The Defense Line

S.C. Defense Trial Attorneys' Association

Fall 1990
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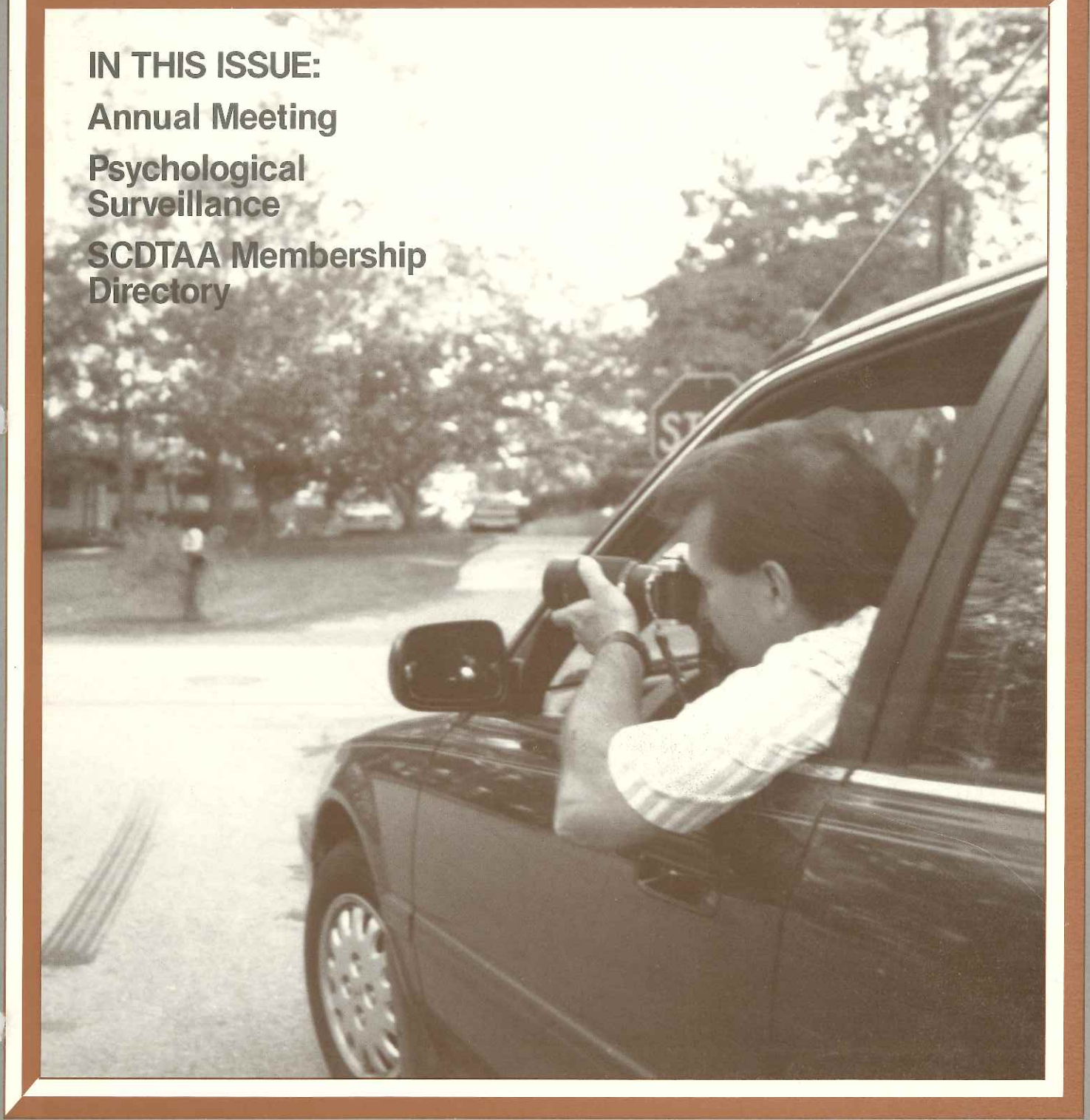


IN THIS ISSUE:

Annual Meeting

Psychological Surveillance

SCDTAA Membership Directory

VOLUME 18, NO. 4 FALL 1990

3 President's Page
4 Annual Meeting Program Report
5 Educational Session Schedule
6 Social Schedule
7 Psychological Surveillance
Insert — 1990-1991 SCDTAA Directory
11 Depositions Raise Numerous Procedural Issues
12 Recent Probate Code Amendments
13 New Appellate Court Rules (Reprint)
14 Amicus Committee

LOOKING BACK TEN YEARS AGO

The Thirteenth Annual Joint Meeting Defense Conference reported to be a great success even though it was held at the Great Smokeys Hilton in Asheville, NC, for the first and last time.

Two of our members, DEWEY OXNER of Greenville, and WILLIAM S. DAVIES, JR. of Columbia, participated in the DRI Industrywide Litigation Seminar in Las Vegas, Nevada.

President BARRON GRIER, was prodding John C.B. Smith, Jr., Program Chairman, for our Thirteenth Annual Meeting at Kiawah Island. BOB PATTERSON of Charleston was golf tournament chairman and THERON COCHRAN from Greenville, was tennis tournament chairman.

LOOKING BACK TWENTY YEARS AGO

The Third Defense Conference was held December 4-5, 1970, at the Mills Hyatt House in Charleston. Total registration was 158, one hundred and one men, fifty-seven women, thirty-six claims men and fifty-eight attorneys. This was only slightly below the first Defense Conference at Hilton Head where we had eighty-one attorneys and thirty-eight claims men. The total registration was a new high.

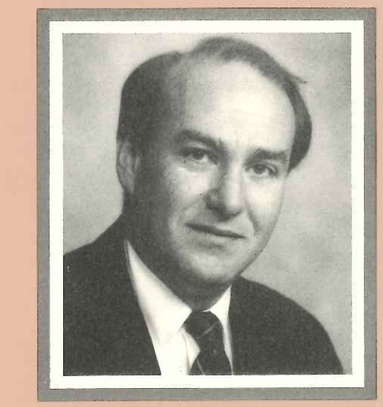
WALT DUNCAN, President of the Claims Managers Association, presided over the initial session. PAUL FOSTER of Greenville presided over our session dealing with the Federal Rules of Civil Procedure. Professor CHARLES RANDALL, FRANCIS MARION of Greenville, HENRY HARE of Columbia and Honorable WILLIAM L. RHODES, JR. were on the panel discussing Rules. HAROLD JACOBS, President of the Association, presided during the Friday evening banquet.

Saturday, EDWARD L. GARRETT, American Mutual of Greenville, presided over a 2 1/2 hour medical/legal session featuring DR. S. EDWARD IZARD, Orthopaedic Surgeon, joined with DR. CHARLES MITCHELL, Neurosurgeon.

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



Please make sure your calendars are marked and cleared for our Annual Meeting to be held October 25-28, 1990 at the Mariner's Inn on Hilton Head Island. The Mariner's Inn is located within Palmetto Dunes; right on the front beach.

Bill Coates has secured for us as a speaker on the subject of negotiations — Bill Bryant, a partner in the Tallahassee, Florida law firm of Foley and Lardner. Mr. Bryant is a member of the teaching staff of the Negotiation Workshop Program for Instruction for Lawyers at Harvard University Law School. It seems that, with the number of cases being filed and the way dockets are moving, we, as defense trial attorneys, spend more time negotiating than we do actually trying cases. This is borne out by statistics I've heard from Judges and professionals engaged in Court and Docket management. They seem to believe that at least ninety-five (95%) percent of all cases which are filed are in fact settled.

We are also pleased to have on the program Walter Hunley, Chairman of the South Carolina Workers' Compensation Commission. Walter, a former member of our Association, was instrumental in drafting the new regulations for the Workers' Compensation Commission. It is my understanding that these regulations became effective September 1, 1990. This is certainly a timely topic, important to all of our members who practice in the area of workers' compensation.

Bill Coates and his committee have also lined up several other speakers which should make the program interesting and informative. We will also have panel discussions, including on the panel State and Federal Court Judges.

As you know the Annual Meeting is our most expensive undertaking of the year. We need the support of all the members to make sure that the program is financially successful as well as educationally and socially successful.

Mike Wilkes, who did such a fine job of arranging the social events at the Joint Meeting, is again in charge for the Annual Meeting. I am sure we can expect to have a very enjoyable time.

Speaking of the Joint Meeting, Congratulations go to Brad Waring and Tom Johnston for putting on a very successful meeting. Four Hundred Twelve (412) people registered for the Joint Meeting, making it one of the largest ever. I heard nothing but raves over the Biltmore Estates event.

The last official event of this fiscal year is our annual CLE seminar co-sponsored with the South Carolina Bar Association. The same will be televised statewide via closed circuit on November 2, 1990. John Wilkerson, Bob Irwin and their committee are working hard to finalize the Seminar. The Seminar will cover problem areas in settlement of personal injury litigation.

This annual Seminar is a source of income for the Association which allows us to maintain the dues at the current level. It is also an inexpensive way to ensure that all of the lawyers in your offices comply with the CLE requirements for the State of South Carolina. Your support in attending the Seminar either in Columbia or at one of the satellite locations will be greatly appreciated.

