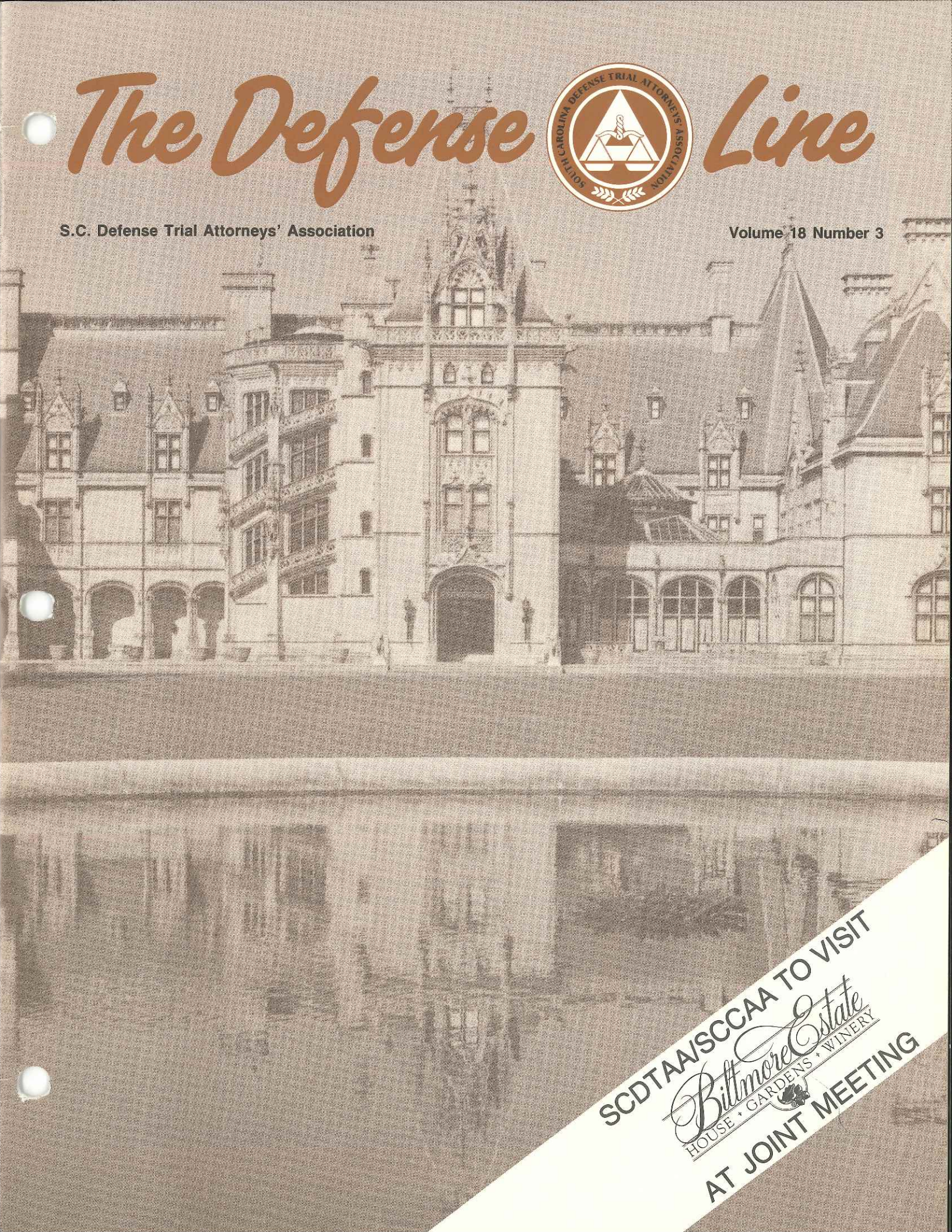
The Defense Line

S.C. Defense Trial Attorneys' Association

Volume 18 Number 3



SCDTAA/SCCAA TO VISIT

Biltmore Estate HOUSE + GARDENS + WINERY

AT JOINT MEETING

VOLUME 18, NO. 3 SUMMER 1990

LOOKING BACK TEN YEARS AGO

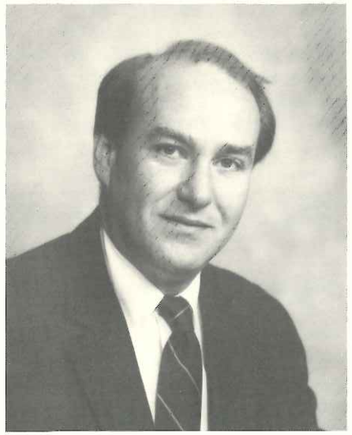
Looking back ten years, President-Elect, BOBBY HOOD, and his wife, JUDY, attended the Thirteenth National Conference of State and Local Defense Associations in Denver, Colorado. There he was presented with the Exceptional Performance Award for our Association. President F. BARRON GRIER, III, reported on a CLE to be held June 27, 1980, coordinated by GENE ALLEN. President BARRON GRIER along with CARL EPPS, ED MULLINS and BRUCE SHAW coordinated the efforts of our Association with that of the State Chamber of Commerce in respect to products liability litigation. The membership of the Association was up to 317 and the Treasurer reported a balance as of March 21, 1980, of $5,506.96. HUGH L. WILCOX was honored by his law firm June 12, 1980, with a reception at Florence Country Club. MARK WALL reported from the first district that two members of the South Carolina Defense Trial Attorneys were in a run-off for senatorial seats, M. WILLIAM YOUNGBLOOD and W. PAUL CANTRELL, JR.

LOOKING BACK TWENTY YEARS AGO

Twenty years ago South Carolina Defense Attorneys and Claims Management Association met March 27, 1970, at the Fort Sumter Hotel in Charleston. HOOVER BLANTON was in charge of the program and JIM ALFORD was in charge of the social planning. REID CURTIS, New York attorney and Vice-President of DRI, was unable to make the meeting because of the control towers operators' strike. CHARLIE GIBBS headed up a panel consisting of J.D. TODD, WILLIAM HORGER and DEXTER POWERS on excess liability. Saturday morning KURT McALPIN of the Atlanta firm of King and Spaulding, talked about "fees and billing". SIMMONS TATE moderated the panel consisting of HAROLD JACOBS, ANDREW MARION, CARL DUNN and GERALD SMITH following Mr. McAlpin's presentation.

The Defense Line is a regular publication of the South Carolina Defense Trial Attorneys' Association. All inquiries, articles, and black and white photos should be directed to Nancy H. Cooper, 3008 Millwood Avenue, Columbia, SC 29205, 1-800-445-8629.

PRESIDENT'S PAGE



MARK H. WALL
Craver, Wall & Hastie

Convention time is here again, and with it comes the realization that half of my year as President of the Association is over.

You have all received your registration packages for the Asheville meeting scheduled for July 26-July 29 at The Grove Park Inn. Brad Waring and Tom Johnston have put into place a superb program dealing with vocational and rehabilitation experts. Also, as promised, one hour of the program is designed to comply with the "ethics" CLE requirement.

This year the Claims Management Association agreed to be responsible for one hour of the program. Jim Sadler, as President of the Claims Managers, has prevailed upon Tom Hesse to return to the scene of his past crimes. As many of you know, Tom is presently in law school, going year round, and has now completed his first year. It appears that the "dynamic duo" of American Mutual rides again!

At the last meeting of the Executive Committee we accepted with reluctance David C. Norton's resignation. This occurred as a result of the nomination by President Bush of Dave to the Federal District Court. It is hopeful that Dave will be sworn in sometime in July of this year. Pursuant to the By-Laws (Article VI) any vacancy in the Executive Committee shall be filled by the Executive Committee. At the meeting, (May 4, 1990), Tim Bouch of Young, Clement, Rivers & Tisdale was nominated and unanimously elected to fill the unexpired term of Dave Norton. Congratulations Tim, we're glad to have you back on the Executive Committee. We all know what a fine job you've done in the past and expect that you will continue to do so in the future.

Glenn Bowers, as President Elect of our Association, represented the Association at the annual DRI National Leadership Conference. Also present was Carl Epps, as DRI State Chairman. We should be receiving a report from them shortly. The annual DRI meeting attempts to set the tone for Defense Groups throughout the country.

Each of you received a Notice of the Request for Nominations for The Hemphill Award. If you wish to nominate anyone who meets the criteria, I would request that you forward that nomination to Carol Davis, at Executive Headquarters, before the Joint Meeting so that the Hemphill Award Committee can begin their review process.

The Legislative session has now ended (except for a one day limited agenda recall which does not affect us). We have again emerged unscathed from attempts by different segments of the Bar to introduce and pass legislation which effects the balance of justice in our Court system. Again, I want to thank Kay Crowe and her Committee for their hard work in monitoring the legislature and in defeating all attempts to change existing law. When the new legislature meets

(Continued on page 4)

By JIM SADLER
Director, Property & Casulty Claims
American Mutual Fire
Insurance Company
Charleston, SC

The year since our last joint meeting has been momentous for claims managers, defense attorneys, and the insurance industry. While many of us feel that recovery from the effects of Hurricane Hugo resulted in our industry's finest hour, frustrations and uncertainties made that recovery a difficult proposition for all involved in the aftermath of this major hurricane.

Now, once again it is time to welcome claims managers, defense attorneys, and their families to Asheville and to our joint meeting. We have all learned a great deal about natural catastrophe, both personally and professionally since last we met, and although the post-mortem of our performance is in the future, we are convinced that it will document what we know to be true: we performed well under adverse conditions.

Life continues in South Carolina, and the non-catastrophe issues facing our industry also continue to present themselves. Our meeting will explore important and timely issues outside of those which have preoccupied us since the storm of last September.

Welcome to the meeting; enjoy the fellowship, but most importantly, take advantage of the educational opportunities for which this meeting has long been noted.

(Continued on page 4)

Mark Wall

(Continued from page 3)

in 1991 it will be time for our Association to again go on the offensive and propose legislation which will bring back the balance to our judicial system which is needed.

At the Annual Bar Meeting, recently held at Myrtle Beach, the Association went on record in opposition to a proposal to allow any organized Bar Group to sponsor portrait committees for sitting Judges. It has been the position of the Association that only the State Bar or County Bar Associations should be sponsors of portraits.

Also, at the annual Bar Meeting, a report was given concerning a new proposal for Case Management in the Federal System. A Committee consisting of John Johnston, Ray Baumil (President of the Trial Lawyers) and myself reviewed the proposal. The proposal would require, among other things, substantial reporting by the Federal Courts of outstanding Motions and pending cases to the U.S. Senate Judiciary Committee. The report also called for the setting up of a model case management system in each district, requiring substantial additional paperwork on the part of the Court and on the part of Counsel. It was the Committee's unanimous recommendation to the South Carolina Bar that the Bar go on record in opposition to the proposal. John Johnston reported the findings of the Committee. The State Bar, by its resolution, voiced its opposition to placing another layer of bureaucracy on the Federal Court system.

On a sad note, J. Edgar Eubanks, President of Association Management Services, the Company that acts as our Executive Director, died suddenly on May 4, 1990. We cannot thank his company enough for all their hard work for our Association. Mr. Eubanks assembled an extremely competent professional staff, particularly Carol Davis and Nancy Cooper, whose services we could not do without. Our condolences go to Mrs. Eubanks and all the members of the staff; together with our thanks for all their hard work.

I look forward to seeing each of you in Asheville in July for the Joint Meeting.

The Amicus Curiae Committee would like to remind members of the bar that any requests for an amicus curiae brief from the South Carolina Defense Trial Attorneys' Association can be submitted to the Committee in care of Susan B. Lipscomb, Nexsen Pruet Jacobs & Pollard, P.O. Drawer 2426, Columbia, S.C. 29202.

