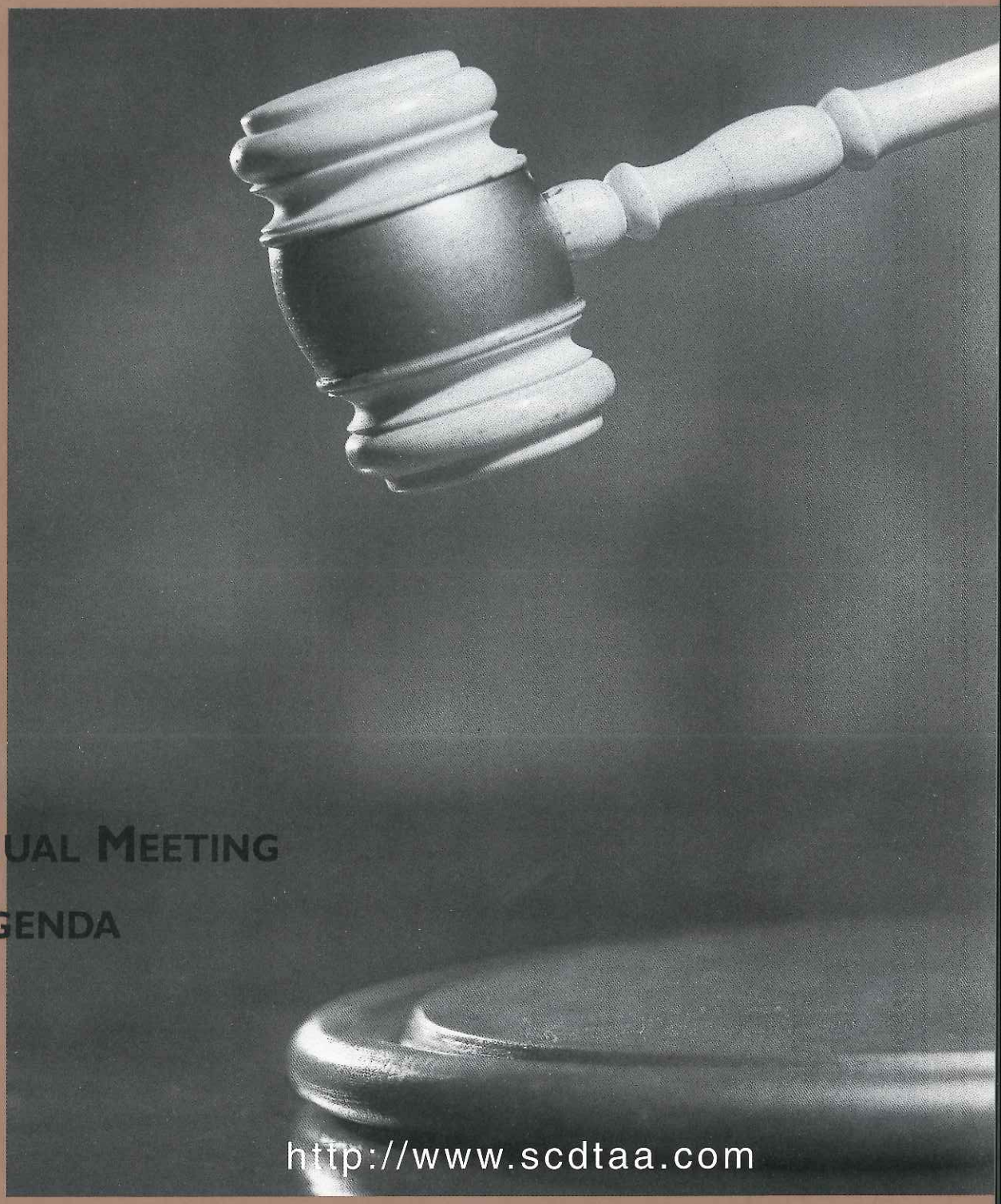
S.C. Defense Trial Attorneys' Association Volume 29 Number 3 • Fall, 2001

SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

THE DefenseLINE



2001 Annual Meeting Agenda

http://www.scdtaa.com

DRI Defense Research Institute
150 North Michigan Avenue ▪ Suite 300 ▪ Chicago, Illinois 60601
(312) 795-1101 ▪ Fax: (312) 795-0747 ▪ E-Mail: dri@dri.org ▪ Web site: http://www.dri.org

SENT VIA FACSIMILE AND FIRST CLASS MAIL

September 20, 2001

Aimee L. Hiers
South Carolina Defense Trial Attorneys Association
3008 Millwood Avenue
Columbia, SC 29205

H. Michael Bowers
Young, Clement, Rivers
28 Broad Street
Charleston, SC 29402

RE: Rudolph A. Janata Award

Dear Aimee and Mike:

It is our pleasure to inform you that the South Carolina Defense Trial Attorneys Association has been selected as this year's recipient of the Rudolph A. Janata Award. As you know, the award is presented annually to an outstanding state or area defense bar association that has undertaken an innovative or unique program contributing to the goals and objectives of the organized defense bar.

The award will be presented at the Awards Luncheon, Thursday, October 4 at the 2001 DRI Annual Meeting in Chicago. The luncheon will feature Bob Love, former Chicago Bull and now Bulls' Director of Community Relations, as the keynote speaker. We hope you will be able to attend.

Congratulations on this honor. We look forward to seeing you in Chicago.

Sincerely yours,

Neil A. Goldberg
DRI President

P.N. Harkins III
President-Elect

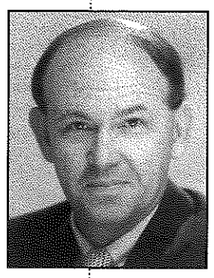
c: David E. Dukes
Richard T. Boyette
William A. Coates

SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

THE DefenseLINE

President's Letter

by H. Michael Bowers



As 2001 winds down, it seems as though it was only a few weeks ago that I wrote my first letter to our Association. Although, I have been involved with this group for a number of years, I did not realize the dedication of the membership until serving as President. I want to express my genuine thanks to all Board members who have willingly volunteered to make this such an outstanding year.

The 11th Trial Academy was held in Greenville and was a tremendous success. Many thanks to all of the participants especially the law firms in the Greenville area. I would like to extend a special thank-you to the Federal and State Judges who were involved in the mock trials. And, last but not least thanks and congratulations to Matt Henrikson and John T. Lay who served as co-chairmen.

