial Center
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SOUTH CAROLINA  
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# THE DefenseLINE

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## 2003 HEMPHILL AWARD CALL FOR NOMINATIONS

### 1. Eligibility

- 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.
- The current officers and members of the South Carolina Defense Trial Attorneys' Association Executive Committee at the time the award is made are not eligible.

### 2. Criteria/Basis for Selection

- The award should be based upon distinguished and meritorious service to legal profession and/or the public, and to one who has been instrumental in developing, implementing and carrying through the objectives of the South Carolina Defense Trial Attorneys' Association. The candidate should also be one who is or has been an active, contributing member of the Association.
- The distinguished service for which the candidate is considered may consist either of particular conduct or service over a period of time.
- The candidate may be honored for recent conduct or for service in the past.

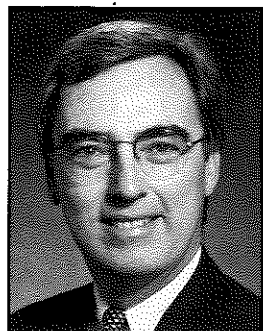
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# President's Letter

by Stephen E. Darling



Once upon a midnight dreary, while I pondered, weak and weary,  
Over many a quaint and curious volume of forgotten lore--  
While I nodded, nearly napping, . . .

Quote the Raven, "Nevermore."  
*The Raven*, Edgar Allan Poe

A paraphrase of the immortal words of former Sullivan's Island resident Edgar Allan Poe ring loudly as I draft this letter. I am deeply embroiled in several projects late at night at the office pondering the difficulties of practicing law in this fast paced world which is burdened by the throes of impending war. Sometimes the obstacles before us seem insurmountable and we long for days of bucolic peacefulness. How nice it would be to say, "Nevermore", as we the defense trial lawyers of the world grapple with the ever increasing stacks of correspondence on our desks, field the unending emails and telephone calls thrust upon us on a daily basis, wind our way through the labyrinth of client problems, play the artful dodger bouncing from court to court and in the end attempt to pull it off successfully and profitably. It is indeed a hard course we set for ourselves. How can we ease our anxieties in coping with the pressures we face. Let me offer several suggestions.

We recently received from a number of members responses to the annual survey sent out with membership renewals and requests for committee preferences. Committees and work on them by members of an association are the lifeblood of any organization. Without hard-working committee members nothing would get accomplished. I have encouraged the SCDTAA board members who serve as committee chairmen to involve committee members actively in the workings of the organization this year. When called upon by a board member or fellow committee members, work with them. You will make your and the association's activities so much more beneficial and useful by so doing.

The SCDTAA's highly successful Trial Academy is in the final planning stages. It will be held this year June 18 - 20 in Charleston. Once the plans are finalized, material will be sent to our members, and I urge you to register the younger more inexperienced lawyers in your firms. The Academy is an excellent way, in somewhat of a low pressure situation, for less seasoned litigators to deal with a factual scenario and try a case before a mock jury and a real judge to begin mastering the art of a trial. With the opening

of the fabulous new courthouse in Charleston, this year will be an outstanding time to have 24 defense lawyers in this state gain invaluable skills under the tutelage of senior faculty and helpful judges. Take advantage of it.

Likewise, the Joint Meeting Committee is diligently working toward planning our meeting at The Grove Park Inn in Asheville on July 24 through 26. I am confident you will see increased participation from the South Carolina Claims Managers Association to present a well-rounded, enjoyable program. I encourage a high turn out for this meeting. Not only will the program be educational and entertaining; but also as we have done in the past couple of years, sponsors will be present to promote their products and engage in conversation with you. From software providers to jury consultants to other vendors, these sponsors and exhibitors help us defray the cost of this meeting and actually make money for the organization.

Also, The SCDTAA is planning a couple of legislative dinners so that we can gain the ear of the House and Senate Judiciary Committees. We hope to increase the voice of the defense community among the legislature so that our positions, needs and concerns are raised. With matters such as tort reform being considered this year, we feel this is an opportune time to strive for legislative involvement.