Jim Sadler

(Continued from page 3)

SOUTH CAROLINA CLAIMS MANAGEMENT
1989-90 Officers & Chairman

PRESIDENT	DON WRIGHT Amica Mutual Ins. Co.
VICE PRESIDENT	JIM SADLER American Mutual Fire
SECRETARY	THOMAS RHAME Seibels Bruce Group
TREASURER	GLENN BECKHAM SCE&G
RECORDER	CURTIS HIPP State Farm Ins. Co.

SOUTH CAROLINA CLAIMS ASSOCIATION
1990 Officers

PRESIDENT	GARRY ANTHONY SCE&G
VICE PRESIDENT	BRIAN McGINNIS Ohio Casualty
SECRETARY	BRIAN HORAHAN Crawford & Company
TREASURER	NANCY CLUBB American Mutual Fire

C.L.E. Seminar — November 2, 1990

The South Carolina Defense Trial Attorney's Association will again co-sponsor a C.L.E. Seminar with the South Carolina Bar on November 2, 1990. The topic this year is "Settlement Considerations in Personal Injury Litigation — Problem Areas and Traps for the Unwary." The seminar will be built around a hypothetical fact situation and the speakers will focus on problems which develop, quite often after a settlement agreement has been entered. The program should be of benefit to attorneys of all experience levels, both plaintiff and defense oriented.

All SCDTAA member firms are encouraged to support this seminar by sending as many attorneys as possible and also spreading the word among your colleagues. This seminar is presented as a service to the bar but it also provides revenue for our organization. Please mark your calendars now.

DRI REPORT

By Carl Epps

DRI conducted its National Conference for Defense Bar Leaders at the Salishan Lodge along the Oregon coast May 31st through June 2, 1990. Glenn Bowers, President-Elect, and I attended from South Carolina. The conference brings leaders from defense groups across the nation together to discuss common issues important to the defense bar both locally and nationally.

The information exchanged is important to us and this year's meeting was particularly informative. The Chairmen of DRI's standing committees, the Regional Vice-Presidents, many State DRI Representatives, the Presidents of the International Association of Defense Counsel, the Federation of Insurance Counsel, and the Association of Trial Counsel were all in attendance. The IADC formed DRI over twenty years ago for the purpose of assisting the Defense Bar on a national level, and it was clear that the FIC and the ADTC support DRI's efforts.

Some of the more interesting points covered included a discussion by representatives of the insurance industry and PACBELL concerning budgeting legal expenses and controlling costs. Requiring counsel to prepare budgets at the inception of litigation delineating anticipated legal expenses and expert fees was debated, as was PACBELL's recently instituted program of submitting legal matters to various law firms for bids on handling them. Just as our weather moves from left to right across the weather map, it seems that our laws do also, and thus events in California are always of interest. California has witnessed a return to conservatism by its appellate courts, but has also seen legislation introduced this past session limiting both plaintiffs' contingency fees and defense attorneys' fees. DRI, in conjunction with the Lawyers for Civil Justice, offers manpower and technical support to help in legislative matters and various state legislatures when needed, as was the case in California.

DRI needs your support and hopes to have every member of the defense bar join it. I recently sent a letter to everyone in our organization who was not a member of DRI asking them to join. Events on the national level will affect our practice even more as time goes on, and if you have not joined DRI, now is the perfect time.

TWENTY-THIRD ANNUAL JOINT MEETING

South Carolina Defense Trial Attorneys' Association — Claims Management Association of South Carolina

JULY 26-29, 1990
GROVE PARK INN, ASHEVILLE, NC

VARIED EDUCATIONAL AGENDA ON TAP

By Brad J. Waring, Esquire and Thomas Johnston, Esquire Co-Chairs/Joint Meeting Program Committee

Your Program Committee for the 1990 Joint Meeting in Asheville has been successful in attracting a diverse group of speakers for our educational conference. On the morning of Friday, July 27, 1990, Paul Lees-Haley, Ph.D and Jack Dahlberg, M.A. will be speaking on the topics of "Containment of Damages — Defense of Damages in Psychological and Neurophychological Claims," and "Damages Assessment Through Rehabilitation Studies," respectively. Dr. Lees-Haley is a nationally known, board certified vocational expert and a licensed psychologist. He has published numerous articles, one of which you will find in this month's issue. Jack Dahlberg owns and operates Dahlberg & Associates Rehabilitation Consultants and is likewise a nationally known rehabilitation expert. The two will spend the third hour on Friday morning critiqueing other rehabilitation expert reports from actual cases and sharing with you their insight and tips on how to attack those reports.

On Saturday, July 28th, we will start the morning with our very own R. Davis Howser, Esq. speaking on "Conflicts of Interest in the 90's — Where We've Been and Where We're Going." For those of you who have not heard Dave speak on this topic, you will find this issue to be extremely timely and helpful in your day-to-day practices. The Honorable Commissioner Vernon F. Dunbar will then speak on "An Overview of Workers' Compensation in South Carolina." His talk should prove to be an asset to those practitioners toiling in this particular vineyard. Lastly, Tom Hesse (former President of the Claims Managers Association and now law student) will take off the gloves and give a presentation on his view of the Claims/Legal System in the State of South Carolina. Thereafter, his former comrade in arms, James Sadler (Director of Property and Casualty Claims for American Mutual Fire Insurance Company) will speak on his experiences in handling Hugo claims since September 22, 1989. I believe Jim's talk will certainly provide insight on handling catastrophic claims.

In all, we have a full and varied educational agenda and we look forward to seeing each of you there.

VARIED SOCIAL AGENDA ON TAP

By Mike Wilkerson

A vacation in the mountains with a small dose of work — that's our joint meeting at the beautiful Grove Park Inn. Attendance at this meeting continues to be outstanding. This is a great opportunity for our members and claims managers to escape their litigation environment and relax together. The social program will provide you the maximum opportunity for relaxation taking advantage of the unique character of the Asheville area.

WHITE WATER RAFTING: Weldon Johnson will lead this expedition this year. Box lunches, tea and soft drinks will be provided on the bus enroute to your white water adventure. Proper anesthetic will be available on the return trip.

GOLF: Sam Outten and Keith Hutto (allegedly scratch golfers) are planning the golf tournament at the Grove Park Inn course. Their one idea of having 6" rough has been overruled by the Executive Committee; so you may expect to have no more than your usual problems finding your ball.

TENNIS: John Britton has alerted the Asheville EMS that we'll have a tennis tournament. It will be exciting to see whether the older horses can keep up with the new talent. A videotape of this competition may be in order.

BILTMORE HOUSE CANDLELIGHT TOUR (Friday Night): (Coat & Tie): This will be one of our most interesting and enjoyable events. We'll have the Biltmore House to ourselves with a candlelight tour and appropriate, live music. Dinner and drinks will be in the Carriage House adjacent to the main house. This will be a taste of Vanderbilt living.

(Continued on page 6)

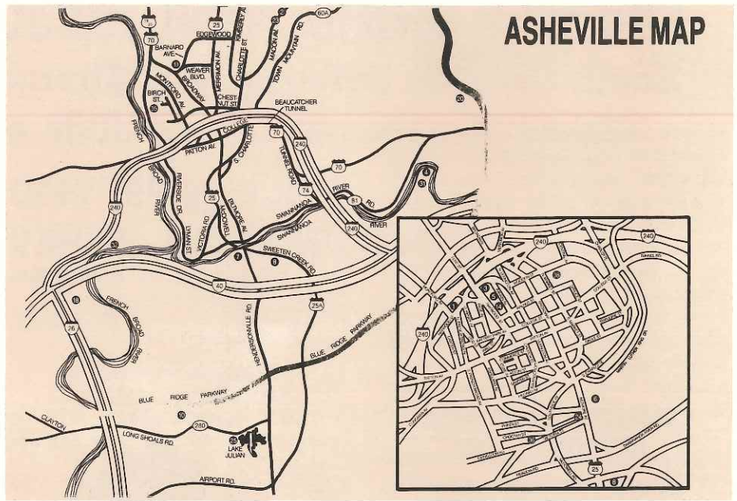
Social Agenda
(Continued from page 5)

BBQ, BLUES AND BLUE GRASS (Thursday Night): After a reception on the patio at the Inn, we'll have a BBQ dinner and then music by the Willis Blume Blues Band (WBBB). Last year everyone was impressed by WBBB; so we invited them back. We'll hear a combination of blues, blue grass and maybe even a beach song or two.

SPOUSES' PROGRAM: A trip to the Asheville Folk Arts Center will provide your spouse a great chance to view a craftmaking demonstration and maybe even purchase unique "mountain" arts and crafts. The bus may also stop at one of the outlet stores in the area.

There will be something for everyone at this meeting. Join us in Asheville for a great time!

ASHEVILLE MAP



ASHEVILLE AREA ATTRACTIONS

ANTIQUE CAR MUSEUM — Asheville. On the grounds adjacent to Grove Park Inn and next door to the Biltmore Homespun Shop. Open Mon.-Sat., 9-5; Sun. 1-5; Winter months, please inquire at Gift Shop for tours. Free. (704) 253-7651.

ASHEVILLE ART MUSEUM — Inside the Asheville Civic Center Changing exhibits. Open Tues.-Fri., 10-5; Sat.-Sun., 1-5. Nominal fee; free to members. (704) 253-3227.

ASHEVILLE TOURISTS BASEBALL — McCormick Field off Biltmore Avenue/US 25. A farm team of the Houston Astros. Season runs April through August. (704) 258-0428.

BILTMORE ESTATE — Asheville. The largest private home in America, a 250-room French Renaissance chateau built in 1895 by George W. Vanderbilt. Self-guided tours include upstairs and downstairs of house, the Estate Winery — where Biltmore wines are available for tasting — and the gardens and grounds. Two Estate restaurants. Special events include Christmas at Biltmore, late November to late December. Located on US 25 three blocks north of exit 50 on I-40 in Asheville. Ticket office open 9-5; Biltmore House open until 6:30; Estate grounds until 8. Closed Thanksgiving day, Christmas day and New Years day. Children 11 and under are admitted free when accompanied by a parent. Admission charge. (704) 255-1700. 1-800-543-2961.

BILTMORE VILLAGE — Asheville. Adjacent to the Biltmore Estate entrance, the Village consists of restored English-style houses that now contain intriguing shops and galleries. George W. Vanderbilt intended this turn-of-the-century construction as a model village.

BLACK MOUNTAIN — Located a mile from the Eastern Continental Divide and a short drive from Asheville, Black Mountain is widely known for its antique shops and large denominational conference centers which attract more than 150,000 guests a year. Four major conference centers are within two miles of the town. Quaint antique and craftstores, unique restaurants, and historic Cherry Street make Black Mountain an inviting tourist destination. For more information, contact the Visitor Information Center in Black Mountain (704) 669-2300.

BOTANICAL GARDENS — Asheville. This ten acre native wildflower area is located on the campus of University of North Carolina — Asheville. Open daylight hours. Free. (704) 252-5190.

CHEROKEE INDIAN RESERVATION — Located at the eastern edge of the Great Smoky Mountains National Park is the home of 8,000 Eastern Cherokees. This is the largest organized Indian reservation east of the Mississippi and spans over 56,000 acres. Cherokee history on this continent goes back more than 10,000 years, and the excellent Cherokee Indian Museum pieces this colorful tradition together. The Oconaluftee Indian Village recreates a living Indian community hundreds of years old, with Guides to explain crafts and arts. Admission charged. Open mid-May — late October, 9-5:30. The Qualla Arts and Crafts Mutual, Inc., located on Hwy. 441 North, is the most successful Indian-owned and operated craft cooperative in America, featuring arts and crafts of the Eastern Band of Cherokee Indians. Open year-round, seven days a week. Mid-June through Labor Day, 8-8. Winter months, 8-5. (704) 497-3103. Cherokee Tribal Travel & Promotions office, (704) 497-9195; Cherokee Indian Museum, (704) 497-3481; Oconaluftee Indian Village, (704) 497-2315.

