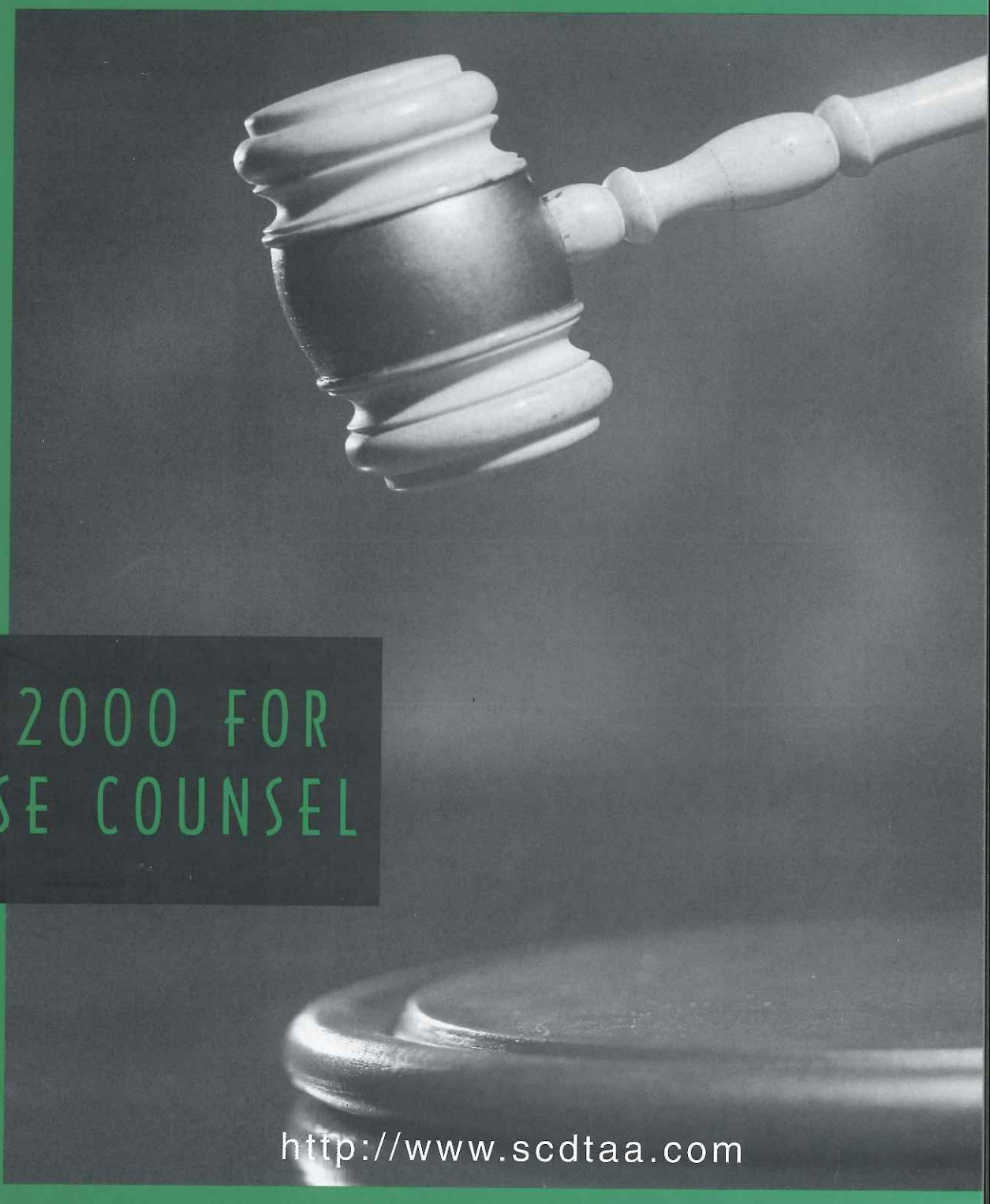
S.C. Defense Trial Attorneys' Association

Volume 27 Number 2 • Summer, 1999

The DefenseLine



YEAR 2000 FOR DEFENSE COUNSEL

http://www.scdtaa.com

1999 SCDTAA TRIAL ACADEMY

USC School of Law
Columbia, SC
July 7 - 9, 1999

AGENDA

Wednesday, July 7, 1999

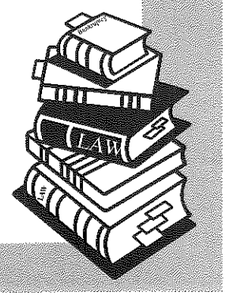
9:00 - 9:30 am	Welcoming remarks; introduction and overview of trial academy — *Matt Henrikson and Skip Utsey*
9:30 - 10:15 am	Discovery and trial preparation
10:15 - 11:00 am	Protecting the trial record
11:00 am - 12:00 pm	Breakout session (theme of case and trial strategy)
12:00 - 1:00 pm	Lunch - Holiday Inn
1:00 - 1:45 pm	Introduction of and objections to exhibits
1:45 - 2:45 pm	Direct and cross examination of lay witnesses
2:45 - 3:00 pm	Break
3:00 - 4:15 pm	Breakout session (exhibits and lay witnesses)
4:15 - 5:00 pm	Opening statements
5:00 - 5:30 pm	Remarks on ethics and professionalism for defense attorneys

Thursday, July 8, 1999

9:00 - 10:15 am	Breakout session (opening statements)
10:15 - 11:15 am	Direct and cross examination of expert witnesses
11:15 am - 12:15 pm	Breakout session (expert witnesses)
12:15 - 1:15 pm	Lunch - Holiday Inn
1:15 - 2:00 pm	Closing arguments
2:00 - 3:15 pm	Breakout session (closing arguments)
3:15 - 3:30 pm	Break
3:30 - 4:15 pm	The trial of the MIST (minor impact - soft tissue) case
4:15 - 4:45 pm	Post-trial motions
4:45 - 5:30 pm	Prepare for mock trials (instructors available to assist)
6:00 pm	Cocktail party - Summit Club

Friday, July 9, 1999

9:00 am - 4:30 pm	Mock trials - Richland County Judicial Center



The DefenseLine

Ten Years Ago

President-Elect **MARK H. WALL** reported on the 22nd National Conference of Defense Bar Leaders held in New Orleans on March 2 - 3, 1989. Our Association again won an award for excellence. President **FRANK GIBBS** reported on work of the Amicus Curiae Committee chaired by **DAVID NORTON** and their work regarding punitive damages. **HUGH McANGUS** apprised the Association of upcoming Legislative session with concerns as usual in auto insurance reform, workers compensation and medical privileged legislation.

