

Views & Visions

A publication of Bowles Rice McDavid Graff & Love PLLC

COUNSELORS *and the* COURTROOM



October 2003

In this issue . . .

COUNSELORS *and the* COURTROOM

- The Honorable Elliott E. Maynard, Justice** Page 4
West Virginia Supreme Court of Appeals
The Case for Non-Partisan Election of Judges
- The Honorable Larry V. Starcher, Chief Justice** Page 6
West Virginia Supreme Court of Appeals
Choosing West Virginia's Judges
- Thomas R. Tinder, Executive Director** Page 8
The West Virginia State Bar
Appointment of Judges in West Virginia
- Charles M. Love III** Page 10
The West Virginia State Court System
- Ronda L. Harvey, Esquire** Page 12
Avoiding the Deliberate Intent Trap
- Gerald J. Kitchen, Executive Vice-President** Page 14
Century Aluminum
West Virginia's Legal Horizon: Is There Hope?
- Corey L. Palumbo, Esquire** Page 16
Legislative Wrap-Up
- Gerard R. Stowers, Esquire** Page 20
A Lawyer's Lawyer
- Diana L. Johnson, Esquire** Page 22
The Accidental Tourist
- P. Nathan Bowles, Jr., Esquire** Page 28
Avoiding the Battle
- Fazal A. Shere, Esquire** Page 33
Mold Litigation: A Growing Issue
- Michael J. Schessler, Esquire** Page 37
Indemnification: Who's Going to Pay?
- J. Mark Adkins, Esquire** Page 40
A Client's Survival Guide
- R. Keith Randolph** Page 41
Product Liability Without the Liability



The Art of Problem-Solving: Courts, Judges and ADR

Charles M. Love, III, Esquire
Bowles Rice McDavid Graff & Love PLLC



That is what “Litigation” is all about — the art of problem solving or conflict resolution.

Sometimes you cannot resolve matters by simply talking about them. One of the blessings of our country is that we have developed a system for problem solving — albeit not perfect — which works reasonably well.

In our firm, we have nearly 100 lawyers. Most are uniquely experienced in substantive areas of the law, such as: Banking; Energy; Corporate; Bond; General Business; as well as others.

This issue of *Views & Visions* deals with problem solving — not a substantive but a specific procedural area of the law. Our lawyers are experienced problem solvers, trained to use various forms of dispute resolution in solving substantive problems.

In the pure sense, trials have become time consuming, expensive and because of appeals, lack finality. Alternative Dispute Resolution (ADR) has become popular with everyone — lawyers and clients alike — because it is relatively quick, inexpensive and usually has finality. There are several forms of ADR: non-binding mediation; binding mediation; arbitration; and others. Our courts frequently require non-binding mediation before permitting a trial.

In this issue of *Views & Visions*, we are honored to present articles by Justices of the Supreme Court and the Executive Director of the West Virginia State Bar speaking to the process of judicial selection. Judicial selection is a “hot button” topic because of its perceived influence on economic development in our state.

In addition, Gerald Kitchen, General Counsel of Century Aluminum, discusses the legal climate from the perspective of one doing business in West Virginia. This, too, is a topic stimulating much discussion in our state.

Our Litigation attorneys are “quick studies,” trained and experienced in issue analysis, good assessment, human relations and all the problem solving techniques — from trials to mediation. In the following pages you will find articles by experienced litigators in our firm dealing with deliberate intent *Mandolidis* issues, indemnification, mold-litigation, lawyers representing lawyers and a legislative wrap-up. This issue of *Views & Visions* will give you some insight to the kinds of things we do to help our clients solve their problems.

When you have an issue that you cannot seem to resolve with another, call on us. We can and will help. ■

Charles M. Love, III, has been a practicing attorney since 1965. He is Chairman of the Litigation Practice Group. Mr. Love concentrates his practice in insurance, toxic tort, products liability and commercial litigation. Mr. Love serves as Chairman of the West Virginia Housing Development Fund (1981 to present) and is a permanent member of the Fourth Circuit Judicial Conference. He is a Fellow of the American Bar Association, a Fellow of the West Virginia State Bar, a member of the Executive Council of the West Virginia Bar Association and President-elect of the Board of Governors of the West Virginia State Bar.



Justice Maynard earned his B.S. from Florida Southern College in 1967 and his J.D. from West Virginia University in 1974. He served in the United States Air Force from 1961 to 1966. After his release, he was engaged in the private practice of law and was elected Prosecuting Attorney of Mingo County. He was subsequently appointed by Governor John D. Rockefeller IV as Judge of the Thirtieth Judicial Circuit, and was twice elected judge of that circuit. In November 1996, he was elected to the Supreme Court of Appeals. He served as chief justice in 2000.

The Case for Non-Partisan Election of Judges

*Honorable Elliot E. Maynard, Justice
West Virginia Supreme Court of Appeals*

In stereotypical lawyer fashion, I am beginning this article with a disclaimer. There simply is no good way to choose judges. There are only different ways.

These ways include so called merit selection, a combination of merit selection with other methods (usually popular retention election), partisan elections, and the best and most viable option I see for West Virginia, non-partisan elections. However, each of these methods has flaws.

Currently, in West Virginia all Supreme Court justices, circuit judges, and magistrates are elected in partisan elections. Since 2002, family law judges are also elected in partisan elections. According to the December 1998 *Report of the Commission on the Future of the West Virginia Judiciary*, West Virginia is one of eight states that use partisan elections to select all of their appellate and trial court judges.¹ Thirteen other states also select their judges by popular election, but on nonpartisan ballots.

In 16 states, judges are chosen under a merit selection process involving a nonpartisan nominating commission, typically made up of lawyers and members of the public who investigate and evaluate applicants for the bench. This nominating commission then submits

the names of the most highly qualified applicants to the governor for final selection. Five states use gubernatorial or legislative appointment to the bench without a nominating commission. Nine states employ a combination of merit selection and other methods (usually popular retention election) for selection of judges at various appellate and trial court levels.

Proponents of merit selection point out that it eliminates campaign and related financing problems. It takes money, if not politics, out of the judicial selection process. Merit selection is a screening process where the commission or other body making the initial decision has substantial information about each applicant not available or even of interest to the general public. Merit selection also draws from a larger pool of candidates since many well-qualified applicants do not want to run in popular elections.²

As Justice James Brinkley of the Michigan Supreme Court eloquently wrote in support of merit selection, "Judicial responsibility requires a blend of education, talent, temperament, and expertise and, yes, a certain aloofness that does not lend itself to evaluation by an electoral lottery. Indeed judicial restraint and ethics mandate that candidates not do what a competitive election is supposed to foster. They can

¹ West Virginia does employ a limited merit selection system on a voluntary basis under Executive Order of the Governor for the selection of justices and circuit judges to fill midterm vacancies. The process uses a nominating commission and subsequent appointment by the governor until the next election.