As the year progresses and as we approach spring, I look forward to seeing you in court and at our functions. We welcome young lawyers at the Trial Academy, and I hope to see many of my friends and acquaintances in Asheville. Keep on pumping!



# 2003 SCDTAA Joint Meeting Preview

Grove Park Inn • Asheville, NC

July 24 - 26, 2003

by Jeffrey D. Ezell

It's safe to say that I remember precious little from my college physics course, save only for the fact that, as an English major intent on going to law school, and fully aware that I'd likely never have need to quote any law of physics off the top of my head, I probably cut more than my fair share of classes. (I'm invoking the doctrine of laches at this point to avoid having my diploma recalled). I do seem to recall something about momentum and object in motion tending to stay in motion, or something like that...the jist of what I'm getting at is that a mass is not supposed to be capable of gaining momentum as it moves under its own power up an incline.

Well, ladies and gentlemen of the South Carolina Defense Trial Attorneys' Association, at this years' Joint Meeting, we intend to defy that very law. The SCDTAA, along with its partner organization, the South Carolina Claims Managers' Association, will gain momentum as we ascend the Blue Ridge Mountains and come to rest once again in scenic Asheville, North Carolina.

The Program Committee has been, and remains, hard at work on this years' agenda. While many items remain in the planning stages, several things have already been firmed up, and others have been conceptualized to the point that we feel reasonably comfortable in reporting on them at this point.

First of all, as was the case last year, each and every Commissioner on the South Carolina Workers' Compensation Commission has been given an individual invitation to attend and participate in specialized breakout programs for the workers' compensation practitioners and claims professionals. Additionally, we hope to use the presence of the Commissioners to attract some in-house counsel and risk managers from larger South Carolina employers to take advantage of this rare opportunity for frank and candid exchange of information and opinions.

In terms of other speakers, John T. Lay has been working diligently to find both states, regional, and national figures to address issues such as tort reform, contribution and indemnity, psychological and psychiatric claims and damages, as well as ethics. John T. has been in touch with a variety of in-house attorneys within some South Carolina companies, and we hope to have a panel to discuss the expectations of in-house attorneys when they retain outside counsel.

Once again, we are looking forward to an outstanding program and an outstanding conference, but the conference can only be as good as the attendees are willing to make it. That having been said, please look deep within your firm and consider member, associates, or other attorneys who might not have been as active in the SCDTAA in the past, but who might benefit from participation in the Joint Meeting. The greater the attendance roll, the greater the conference. Help us "defy the laws of physics" as we gain momentum going up the mountain.

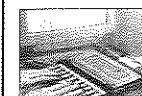
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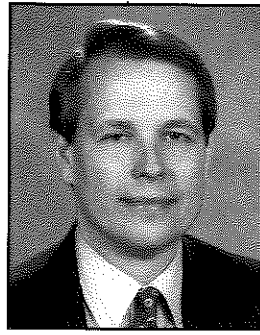
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## Member Profile: H. Mills Gallivan



H. Mills Gallivan

Mills Gallivan was the president of the South Carolina Defense Trial Attorneys' Association from 2001 to 2002. He provided ten years of valuable service to the Association prior to assuming the office of president. As Chairman of the Amicus Curiae Committee in 1992, that Committee filed two briefs with the South Carolina Supreme Court. Mills also served as the Joint Meeting Program Chairman in 1993, the Chairman of Practice & Procedures Committee in 1994, and the Co-Chairman of both the Annual Meeting Committee and the Joint Meeting Committee in 1997.

After graduating from Vanderbilt University in 1973, Mills attended the University of South Carolina School of Law. He received his Juris Doctor degree in 1976 and began practice with Gallivan, White &

Boyd, P.A. Mills served as the Managing Partner of Gallivan, White & Boyd, from 1993 until 1996. Since Mills started with the firm it has grown to over 30 attorneys and more than 40 support staff. As of the publication of this issue of *The Defense Line*, Gallivan, White & Boyd is preparing to move into new offices at 55 Beattie Place, Suite 1200 in Greenville.