The Joint Meeting held in Asheville July 27th-29th was well attended. Many thanks to Jay Courie and Jeff Ezell for such a good job. Our Long Range Planning Committee is working to invite other groups to this meeting such as Risk Insurance Managers Society and the South Carolina Self-Insurers Association to enhance client contact.

Also, one of the features of the Joint Meeting was a breakout for Law Office Administrators and Attorneys with a presentation by Dr. Bill McCallister. The Defense Research Institute has retained Dr. McCallister to man DRIHELP.com. This is an online subscription service that assists defense law firms in management operations including profitability. Finally, a silent auction was held on Friday night. The Pro Bono Committee sponsored this event. I am happy to report that we raised $2000 which will be donated to the South Carolina Council for Conflict Resolution to fund pro bono mediations.

I am pleased to announce that Bill Coates has been elected to the DRI Mid-Atlantic Region Board seat for a 3-year term beginning October of 2001. Bill has done an outstanding job as the SC State Representative to DRI for the last 3 years. Bill Davies has been selected to replace Bill Coates as the SC State DRI Representative. Congratulations to both Bills!

Let me again say that it has been a wonderful experience working with our Executive Committee this year. I want to say a special thank you to Aimee Hiers, our Executive Director, who has spearheaded all our events and worked very hard on the Association's behalf.

In closing, as my last official duty as your President, I will breath a "Huge" sigh of relief as soon as the band shows up at Sea Island on Saturday night. I hope to see you there!

Letter to the Editor

In the Summer 2001 issue of *The Defense Line*, Warren Moise talks about the problems created by the *Hedgepath* and *England* cases. Warren points out that both cases involved domestic relations actions and they discuss the duty of confidentiality owed by a physician to a patient.

Association members should be reminded that the duty of confidentiality has never been analyzed by a South Carolina appellate court in the context of defending civil litigation where the plaintiff's underlying medical condition is in issue. In fact, *McCormick v. England* specifically recognizes that the duty of confidentiality is not absolute. The case cites *Mull v. String*, 448 S.O.2d 952 (Ala. 1984), for the proposition that disclosure of patient information is allowed when a patient's health is at issue in litigation.

A number of defense attorney have prepared briefs on this issue citing cases in support of this exception to the duty of confidentiality. Members confronted with this issue in the course of civil litigation dealing with a patient's medical condition should be aware of this and seek to present this issue for appellate review in an appropriate case. Until the issue has been specifically addressed by the Court, this uncertainty will continue to hamstring the defense bar, as Mr. Moise point out.

Sincerely,
George C. Beighley
Richardson, Plowden, Carpenter & Robinson, P.A.

2001 Joint Meeting Revisited

Grove Park Inn • Asheville, NC
July 26 - 28, 2001

by James R. Courie

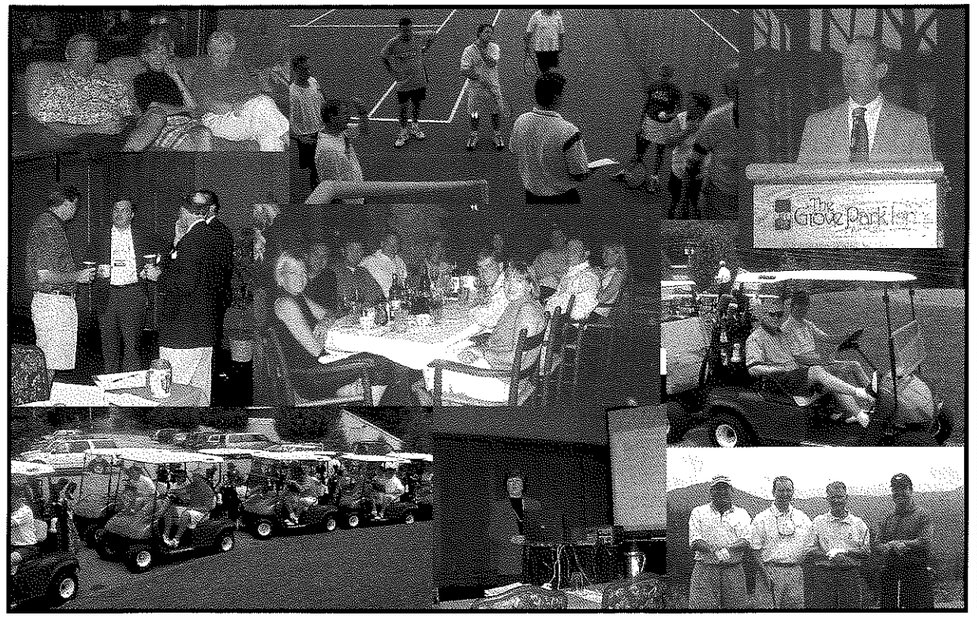
The 2001 Joint Meeting of the South Carolina Defense Trial Attorneys and the Claims Managers Association of South Carolina was another great success. Not only did we enjoy spending time with our fellow attorneys and claims managers, but benefited from an outstanding educational program. Virginia Vroegop provided an update of changes to the new Federal Local Rules. Rick Fuentes and Susan Bowers of DecisionQuest gave us insight into the Jury Box with their presentation of The 2000 Outlook Juror Survey. We all benefited from the roundtable discussion of claims managers, risk managers and corporate counsel. As always, the breakout sessions provided a great opportunity to learn more about our specific practice areas.

We were pleased to host a Law Office Administrators breakout session this year. Dr. Bill McCallister, a nationally recognized law firm consultant, gave us all insight into ways to improve the management and profitability of our firms. And who could forget The MidnightRider and the Four-Day Creeper. If you missed Judge Traxler's speech, you certainly missed one of the most enjoyable presentations in recent memory.

As always, everyone enjoyed spending time together. Congratulations to tennis tournament champions Bob Thomas, Andy Haselden, Mike Abbott, Betsy Dorn, and Sharon Besley and the golf team of Grady Beard, Judy McBrearty, David Slough, and Daniel Hayes for their victory on the links. The whitewater rafting trip was as popular as ever, and the opening of the Grove Park Inn Spa seemed to be an added benefit for those in attendance.

