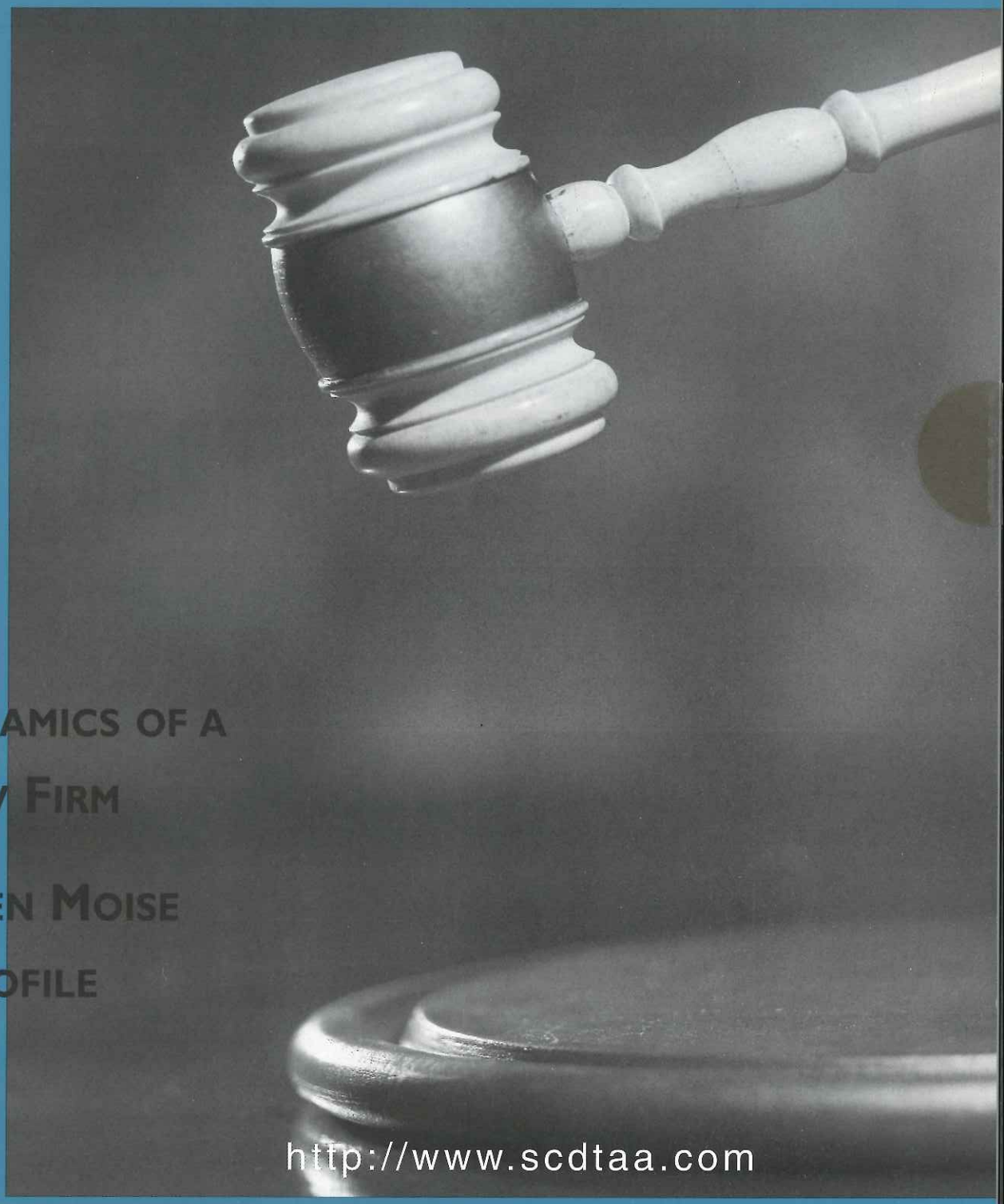
S.C. Defense Trial Attorneys' Association Volume 29 Number 4 ▸ Winter, 2001

SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

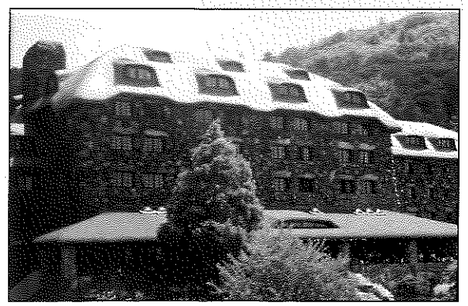
THE DefenseLINE



THE DYNAMICS OF A LAW FIRM

WARREN MOISE PROFILE

http://www.scdtaa.com



TO THE VINEYARD

fall

ANNUAL MEETING

November 7-10, 2002

Château Élan ☛ Braselton, GA

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

SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

THE DefenseLINE

By Laws change:

At the last meeting of the Executive Committee it was noted that retired members of our organization possess a wealth of knowledge and experience that are strong assets to our organization. In order to encourage such individuals who have been active members but have retired from the practice of law to continue to be involved in the organization, the membership committee here by proposes a new membership category as follows:

LIFE MEMBERSHIP

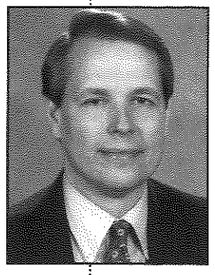
Section 1. Eligibility
Life Membership shall be granted to applicants who have held membership in the South Carolina Defense Trial Attorneys' Association for twenty (20) consecutive years and have retired form full-time legal practice.

Section 2. Definition
Life Membership status will grant all rights and privileges awarded any other members, however the Life Member's annual dues will be waived.

Section 3. Application for Status
Application forms for life membership will be available upon request by the member.

President's Letter

by H. Mills Gallivan



"It was the best of times, it was the worst of times" – Charles Dickens

What a privilege to take over as President of the number one state defense organization in the country. The South Carolina Defense Trial Attorneys' Association is entering its 35th year and in October 2001 under the leadership of President Mike Bowers, our Association was awarded the prestigious Rudolph A. Janata Award by the DRI. Once again a heartfelt thanks to Mike and a hard working Executive Committee who made this long sought after goal a reality.

On a more sobering note, our nation is faced with a crisis the magnitude of which we have never before experienced. Since September 11th I have thought about what I can do to help in this time of crisis. I am convinced that a renewed commitment to improving the civil justice system is the best thing I can do personally and as President of this outstanding organization. I believe this is a great time to be a lawyer and it would behoove each of us to rededicate ourselves to the Attorneys Oath that we took when we were admitted to the Bar. We can all make a significant contribution to our country in this time of crisis just by doing the best we can to live the Oath we have all taken. The civil justice system in this country is alive and well and this was most evident in the resolution of the disputed 2000 Presidential election.