Mills has a varied practice which includes extensive experience in such diverse areas as criminal, personal injury, commercial litigation, and workers' compensation. However, he is best known and most accomplished as counsel in workers' compensation cases. Mills' expertise in that area has been recognized by his selection to the Best Lawyers in America in which he has been listed continuously since 1996. Additionally, from 1993 to 1994 he served as the Greenville County Chairman for the Steering Committee of the Southern Association of Workers' Compensation Administrators Convention. In 1995 he served on the Association of South Carolina Workers' Compensation Commission Committee on Revision of Regulations.

Mills is a frequent lecturer on Workers' Compensation and litigation topics at seminars for South Carolina Bar, South Carolina Defense Trial Attorneys' Association, and South Carolina Workers' Compensation Education Association. He served on the Editorial Staff of *The Law of Workers' Compensation in South Carolina* and he regularly contributes articles to this publication and the South Carolina Bar Torts and Insurance Practice Section Newsletter. Look for Mills' most recent article on page 7 in this issue of *The Defense Line*.

Mills is equally active in civic and religious activities. Civic groups which have benefitted from his involvement include: the Greenville County Health Planning Council from 1978 to 1980; the St. Francis Hospital Foundation Board from 1996 to the present; the City of Greenville's Task Force on Neighborhoods from 1996 to 1997; the Greenville County Easter Seals Society Board of Directors from 1984 to 1993; and the Piedmont Vanderbilt Club from 1995 to 2001. Mills is also a lifelong member of St. Mary's Catholic Church in Greenville. There he serves as a Eucharistic Minister and he co-founded a Catholic Fellowship Group in which he has been a member since 1990.

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## Mediation in Workers' Compensation: The South Carolina Experience

by H. Mills Gallivan

### You want to do what with my workers' compensation case?

This is the typical reaction to the suggestion of mediating a workers' compensation case. However, there is nothing in the Workers' Compensation Act, the Commission Regulations, or the Supreme Court Rules which prohibits the mediation of a workers' compensation case. Mediation is by definition an extension of the settlement negotiation process. The South Carolina Workers' Compensation Act is designed to resolve cases in an expeditious and informal manner. Therefore, one can conclude that mediation is a logical step in this process. Mediation as a formalized Circuit Court program is relatively new to South Carolina. The Supreme Court began by implementing pilot ADR/alternative dispute resolution programs in the late 1990's. Since then, mediation has been a successful component of conflict resolution in the South Carolina Circuit Courts.<sup>1</sup>

The concept of mediation in workers' compensation cases has been addressed in other states. North Carolina has mandatory mediation rules which require the mediation of every disputed workers' compensation case. Mediation was adopted by the North Carolina Industrial Commission to address a back log of disputed workers' compensation cases. The North Carolina experience has been very positive. The North Carolina Industrial Commission's statistics indicate that roughly 70% of the disputed cases are resolved through the mediation process. North Carolina practitioners have accepted mediation as a useful tool in the resolution of disputed workers' compensation cases. Both sides of the North Carolina Bar agree that mediation can be an excellent tool for early resolution of many disputed workers' compensation cases.

On January 28, 2002, the South Carolina Workers' Compensation Commission considered adopting a more formalized process for voluntary mediation of workers' compensation cases. The proposal was discussed at a Full Commission business meeting and comments were received from both sides of the workers' compensation Bar as well as a representative from The Claimant's Association.<sup>2</sup> While the Commission chose not to adopt a formalized process, it has not ruled out the possibility at some later date and continues to keep the matter under advisement. The Commission instructed its Judicial

Director, Herman Lightsey, to conduct a study of the concept in conjunction with both sides of the bar. If mediation is to play a meaningful role in the South Carolina Workers' Compensation System, then ultimately, a well thought-out regulation will probably be needed.

The South Carolina workers' compensation hearing process is similar to arbitration in many respects. The Hearings are designed to be less formal than a trial in Circuit Court. Medical evidence is most often presented through the submission of expert reports. The process of designed to be summary in fashion and most workers' compensation cases are tried in a one-half to two hours. More complicated cases may take a half a day or a day to try, however, these are the exception rather than the rule. Historically in South Carolina, there has not been a significant wait for a hearing date. A hearing is usually set within forty-five to ninety days from the date it is requested. However, there has been some slow-down in this process due to recent statewide budget cuts. The backlog of cases is growing and it is anticipated that this problem will get worse before it gets better.

