



# THE DefenseLINE

## Celebrating **40 Years** of Service to Our Members



### Second Female President Assumes SCDTAA's Highest Office



# President's Message

by Donna S. Givens



**H**appy New Year! We are off to a great start and we have an exciting year ahead. I look forward to working with all of you to advance our best interests. I am optimistic that we will make progress on various fronts to positively affect the quality of life for all of us who practice law.

Upcoming during the next months will be our Trial Academy, Joint Meeting at the Grove Park Inn, and Annual Meeting at the Ritz-Carlton at Amelia Island. We have education and fun times to which we can all look forward. In addition, there will be other opportunities for us to get together and share our ideas, talk about

our concerns, and enjoy each other's company, as well as that of our guests during these various meetings.

I challenge you all to take a moment (yes, right now) to recall those law school days when we focused not on who sat on which side of the courtroom, but instead on our common goal to "make it through." Indulge yourself and recall the friendships we forged in the process of meeting, indeed surpassing that common goal. Those friends with whom we toiled side by side in school are now our professional colleagues, and while we may be on different sides, and have chosen different paths, we need to take time to remember that we still have that common denominator and to be kind to each other as we move forward. Take a moment to contact someone from those days, perhaps a person with whom you have not spoken in a while, or have been meaning to check on. You won't be disappointed, and you never know whether that person might be having one of those days where your call is a welcome relief or even a lifeline. As lawyers, we need to remember our common genesis, and that we began this endeavor by liking each other. It's acceptable to continue that, no matter what side you represent.

At the South Carolina Bar meeting in Charleston, we co-sponsored an event with the South Carolina Trial Attorneys, called "Last Course at Tristan," shown on the program at 10:00 p.m. till 1 a.m. Saturday night. Many thoughts ran through my mind as I tried to ascertain the details of the function I was to attend. Since the time was not a typographical error, I knew we weren't playing golf. And when I learned that "Tristan" is a restaurant, I knew food was involved, so this sounded better by the moment. Indeed the "last course" was actually that: dessert, coffee, and libations at a lovely restaurant filled with great friends and colleagues from all walks of the

profession. This wonderful cross-section of our profession spanned age, practice area and experience level, and we had a wonderful time as we shared our common goals, travails, experiences, stories of children of all ages, and all sorts of things, mostly refreshingly non-legal, all of which led to a great time. On behalf of the SCDTAA, I was proud we co-sponsored such a great event.

We will have other upcoming events to meet with each other in the Defense Bar, and our invited guests in the Legislature in the form of the Legislative Reception at the Oyster Bar in the Spring, and the DRI conference which we host in Charleston in April. We have completed two Board meetings, including one extended workshop in January where your Board dedicated a Friday and Saturday to the issues which we face in the SCDTAA, as well as our plan for making the Association a resource for you all.

Please consult the website at [www.scdtaa.com](http://www.scdtaa.com) so that you may check the committees and find one with which you want to be involved. Please then volunteer, so that we can enjoy the benefit of your company and your input into the upcoming events that make our organization strong. We not only need your participation, but frankly crave it, so that we can hear what you have to say about what we need to do to improve our Association and make it stronger. Contact me or any one of our officers or Executive Committee members and just let us know what you would like to do. We have made great strides in reaching our goal of recognizing those who participate, and it matters not which firm, or what the size of the firm, as those things do not dictate the limits of your achievements with the Association. If you know of someone who has not joined our Association, please encourage them to join, or give their contact information to our membership chairs, Sterling Davies and Johnston Cox, so that we can get them involved. We are so close to reaching the 1000 strong mark, and that will improve our collective voice.

Please know that we are watching the Legislative developments more closely and intensely than ever before. There are always movements afoot, and we want to be on the front end of these, instead of on the back side catching up. This, I believe, allows you to be in the position of helping both to educate your clients and to answer their questions.

This is a compelling reason for us to be strong enough from a membership standpoint to be heard and to make a difference.

# Letter From The Editor

by Wendy J. Keefer

## Celebrating DefenseLine

Those of you who have routinely read our publication know Gray Culbreath as my co-editor and generally as a great attorney and overall nice guy. I know Gray Culbreath as the person who guided our efforts to revive this publication, *DefenseLine*. As many of you know, in past years (though certainly not always) this publication was overlooked, uninformative and generally neglected. This state of things was not the fault of anyone, but a natural and unfortunate reality of many similar, small publications.

Who wants to dedicate what may sometimes be those precious few available nonbillable hours to a publication circulated among your competition – other defense attorneys? Yet over the past two years – and hopefully well into the future – our membership has provided articles full of astute observations and unmatched legal insight. Gray and I can not thank all of you for each of the great contributions we received these past two years.

When Gray and I were asked to become editors of *DefenseLine*, we were tasked with making this publication more relevant. I could have asked for no one better than Gray with whom to work on this daunting task. I now must congratulate Gray on his election to Secretary of this fine organization, and though I am excited by his new leadership position, our membership will undoubtedly all miss his fine contri-

butions to this publication – at least in an official and regular capacity.