Twenty Years Ago

In the February, 1979, issue of *The Defense Line*, it was reported that **ED MULLINS** was elected DRI Director. President **R. BRUCE SHAW** reported that our primary concern in 1979 would be legislation. Comparative negligence was being discussed in the Legislature. **BARRON GRIER** was Program Chairman for the Joint Meeting at Grove Park and **CARL "BUTCH" EPPS** was Program Chairman working on the Annual Meeting. The 1979 President of the Claims Management Association was **CURTIS HIPP**.

Thirty Years Ago

President **B. AUSTIN MOORE, JR.** announced that the officers of the Executive Committee were planning for the First Annual Convention, October 10 - 11, 1969. The meeting was to be held at the Sheraton-Hilton Inn. He reported the membership was up to 130 members at this time.

1999 Joint Meeting Agenda SCDTAA and CMASC

Grove Park Inn • Asheville, NC
July 29 - 31, 1999

THURSDAY, JULY 29

3:00 to 5:00 p.m.	**Executive Committee Meeting**
4:00 to 7:00 p.m.	**Registration**
6:30 to 8:00 p.m.	**Welcome Cocktail Reception**
	DINNER ON YOUR OWN

FRIDAY, JULY 30

8:00 am to 12 noon	**Registration**
8:15 to 8:45 am	**Coffee Service**
8:15 to 8:30 am	**Welcome** John Wilkerson, Esq - SCDTAA President Strom Johnston - CMASC President
8:30 to 9:00 am	**Insurance Law Update** John T. Lay, Esq.
9:00 to 9:30 am	**Update on ADR** Robert W. Hassold, Jr., Esq. Derrick Gordon - State Farm Insurance Co. Dennis Gillilan - Nationwide Insurance Co.
9:30 to 10:15 am	**Preserving the Record for Appeal** Honorable William L. Howard, Sr.
10:15 to 10:30 am	**Coffee Break**
10:30 to 11:15 am	**Workers' Compensation Breakout** Roy A. Howell, Esq. Jeffrey D. Ezell, Esq.
10:30 am to 12:15 pm	**Employment Law Breakout** Allen D. Smith, Esq.
10:30 to 11:15 am	**State Trial Practice** Honorable Henry F. Floyd
11:15 am to 12:15 pm	**Daubert-A Man With a Changing Face** Robert Bruce Shaw
12:15 to 1:15 pm	**Beverage Break**
12:15 to 6:00 pm	**White Water Rafting Trip**
12:30 pm	**Golf Tournament** Chuck Turner, Chair
2:15 pm	**Tennis Tournament** Jeff Ezell, Chair
6:30 to 10:00 pm	**Children's Program and Dinner at Grove Park**
7:00 to 8:00 pm	**Cocktail Reception** Grove Park Inn
8:00 to 11:00 pm	**Dinner and Entertainment** - Grove Park Inn

SATURDAY, JULY 31

7:30 to 8:30 am	**Coffee Service**
7:45 am	**SCDTAA Business Meeting**
8:15 to 8:30 am	**Welcome**
8:30 to 9:15 am	**Bad Faith Insurance Practices** Kenneth M. Suggs, Esquire
9:15 to 10:00 am	**Effective Closing Argument** Honorable Joseph F. Anderson, Jr.
10:00 to 10:15 am	**Legislative Update** James R. Courie, Esquire
10:15 to 10:30 am	**Coffee Break**
10:30 to 11:15 am	**Third Party Audits** William A. Coates, Esq. Jim Echnoz - Allstate Insurance Company
11:15 am to 12:15 pm	**Ethics - Handling Grievances at the Local Level**
12:15 to 1:15 pm	**Beverage Break**

OUR THANKS TO THE FOLLOWING EXHIBITORS
BellSouth Business Systems • Paul Revere Insurance Company
SC Certified Court Reporting Association

President's Letter

by John Wilkerson

As the summer heat sets in for the long haul, we can begin to look forward to our annual respite at the Grove Park Inn. This year's program printed on the opposite page is sure to please everyone who attends.

David Rheney, Phillip Kilgore, Sam Outten and their committee have organized a solid and varied lineup. In addition to a number of members of the SCDTAA and the CMASC who have volunteered their time and talents, we are hosting several guest speakers including members of the judiciary, plaintiff's bar and the insurance industry. The panel discussion on third party audits will surely be well attended (if the overwhelming response to the last President's Letter is any indication). Make your reservations early and plan to join us in Asheville on July 29 through 31.

One order of business in Asheville will be a roundtable discussion between the officers and board members of both organizations to evaluate the future direction of the joint meeting. We want to make sure we continue to meet the needs of all members. The agenda will include discussions of escalating costs, falling attendance, alternative locations, inviting vendors/sponsors, and other ways to strengthen the meeting and the relationship between our organizations. Please contact a member of the executive committee with your ideas and suggestions.

The Trial Academy will be held this year on July 7-9. Skip Utsey and Matt Henrickson have organized a tremendous faculty and group of judges who will certainly make the experience meaningful for all participants. Many thanks to these volunteers and the host of others who have agreed to serve as witnesses and jurors. I would also like to thank Sylvia Butler, Administrative Coordinator at Turner Padget Graham & Laney in Columbia, for her tireless work in planning this year's event and recruiting the many volunteers who make this program possible.

Make sure to clear your calendar now for the annual meeting at Sea Island to be held November 4 through 6. Steve Darling and Moose Phillips promise a stellar plenary session, the Substantive Law Committees will provide focused breakouts, and, of course, Sea Island can't be beat.