We are pleased to report our first Silent Auction was a tremendous success. The South Carolina Defense Trial Attorneys raised over $2,000.00 to donate to the South Carolina Council for Conflict Resolution. Thanks for your generous support of the auction.

If you missed this year's meeting, it's not too early to start thinking about next year. Mark your calendar for July 25-27. Look forward to seeing you there.



Annual Meeting Schedule of Events

November 8-11, 2001
The Cloister, Sea Island, Georgia

Thursday, November 8, 2001

3:00 p.m. to 5:00 p.m.
Executive Committee Meeting

4:00 p.m. to 6:00 p.m.
Registration Desk Open

5:00 p.m. to 6:00 p.m.
Nominating Committee Meeting

7:00 p.m. to 8:00 p.m.
President's Welcome Reception

Dinner on your own

Friday, November 9, 2001

8:00 a.m. to 12:00 p.m.
Registration Desk Open

8:00 a.m. to 9:00 a.m.
Coffee Service

8:15 a.m. to 8:30 a.m.
Welcome & Announcements
H. Michael Bowers, President, SCDTAA

8:30 a.m. to 9:30 a.m.
Ethics Hour:
Avoiding Legal Malpractice Claims
Susan Taylor Wall, Esq.
Nexsen, Pruet, Jacobs & Pollard

9:30 a.m. to 10:00 a.m.
Federal Judges' Panel Discussion

10:00 a.m. to 10:15 a.m.
Coffee Service

10:15 a.m. to 11:30 a.m.
The November 2000 Presidential Election:
The View From The Election Analyst's Chair
David E. Cardwell, Esq.
CNN Election Law Analyst

11:30 a.m. to 12:15 p.m.
Substantive Law Breakout Sessions
A. Employment Law
B. Healthcare
C. Products Liability
D. Maritime Law
E. ADR

12:30 p.m.
Golf Tournament – *Curtis Ott, Chairman*

1:00 p.m.
Fishing

2:30 p.m.
Tennis Tournament

7:00 p.m. to 8:00 p.m.
Cocktail Reception

Dinner on your own

Saturday, November 10, 2001

7:30 a.m. to 12:00 p.m.
Registration Desk Open

7:45 a.m. to 9:00 a.m.
Coffee Service

8:00 a.m. to 8:30 a.m.
SCDTAA Annual Business Meeting /
DRI Report

8:30 a.m. to 9:15 a.m.
Atoms v. Bits:
The Evolution of The Practice of Law
Jonathan Nystrom, IKON

9:15 a.m. to 10:00 a.m.
South Carolina Law on Contribution
& Indemnity
Moderated Panel Discussion - South Carolina Court of Common Pleas Judges

10:00 a.m. to 10:15 a.m.
Coffee Service

10:15 a.m. to 10:45 a.m.
State of the Judiciary Address
Jean H. Toal, Chief Justice
South Carolina Supreme Court

10:45 a.m. to 11:15 a.m.
Current Challenges Facing Defense Attorneys
P.N. (Nick) Harkins, III, Esq.
President, Defense Research Institute

11:15 a.m. to 12:00 p.m.
Substantive Law Breakout Sessions
A. Workers Compensation
B. Insurance and Torts
C. Professional Liability
D. Commercial Litigation
E. Young Lawyers Division

Afternoon on your own

7:00 p.m. to 8:00 p.m.
Cocktail Reception

8:00 p.m. to 12:00 a.m.
Dinner and Dancing
with the Ross Holmes Band
(Black Tie Optional)

SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

ANNUAL MEETING · NOVEMBER 8-11, 2001

THE CLOISTER, SEA ISLAND, GEORGIA

RETURN TO: SCDTAA, 3008 MILLWOOD AVENUE • COLUMBIA, SOUTH CAROLINA 29205
803-252-5646 • 800-445-8629 • FAX 803-765-0860

ANNUAL MEETING REGISTRATION:

NAME (as to appear on nametag): _____

FIRM: _____

ADDRESS: _____

CITY, STATE, ZIP: _____

PHONE: _____ FAX: _____ EMAIL: _____

SPOUSE/GUEST NAME (as to appear on nametag): _____

BAR NUMBER _____ SPOUSE/GUEST BAR NUMBER** _____

**If spouse/guest wishes to receive CLE credit there is a $25.00 processing fee due with registration fee

I am a first time attendee (check box) ❑

REGISTRATION FEES: **Members $ 700.00** **Spouse/Guest $75.00**

I plan to attend: ❑ President's Welcome Reception ❑ Friday Cocktail Party ❑ Saturday Night Banquet
(please check if attending – all three included in registration)

Spouse/Guest plan to attend: ❑ President's Welcome Reception ❑ Friday Cocktail Party ❑ Saturday Night Banquet
(please check if attending – all three included in registration)

ACTIVITIES REGISTRATION :(Please check all that apply and add to registration fee)

Please register ❑ me ❑ my spouse/guest to play in the golf tournament on Friday. $180.00 per person
My handicap: _____ my spouse/guest's handicap: _____
*Includes box lunch from hotel, green fees, cart & beverages

Please register ❑ me ❑ my spouse/guest to play in the tennis tournament on Friday. $45.00 per person
*Includes tournament and beverages

Please register ❑ me ❑ my spouse/guest to go fishing on Friday. $140.00 per person
*Includes box lunch from hotel, beverages, and fishing

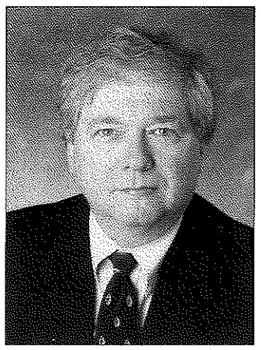
Enclosed is $: _____ (covers registration fee and activities)

• • • PLEASE RETURN THIS FORM TO SCDTAA HEADQUARTERS BEFORE OCTOBER 12TH • • •

Only 75% refund for cancellations after October 15th
No Refunds after October 26th

Meet David E. Cardwell

Featured Speaker at the Annual Meeting



David E. Cardwell is experienced in local government and administrative law. His primary area of practice is public law with an emphasis on local government, infrastructure, public facilities, sports facilities, redevelopment and election law. Mr. Cardwell is recognized by The Florida Bar as a Board Certified City, County, and Local Government Law Lawyer.