² *Report of the Commission on the Future of the W. Va. Judiciary* at 58-59 (W.Va. Supreme Court of Appeals, December 1, 1998).

neither discuss nor promise how they will rule in cases that come before them, and they are not expected to criticize the institution they seek to join.”³

Please excuse the pun, but I do see the merit in Justice Brinkley’s position. One could even argue that the United States Supreme Court would not have desegregated our schools in the landmark decision of *Brown v. Board of Education* in 1954 if those justices had been popularly elected. At that point in our cultural development, the majority of voters wanted to continue so called “separate but equal” schools.

I have read news reports that most voters cannot name all, or even one, of the justices on the United States Supreme Court or their own state’s highest appellate court. Most voters simply do not know about judicial races and do not take the time to educate themselves on the topic. Test this proposition yourself by asking several non-lawyers you know to name one member of the West Virginia Supreme Court.

Finally, the amount of money spent on state court judicial races is obscene and out of control.⁴ The perception that campaign contributions influence judicial decisions is one of the most difficult issues facing courts today. The public tends to think that judges are “in hock” to the lawyers and litigants who gave them money.

Being a realist, I do not think that merit selection is a viable option in our State because I do not believe there will ever be a day when West Virginians will give up their right to elect judges. After all, we live in a state where we still elect our Commissioner of Agriculture for goodness sake!

I also see the very valid point critics make that merit selection also is political in that candidates must win favor and influence with the political bigwigs or legal elite who select them, and that election by the people is fairer. They say merit selection is the politics of the few versus the politics of the many, and is thus undemocratic. Critics also say that an appointed sitting judge is not likely to be removed in a subsequent popular retention election absent some significant controversy about the judge’s performance.⁵

In addition, as noted above, proponents of merit selection aver that it eliminates campaign problems unique to judicial elections such as judicial candidates’ ethical responsibility to neither discuss issues which may come before them nor criticize the court they seek to join. However, in the recent case of *Republican Party of Minnesota v. White*, 536 U.S. 765, 122 S.Ct. 2528 (2002) (5-4) (O’Conner and Kennedy, JJ., concurring) (Stevens, Souter, Ginsburg, and Breyer, JJ., dissenting), the United States Supreme Court effectively granted to judicial

Continued on p. 18

³ James H. Brinkley, *Judicial Appointment v. Judicial Election*, 75 MICHIGAN B.J. 930, 932 (1996).

⁴ William Glaberson, *Fierce Campaigns Signal a New Era for State Courts* (June 5, 2000) <<http://www.nytimes.com/library/national/060500state-judges.html>>.

⁵ *Report of the Commission on the Future of the W. Va. Judiciary* at 59 (W.Va. Supreme Court of Appeals, December 1, 1998).



Chief Justice Starcher earned his A.B. in 1964 and his J.D. in 1967 from West Virginia University. He was elected Circuit Judge of Monongalia County in 1976 where he served as circuit judge for 20 years, 18 as chief judge. While sitting as a circuit judge, Chief Justice Starcher served as a special judge in 23 of West Virginia's 55 counties. In November 1996, he was elected to the Supreme Court of Appeals. He served as chief justice in 1999, and again in 2002.

Choosing West Virginia's Judges

*Honorable Larry V. Starcher, Chief Justice
West Virginia Supreme Court of Appeals*

For more than 125 years, West Virginians have used open and competitive elections to choose our judges — as required by our *Constitution*.

Nevertheless, some have suggested that by eliminating judicial elections and by adopting a purportedly “non-political” system of so-called “merit-based” judicial appointment, we would have “better” judges and more “dignity and respect” for our judicial system.

There are at least two perspectives that may underlie such suggestions for changing West Virginia's judicial selection process.

One perspective is the idealistic and unselfish desire to improve government for the benefit of all people. I understand, respect and appreciate this perspective. In a world of competing interest groups, the sense of civic responsibility that leads people to disinterestedly work for “good government” is all too rare.

However, there is a second perspective that is associated with calls for abolishing our long-standing system of the popular election of judges. This second perspective is less idealistic and is more about power, pure and simple. This perspective reflects the desire of elites to shape, orient and control our legal system. I do not share this perspective.

Competitive electoral judicial selection is a desirable and time-tested democratic process. The great body of political science research, scholarly opinion and just plain common sense supports choosing our judges in elections. Researchers agree that the competitive election process results in just as able or “qualified” a judiciary as the appointment process.

Moreover, it is widely found that there are substantial social and political virtues associated with the competitive election of judges. These virtues include greater accountability, independence and legitimacy of the judicial branch of government — and the selection of persons as judges who are involved in and attuned to their communities. A competitively elected judiciary has been found to result in a more well-rounded, responsive and enlightened bench. Certainly, that is our experience in West Virginia.

Importantly, competitive elections open the judicial selection process to new and challenging people and ideas. Innovative and energetic self-starters who have not received “the establishment's” blessing are able to compete for judicial positions. Judges who come to office in this independent fashion help insure a fair forum for citizens who come up against the “powers that be.”

In summary, the advantages of competitive judicial elections are numer-

ous and well-documented. West Virginia is a better place because we have these advantages.

West Virginia currently has an appropriate balance of electoral and appointment-based judicial selection. Most states in our Union, including West Virginia, rely upon some system of popular elections to choose their judges. However, in states like ours that use elections, the appointment of judges nevertheless plays a significant role in the judicial selection process.

A substantial percentage of judges do not complete their full terms of office. Career changes, financial issues, death, retirement and disability combine with relatively long judicial terms of office to produce vacancies during judicial terms.

Replacements for judges who do not complete their terms are appointed to office. Many of these appointed judges run for office in the next election (with the advantage of incumbency).

In West Virginia, appointment to the bench has been the beginning of some distinguished judicial careers. As former West Virginia State Bar President Elliot Hicks noted in an article in the *West Virginia Lawyer*, appointment has opened the judiciary to under-represented groups like African-Americans and women.

To have a balanced role for “appointive judicial selection” in West Virginia, no change is needed. We have such a balanced role, we have had it for over 100 years, and it is working.