Our Substantive Law Committees continue to gain momentum. If you haven't signed up yet, you are missing a wonderful opportunity to network and participate in a meaningful way in the organization. The New Lawyer's Committee also provides our newest members opportunities to get involved. Please give me a call and I will make sure you can immediately enjoy the benefits of membership in these groups.

See you in Asheville!!!

The Pro Bono Committee Needs Your Input

The Pro Bono Committee is developing objectives for the Committee. We would like to hear from you about Pro Bono work in which you are involved, whether as a part of a firm Pro Bono program, appointments from the Bar or otherwise. We want to publicize the pro bono work of our members as well as determine what programs we want to implement.

You may write to SCDTAA or call, write, fax, e-mail Bev Carroll, Kennedy Covington Lobdell & Hickman, L.L.P., P.O. Box 11429, Rock Hill, South Carolina 29731-1429, (803)329-7604, (803) 329-7678 (fax) or bcarroll@kclh.com

Out and About in Asheville, North Carolina

ASHEVILLE

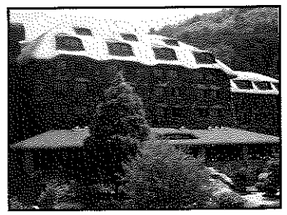
Asheville boasts a 200-year tradition as a resort city. Hundreds of intriguing attractions and festivities prove it. The city has been attracting tourists long before its native son Thomas Wolfe wrote about it in his novel, Look Homeward Angel or George Vanderbilt thought about creating America's largest home, the 255-room Biltmore House. Whether you're looking for an adventure or a place to unwind, you'll discover that the mountains have more to offer than fabulous views.

Asheville is ideally located near the famous Blue Ridge Parkway on both banks of the French Broad River, near the French Broad Basin. The Blue Ridge Parkway is a 470-mile stretch of uninterrupted highway weaving its way through some of the most beautiful and inspirational mountain scenery this side of the Mississippi. With all its exciting attractions, the beauty of the land, and the year-round mild climate, Asheville is clearly a top choice for hosting successful meetings.

CLIMATE

Asheville has a temperate, but invigorating climate. Average temperatures for late August will be with highs in the lower 80s and lows in the high 50s.

THE GROVE PARK INN



When the Grove Park Inn opened in the summer of 1913, newspapers across the country christened her "the finest resort hotel in the world.". Through the efforts of owner Edwin W. Grove and architect Fred L. Seely, the Grove Park Inn drew the rich and famous to Asheville, North Carolina, where they basked amid the panoramic views and soothing climate of the Blue Ridge Mountains. In her early years, the Grove Park Inn served as a summer retreat for Presidents Woodrow Wilson, Calvin Coolidge, and Herbert Hoover, along with such noted personalities as Henry Ford, Harvey Firestone, Thomas Edison, Will Rogers, and John D. Rockefeller, Jr.

After struggling through the Great Depression and serving her country during World War II, when the United States government utilized it as an internment center for Axis diplomats, the Grove Park Inn teetered on the brink of obscurity. In 1955, Texas businessman Charles A. Sammons purchased the forty-two year old hotel and instituted a restoration and expansion program designed to both preserve the aura of the grand old inn and accommodate future generations of guests. When the Grove Park Inn celebrated her seventy-fifth birthday in 1988, she had risen once again to join the ranks of the finest resort hotels in the country. In doing so, she fulfilled the prophecy of William Jennings Bryan, who, at the inn's opening on July 12, 1913, had declared that the Grove Park Inn was "built for the ages".

The Grove Park Inn is a resort complex on 140 acres on Sunset Mountain. The Inn has 510 guest rooms, including 12 suites, located in the Main Inn and the Vanderbilt and Sammons wings. Deluxe and private accommodations provided on the club floor include oversized guest rooms with Jacuzzi, newspaper delivery and a private club lounge.

For our sports enthusiasts, the Inn has an 18-hole, par-72 championship golf course sculpted by Donald Ross, designer of Pinehurst #2. The indoor sports center offers two racquetball courts, an international squash court, a 10 station Nautilus fitness center, and an aerobics room. If you prefer, you can relax and enjoy the whirlpool sauna or indoor pool. There are 6 outdoor tennis courts (4 hard surface and 2 clay) and 3 indoor courts. You may also enjoy the outdoor pool at the country club.

CHECK IN, CHECK OUT

Check-in time at The Grove Park is after 4:00 p.m. and check-out is before 12 noon. If your travel arrangements do not coincide with these times, the bell staff will be happy to store your luggage.

Year 2000 for Defense Counsel

by James K. Lehman and Kevin A. Hall

Technology often presents significant challenges to business, and it will present even greater challenges in the next millennium. One of the most vexing problems, however, may not be new technology, but instead, hidden glitches in existing software and hardware systems — popularly known as the Year 2000 problem, Y2K or the Millennium Bug.

The Year 2000 Problem

The Year 2000 Problem originated from early software designers who, in an attempt to save memory, adopted as a programming convention the recording of years in a two-digit format - "98" instead of "1998." The problem arises when January 1, 2000, arrives, because many computer and software systems will read the date as 01/01/00, with a 2-digit date field, making the computer conclude that the date is January 1, 1900, not January 1, 2000.

Because dates typically are used to determine if someone should receive things — e.g., Social Security benefits, Medicare, drivers' licenses, voter registration, alcohol privileges, salary increases, tax payments, overtime, etc. — the inability of computer systems to cope with the Year 2000 problem could have drastic consequences. Similarly, because dates are used in business and industry to control maintenance schedules, industrial processes, and to calculate interest, due dates, and mortgages, the potential problems associated with the Year 2000 crisis are significant.