I am very blessed to have inherited an excellent group of officers, a very talented Executive Committee and a great Executive Director who are dedicated to taking the SCDTAA to the next level. Our number one goal for the coming year is to improve the services to our membership. We are working on several projects that we believe will substantially enhance the value of your membership in the SCDTAA.

First and foremost, we are finishing our website which will include a members only area. This area will include listservs for our substantive law committees. This will give our substantive law committee members the ability to communicate immediately on hot issues relative to their practice areas. This is a project which has been slowed due to technical difficulties beyond our control. However, we have been assured the website will be fully operational in the next few months.

Second, we are in the process of completing a Long Range Plan to enhance our effectiveness as an Association. Earlier this year the Executive Committee held a weekend retreat to discuss long range planning. We now have a draft Long Range Plan which should be finalized early in 2002. This plan will provide our Association with a framework for service to our members over the next three to five years.

Third, we believe that the Joint Meeting and the Annual Meeting are major benefits to our members. They are also major financial commitments. We are working to make sure that these meetings continue to provide both the highest quality CLE and social opportunities for our members. The Joint Meeting has now taken on a new twist as a venue for major technology exhibitors. We are hoping to increase participation at this meeting by asking RIMS and self insurers to attend. We also plan to ask the South Carolina Workers Compensation Commissioners to attend this meeting. We want to expand the networking opportunities for our members and all who attend the Joint Meeting.

The Annual Meeting this year was a smashing success thanks to a hard working committee led by Mark Phillips and Elbert Dorn. It offered our members an opportunity to experience a great educational program in an ideal setting with direct input from both our federal and state judges. We are looking for ways to increase member attendance and participation at this meeting. The SCDTAA 35th Annual Meeting will be held a Château Élan November 7-10, 2002 and it will be a special event you will not want to miss.

Finally, this Association is made up of outstanding lawyers. I have had an opportunity over the last several years to meet some great lawyers at the DRI Annual Meetings. I have come away from each meeting convinced that the South Carolina Defense Trial Attorneys' Association is made up of the finest lawyers in this country. We want to publicize the achievements of our member lawyers and to that end this issue of the Defense Line marks the inauguration of a new column which will profile one of our outstanding members in each upcoming issue. If you know a member who deserves recognition please submit that person's name to the Editor of The Defense Line for a future Member Profile. We want to recognize our members who have demonstrated superior legal ability, service to the SCDTAA and/or a high level of community service.

You will soon be receiving a membership survey to choose a committee assignment. Please complete this and return it to the SCDTAA Headquarters because we need your help and support to continue our tradition of excellence. I am proud to be the President of such an outstanding association of defense lawyers and I thank you for the opportunity to serve you this coming year.

2001 Annual Meeting Revisited

The Cloister • Sea Island, GA
November 8 - 11, 2001

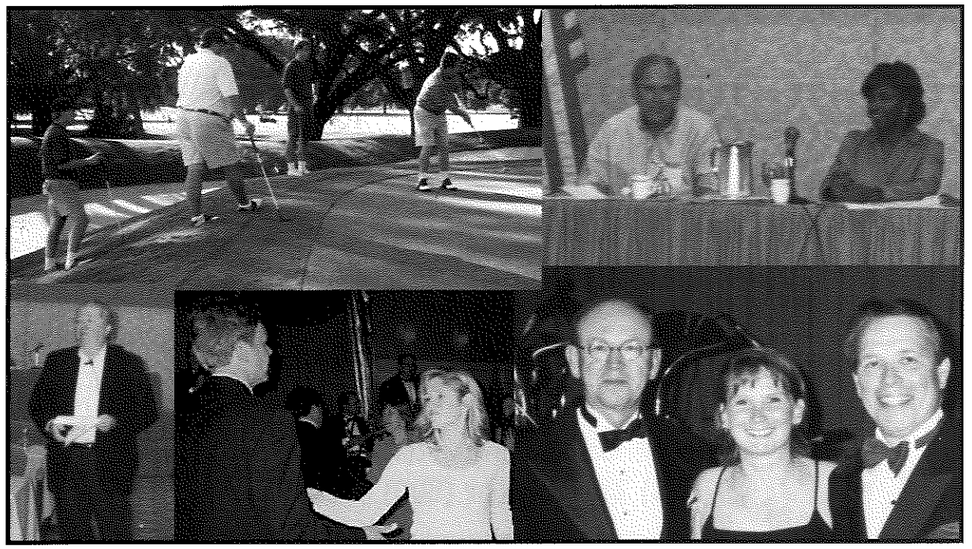
by G. Mark Phillips

Everyone had a ball at the SCDTAA Annual Meeting at The Cloister. Forty state and federal judges and Industrial Commissioners joined us for the weekend.

Susan Wall of Nexsen Pruet Jacobs Pollard & Robinson livened up our ethics hour with a talk on the avoidance of legal malpractice claims. Senior U.S. District Judges Weston Houck and Matthew Perry participated in a most entertaining panel discussion that was led by Chris Daniels of Nelson Mullins Riley & Scarborough. CNN election law analyst David Cardwell gave us an insider's view of the Bush/Gore election shenanigans that took place a year ago. Jonathan Nystrom of IKON addressed us on the use of technology in our law practices. S.C. Circuit Court Judges Jimmy Williams, Vic Rawl, Tommy Cooper, John Few, and John Hayes participated in an excellent, timely panel discussion of contribution and indemnity law. This topic was headed up by Dawes Cooke of Barnwell Whaley Patterson & Helms. Judge Ernest Kinard gave a most informative state of the judiciary address which was spiced with his dry, excellent humor. DRI President Nick Harkins then gave an inspiring talk on overcoming the challenges which defense lawyers face. Lawyer and Judges worked together to present the substantive law breakout sessions.

It was not an all-work weekend. We had plenty of lawyer/judge/spouse interaction at the golf tournament, the evening receptions, the saltwater fishing charters, the restaurants all over The Cloister, and the grand finale on Saturday night. There was plenty of time to relax in an elegant setting on Friday and Saturday afternoons. On Saturday night, we had a steak and lobster banquet. SCDTAA Executive Director Aimee Hiers arranged for two movie screen-sized televisions to be set up on either end of the room. Unfortunately, neither of our teams prevailed in the USC/Florida or Clemson/Maryland games. We still managed to dance the night away with The Ross Holmes (swing) Band of Columbia.

Mark your calendars for next year's Annual Meeting, November 7-10, 2002. We will be at Château Élan Winery & Resort near Atlanta. We look forward to seeing you there.



The Dynamics of a Law Firm: The Strength of the Wolf is in the Pack; The Strength of the Pack is in the Wolf

by Judge Alex M. Sanders, Jr.
Speech at 2000 Annual Meeting
Kiawah, SC • November 3, 2000

The name of my speech today is "The Dynamics of a Law Firm: The Strength of the Wolf is in the Pack; The Strength of the Pack is in the Wolf." Whenever I speak on the subject, I find that there's always somebody in the audience who knows more about law firms than I do. I begin by asking that person to please leave.