I am, however, happy to report that our association's efforts to revitalize *DefenseLine* appear to have paid off. Gray and I have both received regular comments from lawyers and judges about the content of this new, and hopefully improved, *DefenseLine*. Thank you for reading and thank you for recognizing all of Gray's efforts. But, as always, we must plead with you, our membership and our colleagues, to continue to provide articles and other information for publication.

Along this same line, every other member of the Executive Committee has also worked tirelessly to bring our membership invaluable benefits. From trial academy to our association's informative and enjoyable meetings, SCDTAA provides a great opportunity to socialize and to learn from other hard working, smart lawyers.

Information about these upcoming events will be provided here and through other direct contact with our members, and please be sure to mark your calendars to attend these events.



Gray T. Culbreath



Wendy J. Keefer



## President's Message cont. from 2

Of course, I would be remiss if I failed to mention that we will celebrate the 40th anniversary of the formation of the SCDTAA during this year, which happens to be an election year. This means that there will be a great deal of excitement in the air and certainly, the end result will be part of the history of our lives and “in the books” by the time we meet at the Ritz-Carlton in November. Regardless of your political affiliation, it shall be a great year for us to enjoy one of our greatest rights: the right to vote!

I am honored and excited to be part of this great year and I am always available to hear your

concerns. Please mark your calendars now for the many dates depicted in this publication so that we can be assured of your company at these great events. Stay tuned as well for a great article in the next edition of *DefenseLine* about the first meeting in 1968 at which the SCDTAA was formed. It will be enlightening; particularly in educating you about how much work and effort have gone into taking us from 10 to 1000 members in these past years. Thank you to all for your support. Let's work together to make this a year in which we make a difference, work hard and remember to enjoy our colleagues in the process.

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DEFENSE TRIAL  
ATTORNEYS'

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# THE DefenseLINE

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Left to right:

*Treasurer, David Rheney; President-Elect, John T. Lay; President, Donna S. Givens; Secretary, Gray Culbreath; Immediate Past President, Elbert Dorn.*

**Top Right Photo: Past Presidents**

Left to right:

*H. Mills Gallivan, 2001-2002; Mark Wall, 1989-1990; Steve Darling, 2002-2003; Ben Moore, 1968-1969; Bill Coates, 1993-1994; Mark Phillips, 2005-2006; John Wilkerson, 1998-1999.*

# The SCDTAA Docket

MEMBER  
NEWS

## Nelson Mullins Partner Steve Morrison Receives SCDTAA Service Award

Nelson Mullins Riley & Scarborough Partner Steve Morrison received the South Carolina Defense Trial Attorneys' Association's Hemphill Award, the Association's highest honor. The Hemphill Award is based on distinguished and meritorious service to the legal profession and/or the public and goes to one who has been instrumental in developing, implementing and carrying through the objectives of the Association. Named for the late United States District Judge Robert W. Hemphill, the award is not given annually but is given only when an attorney is to be recognized for outstanding service. This is the 12th Hemphill Award given by the Association since its start in the 1960s.

### Defense Verdict in Wrongful Termination Case

On November 1, 2007, N. Heyward Clarkson, III, and John Harjehausen, obtained a directed verdict in favor of the Greenville County School District in a wrongful termination case. The plaintiff sought damages for her termination by the School District after she was arrested for contributing to the delinquency of a minor and enticing an enrolled child from school. These criminal charges were eventually dismissed by the solicitor's office.

The court granted the School District summary judgment on the plaintiff's causes of action for breach of contract and wrongful discharge and dismissed all individual claims which had been asserted against the principal of the school. A subsequent summary judgment motion was granted on the plaintiff's claim for the intentional infliction of emotional distress. On October 3, 2007, a jury trial commenced on the plaintiff's remaining claims for defamation, abuse of process, false imprisonment, and malicious prosecution. At the close of the evidence, Circuit Court Judge Larry R. Patterson directed a verdict in favor of the School District on all claims.

### Stan Lacy Named to The Best Lawyers in America® 2008

Stanford E. Lacy was selected for inclusion in this 25th anniversary edition of The Best Lawyers in America®. Mr. Lacy was selected for his work in workers' compensation law. This represents the third time Mr. Lacy has appeared in the publication. "Again, it is an honor to be listed. The workers' compensation bar in South Carolina is a very special group of people and I am fortunate to be associated with them," Lacy said.

### Collins & Lacy Welcomes New Lawyers

Collins & Lacy welcomes Aisha Grant Taylor, Charles L. Appleby, IV, Lee Floyd and Amy Neuschafer to the firm.

Ms. Taylor is a 2002 graduate of The University of South Carolina and received her law degree from that university in 2006. While in law school, Ms. Taylor

was a recipient of the CALI Award in Race, Education and the Constitution. She was also a semi-finalist at the 2006 Thurgood Marshall Mock Trial Competition. Ms. Taylor served as the President of the Sports & Entertainment Law Society and as the Recording Secretary for the Black Law Students Association. Prior to joining Collins and Lacy, Ms. Taylor served as a judicial law clerk for the Honorable Brooks P. Goldsmith.