As mentioned at the Business Meeting held at the Joint Meeting in Asheville, the Long Range Planning Committee has been given approval to test the waters of the Association to see if there is any interest in setting up a South Carolina Trial Advocacy School. It is anticipated that the school will be a three day intensive training session for young lawyers in the Association. The instructors for the school will be established members of the Association. The school will have limited enrollment in order to ensure the full participation of each "student". You should shortly be receiving the initial questionnaire from either Glenn Bowers or Tim Bouch.

This is my last President's Letter (I'm sure you are as relieved as I am). I, therefore, want to take this opportunity to again thank you for electing me as President for this year. I would also like to thank the Executive Committee for its assistance and particularly the heads of each of the Committees and the members of the Committees for their hard work during this year.

Probably the most thankless job is that of Editor of *The Defense Line*. Will Davidson has to scramble every quarter, with the able assistance of Nancy Cooper, to put together *The Defense Line* and to ensure, for example, that I get the President's Letter to them. (Hopefully, they will get my firm's name correct this time.)

The Association has again won an award from the DRI. Part of the consideration for the award is the superb job Will has done for the last several years in preparing *The Defense Line*. No mention of *The Defense Line* can be had without mentioning Jack Barwick, the heart and soul of *The Defense Line* for more years than I'm sure he would like to recall.

Finally, I would again like to thank Carol Davis for her hard work as Executive Director of our Association. Our Association would not be able to operate efficiently without Carol and her staff.

I look forward to seeing each of you at the Annual Meeting in October.

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

Hilton Head Island lies just off the South Carolina coast. Nowhere on the island is the balance of nature's beauty and elegant sophistication more successfully achieved than at Mariner's Inn, Hilton Head's foremost oceanfront resort hotel.

Mariner's Inn is surrounded by the protected grounds of Palmetto Dunes Resort, a private 1,800-acre oceanfront community with three miles of Atlantic beach, tranquil lagoons, three championship golf courses, the 25-court Rod Laver Tennis Center, restaurants, nightclubs, shopping and a deepwater marina.

Set on its own 13-acre estate beside the Atlantic, Mariners Inn blends with the surrounding subtropical landscape. Twin five-story guest lodges overlook the Atlantic ocean, two swimming pools, and oceanfront whirlpools, all framed by a beautifully landscaped courtyard.

Accommodations are especially rewarding. The Inn's "standard" staterooms are oversized and tastefully decorated, with kitchenettes and dining areas. All rooms and suites have large private balconies with views of the Atlantic.

For dining, your choices range from oceanfront cookouts to the mesquite-broiled seafood specialties of Pisces, the Inn's most elegant restaurant. Or try Praline's, a comfortably plush family restaurant. For lighter fare, there's an ocean-side pool bar and an authentic delicatessen. And at Scarlett's, a cozy yet sophisticated lounge, you can relax with friends or dance the night away to live entertainment.

JOINT MEETING MCLE

The 23rd Annual Joint Meeting sponsored by the South Carolina Defense Trial Attorney's Association held in Asheville, North Carolina on July 26-29, 1990, was accredited for up to 06.00 hours MCLE credit, including 01.00 hours credit for Legal Ethics/Professional Responsibilities.

ANNUAL MEETING PROGRAM REPORT

WILLIAM A. COATES

Your program committee has scheduled a program which we feel will be of interest to all defense attorneys from first year associates to the most senior of advocates. For all of us, a great portion of our practice is devoted to negotiation: negotiation of settlements, negotiation of consent agreements, negotiation of scheduling orders, negotiations of all kinds. When negotiations fail, we are increasingly being faced with a general uncivility in the courtroom, and the use of oppressive and unfair litigation tactics. The annual program will center on these two themes.

We have scheduled a program on negotiation for the entire Friday morning portion of our educational program. We are fortunate to have secured Bill Bryant, Jr. of Tallahassee, Florida to lead this portion of our program. Mr. Bryant is a partner with the firm of Foley & Lardner, and also is a member of the teaching staff of the Negotiation Workshop Program for Lawyers at Harvard University Law School. Additionally, Mr. Bryant is a former attorney with the U.S. Justice Department, Chief Deputy Attorney General, the State of Florida, and Special Counsel to the Governor of Florida. He is a much sought-after speaker on the subject of negotiation. Following Mr. Bryant's initial presentation, we will have a panel discussion among four experienced attorneys who will speak about negotiation from the viewpoint of their diverse individual practices. In addition to the participation of our panel members, time will be allotted for questions and participation from our membership. In addition, all attorneys attending the annual convention will receive the book *Getting to Yes* which is utilized at the Harvard Law School workshop.

Throughout the past year or two, there have been increasing complaints and comments by members of both the Bench and Bar regarding the increasing lack of civility among lawyers in trial practice. Previously, it appeared that this phenomenon was confined to other areas of the United States. Unfortunately, it is becoming increasingly obvious that these so called "Rambo" litigation tactics are creeping into practice in South Carolina. The issues are twofold: What to do when confronted with these tactics, and secondly, what can be done to discourage or deter them overall. These issues will be the topic of discussion on Saturday by a panel of United States District judges and South Carolina Circuit judges. As an introduction to the panel discussion, we will be hearing an address on these subjects by Marvin L. Karp, of Cleveland, Ohio. Mr. Karp is the Chairman-Elect of the Tort and Insurance Practice Section of the American Bar Association as well as a member of the American College of Trial Lawyers and the International Academy of Trial Lawyers. Mr. Karp has spoken on the issue of civility in trial practice throughout the United States, and we are fortunate to have him to lead this discussion.

Also on Saturday morning we will be hearing from Representative David H. Wilkins. Representative Wilkins is the Chairman of the Judiciary Committee of the South Carolina House of Representatives. As you are all aware, this past year saw several changes in laws affecting our membership, and the next legislative year promises to be a very busy one on issues such as statutes of limitations, and no-fault automobile insurance. Representative Wilkins will address these issues, as well as other current matters of interest affecting our Association.

Our Saturday program will conclude with an address from the Honorable Alexander M. Sanders, Jr., Chief Judge, South Carolina Court of Appeals. Anyone who has not heard Judge Sanders speak is in for a real treat. Those of us who have heard Judge Sanders in the past, await the additional nuggets of wisdom which he always imparts to us.

Again this year, the program will feature a workers' compensation break-out. We are pleased to have Honorable Walter Hundley, Chairman of the Workers' Compensation Commission, who will address several timely topics in this area.

As always, the presentation of the Hemphill Award will be presented to the individual who has done the most to foster the goals of our Association. Your program committee feels it has an outstanding program, which combined with the amenities of Hilton Head Island and the outstanding social program, should provide the basis for excellent attendance at an excellent convention.

ANNUAL MEETING — EDUCATIONAL SESSIONS

Friday, October 26, 1990

8:50 a.m. - 9:00 a.m.	*Welcome* Mark H. Wall, Esquire President, SCDTAA
9:00 a.m. - 10:45 a.m.	*Negotiation: Techniques and Tactics — "Getting To Yes"* Bill Bryant, Jr., Esquire Tallahassee, Florida
10:45 a.m. - 11:00 a.m.	Coffee Break
11:00 a.m. - 12:15 p.m.	*Negotiation: Techniques and Tactics — Panel Discussion and Audience Participation* Thomas F. Tisdale, Esquire L. Gray Geddie, Esquire J. Eugene Adams, Esquire Joseph H. Rhodes, Esquire Bill Bryant, Jr., Esquire
11:00 a.m. - 12:15 p.m.	*Issues in Workers' Compensation (Break-out Session)* Honorable Walter L. Hundley, Chairman South Carolina Workers' Compensation Commission

Saturday, October 27, 1990

8:30 a.m. - 9:00 a.m.	*SCDTAA Business Meeting*
9:00 a.m. - 9:10 a.m.	*DRI Report*
9:10 a.m. - 9:30 a.m.	*State of the Judiciary* Justice, South Carolina Supreme Court
9:30 a.m. - 10:00 a.m.	*The Legislative Arena: Recent and Upcoming Legislation* Honorable David H. Wilkins, Chairman, Judiciary Committee, South Carolina House of Representatives
10:00 a.m. - 10:05 a.m.	*Presentation of Hemphill Award*
10:05 a.m. - 10:15 a.m.	Coffee Break
10:15 a.m. - 11:00 a.m.	*What Happened to Civility In Advocacy?: Ethical and Practical Considerations* Marvin L. Karp, Esquire, Chair, Tort and Insurance Practice Section, American Bar Association
11:00 a.m. - 11:40 a.m.	*Response and Discussion, Panel of United States District Judges and South Carolina Circuit Court Judges*
10:15 am. - 11:30 a.m.	*Issues in Workers' Compensation (Break-out Session)* Honorable Walter L. Hundley, Chairman South Carolina Workers' Compensation Commission
11:40 a.m. - 12:15 p.m.	*Remarks,* Honorable Alexander M. Sanders, Jr., Chief Judge, South Carolina Court of Appeals

SCDTAA ANNUAL MEETING — SOCIAL SCHEDULE

It's back to the beach this fall for the SCDTAA Annual Meeting, one last weekend in the sun before you start eating turkey and buying Christmas presents. The Mariner's Inn is part of the terrific Palmetto Dunes Resort and is set on its own 13 acre estate by the Atlantic. The Inn's "standard" staterooms are oversized, with kitchenettes and dining areas, and all have a view of the ocean. The Mariner's Inn has earned the AAA Four Diamond Award, and the Gold Key Award for several years. It has all the amenities you expect at a top beach resort, including restaurants, bars, exercise facilities, pools, whirlpools...