While he's leaving, I'll tell you a quick story. The story is not true. All the other stories this morning are true. Or mostly true. Or somewhat true. The names have been changed. The facts have often been "improved." (After all, I'm still a lawyer.) But, they are true, at least, in the larger sense. As you may have heard, I speak in parables.

Is he gone? Here's the first story, the only one that's not true. Three American lawyers were in Yugoslavia, helping design a legal system for the restructured republic, when the NATO bombs started falling. The lawyers were captured and, because they were Americans, they were put in front of a firing squad. Each lawyer was given the chance to make a statement before being executed.

The first lawyer to speak was actually a law professor. Naturally trying to buy as much time as possible, he said, "I will state the entire history of the common law, beginning with Henry II, in 1189, and continuing up to and including the Paula Jones/Monica Lewinsky case." And he did. Of course, it took a long time. A very long time. But eventually, he ran out of anything else to say, and they shot him.

The second lawyer, an in-house corporate counsel for a major insurance company, proceeding in similar vein but trying to buy even more time, said, "I will review in detail every aspect of revised corporate billing practices, including alternative billing, formatic billing, blended rates, flat fees, billing audits, and precisely how outside counsel will be compensated by the company."

The third lawyer, a defense trial lawyer in private practice, said, "Shoot me now."

A popular subject today is change. I'm not going to talk much about that. Change is not coming. Change is here. Times change. Jogging has replaced protest marches. Jane Fonda has swapped sit-ins for sit-ups and married Ted Turner. Now she's left him and apologized for opposing the war in Vietnam. As I say, times change. Every society is burdened with the task of creating an order that will endow the fact of its existence with meaning. It's not helpful to keep lamenting the changes in the law and saying, "the practice of law is not fun anymore." In fact, that's not even true.

The state of the law - while in need of much improvement - is better than ever. When I began practicing law almost forty years ago, criminal defendants were almost never represented by lawyers. Gideon's trumpet had not been sounded. On the civil side, discovery in the state courts was virtually nonexistent. Interrogatories were unheard of, and depositions were rarely allowed. Trial was by ambush. Admissions to USC Law School were based in large part on the family background of the applicant. No black person had ever been admitted.

I had never attended school a single day with a black person. The anti-lynching law was defeated in Congress as a result of a filibuster by a South Carolina senator, and women were excluded from South Carolina juries Blacks were not allowed to use the bathroom at the Richland County Courthouse. The water fountains were segregated, and even the plaque in the Courthouse memorializing World War II veterans, who died fighting for their country, listed their names in two separate lists, one labeled "White" and the other "Colored." United States District Judge Matthew Perry told me about returning from World War II and being made to eat in the kitchen of a restaurant in North Carolina, while German prisoners of war were served in the main dining room. You can't tell me things were better then. Better for whom? We are nostalgic for a grand era in the law that never was.

The law is not an independent branch of thought, static like mathematics or physics. The felt necessities of the time, the prevalent moral and political theories, institutions of public policy, avowed or unconscious, even the prejudices lawyers and judges share with their fellow human beings have a good deal more to do than precedent in determining the rules by which men and women are governed.

Change almost always represents progress of the human condition. Constancy almost always represents stagnation. In any event, change is certain. There's no point in complaining about it. Even managing partners, like politicians and like diapers,

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The Dynamics of a Law Firm

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sometimes need changing - and sometimes for the same reason.

I've changed jobs every eight years during my whole adult life. The College of Charleston, where I now live and work, was founded in 1770 by three men who signed the Declaration of Independence and three other men who signed the Constitution. The faculty is brilliant, the administration is efficient, and, like the children of Lake Woebegone, all the students are above average. Beyond dispute, the College of Charleston is the most elegant institution of higher learning since the 12th century.

I sent my daughter to the University of Virginia. She had an unusual roommate, a member of the Royal Family of Hungary in exile. She was a beautiful girl. She looked just like Grace Kelly. Her name was "Viva." "Viva," in Hungarian, means "paper towel." Do you believe that? That's a joke. But the rest of the story is true.

Needless to say, I was mightily impressed. And, I was even more impressed when, at parents weekend, I had the opportunity to meet her mother, a bona fide Hungarian princess. Frankly, I was somewhat at a loss for words. I didn't know what to say. What do you say to a Hungarian princess?

In the South, when we meet somebody, we always say, "Where are you from?" You can't say that to a Hungarian princess. "Where are you from?" So I said what people in the North say when they meet somebody for the first time. I said, "What do you do?" That turned out to be an even worse question. "What do you do?"

"That is an embarrassing question," she replied. "I don't do anything. I am a princess. Princesses don't do anything. But, no one understands that in a democratic society. So, ever since we have lived in America, that has been a very embarrassing question for me - a question with no good answer. At least it doesn't have an answer anyone in America can understand."

In a desperate effort to redeem myself, I gave her some advice. "The next time anyone in America asks you what you do, say 'I play the harp.' That is my advice. No one will ever have a harp. If, by chance, they do have one, someone will be playing it. So, I promise you will be safe. And the answer will be perfectly acceptable, even in so egalitarian a society as a democracy. And, what's more - if I may presume to say so - the answer is also entirely suitable for a Hungarian princess."

She thanked me - a little perfunctorily I thought - and terminated our conversation. I never saw her again. That was in 1988. That circumstance - not knowing what to say to somebody - only happened one other time to me. Almost exactly five years later, there was a conference at the College of a distinguished group of nuclear scientists from all over the world.

I had a reception for them at the President's House. One of the best things about the job I have is the chance to meet so many interesting people - including, of course, you all. But on this occasion I found myself, once again, at a loss for words. What do you say to a nuclear scientist from a foreign country?

So, I was delighted to find that one of the nuclear scientists came from Hungary. I had something to say. "You might be interested to know," I said, "I once had the great privilege of meeting a Hungarian princess."

His eyes lit up. "Oh," he said, "the Royal Family, for many years in exile, has just returned to Hungary. And, the people are thrilled," he said. "National pride has returned," he said. "And, the princess is so beautiful," he said. "And so brilliant," he said. And he said, "she plays the harp."

What has that got to do with anything? I tell you what lawyers like you were always telling me when I was a judge: "Bear with me your honor, I'll connect it up eventually." Okay?

The University of Virginia is located not far from here in Charlottesville, Virginia. When my daughter was in school, her mother and I often visited her there. On one such visit, a memorable thing happened.

In Charlottesville, they have turned Main Street into a very nice little mall. They have a drugstore there with an old-fashioned soda fountain. You can get milkshakes and sodas and all the things you used to be able to get before the big chain stores took over the world of drugstores.

