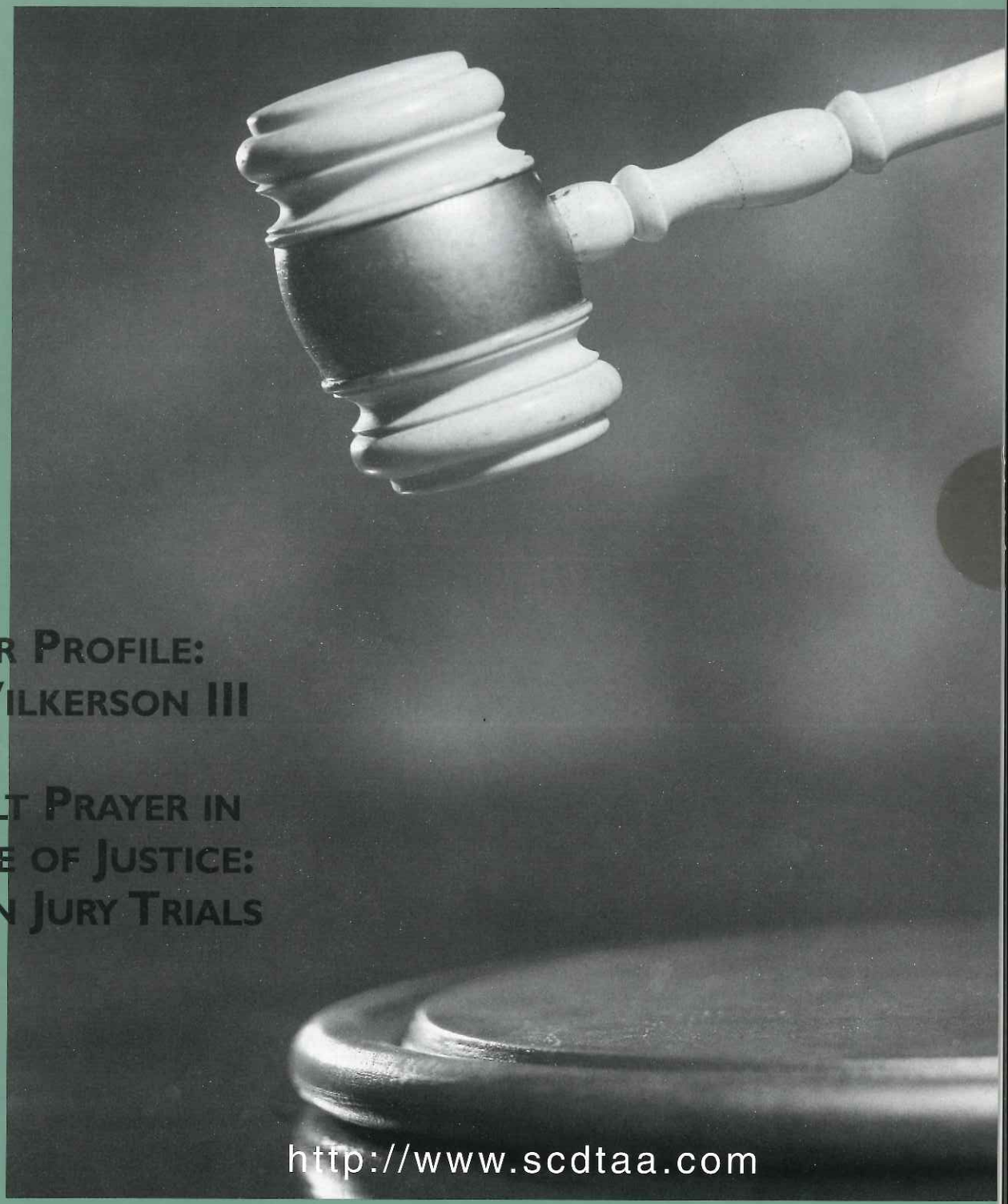
S.C. Defense Trial Attorneys' Association

Volume 30 Number 1 ▸ Spring, 2002

SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

THE DefenseLINE



MEMBER PROFILE: JOHN S. WILKERSON III

HEARTFELT PRAYER IN THE TEMPLE OF JUSTICE: RULE 403 IN JURY TRIALS

http://www.scdtaa.com

2002 Hemphill Award
Call for Nominations

CRITERIA

1. Eligibility.

(a) The candidate must be a member of the South Carolina Bar and a member or former member of the South Carolina Defense Trial Attorneys' Association. He or she may be in active practice, retired from active practice or a member of the judiciary.

(b) The current officers and members of the South Carolina Defense Trial Attorneys' Association Executive Committee at the time the award is made are not eligible.

