Leveling the Playing Field
South Carolina Standards of Review

By Kevin Eberle

In 1976, the S.C. Supreme Court found the lack of familiarity with appellate standards of review so frustrating that it added a special discussion of the topic to an opinion: "An apparent misunderstanding, on the part of the appellate bar, of the jurisdiction of the Supreme Court prompts us to set out the scope of review available upon appeal in civil cases." *Townes Assocs., Ltd. v. City of Greenville*, 221 S.E.2d 773, 775 (S.C. 1976). The general framework of *Townes Associates, Ltd.* remains intact, but statutory changes, alterations to court structure and new judicial guidance have cropped up. Because the identification of the proper standard of review remains one of the most important tactical issues in appellate practice, a refresher is in order.

Choosing the right standard

Litigants are entitled to a fair trial, not a perfect one. *Smoak v. Seaboard Coast Line R.R. Co.*, 193 S.E.2d 594, 598 (S.C. 1972). Standards of review keep cases moving by recognizing that, even if the lower court erred, there is no reason to think that an appellate court would do any better on a second try. A standard of review essentially asks: Just how wrong can a decision be before corrective action is required?

The standard of review must be woven into the law and facts when writing an appellate brief, but the proper standard has to be understood before tackling an appeal. If an appellate court has little flexibility and is bound by a lower court's conclusions, the respondent is already nearing victory before the first argument on the merits is even read. On the other hand, if an appellate court has a relatively free hand to disagree with the lower court, an appeal is far more likely to succeed.

Picking a standard of review can sound complex because of overlapping tests and inconsistent phrasings, but at least the process is well-settled in South Carolina. For some appeals, a context-specific standard has been created by state statute that trumps the ordinary selection process. Otherwise, for the vast majority of rulings in South Carolina, the standard turns on a combination of three characteristics: What sort of error was involved? Who made the error? In what sort of case did the error occur? The following discussion of the different forks in the road can help guide a researcher to the correct standard. For additional guidance, see the flowchart at www.scbar.org/sclawyer.

Context-specific standards

If the legislature has spoken, then defining the standard of review is simple. A statutory standard is sometimes one of the existing standards, just imposed by statute. For example, in zoning cases, title 6, chapter 29, section 840 of the S.C. Code requires factual findings by a zoning commission to be treated just like a jury's factual findings and reviewed with a commonplace "any evidence" standard discussed below.

Elsewhere, the statutory standard might be a modified standard from another setting or a new standard altogether. In administrative cases, the use of the "substantial evidence" standard is required. S.C. Code Ann. § 1-23-380(5) (Supp. 2011). A decision is supported by "substantial evidence" if a reasonable person could have reached the same conclusion. *Miller v. State Roofing Co.*, 441 S.E.2d 323, 324

PHOTO BY GEORGE FULTON

(S.C. 1994). A decision does not lack substantial evidence just because a reasonable mind might also have disagreed. A reasonable choice will be upheld even if the appellate court would not have made that same choice. *Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm'n*, 319 S.E.2d 695, 696 (S.C. 1984).

Likewise, appeals from arbitration enjoy a unique standard of review. Following arbitration, the trial court will not fix factual errors even if convinced of their existence but will look only to whether the arbitrator exceeded his or her powers. *See Pittman Mortg. Co. v. Edwards*, 488 S.E.2d 335, 338 (S.C. 1997) (applying S.C. Code Ann. § 15-48-130 (Supp. 1996)). Even legal errors will not be corrected unless the arbitrator consciously applied the wrong law. *Batten v. Howell*, 389 S.E.2d 170, 172 (S.C. 1990).

These special, context-specific standards are the exception. They apply largely to decisions made by other-than-traditional tribunals. In most other cases, there is no statutory or specialized standard, and the selection process considers the characteristics of the alleged error.

Law or fact?

The most important characteristic is the *nature of the error*: Does the issue present a question of law or a question of fact? A "question of law" involves declaring a principle that is true not just for the case being tried, but for every subsequent case. For instance, whether a public figure must prove actual malice in a libel suit is a question of law. Whether that principle, in the end, applies to a case might be debated, but its truth is a matter of law. The facts of the particular case are inconsequential, and the principle could be given by a judge without ever hearing any testimony.