COLBURN MINERAL MUSEUM — Asheville. On the lower level in the Civic Center Educational display of gems and minerals of Southern Appalachia. Open Tues.-Fri., 10-5; weekends, 1-5; closed Mon. Nominal fee. (704) 254-7162.

CONNEMARA — Home of Carl Sandburg. Three miles south of Hendersonville at Flat Rock. A 267-acre farm where this famous poet and biographer spent his later life with his wife, who raised prize-winning goats. Scheduled guided tours of house. Ages 17-61 nominal charge. Daily except Christmas. (704) 693-4178.

FARMER'S MARKET — Operated by NC Dept. of Agriculture. A modern, year-round facility with retail and wholesale produce, crafts and garden plants. Easy access from I-40 and I-26. Hours vary, closes at dusk. Free. (704) 253-1691.

FLAT ROCK PLAYHOUSE — Located 3 miles south of Hendersonville on US 25. The Vagabond Players present evening performances Wednesday through Saturday at 8:15, matinees Thursday, Saturday and Sunday at 2:15 throughout the summer. The State Theatre of North Carolina. Open mid-June to early September. (704) 693-0731.

GRANDFATHER MOUNTAIN — US 221 and the Blue Ridge Parkway near Linville, North Carolina. Dated as one of the oldest mountains on earth, it is named for its bearded face looking toward the sky. Features a mile-high swinging bridge and environmental habitats for large game animals. Visitor Center and trails. Admission charged. Open daily from April 1 through mid-November. Open daily, weather permitting during winter months. (704) 733-4337.

GREAT SMOKY MOUNTAINS NATIONAL PARK — Extends about 70 miles along the North Carolina-Tennessee border and contains over a half million acres of unspoiled forest. This is the most popular Park in the country and has a resident population of 400 to 600 black bears. Open year-round (615) 436-5615.

THE HEALTH ADVENTURE — Asheville. 501 Biltmore Ave. A health education facility with displays for hands-on learning for all ages. Open year-round. In June, July and August, guided tours Mon.-Fri., 10:30 a.m.; remainder of year, Wed., 3 p.m.; all other times, call for reservations. Nominal admission. Open 8:30-5, Mon.-Fri. (704) 254-6373.

LINVILLE CAVERNS — Four miles south of Blue Ridge Parkway on US 221. This brightly lit cavern offers many interesting formations and extends deep into the mountainside. Guided tours. Open daily, March-November and weekends only December-February. Admission charged. (704) 756-4171.

LINVILLE GORGE/FALLS — At Blue Ridge Parkway Milepost 316. A vast and very rugged terrain. Good hiking trails lead to excellent views of falls and gorge. Open year-round, weather permitting. (704) 765-9266.

LINVILLE VIADUCT — Near Grandfather Mountain at Blue Ridge Parkway Milepost 304. Opened in 1987, this engineering marvel represents the final link in the construction of the Blue Ridge Parkway. Open year-round, weather permitting (704) 295-7591.

NEW ASHEVILLE SPEEDWAY — 219 Amboy Road. NASCAR sanctioned stock car racing. Friday nights mid-April to mid-September. (704) 254-4627.

PISGAH NATIONAL FOREST — Covers almost 497,000 acres of forest and land and spreads over 12 western North Carolina counties. Part of this forest, originally a part of Biltmore Estate, was purchased from George W. Vanderbilt's estate in 1914. Waterfalls, rock slides, swimming holes, fishing, camping, and picnic areas are all found here. Entrance near Brevard where NC 280 intersects NC 276. Open year-round. (704) 257-4200.

RIVERSIDE CEMETARY — Asheville. On Birch Street. Burial place of Thomas Wolfe and O. Henry.

SMITH-MCDOWELL HOUSE — Asheville. 283 Victoria Road, off Biltmore Avenue. Built ca. 1840 and restored as Asheville's oldest house and Museum, may also be used as a rental facility. Open year-round. From May 1 to October 31: Tuesday-Saturday, 10-4; Sunday, 1-4. From November 1 to April 31: Tuesday-Friday, 10-2. Office hours: Monday-Friday, 9-5, year-round. (704) 253-9231. Small fee.

THOMAS WOLFE MEMORIAL — Asheville. Enter from Woodfin Street beside The Radisson Hotel. Famous novelist's boyhood home. This is the Dixieland boardinghouse depicted in the novel *Look Homeward, Angel*. Tours given. Open year-round, 9-5, Mon.-Sat.; 1-5 Sun. Winter hours: 10-4, Tues.-Sat.; 1-4 Sun.; closed Mon. (704) 253-8304. Nominal fee.

UNTO THESE HILLS — At Cherokee, North Carolina. An outdoor drama depicting the great story of the Cherokee Indians. Mid-June through late August, 8:45 p.m. Admission charged. (704) 497-2111.

VANCE HOMESTEAD — State Historic Site. Located on Reems Creek Road off Hwy. 25 North, near Weaverville. Restored late 18th century farmstead of North Carolina senator and Civil War governor, Zebulon B. Vance, born 1830. From November to March: open Tues.-Sat., 10-4; Sun., 1-4; closed Mon. From April to October: open Mon.-Sat., 9-5; Sun., 1-5. (704) 645-6706.

TWENTY THIRD ANNUAL JOINT MEETING
SOUTH CAROLINA DEFENSE TRIAL ATTORNEY'S ASSOCIATION
CLAIMS MANAGEMENT ASSOCIATION OF SOUTH CAROLINA
JULY 26-29, 1990
GROVE PARK INN, ASHEVILLE, NORTH CAROLINA

Thursday, July 26:

3:00 to 5:00 p.m.	Executive Committee Meeting
4:00 to 7:15 p.m.	Registration
7:15 to 8:15 p.m.	Reception
8:15 p.m. to 12 Midnight	"Pig Pickin' " Open Bar and Entertainment of "Willis Blume Blues Band"

Friday, July 27:

8:00 a.m. to 12 noon	Late Registration
8:15 to 8:45 a.m.	Coffee Service
8:45 to 9:00 a.m.	Welcome
9:00 to 10:00 a.m.	"Containment of Damages — Defense of Damages in Psychological and Neuropsychological Claims" PAUL LEES HALEY, PhD.
9:00 a.m. to 12 noon	Tour of Folk Art Center and River Ridge Marketplace
10:00 to 10:15 a.m.	Coffee Break
10:15 a.m. to 11:15 a.m.	"Damages Assessment Through Rehabilitation Studies" JACK DAHLBERG, M.D.
11:15 a.m. to 12:10 p.m.	"Dealing with Plaintiffs Vocational and Rehabilitation Expert" PAUL LEES HALEY, PhD. and JACK DAHLBERG, M.D.
12:10 to 12:15 p.m.	Claims Manager of the Year Award
12:15 to 1:15 p.m.	Bloody Mary and Screwdriver Break
12:30 p.m.	White Water Rafting
12:30 p.m.	Golf Tournament
2:15 p.m.	Tennis Tournament
7:00 to 11:00 p.m.	Candlelight Tour and Heavy Hors D'oeuvres Reception at the Biltmore House

Saturday, July 28:

8:15 to 9:00 a.m.	Coffee Service
8:30 to 9:00 a.m.	Business Meetings for Both Associations
9:00 to 10:00 a.m.	"Conflicts of Interest in the 90's — Where We've Been and Where We're Going" R. DAVIS HOWSER, ESQUIRE
10:00 to 10:15 a.m.	Coffee Break
10:15 to 11:15 a.m.	"Worker's Compensation in South Carolina — An Overview" VERNON F. DUNBAR, COMMISSIONER
11:15 a.m. to 12:15 p.m.	"Claims/Legal System in South Carolina — One View" THOMAS HESSE "Hugo — One Claims Director's Experience" JAMES SADLER
12:15 to 1:15 p.m.	Farewell Bloody Mary and Screwdriver Break

DECLARATORY JUDGMENT: INSURANCE CLAUSES PRECLUDE PLAINTIFF'S RECOVERY IN ACCIDENT INVOLVING CHURCH VAN

In *Rushton v. Allstate Insurance Company, et al.* Civil Action No. 89-CP-10-1922 (February 13, 1990), The Honorable Ralph King Anderson, Jr., held in a declaratory judgment that Defendant's automobile insurance policy, on his own personal car, contained two non-owned vehicle exclusions which were applicable to a church van he was driving which was involved in a single vehicle accident. The two exclusions at issue, which Allstate asserted precluded liability, were the "business use" and "regular use" exclusions for a non-owned vehicle. These were asserted by Allstate in a counterclaim, affirmatively declaring that the provisions of its policy specifically excluded any coverage for the accident in question.

The accident arose out of a single-vehicle automobile accident occurring in Charleston County in 1983. The vehicle involved in the accident was owned by the Defendant, Brentwood Baptist Church, and was being operated by the Defendant, Robert E. Pierce, III, who was employed by the church as an associate pastor for youth services. His duties as youth minister included, keeping the church van in his custody on the Baptist College campus and making regular trips, usually three times weekly, to transport students to services at the church. Pierce had custody of the van from October of 1982 until the time of the accident. He was driving a group of students from the Baptist College to the church for Sunday services when he hit a wet spot on the pavement of Interstate 26 and lost control of the van. Plaintiff Rushton was a passenger in the vehicle and sustained serious injuries in the accident.

The church, as owner of the van, had an automobile insurance policy with State Farm Insurance Company which paid its coverage limits to the Plaintiff. The church also had a policy of insurance with Southern Mutual Church Insurance Company and the Plaintiff ultimately settled his claim against Southern Mutual and they are no longer a party to the action. At the time of the accident, the Defendant Pierce had a policy of insurance with the Defendant Allstate covering his own personal vehicle and that was the policy which was the subject of this declaratory judgment action.

Pierce's policy protected "an insured person from claims or accidents arising out of the ownership, maintenance, loading or unloading of an insured auto." "Insured auto," by definition, includes "a non-owned auto used by you or a resident relative with the owner's permission." The definition includes the following limited language pertaining to "regular use":

> "This auto must not be available or furnished for the *regular use* of an insured person." (Emphasis supplied)

In addition to the above limiting definition of "an insured auto," part I of the policy also contains the following exclusion concerning "business use." The policy does not cover:

> "(3) a non-owned auto while being used *in any business or occupation of an insured person.* However, coverage does apply while you . . . are using a private passenger auto or trailer." (Emphasis supplied)

As to the conclusions of law, the trial court noted that appellate courts in this State have consistently held "that insurers have the right to limit their liability and to impose whatever conditions they desire upon an insured, provided they are not in contravention of some statutory prohibition or public policy." *Pennsylvania National Mutual Casualty Insurance v. Parker,* 282 S.C. 546, 320 S.E.2d 458,461 (S.C. App. 1984). Further, "reasonable exclusionary clauses which do not conflict with the legislative expression of the public policy of the State as revealed in the various motor vehicle insurance statutes are permitted." *Id.*

South Carolina law does not require mandatory automobile insurance coverage for non-owned vehicles, as it does for vehicles owned by an insured. The South Carolina Code of Laws of 1976, Section 38-77-140, sets forth the general requirements for automobile liability coverage for every policy issued or delivered in South Carolina. Mandatory insurance on non-owned vehicles is not set forth as a requirement of the act, and the Supreme Court of South Carolina has confirmed that mandatory insurance on a non-owned vehicle is not required in this State. Thus, in this state, an automobile insurer is free to limit its coverage on non-owned vehicles in such manner as it deems appropriate. *See Willis v. Fidelity and Casualty Company of New York,* 253 S.C. 91, 169 E.E.2d 282 (1969); *Paul v. Harford Accident & Indemnity Company,* 443 F.Supp. 112, (D. S.D. 1977).