2. Criteria/Basis for Selection

(a) The award should be based upon distinguished and meritorious service to legal profession and/or the public, and to one who has been instrumental in developing, implementing and carrying through the objectives of the South Carolina Defense Trial Attorneys' Association. The candidate should also be one who is or has been an active, contributing member of the Association.

(b) The distinguished service for which the candidate is considered may consist either of particular conduct or service over a period of time.

(c) The candidate may be honored for recent conduct or for service in the past.

3. Procedure

(a) Nominations for the award should be made by letter, with any supporting documentation and explanations attached. A nomination should include the name and address of the individual, a description of his or her activites in the Association, the profession and the community and the reasons why the nominee is being put forward. Nominations should be directed to the President of the Association prior to the joint meeting each year.

(b) The Hemphill Award Committee shall screen the nominees and submit its recommendation to the Executive Committee of the Association at its meeting immediately preceding the Annual Meeting of the Association. "The Hemphill Award Committee shall be comprised of the five (5) officers of the Association, and chaired by the immediate Past President."

(c) The Hemphill Award shall be made in the sole discretion of the Executive Committee, when that Committee deems an award appropriate, but not more frequently than annually.

4. Form of Award

(a) The recipient shall receive an appropriately engraved plaque commemorating the award at the annual meeting.

(b) The family of the late beloved Robert W. Hemphill; in the person of Harriet Hemphill Crowder of Mt. Pleasant has consented to having the award named for the late United States District Judge, Robert W. Hemphill. When possible, the Association shall have a member of the Hemphill family present whenever this award is presented.

PLEASE SUBMIT NOMINATIONS BY JULY 1, 2002 TO

SCDTAA HEADQUARTERS • 3008 MILLWOOD AVE. • COLUMBIA, SC 29205 • OR FAX (803) 765-0860

I NOMINATE _____

OF THE FIRM OF _____

_____

_____

CITY and STATE _____

BECAUSE _____

_____

_____

_____

(ATTACH A SHEET OF PAPER IF NECESSARY)

SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

THE DefenseLINE

Formation of SCDTAA Young Lawyers Division

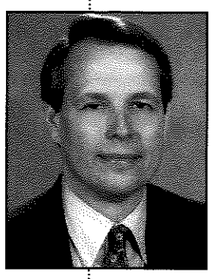
by Richard L. Hinson,
Chairman, New/Young Lawyer Committee

The South Carolina Defense Trial Attorneys' Association is in the very early stages of exploring the creation of a Young Lawyers Division to provide structure and support for the young lawyers in our association. As such, we would like to assemble a committee of about 10-20 attorneys to study the feasibility, purpose, and usefulness of such a division. If we determine that there is enough interest in creating a Young Lawyers Division, this committee may be asked to serve as the initial executive committee, from which any officers may be selected.

It is my hope that this exploration committee could meet for the first time at the SCDTAA Joint Claims Meeting at the Grove Park Inn in Asheville, North Carolina the weekend of July 25-27, 2002. If you are interested in serving, please let me know if you could attend a meeting at Grove Park. My direct number is 843/656-4422, and my email is rlh@tpgl.com. I look forward to hearing from you by the end of the month.

President's Letter

by H. Mills Gallivan



Your Association is off to a great start in 2002. First, I want to thank the Executive Committee for taking the time to participate in the Long-Range Planning Retreat on January 25 & 26 in Savannah. This Retreat was well attended and was a very productive follow up to our first Long-Range Planning Retreat in 2001. Please take the time to read the detailed retreat summary, which is contained in this issue of The Defense Line. Your Executive Committee has dedicated itself to vigorously pursuing the goals set forth in the Long-Range Plan. We welcome any comments or suggestions that you may have regarding the SCDTAA long-range goals and plans.

Also, I want to thank John Wilkerson for volunteering to the Executive Committee his services as the retreat facilitator. John did a great job of keeping us focused on the task at hand and guiding us to the formulation of a long-range plan with realistic goals and strategies. Thanks again John for your generous contribution of time and outstanding service to this critical project of the SCDTAA.

The Trial Academy is returning to Greenville for the second year and will be held June 12th to the 14th. If you or someone in your firm is interested in attending the Trial Academy I would urge you to sign up now. This program is a tremendous value and an invaluable training experience for the young defense trial attorney. I assure you enrollment will fill up quickly.

The Joint Meeting Committee is hard at work on an outstanding program for this year's meeting. The Association has invited all seven of the South Carolina Workers Compensation Commissioners to attend the meeting. In addition we are seeking to diversify and increase attendance by asking self-insured risk managers and out of state claims managers. We also want to increase the attendance of corporate counsel. The revitalization of this meeting is the number one long-range goal of the SCDTAA. The Executive Committee needs and asks for your help in improving the attendance and quality of this meeting. We would ask you to invite someone new to attend this meeting who would benefit from a program designed to increase his or her knowledge of South Carolina law and procedure. For this meeting to thrive in the future we need new and additional participation from our own members as well. I would encourage you to bring new lawyers from your firm to this meeting. It is a wonderful introduction to SCDTAA fellowship with members and with our friends in the claims and litigation management business.