Regardless of the status of the South Carolina Workers' Compensation Commission hearing docket, it is clear that mediation is not appropriate for every workers' compensation case. There are numerous cases involving only an issue of permanent partial disability to a single bodily member and these cases can be resolved through the hearing process in a very efficient fashion.

There are, however, a number of workers' compensation cases which are appropriate candidates for mediation. The author has had experience with mediation in workers' compensation cases both as an advocate and as a mediator. The cases which seem to be most appropriate for mediation are cases which involve a substantial dispute as to the amount of benefits owed. These are usually more complex cases such as heart attacks, lifetime benefits cases, occupational disease cases, and cases on appeal.

Most experienced workers' compensation practitioners have a very good feel for the value of a case. The difficulty in settling any case often lies with convincing the client that settlement is in the client's best interest. Mediation can be an excellent tool for educating and convincing a client as to the benefits of a negotiated settlement. The parties to a successful mediation are usually more satisfied with the

## Mediation in Workers' Compensation

continued from page 9

outcome than a hearing on the same issues. Mediation allows for more input and control in the final outcome than a hearing where the case is being decided by a Commissioner. A good mediator who is familiar with the workers' compensation process can assist the parties with a thorough evaluation of the strengths and weaknesses of their relative positions. If a settlement is reached, both parties feel that they had some control of the process and take more ownership in the final result.

The mediation of a workers' compensation case can be a value added proposition for clients. Mediation allows for early resolution of claims at a time convenient to the parties. Without question, the claimant benefits by the early resolution of the claim and payment of settlement proceeds and other workers' compensation benefits. The defendants benefit by the early resolution of the claim and the reduction of medical, indemnity, and litigation expenses associated with workers' compensation claims. The South Carolina Workers' Compensation Commission benefits from the private resolution of claims by virtue of the fact that it can concentrate and utilize its limited assets to resolve those cases which do in fact need a hearing.

In 2001-2002, the South Carolina Workers' Compensation Commission docketed 9,649 cases for hearings. The Commission actually conducted hearings in 2,342 cases.<sup>3</sup> Approximately 75% of these contested litigated workers' compensation cases were settled through negotiations between the parties. When the Commission issues a Hearing Notice, it generates a flurry of activity at the Commission and by both parties. Earlier resolution of cases (prior to docketing) would ease an overburdened system and result in cost savings to both parties. Mediation simply gives the parties another tool for an earlier resolution of these claims.

Many serious workers' compensation cases also have a significant third-party action filed in state or federal court. Workers' Compensation practitioners should always avail themselves of the opportunity to participate in the mediation of any third-party claims arising out of the workers' compensation case. First, it is much easier to resolve any workers' compensation lien issues if the workers' compensation attorneys are present and participating in the mediation of the third-party case. Oftentimes, the workers' compensation lien is the lynchpin for resolution of the third-party claim. Second, the third-party case mediation also is a good opportunity to resolve the underlying workers' compensation claim if it has not already been resolved.

In South Carolina, the concept of mediation of workers' compensation cases is in its infancy. The purpose of this article is to simply raise awareness as to the value of mediating workers' compensation cases. South Carolina has a number of very talented mediators, many of whom also have experience in the workers' compensation field. It is not difficult to

find a mediator who is familiar with workers' compensation and who can be a real asset in assisting the parties with facilitated or evaluative mediation of a case.

As a workers' compensation defense practitioner, I have found the mediation process to be useful in resolving difficult disputed cases. The mediation process focuses the parties on the issues and the value of the case at a very early stage. I have further found that the level of client satisfaction with the mediated settlement is much higher than from the negotiated settlement process. This is primarily due to the fact that the parties feel that they have had more input into the final mediation agreement than they would have had if the case were tried or simply settled by the attorneys.