He is recognized in the area of redevelopment and tax increment financing in Florida and has been involved in many real estate redevelopment projects, including planning, development agreements and financing. He has also been actively involved in the development of public facilities and sports facilities such as stadiums and arenas, including facility development, lease negotiations with sports teams and financing.

Mr. Cardwell has spoken at several seminars, conferences, and institutes throughout this state, the country, as welt as overseas on development regulation, development agreements, government administrative procedure, land use policies and their effect of the effect of their implementation, and redevelopment. He has recently been a speaker at several national seminars on representing the public sector in sports facilities negotiations and the privatization of infrastructure development and operation. He was the faculty chairman for a seminar on development agreements offered by the Urban Land Institute. He has also drafted several local ordinances, policies, regulations, and other instruments pertaining to development, including sign regulation, historic preservation, redevelopment, and the financing of public improvements. Mr. Cardwell has served on various local boards and commissions concerned with development as welt as providing legal services. He served as a member of a study commission appointed by the Governor and Cabinet of the State of Florida to review state land purchasing policies and procedures.

Mr. Cardwell served as City Attorney for Lakeland, Florida, where he was responsible for drafting land development codes and ordinances, including implementation of the city's Comprehensive Plan and Redevelopment Plan. He also represented the city's Utilities Department in environmental, regulatory, and financing matters regarding its electric and water systems. Before becoming City Attorney, Mr. Cardwell was a staff director of the Florida House of Representatives and served as state elections director and legal counsel to the Department of State, where he participated in the initial administration of several new laws including the Administrative Procedure Act, the Election Code, and the General Corporation Act. Prior to joining state government, he was a litigation attorney with a law firm in Orlando.

Mr. Cardwell has written on the subjects of ethics and elections law, redevelopment and sports facilities development and lease negotiations. His book, Ethics and Elections: The Law in Florida was published by The Harrison Co., and he co-authored an article with Harold Bucholtz entitled "Tax Increment Financing in Florida," which appeared in the Stetson Law Review.

Mr. Cardwell may be reached at:
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8815 Conroy Windermere Road #336
Orlando, FL 32835
Phone: 407-876-6945
Fax: 407-876-4627
Mobile Phone: 407-947-0914
E-mail: dcardwell@cardwell-law.com

2001 SCDTAA Trial Academy

By John T. Lay

This summer, twenty-three lawyers from defense firms across the state participated in the 11th Annual SCDTAA Trial Academy. For the first time, the Academy was held in Greenville, South Carolina, moving from its usual venue of Columbia. The Greenville/Spartanburg Defense Bar enthusiastically embraced the Academy this year, providing speakers, coaches, witnesses and jurors for the three day event.

The Academy is designed for lawyers who have been practicing between two and five years with limited first chair trial experience. The program consisted of two days of speakers and workshops at the Hyatt Hotel in Greenville, followed by a day long mock trial at the Greenville County Courthouse before sitting Circuit Court judges and live juries of eight to twelve lay persons.

Speaking on the basic elements of trial preparation and trying civil cases, the academy students heard from trial veterans like Amy Snyder, Tim St. Clair, Bill Grant, Jim Hudgins, Warren Moise, Michael Fahnestock and former SCDTAA President John Wilkerson. In addition, The Honorable Sam Stillwell addressed strategies for preserving the record on appeal during trial, and The Honorable John C. Few gave a well received talk on the ethical approach to trial from the Circuit bench perspective. Further, Gene Covington, a well known Plaintiff's attorney in Greenville, graced us with his wisdom on the common mistakes that defense lawyers make. Finally, SCDTAA Immediate Past President Frankie Marion gave an affirming talk on being a defense lawyer and responsible member of the Bar. It is the quality of the speakers who have made themselves available for the Academy over the years that makes the program as valuable a teaching tool as it is. The

Continued on page 10

A Student's Perspective

by Stacey Montague

On July 11, 2001, I was one of 23 attorneys who attended the South Carolina Defense Trial Attorney Association's Trial Academy in Greenville, South Carolina. For the most part, we were all young and inexperienced, but eager to become trial attorneys. We came to the Trial Academy because we knew we had a lot to learn – or the people we worked for knew that we had a lot to learn – in order to become decent trial attorneys. Either way, we came to learn.

The Trial Academy consisted of two days of lectures and one day of actually doing a full trial in a real courtroom before a real judge. Prior to arriving, we were given a package that included the pleadings of a fictional case, and deposition summaries of numerous witnesses. We were paired with another attorney and assigned as counsel for either the Plaintiff or the Defendant. The lectures covered a wide variety of topics, including how to do an opening, effective techniques in direct and cross examinations, and how to handle an expert witness. The speakers remained at the Academy after their presentations so that we could use them as resources during our trial preparation. We also had breakout sessions throughout the day with experienced trial attorneys to work on different aspects of our trial and to assist us with practical questions. The presentations and the sessions definitely educated us, but nothing can compare with the education we received from actually trying the case.

I was assigned as counsel for the Plaintiff. As a defense attorney, my first thought was that it would not be very helpful to me to be the plaintiff's counsel. But, in the end, I gained invaluable perspective preparing my case. Due to the fact that one of the directors of the program is also my boss, I was lucky enough to be the only attorney without a partner. After it was all over, I was actually glad I had to work alone. I was forced to work harder and I got that much more out of the experience. I am grateful for the opportunity to have attended the Trial Academy, as there really is no substitute for practicing in a real trial situation.

For those who are considering attending in the future, I would strongly recommend it. Be prepared to work, however, so that you can truly get the most out of it.

2001 Trial Academy

Continued from page 9

Academy provides young defense lawyers the benefit of the wisdom and experience of the best trial lawyers of our state in a forum that would simply be unavailable otherwise. Following each speaker presentation, the students, who were divided into twelve trial teams, met in groups of four in workshops where they practiced their trial skills. Each workshop was led by experienced defense lawyers who gave constructive criticism to each student and helped the groups prepare for their roles in the mock trial. Following Thursday's program, the students met with the judges, speakers, workshop leaders, and Academy staff for barbecue and cocktails at Mills and Carol Anne Gallivan's house. It was a wonderful evening and the SCDTAA wishes to extend its thanks to Mills and Carol Anne for their generosity.