I thank you in advance for your help in achieving our goals and I look forward to seeing old friends and new acquaintances in Asheville.

From the mountains...

JOINT MEETING

July 25-27, 2002

Grove Park Inn
Asheville, NC

To the vineyard

ANNUAL MEETING

November 7-10, 2002

Château Élan
Braselton, GA

* Congratulations to Darra Vallini of Woods & Givens, LLP, the winner of the weekend for two at the Château Élan Winery and Resort.

2002 Joint Meeting

The Grove Park Inn • Asheville, NC
July 25 - 27, 2002

by Jeffrey D. Ezell

This year's Joint Meeting Committee, and the Association as a whole, owes a tremendous debt to Jay Courie for his valiant efforts in improving the quality and character of the Joint Meeting over the last two years. In an effort to seize upon the momentum Jay has generated, the Committee wanted to make each of you aware of some of the items planned for this year's Joint Meeting, and challenge the Association's membership to help make the 2002 Joint Meeting and even greater success, and a stepping stone for future meetings.

This year, the Committee has decided to make a concerted effort to expand the scope of the Meeting in two distinct ways. First of all, we are planning to try and broaden the attendance beyond members of the SCDTAA and the SCCMA. We are extending invitations to corporate counsel groups, risk management groups, and claims managers whose offices might otherwise fall outside the geographic boundaries of our state. In doing so we hope not only to merely increase attendance, but also to heighten the exposure of the Association and its members, and all the Association has to offer, to these important groups.

Secondly, we have invited the entire panel of South Carolina Workers' Compensation Commissioners. The Executive Committee has determined that the Commissioners will henceforth be invited to the Joint Meeting in lieu of invitations to the Annual Meeting. We are hopeful that all of the Commissioners will attend and have already received acceptances from several.

With the Commission in attendance, the Joint Meeting Committee has elected to increase the time allotted for concurrent Workers' Compensation Breakout Sessions, such that there will be Workers' Compensation sessions running on both Friday and Saturday. This will give workers' compensation practitioners, both inside and outside the Association, a greater opportunity to interact with the Commission, and hopefully engage in some mutually beneficial dialogue.

Overall, the Committee is very excited and optimistic about this year's Joint Meeting. We would like to challenge members of the Association to make an affirmative effort to invite one new attendee to this year's meeting; either a lawyer who has generally not attended in the past, a client, or some other party who might benefit from attendance. We want to see this meeting continue upon the path of growth it has enjoyed over the last several years, but we need your help to do that.

See you in Asheville!

2002 SCDTAA Trial Academy

Hyatt Regency • Greenville, SC
June 12 - 14

ABOUT THE ACADEMY:

The twelfth annual South Carolina Defense Trial Attorneys' Association's Trial Academy will be held on Wednesday, Thursday and Friday, June 12-14, 2002 at the Hyatt Regency, Greenville, South Carolina.

This three-day trial advocacy course is designed for practitioners with up to five years of experience in jury trials. The course will focus on the successful handling of all major aspects of a trial from opening statement to closing argument, as well as trial preparation and post-trial matters. There will be demonstrations and lectures by experienced defense trial attorneys. However, the majority of time will be spent on reviewing and critiquing the performance of the participants in breakout sessions and in their conduct of a mock trial. Eighteen hours of CLE credit (possibly including ethics credit) is anticipated.

****

Please register me for the Twelfth Annual SCDTAA Trial Academy:

Name: _____

Firm: _____

Address: _____

City, State, Zip: _____

Telephone: _____ Fax: _____

Email: _____ Bar Number: _____

I understand that the registration fee for this seminar is $900.00
(including a $25.00 non-refundable processing fee)

*** Trial Academy Cancellation Policy***

1. Any cancellation more than 30 days before the first date of the Trial Academy will be entitled to a full refund.
2. Cancellations from 15-30 days before the first date of the Trial Academy will be entitled to a 50 percent refund. However, if the canceling party succeeds in finding a replacement for himself/herself, he/she will be entitled to a full refund upon payment by the replacement.
3. Cancellations less than 15 days shall not be entitled to any refund. However, if the canceling party succeeds in finding a replacement for himself/herself, he/she will be entitled to a full refund upon payment by the replacement.
4. Law firms who reserve a spot for one attorney in the firm may substitute another attorney of that firm at any time without any penalty.