So, why not just change the date? This is the question many people ask in looking for a quick fix to the Year 2000 problem. While logic might suggest that any problem programmed into computers such as 2-digit date fields can be programmed out, that is not necessarily the case. Unfortunately, no universal software fix exists. Rather, expensive and labor intensive efforts to change every reference to a date, and every program and file in use or stored, must be developed. Because dates are usually embedded throughout a software program, this effort can be a herculean task and often presents significant logistics problems as companies attempt to identify the systems possibly affected, and to identify solutions for each system. Indeed, estimates to fix Year 2000 related problems range from $200 billion to $1 trillion. For many companies, the awareness of the problem is just now dawning, and for some, it may be too late to solve this problem before Year 2000 related mishaps occur.

Legal Exposure for Corporations and Their Directors and Officers

Given the many technical and legal issues associated with the Year 2000 problem, it is essential that corporate directors, officers, and senior managers, as well as those providing legal counsel to corporations, become involved in developing solutions to the problem in time to avoid a crisis. With recognition of the Year 2000 problem comes the responsibility of corporate directors, officers and managers to evaluate disclosure obligations. Failure by management to disclose the existence of a significant Year 2000 problem, and the associated costs of addressing the problem, may pose a risk of liability on the part of the company and its directors and officers.

Specifically, liability could result in Securities and Exchange Commission ("SEC") enforcement proceedings or shareholder suits brought under both federal and state securities laws. The SEC has taken an increasingly aggressive approach to Year 2000 issues and the responsibilities of operating companies, among others, to consider their disclosure obligations relating to the Year 2000 problem and the uncertainties associated with it.

Given the responsibilities of corporate officers and directors for addressing Year 2000 issues, officers and directors should consider identifying all potential Year 2000 problems, developing careful remediation action plans, and identifying costs associated with execution of such plans. Officers and directors should also consider the extent to which the existence of the plan and the operational and financial

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consequences of Year 2000 compliance must be disclosed. The possible consequences of untimely or incomplete correction and the costs that may arise as a result also may need to be divulged. Failure to disclose such information, which could have a material effect on both current and future investors, may result in liability under state and federal securities laws.

Defenses to such claims inevitably will focus on the standard of care exercised by directors and officers in performance of their duties. *See, e.g.*, S.C. Code Ann. Section 33-8-300 (Law. Co-op. 1976), which requires directors and officers to act with that degree of care which ordinarily prudent persons would exercise in like positions under similar circumstances. To minimize liability, directors and officers should make sure that they are fully aware of their corporation's Year 2000 problems and that the corporation has undertaken the necessary efforts to identify and address this issue. By taking such actions, the directors and officers should be able to demonstrate that they acted with due diligence in addressing the company's Year 2000 problems. Directors and officers also should document all action taken to address the problem to aid their future efforts in proving that they complied with common law and statutory due diligence standards.

Year 2000 Insurance Coverage Issues

In analyzing the availability of insurance coverage for Year 2000 failures and business interruptions, risk managers and corporate counsel should consider several different sources of possible insurance coverage. First, many corporations maintain insurance policies for directors and officers ("D&O policies") to protect them from personal liability relating to business decisions. As discussed above, directors and officers may be confronted with personal liability when their corporations suffer losses as a result of the failure to become Year 2000 compliant or the failure to make appropriate disclosures.

Depending on the particulars of a corporation's D&O policies, directors and officers may have some protection from personal liability. However, given the uncertainties associated with coverage questions, corporations should carefully examine today their existing D&O coverage. Further, because of the uncertain exposure associated with Year 2000 problems, future policies will likely include specific exclusions addressing the Year 2000 issue. Thus, while existing D&O policies may provide some coverage, the future availability of this coverage is unclear. Most importantly, however, D&O coverage, even if it exists, does little to protect the corporation itself from business interruption losses associated with Year 2000 problems. Thus, D&O coverage is of little value in protecting the corporation's financial health from Year 2000 failures.

Many companies also carry business interruption insurance which is intended to protect the business from losses resulting from interruptions caused by natural forces, such as a severe storm or a hurricane. In the context of losses resulting from Year 2000 problems, however, the availability of business interruption coverage is far less certain because Year 2000 failures are the result of computer programs operating as they were designed to operate, and not due to unanticipated factors. As a result, insurers will contend that business interruption policies do not protect businesses from losses arising because of Year 2000 problems absent special Year 2000 coverage.

Risk managers should analyze carefully the errors and omissions ("E&O") coverage purchased by computer vendors supplying, developing or implementing systems or modifying legacy systems to insure Year 2000 compliance. E&O policies typically will protect customers against non-performance by Year 2000 compliance vendors, including non-performance that results in total or partial failure of the customer's computer systems. Typically, however, E&O insurance is "claims made" insurance, meaning that coverage will apply if the compliance vendor is insured at the time the claim for coverage is made, not when the error or omission occurs. Thus, to guarantee coverage, it is important for the customer of Year 2000 compliance vendors to insist that the solution provider maintain E&O coverage through the last date on which a system failure could occur.

Given the uncertainties associated with traditional insurance coverages and the Year 2000 problem, corporations and other businesses have sought risk management products designed specifically for Year 2000 risks. However, to date, relatively few insurers have developed risk transfer programs specifically for Year 2000 risks. In fact, two products designed for Year 2000 risks - one by American Re and the other by AIG - were discontinued or suspended in the fourth quarter of 1998.

Because of the difficulty in obtaining Year 2000 policies, many companies may be unable to obtain insurance. For those companies without insurance coverage who experience, or themselves cause, significant Year 2000 problems, the threat of Year 2000 related litigation looms large.

Potential Claims Against Computer Vendors

Although the often-predicted tsunami of Year 2000 litigation has not yet occurred, it no doubt is coming. Already a number of suits have been filed that raise Year 2000 issues. For a current listing and description of pending Year 2000 litigation, see the ITAA website: http://www.itaa.org/year2000.