To argue that “politics” can be removed from judicial selection is either to be unrealistic or to be concealing one’s own political agenda. In 1801, John Marshall, rather than Judge Spencer Roane, the distinguished Virginia jurist for whom my home town and county were named, was appointed to the United States Supreme Court. Why? Because Marshall had more “political clout” than did Roane. This statement should come as no surprise. The scholarly and professional consensus is overwhelming that *the selection of judges (including all federal judges), whether by election or by appointment, has always been (and always will be) political.*

Continued on p. 24



Tom Tinder serves as Executive Director of the West Virginia State Bar. He is a member of the Board of Directors of Legal Aid of West Virginia, the Youth in Government Program and Lifebridge. Mr. Tinder also serves as President of the National Association of Bar Executives. He received his Bachelor of Science degree in Business Management from West Virginia University and his J.D. from the West Virginia University College of Law.

Appointment of Judges — It's Alive and Kicking in West Virginia

*Thomas R. Tinder, Executive Director
The West Virginia State Bar*

For some time now there has been an ongoing debate and discussion in West Virginia concerning the selection process for members of the judiciary. The words have been strong and heated about the judicial selection process, but for the major source of legal decision making in the state — the circuit court judge position — as well as for the most important legal decision making affecting our society — the family court — an appointed selection process has been in effect for decades and is apparently working well.

Well-known and well-respected groups and individuals have staked their positions on judicial selection and expressed their opinions in well-reasoned ways. Nevertheless, the facts clearly demonstrate that the present partisan election process does not actually provide the judicial officers in circuit court and family court — these individuals assume their positions through an appointment procedure.

According to the West Virginia Constitution, governors possess the responsibility to appoint persons to circuit court judge positions when there is a vacancy. When the family court system came into existence a couple years ago, state law required that the governor appoint the persons to initially fill those high priority roles.

For twenty of the past twenty-four years, governors from both major po-

litical parties have used judicial selection committees to make recommendations to them when there is a vacancy for a circuit court judge. This diverse group of citizens from all parts of the state notifies the public of the vacancy, accepts applications, does thorough background investigations, interviews the candidates and makes recommendations to the governor. The governor has always appointed an individual who has gone through this selection process for circuit court judges. These appointed circuit court judges must then run for election on their own.

In reviewing the election results at the West Virginia Secretary of State's Office for circuit court judge positions since 1976, not including the 2000 and 2002 election cycles, more than 70% of the current circuit court judges in West Virginia were appointed by a governor and then ran unopposed in their ensuing judicial election. Furthermore, of the appointed circuit court judges, approximately 90% are elected when they have to run for the position. So, it is extremely difficult to challenge an appointed circuit court judge and win the election here in West Virginia.

The facts and statistics demonstrate that the vast majority of our circuit court judges assume their positions through a gubernatorial appointment process and retain those positions, most likely through being unopposed

in the following primary and general election process.

The 2000 election process produced similar results. For the primary election, there were 47 uncontested elections, 15 contested elections involving incumbent circuit court judges (3 of whom lost the election) and 3 races where there was no incumbent. So 72% of all incumbents were unopposed and 95% of all incumbents won their primary election contest.

In the 2000 general election, 53 incumbent judges were unopposed with 9 incumbents having contested elections — only 1 incumbent judge lost the election. There were the same three elections with no incumbent judges involved. Those figures are 85% unopposed and 98% winning the election.

In the first family court judge elections in 2002, 31 gubernatorial appointees

were unopposed with 8 contested elections (2 of the incumbents were defeated), or 79%. In the general election, the same 31 judges were unopposed and only one of the four contested races had the incumbent losing. That figure is 91%.

The debate can rage on between the forces in favor of some sort of selection process and forces in favor of a public election process for judicial officers in West Virginia. But, for circuit court judges and family court judges, the debate is basically over and the process has been set. The vast majority of these individuals are occupying their positions through some type of initial appointment process and then uncontested elections.

Do the citizens of West Virginia have high caliber persons presently serving as circuit court judges and family court judges? You be the judge. ■





Charles M. Love, III, has been a practicing attorney since 1965 and concentrates his defense practice in insurance, toxic tort, products liability and commercial litigation. He serves as Chairman of the West Virginia Housing Development Fund (1981 to present), a member of the Board of Trustees of the Herbert J. Thomas Memorial Hospital and is a permanent member of the Fourth Circuit Judicial Conference. He is a Fellow of the American Bar Association, a Fellow of the West Virginia State Bar, a member of the Executive Council of the West Virginia Bar Association and Vice President of the Board of Governors of the West Virginia State Bar Association.

The West Virginia State Court System

*Charles M. Love, III, Esquire
Bowles Rice McDavid Graff & Love PLLC*

West Virginia has many different courts and court systems. There are court systems that deal with controversies involving taxes, workers' compensation, unemployment compensation and many others. Most controversies, if not early resolved, end up in state trial courts, the courts which most people have heard of and read about.

Our basic trial court system is quite simple. We have trial courts — called circuit courts — and an appellate court — called the West Virginia Supreme Court of Appeals.

Circuit courts are found in each of West Virginia's fifty-five counties. Those courts are called "circuit" courts because originally the judges "rode circuit" — that is, while each county had a court, each county did not have a judge. The judge rode the circuit and "held court" in counties in a particular circuit. A judge was titled as a judge of a particular circuit.

Today we have 31 Judicial Circuits for our 55 counties. Some circuits consist of only one county - Kanawha County alone is the 13th Judicial Circuit and has 7 judges. Other circuits consist of several counties - the 5th and 14th judicial circuits consist of four counties each. This has all changed over the years as population centers have developed and needs have grown. In some instances, new judicial circuits have been created; however, additional

judges, generally, have been provided for existing circuits.

West Virginia presently has 65 circuit "judges." They are elected to eight-year terms and are paid \$90,000 per year. The elections are partisan-contested elections. Most circuit judges were initially appointed by a governor to fill a vacancy created by resignation, retirement or death. Most, not always, once elected, remain in office through successive elections. Few incumbent circuit judges are defeated.

The circuit courts are "trial courts of general jurisdiction" and where most criminal and significant civil cases are tried with a jury. The circuit courts are the lynchpin of our state judicial system.

There is no right of appeal from a decision by a West Virginia circuit court in any type of case. We have an appellate court, the West Virginia Supreme Court of Appeals; however, it alone decides whether a party can appeal. In other words, if you want to appeal, you can "petition" the Supreme Court — seek a writ — and ask permission to be heard by the Supreme Court. In its sole discretion, the Supreme Court determines whether your case can be reviewed in an appeal.

The West Virginia Supreme Court of Appeals is located ("sits") in Charleston, West Virginia, from September to June. It is comprised of 5 "justices."

They are elected to twelve-year terms and are paid \$95,000 per year. These elections are also partisan-contested elections. On occasion, vacancies are filled by appointment; however, unlike circuit judges, appointment to



the Supreme Court does not necessarily mean re-election.