Our social activities will include golf at the Fazio, Jones or Arthur Hill courses, tennis at the 25-court Rod Laver Tennis Center, fishing and a Daufuskie Island tour *(PREREGISTRATION IS REQUIRED).*

THURSDAY NIGHT: After our Welcome Reception, have dinner on your own at the restaurant of your choice (reservations suggested — see list over).

FRIDAY NIGHT is *MONTE CARLO NIGHT*, a *BLACK TIE* casino party with music and a stand-up buffet. Our group of full-time litigators/gamblers will love competing for the "money" necessary to obtain prizes. This night on the felt is back by popular demand. The judges have especially enjoyed this head-up competition on a level playing table. Settlements (pooling of money) will not be allowed. If your luck goes bad, dancing and the usual discussion of rumor and proposed rumor will keep you on your toes.

SATURDAY NIGHT: We'll have the Shuckin' and Pluckin' menu, BBQ and Seafood, at the Inn's Best Little Shorehouse on Hilton Head. After the "Feast on the Beach," we'll go inside for the fantastic show and music of CORNELIUS BROTHERS AND SISTER ROSE, who have sold over 15 million records (Treat Her Like a Lady; It's Too Late To Turn Back Now; Don't Ever Be Lonely).

A double-sized, fully stocked hospitality suite on the ground floor will be open with two TVs, videotape replays of our golf and tennis competitions, and all the tall tales you can stand or remember. This will *not* be Mark Wall's suite, but you may think it is! You're only allowed to have this much fun once a year; so join us for the Annual Meeting!

Thursday, October 25

6:30 - 7:00 p.m.	First Time Attendees Reception (Coat & Tie)
7:00 - 8:00 p.m.	Welcome Reception (Coat & Tie)
Dinner	On Your Own — See List of Suggested Restaurants Below

Friday, October 26

10:00 a.m.	Spouses Program — Exhibit and Demonstration By Renowned Artist Jim Harrison
12:30 p.m.	Golf Tournament
2:00 p.m.	Tennis Tournament

YOU MUST SIGN UP *NOW* FOR GOLF OR TENNIS TO BE SURE YOU GET IN THE TOURNAMENT

Time TBA	Fishing, Daufuskie Island Tour
7:00 p.m.	Monte Carlo Night (*Black Tie*) Stand-Up Buffet, Cocktails, Music, "Gambling"

Saturday, October 27

	Tennis Courts are Reserved 10:00 - 12:00 and 2:00 - 4:00
	Golf Tee Times will be Available in the Afternoon
7:00 - 9:00 p.m.	Shuckin' and Pluckin' Dinner at the Best Little Shorehouse on Hilton Head (Outside Next to the Beach — Casual)
9:00 p.m. Until	Cornelius Brothers and Sister Rose

Sunday, October 28

11:00 a.m.	Farewell Bloody Mary Reception

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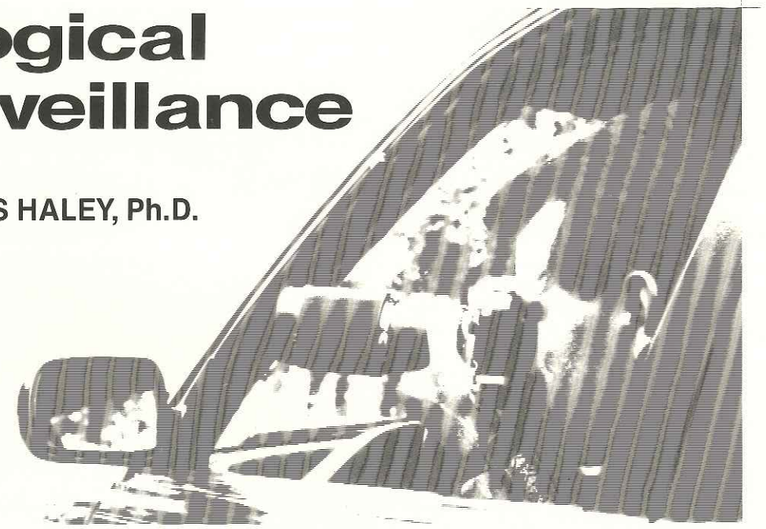
HILTON HEAD RESTAURANTS — RESERVATIONS SUGGESTED

1. Mostly Seafood — Mariner's Inn
2. Harbormaster — Jacket Required
3. The Commodore — Informal
4. The Gas Light — Jacket Requested
5. Cafe Europa — Informal
6. La Maisonette — Informal
7. Ed Murrays — Jacket Requested
8. Hudson's — Informal*
9. Crazy Crabs — Informal*

*May Not Accept Reservations

Psychological Surveillance

PAUL LEES HALEY, Ph.D.



There are those who assume that surveillance of psychological claimants is a waste of time because the complaints are subjective and intangible. This is a mistake, because numerous psychological disorders include observable manifestations among the criteria for correct diagnosis. These observable behaviors can be witnessed by third parties and they can be videotaped. Furthermore, they can be documented and explained in a reasonable fashion to triers of fact.

For the purposes of this article, surveillance will be defined loosely to include both direct surveillance of the claimant and third-party interviews which are used to collect other important information.

Although each case is unique, this essay will outline some general procedures with wide applicability for surveillance of psychological claimants. These techniques help to verify legitimate claims and rebut false claims.

These procedures are usually applied to cases in which one suspects that the claimant is dishonest or feels for some other reason that the damages have been misrepresented. Consequently the suggestions in this article are directed toward two kinds of claimants: (1) those who are exaggerators or outright frauds, and (2) claimants who are honest but inaccurate. An example of the latter type would be claimants who honestly convince themselves that they have problems caused by the defendant. Some of these claimants really do have mental problems but their erroneous attribution of causation to the defendant's actions is an after-the-fact rationalization.

There are five basic steps for organizing psychological surveillance:

Define the issues
Identify observable manifestations of the issues
Directly investigate current functioning (sub rosa)
Indirectly investigate current functioning and past history
Assess, organize, and apply findings

1. Define the issues

The first step is to define the arguments or allegations of the claimant as clearly as possible. Often this step is more complicated than it would appear, for a number of reasons. One problem is that when we read the Complaint, demand letters, settlement brochures, and related documents, we discover that the claimant's "injuries" are described in vague generalities that were pulled from a legal textbook (sometimes they are the same descriptions we have read in previous documents from the same office about different claimants). Another factor that complicates this step is that some doctors and attorneys are less than enthusiastically cooperative about producing psychological and medical records.

This process is enhanced by keeping the psychologist abreast of the records as they come in, and obtaining advice on where to look for further valuable records. It is the rule, not the exception, for the records in psychological cases to contain important omissions. The claims adjuster and the attorney need an experienced psychologist to point out the missing information in most cases. (This suggestion is not a criticism; how many psychologists know how legal records or insurance files are defined, organized, recorded, or stored?)

In reviewing the doctor's records and reports, it is important for claims specialists and attorneys to realize that mental health professionals often assume the claimant is telling the truth and treat the self-reported history as if it were fact. California Judge Herbert Lasky, after trying numerous psychological claims, remarked that psychological examiners often simply fail to consider the possibility that the claimant might not be telling the truth.

The outcome of this step should include as much detail as possible about the claimant's complaints, alleged disabilities, diagnoses made by the claimant's doctors, and alleged current activities and activity limitations.

2. Identify observable manifestations of the issues

The second step is for the psychological consultant to review the entire file to define observable manifestations of the issues identified in Step 1. This process is essentially the preparation of lists of observable characteristics and activities which are consistent and inconsistent with the alleged complaints, disabilities, and diagnoses.

This list has to be prepared with a balance between exhaustive thoroughness and reasonable practicality. The adjustor or attorney managing the investigation should tell the psychologist whether the case warrants extensive investigation, or only nominal resources are available. It is cost effective to ask the psychologist to pinpoint those observations which are most significant and those which are most likely to be found in the shortest period of time, or with the least expenditure of resources.

The potential defenses available for rebutting false psychological claims are too numerous to mention in this space, but the issue of causation will serve as a good illustration. After reviewing the claimant's

Continued on page 8

SURVEILLANCE

Continued from page 7

records, the psychologist can make recommendations on how to investigate for alternative causation. There are numerous alternative explanations for psychological complaints, but here are some common sources of psychological complaints which are erroneously blamed on defendants:

1. Pre-existing complaints.
2. Complaints arising from the natural progression of a pre-existing disorder: These are complaints which were not pre-existing but which were part of a natural progression of a mental disorder which would have led to the production of these complaints even in the absence of the litigated event.
3. Concurrent or after-the-fact causation: For example, this includes other stressful events in the claimant's life which are the cause of the symptons.
4. Personality disorders: Many claimants have long-standing psychological problems known as personality disorders which may not have been apparent to the claimant but which were nonetheless real. These are serious and can have occupationally disabling effects as well as contribute to problems of a social, marital or subjective nature. Many of these claimants have never sought treatment because of the very nature of their mental disorder, not because such problems were absent.
5. Malingering: Malingering is the deliberate exaggeration or fabrication of a mental disorder for gain, and should be distinguished from the factitious and conversion disorders discussed immediately below. There are many clues to the psychological malingerer. One important clue is the most obvious: As Shakespeare put it in Hamlet, "Though this be madness, yet there is method in't." The psychological malingerer is "crazy like a fox."
6. Factitious disorder: Some claimants intentionally seek professional treatment because they want the attention gleaned by playing the sick role. They wander into the litigation arena for a variety of reasons — for example, at the inducement of a family member.
7. Conversion disorder: This is pain or a loss of functioning produced by psychological problems. For example, we see cases in which plaintiffs who have suffered very sad and troubling personal experiences begin to complain of physical pain in their back. These complaints may be expressed in all sincerity as litigation-related complaints, when in fact they are a by-product of the other experiences. Although such plaintiffs may superficially appear to be blatant malingerers, these people are deceiving themselves more than you. It is more accurate to think of them as people who need help than as dishonest people.
8. Self-induced disorders which are denied: In a significant number of cases, plaintiffs induce their own disorders but deny their behavior to themselves as well as to you. Like the plaintiff with a conversion disorder, these plaintiffs may be confused with malingerers. But what is really happening is that they have denied their own role in causing their problems, and in the course of casting about for a way to rationalize their problems they blame the defendant.