First, Judge Anderson discussed the exclusion of non-owned vehicles when furnished for "regular use." The Court noted that the standard which must be shown by an insured to satisfy the "regular use" exclusion has been established by South Carolina case law. The most recent case construing the intent of the "regular use" exclusion was *Tollison v. Reaves,* 277 S.C. 443, 289 S.E.2d 163 (1982) which stated:

> It is to afford coverage for the *infrequent and casual use* of vehicles other than the one described in the policy, but not to cover the insured with respect to his use of another vehicle which he frequently uses or has the opportunity to use. *Id.* at 165.

The Court also noted a Missouri case, *Kern v. Liberty Mutual Insurance Company,* 398 F.2d 958 (8th Cir. 1968) as being instructive since it deals with similar exclusionary language. In *Kern* the Court found that the insured's use of a church van in that case fell within the "regular use" exclusion of the insured driver's personal policy.

Applying the above mentioned law to the facts of the case, Judge Anderson concluded that Defendant Pierce's use of the church van was more than casual, occasional, infrequent or temporary; it was, in fact, regular, frequent and unrestricted as to the church business for which he was responsible.

The Court then went on to discuss the exclusion of non-owned vehicles for "business use." This second exclusion in Pierce's Allstate policy was also applicable to exclude coverage for the subject accident. In holding such, the Court relied on *Commercial Insurance Company of Newark, N.J. v. Gardner,* 233 F.Supp. 884 (D.S.C. 1964), which held the "business use" exclusion was applicable to facts similar to the case which is at hand. In that case, the Court, applying South Carolina law, agreed with the insurer's contention that the insured policeman was using a City of Columbia police cruiser in his "business or occupation" when he was involved in an accident while on traffic patrol. The Court noted three different criteria which had been used by other jurisdictions in determining whether an auto was a private passenger auto. These criteria were:

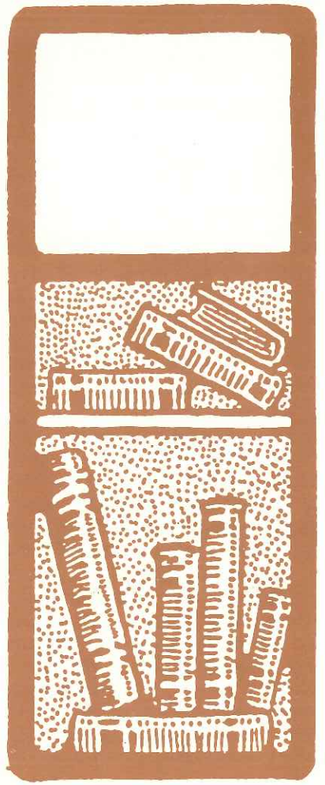
(1) Type of vehicle:
(2) Use to which the vehicle was being put; and/or
(3) Ownership.

By applying any of these tests to the case, it was readily apparent that the church van did not qualify as a "private passenger car" so as to preclude application of the "business use" exclusion. The van was owned by the Brentwood Church, not a

(Continued on page 19)

New Appellate Court Rules

By Charles E. Carpenter, Jr.



These requirements to be concise and direct as to each issue; avoid broad general statements which the court may disregard; and, at the same time to be sure that every point is set forth in the statement of issues does seem to have a heritage in the old version of raising issues by "exceptions." At the same time, the new rules seem to be reaching in a new direction of lessening the rigidity of the old rules. The interpretation which the Court gives to the new rules in the future will be the key to understanding how far we may have moved from our previous practice.

We have eliminated the process of litigating the contents of the record on appeal, and this should be a welcome relief to appellate lawyers, appellate judges, and trial judges. The new procedure for establishing the contents of the record involves the Appellant designating the portions of the record which the Appellant wishes to include and the Respondent designating the portions of the record which the Respondent wishes to include. Counsel is still required to certify that the designation contains no irrelevant matter.

One point of debate in the earlier consideration of the rules was whether or not the parties and the Court would be strictly limited to the contents of the record on appeal or whether the record on appeal would serve as a convenient reference source, but the full record of the case below would remain the true record of the case throughout. The new rules continue the old version of the Record on Appeal being the exclusive boundaries of consideration by the Court. To this extent, the rules differ significantly from the current Federal Rules.

Briefs and Transcript of Record

The briefing procedures under the new rules are considerably different. Rule 207 requires a Table of Contents as before and adds a requirement for a Table of Authorities which is now mandatory. The Statement of the Case now appears in the brief under the new rules rather than in the transcript under the old rules. There are certain specified facts about the case which are required to be in the Statement of the Case. Any matters stated in the Appellant's brief in the Statement are binding on the Appellant. The Respondent is not required to do a Statement of the Case, but if the Respondent does not include a Statement of the Case, the Respondent is bound by the Appellant's Statement. Another new requirement for briefs is that arguments shall contain references to the Transcript to support facts alleged, objections made and rulings. Principle briefs are now limited to fifty (50) pages, and reply briefs are limited to twenty-five (25) pages.

Another dramatic change in the record is the timetable and manner of preparing, serving and filing the briefs and the transcript of record. Anyone who has handled a federal court appeal under the "delayed appendix" provisions of Rule 30 of the federal rules will recognize the new procedure of our state court system. It is a departure from both our current state court procedure and from the current federal court procedure. Under the new South Carolina Appellate Court Rules the process is as follows.

The Appellant prepares the initial brief, and at the time this initial brief is served, the Appellant also serves a Designation of Matter to be Included in the Record on Appeal. In this designation of matter to be included, the Appellant specifies the exact portions of the case which the Appellant wishes to include. The Appellant must also certify that the designation contains no matter which is irrelevant. This initial brief comes very early under the new rules. The Appellant is required to serve one (1) copy of this initial brief within thirty (30) days after receiving the transcript from the court reporter. One (1) copy of the brief is served on all parties and one (1) copy of the brief is filed with the Clerk of the Supreme Court. Note that this is only one (1) copy. This is the same point in time in which the Designation of Matter to be Included is served. Since there is no official record on appeal at this point in time, the first filing of the one copy makes page references to original pleadings and testimony.

The Respondent serves its brief within the following thirty (30) day period and likewise serves one (1) copy on opposing counsel and files one (1) copy with the Court. The Respondent at this time designates matters which the Respondent wishes to be included in the appeal and likewise makes page references to original portions of the pleadings, testimony and other matters in the record below.

After the last brief of the last party has been served, the Appellant then has thirty (30) days in which to physically put together the Record on Appeal. Three (3) copies are served on each party and twenty-five (25) copies are filed with the Court. Rule 209 provides for particular contents of the Record on Appeal and a particular order for any materials that are included in the Record on Appeal. The Appellant has a new certification which must be made at this point that the Record on Appeal contains all material

(Continued on page 10)

Appellate Court
(Continued from page 9)

proposed to be included by any of the parties and not any other material.

Now that the Court and opposing counsel have been provided with one copy of the original versions of the brief, and now that the Appellant has filed twenty-five (25) copies of the official Record on Appeal and served three (3) copies on opposing counsel, all parties have twenty (20) days after the service of the Record on Appeal to serve three (3) copies of the brief on every other party and to file twenty-five (25) copies of the final brief with the Clerk of the Supreme Court. These final briefs are identical to the initial one copy brief, except that references in the initial brief are revised to indicate where the same material appears in the Record on Appeal. The only other changes which can be made are the correction of typographical and spelling errors.

These new changes will eliminate several steps in the process of appeal and will save some time. What these new procedures will also do is to collapse several of the major steps of the appeal into the same time frame. A word of warning may be in order for those on cramped schedules. Within thirty (30) days of receiving the transcript from the court reporter, you will need to have completed your brief and at the same time have decided exactly what you wish to designate to be included in the Record on Appeal. This is a lot to happen in a short period of time, particularly when compared to the existing rules.

Motions

Finally, the rules now contain provisions for motion practice. The old rules did not address the details of motion practice. Anyone familiar with the custom and practices which have developed under the old rules will recognize that the new rules essentially adopt the practice which the Court has been operating under. Motions to dismiss an appeal stay the time limits for protecting the appeal until a motion is decided.

All motions are in writing and should state the grounds within the motion itself. An original and six (6) copies of motions are filed with the Clerk of the Appellate Court and one (1) copy served on each party. Motions shall be accompanied by a memorandum with citations of authorities in support of the motion, and an opposing party has ten (10) days from the date of the service of the motion to file an original and six (6) copies of a return.

There are a number of other changes in the rules which are beyond the scope of this article. Petitions for Writs for Supersedeas and Petitions for Writs of Certiorari are not common to all appeals. There are some changes in these areas. It has been the intent in this article to highlight the principle changes that will affect virtually every appeal under the new rules.

New Appellate Court Rules will become effective September 1, 1990. The new Sections I and II describe a new and different system of procedural rules for handling appeals. The new Sections III, IV and V describe the administration of the Court. The new procedural rules are the ones of greatest interest to the practicing Bar. This article will attempt to point out some of the most significant changes which practitioners may wish to be alert to.

First, the new procedural rules do not apply in any appeal where a Notice of Intent to Appeal was served prior to the effective date of September 1, 1990. The rules do apply to cases in which the Notice of Intent to Appeal was served after September 1, 1990.

Notice of Appeal

The time for service of a Notice of Appeal has been lengthened to thirty (30) days from the current ten (10) day provision. The theory behind this lengthening is to give a longer cooling off period in which to consider and discuss with a client whether or not to undertake the appeal in the first instance. Most of the other provisions will bring about a shortening of the additional steps.

Cross-Appeals

There is a new provision for cross-appeals. Regardless of when the Appellant serves the Notice of Appeal a Respondent has an additional five (5) days after receipt of Appellant's Notice of Appeal in which to file a cross-appeal. This should eliminate the potential traps and gamesmanship when one party is satisfied with a result, but if faced with an appeal, would wish to also include issues on behalf of the Respondent. Under the new rules the Respondent can wait until the full expiration of the time for the Notice of Appeal to see whether or not the Appellant does in fact serve a Notice of Appeal. If the Appellant serves no Notice of Appeal then the potential Respondent has no worry. If the Appellant does serve a Notice of Appeal then the Respondent has a five (5) day safety valve in which to file a cross-notice and raise any issues which the Respondent might wish to raise.

Elimination of Exceptions

The steps which shorten time frames begin immediately after the Notice of Appeal. The time for ordering a transcript from the court reporter has been reduced from thirty (30) days to ten (10) days. The entire process of serving a Proposed Case and Exceptions by the Appellant, the service of Proposed Amendments by the Respondent, and the potential Motion to Settle the Record resulting in a remand to the trial court has been eliminated. The old version of the Statement being contained in the Transcript has been eliminated. The old version of Exceptions have been eliminated and many believe that the technical pitfalls of having to state Exceptions in a manner which complies with the rules is now gone.

It is clear that the steps of this process have been eliminated. The intent and spirit of the rules seems to be to relax the requirements of the old Statement and the old Exceptions. However, perhaps a word of caution is still in order. When the Appellant writes a Brief there is a requirement to include a "Statement of Issues on Appeal." The Statement of the Issues on Appeal are required to be "concise and direct as to each issue." As far as this goes, it sounds like a more relaxed and comfortable approach to presenting issues for review on appeal. However, there is a potential sanction for failing to state issues in a manner that is "concise and direct as to each issue." Immediately following the admonition to state the issues on appeal in this manner, Rule 207 provides that, "Broad general statements may be disregarded by the appellant court. Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal."