ADVANCE REGISTRATION IS ENCOURAGED AS ENROLLMENT IS LIMITED.
For more information, call SCDTAA Headquarters (800) 445-8629
Return to: SCDTAA, 3008 Millwood Avenue, Columbia, South Carolina 29205

Executive Committee Conducts Long Range Planning Retreat

by John S. Wilkerson III

In January, the SCDTAA Executive Committee attended a long range planning retreat in Savannah, Georgia. This was a follow up to a meeting last year that helped to focus attention on the issues of greatest concern to the organization. The mission of the retreat, which was well attended, was to focus on the three or four major needs of the association and develop specific and measurable goals with action plans to be completed in three to five years. The following issues were tackled at the meeting:

- Revitalization of the summer joint meeting;
- Refinement of political and legislative mission of the organization; and
- Member services/member development.

Joint Meeting

The improvement of the joint meeting is clearly on everyone's agenda and the topic promoted a lively debate. The issues raised included waning attendance by both lawyers and claim professionals, quality of programs, profitability, and location. As a result of focused discussion on these issues, the board developed a specific action plan. Attendance will be addressed in various ways. An immediate initiative will be launched to attract claims management professionals from North Carolina and Georgia. The workers compensation substantive committee will also begin a direct marketing initiative to worker's compensation attorneys and claims management professionals. Invited guests to this meeting will also include members of the South Carolina Worker Compensation Commission who, through participation on our programs, will make our seminar more relevant to practitioners in that field. The industry relations committee chair will develop a list of other organizations that may have an interest in our programs and include them on the invitation list. A new plan to involve in-house counsel based in South Carolina will be developed and implemented. Improving the program at the joint meeting was identified as a key factor in attracting more attendees. Consideration of a keynote address, mock trial presentations, and other speakers on relevant topics were discussed. The board at the meeting earmarked an additional $5000.00 from budget surplus funds to use for speaker development at the joint meeting.

Legislative/Political Agenda

For some time, the association has struggled to define its role in the legislative and political arena. Several years ago the board adopted a resolution on this issues, and has continued to maintain a presence (although very low profile) in the legislature through a part-time lobbyist. Questions still remain as to the association's specific role in legislative matters. According to the bylaws, one of the association's purposes is to promote improvements in the administration of justice. The committee resolved to establish a legislative study committee, chaired by Gray Culbreath, to develop a three to five year legislative agenda for the association. The committee's work will begin with a written survey of the membership seeking input and interest in serving on the committee. The committee is scheduled to hold its first meeting in Asheville this year, and present its report at the annual meeting.

Membership/Member Services

Expanding our membership roles to include more young members was identified as a priority. Many incentives to improve participation by young members were identified and discussed. It was resolved to create an active young lawyers section providing relevant programs and leadership opportunities. The young lawyers committee chair, Richard Hinson, was appointed to lead a study committee to develop this young lawyers section. The executive committee views member services as one of the main responsibilities of the association. Recent improvements in the website provide many more opportunities for information sharing among members. Every member is encouraged to visit the website, register for the list serve and begin taking advantage of this powerful tool. The executive director will also begin to use the website for broadcast email directly to members. All association members are encouraged to provide their email addresses to the executive director. One of the most important member services over the years has been the publication of The Defense Line magazine. Revitalization of the this publication is another priority of the executive committee. The Defense Line will soon be posted on the association's website with the future capability of being able to search prior issues. Increasing the number of substantive articles is viewed as an important initiative and a plan was developed in that regard. The substantive law committees, and the young lawyers section (to be formed) could provide excellent resources for the development of substantive articles for this publication. The Defense Line editor will establish a permanent rotation schedule for committee responsibility to present substantive articles for publication. It is hoped that future issues will include at least one article, the newly introduced

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Member Profile: John S. Wilkerson III

This installment of The Defense Line Member Profile focuses on John Wilkerson who once served as the president of the South Carolina Defense Trial Attorneys' Association from 1998 to 1999. Currently he serves as the coordinator and facilitator for the Association's Long Range Planning Committee. That committee is charged with the important task of formulating strategies to revitalize the joint meeting, refocus the legislative activities of the Association, and improving upon the Association's member services. Look for John's article on page 5 of this issue The Defense Line describing the committee's January retreat.

John is a 1976 cum laude graduate of Furman University and a 1979 graduate of the University of South Carolina School of Law, where he was a member of the Order of Wig and Robe, the South Carolina Law Review, and an Instructor of Legal Research and Writing. Along with David S. Cobb, John co-authored the chapter on Motion Practices i the Civil Trial Manual, published by the South Carolina Bar in 1997. In addition, John regularly participates in Continuing Legal Education programs for local, state and national organizations on numerous topics including civil litigation, insurance law, legal ethics and professionalism.