The Supreme Court is the West Virginia court of last resort for all the circuit courts of this state. Additionally, the Supreme Court may review workers' compensation appeals directly from the Workers' Compensation Commission. More than half of the appeals heard by the Supreme Court are workers' compensation appeals.

There are other very important aspects of our judicial system. We have a separate "Family Court" system which deals with domestic matters from divorce to child custody and domestic violence. It covers the state in 36 separate circuits and presently has 35 judges who are elected to six-year terms and are paid \$65,000 per year. They are also elected in partisan-contested elections.

Finally, there is the "peoples court," or Magistrate Court system, which deals with the every-day problems people face from landlord/tenant issues to

small collection matters. If the amount sought is less than \$5,000, anyone can represent themselves in magistrate court. They are found in all counties. There are 158 magistrates and they are paid \$33,625 or \$40,000 per year, depending upon whether the population of their jurisdiction is greater than 8,500. They are elected for six year terms in partisan-contested elections.

All the state courts are supervised by the Supreme Court of Appeals. The salaries of the elected justices, judges and magistrates are fixed by the legislature. There is a single judicial budget which covers the costs of administering the state system, which employs 1,156 people.

The judicial system is the final arbiter in disputes. It is where disagreements between branches of government and where controversies between business and individuals are resolved. Government, individuals and businesses rely upon court decisions to provide guidance, assurance and predictability in our daily activities. ■



Ronda Harvey, a member of the firm, has been with the litigation group of Bowles Rice since 1993. She focuses her practice on defense of clients in claims involving deliberate intent, product liability, legal malpractice and insurance bad faith. Ronda recently tried a deliberate intent case for a major Jackson County employer and received a complete defense verdict. Ronda serves on the Executive Council of The West Virginia Bar Association and is past-president of the Young Lawyers Division of The West Virginia Bar Association.

Avoiding the Deliberate Intent Trap

*Ronda L. Harvey, Esquire
Bowles Rice McDavid Graff & Love PLLC*

Your employee is injured on the job. He receives workers' compensation benefits for his injury. End of story, right? The employer is immune from liability because the employee received workers' compensation benefits, correct? Not necessarily. In West Virginia, an employee may bring a civil action against his employer for excess damages if the employee can prove the five elements of the "deliberate intent" statute, set forth in W. Va. Code 23-4-2.

Basically, the employee must prove that: (1) a specific unsafe working condition that presented a strong probability of serious injury or death existed in the workplace; (2) the employer had actual knowledge of the specific unsafe working condition; (3) the specific unsafe working condition violated a specific safety standard within the employer's industry; (4) the employer exposed the employee to the specific unsafe working condition; and (5) the employee suffered injuries as a result of the exposure.

Employers can avoid deliberate intent actions by ensuring that any one of the five statutory elements is not present. This sounds simple, but it requires a good on-site safety program, employee safety training and reporting procedures. Here are some tips for avoiding the deliberate intent trap both before and after an employee's accident:

Pre-accident

Provide job-specific safety training to employees. Most employers provide general safety training for employees. Employers should also train employees on the safety aspects of each particular job. It is often helpful (and sometimes required, depending on the type of job) to provide employees with written directions and safety guidelines. Indeed, some employers initiate safety testing and peer review programs that enable the employer to track each employee's knowledge of the safety requirements. Follow-up training can then be provided in the areas where each employee is deficient.

Establish supervisor safety reviews and evaluations. Supervisors should watch the employees perform tasks and correct an employee on the spot if the employee is not following appropriate procedures. If other employees complain about a co-worker's unsafe work behavior, the supervisor should investigate immediately and determine whether the employee is performing a task unsafely. If so, the supervisor should correct the employee and assure that the employee is trained on the proper procedure.

Institute a formal reporting procedure for employee safety complaints. In deliberate intent actions, employees often try to prove the second element — that the employer had actual knowl-

edge of the specific unsafe working condition — through testimony of co-workers that they complained about the unsafe working condition prior to the accident. By the same token, the employer's defense is that the employee's injury was caused by an unforeseeable accident and not by any condition that could have been changed by the employer. In other words, the employer had no prior knowledge of the unsafe condition and, therefore, could not have corrected it in advance of the injury. This evidence is established by the testimony of a supervisor who claims that no employees complained of the alleged unsafe working condition. If this situation occurs at trial, the jury is faced with weighing the testimony of the co-workers against the testimony of the supervisor(s).

A formal procedure for employee safety complaints can help strengthen the supervisor's testimony. If such a procedure is in place and no written complaints were filed, the employer can use this evidence to lower the credibility of the co-workers. The employer can argue that the co-workers must not have thought the condition was unsafe, or they would have filed a formal written complaint. On the other hand, if written complaints have been filed prior to the accident, such evidence can substantiate the injured employee's assertion that the employer had actual knowledge of the specific unsafe working condition. Thus, employers should immediately respond to such complaints as discussed in the next section.



Develop a formal procedure for employee safety complaints.

Respond to employee complaints about unsafe conditions. The employer should thoroughly investigate each safety complaint, determine its validity and evaluate whether an unsafe condition exists. If an unsafe condition exists, the employer should barricade the area, prevent employees from entering the area and take steps to eliminate the unsafe condition.

In some instances, the employer may want to retain an independent safety consultant to determine whether the unsafe condition can be altered or modified in some way so that the task can be completed safely.

Continued on p. 27



Gerald J. Kitchen is Executive Vice President, General Counsel and Chief Administrative Officer of Century Aluminum Company, headquartered in Monterey, CA. Jerry joined Century in 1995 and helped take the company public in early 1996. Before joining Century, Jerry was a partner in a mid-sized Palo Alto, California, law firm. He also had served as Vice President and General Counsel of Alumax Inc., a major independent aluminum company that was acquired by Alcoa in 1998. Jerry completed his undergraduate studies at the University of Wyoming, he earned a masters degree in Mass Communications from Ohio University, and he received his JD degree from the University of California Hastings College of the Law in San Francisco.

West Virginia's Legal Horizon: Is there Hope?

*Gerald J. Kitchen, Esquire, Executive Vice-President
Century Aluminum*

Much has been written recently about the hazardous legal terrain manufacturers, physicians and others encounter when they engage in their business or profession in West Virginia. Our company became one of those intrepid adventurers in 1989 when it purchased a manufacturing plant in the state. By now we know the territory well, and we can confirm from first-hand experience that it can be a legally costly landscape.

Century Aluminum of West Virginia operates an aluminum reduction plant in Ravenswood. Our plant is similar to hundreds of other plants in the United States and abroad — except in one regard. Since we acquired the plant and an adjacent rolling mill from Kaiser Aluminum in 1989, about 1,600 occupational pneumoconiosis (“OP”) claims have been filed under West Virginia’s workers’ compensation program by persons allegedly exposed to abnormal quantities of dust in our plant or the rolling mill. The total cost our company has incurred in dealing with these claims has been about \$17.5 million.