NEW REGULATIONS ARE ADOPTED FOR THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Effective September 1, 1990, the South Carolina Workers' Compensation Commission will begin operating under new Regulations. The Regulations appear in the June edition of the *State Register*. Copies of the Regulations may be obtained by writing: Legislative Council, Post Office Box 11489, Columbia, South Carolina 29211 and requesting a copy of document 1254. Lawyers Co-Operative Publishing Company currently publishes an unofficial copy of Title 42 and the Regulations. They will be publishing a supplement to Title 42 containing the new Regulations. Copies of the publication are available from Lawyers Co-Operative Publishing Company by writing: Post Office Box 23909, Rochester, New York 14692-9969 and enclosing a check in the amount of $29.50 plus 5% sales tax.

Personal Injury Malingering

By Paul R. Lees-Haley, Ph.D.

Attorneys have the dubious distinction of seeing people at their best and their worst. Someone once said that humankind comes closest to Godliness on an application to law school. The same wag might have added, "and closest to the devil during a personal injury suit."

Every seasoned attorney has observed the plaintiff who files a personal injury suit over an injury that doesn't seem real. Numerous anecdotal accounts and unexplained facts testify to dubiousness of some claims:

> the high rate of dropouts from health care treatment immediately following settlement; the high frequency of work-related muscle strains at 10 a.m. on Monday mornings during weekend softball season; the tendency of noncontagious, soft-tissue disability-causing diseases to occur in rashes in the same workplace or same family; the sudden surge in medical disabilities just before major layoffs, strikes, and plant closings.

The Nature of Malingering

Malingering is deception intended to create an impression of illness. It includes exaggeration of genuine problems and outright fabrication of nonexistent illness. Malingering is a particularly difficult problem when the injured party complains of unobservable illnesses, for example, stress disorders or chronic pain.

Defense attorneys in recent years have continued to have to cope with the traditional types of less tangible (and more fakable) injuries, such as back strain and muscle weakness, and now they are being confronted with a whole new array of psychological claims. These include post-traumatic stress syndromes, neuropsychological injury, psychic trauma, anxiety reactions, phobias, and depressive responses to injury.

There was a time when courts (especially in workers' comp cases) recognized only physical injuries, or at most psychological injuries which were a direct result of physical problems. If the doctor couldn't see it, the doctor said it was "all in your head," the implication being that it was nowhere at all, and the courts followed the doctor's lead. Now the doctor is more sophisticated, and recognizes the reality of pain once treated with skepticism. In parallel, the courts are recognizing more intangible injuries than ever before in history. Personal injury, including workers' compensation, is a multi-billion dollar "industry," and the fastest-growing segment includes intangible claims — stress disorders, chronic pain syndromes, emotional trauma, and psychological disability.

In the process of providing more humane treatment for real victims, we have opened the door for unethical claimants. Unfortunately, the individuals most likely to use deception to deal with their problems are also the best actors and the most adept liars to enter the doctor's office. They are the psychopaths — the con artists.

Learning How to Malinger

How do unethical plaintiffs know how to act and what to say? Some common sources of "training" are fellow employees, union colleagues, and family contacts. A surprising number of individuals have been through repeated evaluations for various medical complaints, and some have read literature on common injuries or discussed similar illnesses with health care professionals. Such "sophisticated" persons will deliberately coach malingerers to render credible imitations of pathological entities. It is common for a fairly accurate diagnostic description to appear in the popular press. Post-Traumatic Stress Disorder, for example, has been described in a widely distributed Sunday newspaper supplement and in a popular magazine for readers who enjoy digests of articles.

When a disputed claim has turned into a lawsuit, training occurs through the interaction between the plaintiff and attorneys, through the nature of questioning which occurs. Attorneys provide guidance by the frame of reference they use in questioning their clients. At a minimum, their questioning tends to define the issues and teach the employee the range of subjects which are likely to occur in the case. In addition, an attorney's verbal and nonverbal reactions to an injured employee's statements are important cues to the person who is willing to tell the attorney what he wants to hear. Psychopaths are astute students of human behavior, and during litigation they are highly motivated to study their attorneys.

The Role of Physicians and Psychologists

When malingering is likely to be an issue in a case, the attorney should specifically request, as early as possible, that impartial physicians and psychologists take a detailed history of the employee's previous symptoms, including all those related to the particular injury. Wherever feasible, the issue of malingering should be brought up early in the contact between attorney and the health care provider who is evaluating the suspected malingerer. Without being specifically alerted to do so, health care professionals often will fail to identify malingering. Most health care professional training is based on a helping orientation which emphasizes supportive, empathic, and healing forms of rapport building, rather than attempts to penetrate deception. In fact, the major schools of therapy in most health care professions encourage acceptance of the patient's point of view, even when it appears patently untrue, for treatment purposes. An important but often-overlooked aspect of a doctor's treatment history is previous exposure to the type of illness which the individual is attempting to simulate. For example, a surprisingly large number of malingerers will freely admit a pattern of recent, identical, and profitable complaints among their relatives.

The attorney should begin documentation as soon as possible. Comments of witnesses, behaviors and statements witnessed by coworkers, remarks by the doctor, and direct observations of activities should be noted and dated. A wide variety of activities provide evidence of the real level of disability. Hobbies, recreation, leisure activities, work tasks, and social gatherings all may contribute to confirming the reality of a disability or exposing the malingerer.

How to Detect Malingering

Counsel may wish to retain an investigator to observe behavior in the hospital, in public settings, and around the home, to determine if behavior during unguarded moments is consistent with the alleged illness. The same malingerer who claims to be unable to work may play elaborate games, take lengthy vacations while on leave, or cultivate a large garden. One woman moonlighted as a go-go dancer while alleging permanent disability from a back injury. Company investigators covertly filmed her performance in a local nightclub, and the company attorney presented the films to the judge when she

(Continued on page 12)

(Continued from page 11)

appeared in court on a stretcher. A young man who filed a workers' comp lawsuit against a city hospital was observed lifting weights in a gym while out of the city. Another claimant confessed to a co-worker that he was faking disability to pay his way through college, only to learn that the co-worker was a private detective. Such cases settle swiftly.

One major cue to malingering is the potential for gain or loss as a consequence of having problems. This applies to both physical, observable medical problems and intangible complaints such as chronic pain or psychological problems. In the latter case, as Shakespeare put it in *Hamlet:* "Though this be madness, yet there is method in it." If the situation is such that the individual has a clear incentive to present himself as ill, then the likelihood of malingering either in the sense of exaggeration or outright fabrication of illness is heightened. In companies with forthcoming layoffs, the temptation is great to go on medical disability before the layoff date, and in companies under intense pressure, because of a bitter strike or a stressful deadline, disability offers an escape route.

There are no completely foolproof methods for detecting malingerers. The professional who claims that he cannot be fooled has been fooled already.

A detailed transcription of the symptom report of the malingerer adds up to a self-serving rather than a self-incriminating bottom line. Persons truly suffering under their physical symptoms may exaggerate their problems in an effort to make a "cry for help," but they don't "ham it up" on cue and recover when the doctor and the boss aren't looking. By the same token, fakers of emotional illnesses manage to minimize the hassle to themselves while advertising their troubles. Genuinely mentally disturbed persons, on the other hand, commonly exhibit behavior and motives which are counter-productive, illogical, and irrational. To the observer, they are not "crazy like a fox," they are simply "crazy."

Tests and Interviews

There are many techniques for identifying the malingerer. These techniques fall into two general classes — formal testing by a psychologist and evaluation interviews by the health care specialist who typically treats the particular injury.

The psychological tests most familiar to attorneys are the Minnesota Multiphasic Personality Inventory (MMPI), the Rorschach (inkblot) Test, the Wechsler Adult Intelligence Scale (WAIS), and the polygraph (lie detector).

The MMPI is an objective personality test, in which patients read and respond to 566 true-false statements on a first impression basis. The MMPI has validity scales that help assess the extent to which the examinee is being straightforward or attempting to simulate the problems. It is generally considered to be the most effective psychological test for detecting malingering.

The Rorschach is more vulnerable to deliberate deceit than the MMPI. An untrained amateur can fake a psychological condition during his description of the inkblot.

In cases involving impairment of intellectual functioning, such as brain injury, WAIS is the industry standard. An intelligence test with carefully-developed norms, WAIS is one way one can detect fake brain damage or retardation.

Newer neuropsychological tests appear to be more vulnerable to faking. The capability of a polygraph to detect malingering is controversial; it appears highly doubtful at this time whether the lie detector can in fact detect malingering. This author's newly developed malingering detection instrument is providing highly promising results. Tests which combine apparent and misleading questions are useful in exposing faking.

Interview techniques used by health-care providers are the second general category of methods for detecting malingering. Some of these techniques require no special training, while others required specialized diagnostic expertise.

Any experienced interviewer can make use of some of these techniques for uncovering malingerers. For example, simply lengthening the interview creates more opportunities for the deceiver to produce contradictions, make mistakes, lose track of his role, or become tired and more transparent in his deception. Fast-paced interviewing which does not provide opportunities to think through answers will cause many deceivers to expose themselves.

Other interview techniques for detecting the malingerer requires specialized training. Knowing how individuals with particular injuries usually behave, what they typically say, and how they differ from malingerers permits the clinical observer to assess the credibility of the interviewee.

When questioning the patient about alleged symptoms, the doctor may ask if the individual has experienced symptoms from a wide variety of types of illness, often contradictory types that are quite different than the alleged problem. Many malingerers claim a long, chaotic list of problems, and include exotic or rare problems or improbable combinations of symptoms. The pattern of a malingerer's self-reported symptoms tends to be idiosyncratic rather than classical. They include the symptoms they have heard of, or which seem plausible to them, not symptoms characteristic of a diagnostic category. Their symptoms frequently appear full blown on short notice instead of growing over a period of time in association with plausible stressors.

The Behavior of Malingerers

Malingerers describe their symptoms in a different manner than do genuinely ill individuals. For example, they may claim serious symptoms but display a curious lack of information about them, or describe them in unusual ways. Malingerers may be unaware that genuinely impaired persons often fear and resist facing their problems, and that they use common methods to deny or minimize their troubles.

Malingerers tend to exaggerate their symptoms. In lay language, they are sicker than sick people and crazier than neurotic people. They act like they think a sick person should, and may omit lapses into relatively normal functioning. Yet they also retain functioning which contradicts their claims of illness. One slow-witted workers' comp claimant was asked to show the doctor how his hand worked before the paralysis started, and cooperatively did so.

Malingerers tend to be obtrusive with their symptoms, somewhat like children seeking attention. Many trule ill individuals, such as those with brain injuries, find their problems so painful that they avoid exposing their symptoms without coaxing. They often evade or deny problems which malingerers acknowledge with a willingness bordering on alacrity.

The language used by malingerers often expresses a different orientation than that of the genuinely ill. For example, malingerers may speak of themselves with a third person self-reference, providing self-diagnostic information in terms thay have heard or read. One should take a dim view of the employee who announces that he was "suddenly afflicted with a post-traumatic stress disorder" which kept him from coming to work. Even when they report fairly convincing symptoms at a verbal level, malingerers overlook the subtleties of emotional expression which appear in persons with tragic losses. The malingerer's mind is on how to convince you. The genuinely disabled person's attention is on grieving the loss, denying it, and looking for a way out.