   One such example was a man who continued smoking in spite of his emphysema, and clearly was progressively disabling himself. Shortly before his accidental exposure to a toxic substance, he had missed two-thirds of his work days for nine months. It was clearly documented in his medical records that he was on the verge of total disability. At that point he was exposed to a harmless level of a toxic substance and he immediately concluded that he was disabled. Within three days he filed a total disability claim alleging that the toxic exposure was the entire cause of his problems.

In preparing a list of observable manifestations of the diagnoses made by the claimant's experts, the psychologist will use a reference published by the American Psychiatric Association, entitled **Diagnostic and Statistical Manual of Mental Disorders,** Third Edition, revised (DSM III-R).

DSM III-R is a reference book which lists the criteria for various psychological diagnoses. Although DSM III-R is controversial, it is commonly referred to in court testimony because it is the most widely used diagnostic manual in American practice. Claimants' experts usually testify that they used DSM criteria in formulating their diagnosis, and that use of the DSM criteria is a generally accepted practice in their profession. Given this testimony, proof of the absence of these criteria provides strong rebuttal evidence concerning the testimony of these experts.

In addition to a list of observable behaviors, the psychologist can also recommend other guidelines for observations. For example, the psychologist can make recommendations concerning when, where, and how to make observations, such as time of day or week, locations, circumstances, when to videotape the claimant's whole body, when to zoom in for close-ups of the claimant's facial expressions, and so forth.

After the psychologist has prepared this list, there should be a conference between the investigator and the psychologist, with the attorney and claims adjustor present for as much of this discussion as they feel is appropriate. The claims adjustor and attorney will want to be informed in general of the proceedings, but also may have special questions or theories which need to be incorporated into this investigation. The attorney also can provide some boundaries to the activities of the investigator to avoid creating new problems. For example, there have been cases in which a claimant who was correctly identified as a malingerer by an investigator then responded by suing the investigator and the party who hired the investigator for intentional infliction of emotional distress.

3. Directly investigate current functioning (sub rosa)

As an illustration, consider a hypothetical case with the notorious diagnosis of Post-traumatic Stress Disorder with a Major Depression. Following are some representative diagnostic characteristics of an individual with this diagnosis, accompanied by comments and examples of observable behaviors contradicting the allegations of claimants and their doctors.

1. Intense psychological distress at exposure to events that symbolize or resemble an aspect of the traumatic event: In one toxic exposure case, several of the claimants repeatedly returned to the scene of the exposure for incidental reasons, and were observed by several witnesses to do so with no indications whatsoever of hesitation, distress, or regret. Not only did it not bother the claimants to expose themselves to symbols of the traumatic event: they were able to repeatedly expose themselves to the real thing — the actual scene of exposure, before the toxic substances had even been removed.
2. Efforts to avoid activities or situations that arouse recollections of the trauma: The preceding example applies to this diagnostic criterion too. Another example is the claimant who regaled his friends and neighbors with dramatic stories of the thrills of his traumatic experience. On some occasions he appeared to be playing the game referred to as "Ain't it Awful" by Eric Berne in his book **Games People**

Continued on page 9

1990 **South Carolina Defense Trial Attorneys Association Roster of Members** 1991

Law Firms with SCDTAA Members

-A-

(1) Acker, Acker, Floyd & Welmaker
P.O. Box 978
Pickens, S.C. 29671
878-4721
Pickens County

(2) Adams, Quackenbush, Herring & Stuart
P.O. Box 394
1900 Main Street, Suite 1400
Columbia, S.C. 29202
779-2650 Fax: 252-8964
Richland County

-B-

(3) Bailey & Buckley
P.O. Box 953
Charleston, S.C. 29402
772-4092
Charleston County

(4) Barnes, Alford, Stork, & Johnson
P.O Box 8448
1613 Main Street
Columbia, S.C. 29202
799-1111 Fax: 254-1335
Richland County

(5) Barnes & Smith, P.A.
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Beaufort, S.C. 29901
522-8003 Fax: 522-9568
Beaufort County

(6) Barnwell, Whaley, Patterson, et.al
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Charleston County

(7) Bean & Bean
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Spartanburg County

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Richland County

(9) Bogoslow & Jones
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Walterboro, S.C. 29488
549-2502 Fax: 549-2112
Colleton County

(10) Bouknight, Nicholson, Fraser, Anderson
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Lexington, S.C. 29072
359-2512 Fax: 359-7478
Lexington County

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252-0494 Fax: 252-1068
Richland County

(12) William H. Bowman, III. P.A.
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1336 Pickens Street
Columbia, S.C. 29211
256-6545
Richland County

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Florence, S.C. 29503
662-1418 Fax: 669-7648
Florence County

(14) Brockinton, Brockinton & Kerr
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Charleston, S.C. 29402
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Charleston County

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Mason A. Goldsmith (67)
D. Christian Goodall (2)
Thomas R. Gottshall (99)
J. Russell Goudelock, II (105)
W. Andrew Gowder (113)
William M. Grant, Jr. (38)
Perry H. Gravely (65)
Jennings L. Graves, Jr. (67)
James C. Gray, Jr. (76)
Jeffrey E. Gray (48)
Reginald M. Gray (108)
William D. Gray (108)
Harry B. Gregory, Jr. (97)
F. Barron Grier, III (90)
Manton M. Grier (99)
Jack D. Griffeth (67)
Catherine G. Griffin (8)
James M. Griffin (76)
E. Mitchell Griffith (32)
William P. Griggs (39)
Frank E. Grimball (40)
Henry E. Grimball (40)
William H. Grimball, Sr. (40)
Stephen P. Groves (117)
E. Courtney Gruber (117)
Theodore B. Guerard (47)
Linda Weeks Gwin (102)

-H-

B. A. Hagood (18)
William M. Hagood, III (67)
Lucinda J. Haley (581)
Elliott T. Halio (41)
George R. Hall (60)
William F. Halligan (93)
Willard D. Hanna, Jr. (42)
Stuart Hardwick, Jr. (2)
Roy F. Harmon, III (84)
Donald A. Harper (48)
Donald W. Harper (94)
Kenneth W. Harrell (76)
C. Anthony Harris, Jr. (39)
Deborah Harrison (90)
Laura C. Hart (105)
William B. Harvey, III (43)
J. Drayton Hastie, Jr. (92)
John C. Hayes, III (44)
Knox L. Haynsworth, Jr. (45)
Katherine D. Helms (45)
William C. Helms, III (6)
J. Christopher Henderson (76)
Amy C. Hendrix (76)
Matthew H. Henrikson (6)
Angela L. Henry (71)
William H. Hensel (90)
Louis P. Herns (58)
Bryan F. Hickey (48)
Thomas C. Hildebrand, Jr. (98)
Charles E. Hill (105)
James J. Hinchey, Jr. (47)
John W. Hoag, III (84)
David E. Hodge (78)
Erroll Anne Y. Hodges (78)
Thomas T. Hodges (45)
Wallace G. Holland (117)
A. Baron Holmes, III (52)
Stephanie A. Holmes (87)
Robert H. Hood (58)
Michael P. Horger (54)
Robert R. Horger (53)
William A. Horger (54)
J. Wright Horton (55)
Ladson F. Howell (57)
Louis P. Howell (56)
Samuel W. Howell, IV (46)
R. Davis Howser (90)
Arthur L. Howson, Jr. (87)
William C. Hubbard (76)
James W. Hudgens (107)
J. Dwight Hudson (59)
Phillip Luke Hughes (79)
Stephen P. Hughes (57)
David C. Humphries, Jr. (52)
Lawrence M. Hunter, Jr. (48)
T. Parkin Hunter (74)
S. Keith Hutto (105)

-I-

Marvin D. Infinger (98)
Russell T. Infinger (82)