Out in front of the drugstore, in the mall itself, there are these little round tables. You know the kind I mean. Little round tables about two feet in diameter, with two of those wire-backed chairs at each table. There are about twelve or fourteen of these little tables grouped around the front of the drugstore.

It was the middle of the afternoon, and I had some time on my hands. So, I went into the drugstore, bought a newspaper, a Pepsi-Cola and a package of peanut butter crackers. Then, I went outside and sat down at one of the little tables. All the others were vacant. I was the only one there. Have you got the picture?

No sooner than I had sat down and arranged myself, a man came out of the drugstore carrying a cop of coffee, and he sat down opposite me. He sat down at my table, although there were at least eleven other tables with no one sitting at them. Naturally, I thought it a little odd. The man was a black man, a person of color, as they say.

Anyway, here I was, seated two feet away from this man. I looked at him. He looked at me. Neither of us spoke. I ate a cracker, took a sip of Pepsi, I ate another cracker, and went back to reading my paper. Then he did it. He reached over, took a cracker and ate it. Now, what exactly is the proper response to this?

How big a deal should you make of a peanut butter cracker? What I did was I glared at him. He glared back at me. I ate another cracker, never taking my eyes off him. He ate another cracker. Now what? There was one cracker left. Our eyes were locked. I was glaring at him, two feet away. He was glaring back at me, two feet away. Now what?

Then, without a word, without a gesture, without so much as a flicker of the eye, he looked away. He looked back, looked down and gently pushed the last cracker over to me. Needless to say, I ate it. He got up and hurried away, leaving me with my newspaper and my Pepsi-Cola.

I silently congratulated myself on not having been the first to blink, so to speak. And I was still congratulating myself a few minutes later when I picked up my newspaper, and there under it, I saw for the first time, unopened, untouched, my package of crackers. I had been eating his crackers.

What do you suppose that man thought? Undoubtedly, the same thing I thought, and the same thing you thought as you listened to the story. Probably, he is somewhere, as we speak, telling the same story. I never saw him again. I verily hope I never do.

It seems to me that story illustrates a profound misunderstanding which exists in the world. It is the matter which divides the Albanians and the Serbs in Yugoslavia. It is the matter which divides the Catholic and the Protestant in Northern Ireland. It is the matter which is dividing as we speak the Palestinian and the Jew. It is the matter of "who is eating whose crackers."

In America, the question divides white people and black people. White people see themselves living in an America where black people feed off them through welfare subsidies and affirmative action programs. Black people, on the other hand, see an entirely different America. They see an America where they are still foreclosed from the American dream.

Following one of the verdicts in the Rodney King cases, we saw on television Blacks in Los Angeles looting everything in sight. Everything, that is, but Savings and Loans. White people had already looted those. The looting by Blacks has cost millions of dollars. The looting by white people has cost a half-trillion dollars. For some reason, nobody complains much about the white looting.

White people can't imagine the anger of black people. Black people can't imagine the resentment of white people.

Who is eating whose crackers?

That is exactly the question that divides and destroys many law firms. How many times have you heard that ultimately destructive slogan, the anthesis of partnership, the operative opposite of the joint enterprise, "We eat what we kill." How many times have you heard that? A law firm is not a wolf pack. Still, there are similarities. The individual wolf does not eat what he kills or what she kills. The wolf eats what the pack kills. The strength of the wolf is in the pack. The strength of the pack is in the wolf.

As you well know, in South Carolina, the Civil War is not quite over. Despite torturous efforts, there remains the question of whether the Confederate flag should continue to fly. Some people say the flag stands for oppression and slavery - hate. Others maintain just as vehemently that the flag represents our heritage.

I have lately adopted the practice never again to enter upon a premises where the Confederate flag is being discussed. It can suck all the oxygen out of the room. To date, nobody has convinced anybody of anything. The problem with the issue is that it has been played out impersonally by both sides. Everybody's talking; nobody's listening. The debate has even ruined barbecue for me – and that's a big thing in my life.

Not long ago, as I was leaving the President's house at the College, I saw a co-worker of mine standing on the sidewalk in front of the fraternity houses. I recognized her immediately as Dorothy, one of our custodial workers who cleans up the residence halls at night. She was softly crying.

You may have heard me tell the story of Dorothy, when the debate on the flag was before the General Assembly. Now that I think about it, you've probably heard all these stories before. I don't apologize for that. What's wrong with telling a story more than once? Suppose the principle of never repeating a story were applied to music. In any event, I tell Dorothy's story today as illustrative of a different point, only superficially connected to the issue of the Confederate flag.

I know Dorothy, and I know she has problems. She lives a life of "quiet desperation." Everybody at the College knows Dorothy. She is a single mother. She works hard at close to minimum wage to support herself and her children. She bears her burdens privately. Her eyes are like the tinted windows of a limousine: she can see out, but you can't see in.

She is always cheerful and uncomplaining. She neither seeks nor expects any help from anybody. Nevertheless, I thought she might tell me what was causing her such acute distress. I thought she might let me help her.

"What's the matter, Dorothy?" I asked, fully expecting her to reveal some intractable financial crisis or perhaps a serious illness that had overtaken one of her children. I was wrong. She pointed up at the Confederate flag flying proudly on one of the fraternity houses.

"I love these children," Dorothy said. "I love cleaning up after them. I don't mind their mess. But, when I see that flag, it makes me think they hate me." "They don't hate you, Dorothy," I said. "Those fraternity boys are just playing. You know how bad they are sometimes. You know how they like to play." I tried desperately to make her understand. She didn't. Memories of old experiences were too much with her. She sobbed audibly.

I went straight over to the fraternity house. "Men," I said, "I'm sorry, but I've got to ask you to take down that flag." They stiffened visibly. I could see it in their eyes: They were going for their argument like a

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The Dynamics of a Law Firm

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gunfighter preparing to draw his Colt 45. I was in for the diatribe. The bumper sticker argument: "It's part of our heritage. It doesn't represent hate. We have a right." And so forth.

The President of the fraternity stands six feet four. He has the ash blond hair and the indomitable spirit of his Nordic ancestors. He has eyes like a Weimaraner. He was ready for me. "Exactly why should we take it down?" he asked, cool as a cucumber. "Because it makes Dorothy cry," I said. I told them all what had happened. "Oh," the President almost whispered, his eyes now move like those of a deer caught in headlights. "We didn't mean to make Dorothy cry," he said.

That night the fraternity met. They discussed the matter of the Confederate flag as I'm sure they had many times before. But this time, the discussion was different. It centered now not on the lifeless pages of history but on a single human being: Dorothy. The next day the flag came down.