(Continued on page 13)

(Continued from page 12)

Malingerers, especially sociopaths, may maintain a neatly consistent, logical story of their illness. They may enact their role with a good memory for what has been said earlier. The problem with their performance is in neglecting to realize that complete alertness and perfect consistency are hardly typical of a person dazed with pain, mentally fogged by medication, or still psychologically in shock from a traumatic loss of physical or mental ability to function.

For these fashionable fakers who pretend work-related psychological impairments there are a number of keys to detection. Malingerers tend to report their delusional systems in an academically correct manner but they don't live their delusions. A genuine neurotic acts like he believes his illusions, even to the point of self-destructive or expensive errors. The fire of a malingerer's madness rarely overheats his pocketbook.

These examples illustrate the range of resources available when faced with potential malingerers. Although no perfect "standard of truth" exists, careful documentation, timely professional evaluations, and occasional use of private investigators or observations by co-workers have excellent potential for discovering data sufficient to support a valid position concerning an alleged injured party suspected of malingering. The opinion of a credible expert, reports of carefully documented observations, and understandable, convincing anecdotal examples of the plaintiff's actions can make the difference in a case involving a malingerer.

Conclusion

This brief article should assist the defense attorney who deals with claims of intangible, as well as tangible injury, in all sorts of settings. Workers' compensation attorneys should be especially alert for indications of malingering. Back injuries, for example, are commonly exaggerated or are nonexistent. When the attorney has any degree of suspicion that the worker is not really injured, or at least not as severely as he claims, then the attorney should consider the possibility of malingering.

The article has defined the major approaches used to detect malingerers, and illustrated some of the differences between a malingerer and a genuinely ill individual. With the steady growth of awards for intangible injuries, and consequent increase in exposure to malingering, it behooves attorneys and courts to be aware of this important aspect of human behavior.

U.S. Supreme Court Agrees To Hear Punitive Damages Constitutional Challenge

The United States Supreme Court has today granted certiorari in *Pacific Mutual Life Insurance Company* v. *Haslip, et. al.* (89-1279), a case challenging the constitutionality of a punitive damages award under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution.

"Sooner than most people expected, the Supreme Court has decided to confront the massive unfairness in punitive damages today," said Professor Victor Schwartz, a nationally-recognized tort reform expert. "Where the issues have been properly raised at long last we can hope that reasonable rules will be developed for the punitive damages system. The benefits will flow to the American public."

In its June 1989 opinion in *Browning-Ferris Industries, Inc.* v. *Kelco Disposal, Inc.* [109 S.Ct. 2909 (1989)], the Court determined that a punitive damages award more than 117 times the compensatory award did not violate the excessive fines clause of the 8th Amendment, but that an inquiry into possible due process (14th Amendment) limits awaits "another day."

The *Pacific Mutual* v. *Haslip* case asks the Court to examine the following:

1. Whether Alabama Law, as applied, violates Due Process by allowing the jury to award punitive damages as a matter of "moral discretion," without adequate standards as to the amount necessary to punish and deter and without a necessary relationship to the amount of actual harm caused.

2. Whether Alabama law violated Pacific Mutual's right to Due Process under the Fourteenth Amendment by allowing punitive damages to be awarded against it under a **respondeat superior** theory.

3. Whether the amount of punitive damages in this case was excessive, in violation of Pacific Mutual's Due Process right to be free of grossly excessive, disproportionate damage awards.

4. Whether the suit, although nominally civil, must be considered criminal in nature as to the punitive damages awarded therein, entitling Pacific Mutual to protection under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

5. Whether Alabama law discriminates against those defendants subjected to open-ended punitive damages by limiting the amount of such damages which may be awarded against other classes of defendants, without rational basis.

6. Whether the constitutional defects in the award of punitive damages against Pacific Mutual were cured by judicial review and the potential for a remittur.

THE NAMES

Judge ARTHUR GRAY POWELL, in Boswell v. Johnson, 5 Ga. App. 251, 62 S.E. 1003.

Facts: Boswell signed a note for two mules without reading it, though he could read and write, and set up as a defense his inexperience in purchasing mules, his reliance upon false representations by the seller, and the failure of consideration. Judgment for plaintiff affirmed.

Opinion: This is not, as the title of the case might suggest, an action by Dr. Johnson against his friend Boswell, for any failure of the latter to include all the sayings and doings, witticisms (good, bad, and indifferent, real or imaginary), and divers eccentricities of the former, in the famous biography, nor yet an action by the faithful Boswell against the learned doctor for services in his behalf, but is a prosaic affair between horse-dealer Johnson and mechanic Boswell as to the purchase-price of two mules.

Opinions and stories of and from the Georgia Courts and Bar — Collected and arranged by Berto Rogers, Member of the Georgia and New York Bar

Talking to The Other Side's Employees and Ex-Employees

By George B. Wyeth

"I call as my next witness . . ." A dramatic pause. A smile creeps to the lips of the plaintiff's lawyer. To the delight of the audience, and the dismay of opposing counsel, he slowly says the name of a former employee of the defendant hospital — who is sure to have evidence devastating to the defense.

So ends the 1983 movie *The Verdict.* The plaintiff's attorney, played by Paul Newman, produces the suprise witness. From an *ex parte* interview, he knows she will say she altered a key document to conceal the cause of a patient's death. Her superior ordered her to do it. The jig is up. The defendant is liable. Case closed.

Not quite. In a sequel Hollywood will never make, there is a new case and a new defendant. Paul Newman is now fighting for his professional career, defending himself against charges of a gross violation of the Rules of Professional Responsibility. His crime? Contacting and interviewing the hospital's former employee without its knowledge and permission.

No way, you say. Everyone knows ex-employees are fair game. Think again. Although it may surprise even a seasoned litigator, Newman's *ex parte* interview may have been improper. At best, the ethical constraints on such contacts are unclear, and the courts have not been consistent in interpreting the rules. Newman's professional standing, as a lawyer at least, remains very much in doubt.

Even litigators whose daily lives are not grist for the movie mill routinely face decisions about whether and when to talk to the ex-employees of their adversary. They must also worry about their own client's ex-employees being contacted by the other side. Ethical concerns seldom intrude upon these calculations. The conventional wisdom is that although one's own employees, and those of an adversary, may be protected, it is open season on the ex-employees of either side.

This view is wrong on all counts. As the courts are now applying the ethical rules, an *ex parte* interview of a current employee of an adversary may *not* be improper. An interview of an ex-employee, however, may well be.

Just how difficult the problem can be emerges from a hypothetical, but probably familiar, situation.

Suppose you represent a retailer of computer systems for business applications called Data Systems Networks (DSN). Among the products DSN sells are the computers of a major manufacturer, Systron. DSN's distributorship agreement specifies the lines and models that it will sell for Systron; provides that Systron will service all equipment sold by DSN; and states that both Systron and DSN will use "best efforts" to promote the Systron models. DSN specifically negotiated these provisions because it knew the importance of service to computer users, and because it did not want to fall prey to Systron's marketing whims after it built its sales program around certain equipment.

One day you receive a disturbing call from the president of DSN. Systron, he says, was taken over by another company a few months ago; major changes are occurring. Systron is shifting its marketing and downplaying lines that DSN sells. It also appears that Systron's service on the older machines in those lines is declining dramatically.

Your client also reports that, as a result of the takeover, many of Systron's current employees are unhappy. He thinks they might be willing to talk to you, at least on a "deep background" basis. There has also been a major reduction in force, so that former Systron employees from management down to service technicians are out on the street (and, presumably, not well disposed toward the current Systron management). Your client suggests that these folks might have the "inside dirt" on Systron.

If you follow the usual practice, you will likely tell DSN's president that you cannot interview Systron's existing employees even on a "deep background" basis. That produces a torrent of irritation: He says something about his company being on the line — if you can't do what is necessary to save him, he will find someone who will. You appease him with assurances that you will immediately place calls to four or five of Systron's former employees. Your theory is that they, at least, cannot be the source of any problem. You also promise to draft notices for depositions of ten current Systron employees, from executives down to the subjanitor, to be served along with your summons, complaint, and motion for preliminary injunction.

As you are making your plans, your client calls again, and says that sitting in his office at that very moment is the former executive vice president of Systron. He has just been fired. His overriding desire now is to unburden himself of the guilt he feels about Systron having treated its former customers so badly. Unfortunately, he is planning to leave tomorrow for South America. He vows he will never again return to the United States because of his terrible experience with Systron. Can you meet him for breakfast just before his flight leaves?

Finally, as you ponder the issue, your client reminds you that DSN recently fired *its* marketing director for protesting DSN's decision to curtail marketing of Systron products. Your client is concerned about contacts by Systron with this ex-employee, who knows every detail of DSN's business. Surely, he says, you will not allow Systron's attorneys to contact that traitor. By this time, you are probably wondering how many disgruntled DSN employees may be willing or even eager to talk with Systron and its attorneys about DSN's overbearing president, who is, unfortunately, one of your most lucrative clients.

Perhaps you now suspect you need help. There are too many categories of witnesses to keep it all straight. Systron's employees and ex-employees. Its South-America-bound former executive VP. DSN's all-knowing marketing director. DSN's own employees. How do you sort through them all? Where do you begin?

Start with the rules. The key guidepost is Rule 4.2 of the Rules of Professional Conduct, as adopted by your state from the ABA's Model Rules. That rule provides:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be

(Continued on page 15)

> represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

This rule is straightforward enough in cases involving individual clients. Simply put, you may not contact the adverse party. It is much less help in a case like yours, where corporations are involved. The Official Comment to Rule 4.2 sheds some light:

> In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.

This Comment just creates more questions. Which employees fall within the broad categories described in the Comment? Does the listing of these categories implicitly allow contacts with all other persons, even if they are current Systron employees? What about Systron's (or DSN's) ex-employees who originally fell within the proscribed group? Is there any other limit on approaching former employees out on the street? What about tomorrow's breakfast with Systron's former executive VP?

Because the rule and Comment refer most clearly to current employees, start your review with them. A few things seem easy. First, the rule is unequivocal that you may not talk to anyone currently employed by an adverse party at the managerial level. This is aparently true even if the employee is unfriendly to upper management. It is true whether or not the employee is willing to talk on "deep background." And it is still true whether or not a lawsuit is pending: The rule refers only to "matters." Scratch from your list of potential interviewees any Systron employee who fits this description; put him in the deposition-witness column.

But how far from true executive power may someone be and still "have a managerial responsibility"? Some courts have taken a broad approach to the rule. In *Mills Land and Water Co. v. Golden West Refining Co.,* 23 Cal. Rptr. 461 (Cal. App. 1986), for example, an intracorporate fight resulted in the ouster of the company president. His actions were repudiated by the company in subsequent litigation with an outside party, and he was treated as a hostile witness by the company's lawyer in depositions.

These facts did not impress the court, however, when it came out that the ex-president had discussed the dispute informally with the opposing counsel. The court ruled the contact improper, principally because the ex-president was still a director at the time of the conversation. Although it was a difficult case, the court decided to adopt a bright-line rule prohibiting such contacts, even though the current director was no longer an executive in the business, was not privy to any privileged conversations with the company's lawyers, and was thoroughly estranged from his ex-employer.

Mills Land may, however, involve a different proscription. The ex-president's statement could "constitute an admission" of the adverse party. If this means an admission under the Rules of Evidence, that branch of Rule 4.2 would extend the "off-limits" group of existing employees well beyond executive or even managerial ranks and deep into your opponent's organization. Under the Federal Rules, for example, evidentiary admissions may be made by *anyone* in the company, as long as the statement relates to a matter within the scope of his employment. Together, the "manager" and "admission" elements of Rule 4.2 seem to limit severely the number of employees who may be approached.