I would encourage both sides of the South Carolina Workers' Compensation Bar to keep an open mind with regard to facilitated mediation. It can be a very useful tool for resolving difficult or unique workers' compensation cases.<sup>4</sup>

### Footnotes

1 The author bases this statement primarily on the success of the ADR process in the Thirteenth Judicial Circuit.

2 A copy of the proposed regulation is available from the author upon request.

3 Statistics furnished by Herman Lightsey, Judicial Director of the South Carolina Workers' Compensation Commission.

4 The author gratefully acknowledges Thomas J. Wills, IV, Esq., Robert W. Hassold, Jr., Esq., Roshella James, Esq., and Herman B. Lightsey, Jr., Judicial Director of the South Carolina Workers' Compensation Commission, for their assistance and contributions to this article.

*H. Mills Gullivan is a shareholder of Gullivan, White & Boyd, P.A. and is a certified South Carolina Circuit Court arbitrator and mediator.*



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## Discovery for Defense Lawyers:

Taking a Plaintiff's Deposition in a Personal Injury Case: A Checklist

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

*"There are no child prodigies among trial lawyers. Seasoning and actual experience are absolutes."<sup>1</sup>*

G. Ross Anderson, Jr.

*"Regardless of one's skill level, there is no substitute for thorough preparation . . ."<sup>2</sup>*

Joseph F. Anderson, Jr.

There are several matters that a defense lawyer must cover in a personal-injury deposition of a plaintiff. The list given below only addresses the basics.<sup>3</sup> Your own case very likely might have additional issues that must be touched upon. You may use the checklist below as a guide, but adapt it to your particular case. Be pleasant to the witness, even if the witness is condescending. If you confront and argue with the witness, the other lawyer will remember it upon re-reading the deposition and take special care to "prepare" the witness for trial. I have found that the ruder the witness, the less the jury will like him.

### Preliminaries

#### (✓) Mark Exhibits

Have the court reporter mark any exhibits you know will be discussed in the deposition. (Some exhibits you might not want to mark.) Marking a document as a deposition exhibit does not mean that the exhibit is or will be admissible at trial. It really only identifies the exhibit for purposes of the deposition. Virtually anything may be marked as an exhibit.

I also mark the plaintiff's supplemental interrogatory responses as an exhibit, have her verify that the answers are correct, and have her sign the document. When the plaintiff's deposition testimony has been exposed as a lie through subpoenaing of records after the deposition, the plaintiff sometimes alleges that she was mistaken in her deposition: however, she cannot escape the fact that her interrogatory answers are also consistent with her untruth. Moreover, if I see that the plaintiff has been untruthful in an interrogatory answer, I may not even question her about it in the deposition, reserving its use for impeachment at trial.

In a deposition intended for use at trial in which all objections are put on the record, it is unclear whether you must actually announce that you are "moving the exhibit into evidence" during the deposition. I recommend that you do make this offer of evidence on the record: if an objection is voiced by the adverse lawyer, the ground for the objection might indicate to you that you need to either restate the question, lay a better foundation, or otherwise take steps to cure a potential evidentiary problem before the deposition is ended and the witness released.

#### (✓) Plaintiff's State of Mind and Comfort

Establish on the record that the plaintiff feels well, that she is thinking clearly, and that she is not under the influence of any drugs or alcohol. Tell her, also on the record, that you will be happy to take a break if she needs to use the restroom or for any other reason, and that if she needs a drink or anything to make her more comfortable you will be happy to get it for her.

#### (✓) Deposition Rules

Make the disclosures required by local federal civil rule 30.04/state civil procedure rule 30(j), namely:

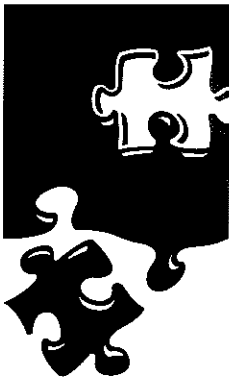
- Instruct the witness to ask you, rather than her own lawyer, for clarifications, definitions, or explanations of any words, questions or documents presented during the deposition
- Inform her that unless her lawyer has instructed her not to answer your questions, the questions must be answered.

#### (✓) Pre-Deposition Review of Documents, Meetings, and Conferences with Interested Witnesses

Ask if the plaintiff has reviewed any documents or other things in preparation for the deposition. Inquire whether she has spoken to attorneys (other than her own lawyer), parties, or witnesses about the case, especially after receiving notice that she would be deposed.

