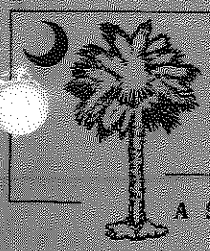
S.C. Defense Trial Attorneys' Association Volume 30 Number 4 • Winter, 2002



SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

THE DefenseLINE

2002 35TH ANNUAL MEETING RECAP

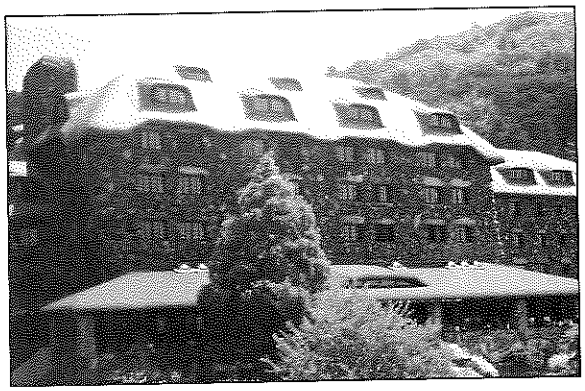
http://www.scdtaa.com

From the mountains

JOINT MEETING

July 24 - 26, 2003

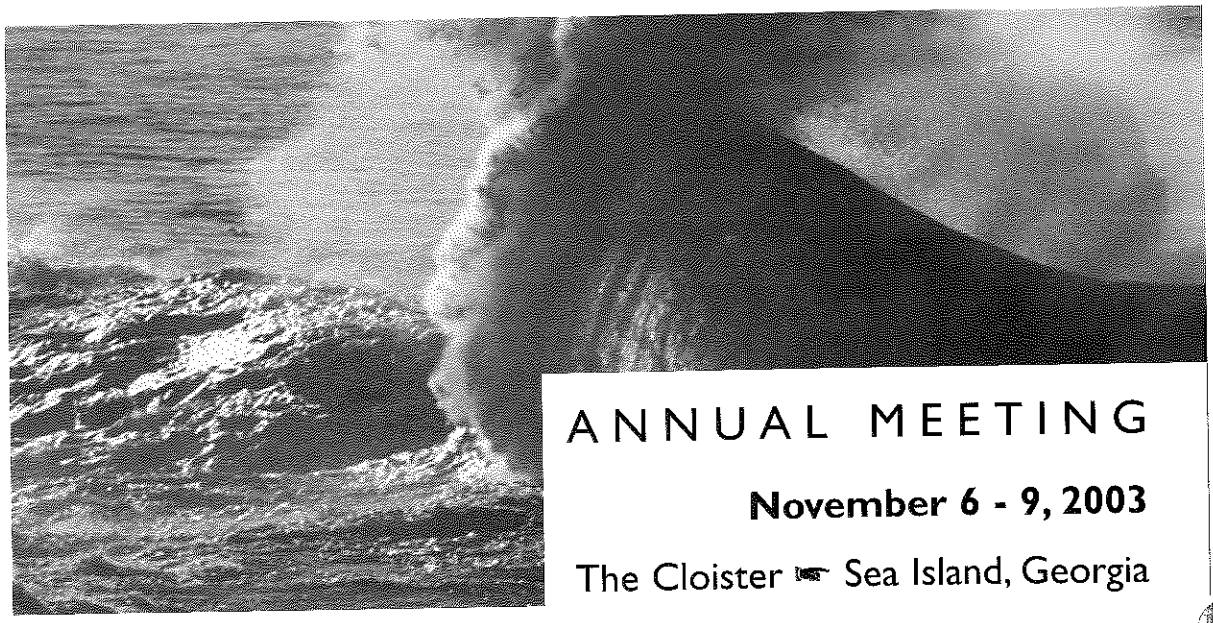
Grove Park Inn ☛ Asheville, NC



summer

TO THE SEA

fall



ANNUAL MEETING

November 6 - 9, 2003

The Cloister ☛ Sea Island, Georgia

For Additional Meeting Information Check Out SCDTAA's Website

http://www.scdtaa. com

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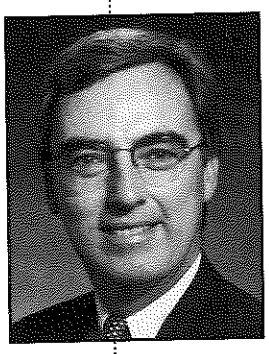
President's Letter

by Stephen E. Darling



I am humbled to serve as president of the South Carolina Defense Trial Attorneys' Association. Those who know me well may exclaim that "humble" is not contained in my personal lexicon! However, having been chosen to lead the finest group of defense lawyers in the country truly renders me both honored and proud.

We have just completed a wonderful and productive year under the erstwhile leadership of immediate past president Mills Gallivan. Several highlights stand out. In January, the Executive Committee and Officers under the direction of John Wilkerson conducted a fruitful long-range planning session in Savannah. Such topics as the format and future of our Joint Meeting, our interaction with the General Assembly, the quality of programs presented at our Joint and Annual Meetings and greater inclusion of the membership in our activities were all discussed and are being tracked by the current Executive Committee.

The Trial Academy drew a full complement of 24 students in Greenville on June 12 through 14. Under the guidance of Matt Henrikson, Donna Givens and Rob Davis, experienced defense lawyers and an invaluable judicial faculty led these young lawyers through great training which will benefit them in their trials of real cases.

Our Executive Committee, and especially Mills and the Practice and Procedures Committee chaired by Bill Duncan, set forth a defense perspective in commenting upon the confidential settlement proposal before the United States District Judges. The Honorable Joe Anderson was very open, frank and sharing with us on the pros and cons of the proposed rule in the District Court and allowed us to propound fully the defense view toward confidentiality agreements.

Several of the officers and members of our group attended the Defense Research Institute Annual Meeting in San Francisco on October 2 through 6, 2002. It was a most educational and enjoyable session, and I encourage those of you who have not visited such a national meeting, especially the DRI function, to put it on your calendar if at all possible. Such meetings are especially helpful in communicating with and sharing ideas with other state and local defense organizations (SLDO's).

Our Joint Meeting with the Claims Managers Association was held again in Asheville at the Grove Park Inn and provided a delightful opportunity for us to mingle and spend quality time with our fellow defense attorneys and claims managers. That meeting may evolve in its composition and venue over the upcoming years so look forward to its metamorphosis.