To confuse things further the rule adds another limit to the restrictions just mentioned: An attorney may not contact anyone "whose act or omission . . . may be imputed to the organization for purposes of civil or criminal liability." This language is probably the foggiest of all. In the DSN/Systron case, for example, does it include only the top-level Systron managers who decided not to honor the contract (who are already off-limits under other portions of the rule) or also the lower-level employees whose failure to perform the required services is the actual source of liability? The rule, Comment, and case law are, at best, uncertain.

Don't Avoid All Current Employees

It might be tempting at this point to throw up your hands and rule out *any* contact with Systron's current employees. Even your client's anger is better than the headache you get parsing Rule 4.2.

Resist the temptation. However uncertain the language of the rule, you still can identify some existing Systron employees who do not fall within its proscriptions. In particular, a low-level employee who was not herself a wrongdoer and whose statements would not be an admission (because the matter discussed is not within the scope of her employment) remains fair game.

The classic example of this is the worker who observes an accident on the job. That worker is simply a third-party witness, just like the bystander to an accident on the street. The same is true of a worker who can testify in a civil rights case about discriminatory or harassing practices in his department. Or the Systron employee who has seen an edict from Systron's president directing its marketing organization to shift its emphasis away from the DSN lines. As long as a *current* employee is not one of those at fault, and not a managerial employee, interviewing her appears proper under the rules.

The courts agree. In one well-known case, the attorney for the plaintiff in a malpractice action (possibly after seeing *The Verdict*) tried to interview nurses who had helped care for the patient. The hospital asked for a protective order. The Washington Supreme Court refused the order, saying that the only employees who were off-limits were those who could "speak for" the hospital — apparently meaning those whose statements would be admissions under the Rules of Evidence. See *Wright v. Group Health Hospital,* 691 P.2d 564, 103 Wash. 2d 192 (1984).

Other courts have been only slightly less generous in allowing *ex parte* discovery behind enemy lines. In *Frey v. Department of Health and Human Services,* 106 F.R.D. 32 (E.D.N.Y. 1985), the court allowed the plaintiff in a discrimination case to interview any employees at certain levels of the organization. The court in *Chancellor v. Boeing Co.,* 678 F. Supp. 250 (D. Kan. 1988) identified certain managerial employees and other potentially involved personnel who, it said, were off-limits, but specifically permitted contacts with any other employees. By contrast, no court has held it improper to contact any and all employees of an opposing party [illegible]e *Nieseg v. Team I* N.Y.L.J. [illegible] 1989 at 21, Col. 3 (N.Y. [illegible]., 2d Dept.).

The courts allow [illegible] *ex parte* contacts partly to avoid the expense of using formal discovery to locate and debrief employees who might know about an incident. Even more important (although the courts do not

(Continued on page 16)

(Continued from page 15)

put it this way) is the practical fact that an employee-witness will be far more forthcoming in an informal interview than in a formal deposition in the presence of the company's lawyer, and possibly company management. In many cases, cutting off informal access to the client's fellow workers may be a roadblock to critical evidence.

Armed with the case law, you begin making your list of existing Systron employees to interview. But how will you determine who they are? Perhaps Systron's former executive VP can be helpful in identifying appropriate candidates (assuming for the moment it is safe to interview him). Just how difficult the matter remains, however, can be seen by shifting the example for a moment. Suppose your client's claim is for sexual harassment; she is continually the butt of sexist jokes in her department. Talking to her supervisor, no matter how low he or she is in the company, may be forbidden because the supervisor's failure to stop the harassment may be a key element of the company's liability.

In addition, although Rule 4.2 permits you to talk to a fellow worker as a witness to, rather than a participant in, the misconduct, you may find during the course of the interview that he participated in the harassment. He is therefore off-limits as one whose conduct contributed to the liability. Unfortunately, you may discover this only after an hour of conversation in which you have obtained a statement highly damaging to company management. Your ability to use the statement is doubtful, and you may be subject to a motion to disqualify or worse.

Participant or Witness?

The distinction between "participants" and "witnesses" is particularly fuzzy in contract cases. Is the employee who negotiated the Systron-DSN contract a "participant" if he had to responsibility for carrying it out? What if he carried it out at one time but was uninvolved at the time Systron shifted its marketing focus? What if, as in most cases, there is a dispute over the interpretation of the contract? If performance of the contract involves low-level Systron personnel, are they merely witnesses to the directions from their supervisors, or participants in the breach?

And finally what of the "whistle-blower" — a current or former employee who contacts the adverse attorney on his own initiative? Can he be interviewed, even if he was personally involved in the disputed events? None of the cases has addressed this issue.

There is one other potential trap. Systron's lawyer, smelling trouble with DSN, may have already interviewed Systron employees, including those who were mere bystanders. Even if an employee is not a manager, such interviews are privileged under *Upjohn v. United States,* 449 U.S. 383 (1981). The facts the witness knows do not become secret because he talked to a lawyer, however; it is only what he said to the lawyer and the lawyer said to him that are privileged.

Systron's lawyer may have disclosed some of his own thinking about the case in interviews. Perhaps to get the facts, the lawyer gave employees a summary of the company's view of the case. At the very least, the nature of the questions the lawyer asked will indicate his perception of the major issues. You cannot get at such privileged information.

Again, you may be tempted to forgo interviews of Systron's employees in the face of all these complications. Given the potential value of the "deep background" interview, any such inclination seems too conservative. It pays, though, to think carefully about your case. The type of claim involved will make a difference — it may be easier in some cases than others to tell witnesses and participants apart.

You can start interviews with threshold questions that will help separate witnesses who are off-limits from those who are not. These questions will not eliminate all danger, but they will provide you with a record of your intent to comply with the rules, and a defense against any subsequent challenge to your conduct.

Another reason not to abandon your thoughts about interviews with existing employees is that Systron's attorney may not be so squeamish. At the very least, you need to consider which of DSN's employees are vulnerable and what you can do to resist *ex parte* forays into your own camp.

Where you are particularly concerned about some of DSN's own employees, and have learned that interviewing has begun, the best response is probably to seek a protective order. Some courts have questioned their authority to issue such an order, as there is no "discovery" going on in any of the ways described in the Rules of Civil Procedure. But all have ultimately concluded that they have the power to control the parties' actions in a litigation. A protective order will designate, by category and possibly by name, who may be contacted and who may not. This has the advantage of keeping some witnesses off-limits to the other attorney; the disadvantage is that it gives a green light for others.

Short of going to court, you may be able to negotiate ground rules with the other side. In cases where both sides are exposed, both may agree not to interview the other side's employees. To get your agreement that some employees may be contacted, the opposing attorney might be willing to limit the categories of employees he will talk to, or give you advance notice of which employees he will contact.

You can also use this occasion to remind the other attorney of his obligations in conducting interviews with your employees. As in the case of other third-party witnesses, Rule 4.3 requires an interviewing lawyer to disclose clearly whether his client's interests are adverse to those of the witness. He must not state or iimply that he is disinterested. You are entitled to have your employees fairly apprised of the implications of anything they say.

Another preventive measure is to ask your client's employees not to talk to the opposing attorney. Ordinarily, it would be improper to ask a witness not to talk to the other side, but Rule 3.4 specifically allows such requests when the witness is an employee of the client *and* you reasonably believe that the witness's interests will not be adversely affected. But, again, beware. The second part of Rule 3.4 may require some thought. In a discrimination case, for example, other minority employees may benefit from the plaintiff's success in pursuing his action.

Former Employees

Once you have charted your way through these crosscurrents, and determined which of Systron's employees you may and may not interview, the task of deciding how to handle *former* Systron employees may come as some relief. In general, contacts with ex-employees are less sensitive than those with current employees because the statements of ex-employees are not admissions in the evidentiary sense. Still, you cannot assume that it is always proper to interview an ex-employee without advising the opposing attorney. The two main areas of concern are: (1) contacts with former employees who were privy to privileged communications with the company's lawyers about the case and (2) contacts with those former

(Continued on page 17)

(Continued from page 16)

employees whose conduct gives rise to the claim against the company.

The privilege issue can arise in several different settings. Most litigators have had the experience of relying heavily on an employee for information while preparing a complaint or answer, only to find when discovery starts that the employee is no longer to be found. It is especially distressing to learn that the key witness with whom you have shared your views of the case has been fired and now would be happier to help the other side than help you. It should come as a relief to learn that he is probably not free to divulge your comments to the opposing lawyer, particularly because the protection of work product is yours, not his, to assert or waive.

In addition, a conversation between a company attorney and an ex-employee may be privileged when the contact takes place at the direction or request of management and relates to matters within the scope of the ex-employee's employment. See *Amarin Plastics, Inc. v. Maryland Cup Corp.,* 116 F.R.D. 36,41 (D. Mass. 1987). This rule is part of the trend toward allowing attorneys to conduct investigations for corporate management without fear of disclosure — a result approved in *Upjohn v. United States,* 449 U.S. 383 (1981). Such conversations do not make the witness inaccessible, but they do confront an interviewing attorney with the problem of how to conduct an interview without breaching the privilege.

A case of an interview that may have gone too far involved a company's former president in *Amarin Plastics.* The court was not troubled by the high position of the interviewee; he had left the company before the dispute arose. But he had been consulted *after* his departure by the company's lawyers who, the court said, reasonably expected that he would keep their conversation confidential — particularly those parts relating to their theory of the case. The court hinted darkly that if the company could show that the opposing attorney had sought information about these conversations, unspecified sanctions "might well" be imposed.

The problem of access to privileged conversations also arose in *American Protective Insurance Co. v. MGM Grand Hotel—Las Vegas, Inc.,* Nos. 83-2674, 83-2728 (9th Cir. Dec. 3, 1984). (The opinion was later withdrawn because the court concluded it lacked jurisdiction, but it is frequently cited anyway.) There, an ex-employee had continued to consult about

> ***"A disgruntled ex-employee is precisely the witness most likely to shed light on internal corporate activities that otherwise would be difficult or impossible to uncover."***

the case with his former employer's lawyers, who gave him access to the corporation's trial strategy. The court found it improper for the opposing counsel to have contacted the witness directly rather than going through the company's attorney.

Privilege Questions

Avoiding trouble on the privilege issue is as simple as developing some initial questions. In your breakfast interview with Systron's former executive VP, ask him if he has had conversations with Systron's in-house or outside counsel about the company's legal position or conduct. Warn him to leave the substance of those conversations out of your discussions.

More troublesome is the prospective interviewee who, though no longer employed, had personal involvement in the actions that gave rise to the dispute. Even though neither Rule 4.2 nor its Comment says anything about ex-employees, the court in *Chancellor v. Boeing Co.,* 678 F. Supp. 250 (D. Kan. 1988) concluded that such ex-employees are off-limits. The *Amarin Plastics* case reached the same conclusion, permitting informal contacts with the opposing party's ex-president only because he had left the company *before* the contract dispute that was the basis of the litigation. And in *Porter v. Arco Metals Co.,* 642 F. Supp. 1116 (D. Mont. 1986), the court allowed interviews of ex-employees but prohibited contacts with anyone who had managerial responsibility for the matter in question.

This view is not unanimous. In *Wright v. Group Health Hospital,* the plaintiff's attorney was permitted to interview freely *any* ex-employees of the defendant hospital. But *Wright* was decided under the earlier disciplinary rules, and expressly took positions contrary to those in the present Official comment.

The logic behind the more recent cases is something of a puzzle. The practice of limiting contacts with ex-employees seems to be based on the notion that a company has a proprietary interest in controlling the testimony of those whose own acts gave rise to the claim of liability. Why this should be so is not obvious.