Perhaps, the Confederate flag will go back up tomorrow or next year or years from now, when all the fraternity boys now at the College have graduated. But, for one brief, shining moment an idea prevailed that is the best idea any of us ever had, the idea of unselfishness.

Approaching the issue from that perspective - from Dorothy's perspective - immediately invokes the familiar rule fundamental to literally every religion, Christians and Jews, Muslims, Hindus, and Buddhists: Do unto others as you would have others do unto you, the Golden Rule.

The Golden Rule is found in the New Testament, in the seventh and twenty-second chapters of Matthew and in the sixth chapter of Luke. The New Testament takes the original version of the Rule from the nineteenth chapter of Leviticus in the Old Testament. The Rule also appears in the fourth chapter of the Book of Tobit and in the Apocrypha. "That is the entire law," says The Talmud. "All the rest is commentary."

The poet Shelley paraphrased the Rule: "A man, to be greatly good, must imagine intensely and comprehensively; he must put himself in the place of another and of many others; the pains and pleasures of his species must become his own." Hate is not the opposite of love; indifference is. Indifference to others violates the Rule.

The Rule is obeyed by unselfishness. Whether in a law firm or a wolf pack, unselfishness is the key to all successful joint endeavor, all viable partnership. That's why the strength of the pack is in the wolf, and the strength of the wolf is in the pack. Unselfishness is not merely moral, unselfishness is of enormous practical benefit. Without unselfishness, joint endeavor is doomed. Without unselfishness, partnership is hopeless.

The idea of unselfishness seems to have fallen on hard times lately. A certain cynicism and bitterness seems to have overtaken the American spirit. We don't like politicians. We don't like lawyers. We don't like doctors. We don't like business. We don't like labor. We don't like criminals. We don't like the police. Pedestrians hate cars. Cars hate pedestrians.

We don't like the Chinese, and guess what. The Chinese don't like us. They think they got cheated. They gave all those campaign contributions, and they still had to steal the good stuff. We don't like anyone except the deserving poor, and we don't want to do anything much for them, perhaps because if we did they wouldn't be poor anymore, and then we wouldn't like them. We seem to resent everybody.

You can't be successful in practicing law and be resentful towards your partner. Resentment affects you physically. Resentment is the enemy of a healthy life. Nobody knows what causes cancer. But studies show stress breaks down the immune system. Resentment produces the ultimate in stress. The human body wasn't made to harbor resentment. That emotion is far too complicated. We haven't sufficiently evolved as a specie to harbor resentment for long.

All higher primates share most emotions. Resentment, however, is unknown in other primates, and resentment in a person is like acid in a paper cup: ultimately destructive of the vessel that contains it. The joy of being unselfish, on the other hand, is a simple emotion, a healthy emotion, requiring hardly any thought.

Some things about the practice of law are unpleasant. But that's true of every endeavor in life. A member of our faculty came to see me recently with a number of complaints. "Don't misunderstand me," he said. "I like ninety percent of everything about my job." "If you liked a hundred percent," I said. "You'd have to pay me." The ten percent is what we all get paid for. Most unpleasant things about the practice of law are tolerable. Resentment is the exception. Resentment will kill your firm; resentment will kill you. The potential for resentment in a law firm are unlimited. Perhaps you resent an older lawyer who is no longer carrying his load. Perhaps you resent a charismatic young associate; perhaps a contemporary making more money than you for no discernable reason. For whatever reason, if you can't overcome lingering resentment in your law firm, take my advice: Get out before it's too late.

One more story from the College of Charleston, and I'm finished. The College is truly a community of scholars. But the brightest light among us there is a gentlemen named James Parlor.

In the 1950s, when Eisenhower was President, James Parlor graduated from high school in Yemassee, South Carolina. Yemassee is a small town, a short distance south of Charleston. Not far from Yemassee, to the east, begins the great expanse of the salt marsh, which makes up South Carolina's coast, the salt marsh, stretching from horizon to horizon, as far as the eye can see.

When James Parlor was a boy, huge flights of migrating waterfowl often crowded the sky. There were often more ducks and geese over the skies of Yemassee than there were people on the ground in Yemassee.

Naturally, it was James Parlor's ambition to go to college, and even more naturally, the college he wanted to attend was the College of Charleston. But, James Parlor was not allowed to attend the College of Charleston. Although Parlor is a prominent name in South Carolina, James Parlor and his family are not among the landed gentry. They did not come to South Carolina from Europe. They came from Africa. James Parlor is not a European American. He is a person of color, as they say.

In the 1950s, African Americans were not allowed to attend the College of Charleston. Therefore, largely without choice in the matter, James Parlor followed the pattern of the migrating waterfowl and left Yemassee.

At first, he did not go far. An island in the salt marsh, not far from Yemassee is named Paris Island. Perhaps, you have heard of it. It is a basic training facility for the United States Marine Corps. James Parlor joined the Marines. He became a drill instructor, and had a distinguished military career.

In 1984, James Parlor retired, returning home to care for his invalid mother, and he did two other things upon his return. He got a job as a campus policeman at the College of Charleston. He now holds the rank of police captain, and he accomplished something at the College even more significant.

Upon his arrival on campus in 1984, James Parlor fulfilled his childhood ambition by enrolling as a student at the College. Seven years later, in December 1992, at my very first graduation ceremony as President, it was my great honor to hand James Parlor his diploma and declare him a graduate of the College of Charleston. The education establishment says a student who does not graduate in six years, or less, is a failure. The education establishment does not know James Parlor and thousands like him.

Not too long after I handed James Parlor his diploma, he gave me something in return, something he had written. He said it was not original with him. He said the author was anonymous. Nevertheless, like his life in general, I think James Parlor was drawn to the words by the experience of his childhood. He must have been influenced by the migrating waterfowl of his youth - the great flights of ducks and geese in the sky over Yemassee.

In any event, what he gave me turned out to be the best advice I ever received. Here it is. These are the words he wrote, the words of James Parlor, African American from Yemassee, South Carolina; United States Marine Corps, Retired; Police Captain; College of Charleston graduate.

"Next fall, when you see geese heading south for the winter, flying along in 'V' formation, you might consider why they fly that way."

"As each bird flaps its wings, it creates an uplift for the bird immediately following."

"By flying in a 'V' formation, the whole flocks adds a good bit more flying range than possible if each bird flew on its own."

"When a goose falls out of formation, it suddenly feels the drag and resistance of trying to go it alone, and it quickly gets back into formation to take advantage of the lifting power of the bird in front."

"When the head goose gets tired, it rotates back in the wind and another goose flies point."

"Geese honk from behind to encourage those up front to keep up their speed."

"Finally - and this is important - when a goose gets sick or is wounded by gunshot and falls out of formation, another goose leaves the formation with that goose and follows it down to lend help and protection. The goose stays with the fallen goose until it is able to fly or until it dies. Only then does the goose launch out on its own or with another formation to catch up with its group."