The mock trial this year was again loosely based on the *Bounaconti v. The Citadel* case tried in Charleston fifteen years ago. Modified to simplify the issues, it is basically a medical malpractice case involving the decision to allow a college athlete to play with a neck injury. The trials are designed to be as realistic as possible, and witnesses included actual football coaches and football officials, as well as several of your Executive Committee members playing the father and various doctor's roles. Exhibits included x-rays, photo blowups, a video tape of the injury, NCAA rules, warning labels, and helmets. Most trial teams called four or five witnesses, so each student had several chances to direct and cross both lay and expert witnesses. Taking the trials very seriously, the judges hear motions in limine, take sidebars, and decide on motions for directed verdict, sometimes dismissing peripheral parties on legal grounds. Some juries have deliberated for more than an hour and have returned with questions. Of the six trials this year, five resulted in defense verdicts while one ended in a hung jury.

One of the most valuable aspects of the Academy is the ability for the students to get feedback and criticism from the judges and members of the juries following the verdicts. Presiding over the trials this year were Judges G. Ross Anderson, Gary Clary, Larry "Choppy" Patterson, John Kittredge, Henry Floyd, and John C. Few. The very generous gift of their Fridays to the Academy by these and other Circuit Court judges in past years has, simply put, made the Academy possible. Without the trial judges and juries to make the mock trials realistic, the learning experience would be incomplete and far less meaningful.

Matt Henrikson of Barnwell Whaley Patterson & Helms, and John T. Lay of Ellis, Lawhorne & Sims were this year's Academy co-chairs, but the success of the program owes itself to the speakers, judges, workshop leaders, witnesses and jurors. The bulk of the preparation for the Academy was done again by SCDTAA Executive Director Aimee Hiers and Susan Williams, a paralegal at Haynesworth Sinkler & Boyd. They recruited and coordinated over 100 volunteers who played witness roles and sat as jurors. This was a massive effort which included feeding and arranging downtown parking for that number, as well as managing courtroom assignments as witnesses played different roles in more than one trial and were called in varying order. Aimee and Susan deserve the thanks of everyone involved with the Academy. A special thanks also to Frankie Marion and Sam Outten for their invaluable assistance in coordinating this event and to David Holler and John Bell for spending three entire days in Greenville away from their families assisting with the Academy.

Plans are being made for next year's Trial Academy and another all-star lineup of speakers is expected. Registration for the limited number of spaces will be in early 2002.

Mark Your Calendars for Next Year's Trial Academy!

Summer, 2002

Recent Order

IN THE COURT OF COMMON PLEAS
STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON
C. A. No. 2001-CP-04-009

Kevin Cowan and Jimmy Blanding,
Plaintiffs
vs.
Allstate Insurance Company,
Defendants.

This matter comes before the Court upon cross motions for summary judgment. Oral argument was held on March 29, 2001. This case concerns a coverage dispute following an automobile accident which occurred on October 19, 1999. Plaintiffs alleged their injuries were caused by Allstate's insured, Stacy Johnson. The plaintiffs filed a tort action against Stacy Johnson, C.A. No. 99-CP-04-2275, and obtained a default judgment, which was entered on July 11, 2000. The record clearly demonstrates that plaintiffs' attorney knew Ms. Johnson's liability insurance carrier was Allstate Insurance Company. In fact, plaintiffs' attorney corresponded with the insurance carrier prior to the default judgment. At no time did the attorney for the plaintiffs serve or send any notice of the lawsuit to Allstate and no evidence indicates that Allstate had actual notice of the lawsuit from any other source. Plaintiffs' counsel provided Allstate with notice of the lawsuit when they forwarded a copy of the default judgment entered on July 11, 2000.

Legal Analysis

It is undisputed that Allstate had no notice of the action and was unable to provide a defense to its insured, Ms. Johnson. Allstate now attempts to deny coverage based on its insured's failure to provide the suit papers to Allstate as required by the policy.

Under the common law, only material breaches of an insurance contract would allow a liability carrier to disclaim coverage. *Evans v. American Home*, 252 S.C. 417, 166 S.E.2d 811 (1969). The Court of Appeals altered this principle when it issued its opinion in *Shores v. Weaver*, 315 S.C. 347, 433 S.E.2d 913 (Ct. App. 1993). In *Shores*, the Court held that a cooperation clause of an insurance policy may not be enforced to the extent of the Financial Responsibility Act minimum limits of coverage.

On March 1, 1999, S. C. Code Ann. Section 38-77-142(b) became effective and provided that an insurance company cannot enforce a cooperation clause if the carrier has actual notice of a suit or a request for judgment. The legislation provides as follows:

> If an insurer has actual notice of a motion for judgment or complaint having been served on an insured, the mere failure of the insured to turn the motion or complaint over to the insurer may not be a defense to the insurer, nor void the endorsement or provision, nor in any way relieve the insurer of its obligation to the insured, provided the insured otherwise cooperates and in no way prejudices the insurer.

S. C. Code Ann. Section 38-77-142(b)(Supp. 2000).

Just like *Shores v. Weaver*, the statute deals with the specific issue of when a carrier may not enforce a cooperation clause against its insured. The Court, therefore, finds that this language is a legislative refinement of the prior holding of *Shores v. Weaver* and its progeny, *USAA v. Markosky*, 340 S.C. 223, 530 S.E.2d 660 (Ct. App. 2000).[1] The Court also notes that this statute aims to address and remedy the shortcomings and seeming unfairness of *Shores*. In *Shores*, the insurer had only a letter of representation and a threat by the claimant's attorney to file a lawsuit. Apparently, the legislature decided that such correspondence was insufficient to place the carrier on notice of a lawsuit and, as a consequence, opted to modify the standard for prohibiting enforcement of a cooperation clause. It is hard to argue that the legislature did not intend to remedy this situation when it spoke on the exact subject of *Shores v. Weaver*. The legislature is presumed to know the status of the current common law. *See State v. Bridgers*, 329 S.C. 11, 495 S.E.2d 196 (1997)(noting, "The General Assembly is presumed to be aware of the common law...").

The other provisions of S.C. Code Section 38-77-142 further evidence how the legislature intended the statute to ameliorate certain problems associated with liability insurance. Here, the legislature provides relief for an insurance company which elects to defend a lawsuit in the name of the insured without assistance from its insured. The Court can imagine the difficulty of attempting to respond to discovery without an insured's cooperation, and this provision allows the carrier to respond based upon the information within its possession and control and to avoid sanction for failing to provide information which might be in possession of its insured, but which is not available to the carrier due to the insured's failure to cooperate.