Our recent Annual Meeting conducted for the first time at Château Élan in Braselton, Georgia, was a huge success. We rolled out our new co-sponsorship of the Wills for Heroes Program as initially developed by Anthony Hayes of Nelson Mullins Riley & Scarborough. That pro bono project provides wills to first responders such as police, firefighters and EMS technicians and has been highly successful in its infancy and now will move on to even grander levels with our assistance. Work is already underway to implement that program in Charleston and other communities.

The educational program at the Annual Meeting proved to be one of our most outstanding. From trial advocacy tips by Professor Ron Carlson of the University of Georgia with the theatrical assistance of the Honorable James Lockemy to a description of the Wills for Heroes project to an absolutely fascinating account of the trial of the Jim Williams case by Sonny Seiler which served as the basis for the "Midnight in the Garden of Good and Evil" novel, everything was a treat. The second day of our meeting was highlighted by Chief Justice Jean Toal's State of the South Carolina Judiciary discussion, comments by DRI's President Sheryl Willert (originally from Columbia, South Carolina), a run through of the new SCDTAA web site by Glen Elliott, followed by Substantive Law Breakouts, a legal malpractice talk by Lane Young of Hawkins & Parnell and topped off by a riveting governor's panel discussion with former Governors James Edwards and Dick Riley, moderated by the affable Phil Lader. Not at all taking a backseat were the social events ranging from receptions to fine dinners to wine tasting to golf and tennis to a most enjoyable dinner/dance with music by the Fantastic Kays. To the very last note, numbers of revelers were dancing their cares away. Kudos to the Convention Committee of Mark Phillips, Elbert Dorn and David Rheney!

Now on to this year; I have the benefit of an outstanding group of Officers and Executive Committee members to thrust us into 2003. We have many things to anticipate and use.

The SCDTAA web site is now operative. I encourage you all to use it. Log on at www.scdtaa.com. Make use of the Members Area to share thoughts, communicate ideas, help each other with the defense of cases and accomplish our mission to promote civil justice.

Attend the meetings of the organization. Both the Joint Meeting and the Annual Meeting are great times to spend together, to earn CLE credits, to socialize with judges and commissioners, to have a good time and to share ideas and network.

Get other lawyers in your firms and communities involved. Remember Mike Bowers suggested a couple of years ago that all we had to do was ask a couple of lawyers in our firms who were not participating to get involved to boost attendance and increase activity. Re-double your efforts in that regard, and I encourage you to have others take advantage of the benefits of the SCDTAA.

We are working to add corporate counsel to the SCDTAA mix. Through the organizational help of corporate counsel in this state, that group of lawyers and their companies will provide a hugely exciting boost to the association.

As mentioned above, the Wills for Heroes program is plowing forward. One of my partners, who recently helped with writing wills in Blythewood, commented to me how fulfilling his and others' efforts were. The firefighters were genuinely appreciative of the service provided and expressed how much they were thankful. That is a great way for our organization to give something back to the communities.

The New/Young Lawyers' section of our organization is becoming more and more active. Under the leadership of Richard Hinson and a core group of younger defense lawyers, I hope to see more and more of our younger brethren becoming active early in the association and participating throughout.

I have but two agenda items for this year. One, I ask everyone to participate to the fullest extent possible. When I was a young lawyer, I had the benefit of my former mentor Dana Sinkler, who was one of the first presidents of this group, allowing me to attend Joint and Annual Meetings from my first year with our firm. He got me involved in this group, and I have stayed involved. Although not a fraternity or sorority, this organization is made up of lawyers of like mind, like work and similar ideas, goals, philosophies and ideals. Not only that, we have the same worries and problems, and a shared approach to dealing with those things is beneficial. So, be active; don't just sit on the sidelines in the "sensitive" words of my late senior partner Charles H. Gibbs "with your thumb up."

Second, as you participate and participate fully, enjoy yourself. One thing that I like to do is relax, have fun and get some pleasure out of doing things. By all means, work hard, study hard, try cases hard, but at the end of the day, having done all those things, say you have done them with pleasure and then kick your feet up, enjoy yourself and "smell the roses." My guess is if you work within this organization, you will have fun doing it and enjoy the camaraderie. From the list of things above, you can see there are myriads of ways to participate. I encourage you to sign up for committee work and be active in those committees. Once you begin working, you will find that there are more and more ways you can engage in the SCDTAA for your and the group's mutual benefit as in the oft-repeated words of Coach Lou Holtz in addressing multiple options: "and et cetera."

As a sidebar, I commend to your reading the article which appeared in one of the recent SC Bar News publications entitled "Notes from the Richland County Bar President" by D. Reece Williams, III as reprinted from the May/June 2002 issue of RICHBAR NEWS. That article does a great job of addressing a lawyer's work but at the same time correctly commenting that balance needs to be in place for family, friends and fun.

So, let's get started on a great year. Participate, share, have fun, work hard, play hard and in the end, if you can say, "I enjoyed it," we all will have achieved success. I look forward to it.

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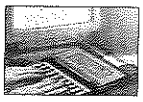

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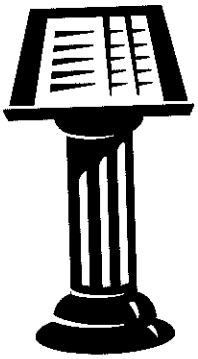
2002 SCDTAA 35th Annual Meeting Recap

Château Élan • Braselton, GA
November 7-10 , 2002

by G. Mark Phillips



An excellent time was had by all who attended the SCDTAA's Annual Meeting at the Château Élan in Braselton, Georgia. The meeting featured a celebration of the SCDTAA's thirty-fifth anniversary and recognition of its past-presidents, most of whom were in attendance.

The educational program was over the top. Noted University of Georgia trial advocacy professor Ron Carlson led us off with a mock trial which illustrated the hottest tips in trial advocacy. Among the thespian participants were Judge James Lockemy, who played counsel for the defendant in a closed head injury case. U.S. District Judge David Norton then led a panel discussion of past SCDTAA presidents, focusing on the evolution and changes in civil defense practice. Anthony Hayes of Nelson Mullins Riley & Scarborough then made a presentation on the post-9/11 Wills for Heroes program. Savannah attorney Sonny Seiler closed Friday with a fabulous talk on his successful murder defense in the case which became "Midnight in the Garden of Good & Evil", complete with video clips from the feature film.