#### (✓) Background, Relatives, Close Friends.

You must get a feel for how the jury will react to your adversary and get the names of her relatives



Continued on page 10

and friends in the venue of trial. Ask background questions about her social-security number; date of birth; prior places she has lived; other marriages (including her maiden name); organizations in which she is a member; her education;<sup>4</sup> her hobbies; relatives; her five best friends; people with whom she now lives; where she, her husband/boyfriend, and her children work; and the like. Ask the names of the fathers of her children and about their families.

**(v) Arrests/Convictions**

Be sure to question the deponent about not only felonies, but also lesser crimes including shoplifting and "bad checks"<sup>5</sup> that reflect upon untruthfulness. Bad acts not the subject of an arrest may be admissible under rule 608(b) if they reflect upon untruthfulness, so questions about mere arrests are generally proper.

**(v) Employers and Doctors/Hospitals: Names and Addresses**

Ask about all employers for ten or more years and why she changed jobs. Get the names of all doctors, including chiropractors. Inquire whether she has ever been in a hospital for any reason, including as an outpatient, where, and why. Picture yourself sitting down to dictate subpoenas: get enough information so that you may subpoena all of these records.

**(v) Ask About All Other Accidents, Both Before and After Your Client's Accident**

Ask this question broadly. Don't just ask about "prior" accidents or "other auto accidents." Explain that the word "accident" is broader than just an auto accident or a slip and fall: it may include sports injuries, work injuries, lifting injuries, and even auto accidents in which no one was hurt.<sup>6</sup>

**(v) Ask About Other "Claims for Compensation," Including Lawsuits, and Other Attorneys**

Before asking this question, explain what you mean by a "claim" and that a lawsuit is a type of claim. Give examples of claims, such as social security claims, disability claims, and workers' compensation claims. Then ask this question broadly. Do not just limit your question to other "lawsuits." Do not limit your question to prior claims either. Question her about whether she has ever hired any other attorneys, and, without delving into confidential communications, why she sought representation.

**(v) Ask About All the Places the Plaintiff Suffered Pain or Discomfort as a Result of the Accident for Which She is Being Deposed**

Have the plaintiff list each specific part of her body where she suffered pain from your accident. Ask if the pain were on the left side, the right side, in the middle, etc. Repeat all of the places she says she had pain or discomfort (e.g., "left side of the neck, low back, and left knee") and then ask her, "Is that all?" Do not stop until you have this issue locked down.

**(v) Ask if the Plaintiff Has Ever Suffered Pain or Discomfort in These Same Parts of Her Body Before the Accident, or Since the Accident From Unrelated Causes**

This ties the plaintiff down on her history and can be very valuable if you are able to prove to the contrary.

**(v) Question the Plaintiff About Her Condition of Health "in the Year Before the Accident"**

You will be amazed in some cases how ill she was in the 12 months before your accident.

**(v) Lost Income and Business Records**

You must determine the extent of and basis for the plaintiff's lost-wage claim. With an hourly-wage employee, the basics are fairly simple: just get the average hours worked per week, the hourly wage, and the rate/amount of overtime. With other jobs this may be more difficult. There is nothing more disheartening than learning that the plaintiff is a commission-sales employee, such as a realtor, and is claiming lost income. Simply do the best you can.

Always ask whether the plaintiff has filed income tax returns for the past three years before the deposition and a year or two afterwards. If not, ask why. Get the name and address of her accountant. Question the plaintiff in detail about records and computer data at home pertaining to her business.

**(v) Ask About the Incident That Is the Basis for Your Lawsuit, Including Liability Issues**

Ask the plaintiff to "tell me in your own words how the accident happened starting from a few minutes beforehand." Get the basics of the accident,<sup>7</sup> the names and addresses of witnesses, whether an alcohol or drugs were involved, and all conversations that may be attributed in any way to the plaintiff or your client.

Question her about her body's movements in the accident, including whether it struck anything inside the car, whether her seat belt were fastened and snug<sup>8</sup> or in a slip-and-fall case, how it struck the floor. Ask about visible injuries and whether these were shown to her doctors and spouse.