After graduation, John accepted a position with Turner, Padget, Graham & Laney. He practiced in the firm's Florence office from 1984 until 1999. In 1999, he moved to Charleston to serve as managing partner of his firm's Charleston office. Under John's management, the Charleston office of Turner, Padget has grown to eleven attorneys. John concentrates his practice in complex litigation. His trial experience includes a wide variety of substantive areas including: professional malpractice, commercial litigation, products liability, insurance "bad faith" litigation and complex insurance coverage disputes. He is also a very active civil mediator in state and federal courts.

In addition to his participation in the activities of our Association, John is an active member of the Defense Research Institute for which he serves on the Professional Negligence, Alternative Dispute Resolution, and Insurance Law Committees. John is a past president of the Florence County Bar Association. He is also a member of the Federation of Defense and Corporate Counsel, the South Carolina Law Institute, and the South Carolina Bar. He served on the South Carolina Supreme COurt Joint Commission on Alternative Dispute Resolution from 1996 - 1997.

John is a self-described woodworker wannabe in his spare time. The only offer that could lure him away from the practice of law would be to join Norm Abram as the co-host of the PBS series, The New Yankee Workshop. Until then, the Association and its members will continue to benefit greatly from his continued interest and involvement in the issues affecting the defense bar.

Long Range Planning Retreat

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member profile, a legislative update, the traditional president's letter, the Evidence Matters feature by Warren Moise, and an editorial or human interest piece.

Although the goals established at the planning retreat are ambitious, the executive committee is confident that they are achievable. Input and suggestions are always solicited and welcomed from association members, and any member of the executive committee would be pleased to receive those suggestions at any time. Although the association has recently been recognized by DRI through the Rudolf Janetta Award, the board is anxious to lead the association to a higher level of service to the defense bar and legal community.

Evidence Matters

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

Heartfelt Prayer in the Temple of Justice: Rule 403 in Jury Trials

The most earnest supplication in the temple of justice is a prayer under rule 403. Rule 403 too often is the crutch of the lame, ill-prepared lawyer, cited in hopes of buttressing the rotten timbers of a tottering case. Depending upon one's viewpoint, use of rule 403 is a paternalistic exercise in *parens patriae* by the government upon its pitiful wards, the jurors, or a commonsense tenet of rationalism through which logical evidence rules are used to ensure that verdicts are based upon facts, not hysteria or prejudice. Through its magic, a judge may use her discretion to transform an ugly, base case into a thing of great beauty for the jury. Like Superman, it enables an attorney to leap tall obstructions in a single bound, excluding potent, relevant evidence from the jury's consideration.

Some members of the lay public might be amazed, or indignant, to learn that a judge can exclude relevant evidence from juries. George Sand recognized that we should "accept truth, even when it surprises us and alters our views."[1] But the concept of excluding irrelevant or overly prejudicial evidence is not a new one. Aristotle admitted the impropriety of "pervert[ing] the judge by moving him to anger or envy or pity - one might as well warp a carpenter's rule before using it."[2] Even Jeremy Bentham, the 19th century's scathing protagonist of relevance, recognized some limitations, and the judge's discretion is a well-rooted legacy of English common law embodied in contemporary evidence codes.

During the congressional hearings on the proposed federal rules, rule 403 was considered controversial. A movement to add "surprise" to the list of factors to be considered by the judge under federal rule 403 was defeated,[3] and the advisory-committee note to the federal rule indicates that when surprise is claimed, a continuance would be a more preferable remedy than exclusion of evidence.[4]

Federal and state rules 403 read as follows: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[5] Evidence excluded under rule 403 must have some relevance before the judge invokes her discretion to admit or exclude it. (Totally irrelevant evidence is excluded under rule 402.) The advisory committee for the proposed federal rules made known to Congress its preference for admitting relevant evidence. A somewhat similar principle was suggested as a guide to the courts by Professor James F. Dreher in *A Guide to Evidence Law in South Carolina*.[6]

In the Fourth Circuit there is a "strong preference for admitting probative evidence."[7] When a party moves to exclude evidence under federal rule 403, the court will "'look at the evidence in a light most favorable to its proponent, maximizing its probative value and minimizing its prejudicial value.'"[8]

Merely because the probative value of evidence *slightly* or *somewhat* outweighs its potential for unfair prejudice is not a ground for exclusion: the evidence must tip the scales *substantially* toward unfair prejudice before a judge must exclude it.[9] On the other hand, a trial judge must be given some leeway regarding admission of evidence, and higher courts will be broadly deferential to the trial judge's ruling.[10] The appellate courts will not reverse a discretionary decision simply because they might have decided the issue otherwise due to a differing view of the subjective factors of probative value versus prejudicial effect.[11] Instead, the reviewing court will approve a rule-403 decision to allow or exclude evidence, except in the most "extraordinary" or "exceptional" of circumstances.[12]