On Saturday morning, Chief Justice Jean Toal and DRI president Sheryl Willert both provided excellent comments and addresses to The Association. After substantive law break-out sessions, Atlanta attorney Lane Young gave some witty, timely comments on how litigators can avoid malpractice claims. We then heard from Court of St. James Ambassador Phil Lader, who led an excellent panel discussion with former S.C. Governors Jim Edwards and Dick Riley.

The weekend was not all work. We were joined by a host of state and federal judges. We had a wonderful President's reception on Thursday evening, a successful golf tournament on Friday afternoon, an excellent wine tasting and dinner on Friday evening, and a fabulous dinner/dance banquet, on Saturday night which featured "The Fantastic Kays". After everyone danced the night away and slept off the weekend in excellent accommodations, it was back to the real world.

Do plan on joining the SCDTAA and the state and federal judges for this year's Annual Meeting at The Cloister on Sea Island, Georgia during the weekend of November 6, 2003.

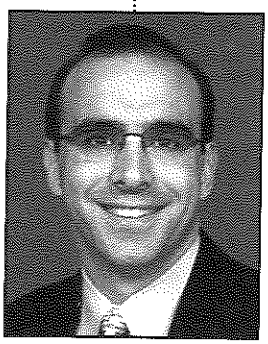
SCDTAA Attorney Starts *Wills for Heroes* Program

Wills for Heroes Provides Free Wills for Firefighters and Law Enforcement Personnel

Following the events of September 11, many Americans felt helpless as they watched volunteers work around the clock to clear rubble and search for survivors. Many Americans wanted to be in New York, Washington or Pennsylvania to assist with the clean up. For most, however, that was not possible.

Several days after the attack, David Lim, a Port Authority Police officer pulled from the World Trade Center rubble, was interviewed on a morning talk show. When asked about the volunteers flooding New York, Lim said, "You don't have to pick up a rock to help." What Mr. Lim correctly noted was that each person had something to offer and they did not have to be in New York to help. Those words, in conjunction with many others, inspired the creation of the Wills for Heroes Program.

Started by Anthony Hayes, an attorney with Nelson Mullins Riley & Scarborough, LLP, and supported by the firm, Wills for Heroes has provided over 200 free wills for firefighters in the Midlands. This program is a way for lawyers to "give back" to their communities and to honor and thank the men and women who devote their lives to saving others.



Anthony Hayes

Wills for Heroes has received corporate sponsorship from Gateway Computers. Gateway's donation of computer equipment enables attorneys to take the program directly to the firefighters.

The wills process is simple. Firefighters receive questionnaires that explain the process and outline certain basic questions. The attorneys and staff visit the fire stations to meet the firefighters, review questionnaire answers, and prepare the wills. Following personal and confidential meetings, wills in final form are issued. The process generally takes 30 minutes and the firefighters leave with fully executed wills. The program has been offered to the Columbia, Irmo and Lexington fire departments.

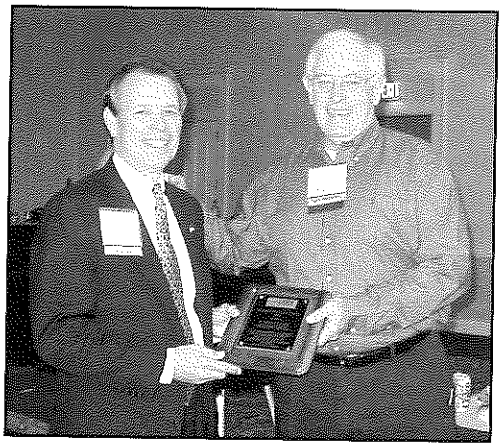
The Young Lawyers Division of the South Carolina Bar has adopted the program, and with participation from lawyers throughout the state, the plan will be offered in counties throughout South Carolina and broadened to include law enforcement personnel.

Following September 11, Americans came together to support our leaders and communities. As a result, our communities were made stronger and America became stronger. Together, we can build stronger communities, a stronger state, and a stronger nation.

Defense Research Institute

Awards H. Mills Gallivan the 2002 Exceptional Performance Citation

For Having Supported and Improved
the Standards and Education of
The Defense Bar, and for
Improvement of the Administration
of Justice in the Public Interest



DRI State Representative Bill Davies presents H. Mills Gallivan with the award.

Member Profile: David E. Dukes

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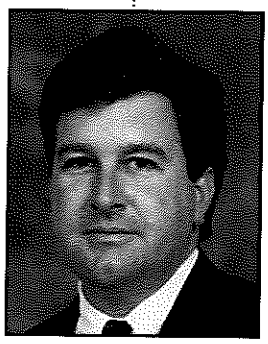

David E. Dukes

David E. Dukes has been nominated as Second Vice President of the Defense Research Institute.

Mr. Dukes has been a defense attorney for 18 years. He joined Nelson Mullins firm immediately upon graduation from law school in 1984. In his practice, he focuses on drug and medical device litigation; he also engages in products liability, general corporate, and intellectual property litigation. He has served for national trial counsel for companies in both the computer and pharmaceutical industries. He has been active in the International Association of Defense Counsel and the South Carolina Defense Trial Attorneys' Association. David is a Fellow of the American Bar Foundation and a permanent member of the Fourth Circuit Judicial Conference.

Mr. Dukes has been a DRI member since 1985, and has sat on the Board of Directors since 1999. He has served as DRI State Representative for South Carolina. David has been especially active in the Drug & Medical Device Committee, serving as its Chair and speaking at its seminars. For the past seven years, he has been on the Law Institute, the group that plans and conducts all DRI seminars. David was the Chair of DRI Annual Meeting in 2001.

Mr. Dukes has four district goals for DRI. First, he would build on his strong background in lawyers' education and publications, and his knowledge and experience with DRI committees, to provide top quality services to all DRI members. Second, he would increase DRI's visibility as the national voice of the defense bar, by working with all segments of the defense community to reach a consensus on key issues affecting defense lawyers. These include the role of experts, class actions, and electronic discovery. This defense bar positions would then be effectively communicated through the rules-making process, testimony before legislative bodies, and scholarly publications.

DRI can provide a forum for discussion and resolution on issues on which there may be disagreement with in the defense community. David will continue to emphasize the Corporate Roundtable and the Insurance Roundtable, DRI initiatives that bring together leaders of the corporate and insurance world to examine significant issues in a constructive way. Finally, David will push for DRI to provide more law office management information and resources for member firms. He understands these needs from his experience on his firm's Executive Committee and as managing partner.