Warranty and Contract Claims

Depending on when the software or hardware was implemented or installed, a computer vendor may have provided an express warranty that a program or program fix is Year 2000 compliant. In addition, a representation may have been made as part of the sales cycle, either orally or in some type of written marketing material, that may form a basis for a warranty claim if the representation became the basis of the bargain between the parties. Similarly, there may be circumstances under which a purchaser could make a claim for implied warranty, such as implied warranty of merchantability or an implied warranty of fitness for a particular purpose. See S.C. Code Ann. Section 36-2-314(2)(c) and S.C. Code Ann. Section 36-2-315. The implied warranty of merchantability provides that in every sale there is a promise the product will perform the ordinary purpose for which such software would be used. See S.C. Code Ann. Section 36-2-314(2)(c). A warranty of fitness for a particular purpose arises when a vendor has knowledge that a purchaser is buying a product in order to fulfill a particular need and that the purchaser is relying on superior skill or knowledge of the vendor to provide the appropriate product. *Id.* at 36-2-315. These implied warranties, as with the express warranties, are often fact specific warranties that may require investigation of the facts and circumstances surrounding the original purchase.

Warranty claims can be disclaimed under certain circumstances. See S.C. Code Ann. Section 36-2-316. The UCC has very specific guidelines for disclaimers of warranties that must be followed for a warranty disclaimer to be effective. *See id.* Moreover, standard warranty disclaimers may not be enforced by a court in cases involving unsophisticated purchasers of software, especially those with unequal bargaining power. However, if the contract was negotiated and executed by parties as equal bargaining partners, courts are more likely to allow the disclaimer of warranty to stand. See S.C. Code Ann. Section 36-2-316(3)(c).

In addition, remedies for breach of an express warranty and breach of implied warranties may be limited. For example, a vendor may limit recovery to the repair or replacement of the software and exclude any consequential or special damages. Vendors have a strong argument that such disclaimers should be enforced, particularly when they are negotiated by the parties and are made explicit in the contract. However, purchasers can sometimes argue that the disclaimer is void if the remedy fails of its essential purpose. See S.C. Code Ann. Section 36-2-317.

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Fraud and Misrepresentation Claims

In addition to contract-based warranty claims, there may be circumstances under which a plaintiff may be able to allege fraud, fraudulent inducement or negligent misrepresentation if the vendor misled the purchaser about the ability of the software or hardware to meet the needs of the purchaser in the future. Claims of fraud and fraudulent inducement require the plaintiff to plead and prove the nine elements of fraud under South Carolina law, including knowledge of the misrepresentation by the vendor as well as the intent to deceive the purchaser of the goods or services. In addition, there may be a merger or integration clause in a contract that limits the potential liability stemming from express representation. However, claims for fraudulent inducement may stand if the customer can prove that it was led to enter into a contract due to fraudulent misrepresentations of the vendor.

Purchasers may also make a claim for negligent misrepresentation which, although similar to a fraud claim, may not always require proving an intent to deceive on the part of the vendor. At least in certain jurisdictions, however, a plaintiff can only proceed under a theory of negligent misrepresentation if there is a special relationship between the parties which gives rise to a duty on the part of a vendor to provide accurate and non-misleading information to the customer, which courts have been reluctant to find in the case of a computer services vendor. *See, e.g., NMP Corp v. Parametris Technology Corp.*, 958 F.Supp. 1536, 1547 (N.D. Okl. 1977); *Accusystems, Inc. v. Honeywell Information Systems, Inc.*, 580 F.Supp. 474 (S.D.N.Y 1984). Additionally, as with all negligence cause of actions, there are arguments that such claims are barred by the economic loss rule. *See e.g., Apollo Group, Inc. v. Avnet, Inc.*, 58 F.3d 477, 480 (9th Cir. 1995)(holding the economic loss rule precludes a computer hardware purchaser from seeking pecuniary damages under a negligent misrepresentation theory).

Negligence and Tort-Based Claims

Purchasers may also bring claims for negligence, negligent design and professional malpractice. First, a purchaser could proceed under a theory of professional malpractice against the computer consultant or software vendor. However, a number of courts have refused to recognize claims for consulting or computer services malpractice as a matter of law. *See, e.g., St. Barnabus Hosp. v. Sentiment Systems*, 1988 U.S. Dist. Lexis 51 (S.D.N.Y. 1/8/98) (computer services do not support a malpractice cause of action); *RKB Enterprises, Inc. v. Ernst & Young*, 582 N.Y. S.2d 814, 86 (3d Dept. 1992) ("there is no cause of action for professional malpractice in the field of computer consulting"). Claims for negligent programming and negligent design are far more common. However, as with negligent misrepresentation claims, these claims may be barred under the economic loss rule. *See, e.g., Laidlaw Environmental Services v. Honeywell, Inc.*, 966 F.Supp. 1801, 1414 (D.S.C. 1996). Moreover, depending on the age of the software or hardware in question, the vendors may have arguments that no duty was breached based on the level of pertinent scientific and technical knowledge existing at the time of the alleged tort. In addition, vendors may have significant arguments that any recovery should be reduced or barred based on the doctrine of comparative negligence. The Year 2000 problem has been known to computer and software professionals for many years. Therefore, sophisticated commercial users of software arguably have had actual knowledge or constructive knowledge of defects in their systems in time to have avoided any problem through Year 2000 remedial efforts. Failure to address such issues in a timely manner may be a basis for a vendor to assert comparative negligence.

Statute of Limitations Issues

Actions brought to recover damages resulting from Year 2000 problems will present a new challenge to the rules governing statute of limitations. In South Carolina, tort and contract claims are generally governed by a three-year statute of limitations. See S.C. Code Ann. Section 15-3-530.

According to South Carolina law, a statute of limitations does not begin to run until the plaintiff knows or should have known of the injury or the breach of the contract which is the source of the lawsuit. Under this "discovery rule," the plaintiff's knowledge of injury or breach is critical. Given the significant amount of attention that Year 2000 problems have received in the industry and even in the general press, computer vendors will have a strong argument that purchasers should have known about potential Year 2000 problems by the early 1990's. However, this argument may not be effective if the plaintiff did not know that it had a cause of action for a Year 2000 problem with its systems. *See, e.g., True v. Monteith*, 489 S.E.2d 615, 617-17 (S.C. 1997). In addition, if a plaintiff alleges and is able to prove fraudulent behavior by a computer vendor, the statute of limitations for certain claims may be tolled until the time when the plaintiff should have discovered the fraud, which may be a later time period than when the plaintiff should have known about any injury or breach of a contract.