Of the factors noted in rule 403, allegations of excessive prejudice are most frequently advanced. Of course, the very *object* of impeachment evidence is its prejudicial effect. Neither federal nor state rule 403 forbids mere prejudicial evidence. Instead, rule 403 addresses *unfair* prejudice to the opposing party.[13] Drafters of the federal rules rejected the words "undue prejudice" as used in Model Rule of Evidence 303. The use of "undue" instead of "unfair" likely was in response to certain influential critics of the Model Code who argued that a judge should not have authority to exclude prejudicial evidence; this is because all evidence is intended to prejudice an adversary's case.[14]

Courts have advanced various definitions of what evidence gives rise to "unfair prejudice." The Fourth Circuit characterizes unfairly prejudicial evidence as carrying "the possibility that [it] will excite the jury to make a decision on the basis of a factor unrelated to the issues properly before it."[15] In the Fourth

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Circuit, rule 403 authorizes the exclusion of evidence upon the ground of prejudice "*only* when 'there is a genuine risk that the emotions of the jury will be excited to irrational behavior' and *only then* when the risk is disproportionate to the probative value of the evidence."[16] Trials by jury are not antiseptic events where the finders of fact are shielded from relevant, though upsetting, evidence.[17] Judges must recognize that if it aids in the search for the truth, the Federal Rules of Evidence favor "placing even the nastier side of human nature before the jury."[18] Put another way, the court is not required to exclude relevant evidence, simply because it is unpleasant or offensive.[19]

The South Carolina Supreme Court in *State v. Alexander*[20] adopted federal rule 403 and quoted its advisory committee note five years before the South Carolina Rules of Evidence became effective. The advisory committee note to federal rule 403 defines "unfair prejudice" as evidence having "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Earlier, South Carolina common law held that unless the trial judge "clearly perceive[s the] logical relevancy, . . . evidence [with a dangerous tendency and misleading probative force] should be rejected."[21] Another decision permitted *circumstantial* evidence to be excluded only upon the ground that it creates unfair prejudice.[22] The South Carolina Court of Appeals has held that when considering a rule 403 challenge to an allegedly prejudicial prior statement, the trial judge must consider both the nature of the statement and the context in which it was made.[23] Statements containing graphic language distasteful to normal sensibilities, epithets, or slurs (such as a racial slur) may be excluded under rule 403 when they have little relevance;[24] however, where racial slurs have other relevance, such as when they bear upon a discriminatory intent and show bigotry, they may be admissible.[25]

Of course, some types of evidence are extremely prejudicial by their very nature. The Fourth Circuit has accepted without the need for extensive argument that implications of homosexuality and abuse of women unfairly prejudice a defendant.[26] Furthermore, that court has noted the inflammatory potential of child-molestation allegations and a special sensitivity to prejudice in cases where a defendant subscribes to an unpopular religion such as the Hare Krishna sect.[27] Other courts have held similarly regarding devil worship and belief in the occult,[28] although such evidence sometimes is admissible for other purposes. Cross-examination about a witness's psychiatric history can only be invaded when required in the interests of justice. Psychiatric history, especially when of only minimal probative value, is manifestly unfair, unnecessarily demeaning, and often causes much collateral matter to be introduced into the trial. Thus, forbidding a party to cross-examine a witness about his psychiatric history may be proper in many cases under rule 403.[29] In *Nichols v. American Nat'l Ins. Co.*[30] the Court of Appeals for the Eighth Circuit held that evidence of the plaintiff's abortion was highly prejudicial and should have been excluded: "That Nichols had the abortion even though it was against her religion increased the likelihood that the jury would view her as immoral and not worthy of trust and reach its verdict on such basis."[31] It generally is improper to allow trial to proceed when the accused is dressed in prison garb, although an objection must be voiced.[32]

One commentator has noted that "[t]he prejudice to an opponent can be said to be 'unfair' when the proponent of the evidence could prove the fact by other, non-prejudicial evidence."[33] The advisory committee note to federal rule 403 states that "[t]he availability of other means of proof may also be an appropriate factor."[34] Thus, a stipulation [35] or concession by the adverse party admitting to certain facts might be used as a means to avoid prejudicial evidence,[36] and in rare cases, a refusal by a party to stipulate may require reversal as a matter of law. Another matter to consider in excluding evidence upon the ground of unfair prejudice would be whether a limiting instruction to the jury would be effective.[37] Instructions to disregard objectionable evidence generally are deemed to have cured erroneously admitted evidence, except in those cases where upon the particular facts the accused was probably prejudiced despite the instruction.[38] The Fourth Circuit has noted that the law almost invariably assumes that jurors follow their instructions.[39]

Regardless of whether one believes it to be an exercise in paternalism or the very embodiment of fairness, rule 403 has become an integral tool in jury trials. We elect capable judges, and we necessarily must trust them with discretion. Where the line must be drawn to save a witness from his relevant bad acts is a difficult one. However, the trial judge will do well to follow the legislative mandate embodied in rule 403 and err in favor of admitting relevant evidence, even when it requires that unpleasant or even ugly facts be brought into the clear daylight where jurors may see them for what they are worth.