Mr. Dukes believes that the entire defense community – defense counsel, self-insured companies, insurance companies, and other defense organizations – mist unite its resources to jointly work on civil justice initiatives designed to ensure that defense lawyers and their clients have a level playing field in courts across the country.

"The appropriate role for DRI is to provide the highest quality education for the defense attorneys, to serve as the spokesperson for the defense bar on national issues, and to facilitate the unification of the entire defense community."

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South Carolina Behind the Curve:

The Abolishment of Joint and Several Liability

by Wendy J. Keefer

Since the late 1980's, state legislatures have been lining up to abolish or modify the common law doctrine of joint and several liability. Indeed, over 30 states no longer apply strict joint and several liability in their courtrooms.[1] South Carolina, however, is not one of those states. Remaining tied to this arcane principle of joint and several liability, South Carolina continues to hold each defendant liable for an entire award to a plaintiff even where a particular defendant is only marginally liable for the plaintiff's damages. It is time to bring South Carolina into the civil justice reform fold that has now enveloped so many other States. The continued respect for our civil justice system and the ability to attract and retain industry and jobs in and doing business in South Carolina depends on it.

As the defense bar is well aware, joint and several liability makes each defendant in a civil lawsuit responsible for the entire amount of any verdict, regardless of the extent to which a particular defendant is actually liable. This doctrine permits plaintiffs to seek to collect entire judgments from a single defendant, typically the defendant believed to have the deepest pockets, even where other defendants have more culpability. The resulting search by plaintiffs for at least one "deep pocket," and the related naming of any and all potential parties in a blind search for that deep pocket, muddies the legal system and unnecessarily puts a strain on the cost of doing business in or with South Carolina. And, the impact is not simply on businesses but on individuals who may find themselves defendants in lawsuits. In addition, defendants who may settle with a plaintiff prior to trial and verdict are absolved of any further liability, even if a jury ultimately allocates or would allocate 90% of the fault for the plaintiff's injury to that defendant.[2]

Although not everything in law is or should be "fair," the only logical system today -- where comparative fault doctrine already requires juries in South Carolina to allocate fault between the plaintiff and defendants -- is to require each defendant to pay only its proportionate share of the plaintiff's loss. Today, a large majority of States throughout the country have modified or abolished altogether the doctrine of joint and several liability. It is time the South Carolina General Assembly do the same for reasons that should be apparent in this day of ever increasing litigation.

To be sure, the goal of the civil justice system is to restore plaintiffs, to the extent possible, to their pre-injured state; this end does not justify the means of requiring parties to bear the financial burden to an extent greater than their wrongdoing. Now is the time and opportunity to fix this injustice and to force the system to hold defendants accountable to the extent they are found by juries or judges to be accountable – no more, no less.

Below is model legislation to accomplish just this goal. I urge the defense bar, as well as all attorneys, who wish to hold responsible those who would cause injury, while alleviating the burden on those whose negligence or other wrongdoing is not of as such a serious nature, to support this or similar legislation in South Carolina.

Model Legislation

(Provided by the American Tort Reform Association, with modifications)

Model Joint and Several Liability Abolition Act

Section 1 -- Short Title.

This Act may be cited as the South Carolina Joint and Several Liability Abolition Act.

Section 2 – Definitions.

The following words, as used in this Act, shall have the meanings set forth below, unless the context clearly requires otherwise:

(1) "Damages" means pain, suffering, inconvenience, physical impairment, disfigurement, mental anguish, emotional distress, loss of society and companionship, loss of consortium, injury to reputation, humiliation, any other theory of damages such as fear of loss or illness or injury, loss of earnings and earning capacity, loss of income, medical expenses and medical care, rehabilitation services, custodial care, burial costs, loss of use of property, costs of repair or replacement of property, costs of obtaining substitute domestic services, loss of employment, loss of business or employment opportunities, any and all derivative claims, and other

Continued on page 10

Colorado (abolished except in cases where the tortfeasors acted in a concerted effort to commit the tortuous act, SB 70, 1986);

Connecticut (abolished with regard to noneconomic damages unless the liable party's share of the judgment is completely uncollectible, HB 6134, 1986);

Florida (applies a multi-tiered approach to limit the doctrine basing application on whether the plaintiff is at fault and to what to degree and whether the defendant's proportion of fault is greater or less than 10%, HB 775, 1999);

Georgia (abolished where the plaintiff is apportioned any fault in his injury, HB 1, 1987);

Hawaii (abolished with regard to government defendants, HB 1088, 1994, and with regard to noneconomic damages against any defendant where the defendant is 25% or less at fault, SB S1, 1986);

Idaho (abolished except for intentional torts, hazardous waste, and medical and pharmaceutical product liability cases, SB 1223, 1987);

Illinois (abolished with regard to noneconomic damages from defendants 25% or less at fault, except in auto, product, or environmental cases, SB 1200, 1986);

Iowa (abolished for defendants found to be less than 50% at fault, HF 693, 1997);

Kentucky (abolished, making defendants only liable for their apportioned fault amount of any verdict, HB 551, 1988);

Louisiana (abolished in its entirety, HB 21, 1996);

Massachusetts (abolished against public accountants, HB 574, 2001);

Michigan (abolished except in cases of employers' vicarious liability and medical liability cases where the plaintiff bears none of the fault for the injury, HB 4508, 1995, also abolished as to municipalities, HB 5154, 1986 – which used to also contain exceptions for products liability actions where the plaintiff was not at fault and where uncollectible shares of the judgment existed, which shares would be apportioned among the solvent defendants; it is unclear whether these rules still apply after the 1995 enactment);

Minnesota (abolished for defendants 15% or less at fault, which defendants can only be made to pay up to four times their share of damages, HF 1493, 1988);

Mississippi (abolished except to the extent necessary for the injured party to receive at least 50% of his recoverable damages, HB 1171, 1989);

Missouri (abolished where the plaintiff is apportioned any fault, HB 700, 1987);

Montana (retained its current modified system of joint and several liability, enacted by SB 51 in 1987, abolishing the doctrine where a defendant is found to be less than 50% at fault, but revised comparative negligence to permit allocation of a percentage of liability to defendants who settle or are otherwise released by the plaintiff from liability and allowing those defendants to intervene where necessary, HB 571, 1997, if this statute is held to be unconstitutional, HB 572 is to take effect, which completely abolishes application of the joint and several liability doctrine);

Nebraska (replaced the slight gross negligence rule with a 50/50 rule providing the plaintiff full recovery where he is less than at fault than all the defendants, but abolishing the joint and several doctrine for noneconomic damages, LB 88, 1991);