If an "unknown" employee at the defendant's company made statements to her, ask his name, job duties, etc.<sup>9</sup> Discover everything that occurred at the accident scene until the plaintiff left it. Learn when her pain first appeared (e.g., back pain started immediately and neck pain the next day) and if she told the ER doctor and nurse about the different places she alleges she had pain. Inquire about how she felt that night.

**(v) Establish a Chronology of the Plaintiff's Post-Accident Activities and Limitations**

Usually a plaintiff's greatest pain and disability will be immediately after an accident, and from that point, over weeks or months, she will begin a recovery. An overwhelming disadvantage of the defense

lawyer is that usually she does not become involved until a year or more after the accident. If the defense lawyer can recreate the days following the accident, starting with the next morning, and show circumstantially that the plaintiff's activities were inconsistent with her allegations of pain, this is strong evidence that the injury was non-existent, or minimal.

Thus, ask the plaintiff what she did those first few days after the accident and when she left the house after the accident. Tell her that you do not want to know any communications between her and her attorney, then ask her when she first "traveled" to her attorney's office. Then ask the plaintiff to list the financial institutions with which she deals (her banks, Visa card issuers, Mastercard issuers, etc.) so you may subpoena copies of her checks and charge-card statements, if they exist. I have won more than one case by subpoenaing the plaintiff's checking information and comparing it to her allegations of injury. In one case, we showed that the plaintiff got a work excuse on a Friday from her doctor by complaining of excruciating pain from our auto accident. By cross-referencing that Friday with her checks, we proved that although she was too "ill" to go work, in fact she felt well enough to spend the rest of the afternoon shopping at Big Lots and K-Mart. In another case, a plaintiff alleged her injuries were so bad that she her daily activities were very limited. She could no longer exercise, sit for long periods of time, "vacuum or do laundry," etc. However, her checking and charge card records showed she traveled regularly around the United States and to the Caribbean living a very active lifestyle.

**(v) Ask the Plaintiff How She Feels Now**

By this, I mean ask her about her present physical condition, whether she has recovered from her injuries ("Do you feel like you're back to your pre-accident state of health?"), and if not about the frequency/nature of her current discomfort and limitations.

**(v) Question Her Whether There Were Anything She Could Do Before the Accident That She No Longer Can Do**

This generally will be relevant only if the plaintiff alleges continuing pain from the accident.

**(v) Wrap-Up List**

Go over any special questions you might have that pertain to the accident and which were not on your standard outline. Also, question the plaintiff regarding any documents about which you intend to ask her and lay evidentiary foundations for admissibility.<sup>10</sup>

**(v) Final Questions**

End the deposition by asking if she has given honest and truthful responses to your questions, whether she would like to change any answers or add any addition testimony, and if called upon at testify

at trial, if she'll testify the same as at the deposition.

Next Issue: Interrogatories

**Footnotes**

1 G. Ross Anderson, Jr., Address at the South Carolina Solicitors' Convention, Oct. 2, 1994 in *Setting Yourself Apart From the Herd: A Judge's Thoughts on Successful Advocacy*, 50 S.C. L. Rev. 617 (1999)[hereinafter *Joseph F. Anderson, Jr.*].

2 *Joseph F. Anderson, Jr., supra* note 1, 50 S.C. L. Rev. at 617.

3 Thanks to Mark Wall, Jim Myrick, Scott Moise, and John Massalon for their suggestions with this column.

4 If the plaintiff has trouble reading, you might embarrass her and yourself asking her to read documents or deposition testimony at trial.

5 The correct name for the crime involved with writing bad checks is "uttering fraudulent checks."

6 For any prior accidents with injuries, learn the specific part of the body injured, the treatment given, the damage to the vehicles (if an automobile accident), and whether she continued to have pain or discomfort once released from her doctors. Get the names and addresses of her other attorneys and doctors, and the amounts received in compensation.