Footnotes

1 George Sand, *Letters of George Sand* (Raphael Ledos de Beafort ed. 1886).

2 Aristotle, *Rhetoric*, Book I, ch. 1.

3 22 Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* Section 5211, at 247 (1978 & Supp. 1996)[hereinafter 22 *Federal Practice and Procedure*].

4 *See* Fed. R. Evid. 403 advisory committee note.

5 Fed. R. Evid. 403; S.C. R. Evid. 403.

6 James F. Dreher, *A Guide to Evidence Law in South Carolina* (1967). Professor Dreher wrote:

> But I do submit that there is an overall purpose in the [common-law evidence] rules as a whole, and that is to give the fact-finders all information helpful to them which has reasonable reliability and a minimum of counter-weighing hazards. The furtherance of that purpose should be the goal of all courts, both those which announce the law and those which apply it. The aim should be to get at the truth as directly as possible. Complicated formulas and fine spun distinctions should be shunned as the plague; there is not enough time in a lawsuit for mental gymnastics.

Id. foreword at ix.

7 *United States v. Simpson*, 910 F.2d 154, 157 (4th Cir. 1990).

8 *Id.* at 157 (quoting *Mullen v. Princess Anne Volunteer Fire Co.*, 853 F.2d 1130, 1135 (4th Cir. 1988)). In *Gross v. Black & Decker* (U.S.), Inc., 695 F.2d 858, 863 (5th Cir. 1983), the court held that rule 403 favors admissibility of relevant evidence because it requires such evidence to be "substantially outweighed" by the danger of unfair prejudice.

9 *See State v. Pace*, 337 S.C. 407, 523 S.E.2d 426, 470 (Ct. App. 1999)(emphasis in original)(quoting *State v. Asbury*, 328 S.C. 187, 193, 493 S.E.2d 349, 352 (1997)).

10 *State v. Hamilton*, 344 S.C. 344, 543 S.E.2d 586 (Ct. App. 2001).

11 *Id.* If judicial restraint is ever desirable, it is when reviewing a trial judge's discretionary decision under rule 403. *Id.*

12 *United States v. Heyward*, 729 F.2d 297, 301 n.2 (4th Cir. 1984)(extraordinary); *United States v. MacDonald*, 688 F.2d 224, 227-28 (4th Cir. 1982)(extraordinary); *Pace*, 337 S.C. 407, 523 S.E.2d at 470 (citing *United States v. Green*, 887 F.2d 25, 27 (1st Cir.1989)); *Hamilton*, 344 S.C. 344, 543 S.E.2d 586. Of course, the trial judge must actually *exercise* discretion in making the ruling.

13 *Simpson*, 910 F.2d at 158 ("Of course, all relevant evidence is prejudicial; Rule 403 is concerned only with limiting 'unfair' prejudice."); *State v. Gilchrist*, 329 S.C. 621, 496 S.E.2d 424 (Ct. App. 1998)(citing *United States v. Rodriquez-Estrada*, 877 F.2d 153, 156 (1st Cir. 1989) for this proposition); *see also Westfield Ins. Co. v. Harris*, 134 F.3d 608, 613 (4th Cir. 1998)(mere fact that fire marshall's testimony would bolster conclusion of defendant's investigator not the type prejudice envisioned by rule 403); *United States v. Sanchez*, 118 F.3d 192 (4th Cir. 1997)(stating the proposition in so many words). For a discussion of unfair prejudice, see generally 22 *Federal Practice and Procedure, supra* note 3, Section 5215, at 273-85. *Cf. United States v. Bentley*, 825 F.2d 1104, 1108 (7th Cir. 1987)("This was 'prejudicial' to the defendants only because of its probative force. Damning evidence is not inadmissible on that account.")(cited in *Wanke v. Lynn's Transp. Co.*, 836 F. Supp. 587, 591-92 (N.D. Ind. 1993)).

14 *Mullen v. Princess Anne Volunteer Fire Dept.*, 853 F.2d 1130, 1134 (4th Cir. 1988).

15 *Mullen*, 853 F.2d at 1134. The problem of jurors disregarding the facts and deciding cases upon other grounds is an age-old problem. "[Juries] will often have allowed themselves to be so much influenced by feelings of friendship or hatred or self-interest that they lose any clear vision of the truth and have their judgment obscured by considerations of personal pleasure or pain." Aristotle, Rhetoric Book I, Ch. 1, Section 1354b (The Modern Library, N.Y. 1954)(W. Rhys Roberts trans.).