"If we have the sense of a goose, we will stand by each other like that," said James Parlor. Hasn't James Parlor captured the essence of the partnership?

Most of you are partners in great law firms. I hope you will work to make your law firm even greater. Alexander Hamilton said, "The ordinary administration of criminal and civil justice contributes, more than any other circumstance, to the peoples affection, esteem, and reverence toward the government." That is an awesome responsibility, and the effort must be always ongoing.

It will not do to assume that someone else will bear the major burdens, that someone else will demonstrate the key convictions, that someone else will preserve culture, transmit value, and maintain civilization. What you do not value will probably not be valued, that what you do not change will probably not be changed, and that what you do not do will probably not be done.

You can't be like the Hungarian Princess. You have to actually do something. (See, I told you I would connect it up.)

As lawyers, you are a part of a rich heritage. You are each the sum total of generations of growing, yearning, of planning and failing, of building and destroying and building again. If you look back far enough - to Alexander Hamilton and beyond - within each of you is the entire history of the Western World. You contain within each of you the potential, the energy, the dreams of all who have gone before; and if you are to discover your own unique role on earth, you must look back at those dreams and try to understand why they failed and how they succeeded, so that you may dream more clearly and act more nobly in your own lives.

James Parlor retired from the College of Charleston on Tuesday. He is moving to California. I hope you will remember the lesson of the wild goose he taught me. I hope you will remember the lesson of the wolf pack I taught you. I hope you will come to think of the crackers as our crackers. And, whatever you do, whatever you do, I hope you don't make Dorothy cry.

Thank you.

Member Profile: Warren Moise

by John Massalon

Warren is a member of the firm of Grimball & Cabaniss, LLC in Charleston, South Carolina. He graduated with honors from the University of South Carolina in 1985, and received his juris doctorate from the University of South Carolina in 1988, where he was a legal writing instructor and Articles Editor of the South Carolina Law Review.

In 1998 he was elected to the South Carolina Bar's House of Delegates and has served on the Bar's Practice and Procedure Committee since 1997. He is a member of the Charleston Bar Association, the American Bar Association, where he serves on the Trial Evidence Committee, and the South Carolina Defense Trial Attorneys' Association.

He financed his legal education in part by playing music as a studio musician and live, and publishing and writing songs. Before law school, Warren was a professional songwriter and musician for 12 years. During that time he played with the Chairmen of the Board (that's Warren playing keyboards and singing back up on Carolina Girls and most of their other newer songs), Billy Joe Royal (Down in the Boondocks), and others. He wrote several songs recorded by Bill Pinckney and the Original Drifters, Clifford Curry, and the Band of Oz (including Ocean Boulevard which won a Beach Music Association Award). The demands of his busy practice have all but extinguished his music-writing activities. However, he wrote a song called Charlotte which was recently recorded by Maurice Williams and Billy Scott and declared the official song of the City of Charlotte by its mayor.

According to Warren, writing music naturally lead him to an interest in writing in the legal field. While he was articles editor for the South Carolina Law Review, he wrote his first published Note on the "new" equitable distribution act. Since then he has written fairly consistently in the legal field. One article and proposed statute that he published in the South Carolina Lawyer was taken up by the General Assembly and enacted (after revisions were made during the legislative process). The statute ended the 300-year-old requirement that the words "and his heirs" follow the grantee's name in a real-estate deed when transferring property.

After Warren wrote his book on impeachment evidence, the idea came to him for an evidence column for defense lawyers. He had read numerous articles written for the South Carolina Trial Lawyer Bulletin by Judge G. Ross Anderson, and found them to be very well written, with both a scholarly and practical aspect to them. Warren thought that similar articles for defense lawyers would be very useful for the members of the South Carolina Defense Trial Attorneys' Association. Since 1997, the members of the Association have enjoyed the benefits of Warren's insights through his column entitled *Evidence Matters*.

As originally conceived, *Evidence Matters* was a column devoted primarily to issues of interest to the defense bar. Recently, Warren has expanded his concept, and now the articles are really more for the practicing trial lawyer regardless of his or her practice. Warren says that he tries very hard to accurately describe the state of the law in his column, and he offers opinions about what the law should be only when the reader is forewarned.

Warren has learned much through writing his column. The articles have taught him the many nuances of evidence law, and given him a greater appreciation for the role of the judiciary, including the need for the exercise of fair and unbiased discretion by the trial judges. He often finds himself amazed by the opinions of our current appellate

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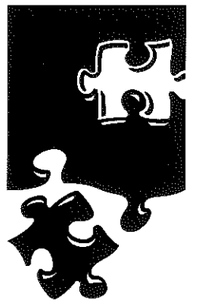
Evidence Matters

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

Evidence, Procedure, and Pigs With Lipstick in Bench Trials



I. Introduction[1]

Professor James Thayer recognized in the 19th Century that much of our evidence law is directed to regulate jury trials where the facts are judged by untrained lay citizens.[2] Thus, the question may be asked whether there is any difference in the rules of evidence in a bench trial as opposed to a jury trial. Neither the Federal Rules of Evidence nor the South Carolina Rules of Evidence have any special provisions for the reception of testimony, exhibits, or the like when the trier of fact is a judge.[3] On the other hand, there is little doubt that cases are tried differently to a judge than to a lay jury. This has as much to do with evidence as it does human nature.

II. Historical Basis

There was a time in early South Carolina history when judges may have taken a more active role in trials. One common-pleas case in October 1771 involved a trial presided over by Chief Justice Thomas Knox Gordon of Ireland, together with Judges John Murray, Edward Savage, and Rawlins Lowndes. Judge Lowndes was the lone native South Carolinian. The plaintiff was John Harvey who sued David Robinson for a "sound thrashing" arising out of a Regulator incident. Harvey had been caught by Robinson with stolen horses. After the defendant's lawyer failed to appear at trial, Judge Lowndes became concerned that Robinson was being railroaded. While on the bench, Judge Lowndes *sua sponte* described to the jurors how villainy in the Upstate of South Carolina drove good men to seek redress by taking the law into their own hands. He commented on the plaintiff's bad character, of which he had personal knowledge. Chief Justice Gordon, interrupting Lowndes, told the jury that the plaintiff's bad character was not at issue in the trial and that, because the plaintiff's prior criminal convictions had not been admitted into evidence, the jury could not consider them. Unbowed, Judge Lowndes began to argue with the Chief Justice on the bench. He said that not only would he be willing to be sworn to give testimony of the plaintiff's criminal conviction, but that the clerk of court could be called to bring the record of the convictions from general-sessions court. Lowndes later admitted that he had violated evidence rules used in England, but refused to apologize.[4] Although the case involving Judge Lowndes was singular, in fact Governor Bull had noted that it was customary in the South Carolina courts of that era for judges to be considered as counsel for the accused.[5]