Nevada (abolishing with regard to noneconomic damages in medical malpractice claims, AB 1, 2002, having earlier barred application of the doctrine in its entirety, except for products liability, toxic waste, and intentional tort cases, and where the defendants acted in concert to cause the harm, SB 511, 1987);

New Hampshire (abolished as to all defendants less than 50% at fault, SB 110, 1989);

New Jersey (abolished as to all defendants less than 60% at fault, extending this limit across the board from its earlier limit which applied only to noneconomic damages, SB 1494, 1995);

New Mexico (abolishing except in cases involving toxic torts, products liability, and situations "having a sound basis in public policy, SB 164, 1987);

New York (abolishing with regard to any defendant less than 50% at fault, except where the defendant acted with reckless disregard or in auto, toxic tort, contract, construction, and product liability – where the manufacturer could not be joined – cases, SB 9391, 1986);

North Dakota (abolished except for intentional torts, products liability, and cases where the defendants acted in concert to cause harm, HB 1571, 1987);

Ohio (initially abolished for defendants less than 50% at fault and for noneconomic damages even where the defendant is more than 50% at fault, HB 350, 1996; unfortunately declared unconstitutional by the Ohio Supreme Court);

Oregon (abolished except where the defendant is insolvent within a year of final judgment, in which case where that defendant is less than 20% at fault he would only be liable for up to two times his exposure – proportion of fault, SB 601, 1995, abolished in its entirety with regard to noneconomic damages and where the defendant is less than 15% at fault, SB 323, 1987);

Pennsylvania (abolished except where the defendant is liable for intentional tort or fraud, environmental hazards, civilly liable for drunk driving, or where the defendant is more than 60% at fault, SB 1089, 2002);

South Dakota (no defendant less than 50% at fault may be held liable for more than two times his apportioned fault percentage of the verdict, SB 263, 1987);

Continued on page 12

Colorado (abolished except in cases where the tortfeasors acted in a concerted effort to commit the tortuous act, SB 70, 1986);

Connecticut (abolished with regard to noneconomic damages unless the liable party's share of the judgment is completely uncollectible, HB 6134, 1986);

Florida (applies a multi-tiered approach to limit the doctrine basing application on whether the plaintiff is at fault and to what to degree and whether the defendant's proportion of fault is greater or less than 10%, HB 775, 1999);

Georgia (abolished where the plaintiff is apportioned any fault in his injury, HB 1, 1987);

Hawaii (abolished with regard to government defendants, HB 1088, 1994, and with regard to noneconomic damages against any defendant where the defendant is 25% or less at fault, SB S1, 1986);

Idaho (abolished except for intentional torts, hazardous waste, and medical and pharmaceutical product liability cases, SB 1223, 1987);

Illinois (abolished with regard to noneconomic damages from defendants 25% or less at fault, except in auto, product, or environmental cases, SB 1200, 1986);

Iowa (abolished for defendants found to be less than 50% at fault, HF 693, 1997);

Kentucky (abolished, making defendants only liable for their apportioned fault amount of any verdict, HB 551, 1988);

Louisiana (abolished in its entirety, HB 21, 1996);

Massachusetts (abolished against public accountants, HB 574, 2001);

Michigan (abolished except in cases of employers' vicarious liability and medical liability cases where the plaintiff bears none of the fault for the injury, HB 4508, 1995, also abolished as to municipalities, HB 5154, 1986 – which used to also contain exceptions for products liability actions where the plaintiff was not at fault and where uncollectible shares of the judgment existed, which shares would be apportioned among the solvent defendants; it is unclear whether these rules still apply after the 1995 enactment);

Minnesota (abolished for defendants 15% or less at fault, which defendants can only be made to pay up to four times their share of damages, HF 1493, 1988);

Mississippi (abolished except to the extent necessary for the injured party to receive at least 50% of his recoverable damages, HB 1171, 1989);

Missouri (abolished where the plaintiff is apportioned any fault, HB 700, 1987);

Montana (retained its current modified system of joint and several liability, enacted by SB 51 in 1987, abolishing the doctrine where a defendant is found to be less than 50% at fault, but revised comparative negligence to permit allocation of a percentage of liability to defendants who settle or are otherwise released by the plaintiff from liability and allowing those defendants to intervene where necessary, HB 571, 1997, if this statute is held to be unconstitutional, HB 572 is to take effect, which completely abolishes application of the joint and several liability doctrine);

Nebraska (replaced the slight gross negligence rule with a 50/50 rule providing the plaintiff full recovery where he is less than at fault than all the defendants, but abolishing the joint and several doctrine for noneconomic damages, LB 88, 1991);

Nevada (abolishing with regard to noneconomic damages in medical malpractice claims, AB 1, 2002, having earlier barred application of the doctrine in its entirety, except for products liability, toxic waste, and intentional tort cases, and where the defendants acted in concert to cause the harm, SB 511, 1987);

New Hampshire (abolished as to all defendants less than 50% at fault, SB 110, 1989);

New Jersey (abolished as to all defendants less than 60% at fault, extending this limit across the board from its earlier limit which applied only to noneconomic damages, SB 1494, 1995);

New Mexico (abolishing except in cases involving toxic torts, products liability, and situations "having a sound basis in public policy, SB 164, 1987);

New York (abolishing with regard to any defendant less than 50% at fault, except where the defendant acted with reckless disregard or in auto, toxic tort, contract, construction, and product liability – where the manufacturer could not be joined – cases, SB 9391, 1986);

North Dakota (abolished except for intentional torts, products liability, and cases where the defendants acted in concert to cause harm, HB 1571, 1987);

Ohio (initially abolished for defendants less than 50% at fault and for noneconomic damages even where the defendant is more than 50% at fault, HB 350, 1996; unfortunately declared unconstitutional by the Ohio Supreme Court);

Oregon (abolished except where the defendant is insolvent within a year of final judgment, in which case where that defendant is less than 20% at fault he would only be liable for up to two times his exposure – proportion of fault, SB 601, 1995, abolished in its entirety with regard to noneconomic damages and where the defendant is less than 15% at fault, SB 323, 1987);

Pennsylvania (abolished except where the defendant is liable for intentional tort or fraud, environmental hazards, civilly liable for drunk driving, or where the defendant is more than 60% at fault, SB 1089, 2002);

South Dakota (no defendant less than 50% at fault may be held liable for more than two times his apportioned fault percentage of the verdict, SB 263, 1987);