In addition to statutes of limitation, some jurisdictions have enacted a statute of repose which sets an inflexible cutoff date for lawsuits regardless of the discovery rule. South Carolina has -a statute of repose; however, on its face, it only applies to claims arising out of improvements to real property. See S.C. Code Ann. Section 15-3-640. Thus, it is unlikely that the South Carolina statute of repose will bar Year 2000 lawsuits.

* * * * *

Because of the great potential for damage and the amounts of money that are at stake, there will no doubt be a number of lawsuits over Year 2000 liability issues between technology purchasers and vendors, shareholders and management, and businesses and their insurance carriers. This litigation inevitably will involve difficult legal and technical issues. Thus, businesses and insurance carriers that potentially face Year 2000 issues should consult counsel experienced in technology issues and software litigation in order to develop the best course of action for resolving Year 2000 issues.

Employment Law Committee Organizes

After a loose confederation for the past few years, the SCDTAA has formed an Employment Law Substantive Committee to be chaired this year by Scott Justice of Haynsworth, Baldwin and Philip Kilgore or Ogletree, Deakins. The purpose of the committee is to develop programs and services for its members and their firms in the field of employment litigation and to provide a forum for the exchange of ideas of interest to its members. The charter members are:

Allen Smith
Molly Hood Craig
Charles H. Gibbs, Jr.
Cherie Blackburn
Susan P. McWilliams
Amy Yager Jenkins
Kathy Dudley Helms
Clay Robinson
Art Justice
Mark Buyck, III
Eric C. Schweitzer
Jeff Ezen
David B. McCormack
Baker Wyche
J. Walker Coleman, IV

If you are interested in participating on this committee or in its activities, please call Scott Justice at (803) 799-5858 or Philip Kilgore at (864) 271-1300

Greenville County Adopts Standing Order for Alternative Dispute Resolution

This order applies to all Common Pleas jury and non-jury cases filed and pending in Greenville County, South Carolina, except post conviction relief (PCR) cases, and shall remain in effect until further order of the Court. All such cases filed on or after June 1, 1999 shall participate in the following recognized methods of alternative dispute resolution (ADR): mediation or arbitration (binding or nonbinding); on or before 300 days from the date of filing the action. The parties to a case have a right to mutually agree upon the form of ADR and a neutral person(s) to conduct that ADR process. In the event that the parties are unable to agree upon the form of ADR and the neutral, the Court hereby designates mediation as the default process of ADR and will appoint a certified mediator and alternate mediator in case of a conflict of interest or unavailability of the primary mediator.

By 210 days after the filing of a case, the Court will give notice to all parties through their attorneys, or directly if unrepresented and an address is given for the party, of an Order for ADR, is attached. Notice may be given by first class mail or by facsimile transmission.

Appointment of the mediator and alternate mediator by the Court, shall be made from the current list of certified mediators published by the South Carolina Board of Arbitrator and Mediator Certification on a rotating basis, one case at a time, from among those mediators agreeing to accept Common Pleas cases in Greenville County. In the event the parties are unable to agree upon a mediator, the parties and/or their attorneys shall be responsible for contacting the Court-appointed mediator directly regarding scheduling and payment of the court mandated fee.

By 300 days from the date of filing the action, it shall be the responsibility of the parties to that case to file with the Office of the Clerk of Court without excuse, delay, postponement or continuance the attached Proof of ADR or Exemption form.

On or immediately after 300 days from filing of the action, the Court may issue a Rule to Show Cause why sanctions should not be imposed in all cases in which there has not been filed with the Office of the Clerk of Court a Proof of ADR or Exemption form indicating evidence of participation in, or exemption from, and ADR process. Those cases exempt from ADR or in which an effort at ADR has proven unsuccessful shall be placed upon the status conference roster for determination by the Court as to whether or not the matter is ready for trial.

Binding arbitrations shall be conducted in accordance with this Order and the South Carolina Uniform Arbitration Act, Section 15-48-10 et.seq. S.C. Code of Laws. Non-binding arbitrations shall be conducted in accordance with this Order and the South Carolina Supreme Court/Circuit Court Arbitration Rules 3(b) through (q), 4(a) and (b), 9, 10, 11. Mediations shall be conducted in accordance with this Order and the South Carolina Supreme Court/Circuit Court Mediation Rules 1, 4(a), (c), (d), and (e), 5, 6, 7, 8, 9, 10, 11, and 12. Nothing in this Order shall preclude the parties from participating in any other recognized ADR process under any mutually agreed upon rules.

AND, IT IS SO ORDERED.

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS

_____
PLAINTIFF

vs

_____
DEFENDANT

ORDER FOR ADR

FILE NO.:_____

Pursuant to the Standing Order for Alternative Dispute Resolution, dated_____, you are required to participate in the following recognized methods of Alternative Dispute Resolution (ADR): mediation or arbitration (binding or nonbinding); on or before 300 days from the date of filing this action. The parties have a right to mutually agree upon the form of ADR and a neutral person(s) to conduct that ADR process. In the event the parties are unable to agree upon the form of ADR, the Court hereby designates mediation as the default process of ADR. In the event the parties are unable to agree upon a mediator, the Court hereby appoints _____to serve as mediator. In the event the aforementioned mediator has a conflict of interest or is unable to serve, the alternate mediator is _____. The parties and/or their attorneys shall contact the Court-appointed Mediator directly regarding scheduling and payment of the Court mandated fee.

A Rule to Show Cause why sanctions should not be imposed may be issued in all cases that fail to file a Proof of ADR or Exemption form indicating evidence of participation in, or exemption from, an ADR process within 300 days from the date of filing of the action.

Date:_____

_____
Chief Administrative Judge/Clerk of Court
Thirteenth Judicial Court/Greenville County

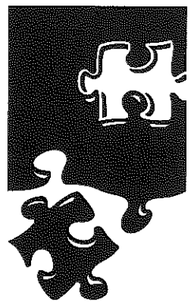
Notice by Fax or Mail

Notice of this order was given by facsimile transmission or first class mail to the attorneys of record on _____, 199__.