"Questions of fact," on the other hand, are questions of evidence. They require the review of testimony in a specific case to decide their truth. *See Sawyer, Wallace & Co. v. Macauly*, 18 S.C. 543, 548 (1883). They normally answer the who, what, when and where of a case. For example, was the traffic light red or green? How long had the water been on the floor? Questions of fact have definite answers even if they require circumstantial proof (e.g., Was the landlord motivated by the defendant's having a child in refusing to rent the apartment?). Any competent person could listen to the testimony and decide which side to believe, and no amount of legal training makes the decision any more reliable.

If an error raises a question of law, the analysis for the standard of review stops, and the *de novo* standard applies. *N. Am. Rescue Prods., Inc. v. Richardson*, 720 S.E.2d 53, 58 (S.C. Ct. App. 2011). The *de novo* standard is the most appellant-friendly standard on the spectrum. A court examines the issue with a fresh set of eyes using the same analytical framework the lower court used, but the lower court's own resolution gets no deference. *Lewis v. Lewis*, 709 S.E.2d 650, 654-55 (S.C. 2011).

Some advocates mistakenly describe the *de novo* standard of review as a *de novo* scope of review. Although *de novo* is often described as a "do over" standard, it is not a *de novo* proceeding. A *de novo* trial is a brand new trial: witnesses are called, motions are made, jurors deliberate and a verdict is reached as if the first proceeding had never happened. During a *de novo* review, only the specific decision challenged by the appellant is rewound. The appellate court places itself in the shoes of the lower court at the time of the lower court's decision and makes its own determination in that same context. The evidence is limited to the materials presented below, and the parties may not use their appeal to fill the gaps exposed in the trial court's order with new testimony.

Judge or jury?

All questions of law are resolved by the tribunal, but when the purported error involves a question of fact, a second characteristic becomes important: Who made the call—judge or jury?

As one South Carolina justice summed up: "Inquiry must end somewhere." *Pressley v. Kemp*, 16 S.C. 334, 343 (1882). In many cases, inquiry ends with a jury verdict. South Carolina's Supreme Court has long recognized the practical and constitutional importance of allowing jurors to do their duty without being second-guessed in their weighing of competing evidence:

> The jurors, and not the judge, are the constitutional and legal judges of such matters. It is for them to decide on the credibility of testimony delivered to them, and estimate the comparative weight of such testimony, where it goes to establish contradictory propositions. This court ought not to interfere with this great and incontestable right of juries. If the opinions of judges are to countervail the opinions of juries on questions of fact, the boasted privilege of trial by jury is worth nothing.

Fuller v. Alexander, 3 S.C.L. (1 Brev.) 149, 150 (1802). Courts simply lack the power to weigh factual matters on appeal. S.C. Const. art. V, § 5.

When a jury has spoken on a factual issue, the burden on the appellant is near its highest. Under the "any evidence" standard, the appellate court does not have to be persuaded itself about the resolution and does not have to find that there was a preponderance or even substantial evidence. As long as "any evidence" reasonably supports the decision, it will be affirmed. The standard applies regardless of the nature of the action presented to the jury. *See Watson v. Ford Motor Co.*, 699 S.E.2d 169, 174 (S.C. 2010) (case in law); *N. Am. Rescue Prods.*, 720 S.E.2d at 60 (case in equity).

Of course, resolutions of factual issues are not legally unassailable even by juries. When there is "no evidence," an appellate court will reverse. *See Holland v. State*, 470 S.E.2d 378, 379 (S.C. 1996). The standard has been harmonized with the constitutional bar to a review of jury decisions this way: The court is not weighing the conflicting evidence in any way. Rather, the court is simply deciding whether any evidence exists at all.

> [I]t is not to be understood, that the final determination of every case in which questions of fact are involved, are alone to be decided by a jury; for when it is clear to demonstration, from the facts stated, that it is impossible to infer from them any thing (sic) which can go to charge a party, it then becomes a question of law, to decide which is the peculiar province of the court.

Martin v. Bacon, 9 S.C.L. (2 Mill) 132, 299 (Const. Ct. App. 1818). The standard is most akin to the trial court standard for summary judgment: Is there any evidence upon which a person could reasonably seize to reach an outcome? Permitting a review of factual matters for the mere existence of evidence prevents jury nullification where a jury flatly refuses to apply the law under the guise of a factual issue.

Law or equity?