Mr. Appleby practices in the areas of Complex Defense Litigation, Construction Defect Litigation, and Employment Law. He was a 2004 cum laude graduate from The University of Florida and a 2007 graduate of The University of South Carolina School of Law. While in law school, he served as the University of South Carolina Student Bar President and was a member of the John Belton O'Neill Inn of Court and the University of South Carolina Law School Advocates. He initiated the inaugural University of South Carolina School of Law Career Week and was awarded the Susan V. "Gina" Johnston Award.

Mr. Floyd practices in the areas of Insurance Coverage, Class Action Litigation, Professional Negligence and Products Liability. He was a 2003 magna cum laude graduate from Wofford College and a 2007 cum laude graduate from The University of South Carolina School of Law. In law school, he served on the Editorial Board for the law review, participated in Moot Court, and won the Roberts' Most Outstanding Research Paper Award.

Ms. Neuschafer earned her undergraduate degree from The University of North Carolina at Chapel Hill in 2002 and was a 2007 cum laude graduate of The University of South Carolina School of Law. While in law school, she was a member of the ABA Real Property, Probate and Trust Journal and the Order of the Wig and Robe. She was also awarded the CALI Award in Products Liability Research Problems. Prior to joining Collins and Lacy, Ms. Neuschafer served as a Staff Attorney for the South Carolina Supreme Court.

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### **Ellis Lawhorne Shareholders Selected As Best Lawyers In America**

Ellis, Lawhorne & Sims, P.A. is pleased to announce that 11 of the Firm's 32 attorneys – representing over half of the Firm's shareholders – were named to the 2008 edition of Best Lawyers in America.® These attorneys were selected from a pool of more than two million entries nationwide. Those honored include all five of the Firm's shareholders specializing in workers' compensation law – F. Earl Ellis, Jr., Ernest G. Lawhorne, William R. Harbison, Mary Sowell League, and Lana H. Sims – all three of the Firm's shareholders specializing in trusts and estates – Rita Bragg Cullum, David S. Sojourner and Karen Hudson Thomas – as well as real estate lawyers William O. Huggins and William P. McElveen and litigation attorney, John T. Lay, Jr.

### **Nelson Mullins Partner Stuart Andrews Honored With National Equal Justice Award**

The National Legal Aid & Defender Association bestowed its Charles Dorsey Award on Nelson Mullins Riley & Scarborough Partner Stuart Andrews for his service to the equal justice community. Mr. Andrews was recognized for his career-long efforts to improve access to justice for South Carolina's low income community. He joined the Firm in 1988 to institutionalize the pro bono work of the Firm and was instrumental in the development and continuation of the Firm's commitment to pro bono work, which was recognized in 1992 when the Firm received the ABA's Pro Bono Publico Award.

### **Nelson Mullins Attorney Betsy Johnson Burn Certified in Bankruptcy/Debtor-Creditor Law**

Betsy Johnson Burn, an associate with the firm of Nelson Mullins Riley & Scarborough was certified by the South Carolina Supreme Court as a specialist in Bankruptcy/Debtor-Creditor Law. Ms. Burn is co-author of a chapter on South Carolina exemption law in the Bankruptcy Exemption Manual: West's Bankruptcy Series (West Group 2007). She is also a member of the American Bar Association, the Richland County Bar Association, the South Carolina Women Lawyers Association, the South Carolina Defense Trial Attorneys' Association, the American Bankruptcy Institute, the South Carolina Bankruptcy Lawyers Association, and is a charter member of the Carolinas Network of the International Women's Insolvency and Restructuring Confederation.

### **33 Columbia Nelson Mullins Lawyers Named to Best Lawyers in America®2008**

Thirty-three attorneys from the Columbia office of Nelson Mullins Riley & Scarborough, LLP were selected for inclusion in The Best Lawyers in America® 2008. The lawyers included are Stuart M. Andrews, Jr., George S. Bailey, C. Mitchell Brown, George B. Cauthen, Karen Aldridge Crawford, Christopher J. Daniels, Williams S. Davies, Jr., Gus

M. Dixon, Dwight F. Drake, David E. Dukes, Mark C. Dukes, Carl B. Epps, III, Daniel J. Fritze, James C. Gray, Jr., Kevin A. Hall, Sue Erwin Harper, Bernard F. Hawkins, P. Mason Hogue, Jr., William C. Hubbard, S. Keith Hutto, Kenneth Allan Janik, Catherine H. Kennedy, D. Larry Kristinik, III, John T. Moore, Stephen G. Morrison, Edward W. Mullins, Jr., R. Bruce Shaw, B. Rush Smith, III, Joel H. Smith, David G. Traylor, Jr., Ralston B. "Pete" Vanzant, II, Daniel J. Westbrook, and George B. Wolfe.