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South Carolina Behind the Curve

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Texas (abolished for defendants less than 51% at fault, SB 28, 1995, further limiting an earlier 1987 modification);

Utah (completely abolished, SB 64, 1986, clarified that the doctrine was indeed completely abolished in HB 74, 1999);

Vermont (completely abolished, 1985);

Washington (abolished except in hazardous or solid waste disposal, business torts and cases involving the manufacture of generic products, as well as excepting from the abolition cases in which the defendants acted in concert to cause harm or the plaintiff is fault free, SB 4630, 1986);

Wisconsin (abolished where the defendant is less than 51% at fault, but requiring the plaintiffs portion of fault to be measured against the defendants in determining this apportionment, SB 11, 1995);

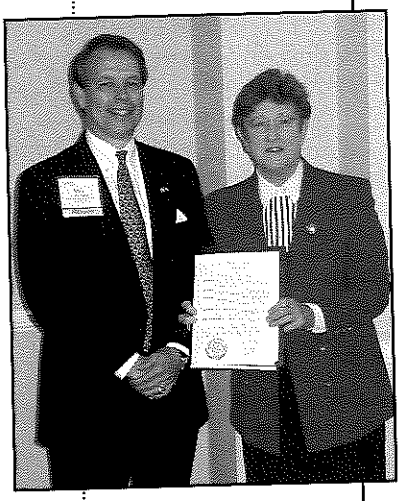
Wyoming (abolished, SB 17, 1986, and clarified as to definitions of fault in SF 35, 1994).

Footnotes

1 See list and description of other States efforts to abolish or modify the doctrine of joint and several liability at the end of this discussion.

2 For example, a doctor found only 25% responsible for a patient's injury in a case where another doctor was found 75% responsible, could be on the hook for the full verdict, even where that verdict is in the realm of millions of dollars. This scenario becomes particularly likely where the doctor, or other party most at fault, is unable to pay the verdict due to bankruptcy or some other financial shortfall. Just this situation occurred in a 1987 case in Texas.

Wendy J. Keefer is former Chief of Staff in the Office of Legal Policy at the Department of Justice and currently practices law in Charleston, South Carolina with the firm of Barnwell Whaley Patterson & Helms, LLC.



State of South Carolina
Proclamation
by
Governor Jim Hodges

WHEREAS, founded on November 14, 1968, the South Carolina Defense Trial Attorneys' Association is dedicated to elevating the standards of trial practice and to encouraging the highest standards of professionalism and courtroom conduct; and

WHEREAS, today, the South Carolina Defense Trial Attorneys' Association consists of over 700 attorneys who counsel and defend corporations and individuals in civil matters throughout the state of South Carolina; and

WHEREAS, the South Carolina Defense Trial Attorneys' Association is dedicated to enhancing the knowledge and improving the skills of defense lawyers by promoting the fair administration of the civil justice system through educational programs and the open exchange of information and ideas; and

WHEREAS, through its active involvement, leadership, and recognition on a state, local, and national level, the South Carolina Defense Trial Attorneys' Association has built a reputation of excellence as one of the preeminent civil defense trial bars in the United States.

NOW, THEREFORE, I, Jim Hodges, Governor of the Great State of South Carolina, do hereby proclaim November 9 - 16, 2002, as

SOUTH CAROLINA
DEFENSE TRIAL ATTORNEYS' ASSOCIATION WEEK

throughout the state and encourage all South Carolinians to recognize the many contributions made by the South Carolina Defense Trial Attorneys' Association to the civil justice system and legal profession in the Palmetto State.

SEAL OF THE GOVERNOR SOUTH CAROLINA 1776 ANIMIS OPIBUSQUE PARATI

Jim Hodges

Jim Hodges
Governor
State of South Carolina

Discovery for Defense Lawyers

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

To the Bar of South Carolina:
From the Dawn of the Revolution to the present day, It has been abundant in the production of Orators, Patriots, Statesmen, and Soldiers!
Martin Van Buren
Toast on March 17, 1827
St. Andrews Hall, Charleston

Taking a Plaintiff's Deposition in a Personal-Injury Case: Pre-Deposition Strategy and Tactics

I. Some History and Introduction

In 1836, the W. Riley Company, located at 110 Broad Street in Charleston, published and sold *Rules of the Courts of Sessions and Common Pleas, of the Courts of Equity, and of the Court of Appeals of South Carolina.* The circuit-court rules listed in it were promulgated on May 7, 1814 by Judges Grimke, Bay, Brevard, Smith, Nott, and Colcock while in Charleston. Other than the requirement that lawyers wear black gowns and coats[1] and that the sheriff sport a black coat, military hat, and sword,[2] we would feel relatively comfortable litigating a case in the early 1800s. By then, lawyers no longer had to petition the chancery for the right to do discovery,[3] and depositions were an important part of trial practice. General sessions and common pleas rules LXI and LXII allowed either party to apply for commissioners to take pretrial depositions. Similarly, equity rules XIX, XX, and XXI, issued on March 26, 1814 in Charleston by Chancellors DeSaussure, Gailliard, Waites, James, and Thompson, also regulated depositions. The equity rules allowed for four commissioners, two chosen by each party. The commissioners could take depositions of witnesses if they were either elderly, sick, or otherwise infirm.[4] (Imagine persuading a witness with low-back pain to travel by horseback from Greenville to Charleston for trial.) The procedure was similar to that for depositions upon written questions as set forth in Federal and South Carolina Rules of Civil Procedure 31.

One thing is for sure. Depositions often are the most effective means of getting a grip on a witness's character, background, and jury appeal - not to mention learning about her knowledge of the facts. This column addresses the strategy and tactics used in taking a plaintiff's personal-injury deposition, although the basics outlined here can apply to most other depositions too. It is geared toward young trial lawyers.