Move forward two centuries to the years before the Federal Rules of Evidence were written. The Judicial Conference of the United States requested that Chief Justice Warren Burger create a special committee on evidence to examine the state of evidence law in the United States. The special committee prepared a *Preliminary Study of the Advisability and Feasibility of Developing Uniform Rules of Evidence for the Federal Courts*.[6] That study found:

> There is a well known tendency to apply rules of evidence less strictly in cases tried without a jury. In keeping with this tendency, very little emphasis was placed on the rules of evidence in equity suits in the [f]ederal courts. Although it was held that the same rules applied in equity as in actions at law, questions of evidence were seldom litigated in reported equity cases.[7]

Some court opinions suggested that a judge sitting in admiralty was not bound by *all* of the rules of evidence, although probably the better approach was to recognize that admiralty courts are not *strictly* bound by the rules of evidence.[8] In any event, by the late 20th Century, it was understood that although evidence rules were facially the same for all trials, some were applied a bit differently.[9] Courts have continued to adhere to this doctrine since the federal rules became effective.[10]

III. Pigs With Lipstick, and Practical Realities

Certainly, lawyers will posture and strut less when a judge is substituted for jurors. Procedures are often relaxed, and the case usually moves more quickly. But what is the effect of an admission of improper evidence? There is a presumption of regularity in bench trials, and the judge is assumed to have discarded any inadmissible evidence. The South Carolina Supreme Court discussed this issue in *Ross v. Jones*.[11] In Ross the court noted as follows:

> [I]n regard to the verdict of the jury, that such verdict is a compound made up of findings of fact governed by the law as

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> announced to the jury by the presiding judge, so it is with a judge who sits on the law side of the court without a jury, - his judgment is made up by his findings of fact, as governed by the principles of law applicable thereto. When, therefore, [the circuit judge] rendered his judgment, it must be assumed that he was controlled in his findings of fact by legal testimony, and that he discarded all incompetent testimony.[12]

This brings to mind the Russian proverb, "a judge and a stomach do their asking in silence."[13] One hopes that the judge discarded the improper inferences, but unless the judge says so, one never knows. This is a risk one assumes when choosing a bench trial over one by jury. Some defense lawyers believe that by taking before a judge a difficult case with inadmissible evidence, it will be received more favorably than by a jury. They perfume an odious set of facts and pretty up the scurrilous defendant like a pig with lipstick, only to find that the judge sees the obvious flaws in the case. Assume that a defendant had three prior convictions for criminal domestic violence (he was a wife beater), two DUIs, several marijuana simple-possession convictions, and two public-drunk convictions. None of these convictions likely would be admissible under rule 609. But could a judge be able to completely ignore this evidence once offered by the adverse party? Could anyone? In fact, jury studies show that judges often agree with juries' verdicts, so other than a sensitivity to certain issues (possibly such as excess judgments above the defendants' liability limits), there might be little advantage in taking a bad case before what Edmund Burke called the "cold neutrality of an impartial judge."

When inadmissible evidence is allowed in a bench trial, there is no requirement that the judge affirmatively state that she did not rely upon inadmissible evidence in reaching her verdict. To do so would require that the trial judge rule on all issues.[14] Of course, when the judge's findings of fact or comments actually show that the inadmissible evidence was given some weight, the appellate court may reverse, as occurred in *Green v. Green*.[15] The same applies when a judge erroneously excludes inquiry into a relevant issue.[16]

A motion might also be made to exclude otherwise relevant evidence under rule 403 upon the ground that it is unfairly prejudicial. A judge may exclude evidence in a bench trial because it is cumulative or a waste of time. However, in bench trials held in the United States courts, evidence should not be excluded under rule 403 upon the ground that it is unfairly prejudicial.[17] The South Carolina courts appear to hold similarly.[18] The courts assume that a trial judge has the mental acuity to sift the wheat from the chaff after receiving improper evidence,[19] and the judge runs more risk of reversal for excluding evidence than in admitting it. In the United States courts, for example, a decision to admit polygraph evidence is discretionary in a bench trial, although it would have been improper in a jury trial.[20] However, excluding cross-examination into a vessel operator's use of alcohol in a comparative-fault negligence case is ground for reversal, even when tried by the judge alone.

IV. Conclusion

Certainly there is often a more relaxed atmosphere during a bench trial and less posturing. From an evidentiary standpoint, judges may receive a good deal more evidence than in a jury trial. Judges are more likely to be reversed for exclusion of evidence than for admitting improper evidence in a bench trial. There are also disadvantages to this loosening of the evidence fetters, depending upon the facts at hand. If the lawyer assumes that a judge will hear but ignore prejudicial evidence that might arise during a trial, there is little harm in its admission. But I have yet to meet a judge who is not to a large degree human, and as Justice Felix Frankfurter recognized, no judge writes on a totally clean slate. If one assumes that prejudicial, but otherwise inadmissible, facts will come to light and are so compelling that the judge will unconsciously incorporate them into the decision making process, the choice between a jury and a bench trial become more difficult.

Footnotes

[1] This column is reprinted from JCLE materials originally presented to the South Carolina Bar in October 12, 2001 in Columbia.

[2] James Bradley Thayer, *Preliminary Treatise on Evidence* 509 (1898).

[3] The evidence rules are, of course, relaxed or inapplicable to certain procedures in a jury trial, such as hearings done out of the jury's presence.

[4] Carl J. Vipperman, *The Justice of Revolution: The South Carolina Judicial System*, 1721-1772 at 227 in South Carolina Legal History 225, 237-39 (1980).

[5] *Id.* at 239.

[6] 1 James F. Bailey and Oscar M. Trelles, II, *Preliminary Study of the Advisability and Feasibility of Developing Uniform Rules of Evidence for the Federal Courts* in The Federal Rules of Evidence: Legislative Histories and Related Documents (1980).

[7] *Id.* at 4.

[8] *Id.* at 9-10 (emphasis added).

[9] *See, e.g.*, 1 Kenneth S. Broun et al., *McCormick on Evidence* Section 60, at 238 (4th ed. 1992).

[10] "In addition, the burden of showing prejudice rests on the party claiming that the evidence was erroneously excluded. . . . This burden is especially onerous in a bench trial, since `rules of admissibility should not be applied with the same strictness where the case is tried before the court without a jury.'" *Ghandi v. Police Dept.*, 747 F.2d 338, 355 (6th Cir. 1984)(quoting *United States v. 1291.83 Acres of Land*, 411 F.2d 1081, 1086 (6th Cir.1969)).

[11] 58 S.C. 1, 35 S.E. 402 (1900). *Accord Voorhees v. Jackson*, 35 U.S. (10 Pet.) 449 (1836).