### **T. Eugene Allen, III, of Nexsen Pruet Joins the Board of Directors of the FDCC Foundation**

T. Eugene Allen, III, a Member in Nexsen Pruet's Columbia office, was elected to the Board of Directors of the FDCC Foundation, the educational and charitable arm of the Federation of Defense and Corporate Counsel. A certified specialist in Bankruptcy and Debtor-Creditor Law and Certified Circuit Court Mediator, Mr. Allen practices primarily in the litigation, creditors' rights and bankruptcy areas. He also has extensive experience in insurance coverage, insurance litigation, lender liability, commercial law, and consumer issues.

### **Nexsen Pruet Member Brad Waring to Chair National Committee of Federation of Defense and Corporate Counsel and Named Honorary Danish Consul for North and South Carolina**

Nexsen Pruet Member Brad Waring was appointed chairman of the Continuing Legal Education Committee of the Federation of Defense and Corporate Counsel. Waring concentrates his practice primarily in civil litigation in state and federal courts, emphasizing complex commercial litigation, including products liability, insurance coverage, business litigation, and admiralty. He is listed in Best Lawyers in America® for litigation and is a past president of the South Carolina Bar and current member of the Bar's Board of Governors. Additionally, Mr. Waring is a member of the American Board of Trial Advocates, the American Judicature Society, the Defense Research Institute, the South Carolina Trial Attorneys' Association, the South Carolina Bar Foundation, the American Bar Association, and the Charleston Bar Association.

In addition to his role in the Continuing Education Committee, Mr. Waring has also been appointed as the Honorary Danish Consul for North and South Carolina by decree of Her Majesty Margrethe II, Queen of Denmark. As consul, Mr. Waring will help promote trade and business with Denmark – focusing on the Carolinas – and will assist Danish citizens with issues they may encounter while traveling in this part of the country.

### **38 Nexsen Pruet Lawyers Named to Best Lawyers in America® 2008**

Thirty-eight attorneys from Nexsen Pruet, LLC were selected for inclusion in The Best Lawyers in America® 2008, including six who have earned the

honor for 10 years or more. Ed Menzie, listed for corporate and real estate law, has been included in the publication for twenty years. Harold Jacobs, Neil C. Robinson, Thomas S. Tisdale, Jr., Tommy Lavender and Kent Porth have all been included for at least ten years. The other attorneys honored in the 2008 publication are Paul Dominick, David Hawkins, Molly Hughes, Brad Waring, Richard Wilson, Michael Brittingham, Henry Brown, Rusell Burke, David Dubberly, Vickie Eslinger, William Floyd, Jay Hennig, Freddie Kingsmore, William Y. Klett, III, Mark Knight Alan Lipsitz, Susi McWilliams, Rick Mendoza, Billy Newsome, Julian J. Nexsen, Sam Painter, Margaret Burnham, Jay DeVaney, Trudy Ennis, Harper Heckman, David Senter, Bill Wilcox, Grant Burns, Leon Harmon, Rusty Infinger, and Tom Stephenson.

#### **Nexsen Pruet Welcomes New Lawyers**

Kristian Cross and Andrew Dennis have joined the Columbia office of Nexsen Pruet and will work in the business litigation and corporate departments, respectively.

Ms. Cross is a graduate of Clemson University and The University of South Carolina School of Law. In law school, she was heavily involved in several organizations, including Women in Law, Black Law Students' Association, and Law Advocates. She also served as the Student Bar Association Secretary.

Mr. Dennis is a graduate of the University of North Carolina at Chapel Hill and earned his law degree from The University of South Carolina School of Law. He previously served as a student law clerk at Santee Cooper, assisting with research, employment and small claims matters.

#### **Turner Padgett Welcomes New Lawyers**

Anne R. Culbreath and Erika V. Harrison have joined the firm of Turner Padgett Graham & Laney, P.A. Ms. Culbreath is in the Firm's Greenville office and Ms. Harrison joined the Firm's office in Charleston.

Ms. Culbreath is a member of the Insurance and Torts Team. She began her litigation practice in 1998 and has focused on the areas of professional liability, transportation litigation, government liability and products liability. She also served as an Assistant Solicitor and as an adjunct instructor in the paralegal department at Greenville Technical College.

Ms. Harrison practices with the Firm's Insurance and Torts Team. A graduate of Wake Forest University and a 2004 graduate of Wake Forest University School of Law, she practices in the area of civil litigation with an emphasis on automobile torts, premise liability and consumer protection.

#### **Wilkes Bowers, P.A. Announcements**

Michael Wilkes Law Firm, P.A. is pleased to announce that H. Michael Bowers has become a shareholder in the Firm and the name has been changed to WILKES BOWERS, P.A. The Firm has opened a Charleston office in which Mr. Bowers will practice.

Melinda K. Powers has also joined the Firm. A former law clerk to the Honorable Larry R. Patterson, she will be working in the Firm's Spartanburg office handling all phases of the Firm's litigation practice.

The Firm continues to litigate in the primary practice areas of design and construction, professional negligence, insurance coverage, products liability and business transactions and serves clients in South Carolina, Georgia, Charlotte and Western North Carolina.