What is remarkable (beyond the number of claims and the costs of dealing with them) is that we know of no other primary aluminum plant in the *world* where even a *single* OP claim has been filed. Why us? We are probably just collateral victims of a culture of administrative and judicial liberality which

grew out of the state’s history of “black lung” claims filed by coal workers and exaggerated by a “back door” response to the state’s high unemployment rate. The result of this liberality is that often permanent disability awards are made in cases where no impairment has been found. Whatever the claims are, illusory or not, the financial damage is real. In West Virginia, our workers’ compensation costs are five times higher per employee than they are at our comparable plant in Kentucky.

Job growth in West Virginia? There has been much written as well about the importance of this goal to the West Virginia economy. We currently have about 700 good paying jobs in Ravenswood, and our company would like to help. But we compete with similar plants all over the world, and even if we do not consider our workers’ compensation costs, we are one of the highest-cost plants in our industry. If we want to avoid the fate of U.S. steel plants, we will have to reduce our costs. It is hard to hire under these circumstances. It is my guess that, if the job growth numbers were tallied, we would find that the largest number of new high income jobs in the state are held by plaintiffs’ attorneys who have moved to the Mountain State to share with their indigent colleagues the bounty of tilling its fertile jurisprudential soil. It is not hard to see why Industry polls (see e.g., April 10 *The Wall Street Journal*) vote West Virginia 49th out of 50 states in

terms of favorable legal environment for business. That is not great news for our company or for the State of West Virginia.

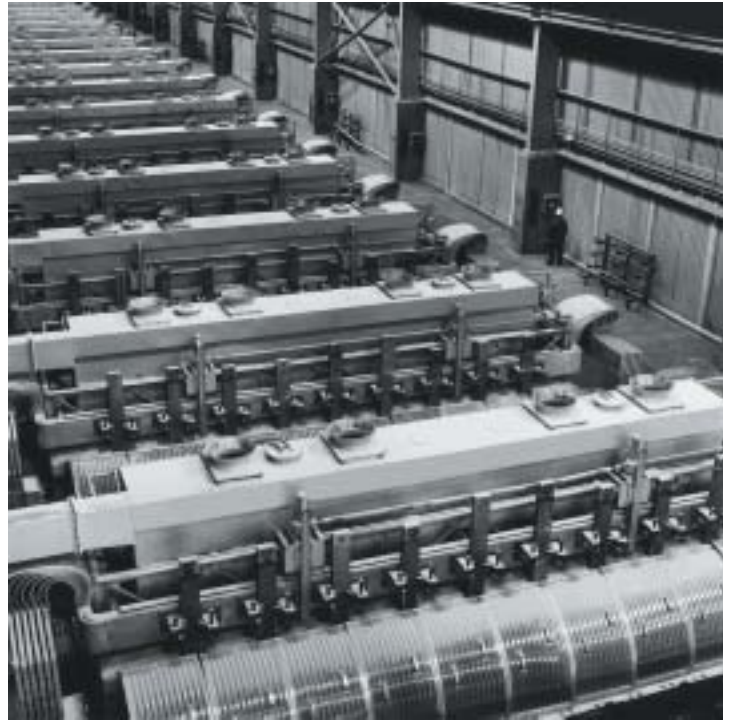
Against this rather bleak background, companies such as ours wonder if there is hope or light anywhere on West Virginia's legal horizon. I am pleased to report we are seeing hints of it, although not in the workers' compensation arena as yet. We are finding it in the trial courts of the state.

The laws of West Virginia and other states recognize that the limits placed on workers' compensation awards should not prevent an injured employee from seeking additional compensation when the employee's injury or death results from the employer's "deliberate intent." We think it is appropriate that there be such an exception. That principle was developed in the 1978 case now generally known as "Mandolidis" and in legislation adopted in 1983. The test was then modified by the West Virginia State Legislature in the "deliberate intent" statute and civil actions pursued against employers under this statute are referred to as "deliberate intent" actions.

Our company, and the predecessor companies that owned the plant, have been named in a number of deliberate intent lawsuits. The early results of some of those cases were discouraging. Despite the rigid five-part deliberate intent test (these are thresholds which must be overcome to permit any award), judgments against the

company were sometimes rendered when the legal requirements simply were not met. The reasons varied. Sometimes it may have been laxity from the bench. At other times it may have been a simple matter of a jury deciding to provide an additional award to the plaintiff although he has not met the burden of the standards of the deliberate intent test. There were two consequences of these unpredictable results. The number of deliberate intent claims seemed to increase, and the company faced the quandary of deciding whether to settle the cases (limiting possible exposure in a single case but encouraging additional cases) or to try them in an uncertain legal environment.

We have decided to try our deliberate intent cases — not settle them — and we are pleased by our results so far. We have won favorable jury verdicts in four consecutive cases. We attribute our successes to a number of factors. First, we have had extremely capable representation by Bowles Rice attorneys. They have been thorough in preparation, appropriately aggressive in all aspects of discovery and trial, and



Primary aluminum is produced in electrolytic cells called "pots" that are configured into lines. Shown here is Line #5 at Century's Hawesville (KY) Operations. The line began operation in 1999 and produces about 47,000 metric tons of primary aluminum per year (mtpy) from 112 pots. The feedstock for making primary aluminum is alumina — a white powdery substance that is chemically refined from bauxite ores. Aluminum is the most abundant metallic element found in the Earth's crust.

Continued on p. 25



Corey Palumbo is an associate with the firm and a member of the West Virginia House of Delegates, where he serves on the Judiciary, Industry and Labor, and Political Subdivisions Committees. He concentrates his law practice in general civil litigation and insurance defense.

Legislative Wrap-Up

*Honorable Corey L. Palumbo
West Virginia House of Delegates
Bowles Rice McDavid Graff & Love PLLC*

As a new member of the West Virginia House of Delegates, the 2003 legislative session was very interesting to say the least, in large part, because West Virginia is faced with many difficult challenges. Several important bills passed during the session, while other highly publicized bills did not.

House Bill 2122 regarding medical professional liability was likely the most significant piece of legislation passed during the 2003 session. It provides for a non-economic damages cap of \$250,000, with a few specific exceptions which could increase the cap to \$500,000. The bill eliminates joint and several liability and prevents potential double recoveries possible under the collateral source rule. This bill provides physician liability premium rate relief and strengthens medical professional monitoring and standards. Finally, House Bill 2122 allocates \$24 million from the state class action tobacco settlement to help fund the West Virginia Physicians' Mutual Insurance Company. This bill was very important to the medical community and already seems to be helping West Virginia retain physicians and recruit new ones.