-J-

Harold W. Jacobs (82)
Albert L. James, III (85)
George C. James, Jr. (89)
George C. James (89)
Paul A. James (40)
Kenneth Allan Janik (76)
Brenton D. Jeffcoat (76)
Julie Jeffords-Moose (76)
Rodney C. Jernigan, Jr. (61)
E. Russell Jeter, Jr. (74)
Benjamin A. Johnson (94)
Darrell T. Johnson, Jr. (62)
Maye R. Johnson, Jr. (48)
Pope D. Johnson, III (110)
R. Lewis Johnson (4)
Thomas W. Johnson, Jr. (18)
Weldon R. Johnson (4)
Ellis M. Johnston, II (48)
John E. Johnston, Jr. (65)
James D. Jolly, Jr. (108)
C. Roland Jones, Jr. (107)
Celeste T. Jones (74)
J. Mark Jones (76)
Marvin C. Jones (9)
Arthur E. Justice, Jr. (106)

-K-

Richard B. Kale (45)
Thomas J. Keaveny (52)
William W. Kehl (115)
David Hill Keller (48)
James G. Kennedy, Jr. (58)
Richard M. Kennedy, Jr. (63)
Trent M. Kernodle (52)
Robert A. Kerr, Jr. (18)
H. Spencer King (64)
Robert O. King (84)
R. Bentz Kirby (105)
H. Grady Kirven (108)
Steven C. Kirven (108)
Henry S. Knight, Jr. (76)
R. Y. Knowlton (99)
Clifford O. Koon, Jr. (95)
John F. Kuppens (76)

-L-

Stanford E. Lacy (27)
Rebecca Laffitte (76)
Edward W. Laney, IV (105)
Lewis C. Lanier (54)
Ernest G. Lawhorne (75)
Wm. E. Lawson (69)
Agnus M. Lawton (52)
W. Jefferson Leath, Jr. (117)
Judith A. Leatherwood (38)
Linda J. Lemel (47)
Flo S. Lester (106)
George E. Lewis (105)
Stephen R.H. Lewis (76)
Andrew F. Lindemann (75)
John P. Linton (98)
Susan B. Lipscomb (82)
Donald T. Locke (48)
James . Logan, Jr. (108)
Wade H. Logan, III (52)
Richard M. Lovelace (68)
George K. Lyall (78)
Thomas E. Lydon, III (76)
Robert T. Lyles, Jr. (92)
Terri M. Lynch (98)
W. G. Lynn, Jr. (49)

-M-

H. Sam Mabry, III (48)
Teresa E. MacGillivray (76)
Francis M. Mack (90)
Max G. Mahaffee (40)
Joseph E. Major (65)
Elizabeth Mann (87)
John P. Mann (103)
E. Meredith Manning (93)
Marcus A. Manos (82)
Andrew B. Marion (46)
W. Francis Marion, Jr. (48)
William F. Marion (48)
Bradford N. Martin (65)
Edwin P. Martin (105)
John F. Martin (117)
O. Doyle Martin (65)
Charles Stuart Mauney (87)
W. Hugh McAngus (105)
Barbara H. McArthur (76)
Duke McCall, Jr. (65)
Mary C. McCormac (45)
David B. McCormack (18)
T. English McCutchen, III (110)
John B. McCutcheon, Sr. (69)
John B. McCutcheon, Jr. (69)
Charles E. McDonald, Jr. (48)
Heyward E. McDonald (70)
J. E. McDonald (19)
Moffatt Grier McDonald (48)
Joseph H. McGee (18)
Roger T. McGill (26)
D. Laurence McIntosh (114)
Douglas McKay, Jr. (71)
Julius W. McKay (46)
Julius W. McKay, II (71)
Robert A. McKenzie (70)
Stephen F. McKinney (46)
Thomas A. McKinney (72)
Arthur F. McLean, III (48)
Joseph P. McLean (23)
William M. McLean (92)
James C. McLeod, Jr. (112)
John B. McLeod (48)
Peden B. McLeod (73)
Frank B. McMaster (104)
George Hunter McMaster (104)
H. D. McMaster (104)
John Gregg McMaster (104)
Joseph D. McMaster (104)
Marvin E. McMillan, Jr. (109)
Martha P. McMillin (90)
Susan P. McWilliams (82)
Joseph M. Melchers (76)
Robert O. Meriwether (76)
Gregg Meyers (113)
Steven G. Mikell (112)
Terry B. Millar (72)
Bruce E. Miller (6)
Thomas H. Milligan (58)
E. Warren Moise (40)
Elizabeth S. Moise (76)
Michael A.. Molony (117)
Mary M. Montgomery (6)
Francis P. Mood (99)
Steven T. Moon (46)
B. Allston Moore, Jr. (18)
David L. Moore, Jr. (67)
James B. Moore, Jr. (74)
John T. Moore (76)
Leslie A. Moore (75)
Thomas F. Moran (76)
Elford H. Morgan (21)
G. D. Morgan, Jr. (110)
Gary W. Morris (46)
M. Robin Morris (69)
David L. Morrison (75)
Stephen G. Morrison (76)
Wm. Howell Morrison (52)
L. Elaine Mozingo (4)
John H. Muench (26)
Edward W. Mullins, Jr. (76)
Danny H. Mullis (52)
John Robert Murphy (15)
Royann Russ Murray (76)
James D. Myrick (18)

-N-

James D. Nance (54)
Ernest J. Nauful, Jr. (75)
William S. Nelson, II (76)
John L. Nettles (81)
Louis D. Nettles (81)
James P. Newman, Jr. (90)
George S. Nicholson, Jr. (10)
Charles R. Norris (76)
David C. Norton (52)
J. Douglas Nunn, Jr. (76)
Michael M. Nunn (26)
Jeanne M. Nystrom (76)

-O-

Patrick O'Dea (79)
George H. O'Kelley (83)
John M. O'Rourke (34)
Lawrence B. Orr (13)
Hamilton Osborne, Jr. (99)
Samuel W. Outten (65)
Steven W. Ouzts (105)
G. Dewey Oxner, Jr. (48)

-P-

H. Fletcher Padget, Jr. (105)
Samuel F. Painter (82)
Susan C. Pardue (79)
James E. Parham, Jr. (90)
Edwin B. Parkinson, Jr. (48)
Robert A. Patterson (6)
Jonathan P. Pearson (84)
Pamela M. Pearson (58)
James W. Peterson, Jr. (23)
G. Mark Phillips (58)
Carl E. Pierce, II (58)
Carrol M. Pitts, Jr. (94)
Thomas E. Player, Jr. (89)
Charles N. Plowden, Jr. (90)
Russell Z. Plowden (78)
L. Lee Plumblee (67)
Edward E. Poliakoff (76)
Charles Porter (74)
Warren C. Powell, Jr. (8)
E. Douglas Pratt-Thomas (113)
James B. Pressly, Jr. (48)
V. Clark Price (67)
Edward K. Pritchard, III (98)
Kyle D. Pruitt (46)
Michael A. Pulliam (90)

-Q-

A. Marvin Quattlebaum, Jr. (76)

-R-

J. Gail Rahn (113)
F. Dean Rainey, Jr. (87)
Robert B. Ransom (113)
D. Cravens Ravenel (8)
Allen L. Ray (88)
Phillip E. Reeves (87)
T. David Rheney (106)
Sally H. Rhoad (117)
Jeter E. Rhodes, Jr. (110)
Joseph A. Rhodes, Jr. (45)
Donald V. Richardson, III (90)
Charles B. Ridley, Jr. (91)
Edward P. Riley, Sr. (78)
Edward P. Riley, Jr. (78)
Nancy B. Riley (76)
Richard W. Riley (78)
Ronald E. Robbins (8)
Pamela Roberts (82)
D. Clay Robinson (93)
David W. Robinson, II (93)
Neil C. Robinson, Jr. (92)
Carroll H. Roe, Jr. (67)
Carolyn W. Rogers (94)
Eugene F. Rogers (95)
James F. Rogers (76)
Linda W. Runge (76)

-S-

Robert E. Salane (4)
Thomas C. Salane (105)
T. Reeve Sams (96)
W. Toland Sams (96)
I. Lynn Sandifer (4)
George. Sands, Jr. (108)
David Savage (82)
Claude M. Scarborough, Jr. (76)
Mikell R. Scarborough (63)
John E. Schmidt, III (76)
Donna J. Schoaff (48)
Gordon D. Schreck (18)
Lester S. Schwartz (47)
Timothy D. Scrantom (92)
H. Donald Sellers (48)
William E. Shaughnessy (48)
R. Bruce Shaw (76)
J. Lynn Shook (48)
Cheryl D. Shoun (92)
John S. Simmons (76)
Keating L. Simons, III (52)
William P. Simpson (46)
Lana H. Sims, Jr. (75)
E. McLeod Singletary (74)
Ethel Singley (113)
G. Dana Sinkler (98)
Bachman S. Smith, III (98)
Benjamin Rush Smith, III (76)
Franklin J. Smith, Jr. (90)
Geoffrey M. Smith (92)
Joel H. Smith (76)
John C. B. Smith, Jr. (82)
Michael Smith (87)
Newman Jackson Smith (76)
Nina N. Smith (76)
V. Manning Smith (5)
Augustine T. Smythe (18)
Henry B. Smythe, Jr. (18)
Henry B. Smythe (18)
Amy M. Snyder (48)
Stephen A. Snyder (48)
David C. Sojourner, Jr. (75)
Thornwell F. Sowell, III (76)
Charles T. Speth, II (45)
J. Kershaw Spong (93)
W. Duvall Spruill (105)
Timothy D. St.Clair (105)
M. Baron Stanton (104)
Russell S. Stemke (113)
Theodore S. Stern, Jr. (48)
J. Hamilton Stewart, III (84)
John C. Stewart, Jr. (79)
Valentine H. Stieglitz (82)
G. Vanessa Stoner (76)
Randall C. Stoney, Jr. (117)
Robert T. Strickland (4)
Donald H. Stubbs (76)
S. Markey Stubbs (8)
Jimmy Stuckey (101)
Fred W. Suggs, Jr. (84)
Edward D. Sullivan (95)
David B. Summer, Jr. (82)
William O. Sweeny, III (76)