The Value of Unhappiness

A disgruntled Systron ex-employee is precisely the witness most likely to shed light on internal corporate activities that otherwise would be difficult or impossible to uncover. As every litigator knows, there is a big difference between probing for details in a deposition with opposing counsel nipping at your heels and having a private conversation in your office.

It is understandable that Systron's attorney will feel uncomfortable about your contacting an ex-employee whose actions are in dispute. This is especially true if the ex-employee has an ax to grind against the company; he has nothing to lose if the company is found liable for his actions. As the court said in *Wright v. Group Health Hospital,* however, "It is not the purpose of the rule to protect a corporate party from the revelation of prejudicial facts."

More to the point may be the basic rationale of the rule: protecting witnesses from being exploited by opposing lawyers. A former employee who is still friendly to the corporation but knows little or nothing about the case could unwittingly be induced to make statements without understanding their legal implications. There is some potential for abuse.

Not much, however. Most ex-employees who are still friendly to their employer are unlikely to talk freely with an opposing attorney. They will probably call the company first. Conversely, where the ex-employee is already hostile to the company, there is little risk that he will be taken advantage of. This is especially true if, as Model Rule 4.3 requires, the opposing attorney fully discloses his client's interests in the matter and how those interests could conflict with the ex-employee's. And the company is entitled to ask its departing employees to contact the company if they are called by the opposing lawyer. With these safeguards, a flat rule prohibiting *ex parte*

(Continued on page 18)

Talking To

(Continued from page 17)

contacts with former participants seems excessive.

Still another concern is that hostile ex-employees may not always tell the whole truth when revealing supposed "inside" information. In other contexts, however, the courts have addressed such concerns by relying on skillful cross-examination to point out biases or weaknesses in a witness's testimony — not by making the witness unavailable. This approach seems particularly sensible where a sweeping application of the ethical rules might deter a whistle-blower who has an important story to tell.

Determining which ex-employees are off-limits as a result of their participation in the challenged conduct can be even more difficult than making the same judgment for current employees. Because ex-employees are usually available earlier — as in the case of Systron's former executive VP — the legal theories in the case may be tentative; they may change as information is gathered. It may be impossible to determine at the outset whether you are talking to someone whose actions could have created liability. The witness may not realize that she contributed to the alleged wrongdoing; it may not become apparent to you until she has told the entire story. This makes interviewing ex-employees risky unless a clear line can be drawn between those involved in the incident and those who are mere witnesses.

If you are worried about DSN's — your client's — former employees, take some preemptive steps. Contact all ex-employees who may be witnesses before the other attorney does. Though the rule allowing you to ask current employees not to talk to the other lawyer may not apply here, you can certainly (a) advise ex-employees that they have no legal obligation to talk to the other side without a subpoena, and (b) ask that they let you know before they talk about the case with the other side, or that they let you participate in the interview.

You can also use this opportunity to do some evidence-gathering, privileged under *Upjohn*. You may then legitimately raise concerns about disclosure of privileged information as a ground for opposing future *ex parte* contacts.

As you ponder these issues in making up your list of Systron employees and ex-employees to interview, you must also consider the consequences of making a mistake. One risk is creating an impression that you are an under-handed sneak who does not play by the rules. If the issue is taken to court and the judge thinks that you have intentionally tried to evade appropriate discovery procedures, she is not likely to help you later when formal discovery disputes arise. On the other hand, if you can convince the judge that you made a good faith error, she may feel somewhat responsible for making you go through the burden of formal discovery; you may have good ground for arguing that your opponent is abusing the Rules of Professional Conduct if he hinders subsequent formal discovery.

Hostile ex-employees may not always tell the whole truth when revealing supposed "inside" information. Determining which ex-employees are off-limits can be more difficult than making the same judgment for current employees.

A more serious risk is disqualification, the sanction imposed in the *Mills Land* case. True, the *Mills Land* disqualification applied only to the individual attorney who talked to the ex-employee, not his entire firm, but only because the facts were favorable to the attorney and no prejudice had been shown.

One way to avoid disqualification is to seek an order in advance permitting you to interview certain classes of current or former employees. In general, judges would rather hear a motion for such an order (or for a protective order) than an motion to disqualify. The court in *Mills Land* urged attorneys not to make unilateral decisions about the propriety of any *ex parte* contacts, and to submit the issue to the court before proceeding further. This would apply not only where privileged communications are involved, but wherever one learns that an interviewee may be in a group with who it is improper to confer directly.

The result is that, at least in California (and possibly elsewhere), a lawyer who wants to interview the other party's current or former personnel may have to go to court for advance approval. This means disclosing who you want to talk to. Because Rule 3.4 allows the employer to "request" that its employees not talk to the opposing attorney, disclosing names of prospective witnesses may doom the entire effort. In some cases, however, a party seeking access has obtained an order specifically stating that certain groups of employees and ex-employees may be contacted; this may nullify the effect of the company's request that its personnel not cooperate. See *Amarin Plastics v. Maryland Cup Corp.* and *Wright v. Group Health Hospital.* A court order thus may thwart an evidentiary ambush, and it will give you peace of mind.

Mr. Wyeth, who is now with the General Counsel's office of the United States Environmental Protection Agency, did much of the work on this article while he was with the Minneapolis law firm of Leonard, Street and Deinard.

Article by George B. Wyeth, "Talking to the Other Side's Employees and Ex-Employees" as it appeared in Volume 15 Number 4, Summer 1989 issue of "Litigation."

Recent Decisions

(Continued from page 8)

private individual, and was used on church business, namely to transport its members to church services and church-sponsored functions.

The Plaintiff cited the case of *Pennsylvania National Mutual Casualty Insurance v. Parker, supra,* for the proposition that the business use exclusion contravenes the legislative expression of public policy of South Carolina as revealed in the Motor Vehicle Financial Responsibility Act and Automobile Reparation Reform Act. However, a close reading of that decision clearly indicates that it dealt only with the business use exclusions as applied to *owned* vehicles as opposed to non-owned vehicles.

Submitted by:
Gordon D. Schreck, Esquire
Buist, Moore, Smythe & McGee
Five Exchange Street
P.O. Box 999
Charleston, South Carolina 29402

DISCOVERY: WRITTEN STATEMENT OF DEFENDANT'S EMPLOYEE GIVEN TO INSURANCE ADJUSTER WAS DISCOVERABLE BECAUSE IT WAS IN THE ORDINARY COURSE OF BUSINESS

In *Albert Devine v. C.S.R.A. Foods Division, Inc.,* Civil Action No. 90-CP-06-42 (May 25, 1990), the Honorable Rodney A. Peeples held that a written statement by Defendant's employee given to an adjuster was discoverable because it was in the ordinary course of business and not in anticipation of litigation. The Defendant's employee offered an affidavit to the claim's supervisor stating that the insurance carrier first learned of an insurance workers' compensation and subrogation claim on February 1, 1989. It then went on to note that six days later the carrier hired an independent adjuster to investigate the claim. Further, the affidavit stated that on March 2, 1989 a written statement from the Defendant's employee, was obtained by the independent adjuster. Judge Peeples found that this affidavit was not indicative of the insurance company disputing the claim at the time the statement was made, thus it was in the ordinary course of business.

The Court noted "the probability that some particular litigation will occur must be substantial [and the commencement imminent] before a document may deem to be in anticipation of litigation." *Duplan Court vs. Deering Millikin, Inc.,* 61 FRD 127, _____ (D.C.S.C. 1973), citing *Thomas Organ Company vs. Jadranska Slobodna Plovidba,* 54 FRD 67 (N.D. Ill. 1972). Supporting its position that this was merely an investigation in the ordinary course of business of a claim, the South Carolina Court noted a Georgia case stating the following:

> [It is apprehensible] that every carrier, liability insurance company, and every business of significant size has a standard practice of investigating an accident in which it or its servants and agents may be involved while performing its functions. That is simply a matter of common prudence. To have the statements obtained or facts discovered in the course of these investigations behind the shield of "work product" would pervert the purpose of that doctrine, which is, simply stated, to protect the attorneys preparation for trial from discovery." *Atlantic Coastline Railroad Company vs. Daugherty* 111 Ga. App. 144, 141 SE 2d 112, 118, (1965).

Judge Peeples went on to say that even if the statement were taken in anticipation of litigation, the documents were discoverable anyway since the Plaintiff was in substantial need of the documents and could not obtain them or the substantial equivalent without undue hardship. The Defendant argued that there was no undue hardship since the Plaintiff could obtain the statement from the employee by other means, such as a deposition. Further, the Defendant pointed to the fact that the deposition of the employee had already been taken by the Plaintiff.

The Court dismissed such arguments stating that the deposition had occurred over one year after the statement was taken and due to the fact that the statement was given in a closer proximity to facts which gave rise to this law suit, it would be fresher and a more contemporaneous account of the events that had occurred. Moreover the Court stressed that there may also be inconsistencies in the statement which could be used for impeachment purposes by the Plaintiff.

SCDTAA ANNUAL MEETING
OCTOBER 25-28, 1990
MARINER'S INN
HILTON HEAD ISLAND
SOUTH CAROLINA

LIGHTER SIDE

Commatology

The afternoon's activities require rather greater study; and I claim to be the founder of the latest of the biological sciences, the science of Commatology. "Commatology" is the study of the life cycle of the committee.

Now I'm sure we all realize, by now, that a committee is not a structure but an organic growth. It is something that is planted and it grows up. It throws out branches, sub-committees, in all directions, and it flourishes; decays; and dies. And in dying scatters the seed from which other committees spring up. How does this happen?

Let me try to put this in rather more concrete form. The committee, when first seen under the microscope, consists of five members; you actually only want three, but you have two to allow for wastage. With five nominal members you feel tolerably certain of having a quorum of three on any occasion, as it first appears — and that is probably the ideal number.

But it's very difficult to keep a committee down to five. Some people feel they have been unjustly excluded, and having this feeling of unjust exclusion, they criticize. They "bellyache" if I may use the expression, about what the committee does or does not do.

Now, in Soviet Russia the answer to that will be simple. The critics would be liquidated.

In what we call the Anglo-Saxon world, we have another method. We bring them on to the committee. Which method is the more humane I don't know. But the result of this process is that you shut up the critics, but in doing so you enlarge the committee; and from its original number of five, it gradually rises, to seven; to nine; to eleven; to thirteen — until it finally reaches what is known, technically, as the coefficient of inefficiency, which lies, as you will all know, between 19 and 23.

Now, this inefficiency is reached because for some historical reason the table at which the committee meets is practically always a long table — not a round table. Round tables are only used for round table conferences. That is something entirely different.

A committee meets at a long table, and, of course, as the committee is enlarged, the table has to get longer. So, it gradually draws out. Any table would do very well but it would have to be straight; and you'd see it extending in either direction, and when the coefficient of inefficiency had been reached, different conversations would have developed at either end. No agreement is even remotely possible because people aren't even discussing the same subject.

And at that point the original five members — just this little group in the middle here-say to each other, "Well, next time we'll have lunch the day before and settle everything then."

And so you have the inner committee of the committee, back to the number five, but of course the pressure begins and that, too, is enlarged until you have the inner committee of the inner inner committee, and so on, in a majestic cycle of nature, from spring to winter, from dawn to dusk.

— Professor C. Northcote Parkinson in an address before the Executive's Club of Chicago.

SOUTH CAROLINA
DEFENSE TRIAL ATTORNEYS' ASSOCIATION
3008 MILLWOOD AVENUE, COLUMBIA, SC 29205

ADDRESS CORRECTION REQUESTED

Bulk Rate
U.S. Postage
PAID
Columbia, S.C.
29201
Permit No. 535

1990 JOINT MEETING
GROVE PARK INN
ASHEVILLE, NC
JULY 26-28, 1990