From Circuit Court Fax 467-8540 or 8519 **Clerk's Initials: _____**

Evidence Matters

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



DIRTY LAUNDRY: PART I

In light of the recent misadventures of William Jefferson Clinton, the topics of credibility evidence and prior bad acts provide food for thought.[1] The pubic airing of a defendant s dirty laundry in the courtroom can create liability where none previously existed. Similarly, when the bad odor of a plaintiff's iniquities drifts into the jury box, a strong case on damages begins to smell fishy.

Without a doubt, the admissibility of a witness's bad acts is the most confusing area of evidence law. Prohibitions against other-acts evidence harkens back to the abuses of the Star Chamber in England and were carried forth into South Carolina law by the colonists. The Fourth Circuit Court of Appeals recently noted that a number of opinions in recent years had dealt with prior bad acts, admitting that some were seemingly in conflict.[2] The greatest number of cases discussing bad-acts evidence usually cite (but often confuse) rules 404(b) or 608(b), or the res gestae common-law rule. Even when prior acts are inadmissible under one theory, however, they may be introduced for another proper purpose.

1. The General Rules

The basic rule is that a party is not entitled to show that a witness did some prior act and therefore probably did it again at the relevant time at issue in the lawsuit. For example, a defendant may not show that the auto-accident plaintiff drove recklessly on a prior occasion, that therefore the plaintiff was a "reckless driver," and that as a result of his bad driving character probably drove recklessly causing the automobile accident in question. On the other hand, the Federal and South Carolina Rules of Evidence (and the common-law rules) permit prior bad acts to be admitted for various reasons. When used in connection with bad acts, prior generally means prior to *trial*.

2. Theories for Admissibility of Prior Bad Acts

A. To Prove Elements of the Tort, Crime, Defense, Etc.: Rule 404(b)

Bad acts admitted under rule 404(b) are to prove the **elements of the tort, crime, defense, or claim** at issue in the trial. For example, a defendant's prior drug sales might be relevant in a drug trafficking prosecution to show the element of intent. A defendant grocery store might prove the absence of prior accident to show lack of notice of a dangerous condition[3] if the prior condition was substantially similar to the one present when the accident occurred.

Under the federal rule, evidence of other acts is admissible when used to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. The purposes for which bad acts may be admitted are not limited to those listed in federal rule 404(b). However, the South Carolina version of rule 404(b) permits prior acts to be admitted for only those purposes set forth in the 1923 case of *State v. Lyle*,[4] which is substantially similar to New Hampshire Rule of Evidence 404(b).[5] The permissible purposes are to show motive, identity, existence of a common scheme or plan, the absence of mistake or accident, and intent. The state courts require that the evidence pass a rather severe test[6] for admissibility in some cases, and on the average, the federal courts appear somewhat more willing to allow bad-acts evidence under rule 404(b).

B. To Show the Witness Should (or Should Not) Be Believed: Rule 608(b)

Prior bad acts are admissible under this rule when they reflect upon **truthfulness and untruthfulness**. Put another way, if the prior act shows the witness has a tendency to lie (or to be truthful), it may be admitted in the court s discretion. The acts need not even rise to the level of a crime, much less an arrest. Remote acts are usually inadmissible.

Some examples of acts indicating untruthfulness are perjury, even when not the subject of a conviction,[7] guessing while under oath on an earlier occasion,[8] deceptive business practices,[9] reversing odometer mileage on vehicles before selling them,[10] embezzlement,[11] uttering fraudulent checks,[12] ballot or insurance fraud,[13] lying on a license, job, or credit-card application,[14] failure to report income on a tax return,[15] lying to a government agency or a border guard,[16] and simply lying repeatedly.[17]

Compare the bad conduct noted above with the following acts which, although frequently involving violations of the law, do not clearly reflect upon whether a witness might lie: Marital infidelity,[18] sexual activities,[19] prostitution or requesting that another person engage in prostitution,[20] fantasizing,[21] drug-related conduct, [22] drunkenness,[23] psychiatric treatment,[24] failing to pay legitimate debts,[25] police brutality,[26] associating with organized crime or known criminals,[27] making threats against a judge,[28] filing an allegedly frivolous civil claim,[29] murder and assassination,[30] and rape.[31]

Rule 404(b) allows extrinsic evidence, but under rule 608(b), the cross-examiner must live with the witness's answer. In some situations, either rule 404(b) or rule 608(b) could apply to a prior act.

C. To Show the Setting of the Case: The Res Gestae Rule

Although similar evidence might be introduced in some situations under rule 404(b) / *Lyle* and the res geste exception, the res geste exception is properly viewed as a separate ground for admissibility of other bad acts.[32] The theory behind admission of such evidence is that it is necessary for a full presentation and that the jury cannot be required to make its decision in a void, lacking knowledge of the time, place, and circumstances of the acts forming a basis of the charge.[33] Put another way, the jury should be able to know the setting of the case, and prior acts are inextricably intertwined with the case being tried.[34]

D. To Show Facts Directly Relevant to a Claim, Crime, or Defense

When a party must prove certain facts to meet its burden of proof, the acts are admissible under rule 402. For example, the plaintiff must prove a defendant's prior unfair trade practices to prevail in an action under that statute. In a negligent-entrustment case involving an automobile, the plaintiff must show the driver should not have been allowed to use the vehicle in question. This may be done by showing prior bad instances of operating a vehicle.[35] There may be some overlap in evidence allowed under rule 404(b) and rule 402.

Footnotes

[1] As will be seen below, evidence of marital infidelity generally is inadmissible under evidence rule 608(b), but lying under oath about it is admissible for impeachment. Caution: this rule is inapplicable to congressional proceedings.

[2] *See United States v. Queen*, 132 F.3d 991 (4th Cir. 1997).

[3] Kenneth S. Broun et al., *McCormick on Evidence* 200, at 850 n.28 (4th ed. 1992)(citing cases).

[4] 125 S.C. 406, 118 S.E. 803 (1923).