Continued on page 12

Recent Order

Continued from page 11

Interestingly, the Court notes that Section 38-77-142 provides no limitation with regard to the Financial Responsibility Act minimums. Under *Shores*, the carrier's liability was restricted to the $15,000/$30,000 limits when not given proper notice. Though it is beyond the scope of this case, as the judgment is less than the Financial Responsibility Act minimums, it would appear that the legislature intended to do away with that limitation so long as the carrier has actual notice.

Since the legislature stated that an insurance carrier cannot enforce a cooperation clause if it has actual notice, the corollary must also be true. Specifically, the carrier can enforce the cooperation clause if it does not have actual notice. This is consistent with the rule of statutory construction in which the express inclusion of one thing implies the exclusion of the other. *Hodges v. Ramey*, 353 S.E.2d 578 (2000).

As stated previously, the Court finds that Allstate did not have actual notice. In the underlying case, the Court found that the defendant was properly served and was in default. While the insured is bound by that decision, Allstate is not and is free to assert its cooperation clause and deny coverage. This interpretation allows Plaintiffs the ability to avoid the effects of this section by informing the carrier of the suit by sending a filed courtesy copy of the complaint, which should encourage the open exchange of information and discourage default "traps" where the insured is not represented by counsel.

In summary, the Court finds that the legislature enacted Section 38-77-142(b) as a measure remedying the seeming unfairness in forcing an insurer to pay a judgment without notice. The unfairness is especially present here when the plaintiffs' attorney actually had correspondence with the carrier but provided no notice to the carrier of the lawsuit having been filed. It is precisely this sort of ambush which the legislature addressed in passing the statute. Accordingly, defendant's Motion for Summary Judgment is granted, the Court finds that no coverage exists for this judgment, and this case is hereby dismissed.

AND IT IS SO ORDERED.
James W. Johnson, Jr.
Presiding Judge, Tenth Judicial Circuit
May 16, 2001.
Anderson, S.C.

Judges's Note: This court specifically finds that the language of the statute in question is not vague and ambiguous. Futher, this court has reviewed the insurance policy in question, and it has been made a part of the record.

Footnotes

[1] *USAA v. Markosky*, 340 S.C. 223, 530 S.E.2d 660 (Ct. App. 2000) arose prior to March 1, 1999, the date S.C. Code Ann Section 38-77-142 went into effect.

Evidence Matters

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

Introductory or Background Evidence

When a witness steps into the box, his background is often a mystery. Of course, the jurors can see the witness's clothes and hear his diction, but they want more. They want to know the type work he or she does. Does he put up sheetrock for a living, or is he a computer software engineer? How far did the witness go in school? Is she a fifth grade dropout, or does she have a masters degree in social work? Has he had any trouble with the law? In short, the jurors, just like you and me, want as much background information as possible so that they can size the witness up and put her into some sort of category. Once they have reached this baseline, they may then elevate or lower the witness on the credibility scale. Few court opinions have discussed or analyzed the extent to which a witness may be asked about his background when introducing himself to a jury. Analogous issues may arise when a prosecutor or defense lawyer introduces her client to the jury in an opening statement or elicits preliminary questions that suggest the witness will testify truthfully. Some basic information usually is justified, such as whether he is married, where he works, and the like. But how much is too much? In *Government of Virgin Islands v. Grant* [1] the United States Court of Appeals for the Third Circuit recognized the lack of evidentiary law in this area:

> During the course of a trial, it is customary for the defendant to introduce evidence concerning his background, such as information about his education and employment. Such evidence is routinely admitted without objection . . . .
>
> The jurisprudence of "background evidence" is essentially undeveloped. "Background" or "preliminary" evidence is not mentioned in the evidence codes, nor has it received attention in the treatises. One justification for its admission, at least in terms of the background of a witness qua witness, is that it may establish absence of bias or motive by showing the witness' relationship (or non-relationship) to the parties or to the case. It may also be said to bear on the credibility of the witness by showing the witness to be a stable person.[2]

The advisory committee notes to federal rule 401 (definition of "relevant evidence") are instructive: "[e]vidence which is essentially background in nature can scarcely be said to involve disputed matter, yet it is universally offered and admitted as an aid to understanding." In discussing this issue, the advisory committee specifically referred to posters, charts, murder weapons, and views of realty, but the comment equally applies to questioning a witness about his background.

The South Carolina courts have held that preliminary questions to a witness designed to show that the witness is somewhat credible or non-biased toward the party calling him may be allowed because they give the jury some knowledge of the witness and a more complete perspective in considering his testimony.[3] This includes questioning into the witness's employment background and lack of contact with the party calling him, so long as it is done within reasonable limits.[4]

On the other hand, several other evidence rule rules may come into play when background information is offered. In a criminal trial, there is a risk that by going too far with introductory evidence, the accused may have offered evidence of a pertinent character trait under rule 404(a), thereby permitting rebuttal by the prosecutor.[5] Regardless of rule 404, the common law long has provided that a witness who opens the door into a topic may be impeached on the matter by an adverse party.

The rule against bolstering credibility also might be cited in connection with background evidence. Courts disallow "bolstering" of a witness's credibility,[6] which is an attempt by a friendly party to offer evidence that the witness is believable before the witness's credibility has been attacked.[7] It generally is improper to offer evidence that a witness is credible until the witness has been impeached.[8] The common law followed this line of reasoning, and rule 608 is an adoption of the common-law approach. The policy behind federal rule 608(a) (from which the state rule was taken) is that to allow evidence of good credibility before credibility has been attacked would involve an enormous and needless consumption of time.[9]

When the United States Attorney puts up a witness and discloses to the jury that the witness has testified in other cases resulting in convictions, improper bolstering has occurred under rule 608.[10] Bolstering

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may occur when the questions imply that the attorney has instructed the witness to testify honestly, such as: "What did I tell you regarding your testimony to the jury today? The only thing the State wanted from you was what?" or "Did I tell you to tell the truth to the jury?"[11] These type questions may suggest to the jury that the attorney believes the witness is telling the truth.