**MEMBER  
NEWS  
CONT.**

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# Annual Meeting Recap Pinehurst, NC

by Molly H. Craig

What a wonderful time we had in Pinehurst, North Carolina for the SCDTAA Annual Meeting! The weather cooperated fully throughout the weekend, making the golf, hunting and shopping even more enjoyable than expected. If you missed this outstanding weekend event, plan now to attend next year's Annual Meeting at the Ritz Carlton in Amelia Island.

We kicked off the weekend on Thursday evening with the President's reception on the West Lawn just outside the Carolina Inn, where we were treated to great food and enjoyed catching up with friends. Later, many members of the state's judiciary joined our members for dinner in various locations in and around Pinehurst. On Friday morning, we began the CLE portion of our program. We were fortunate to have guest speaker, Bruce Barze, President of the Alabama Defense Lawyers Association, provide an insightful presentation about an emerging area of litigation involving environmental impact from industry, including climate changes. Bruce is a partner with Balch & Bingham, LLP in Birmingham, Alabama.

Following Bruce, we were fortunate to have an esteemed panel discussion regarding the new mentor program in South Carolina. Kay Crowe served as moderator of the mentoring program panel discussion as we were all educated on the history behind the mentoring program, the establishment of the program and how the mentoring program can benefit all lawyers in South Carolina. We sincerely thank Kay, along with Chief Justice Jean Toal, Robert Wilcox and Steve Morrison, for their gracious participation in this panel. Following our panel discussion, Travis Smith and Ben Batista provided a sobering update about Medicare Set Asides and gave tips so defense lawyers could better protect themselves and their clients. We ended our Friday CLE with group breakouts in Product Liability, Auto and Tort, Medical Malpractice, Worker's Compensation, Construction and issues facing Managing Partners. Many thanks to Nick Gladd, Sam Sammataro, Johnston Cox, Jay Davis, Mundi George, Andy Goldsmith and Jay Courie for moderating insightful and substantive group breakouts on these material topics.



On Friday afternoon, many members and judges enjoyed the golf tournament on the Pinehurst Number 5 course. As anticipated, the Pinehurst golf courses were in perfect condition and the springtime weather only added to the overall experience. The winning foursome of the golf tournament was Judge Bruce Williams, Sam Outten, David Rheney and Steven Craig. We also had several attendees participate in a quail hunting excursion. Based on his performance, it was rumored that Moose Phillips has taken shooting lessons from Dick Cheney. Other social activities for Friday afternoon included tours of Pinehurst Village, on-site wine tastings and of course, exceptional spa activities. On Friday night, we all enjoyed an indoor/outdoor “Taste of North Carolina” dinner in the “91st Hole” and surrounding porches at the Pinehurst Golf Club.

On Saturday morning, our CLE program began with a legislative update. Gray Culbreath, Eric Englehardt and Jeff Thordahl addressed several pending bills in our state legislature and gave a perspective on the dwindling role of lawyers in the general assembly. We are grateful to Justice Costa Pleicones, Judge John Few, Warren Moise, Elbert Dorn and John Wilkerson for participating in the panel discussion addressing expert witness testimony and sharing their experiences and their opinions regarding qualification of expert witnesses in state court. John Wilkerson served as the moderator of the expert witness panel discussion and successfully led a lively and thought-provoking debate. To the benefit of our audience, the panel discussion both

entertained the crowd and offered tips on challenging expert witnesses in state court.

We were, indeed, honored to have Judge William Wilkins attend our meeting and offer a captivating presentation to our group regarding the social and political implications of the death penalty. We owe a great deal of gratitude to Judge Wilkins and the other numerous judges who graciously dedicated their time and efforts to participate in our CLE programs.

We were also honored to have John Martin, the President of the Defense Research Institute, as one of our honored guests. Despite Mr. Martin’s exceptionally busy travel schedule as President of DRI, he and his wife joined us for the weekend and John provided our membership with an update on the current activities and issues on tap within DRI.

Aside from top-notch CLE programs, there were two notable appearances at our meeting. First, the SCDTAA was proud to present Steve Morrison SCDTAA’s Hemphill Award. The award is the highest honor given by the SCDTAA and Steve was only the twelfth recipient of the award given to date. Second, we were also honored with the presence of Ben Moore, the first President of the SCDTAA. Mr. Moore is one of the founding members of our Association and he has been a dedicated member for over sixty years.

The Annual Meeting was an enjoyable, productive and beneficial experience for everyone involved. We look forward to another successful Annual Meeting next year at the Ritz Carlton Hotel in Amelia Island, Florida the weekend of November 13, 2008.



# FDCC Creates Leadership Institute

by H. Mills Gallivan

In July of 2007, the Federation of Defense and Corporate Counsel announced a new program entitled Pathways to Leadership. The first annual FDCC Leadership Institute will take place April 23-25, 2008 at the University of Chicago Gleacher Center. This program is for lawyers and is the first of its kind in the nation.

The primary goal of the Leadership Institute is to foster the development of tomorrow's lawyer leaders. Specifically, the mission of the Leadership Institute is to "train future leaders by assisting them in the recognition and evaluation of their attributes, giving them the tools to develop their leadership skills and principles, and then providing a framework to effectively put those skills and principles into action – in their firms, companies, and communities".