The final characteristic of alleged errors is the *nature of the action*. English courts of law existed independent of the Crown and made decisions based on the common law. The results were predictable, but sometimes inflexibly so. When the common law's mechanical approach failed to produce "fair" outcomes, litigants sought the assistance of the sovereign's chancellor with the power to smooth out the rough edges of the common law. Formal chancery or equitable courts developed, and the tradition continued in South Carolina with two, separate courts for different types of actions. *See Burrow v. McWhann*, 1 S.C. Eq. (1 Des. Eq.) 409, 418 (Ct. App. 1794) ("We consider ourselves placed here to do certain things, which the courts of common law by the strictness of their rules cannot do. Indeed the first principle of a court of equity is, to correct the rigor of the common law."). The two were finally merged by South Carolina's Constitution of 1868. S.C. Const. of 1868, art. IV, § 16.

The merger did not merge the legal systems themselves, just the court structures. *Timmons v. Turner*, 33 S.E. 571, 574 (S.C. 1899) ("It is quite true that the principles of equity still subsist in all their pristine splendor and are enforced in the court of common pleas, and it is also true that the common law, in all of its rugged strength, still leads to the exercise of the right of a trial by jury; but one court now does for both."). When that happens, "each retains its own identity as legal or equitable for purposes of the applicable standard of review on appeal." *Corley v. Ott*, 485 S.E.2d 97, 99 n.1 (S.C. 1997).

Before 1868, when courts of equity and courts of law were different courts, distinguishing equitable and legal claims would have been as simple as seeing which court had heard the case below. *State v. Pac. Guano Co.*, 22 S.C. 50, 77 (1884). A court's name can still be used to identify some claims as legal or equitable. For instance, all criminal cases, heard in the Court of General Sessions, necessarily sound in law since equity has no criminal jurisdiction. *Baird v. Charleston Cnty.*,

511 S.E.2d 69, 78 (S.C. 1999). On the other hand, family courts are courts of equity, *Lewis* 709 S.E.2d at 652, and the claims litigated there are equitable.

For the vast majority of claims, heard in the unified Court of Common Pleas, categorizing claims as legal or equitable involves more historical research than principled, legal analysis. The question is simple even if its resolution is not: Before the merger of the courts in 1868, where would the claim have been filed? *Pac. Guano Co.*, 22 S.C. at 78. The line between law and equity claims was already blurring 200 years ago. *Warnock v. Wightman*, 3 S.C.L. (1 Brev.) 331, 370 (Const. Ct. App. 1804) ("Our courts of equity differ from those of law, more in exterior matters of practice, than in principle . . . ."). Nevertheless, the important, historical distinction was the remedy: Law cases resulted in compensatory, money damages, while in equity, courts ordered some action or the unwinding of a transaction. *See First Union Nat'l Bank of S.C. v. Soden*, 511 S.E.2d 372, 379-80 (S.C. Ct. App. 1998). But even that litmus test is not perfect: In the modern era, some legal claims do not involve monetary relief (e.g., ejectment) and some equity claims do (e.g., *quantum meruit*). Thankfully, several sources catalog various claims as legal or equitable, and the need for historical research rarely arises. *See, e.g.*, Jean Hoefer Toal, et al., *Appellate Practice in South Carolina* 180-90 (2d ed. 2002) (categorizing 77 claims as legal or equitable).

When reviewing an action that sounds *at law*, a judge's factual findings are on firm footing. The trial judge essentially sits as a jury, and his or her factual determinations are given the same deference. *Chapman v. Allstate Ins. Co.*, 211 S.E.2d 876, 877 (S.C. 1974). The appellate court will not disturb the judge's findings of fact in a legal case if there is any evidence standard that could reasonably support the judge's determinations; in other words, the decision will be upheld "unless wholly unsupported by the evidence." *Butler Contracting, Inc. v. Court St., LLC*, 631 S.E.2d 252, 255 (S.C. 2006).

In cases at law presenting criminal claims, judges must answer some factual disputes, the resolution of which is necessary for pre-trial rulings on matters such as the voluntariness of a confession. The standard is called "clear error" in criminal cases, but the meaning is the same as the "any evidence" used with any other factual ruling made in a legal case. *See State v. Wilson*, 545 S.E.2d 827, 829 (S.C. 2001). The court "does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial judge's ruling is supported by any evidence." *Id.* If there is any probative evidence to support a ruling, the ruling will be affirmed.