-T-

John R. Tally (95)
H. Simmons Tate, Jr. (99)
Raymond Tate (34)
Ronald G. Tate, Jr. (87)
Inez M. Tenenbaum (99)
K. Lindsay Terrell (57)
John C. Thomas (69)
John W. Thomas (95)
Karen Hudson Thomas (76)
Richard C. Thomas (4)
Robert J. Thomas (95)
B. M. Thomson, Jr. (52)
John H. Tiller (98)
H. Bernard Tisdale (87)
Thomas S. Tisdale, Jr. (117)
J. D. Todd, Jr. (65)
Monteith P. Todd (76)
L. Walker Tollison, III (76)
Harold E. Trask, Jr. (98)
David G. Traylor, Jr. (76)
Jane W. Trinkley (74)
J. Paul Trouche (47)
Ronald J. Tryon (110)
William H. Tucker (49)

-U-

Joe. W. Underwood (95)
Bert G. Utsey, III (98)

-V-

Howard A. VanDine, III (76)
Ralston B. Vanzant, II (76)
Victoria T. Vaught (68)
Jerry D. Vinson, Jr. (106)
M. Jeffrey Vinzani (92)
Theodore Von Keller (2)
John C. Von Lehe, Jr. (117)
Virginia L. Vroegop (99)

-W-

Emil W. Wald (100)
G. Trenholm Walker (113)
H. Clayton Walker, Jr. (8)
Mark H. Wall (92)
Susan Taylor Wall (52)
Shawn D. Wallace (117)
William L. Want (80)
Bradish J. Waring (117)
Thomas Waring (52)
Elizabeth H. Warner (18)
Eleanor D. Washburn (6)
Samuel C. Waters (95)
William L. Watkins (108)
J. Calhoun Watson (76)
James H. Watson (65)
Richard B. Watson (76)
M. Linda Weeks (105)
M. M. Weinberg, Jr. (109)
M. M. Weinberg, III (109)
G. Edward Welmaker (1)
Clifford L. Welsh (69)
Daniel J. Westbrook (76)
David B. Wheeler (52)
Albert E. Wheless (111)
Andrew J. White, Jr. (48)
Daniel B. White (87)
David A. White (94)
Knox H. White (48)
David R. Whitt (95)
David W. Whittington (18)
Forrest C. Wilkerson (94)
John S. Wilkerson, III (106)
Michael B.T. Wilkes (107)
Robert P. Wilkins, Sr. (77)
Robert P. Wilkins, Jr. (77)
Hugh L. Willcox, Jr. (112)
Hugh L. Willcox (112)
D. Reece Williams, III (93)
Daryl L. Williams (99)
Gregory G. Williams (4)
Wm. Reynolds Williams (112)
Richard H. Willis (76)
Thomas J. Wills, IV (6)
Bonum S. Wilson, III (113)
Cherie L. Wilson (92)
Harry C. Wilson, Jr. (66)
Robert C. Wilson, Jr. (48)
Stephen S. Wilson (107)
Jeffrey A. Winkler (18)
Thomas D. Wise (113)
Deborah W. Witt (76)
George B. Wolfe (76)
Robert P. Wood (95)
H. Bowen Woodruff (46)
William B. Woods (15)
Bradford W. Wyche (115)
M. Baker Wyche, III (84)
David R. Wylie (45)
Robert L. Wylie, IV (92)
Steven M. Wynkoop (76)

-Y-

J. Rutledge Young, Jr. (117)
Kenneth E. Young (78)
Kenneth R. Young, Jr. (116)

SURVEILLANCE

Continued from page 8

Play, in which one gets attention by complaining. This claimant took such delight in telling his stories that he began to embellish them. One witness compared him to a fisherman telling the story of the one that got away: "As time went by that fish seemed to get longer and longer."

3. Markedly diminished interest or pleasure in all, or almost all, activities most of the day, nearly every day, as indicated either by subjective account or observation by others of apathy most of the time: Some claimants go right on pursuing their normal recreations, social activities, and hobbies with no appreciable change in the level of activity or the apparent enjoyment in those activities. However, during an independent examination they will often deny these activities and claim to be at home mourning and suffering. The surveillance becomes doubly important in these cases because it provides evidence of the facts and of the claimant's credibility.
4. Restricted range of affect (loss of ability to express normal feelings): Affect is generally thought of as observable manifestations of one's feelings. This is a good example of an instance in which it is helpful to have a close-up videotape of the plaintiff's face and a midrange, upper body shot portraying gestures. When possible, the investigator should make such observations at events which are associated with relatively clear demonstrations of feelings. Depending on the plaintiff and situation, this might range from sporting events to sentimental movies, playing with children in the front yard, visits to activities of one's child such as a school play, sporting event, or ceremonial occasions.
5. Sense of a foreshortened future (for example, does not expect to have a career, marriage, children, or a long life): The claimant who seriously does not have these expectations behaves differently than one who does. Numerous claimants enroll in school, make long-range plans, or otherwise demonstrate that they have every expectation of a long life containing normal events.
6. Depressed mood most of the day, nearly every day, as indicated either by subjective account or observation by others: Claimants range from those who allege that they have been in profound psychological agony literally every single second of every day for several years to those who report various patterns such as, "Very bad at first and progressively better," or "On again - off again," and so on. The claimant's demeanor, conduct, and activities as determined by surveillance should be compared with self-report during deposition and the psychological records (including psychologists' reports, psychological tests, raw data, and session notes).
7. Insomnia or hypersomnia nearly every day: An important question in this regard is whether the claimant is maintaining a regular schedule of activities, especially recreational or work-related. An individual with a serious degree of insomnia is not the one you expect to appear energetic and "bright-eyed and bushy-tailed." Hypersomnia is sleeping far more than usual. Someone with hypersomnia should be missing from a significant amount of their routine daily life because they are in bed asleep.

   Attorneys and claims personnel involved in evaluating the case should be made aware that insomnia is an extraordinarily frequent complaint in our society. For example, I have lectured all over the United States and in Canada, and as a demonstration I routinely ask audiences to raise their hands to indicate how many of them have had symptoms of insomnia within the last few weeks. These audiences are made up of people who are working at a minimum full time, as well as carrying on the rest of their lives, and without exception the vast majority of the people present raise their hands. This finding is consistent with the epidemiologic research and research on insomnia throughout the United States. In other words, insomnia is such a common complaint that it adds almost zero diagnostic information and is an invalid basis upon which to conclude that someone has depression. This is so well recognized by experts on depression that insomnia complaints were deliberately left out of the most widely used psychological test for the assessment of depression.
8. Psychomotor agitation or retardation nearly every day (observable by others, not merely subjective feelings of restlessness or being slowed down): Psychomotor agitation is a generalized overactivity, and psychomotor retardation is a general slowing down of physical and emotional reactions.

   Videotapes of the whole body as well as the face of the individual performing an activity are useful pieces of evidence in connection with this criterion. Tapes can be made in any number of common settings. The claimant may jog, take walks, or go shopping, and the claimant may be working. In regard to this criterion, it is better to take several brief samples of the claimant's behavior at times and places suggested by the psychologist, rather than relying on a single brief observation.
9. Fatigue or loss of energy nearly every day: This is a characteristic that is not necessarily observable at a glance, although some people with this feature immediately strike one as being very tired. However, it is inconsistent with a pattern of activities that is associated with a high energy level, whether recreational or related to family or work activities. The phrase "nearly every day" should be given due attention. More than one claimant has admitted that the sub rosa investigator's findings are completely true, but that coincidentally the films were made on the one day that year that the claimant was feeling better.
10. Diminished ability to think or concentrate, or indecisiveness, nearly every day (either by subjective account or as observed by others): We have seen cases in which a claimant alleging these problems was actively involved in the day-to-day affairs of an entrepreneurial business requiring prolonged hours of intense concentration, careful thought, and firm decisiveness. For example, one entrepreneur was negotiating contracts, writing complex proposals, dealing with customers, managing employees, solving technical problems, and occasionally dashing into his psychologist's office for a brief treatment for his totally disabling major depression.

These examples illustrate the basic principle that we compare surveillance findings with a list of the findings that should be there if a diagnosis is correct. For every type of psychological claim, an investigative analysis is tailored for the unique claimant. This investigative analysis takes into account the particular diagnosis, alleged complaints or disabilities, and other components of the psychological damages claim.

4. Indirectly investigate current functioning and past history

It is quite worthwhile to send investigators to a variety of sources for locating information about the claimant's current functioning and past history. These inquiries should be guided in part by the list of behaviors sug-

Continued on page 10

Continued from page 9

gested by the psychologist, but the best investigators remain alert and open to new, unexpected leads. This type of investigation is extremely useful in proving alternative causation, the presence of pre-existing complaints and personality disorders, and malingering.