The target participant for the Leadership Institute is an attorney who has been in practice for six to ten

years. The program is not limited to Federation law firms or company representatives, although they will receive priority in the form of early registration. Perspective students will apply for admission, and upon selection, will be offered an appointment into the program. Upon acceptance into the program, each student will complete a detailed Leadership Assessment Form. The Leadership Institute will utilize a "hands-on" approach, with students being divided into groups and assigned to a faculty member with whom the group will work throughout the program. Each student will be provided with valuable feedback regarding both subjective and objective leadership skills. In addition, faculty members will follow-up with groups throughout the following year.

In addition to the group experience, students will hear from speakers who specialize in leadership training, from leaders in the Defense Bar, and from

leaders in the community. The primary training expert will be Susan Manch of Shannon & Manch, LLP Susan is regarded as the top leadership skill builder in the country. She is regularly retained by the largest and most successful law firms throughout the country to provide in-house training. She has developed an outstanding curriculum which will be of great value to both students and their sponsoring firms.

Information regarding the Institute's Mission Statement, a summary of the program, and an early registration form can be found now on the FDCC website ([www.thefederation.org](http://www.thefederation.org)) A registration discount is available for any firm or company sending three or more participants.

The Leadership Institute is targeted for your best and brightest potential leaders. This unique opportunity will provide a valuable tool for firms and companies to ensure a steady stream of future leaders. I encourage you to include this in your budgeting process for 2008, and discuss with your colleagues, the candidates you would like to send to the Institute. Should you have any questions, please contact the Leadership Institute Chair, Mike Lucey at [mlucaey@gordonreeves.com](mailto:mlucaey@gordonreeves.com) or contact H. Mills Gallivan at [mgallivan@gwblawfirm.com](mailto:mgallivan@gwblawfirm.com).

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# Phanton Billing: The Next Step in History

by Richard Neely\*

This article first appeared in a publication of the West Virginia State Bar Association, "Phantom Billing- The Next Step in History," *The West Virginia Lawyer*, August, 2002 (author retained rights, reprinted with author's permission)

In the late 1950's, big law firms concluded that they were not making enough money. Firms were getting bigger to accommodate regulatory expansion with accompanying higher overhead, so the big firms invented "hourly billing." Hourly billing rewarded labor not results, and conveniently allowed the breaking down and billing out of overhead so that every Xerox machine became a profit center.

Old lawyers loved hourly billing because it allowed them to leverage young lawyers. I remember that when I was practicing at Nixon, Mudge, Rose, Guthrie & Alexander in New York in 1966 I was paid \$125 a week, but my time was billed out at \$35 per hour and we were expected to work overtime!

Hourly billing creates an incentive to work everyone to death. Old lawyers can't flog young lawyers into sixty-plus hour working weeks unless they're there themselves. Yet my grandfather, who was both a United States Senator and a very rich practicing lawyer in the 1950's, walked home each day for lunch, always left his office by 5:00, and took an hour nap every afternoon. Furthermore, he represented the B&O Railroad, E.I. Dupont de Nemours, and a host of other big companies. Hourly billing would have destroyed him!

My partner and I have decided that the way of the 1950's is the better way to practice law. We were both trained as "legal realists" at the Yale Law School, and looked at realistically, hourly billing aspirates!<sup>1</sup>

Preeminently, hourly billing imprisons lawyers in their offices doing utterly useless things in order to bill. Often young lawyers aren't entirely aware of what they are doing because they are applying firm algorithms developed by someone else. Judges hate this useless stuff but are too polite to say so. Yet when the courts are overwhelmed, decision making has to be done by judicial helpers-- discovery masters, law clerks, probation officers and secretaries, which makes the system more cumbersome, bogs it down, and forces up costs.

Using billing algorithms makes *real* work that takes time away from family, even though from the client's point of view that work has little or no marginal value. Even worse, billing-driven work ties a lawyer up and exhausts her so that she can't think as much about clients' problems. For example, no purpose is served by making a motion for summary judgment in a case with obvious questions of fact. But, in my experience, a summary judgment motion is made in almost all cases because doing so brings in between four and twenty grand.

Clients, unfortunately, *suspect* that some of the work their lawyers are doing may not be entirely necessary or add much value. These suspicions, then, have led to the new lawyer auditing industry. But most clients don't want constant argument about bills, so they simply chisel down the hourly rate on the assumption that they are in a buyers' market. This, of course, forces billing for yet more unnecessary procedures.

Our firm has run across a new billing approach that will solve these problems. We call this innovative system "phantom billing." Under this system, we would continue to bill for useless things, but not really *do* any of them. Furthermore, we would split the profits with the client! We would bill only sixty percent of our normal fees for the things we don't actually *do*!<sup>2</sup> This would create a huge client savings.