16 *Westfield Ins. Co. v. Harris*, 134 F.3d 608, 615 (4th Cir. 1998)(emphasis added)(citing *United States v. Queen*, 132 F.3d 991, 995-96 (4th Cir. 1997); *Morgan v. Foretich*, 846 F.2d 941, 945 (4th Cir. 1988)).

17 *Mullen*, 853 F.2d at 1135.

18 *Id.*

19 *Davis v. Traylor*, 340 S.C. 150, 530 S.E.2d 385, 387 (Ct. App. 2000).

20 303 S.C. 377, 401 S.E.2d 146 (1991).

21 *State v. Lyle*, 125 S.C. 406, 417, 118 S.E. 803, 807 (1923).

22 *See State v. Whitener*, 228 S.C. 244, 89 S.E.2d 701 (1955).

23 *See State v. Gilchrist*, 329 S.C. 621, 496 S.E.2d 424 (Ct. App. 1998).

24 *Id.* (citing *United States v. Kallin*, 50 F.3d 689 (9th Cir. 1995)).

25 *Mullen v. Princess Anne Volunteer Fire Co., Inc.*, 853 F.2d 1130 (4th Cir. 1988)(rule 404(b)); *Davis v. Traylor*, 340 S.C. 150, 530 S.E.2d 385, 387 (Ct. App. 2000)(admissible to show intent). *But cf. Morgan v. American Te. & Tel. Co.*, 812 F.2d 409, 411 (8th Cir. 1987) (single episode insufficient to establish racial animus and therefore exclusion, even if erroneous, not ground for reversal).

26 *See United States v. Ham*, 998 F.2d 1247, 1252 (4th Cir. 1993), *aff'd upon retrial*, 58 F.3d 78 (1995); *see also United States v. Gillespie*, 852 F.2d 475, 479 (9th Cir. 1988)(cited in *Ham*, 852 F.2d at 1252 n.6, as support for proposition that evidence of homosexuality is extremely prejudicial).

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27 *See Ham*, 998 F.2d at 1252-53.

28 *See State v. Kimbrell*, 84 N.C. App. 2d 59, 351 S.E.2d 801 (declining to reverse, although noting that such evidence should have been excluded under rules 610 and 403), *rev'd*, 320 N.C. 788, 360 S.E.2d 691 (1987)(although not specifically mentioning rule 403, court reversed citing prejudicial effect of devil-worship evidence).

29 *See United States v. Lopez*, 611 F.2d 44, 45-47 (4th Cir. 1979).

30 154 F.3d 875 (8th Cir. 1998).

31 *Id.* at 885 (quoting Nickerson v. G.D. Searle & Co., 900 F.2d 412, 418 (1st Cir. 1990)).

32 *Humbert v. State*, 345 S.C. 332, 548 S.E.2d 586 (2001).

33 22 *Federal Practice and Procedure, supra* note 3, Section 5214, at 269 n.32 and accompanying text; *see also Gross v. Black & Decker, (U.S.), Inc.*, 695 F.2d 858, 863 (5th Cir. 1983)(noting that one factor to consider is whether facts can be proved by other evidence).

34 For cases discussing this issue in the context of rule 407 (subsequent remedial measures), *see Malone v. Microdyne Corp.*, 26 F.3d 471 480 (4th Cir. 1994)(other evidence in the record); *Landry v. Hilton Head Property Owners Ass'n*, 317 S.C. 200, 452 S.E.2d 619 (Ct. App. 1994)(other proof in the record).

35 Although attorneys frequently refer to an agreement by one party to admit that a fact is proved (e.g., stipulating that an event occurred at a certain time), this is a misnomer. A stipulation is an agreement between two parties requiring mutual assent. *State v. Anderson*, 318 S.C. 395, 399-400 & n.2, 458 S.E.2d 56, 58-59 & n.2 (Ct. App. 1995); 83 C.J.S. *Stipulations* Section 3, at 3 (1953)(cited in *State v. Hamilton*, 327 S.C. 440, 486 S.E.2d 512 (Ct. App. 1997)).

36 In *State v. Middleton*, 288 S.C. 21, 339 S.E.2d 692 (1986) the court reversed for admission of graphic photographs, noting that defense counsel had agreed to stipulate to certain underlying facts in order to avoid introduction of the pictures.

37 Fed. R. Evid. 403 advisory committee note.

38 *State v. Crim*, 327 S.C. 254, 489 S.E.2d 478 (1997)(citing *State v. Craig*, 267 S.C. 262, 227 S.E.2d 306 (1976)); *State v. Campbell*, 259 S.C. 339, 191 S.E.2d 770 (1972)).

39 *See Nichols v. Ashland Hosp. Corp.*, 251 F.3d 496 (4th Cir. 2001)(assuming that jurors followed instructions to disregard party's spontaneous outburst during trial).

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

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