In equity cases, the analysis differs. The power to review factual determinations in equitable cases was preserved in the S.C. Constitution of 1895 (our current constitution), but no particular standard was mentioned. In *Finley v. Cartwright*, 33 S.E. 359 (S.C. 1899), with almost no analysis, the Supreme Court declared, "[I]t may

now be regarded as settled that this court may reverse a finding of fact by the circuit court [in equity] when the appellant satisfies this court that the preponderance of the evidence is against the finding of the circuit court." *Id.* at 360-61. Although another—better reasoned?—analysis was offered by Chief Justice McIver for a "manifest error" standard, *id.* at 361 (McIver, C.J., concurring in result), his opinion has never found any traction, and the point has been settled for more than 100 years. In an action *in equity* tried by the judge, the appellate court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence. *Townes Assocs., Ltd.*, 221 at 775. In other words, the court will use a *de novo* standard. *Lewis*, 709 S.E.2d at 652.

For equitable claims, one curveball can catch lawyers unaware. Until 1999, a case in equity could be transferred to a master-in-equity or special referee to make a factual report for review by the circuit court judge. If the circuit judge reviewed the report using a *de novo* standard and accepted it, those factual findings would be deemed especially reliable, and upon any further review, they would be affirmed if "any evidence" reasonably supported them. *See Riley v. Berry*, 199 S.E. 866, 868 (S.C. 1938). That two judges had agreed essentially converted the findings into the equivalent of jury determinations. In *Dean v. Kilgore*, 437 S.E.2d 154 (S.C. Ct. App. 1993), the Court of Appeals extended the "two judge rule" to equitable claims beginning in probate court, where the fact findings of the probate judge had already been affirmed by the circuit court judge during a first appeal. A change to the S.C. Code now prevents factual reports by masters and skips the circuit court in appeals, S.C. Code Ann. § 14-11-85 (Supp. 2011), but the "two judge rule" still has some life left in it in the very particular circumstance of a factual finding on an equitable claim by a probate judge which has already been affirmed by the circuit court.

Improving your odds on appeal

A clever lawyer once advised that the most persuasive tactic before the Supreme Court is to bind your brief with red paper. The joke, of course, is that only respondents' briefs are bound in red, while appellants use blue. The underlying truth is that an appellant will have *at best* an even playing field even with a *de novo* review; every other option tilts the field against an appellant before the first filing. Every lawyer (but especially an appellant's lawyer) has to work to stack the deck as much as possible.

It might seem obvious by this point, but mentioning the standard of review is important. The reviewing court will undoubtedly have to pick a standard of review, and lawyers who simply do not address the matter are recklessly omitting a persuasive component from their briefs. In federal court, stating the standard of review is required. Although not compelled by South Carolina Appellate Court Rule 208, no competent lawyer should leave out the standard of review.

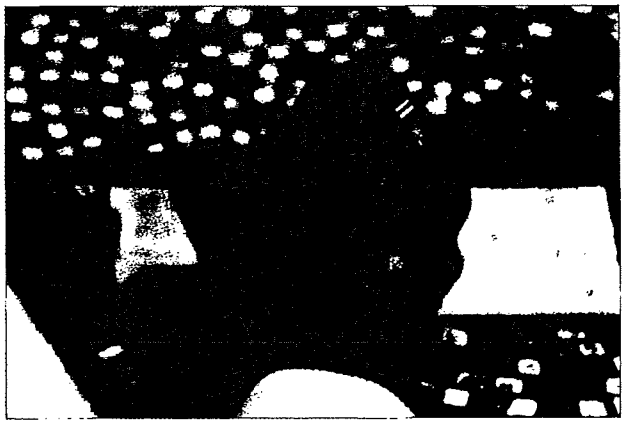
When selecting which issues to appeal, the sexiest ones are not

Bar Foundation grantees are life changers... one person at a time.

Five years ago: Frank and wife Bethany lived at Crisis Ministries.

Life changer: The Crisis Ministries' attorney found Frank was eligible for TWO pensions awarding $481/month and $6,000 in back pension plus interest.

Now: They reside in their own home and know the chance of returning to Crisis Ministries as residents is small.



One year ago: Sylvia went to the bank and found her oldest daughter (with whom she lived) had been stealing what little money she had from her account.

Life changer: The attorney at Lowcountry Legal Volunteers helped Sylvia open a new account, prepared power of attorney revocations and put new powers in place.

Now: Sylvia resides with another family member who she can trust, and her meager assets are safe.