Some exceptions to the rule against bolstering exist, but they are limited: no bolstering occurs when the government merely explains its investigation, procedures, or relationships with its witnesses.[12] Moreover, the prosecutor may anticipate the expected cross-examination of her own witness by first disclosing a plea agreement's existence to the jury during direct examination. However, whenever the prosecution offers evidence of a plea agreement, there is a danger that the agreement may help the government by implying the witness's knowledge of the crime or by sending an unspoken message that the prosecutor knows the truth and is ensuring that it is being revealed to the jury.[13] To protect against this danger, the Fourth Circuit held in *United States v. Romer* [14] that the government may only elicit testimony regarding a plea agreement if: "(1) the prosecutor's questions do not imply that the government has special knowledge of the witness's veracity; (2) the trial judge instructs the jury on the caution required in evaluating the witness's testimony; and (3) the prosecutor's closing argument contains no improper use of the witness's promise of truthful cooperation." [15] The details of plea agreements and the witnesses' promises to tell the truth on the stand may be disclosed to the jurors in the United States courts,[16] and a judge may allow the prosecutor to elicit such details, even if the defense does not intend to impeach the witness with the plea agreements.[17] In the South Carolina courts, a prosecutor also may bring out the plea agreement during direct examination and ask if it requires the witness to be truthful;[18] however, the solicitor must wait until after the witness has been cross-examined on the agreement before eliciting details of the plea agreement.[19]

Similarly, the courts hold that it is error for a prosecution to vouch for its own witnesses.[20] Vouching occurs when the prosecutor's actions could make the jurors reasonably believe that she is indicating a personal belief that the witness was believable.[21] Vouching usually occurs in the opening or closing statement, although the policies against vouching may be violated when the questions on direct examination indicate the examining lawyer believes the witness to be telling the truth.[22] Thus, a prosecutor may not make explicit personal assurances that a witness is trustworthy or comments suggesting as much; nor may the witness's credibility be bolstered by implying to the jury that information known to the attorney but not revealed in court supports the witness's testimony.[23]

There is a split between the jurisdictions whether a witness may tell the jury as an introductory matter that he has never been arrested. For example, the Fourth Circuit Court of Appeals held in *United States v. Hicks*[24] that improper bolstering occurred under rule 608 when a witness testified during direct examination that he had no prior criminal record:[25]

> The district court erred in permitting the government to prove in its direct examination of [cooperating-witness] Ford that he had no prior criminal record. Unquestionably, the evidence was adduced to bolster Ford's credibility, and Federal Evidence Rule 608(a) specifically provides that evidence of truthful character is admissible "only after the character of the witness for truthfulness has been attacked . . . ." [26]

The *Hicks* court went on to say that the error was harmless. The Court of Appeals for the Third Circuit found that evidence that the accused had never been arrested did not open the door into his character. The Third Circuit believed that the extent of such background questioning, at least when the accused is involved, is proper but nonetheless discretionary with the judge:

> The routine admission of evidence that an accused has never been arrested would thus seem to be a function of years of practice and of the common sense notion that it is helpful for the trier of fact to know something about a defendant's background when evaluating his culpability.
>
> We do not gainsay that the practice of admitting evidence as to a lack of prior arrest, as background evidence (though not as evidence of good character that would require a good character charge and open the door to evidence of bad character) makes some sense[, although] wide discretion should remain with the trial court. We hold that the Territorial Court did not abuse its discretion in refusing to permit Grant to testify that he had no prior arrests. We also note that . . . refusal to admit such evidence [by the accused], even if error, would be harmless. [27]

Rule 610 also may bar background evidence. Preliminary questions eliciting information about a witness's background might attempt to bring out that the witness attends a specific local church, is involved in church activities (e.g., a Sunday school teacher), or is a church officer such as a deacon. The real purpose of this testimony is to use angels' wings to lift the witness's credibility over that of other more earthbound, less spiritually-inclined witnesses.

Federal and South Carolina Rules of Evidence 610 are identical in providing that "[e]vidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness's credibility is impaired or enhanced." There are at least two policies underlying federal rule 610. The first policy is that religious beliefs have little probative value. Taking this a step further is the assumption that neither unorthodox religious beliefs nor atheism indicate untruthfulness. The second policy underlying rule 610 is a perception that the connection between religious beliefs and morality in jurors' minds might cause unfair prejudice.[28] Jurors might, for example, put undue emphasis upon the adherence to a particular religion, or vice versa. The witness's testimony also could be ignored if he followed a religious belief contrary to those of the jurors, similar to Martin Luther being tried by a jury composed of the orthodox priesthood. By keeping religion neutral in the judicial process, rule 610 plays an important part in promoting and protecting First Amendment values.[29] Unless there is some other overriding reason to admit this evidence, background testimony regarding participation in religious activities is best left out of the courtroom.

Finally, the mere fact of a party or witness's residence might engender unfair prejudice. When a prison inmate is asked on cross-examination where he "resides," for example, this fact alone could cause unfair prejudice, assuming the criminal conviction causing his incarceration is not admissible anyway.[30] In a slightly different but analogous situation, the South Carolina Supreme Court has held that it generally is improper to allow trial to proceed when the accused is dressed in prison garb, although an objection must be voiced.[31]

Also, when parties or witnesses do not hail from the locality where the case is being tried, an adverse party sometimes may subtly attempt to portray them as outsiders. The problem is especially exacerbated when the witness's status as an outsider is mentioned during closing argument:

> [During] closing argument of appellee's counsel[,] references were made to appellant's corporate status, its residence in another state, and its reliance on "fine city lawyers." Appellant maintains that these statements were so prejudicial as to require a new trial. We agree that the remarks were in extremely poor taste and were obviously designed to prejudice the jurors. [32]

A variant of this problem is seen with experts, such as when a defendant physician seeks to portray a plaintiff's medical expert in a malpractice case as an outsider; of course, the reason that plaintiffs sometimes employ out-of-state experts is because in-state doctors frequently are reluctant to testify against one another. The inference is unfair, whether applied to medical or any other experts and whether testifying for the plaintiff or the defendant. Intent to misuse this type background evidence usually will be evident, because the party seeking to prove the outsider status will be adverse to the witness. Such evidence is a proper subject for exclusion under rule 403.