The list of topics for inquiry should be prioritized based on the information gleaned from the records reviewed prior to preparing the list. A good investigator will begin with a relatively easy question, but will simultaneously assess the willingness of the interviewee to disclose information. Finding a willing interviewee, the investigator should move to the most important issues.

An extremely fertile source for this information is interviews at former places of employment. Supervisors, coworkers, supervisees and other individuals who are simply in physical proximity to a claimant often spend more time with the claimant than anyone else, including family members. They may have known the claimant for years and may be intimately familiar with the claimant's personal life.

Additional points of contact include neighbors, former spouses and friends, business associates including customers and vendors, and other people who may have come in contact with the claimant. One underutilized area for investigation is the staff of doctors' offices. A surprising number of claimants will volunteer extremely important, if not explosive information to staff members as if they assume that a doctor's staff never speaks to the doctor. Others will radically alter their behavior as they move from the front door or waiting room to the psychologist's examining office. One claimant casually volunteered to an office clerk that he had no intention of answering the psychological test questions accurately because he thought that it was all a "crock."

In investigations in the work place, the first order of business is to establish rapport and ask direct, important questions of the witnesses. However, when possible, the investigator should also consider more esoteric inquiries, such as retrieving old telephone message pads to find who was calling the claimant at work. This is a valuable potential source for locating outside stressors which the claimant did not disclose to independent examiners. Examples include ongoing feuds with ex-spouses, creditors, lawyers in unrelated legal actions, or highly stressful family conflicts which were in fact the cause of the complaints which led to the claim.

There are those who assume that surveillance of psychological claimants is a waste of time because the complaints are subjective and intangible. This is a mistake...

The employee's history of absences and one- or two-day vacations should also be investigated. Often half-day or one-day personal leave or vacation use is associated with family emergencies which are highly pertinent to a psychological claim. These range from difficulties of children in school through marital problems, and on to a host of other issues which potentially are directly pertinent to the claim.

5. Assess, organize, and apply findings

It is extremely useful to arrange the findings several different ways. A chronological arrangement exposes significant gaps in the claimant's story, helps demonstrate alternative causation, and highlights inaccuracies. A list of findings grouped by source of the information helps evaluate potential witnesses. It clarifies what they will say, discloses inconsistencies, helps assess their credibility, and reveals needs for further inquiry. Arranging the findings under headings which are the claimant's major allegations and arguments will help clarify the issues and organize your rebuttal evidence.

In reviewing the evidence with regard to the key issues do not fail to consider these questions: Are there really any psychological symptoms? If so, what are they? When did they begin? Does it make any sense to allege that the defendant's role caused them? How many of them were caused by irrelevant factors? Is the claimant mitigating or aggravating the condition? If there is a genuine complaint, is the claimant capitalizing on the genuine complaint by magnifying it?

Consider supplying the findings of the investigation to the psychologist prior to the independent examination. Even if full details are not available to the psychologist during the examination, knowing some of the general questions, activities, problems, etc. can be extraordinarily valuable leads which dramatically impeach the dishonest claimant.

A claimant's credibility in a psychological claim is of crucial importance. Setting aside fraud, claims investigators and attorneys inexperienced with psychological claims should be aware that in numerous instances in which the claimant has a genuine bad experience, the claimant yields to the temptation to embellish or exaggerate the loss.

Ben Franklin once said something to the effect that if knaves knew what good business it is to be honest, they would all reform, out of sheer greed. Claimants would do well to heed Franklin's admonition. Over and over in the problem cases we see the psychological equivalent of a claimant who actually has lost one leg who claims to have lost three legs. They don't seem to understand that juries don't want people to be hurt, and are sympathetic to legitimate claims concerning genuine human suffering. However, juries naturally become concerned that their sympathies may be misplaced when they discover the claimant is telling stories and claiming nonexistent damages.

Contrary to the images created by popular media, judges and juries have a refreshing ability to differentiate between fact and fiction, when given the opportunity to do so. Objective documentation which lets juries see the facts for themselves gives them this opportunity.

When organizing evidence and preparing exhibits from this investigation, reduce the abstractions to concrete examples. Then express them simply and clearly. The significance of these findings can be demonstrated to judge or jury in any number of ways.

One useful approach is to first ask both claimant and defense doctors if they agree on the standard list of criteria for making the diagnosis ["yes"]. As they agree, list the diagnostic criteria right out of the book onto a black board in front of the jury. Then go through the behaviors you are going to demonstrate, one by one, with both doctors, and ask if each one is consistent with the diagnosis ["no"]. While asking this, write the doctors' answers alongside the diagnostic criteria you already listed on the blackboard. Then get out your surveillance evidence, perhaps arranged in the same order as the list on the blackboard, and go down the list demonstrating the reality of the claimant's behavior.

In his December 1988 Best's Review article on detecting fake claims, **In Photo** investigator Bill Kizorek points out that in some jurisdictions, surveillance evidence such as videotapes must be disclosed during discovery. In Snead v American Export -

Continued on page 11

Continued from page 10

Isbrandsten Lines Inc (59 F.R.D. 148, E.D. Pa. 1973) the court ruled that the claimant was entitled to view such films, based on Federal Rule 26(b)(3), but allowed the defense predisclosure depositions prior to responding. In Jenkins v Rainner (69 N.J. 50, 350A.2d 473, 476-77, 1976), the court made a similar finding.

If you are required to disclose your findings prior to trial, ask for an additional discovery deposition to obtain testimony about the critical findings. If this request is contested, point out to the judge that claimants who are telling the truth have nothing to lose by answering deposition questions before they see the surveillance evidence. State clearly that you have evidence which will impeach the claimant's testimony, and that it is inappropriate to permit the claimant to review your impeachment evidence as a rehearsal for testimony.

Conclusion

Surveillance and investigative interviews are under-utilized in psychological claims because the damages are regarded as too intangible to document. In fact, when conducted by imaginative experts, these techniques will confirm legitimate claims and rebut exaggerated fraudulent claims. Creative use of investigative interviewing and surveillance can make the difference in what appears to be a hopeless case.

Worker's Compensation Update

On November 16, 1990, Marvin F. "Buddy" Kittrell will join the South Carolina Compensation Commission. Mr. Kittrell was in private practice in Newberry and has replaced Commissioner A. Victor Rawl. Commissioner Kittrell's term of office runs through June 30, 1996.

It should also be of interest to the Association that on June 4, 1990, Governor Carol A. Campbell, Jr. signed into law comprehensive regulations for the South Carolina Workers' Compensation Commission.

The ratification of these regulations ended over two years of development. These regulations became effective September 2, 1990 and copies of the regulations are available from the Legislative Council, State House, Post Office Box 11489, Columbia, South Carolina 29211, at a cost of $4.75.

Depositions Raise Numerous Procedural Issues

By Andrew F. Lindemann
Nauful & Ellis, P.A.

In most cases, the procedure surrounding the taking of a deposition is routine. Nonetheless, there are occasions when a dispute arises regarding the time or place for a deposition. Such disputes give rise to various procedural issues. The purpose of this article is to address some of these issues. Due to the lack of authority under the South Carolina Rules of Civil Procedure, the majority of the case law cited below interprets the Federal Rules of Civil Procedure.

I. Does the filing of a motion to quash or a motion for protective order postpone or stay the scheduled deposition, although the court has not heard or ruled on the pending motion?

Often when a dispute arises regarding the time or place for a deposition, one party will file a motion to quash or a motion for protective order to postpone or stay the scheduled deposition. However, the rather scant case law addressing this issue states that "it is not the filing of such a motion that stays the deposition, but rather a court order." *Federal Aviation Administration v. Landy*, 705 F.2d 624, 634-35 (2d Cir. 1983). Similarly, it has been held that "the burden [is] on the deponent to get an order postponing the deposition, otherwise the duty to appear remains." *Fisher v. Henderson*, 105 F.R.D. 515 (N.D. Tex. 1985). The court's inaction in hearing or deciding the filed motion to quash or the motion for a protective order will *not* relieve the deponent of his duty to appear. *See, Hepperle v. Johnston*, 590 F.2d 609 (5th Cir. 1979).

The leading case addressing this issue is *Pioche Mines Consolidated, Inc. v. Dolman*, 333 F.2d 257 (9th Cir. 1964). The *Pioche Mines* decision offers the following discussion:

> Counsel's view seems to be that a party need not appear if a motion under Rule 30(b) [now Rule 26(c)]' ... is on file though it has not been acted upon. Any such rule would be an intolerable clog upon the discovery process. Rule 30(b) [now Rule 26(c)] places the burden on the proposed deponent to get an order, not just to make a motion. And if there is not time to have his motion heard, the least that he can be expected to do is to get an order postponing the time of the deposition until his motion can be heard. He might also appear and seek to adjourn the deposition until an order can be obtained. (Rule 30(d)). But unless he has obtained a court order that postpones or dispenses with his duty to appear, that duty remains. Otherwise, ... a proposed deponent, by merely filing motions under Rule 30(b) [now Rule 26(c)], could evade giving his deposition indefinitely. Under the Rules, it is for the court, not the deponent or his counsel, to relieve him of the duty to appear.

333 F.2d at 269.

Therefore, the mere filing of a motion will *not* stay the taking of a scheduled deposition; instead, a court order is necessary to stay the taking of the deposition. If the motion is not heard and decided prior to the scheduled time for the depositions, the deponent must appear for his deposition. Failure to appear may result in sanctions.