At the beginning of the school year: A teacher faced an unruly classroom with all kinds of students - Goth kids, the geeks, some who had no friends, the most popular guy on campus, students whose parents couldn't care less.

Life changer: Through the Law Related Education Division's Mock Trial program, students became invested and worked as a team. They sold doughnuts, collected donations and saved allowances so they could participate in the competition.

Now: Several students desire careers in law - solid proof that this 'mixed bag' of students could work together toward a common goal.

South Carolina
BAR FOUNDATION
Lawyers Sustaining Justice

www.scbarfoundation.org
803-765-0517

always the ones to pursue. There might be several possible errors, but which ones have the least deferential standard? The impact of a more or less deferential standard of review can multiply the chances of winning many times. Consider two examples:

- The denial of Appellant's workers' compensation claim must be reversed because it was not supported by substantial evidence.
- A *de novo* review of the Commission's definition of a legally compensable injury shows that it was based on a misapplication of this Court's guidance. Moreover, its denial of Appellant's claim was unsupported by substantial evidence in any event.

The first option gives the appellate court just one chance to help the appellant, but proving that there was not enough evidence to make the lower court's findings even reasonable is taking on a difficult task. If the same lawyer carefully parsed the analysis of the Commission and separated out the legal analysis from the weighing of the facts, she would have both presented a second choice to the appellate court *and* lowered the bar.

A very fine review of an error can sometimes disclose that the choice of a standard is more debatable than one would expect. For instance, as simple as the choice might seem between questions of fact and law, most issues are neither pure questions of textbook law nor pure questions of historical truth. When the two merge, the result is a "mixed question of law and fact." The historical facts are established and the rule of law is undisputed, but the issue is whether the facts have triggered some legal consequence. Examples include whether an item is a fixture to real estate, whether actions crossed the line into gross negligence, and whether the police had probable cause to search.

When an error is a mixed question of fact and law, courts often focus on the legal aspect and default to a *de novo* standard, but not always. In *State v. Brockman*, 528 S.E.2d 661 (S.C. 2000), two police officers found cocaine in a compartment of a moped belonging to William Brockman. Brockman sought to suppress evidence as the result of an illegal search. According to the police, Brockman's mother, the homeowner, had told them that her son's moped contained drugs and she wanted it out of her house. She volunteered to show the moped to the police, offered to open the compartments on the moped and pried them open with a screwdriver. Her own testimony differed: She denied ever having reported drugs and claimed the police had insisted on investigating the moped themselves.

The trial judge heard the competing testimony and denied the motion to suppress, explaining that the cocaine had been found during a "private search" initiated by the homeowner, not the police. The Court of Appeals used the least deferential *de novo* standard because reasonable suspicion was a mixed question of law and fact, decided that the search was not "private" and reversed. On further appeal, the Supreme Court began by considering

the standard of review. The ultimate resolution of the trial judge's ruling was the product of a mixed question of law and fact: Would the historical facts have led a reasonable officer to have reasonable suspicion? Although most mixed questions are treated as legal errors, the Court realized that the factual issues predominated in the specific case, found that there had been no "clear error" in the original ruling and reinstated it.

Even the most bright line standard of review can still be tweaked. While the name of the standard might be set in stone, careful lawyering can tint it slightly where "practical deference" applies. "Practical deference" is the wiggle room that a reviewing court can employ to justify a little more—or a little less—probing review. For example, when an administrative agency's legal ruling is questioned, the *de novo* standard applies. *Lizee v. S.C. Dep't of Mental Health*, 623 S.E.2d 860, 863 (S.C. Ct. App. 2005) ("[W]here the Commission's decision is controlled by an error of law, this court's review is plenary."). But, as a practical matter, administrative matters tend to be technical and unfamiliar. Appellate courts, therefore, at least announce some practical deference to interpretations of statutes within the scope of an agency's powers. *See, e.g., Anderson v. Baptist Med. Ctr.*, 541 S.E.2d 526, 529-30 (S.C. 2001). In *Anderson*, the court had to decide whether excluding fringe benefits from wages was appropriate in a workers' compensation case and, even though a *de novo* standard governed, noted it would give "the most respectful consideration" to the Commission. *Id.*