Other health care bills which passed during the 2003 session include House Bill 2675 and Senate Bill 105. House Bill 2675 mandates insurance coverage for certain clinical trials. Senate Bill 105 increases the cigarette tax from 17¢ to 55¢ per pack. This bill should

also improve health care because statistics indicate that a ten percent increase in the price of cigarettes results in a seven percent reduction in cigarette use. West Virginia pays substantially each year for health care costs for smoking related illnesses.

Senate Bill 213 restricts actions brought by non-residents in state courts. This bill will prevent out-of-state plaintiffs from filing a civil action in West Virginia when they did not get injured in West Virginia. In the past, there has been significant resistance to this bill. However, in 2003 it passed easily.

Senate Bill 583 creates the Coal Resource Transportation System. This controversial bill passed during the 2003 legislative session. It will allow trucks weighing 120,000 pounds, with a five percent tolerance, to operate on certain roads in West Virginia. The West Virginia Secretary of Transportation will designate the roads that can handle such weight. The bill contemplates that coal companies that want to use these roads to haul 120,000 pounds of coal will help pay to upgrade and maintain the roads. The ability to enforce this limit and the penalties for violating the law will be increased significantly. As most people know, this bill will effectively reduce the weights of current trucks. While the current weight limit is 80,000 pounds, it is common knowledge that many trucks are running at twice that limit, if not more. While the perception is that

passage of this bill will be a blow to public safety, it should be noted that strict enforcement of the 80,000 limit would likely have resulted in a significant increase in the number of coal trucks on West Virginia roads. While these trucks would have been lighter, the increased truck volume would likely have caused an increase in the number of coal truck related accidents. The 2003 legislative session was not especially strong one for public safety. While West Virginia currently has a secondary seat belt law, a bill to make violation of the seat belt law a primary offense was defeated. Studies indicate that making the seat belt law a primary offense would save approximately fifty lives per year. This change would also result in a \$250 million savings in health care costs. Since one out of every ten West Virginians is insured by Public Employee's Insurance Agency (PEIA), this would save PEIA approximately \$25 million per year. A bill to reduce the blood alcohol limit for DUI offense from .10 to .08 also failed. Research suggest such a change could save approximately ten lives per year. Finally, a bill to regulate all-terrain vehicles (ATV) failed. Statistics indicate that approximately twenty-five people die in West Virginia per year in ATV related accidents. Many of these victims are children.

Finally, no bills regarding workers' compensation passed during this session. However, workers' compensation was the subject of a special session during the summer of 2003. A sweeping bill was passed during this special session. This bill created an eleven member Board of Managers to oversee the system. The bill provided that there will be no additional increases in base rates, assessments or

surcharges for fiscal years 2004, 2005 and 2006. The second injury fund was eliminated. Various state sources infused over Two Hundred Million Dollars into the system in an attempt to keep the system solvent for the next three years. A new standard for weighing evidence was created. Under the new standard, a conflicting issue will be resolved in the claimant's favor if all evidence is of equal weight. Claimants' benefits were also reduced. Total temporary disability benefits were reduced to 66 2/3% of the claimants' average weekly wage earnings and the length of the benefits was reduced to 104 weeks. Permanent partial disability benefits were reduced, while the threshold for receiving these benefits was raised. These are only a few of the provisions that were contained in this comprehensive piece of legislation. While this bill is certainly not a cure all, it will likely be a key first step to running a fiscally responsible workers' compensation system. The next step, assuming the changes that were made hold up in court, will likely be to find a way to fund the almost Four Billion Dollar unfunded liability of the system.

Great strides were made during this session. However, substantial work remains to be done in the coming months and years. Among the issues that will likely be examined during the 2004 session are regulations for All Terrain Vehicles ("ATV"), lowering the limit for driving under the influence, insurance issues, major budgetary problems and how to protect our abundant supply of water. I look forward to the next session and to working on these and other important issues. ■

Maynard . . . continued from p. 5

candidates greater freedom to speak out on campaign issues. Specifically, the Supreme Court held that the Minnesota Supreme Court's canon of judicial conduct prohibiting candidates for judicial election from announcing their views on disputed legal and political issues violates the First Amendment.

According to Minnesota's "announce clause," a "candidate for a judicial office, including an incumbent judge," shall not "announce his or her views on disputed legal or political issues."⁶ 122 S.Ct. at 2531 (citation omitted). The Supreme Court read this provision to "prohibit[] a judicial candidate from stating his views on any specific nonfanciful legal question within the province of the court for which he is running, except in the context of discussing past decisions — and in the latter context as well, if he expresses the view that he is not bound by *stare decisis*." 122 S.Ct. at 2534 (footnote omitted). The Supreme Court reasoned that the announce clause is not narrowly tailored to serve impartiality, defined by the Court as "the lack of bias for or against either *party* to the proceeding." 122 S.Ct. at 2535. The Court explained,

[the clause] does not restrict speech for or against particular *parties*, but rather speech for or against particular *issues*. To be

sure, when a case arises that turns on a legal issue on which the judge (as a candidate) had taken a particular stand, the party taking the opposite stand is likely to lose. But not because of any bias against that party, or favoritism toward the other party. *Any* party taking that position is just as likely to lose. The judge is applying the law (as he sees it) evenhandedly.

122 S.Ct. at 2535-36 (footnote omitted).

In my view, *Republican Party of Minnesota* weighs in favor of the election of judges. This is because judicial candidates' greater freedom to discuss important legal and political issues increases the electorate's ability to make intelligent and informed decisions.

In my humble opinion, the best solution to help eradicate the growing public perception in West Virginia that the judiciary is "political" and that cases are decided on politics is for the public to elect judges in nonpartisan elections. While nonpartisan elections will not completely eliminate the perception that campaign contributions influence judicial decision making, I believe it would help temper that perception to some degree.

Nonpartisan elections also would be

⁶ West Virginia's analogous provision is found at Canon 5A(3)(d)((ii) of the West Virginia Code of Judicial Conduct and provides that a candidate for judicial office shall not "make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court[.]" Not at issue in *Republican Party v. Minnesota* was Minnesota's "pledges and promises" clause which prohibits judicial candidates from making "pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office[.]" 122 S.Ct. at 2532 (citation omitted). Minnesota's pledges and promises clause is the same as West Virginia's which is found at Canon 5A(3)(d)(i) of the Code of Judicial Conduct.

fairer to a wider variety of candidates. I have been a West Virginia Supreme Court justice since 1997, and previously served as a trial judge since 1982. I have personally benefitted from the present partisan system. I certainly would not have won election for so many years without being a member of the Democratic Party. Simply put, had I run as a Republican, I would not be on the Supreme Court today. Indeed it is a rare Republican who wins high judicial office in West Virginia, particularly on the Supreme Court. Not since 1925 has any Republican been directly elected to the West Virginia Supreme Court without first being appointed!⁷

Proponents of partisan judicial elections will disagree with my position. They have said that party affiliation is one of the few ways for voters to know where a judge stands because judicial ethics so severely limit what judicial candidates can talk about. As noted above, this is no longer as true after *Republican Party of Minnesota*.