[12] *Ross*, 58 S.C. at 12, 35 S.E. at 405-06.

[13] H.L. Mencken, *A New Dictionary of Quotations* (1946).

[14] *Brown v. Allstate Ins. Co.*, 344 S.C. 21, 542 S.E.2d 723, 726 (2001).

[15] 228 S.C. 364, 90 S.E.2d 253 (1955).

[16] *Schultz v. Butcher*, 24 F.3d 626 (4th Cir. 1994).

[17] *Id.*, 24 F.3d at 632.

[18] *See Brown v. Allstate Ins. Co.*, 344 S.C. 21, 542 S.E.2d 723 (2001)(court's job is to admit "all" of the evidence).

[19] *Schultz v. Butcher*, 24 F.3d 626, 632 (4th Cir. 1994)("For a bench trial, we are confident that the district court can hear relevant evidence, weigh its probative value and reject any improper inferences.").

[20] *United States v. Webster*, 639 F.2d 174, 186 (4th Cir. 1981)("[T]he case was tried to the court, not to a jury, so the underlying fear that juries would be overly influenced by such evidence was not a factor here. Yet we are on the other side of the coin. A decision to deny polygraph evidence is also discretionary.)(cited in *Jackson v. Garrison*, 677 F.2d 371, 373 (4th Cir. 1981)); *see also United States v. Oliver*, 525 F.2d 731, 736 (9th Cir. 1975), *cert. denied*, 424 U.S. 973 (1976)(also cited in *Garrison*, 677 F.2d at 373, for proposition that court has discretion to admit polygraph test results).

[21] Felix Frankfurter, *The Commerce Clause* (1937).

Member Profile: Warren Moise

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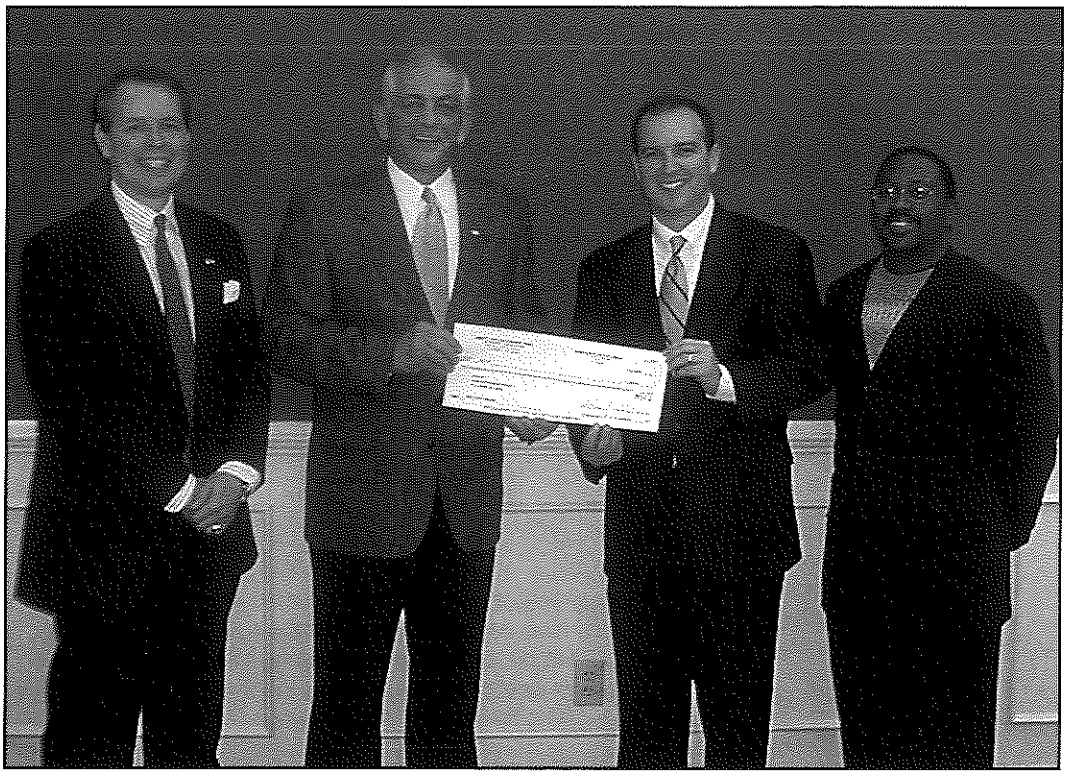
judges and justices. Warren thinks that the best opinions about evidence are usually the criminal cases because the complex analyses done in those cases are invariably well-thought out.

Having majored in history as an undergraduate, Warren's favorite articles in the *Evidence Matters* series are those dealing with historical issues. His great-great-great grandfather was a Charleston lawyer who practiced with James Petigru for a time, and he finds it fascinating how little the basic procedural law (other than evidence law) has changed since the first half of the 1800s. However, Warren tries not to devote too many articles to matters of history so that practicing trial lawyers will find relevant information in his column and continue to read it. In addition to his book titled Impeachment Evidence: Attacking and Supporting the Credibility of Witnesses in South Carolina, and his regular column in the Defense Line, Warren has authored a number of interesting articles including: Legacy of the Law Hippies: the Federal Rules of Evidence, South Carolina Trial Lawyer Bulletin (Summer 2000); Under the Microscope: How the Jury Perceives Us, Our Witnesses, and Our Evidence, The Arizona Defender (1998); Cross-Examining Experts with Hearsay under Rules 703, 704, and 705, The Defense Line (1997); Trial Evidence for Claims Adjusters, The Statement (1994-96)(column); Arbitration v. Jury Trial: One Lawyer's Perspective, An Alternative (1995); Offers of Judgment in South Carolina Under State and Federal Law, *The Defense Line* (1993); Words of Inheritance: Ending the Feudal Reign, The South Carolina Lawyer (1992); and The South Carolina Equitable Distribution Statute and the Common Law: The State of the Union, South Carolina Law Review (1988).

Currently, Warren is at the beginning of a political campaign which has forced him to curtail some of his writing activities. He has been working on a new evidence book which is approximately 75% complete, but he thinks that he will have to put it on hold until after the primary. Regardless of the outcome of the election, Warren hopes to keep writing the evidence column. Everyone in the Association deeply appreciates Warren's dedication and contribution to our profession, and we join him in that hope.



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(L to R) Mills Gallivan, SCDTAA President; Mitch Mitchiner, Retired Brigadier General; Jay Courie, SCDTAA 2001 Joint Meeting Co-Chair; Darryl Smalls, 2001 Pro Bono Committee Chair; Absent: Mike Bowers, SCDTAA Past President and Jeff Ezell, SCDTAA 2001 Joint Meeting Co-Chair

South Carolina Defense Trial Attorneys' Association
3008 Millwood Avenue
Columbia, SC 29205

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