II. The Standard Stipulations

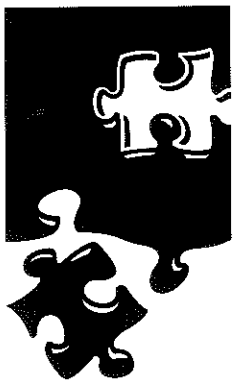
At the beginning of a deposition, whether you want her to or not, the court reporter often will ask, "Standard stipulations?" or "Usual stipulations?" I have seen this question precipitate some fairly heated arguments. Court reporters are not hired to bring the lawyers together on a stipulation of any sort and would be better served not trying to do so. Sometimes the stipulation is gratuitously inserted in a deposition transcript even when it was never discussed. The "standard" stipulation is as follows:

> *It was stipulated by and between counsel for the parties that this deposition is taken pursuant to notice and that all questions as to notice are waived; that all objections, save as to the form of the question, are reserved until the time of trial; that the deposition is taken pursuant to the [Federal or South Carolina] Rules of Civil Procedure, for the purposes allowed therein.*

Although I have never had the standard stipulations become a factor in any case in which I have been involved, it came very close in one of my former partner's trials, when a police officer died shortly after the deposition. The stipulation appears to favor the *non-questioning* attorney, because it allows most of her objections to be reserved until trial. My practice is not to agree to the stipulation if I am taking the deposition, but simply to say that the deposition is being taken pursuant to the "Federal (or South Carolina) Rules of Civil Procedure," which are very similar to the standard stipulations anyway.

III. Deposition Objections

Depositions should be divided into at least two categories: those in which the witness is expected to testify at trial and those where he is not. If the witness will testify in person at trial, all objections need not be put on the record except in special circumstances. The advisory committee to the Federal Rules of Civil Procedure recognized that regardless of the "usual stipulation," most deposition objections may be raised for the first time at trial and "should be kept to a minimum during a deposition."[5] Objections to hearsay, irrelevant testimony, unfairly



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prejudicial evidence, and most other questions need not be made in a discovery deposition. Unless there is a fundamental defect in the actual deposition procedure itself,[6] the only time objections generally must be made in a discovery deposition are: (a) if the question itself is phrased improperly, (b) if other additional questions must be asked to lay a more complete foundation for the question just asked, or (c) if the question solicits privileged testimony.

When a witness likely will not testify at trial, however, all objections should be on the record, and this should be explicitly stated at the beginning of the deposition.[7] "Continuing objections" generally are invalid, unless allowed by the judge at trial or by stipulation. Thus, if the deposition is for trial, each objection should be put on the record, or the lawyers should stipulate on the record that a continuing objection to a particular line of questioning is acceptable.

Another common objection at a standard discovery deposition is to the "form of the question." There are two problems with this type objection. First, it requires the trial judge and the appellate courts to speculate about the ground for the objection.[8] Second, its vague nature permits the objecting lawyer to sandbag the questioning attorney and later decide at his leisure what ground(s) he will choose for the objection. In this way, an "objection to the form" allows a party to sidestep the common-law rule that a party may not state one ground for an objection then later substitute another rule in its place.[9] Rule 30(c) states that examination and cross-examination "may proceed as permitted at the trial under the provisions of the Federal [and South Carolina] Rule[s] of Evidence" and that the objections shall be noted by the court reporter. An "objection to the form" is not a proper trial objection under the rules of evidence. However, there are no Fourth Circuit or South Carolina cases specifically addressing this issue. One way to deal with this potential problem is simply by stating the specific ground for your objection (e.g., "leading" or "lacks a proper foundation") in a non-disruptive and non-suggestive way.[10] Another possible solution is to reach agreement with the other lawyers at the deposition that unless there is a request for clarification, an "objection to the form" is adequate to protect the record. If another lawyer objects "to the form" of one of your questions, ask her for the basis of the objection; often there will be none.

IV. Strategy and Tactics

(A) Discovery Approach v. Impeachment Approach

There are at least two types of strategies employed by attorneys in taking plaintiffs' depositions. The first I will call the discovery approach, and the second is the impeachment approach. Using the discovery approach, the lawyer focuses on information useful in evaluating and settling the case. The attorney takes a more wide-ranging deposition, asking in-depth questions about all issues that might be relevant. When a witness testifies contrary to information in a document (for example, a medical history) or information known to the lawyer, the attorney may produce the document and question the plaintiff about the inconsistencies.

The second approach is the trial approach. In this type deposition, if a plaintiff testifies contrary to documents or information the lawyer suspects or knows to be true, the matter is not explored further; the attorney simply waits until trial to produce[11] the contrary document and uses it to impeach the witness's credibility. For example, if a plaintiff were to deny at his deposition any other injuries similar to the one being litigated, the questioning attorney would pursue the matter no further, even if she knew this to be untrue. Then if records subsequently subpoenaed showed other similar injuries, the plaintiff's credibility might be impeached at trial by evidence of the other injuries.

I use the trial-oriented approach in most cases. Even in a discovery-oriented plaintiff's deposition, I very rarely will contradict an obvious untruth by showing contradictory documents or records. I just let them lie (the documents and the witness) until trial. The key is not to ask one question too many. Remember, however, that unless you provide the witness with copies of documents the required number of business days before the deposition, the witness and her lawyer may discuss them privately before she answers your questions about the documents.[12]

(B) Credibility

There is an old saying among trial lawyers: damages affect liability, and liability affects damages. Lies are like viruses - they don't stay in one place, but instead infect the entire *corpus* of a party's case. Credibility is the key to winning many personal-injury cases, but especially so with soft-tissue claims. Even when the plaintiff's injuries are obvious (e.g., a broken leg), she still may exaggerate her damages and recovery. She may fabricate physical "impairments" and "disability" - two different concepts.[13] Many jurors are suspicious of personal-injury claimants, especially when common sense tells them that no injury likely occurred, such as when there are no visible injuries, when an automobile accident resulted in light damage, when the plaintiff is caught in an obvious lie, and the like. As Daryl Hawkins once observed, "A little fraud goes a long way."

(C)(1) Giving the Plaintiff the Keys

Over the years, I have learned that certain key points distinguish an honest plaintiff from a dishonest one. A party's deposition is both an interrogation and a test, and often you will not know until after her deposition whether a plaintiff has been truthful with you. She holds the key to her credibility. An honest plaintiff will testify consistently, not exaggerate her claims, and admit obvious, common-sense notions

about the case. After the deposition, witnesses will be interviewed and her records will be subpoenaed. If she has been truthful and your client is liable, she should receive full value for her claim. However, if she has been untruthful, her claim may be worth less, or even nothing.

My depositions are simply a matter of asking the plaintiff questions on critical points and seeing her responses. Like bowling for dollars, it is simply a matter of setting up the plaintiff with questions, and if they are answered falsely, knocking down her bowling pins (untruths) one-by-one at trial. Here are some potential lines of questioning.

(C)(2) Contradicting the Plaintiff Through Her Own Doctors and Employers

Pitting the plaintiff against her own witnesses[14] is an important way of attacking her credibility. This is especially true with her medical-care providers such as the EMS paramedic, nurse, ER doctor, and primary treating physician.