Under Rule 1.5(b) *Code of Professional Responsibility*, all of this must be **disclosed** to the client. Thus, in our stock retainer agreement we would have the following paragraph:

Client understands that there are a host of useless and unnecessary undertakings that the lawyer could perform in all cases as per the attached schedule of stupid and unnecessary procedures (hereinafter "the Stupidities Schedule.") Client understands that when lawyer would otherwise have an occasion to work on and bill for one of these useless and unnecessary undertakings, and could justify a decision to do so according to one of the standard justifications used in the legal profession as per Exhibit I to the Stupidities Schedule (hereinafter "The 'Lame Excuse Table'") lawyer shall forebear from doing the actual work, but shall nonetheless bill client sixty percent of the

standard fee for that particular useless and unnecessary undertaking as per the fees set forth on the Stupidities Schedule.

Happily for our bottom line, we already have a list of countless ridiculous things that lawyers do; indeed, the Stupidities Schedule can be amended and lengthened almost every fortnight. Just last week we received a motion to dismiss a complaint for some minor defect in our service of process. Rather than answer the motion, we simply got good service. But, a few days before, I actually had to drive seventy miles round trip to respond to a motion in opposition to the *pro hac vice* admission of a prominent out-of-State lawyer. Preparing the service of process motion probably took the lawyer only three hours, but the opposition to the *pro hac vice* admission must have been an eleven hour gold mine!

As the stock client disclosure paragraph quoted above shows, there are two parts to the phantom billing system. Obviously we can't just randomly bill for every stupid thing a lawyer could do; there must be at least a tenuous reason in a given case for doing a particular stupid thing. So, as an integral part of the Stupidities Schedule, we have attached the Lame Excuse Table, which sets forth the standard reason lawyers give for doing each and every useless and unnecessary thing.

Our bills, then, would have a complex coding system. Every phantom item would be clearly marked with a small "p" surrounded by a circle, and after the "p" would appear two distinct number codes separated by a slash. The first number refers to

the matter's place on the Stupidities Schedule, while the second number refers to the justifying reason on the Lame Excuse Table. So we might have an entry that looks like this:

Motion for Summary Judgment (p) 3/14 @ 60%....\$7,800

The "(p)" indicates a phantom item, "3" indicates that the motion for summary judgment is a scheduled item in the Stupidities Schedule, and the "14" references the particular lame excuse (in this case, that judges *sometimes* grant these motions from frustration or in a weak moment) from the Lame Excuse Table. We further would show that we are billing for this work not performed at only 60 percent of our standard rate for work we actually perform.

However, the simple saving of money for the client would not be the only client benefit. In another paragraph of our retainer agreement, we would solemnly covenant that we will *not* take the time we save by *not* doing stupid things and squander it on other matters – in a sense double billing. Instead, we would agree, then, to take the saved time and spend it with our families, on the golf course, or simply riding motorcycles or bicycles. That way, when we *do* approach the client's case, we won't be so exhausted from mind-numbing, senseless work that we won't be able to do good lawyering.

Naturally, the question arises: Why not simply raise hourly rates and forget about itemized, fully-disclosed phantom billing? The answer is that phantom billing is an indispensable part of a *permanent* honest billing system. Without *itemized* phantom bills, some new lawyers unacquainted with the horrors of the old system will begin doing stupid things again but at the *higher* hourly rate. They, then, will go out and buy Bentleys and BMW's, which will force all of the lawyers driving P.T. Cruisers to have crises of self doubt. Then, *voila*, lawyers will be back to living in their offices; their children will go back to sex and drugs; and, their wives will again seek solace with the mailman.

What has always drawn me to law practice is the extent to which it is entirely counter-intuitive. At first blush, one would think phantom billing is an outrage, but upon mature reflection, we can all see that because of the natural cupidity of man, a system that rejoices in outright, unmitigated cynicism is vastly superior to any idealistic alternative.

### Footnotes

1 The word "aspirate" comes from the French verb aspirer, which means "to suck."

2 The one exception to the sixty percent rule comes in the defense of medical malpractice claims. Because of the current malpractice crisis in this State, we would bill only twenty percent for things we don't do in malpractice defense claims.

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# Case Notes

## State

### ***Marlar v. State of South Carolina, Op. No. 26391 (S.C. Nov. 5, 2007).***

In this appeal from a post conviction relief (PCR) ruling, the Supreme Court reversed the court of appeals decision to remand the matter based on the trial judge's failure to include specific findings of fact and conclusions of law in his order. The court of appeals' decision was based, at least in part, on S.C. Code Ann. § 17-27-80, which requires a PCR judge to make such specific findings. The Supreme Court, however, did not view that statutory requirement as altering the general rules for preserving issues on appeal.

Though this was a PCR case, the Court took this opportunity to reiterate the importance of Rule 59 motions to preserve issues for appeal. The Court concluded by stating the following, guidance that should be considered in all instances and not limited to PCR proceedings:

We take this opportunity to reiterate our admonition that “[c]ounsel preparing proposed orders should be meticulous in doing so, opposing counsel should call any omissions to the attention of the PCR judge prior to issuance of the order, and the PCR judge should carefully review the order prior to signing it. Even after an order is filed, counsel has an obligation to review the order and file a Rule 59(e), SCRCP, motion to alter or amend if the order fails to set forth the findings and reasons for those findings as required by § 17-27-80 and Rule 52(e), SCRCP” [citation omitted]

Failure to make the Rule 59 motion may eliminate any availability of review on appeal.