Also, judicial decisions should not be predictable based on a judge's political party. Judges must follow the rule of law. Judges should not follow the rule of men, or their political parties. Judges should be able to make legally correct, and sometimes unpopular, de-



Chambers of the West Virginia Supreme Court of Appeals

isions without facing criticism for not following the party line. This is one judge who knows about such criticism up close and personal.

As Archibald Cox, former United States Solicitor General and Watergate prosecutor said, “a judge whose decisions are influenced by politics is putting the independence of courts at risk.” It is perception that counts, and partisan elections support the perception that judges make political decisions. This is why nonpartisan election is the most practical solution for a state whose voters will never give up their right to elect judges. Politics of any kind, and especially partisan politics, has no place in our courtrooms. ■

⁷ The last Republican to win election to the Supreme Court of Appeals of West Virginia was Justice Charles H. Haden, II, who was first appointed to the Supreme Court to an unexpired term by the governor in 1972 and won election later that year. The last Republican to win election to the Supreme Court without first being appointed to an unexpired term was Justice Homer B. Woods in 1925. WEST VIRGINIA BLUE BOOK at 474(W.Va. Senate, Darrell E. Holmes, Editor, 79th ed., 1997) cited in Supreme Court of Appeals of West Virginia brochure at 14 (W.Va. Supreme Court of Appeals, Michelle T. Mensore, Editor, February 2000).



Mr. Stowers specializes in the defense of professional liability claims, including legal malpractice claims, and has defended hundreds of professional claims throughout West Virginia. Mr. Stowers also provides consultation to professional groups on how such claims may be avoided.

“An ounce of prevention is worth a pound of cure.” Anonymous.

A Lawyer’s Lawyer

*Gerard R. Stowers, Esquire
Bowles Rice McDavid Graff & Love PLLC*

Have you ever wondered who represents lawyers when they get sued? More often than not, the answer is Bowles Rice. While not publicized as much as medical malpractice claims, legal malpractice claims are on the rise. There are typically 140 or so claims filed each year in West Virginia, a significant increase from 15 years ago, when fewer than 15 claims were filed in any given year.

Until DPIC Companies withdrew coverage for lawyers a couple of years ago, they stood as West Virginia’s legal malpractice insurance carrier of record. When their replacement also stopped writing policies, many state attorneys turned to ALPS (Attorneys Liability Protection Society) for their insurance needs. Formed by an alliance of State Bar Associations partly in response to a past malpractice insurance crisis, ALPS has provided critical coverage to state lawyers when other major carriers have refused to face West Virginia’s “tort hell.”

Lawyers at Bowles Rice have defended hundreds of these legal malpractice claims over the last ten years. Often retained by one of the legal malpractice carriers such as DPIC, TIG or ALPS, Bowles Rice lawyers step in and provide the defense for lawyers faced with malpractice claims by clients and non-clients alike.

Because of liberal interpretation of tort

laws in West Virginia, lawyers are often faced with defending claims not only by clients, but by non-clients as well. You may have heard of the recent West Virginia case where a physician allegedly overprescribed medication to a patient, who then drove a vehicle across the center line and stuck another vehicle. The West Virginia Supreme Court recently held that the non-patient victim could maintain a medical malpractice claim directly against the physician. Typically, in a legal setting, a party in a case will become disgruntled with the actions of the opposing lawyers and file a separate suit attempting to attack the lawyer’s conduct. These suits are often dismissed in other states, but in West Virginia they tend to linger, making every lawsuit a potential seed bed for other litigation against the lawyers themselves. Some might say the lawyers have brought this upon themselves (and this might be true to some degree), but in any event, these cases must be defended.

May disgruntled heirs sue the lawyer who wrote the decedent’s will? In most jurisdictions they cannot. May a shareholder who lost the value of an investment in a company sue the corporation’s accountants? This is soon to be tested. What happens when professionals, such as architects, rely upon the advice and opinions of other professionals, such as geotechnical or structural engineers? An architect may have insisted upon

core drillings to aid in the design of a building and the core drilling company may have misinterpreted the core results, or mixed the results up with other cores from another site. Can the architect be sued by the clients? Absolutely. In such a case, the architect could assert a third-party claim against the core drilling company.

Defending other lawyers is not necessarily an easy task. When the client is trained in law and legal procedures, many lawyers tend to want to micro-manage their own defense. To paraphrase an adage, “only a fool has himself for a lawyer.” Although it can be difficult for a lawyer (now client) to sit back while another lawyer fashions a defense, Bowles Rice attorneys have learned to successfully accommodate and deal with the special issues and concerns that come up in legal malpractice cases.

Similar issues arise when defending any professional liability claim. Because professionals are experts in their own fields, they will always know more about the field than the lawyer. Our lawyers are accustomed to learning these “technical issues” and are routinely called upon to defend accountants, architects, engineers and other professionals. Referred to as “professional liability claims” these suits often implicate the professional’s reputation and always call into question the professional’s judgment and actions.

Defense of these types of claims requires particular skill and is a specialized area of law. The usual claim al-

leges that the professional failed to conform to the “standard of care” recognized by the profession. An obvious example of such a claim could arise if the “standard of care” required an architect to provide a detailed sketch of a critical structural connection and the architect failed to do so. If the connection is not properly made and the building or structure later settled or failed, the architect may be subject to liability for professional malpractice.

What is the standard of care? It is that conduct that the profession demands of all its members. It is not the highest standard (A+ work), but rather providing professional services that fall below average standards (D- work). This is the central issue in most professional liability lawsuits, including legal and medical malpractice claims. How is it proven? Usually, each party in such a lawsuit hires expert witnesses (other engineers, doctors or lawyers) who practice in the same field, and who give opinions on the applicable standard of care.

Does the standard of care require a lawyer to present all settlement offers



Lawyers at Bowles Rice have defended hundreds of legal malpractice cases. Pictured here are two Bowles Rice litigators, Stuart McMillan (left) and Ken Webb.

Continued on p. 26



Diana Johnson is an associate in the Charleston office and focuses her practice on litigation. She has been a practicing attorney since 1997. Prior to joining the firm, Ms. Johnson was Assistant Prosecutor with the Kanawha County Prosecutor's Office, and also served three years in private practice. Ms. Johnson taught the "Criminal Procedure" course at West Virginia State College in the fall of 2000.