Footnotes

[1] 775 F.2d 508 (3d Cir. 1985).

[2] *Id.* at 513 (footnote omitted)(cited in *United States v. Sullivan*, 85 F.3d 743 (1st Cir. 1996); *United States v. Blackwell*, 853 F.2d 86, 88 (2d Cir. 1988)).

[3] *See South Carolina Dep't of Highways & Pub. Transp. v. ESI Invs.*, 332 S.C. 490, 505 S.E.2d 593 (1998)(quoting *City of Baltimore v. Zell*, 367 A.2d 14 (Md. 1977)).

[4] *ESI Invs.*, 332 S.C. 490, 505 S.E.2d 593.

[5] *Grant*, 775 F.2d at 513 n.7.

[6] *See* Fed. R. Evid. 608; *United States v. Samad*, 754 F.2d 1091, 1100 (4th Cir. 1984); S.C. R. Evid. 608; *State v. Lynn*, 277 S.C. 222, 284 S.E.2d 786 (1981).

[7] To "bolster" as defined by Webster is "[t]o support; to hold up." *See Webster's New Universal Unabridged Dictionary* 205 (2d ed. 1983). For case law on bolstering, see generally Ralph King Anderson, Jr., *Nuts and Bolts of South Carolina Substantive and Procedural Law* 113-18 (1994).

[8] *See Powers Constr. Co. v. Salem Carpets, Inc.*, 283 S.C. 302, 322 S.E.2d 30 (Ct. App. 1984). Evidence of character generally is not admissible in civil trials. In *Woods v. Thrower*, 116 S.C. 165, 107 S.E. 250 (1921), the court noted that a stranger to the area may have his good character shown before it is attacked. The South Carolina Rules of Evidence do not expressly incorporate this requirement.

[9] *See* Fed. R. Evid. 608(a) advisory committee note.

[10] *See United States v. Taylor*, 900 F.2d 779, 781-82 (4th Cir. 1990); *see also United States v. Vogel*, 37 F.3d 1347 (4th Cir. 1994)(unpublished opinion)("*In . . . Taylor* . . . the government introduced evidence that its star witness had given `reliable' testimony that had led to convictions in other, unrelated cases, and it argued that the jury should believe its star witness because other juries had done so in the past. In *Taylor*, we held that introducing convictions obtained in other cases in which a testifying witness had testified in an effort to bolster or rehabilitate that witness's credibility violates Rule 608(b).").

[11] *State v. Kelly*, 343 S.C. 350, 540 S.E.2d 851 (2001). In *Kelly*, the improper questioning went as follows:

> [Assistant Solicitor]: What did I tell you that I absolutely required regarding your testimony to this jury today?
>
> [Prosecution witness]: Uh - excuse me?
>
> [Assistant Solicitor]: Did I tell you to tell the truth to this jury -
>
> [Prosecution witness]: Of course.

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. . . .

[Assistant Solicitor]: What did I tell you regarding your testimony to this jury today? The only thing the State wanted from your testimony was what?

[Prosecution witness]: The truth.

Id.

[12] *United States v. Lewis*, 10 F.3d 1086, 1089 (4th Cir. 1993)(cited in Carl Horn, *Fourth Circuit Criminal Handbook* Section 229, at 294 (2000 ed.)); *United States v. Evans*, 917 F.2d 800, 809 (4th Cir. 1990).

[13] *United States v. Henderson*, 717 F.2d 135, 137 (4th Cir. 1983).

[14] 148 F.3d 359 (4th Cir. 1999).

[15] *Id.* at 369 (citing *Henderson*, 717 F.2d at 138)(cited in *State v. Shuler*, ___S.C.___, ___S.E.2d (2001)).

[16] *Henderson*, 717 F.2d at 138.

[17] *Id.*

[18] *State v. Shuler*, ___S.C. ___, ___S.E.2d___(2001).

[19] *See id.*___S.C. at___n.3 ,___S.E.2d at___n.3.

[20] *See United States v. Samad*, 754 F.2d 1091, 1100 (4th Cir. 1984); *State v. Kelly*, 343 S.C. 350, 540 S.E.2d 851 (2001).

[21] *United States v. Lewis*, 10 F.3d 1086, 1089 (4th Cir. 1993)(cited in Carl Horn, *Fourth Circuit Criminal Handbook* Section 229, at 294 (2000 ed.)).

[22] *See Kelly*, 343 S.C. at ___, 540 S.E.2d at___(citing *United States v. Walker*, 155 F.3d 180, 184 (3d Cir. 1998)).

[23] *Lewis*, 10 F.3d at 1089; *Kelly*, 343 S.C. at ___, 540 S.E.2d at___(citing *Walker*, 155 F.3d at 184); William B. Johnson, *Propriety and Prejudicial Effect of Comments by Counsel Vouching for Credibility of Witness: State Cases*, 45 A.L.R.4th 602 (1986).

[24] 748 F.2d 854 (4th Cir. 1984).

[25] *Id.* at 859.

[26] *Id.*

[27] *Government of Virgin Islands v. Grant*, 775 F.2d 508, 513 (3d Cir. 1985)(footnote omitted)(cited in *United States v. Sullivan*, 85 F.3d 743 (1st Cir. 1996); *United States v. Blackwell*, 853 F.2d 86, 88 (2d Cir. 1988)).

[28] *See* 1 Kenneth S. Broun et al., *McCormick on Evidence* Section 46, at 171 (4th ed. 1992). Prejudice from disclosure of a witness' adherence to agnosticism, atheism, or an unusual or unpopular sect -- especially in small, rural communities -- could transfer the jury's focus away from the issues at hand and unduly prejudice the party calling the witness. *Id.* Section 46, at 171-72.

[29] 28 Charles Alan Wright & Victor James Gold, *Federal Practice and Procedure* Section 6152, at 308-11 passim (1993).

[30] If the plaintiff were incarcerated and suing prison officials under Section 1983 for cruel and unusual punishment, or if the conviction were admissible under evidence rule 609, it would make little difference whether he were asked where he resided - the jury would know this anyway.

[31] *Humbert v. State*, S.C. Sup. Ct. Op. No. 25314, filed June 25, 2001.

[32] *Smith v. Travelers Ins. Co.*, 438 F.2d 373, 375 n.2 & accompanying text (6th Cir. 1971).

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