[5] *State v. Nelson*, 331 S.C. 1,_n.15, 501 S.E.2d 716, 722 n.15 (1998)(Waller, A.J.).

[6] *State v. Timmons*, 327 S.C. 48, 488 S.E.2d 323 (1997).

[7] *United States v. Bagaric*, 706 F.2d 42, 64-65 (2d Cir. 1989). *Bagaric* involved a statement by an administrative judge in a prior hearing that the witness s testimony had not been credible. *See id.* 706 F.2d at 65.

[8] *United States v. Terry*, 702 F.2d 299, 316 n.20 & accompanying text (2d Cir. 1983). In *Terry*, the court found that a prior judge had noted the expert witness was not credible and that he had guessed under oath. *See id.*, 702 F.2d at 316.

[9] *United States v. McClintic*, 570 F.2d 685, 690 (8th Cir. 1978).

[10] *United States v. Crippen*, 570 F.2d 535, 538 (5th Cir. 1978).

[11] *Telum, Inc. v. E.F. Hutton Credit Corp.*, 859 F.2d 835, 839 n.3 (10th Cir. 1988); *United States v. Sutherland*, 656 F.2d 1181, 1198-99 (5th Cir. 1981).

[12] *United States v. Holt*, 817 F.2d 1264 (7th Cir. 1987).

[13] *United States v. Rosa*, 891 F.2d 1063 (3d Cir. 1989)(insurance fraud); *United States v. Amahia*, 825 F.2d 177 (8th Cir. 1987)(insurance fraud); *United States v. Girdner*, 773 F.2d 257 (10th Cir. 1985)(ballot fraud).

[14] *United States v. Howard*, 774 F.2d 838 (7th Cir. 1985)(job); *United States v. Sperling*, 726 F.2d 69 (2d Cir. 1984)(credit card); *United States v. Carlin*, 698 F.2d 1133 (11th Cir. 1983)(license); *Lewis v. Baker*, 526 F.2d 470 (2d Cir. 1975)(job).

[15] *United States v. Zandi*, 769 F.2d 229 (4th Cir. 1985)(failure to report income).

[16] *United States v. Farias-Farias*, 925 F.2d 805 (5th Cir. 1991)(border guard); *United States v. Reid*, 634 F.2d 469 (9th Cir. 1980)(government agency).

[17] *United States v. Jones*, 900 F.2d 512 (2d Cir. 1990)(lying on employment and apartment applications, and false statements regarding a driver's license, a loan, her income tax return, and membership in an organization).

[18] *United States v. Stone*, 472 F.2d 909, 916 (5th Cir. 1973). *Stone* is a pre-rule 608(b) case.

[19] *United States v. Cox*, 536 F.2d 65, 71 (5th Cir.1976).

[20] *United States v. Mansaw*, 714 F.2d 785, 789 (8th Cir. 1983)(prostitution); *United States v. Whitworth*, 856 F.2d. 1268, 1284 (9th Cir. 1988)(requesting another). However, as discussed below in the text, prostitution combined with an intent to rob or deceive might be admissible.

Continued on page 16

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[21] *United States v. Rubin*, 733 F.2d 837, 842 (11th Cir. 1982).
[22] *United States v. Brown*, 946 F.2d 1191, 1196 (6th Cir. 1991); *United States v. McDonald*, 905 F.2d 871, 875 (5th Cir. 1990); *United States v. Rubin*, 733 F.2d 837, 842 (11th Cir. 1984); *Crimm v. Missouri Pac. R. Co.*, 750 F.2d 703, 707-08 (8th Cir. 1984).
[23] *Poppell v. United States*, 418 F.2d 214, 215 (5th Cir. 1969).
[24] *United States v. Burns*, 668 F.2d 855, 860 (5th Cir. 1982).
[25] *United States v. Lanza*, 790 F.2d 1015, 1020 (2d Cir. 1986).
[26] *Tigges v. Cataldo*,, 611 F.2d 936, 938 (1st Cir. 1979).
[27] *Levine v. District Court*, 775 F.2d 1054, 1058 (8th Cir. 1983).
[28] *United States v. Van Dorn*, 925 F.2d 1331, 1336 (11th Cir. 1991).
[29] *United States v. Dowling*, 855 F.2d 114, 120 (3d Cir. 1988).
[30] *United States v. Sampol*, 636 F.2d 621, 656 n.21 (D.C. Cir. 1980).
[31] *United States v. Fox*, 473 F.2d 131, 135 (D.C. Cir. 1972)(pre-rule 608 case).
[32] *See State v. Gagum*, 328 S.C. 80, _n.2, 492 S.E.2d 822, _n.2 (Ct. App. 1997)(citing *State v. Bolden*, 303 S.C. 41, 43 n.1, 398 S.E.2d 494, 495 n.1 (1990)). In fact, the courts sometimes discuss the res geste as if included in rule 404(b), *see United States v. Masters*, 622 F.2d 83, 85-87 (4th Cir. 1980)(discussing res geste in context of rule 404(b)) and sometimes as direct evidence . . . not Rule 404(b) evidence, *United States v. Loayza*, 107 F.3d 257,263-64 (4th Cir. 1997)). The modern trend as shown by cases such as *Loayza* appears to be viewing res-geste evidence as separate from rule 404(b) evidence. *See, e.g., United States v. Riebold*, 135 F.3d 1226, 1229 (8th Cir. 1998)(When evidence is admitted under res geste, Rule 404(b) is not implicated.).
[33] *United States v. Steiner*, 152 F.3d 931 (9th Cir. 1998).
[34] *State v. Crim*, 327 S.C. 254, 489 S.E.2d 478 (1997)(larceny of vehicle part of res geste of felony DUI); *State v. Adams*, 322 S.C. 114, 470 S.E.2d 366 (1996)(cocaine use before robbery and murder part of res geste because inextricably intertwined with latter two crimes); *State v. Williams*, 321 S.C. 455, 469 S.E.2d 49 (1966)(drug purchases before murder part of res geste).
[35] Fed. R. Evid. 404(b) advisory committee note.

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