7 Some additional topics for slip-and-fall and automobile accident cases include:

**Slip and Fall Case:**

- Whether the area was well lit
- Where the plaintiff was looking when she fell
- Why she thinks your client should have known of the dangerous condition (i.e., describe whether it would have been plainly visible to the employees)
- Describe the substance on the floor
- When she stood up after the fall, whether she could see the substance on the floor
- Whether anyone was in the area, and whether anyone else fell

**Automobile Accident Case:**

- Speeds of the vehicles
- The location of any vehicular debris and skidmarks on the roadway
- The final resting place of the vehicles

8 The statute prohibits evidence that the plaintiff failed to wear her seatbelt as evidence of negligence. It does not prohibit a showing that she complied with the law by wearing the seatbelt.

9 The plaintiff has the burden of laying a proper foundation under evidence rule 801 before introducing evidence of harmful statements allegedly made by your client's employees. Often the plaintiff has no idea about the identity or scope of employment of the phantom employee who allegedly said, "Oh my God! You're terribly hurt, it's all our fault, and you deserve a lot of money for your C5-C6 left-sided disc herniation!"

10 If photos of a plaintiff's car are at issue, ask her if they are truthful and accurate photos of the way her car looked as a result of the accident; you also may confirm that the condition of the car had not changed between the accident and when the photo was taken. Proceed similarly for photos of the accident scene.

# By-Law Change

The Bylaw changes are in all caps and are bold.

## Article II: PURPOSE:

The purpose of this Association shall be to bring together by association, communication and organization, lawyers **AND CORPORATE COUNSEL** of South Carolina who devote a substantial amount of their professional time to the handling of litigated cases and whose representation in such cases is primarily for the defense; to provide for the exchange among the members of this association of such information, ideas, techniques or procedure and court rulings relating to the handling of litigation as are calculated to enhance the knowledge and improve the skills of defense lawyers **AND CORPORATE COUNSEL**, to elevate the standards of trial practice in this area and, in conjunction with similar associations in other areas, to develop, establish and secure court adoption or approval or a high standard code of trial conduct and courtroom manner; to support and work for the improvement of the adversary system of jurisprudence in our court; to work for the elimination of court congestion and delays in civil litigation; and in general to promote improvements in the administration of justice and to increase the quantity and quality of service and contribution which the legal profession renders to the community, State and nation.

## Article III: QUALIFICATIONS FOR MEMBERSHIP:

Those persons shall be qualified for membership who (1) Are members in good standing of the South Carolina Bar; (2) Are actively engaged in the private practice of civil law, **AS CORPORATE COUNSEL**, or are employed by governmental bodies; and (3) Individually devote a substantial portion of their time in litigated matters to the defense of damage suits on behalf of individuals, insurance companies and corporations, private or governmental, or (b) the representation of management in labor disputes.

## Article V: EXECUTIVE COMMITTEE:

There shall be an Executive Committee which shall consist of the officers, the immediate past-president, one past president (referred to as "past president committee member") whose term of office expired more than five years prior to election and a minimum of fifteen executive committee members made up of two representatives from district as set forth herein and three at large executive committee members. For the purposes of the election of officers of the Executive Committee, the districts shall have those boundaries set forth in Appendix A. Each district shall have one additional member of the Executive Committee for each 100 members of the Association in the District. Sixty percent (60%) of the members of the Executive Committee shall constitute a quorum. The state chairman of the Defense Research Institute shall be an ex-officio member of the Executive Committee provided this person is a member of the Association in good standing. **THE CHAIRPERSON OF THE SCDTAA'S YOUNG LAWYERS DIVISION SHALL BE AN EX-OFFICIO MEMBER OF THE EXECUTIVE COMMITTEE. THE CORPORATE COUNSEL SECTION'S CHAIRPERSON OR DESIGNATED REPRESENTATIVE SHALL BE A VOTING MEMBER OF THE EXECUTIVE COMMITTEE.**

## Article VI: ELECTION OF OFFICERS AND TERMS OF OFFICE:

The term of each member of the Executive Committee who is not an officer or an immediate past-president shall be three years. **ONE-THIRD OF THESE MEMBERS SHALL BE ELECTED AT EACH ANNUAL MEETING.** Vacancies in office, other than the President and President-Elect, shall be filled by the Executive Committee.

For Additional Information Check Out SCDTAA's Website  
<http://www.scdtaa.com>

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