Question the plaintiff about the favorable points you've discovered in her medical records received pursuant to discovery requests, especially common-sense observations and statements that are contradictory of a person in acute pain. (When questioning the plaintiff, do not refer to the records, just ask about the facts themselves.) These common-sense observations are powerful evidence to a jury, because they are things to which jurors can easily relate and which make for vivid images. In an involuntary spasm of self interest, a plaintiff often will flatly deny any observation in the medical records if it hurts the plaintiff's case. Then the plaintiff has compounded the harmful note in the record by lying about it.

For example, if the records indicate "NAD"[15] at the accident scene or the emergency room, ask her whether she were in severe pain at that time. If she claims she had been in acute distress, you then may use the testimony of her own ER doctor or nurse to impeach her. Determine if her gait were recorded as being normal. If so, or there is no record of an abnormal finding, question her whether her pain had been such that it caused her to have trouble walking or to "limp." An honest plaintiff will admit that she could walk with no problems, but a dishonest one might manufacture a prominent limp. If she says that she did have trouble walking,[16] ask her how many weeks or months this occurred. You then may use witnesses to dispute this allegation. Similarly, if the records show no visible injuries, ask her about this issue. If she alleges visible injuries, you again may use her medical-care providers to impeach her credibility.

(C)(3) The Plaintiff's Medical History

When giving medical histories to medical care providers, plaintiffs sometimes deny prior injuries or similar pain when, in fact, there were prior problems. I have often wondered why a dishonest plaintiff would deny prior similar pain, especially when the previous pain involved longstanding medical treatment; apparently the rationale is the plaintiff wants you to believe that the defendant caused her a "new" injury, and thus it (and any impairment) is worth more in compensation. Obviously a preexisting condition is important to damages; however, it is more important for another reason: it shows the plaintiff was untruthful to her doctors. A liar is odious to the jury and usually will be treated with callous disregard by it.

(C)(4) Denying the Obvious

Again, this is another example of giving the plaintiff the keys to her own credibility. Ask the plaintiff about obvious truths the jury will expect her to answer. When a witness denies obvious truths, she is seen as less credible in the jury's eyes. For example, where the plaintiff alleges a large visible floor spill on which she slipped and fell, question her whether in fact the accident would not have been avoided if she had simply looked down before she fell. Or in a minor-damage auto accident case, show her pictures of the auto and ask her if in fact they show only minor damage; for some reason, dishonest plaintiffs have trouble admitting that minor damage is, in fact, minor damage, or in some cases, claim they never saw the damage to their own vehicles.

Next Column: Outline for a Plaintiff's Personal-Injury Deposition and Comments

Footnotes

1 S.C. R. Com. Pl. XIII (circa 1836).

2 *Id.* at R. XIV.

3 Samuel L. Prince, *Our Common Law Heritage* 25 (1959) (discussing necessity for discovery hearing in equity court).

4 S.C. R. Eq. XX (circa 1836).

5 Fed. R. Civ. P. 30(d) advisory committee note to 1993 amendments.

6 Examples of such fundamental defects are a failure to serve a deposition notice, a court reporter who is not a notary public, a witness or lawyer who is intimidating the deponent, or other matters fundamental to the integrity of the deposition, but unrelated to the questions and testimony themselves.

7 For example: "This deposition is being taken to be published to the jury at trial. All objections must be on the record."

8 *See Mayor v. Theiss*, 729 A.2d 965 (Ct. App. Md. 1999) (deposition objection "to the form of the question" is inadequate). I have unofficially consulted one venerable and well-respected federal judge in South Carolina who agrees with the reasoning in *Theiss* regarding the inadequacy of an objection "to the form." I also attempted to contact Judge Gawthrop through the United States Court for the Eastern District of Pennsylvania for his opinion regarding the propriety of a deposition objection to the "form of a question," but the judge is deceased. Judge Gawthrop's well-known order setting deposition guidelines has been adopted by the federal and state courts in South Carolina.

9 *Cf. State v. Ard*, 332 S.C. 370, 505 S.E.2d 328

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(1998) (may not cite one rule at trial and different one on appeal); Jean Hoefer Toal, Robert A. Muckenfuss, & Shahin Vadai, *Appellate Practice in South Carolina* 58 (2d ed. 2002) (may not raise new issue on appeal).

10 *See also* 8A Charles A. Wright. Arthur R. Miller, & Richard L. Marcus, *Federal Practice and Procedure: Civil* 2d Section 2113, at 97 (1994) ("On one score, the 1993 amendments [to the Federal Rules of Civil Procedure] make it clear that there should be some explanation of a [deposition] objection."). Cf. Section 2156, at 206 ("[The rule] should be interpreted to permit sufficient explanation to . . . notify the interrogator of the ground for the objection and thereby allow revision of the question to avoid the problem.").

11 Of course, if information were requested through discovery, it must be produced in a timely fashion.

12 Fed. Local Civ. R. 30.04(H) (3 business days); S.C. R. Civ. P. 30(j)(8) (2 business days).

13 *Impairment and disability* often are confused. *Impairment* refers to a body part or function that is damaged. An impairment need not cause pain or any limitation in the way the injured person works or lives. A person with a permanent impairment may still be able to do her job with no limitations at all. For example, a herniated disc is a disc that no longer functions like a normal one. It may cause pain and restrict a person's ability to do her job, or it may not. Regardless, the herniated disc is damaged and "impaired." A scar is an impairment of the skin. It very likely causes no pain and has no effect upon someone's ability to do most jobs. *Disability* refers to a person's ability to do a particular job, usually because of a physical impairment. A person may suffer a herniated disc in an accident, resulting in a 10% impairment. If the person's job involved lifting heavy objects and the herniation caused him to be unable to lift, he also might be totally disabled from that job. On the other hand, if the person who suffered the 10% impairment worked at a job involving no lifting, such as a lawyer, he might have no disability.

14 By "pitting" the plaintiff against her witnesses, I do not mean that at trial that you should violate the state-court evidence rule prohibiting pitting witnesses against one another. See Ralph King Anderson, Jr., *Nuts and Bolts of South Carolina Substantive and Procedural Law* 299-308 (2d ed. 1998).

15 "NAD" is medical shorthand for "no acute (or apparent) distress."

17 I have been amazed at how many plaintiffs claim they had to limp for weeks after an accident.

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

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