### ***Callahan v. Beaufort County Sch. Dist., Op. No. 26377 (S.C. Sept. 4, 2007).***

Plaintiff/Claimant was allegedly injured while working at Battery Creek High School. She filed for worker's compensation benefits, which the school district and its insurance carrier denied. Plaintiff/Claimant then filed a Form 50 on January 17, 2003, requesting a hearing. A week later, on January 24, 2003, Plaintiff/Claimant filed a civil suit in circuit court against a third party. She failed to give notice of this suit within the thirty (30) day time

period as required by S.C. Code § 42-1-560(b). The single commissioner denied her benefits as a result of this failure. The full commission affirmed that denial.

The circuit court, however, reversed the commission's decision based on the fact that the third party suit never reached a final determination on the merits because it was voluntarily dismissed in November 2003. Thus, the circuit court concluded the suit did not prevent the “equitable adjustment of the rights of all the parties.” Though the Supreme Court affirmed the lower court's ultimate conclusion, it did so on different grounds.

The Supreme Court disagreed with the lower court's excusing compliance with the statutory notice requirement based on an equitable evaluation. Instead, the Supreme Court reached its conclusion that the denial of benefits was erroneous because Plaintiff/Claimant's voluntary dismissal put the matter in the same position as if a suit had never been filed. Thus, since the legal status of the third party litigation was that it was essentially a nullity, S.C. Code § 42-1-560 was not applicable.

### ***Todd v. Joyner, Op. No. 4315 (S.C. Ct. App. Nov. 27, 2007).***

This appeal involves review of several evidentiary rulings by the trial court in an automobile accident in which the defendant stipulated to her negligence. The jury awarded Plaintiff Todd \$37,191.11, the exact amount of her medical bills. She appealed based on the trial court's exclusion of various evidence, including evidence of amounts paid by defendant's insurer, State Farm, to defendant's expert witness during the past several years and the exclusion of a covenant not to execute.

Though the court of appeals acknowledged that the tie between the defendant's insurance company and a defense expert witness is not inadmissible under Rule 411, SCRCP, or other evidentiary rules, when one seeks to introduce evidence such as evidence that reveals the existence of an involved insurer, the “substantial connection” test is used to determine whether the expert's connection to the insurer is sufficiently probative to outweigh the clear prejudice that results from the jury's awareness of insurance coverage. In this case, the appellate court affirmed exclusion of the evidence based on this analysis. The connection between the witness and State Farm was insufficient, amounting to just a list

of payments made to the witness totaling \$50-60,000 over three years.

The court of appeals also affirmed exclusion of the covenant not to execute because unlike in cases like *Poston v. Barnes*, 294 S.C. 261, 363 S.E.2d 888 (1987), where the covenant was deemed a façade and should have been admitted, nothing in this case indicated the covenant was not a legitimate agreement about which the jury need not know to reach its decision.

***Executive Order No. 2007-16  
(Sept. 20, 2007).***

Governor Sanford, pursuant to this Executive Order, directed the South Carolina Workers' Compensation Commission and each of the commissioners "to strictly apply either AMA Guidelines or any other accepted medical treatise or authority in making their injury compensation determinations" in contested cases. The Executive Order further requires quarterly reporting by the Commission and the commissioners confirming in writing such objective standards and guidelines were used in that quarter.

## Federal

***RZS Holdings AVV v. PDVSA Petroleo S.A.,  
No. 06-1680 (decided November 1, 2007).***

While a motion for RZS Holding's counsel to be relieved due to RZS' non-payment of fees was pending, a hearing was held on PDVSA's motion to confirm an arbitration award. In response to the motion to be relieved and prior to the hearing on the motion to confirm the arbitration award, the owner

of RZS filed pro se pleadings with the district court. During the motions hearing, which included argument on the motion to be relieved as counsel and the motion to confirm the arbitration award, the district court first granted counsel's motion. The district court also struck RZS's pro se pleadings concluding they were improper pro se filings by a corporate entity. RZS then requested a continuance to permit it to retain new counsel, which request was denied.

The district court confirmed the arbitration award without permitting any argument on behalf of RZS, either by its owner or by the relieved counsel. When that counsel asked to be able to argue on behalf of RZS given the circumstances, the district court stated "[i]t's you're in or you're out. Which do you wish to be?" Counsel chose to be out given that choice and the court said "goodbye." The district court granted the motion to confirm the arbitration award.

The Fourth Circuit reversed. The Court concluded that the district court abused its discretion in conducting ex parte proceedings and by denying the request for continuance to permit RZS to retain new counsel.

It is settled beyond peradventure that, in our system of justice, ex parte judicial proceedings, such as that which occurred [here], are greatly disfavored. The conduct of such proceedings present substantial due process concerns, and our courts are necessarily and properly reluctant to participate in them. Indeed, under the Code of Judicial conduct for United States Judges, Canon 3(A)(4), a judge "should ... neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding."

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