Practical deference can be used in appeals of fact findings too. The type of evidence presented should be played up by one party or the other, not because it changes the standard of review, but because it colors it. In an equitable claim, for instance, the appellate court *may* abandon the trial court's factual rulings and reweigh the evidence as it sees fit. But why would it? The trial judge, who saw and heard the witnesses, was in a better position to evaluate their credibility and weigh their testimony. *See McClerin v. McClerin*, 425 S.E.2d 476, 478 (S.C. Ct. App. 1992). Because the appellate court lacks the opportunity for direct observation of the witnesses, it should, as a purely practical matter, put stock in the trial court's own conclusions. *See Aiken Cnty. Dep't of Social Servs. v. Wilcox*, 403 S.E.2d 142, 144 (S.C. Ct. App. 1991). In equitable cases in which factual conclusions are based on easily reproduced evidence—videotaped testimony and documents, for example—there is less reason to apply any practical deference. *See Pool v. Dial*, 10 S.C. 440, 444-45 (1879).

One case of "practical deference" deserves special mention because it is mentioned so frequently that it has taken on the air of a distinct standard. The "abuse of discretion standard" applies to trial calls on matters such as the scope of cross-examination and the exclusion for evidence for undue prejudice. Appellate courts know that procedural rulings made before and during the hurly-burly of a trial often require snap judgments that should not be lightly set aside

lest the progress of trials slows to an unworkable rate.

Historically, the exercise of discretion by a trial judge was shielded from appellate attack: "[D]iscretion is unlimited. It is bounded by no rule except the good sense and integrity of the party empowered to exercise it, and, in the absence of an express right to appeal, it necessarily follows that its exercise is unappealable." *Truett v. Rains*, 17 S.C. 451, 453 (1882). When such matters were eventually declared reviewable, a new name was used for their level of review, and the "abuse of discretion" standard was coined. "Abuse of discretion" applies to those rulings which, at one time, were simply beyond the reach of appellate courts, but the standard itself is no different than that used for an appeal of any other judge's ruling. "An abuse of discretion occurs when the ruling is based on [1] an error of law or [2] a factual conclusion without evidentiary support." *Conner v. City of Forest Acres*, 611 S.E.2d 905, 908 (S.C. 2005). A judge's ruling has no evidentiary support only when there is no evidence which, if believed, would have justified his or her choice among the possible rulings. *See McDaniel v. Addison*, 31 S.E. 226, 227 (S.C. 1898). To the extent that an "abuse of discretion" is a higher hurdle than for any other appeal of a legal or factual conclusion, it is only for the practical reluctance of appellate courts to reverse, not because the actual test is any higher. Even though the standard is the same, because of the context of the supposed error, appellate courts will place more faith in the decision of the trial judge: "We suppose it possible that there might be such a gross abuse of discretion as to demand relief, but happily such cases never occur, or certainly very rarely, in the administration of our law." *White v. Coleman*, 17 S.E. 21, 22 (S.C. 1893).

Conclusion

As Judge Posner of the Seventh Circuit only half-jokingly wrote, "We acknowledge that there are more verbal formulas for the scope of appellate review (plenary or de novo, clearly erroneous, abuse of discretion, substantial evidence, arbitrary and capricious, some evidence, reasonable basis, presumed correct, and maybe others) than there are distinctions actually capable of being drawn in the practice of appellate review." *United States v. Boyd*, 55 F.3d 239, 242 (7th Cir. 1995). South Carolina courts might seem to share that muddled catalog of standards, and as a result, when a dedicated section is not required (as in state practice), many lawyers eliminate the standard of review section from their briefs entirely.

The treatment is unfortunate for their clients. The fog created by the various verbal formulas can be easily lifted with a simple analysis. Once the process and the resulting standards are understood, appellate lawyers gain a new tactical and persuasive tool that can either level an uneven playing field or create one.

Kevin Eberle is a legal writing professor at the Charleston School of Law. He would like to thank his 2011-2012 research assistant, Sylvia Maddox, for her help on this and other projects.

GET PUBLISHED!

The ***South Carolina Lawyer*** wants to hear from you! Articles are needed that appeal to a broad range of Bar members focusing on:

- recent changes in the law,
- the effects of cases and rulings about which members of the Bar need to be informed (no case notes),
- ethical considerations,
- quality of life issues and
- law practice management.

Authors may receive two MCLE credit hours for articles that are at least 2000 words in length.

If you are interested in writing an article, please see the Memorandum for Authors at **www.scbar.org/sclawyer** or e-mail **kmoran@scbar.org**. You may also view an index at the site referenced above for topics previously published.