II. Can a non-resident plaintiff refuse to travel to the forum state or forum district for his deposition?

The general rule holds that a non-resident plaintiff who chooses a particular district as his forum is required to appear for his deposition in the forum district, absent compelling circumstances. *Clem v. Allied Van Lines International Corp.*, 102 F.R.D. 938 (S.D.N.Y. 1984); *Seuthe v. Renewal Products, Inc.*, 38 F.R.D. 323 (S.D.N.Y. 1965); *Dollar Systems, Inc. v. Tomlin*, 102 F.R.D. 93, 94 (M.D. Tenn. 1984) ("[T]he plaintiff will not be heard to complain about having to appear in the forum-district for the taking of its deposition, since it selected that forum in the first instance.") The same argument certainly applies to a state court case. A non-resident plaintiff who files suit in South Carolina should be required to appear in South Carolina for his deposition.

Continued on page 12

DEPOSITIONS

Continued from page 11

This, however, is not an inflexible rule. "[I]f special circumstances are shown, such as hardship or burden to the plaintiff, which outweigh any prejudice to the defendant, the general rule may yield to the exigencies of the particular case." *Seuthe v. Renewal Products, Inc.*, 38 F.R.D. 323, 324 (S.D.N.Y. 1965). "The matter rests in the discretion of the court and there must be a careful weighing of the relevant facts." *Id.* Financial hardship, if adequately shown, may nonetheless constitute a special exception to the general rule.

Thus, if the place stated in the deposition notice causes hardship or is inconvenient, then the plaintiff whose deposition is to be taken must move the court for a protective order to change the location of the deposition. It is not proper for the plaintiff to merely disregard the deposition notice. *See, Clem v. Allied Van Lines International Corp.*, 102 F.R.D. 938 (S.D.N.Y. 1984); *Dollar Systems, Inc. v. Tomlin*, 102 F.R.D. 93, 94 (M.D. Tenn. 1984). Otherwise, the plaintiff who fails to attend his deposition without prior court approval is subject to sanctions pursuant to Rule 37.

[1]The original Rule 30(b) on protective orders was transferred to Rule 26(c) during the 1970 Amendments to the Federal Rules of Civil Procedure.

Recent Probate Code Amendments

David C. Sojourner, Jr.
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The South Carolina Probate Code was recently amended by an Act that was effective on June 5, 1990 (R. 634). These amendments changed the procedure for the approval of settlements involving minors or incapacitated persons and clarified the procedure for the approval of wrongful death claims and survival actions.

Approval of Settlements Involving Minors or Incapacitated Persons

The approval of settlements involving minors or incapacitated persons will continue to be governed by the provisions of South Carolina Code §62-5-433. The dollar amounts included in §62-5-433(B), (C) and (D) have been increased.

Under revised §62-5-433(B), if the claim exceeds Ten Thousand ($10,000) Dollars, the circuit court of the county where the minor or the incapacitated person resides has jurisdiction over the approval of the settlement. The petitioner must file a verified petition in the circuit court requesting approval of the proposed settlement. The order approving the settlement must require that payment be made through a conservator. If a conservator has not been appointed, the petitioner shall, upon receiving the money, pay the money to the court pending the appointment of a conservator.

If the claim does not exceed Ten Thousand ($10,000) Dollars, either the circuit court or the probate court of the county where the minor or the incapacitated person resides has jurisdiction over the approval of the settlement. The following procedure must be followed to approve such claims.

> (1) If a conservator has been appointed, the conservator may either *settle without court authorization or confirmation* (as provided in §62-5-424) or the conservator may petition the court for approval under the procedure set forth for claims in excess of $10,000. Payment must be made to the conservator and the conservator shall execute a proper receipt and release or covenant not to sue, which is binding upon the minor or incapacitated person. §62-5-433(C)(1).
>
> (2) If a conservator has not been appointed, the guardian or guardian ad litem must petition the court for approval under the procedure set forth for claims in excess of $10,000. Payments must be made in accordance with §62-5-103, which provides that payment may be made to (a) the minor, if he is married; (b) any person having care or custody of the minor or incapacitated person with whom the minor or incapacitated person resides; (c) a guardian of the minor or incapacitated person; or (d) a financial institution incident to a deposit in a federally insured savings account in the sole name of the minor or for the minor under the Uniform Gift to Minor's Act. §62-5-433(C)(2).

For claims not exceeding Two Thousand Five Hundred ($2,500) Dollars, either the circuit court or the probate court of the county where the minor or the incapacitated person resides has jurisdiction over the approval of the settlement. These settlements may be effected by the parent or guardian of the minor or incapacitated person without court approval of the settlement and without the appointment of a conservator. The parent or guardian shall receive the money and execute a proper receipt and release or covenant not to sue, which is binding upon the minor or incapacitated person. Payment must be made in accordance with §62-5-103, as set forth above. §62-5-433(D).

Approval of Wrongful Death and Survival Action Settlements

South Carolina Code §62-3-715 provides that, except as restricted or otherwise provided by the will or an order in a formal proceeding, a personal representative of an estate is authorized to enter into certain listed transactions for the benefit of interested persons. The Act amended this section to add a new subsection (24) which provides that the personal representative may:

> with the approval of the probate court or the circuit court, compromise and settle claims and actions for wrongful death, pain and suffering or both, and all claims and actions based on causes of actions surviving, to personal representatives, arising, asserted, or brought under or by virtue of any statute or act of this State, any state of the United States, the United States, or any foreign country.

New Appellate Court Rules

By Charles E. Carpenter, Jr.

The following article appeared in Vol. 18, No. 3 of Defense Line. The article was out of sequence and is therefore being run again in its entirety — our apologies to the author.

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 has been eliminated and many believe that the technical pitfalls of having to state Exceptions in a manner which complies with the rules are 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 is 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."

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 be sure that every point is set forth in the statement of issues do 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, serv-

Continued on page 14

NEW APPELLATE

Continued from page 13

ing 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 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 perfecting 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 is 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.

AMICUS COMMITTEE

The SCDTAA has been asked to submit an amicus brief on the issue of whether contributory negligence should continue to be the law in South Carolina or whether by judicial decision the law should be changed to comparative negligence. The underlying case, *Laura Lee v. Florence County School District Three,* was tried to a defense verdict in Florence County before The Honorable C. Anthony Harris. Ken Suggs and William A. Bryan represented the plaintiff and Larry Orr represented the defendant. The South Carolina Supreme Court granted the plaintiff's petition to argue for the overruling of contributory negligence on August 16, 1990. The Court granted the SCDTAA petition to file an amicus brief on September 11, 1990.

ROLLING ALONG WHO SAID THAT?

Life is largely a matter of expectation • You can't win them all, if you didn't win the first one • Assume nothing • Exceptions rule • Every clarification breeds new questions • If the first person who answers the phone cannot answer your question, it is a bureaucracy •There is a difference between an open mind and a hole in the head • Nothing ever gets done on schedule or within budget • If it's worth doing, it's worth hiring someone who knows how to do it • There is always free cheese in a mousetrap • Never, ever, play leapfrog with a unicorn • Second rate people hire third rate people • He who never sticks out his neck, never wins by a nose • The first myth of management is that it exists • The wheels of progress are not turned by cranks • The other man's word is an opinion, yours is the truth and the boss's is law • Incompetence plus incompetence equals incompetence • No job is too small to botch • Information is where you find it • The world gets better every day, then worse with the evening news • People can be divided into three groups: those who make things happen, those who watch things happen, and those who wonder what happened • Those who think they know it all are very annoying to those who do • There's never time to do right, but always time to do it over • People ask stupid questions for a reason • Secret negotiations are usually neither • Of all possible reactions to any given agenda item, the action that will occur is the one which will liberate the greatest amount of hot air • You can never really get away, you only take yourself somewhere else • Not all heads are perfect, some have hair on them •

C.L.E. Seminar — November 2, 1990

The South Carolina Defense Trial Attorneys' 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.

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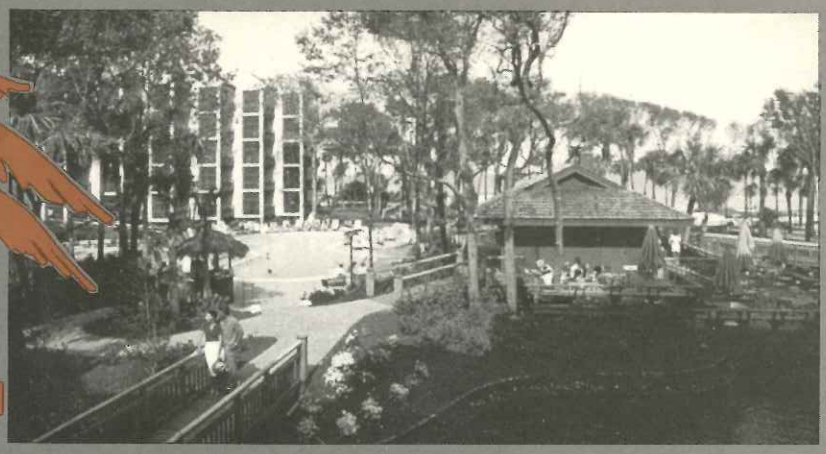

MARINER'S INN

October 25-28, 1990

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