The Accidental Tourist

*Diana L. Johnson, Esquire
Bowles Rice McDavid Graff & Love PLLC*

People in the recreation industry know that in the past several years, West Virginia has created an aggressive national campaign to promote in-state tourism. Brightly colored magazine ads are found in travel magazines on newsstands. Even the magazine stashed in the seat pocket of your favorite airline has an advertisement about visiting Wild, Wonderful West Virginia. Such advertisements highlight the exciting recreational attractions available to Mountain State tourists, with images of people skiing, riding horseback on scenic mountain trails, mountain biking over challenging terrain or whitewater rafting over our famous Class V rapids. One ad even depicts a former United States Vice-President enjoying a fun-filled West Virginia getaway with his family.

Such recreational activities bring tourists from every state and many countries throughout the entire year. When these tourists come here to play, they also spend money at local hotels, restaurants and specialty shops.

What possible problem could arise from all of these tourists coming to West Virginia to have fun and spend money?

Unfortunately, thrill-seekers fall off their horses, or topple over the handlebars of their bikes. Others ski head-

first into trees, or overshoot the half-pipe. And even with the best tour guides on call, whitewater rafting will never be without risk. Even among the less adventurous tourist set, there will be people who crash their cars after drinking a few too many at local restaurants or who have other unpre-



dictable accidents for which they may be tempted to blame West Virginia's hard working businesses. Therefore, it is important for business owners who offer these unique forms of entertainment, lodging and meals, to be prepared to encounter the "Accidental Tourist."

It is unfortunate, but due to the inherent risks presented by adventure activities, people are injured from time to time. Fortunately, in an effort to promote tourism and recreation, the West Virginia State Legislature has enacted statutes limiting liability to people who have been injured through *inherently* risky activities, such as horseback riding, whitewater rafting and skiing.



There are also statutes and case law designed to protect businesses that cater to the tourists looking for adventure and excitement. Based on these statutes, stable, whitewater rafting, and ski operators may be released from liability by rental agreements. These releases should and must be signed by

the tourist and explained before the horse is out of the stable, the ski is on the snow or the paddle hits the water. We have substantial experience in this area and can help protect your business from costly litigation. Properly drafted and executed, such a release may be enough to short circuit a suit, though in today's legal climate it is important to have counsel familiar with these issues and problems. Furthermore, insurance coverage is available to cover the claims of an "**Accidental Tourist**" who sought your business as a source of fun, but now views it as a source of pain.

Before you and your business find yourself in the precarious situation of having to deal with the claims of an "accidental tourist," make sure all available means to protect yourself from risk have been addressed. We can review the releases you use as protection from liability. We also have experience in defending claims against recreational operators and can help you prevent the next out-of-state tourist from leaving you with a litigation souvenir of their trip to Wild, Wonderful West Virginia. ■

Starcher . . . continued from p. 7

Thus, the issue is *not* whether there will be politics in the judicial selection process. The issue really is: what sort of politics?

The politics of the few — or the politics of the many?

I favor a politics that gives *all citizens* a *direct voice* in choosing judges in an open and competitive marketplace. I disfavor a politics that gives the choice of judges to a select few, behind closed doors. I also believe in merit selection — but with the merit of judicial candidates being determined by the electorate, rather than by a handful of the politically powerful.



I believe that my view is shared by most West Virginians. I doubt that West Virginians would favor a system where our state judges are selected by a non-elective — but undoubtedly political — process.

West Virginia’s judicial election campaign finance laws represent a fair and workable compromise that reflects current American political philosophy. The financial cost of running a competitive election campaign, especially state-wide, is substantial. This cost frequently serves as a focal point for disfavoring the election of judges. However, West Virginians are ahead of the curve in judicial campaign finance regulation. We limit and make campaign contributions public in a way that a number of other states are just trying out.

I strongly favor reducing political campaign costs — for example, by providing free or low-cost air time to candidates. But the issues of campaign costs and financing are distinct and different from the issue of judicial selection methods. Campaign finance issues should not be used as a smokescreen for depriving West Virginians of the right to choose judges in competitive popular elections.

Each voter with whom I have spoken — and there are thousands — has strengthened my commitment to do a quality job for my fellow citizens. Each vote cast in a judicial election — *including the votes cast for my opponents* — reminds me to try not to disappoint the voters’ faith in our democratic system.

Here is a challenging fact about our present judicial selection system: It gives the same weight to the opinion of a minimum-wage dishwasher as it does to the opinion of a multimillionaire.

The arguments against popular judicial elections in essence ask: what does a dishwasher know of judging? But one might as well ask, what does a dishwasher know of governmental budgeting or of foreign policy?

Perhaps not much. Yet it is the key to our system that we entrust the selection of key public officials to our citizenry in general, rather than to elites with purportedly “superior” knowledge and training.

To me, this egalitarian, one-person/one-vote approach to selecting those who exercise state power — including the power of judging — is the essence of sustainable “good government.”

A final word about why an elected judiciary serves democracy. The judicial branch of government is in many respects like the officials in a sporting contest — judges are the referees, interpreting the rules that govern the other branches.

This role of the judiciary is evident in cases like the recent lottery bond case, where the Legislature was found to have violated the separation of powers in seeking to control certain gubernatorial appointments.

Now if the members of the judiciary are *dependent upon the Legislature and/or the Executive for their jobs*, it would

be like having one team (or both) picking the referees. What kind of truly independent application of the rules do you think would come from referees selected by the teams?

I recognize that those who wish to diminish the independent power of the judicial branch will never cease from attacking the idea of an elected judiciary — judges who, like the members of the other branches of government, are selected by and accountable to the people. And these objections will present their best arguments, backed up with money and publicity. But no amount of money or publicity will make those arguments correct.

West Virginians know that an independent, elected judiciary is a key safeguard for our democracy and liberty! ■

Kitchen . . . continued from p. 15

sensitive to the need to communicate effectively with their juries. Second, we have had good, hard-working and fair judges. And third, the juries in our cases have been attentive and thoughtful in their deliberations. We are becoming believers in the fairness and integrity of West Virginia’s trial courts and their juries.

We hope the competence and fairness we are seeing in the trial courts is contagious. The State of West Virginia needs good jobs for its citizens, and it needs to have a fair and predictable

legal climate which attracts employers that can provide those jobs. The legislature’s recent failure to deal with the workers’ compensation crisis is discouraging. But there has been broad and thorough discourse on the things that ail the workers’ compensation program and maybe even the emergence of the political will to finally deal with them.

Our company has seen faint signs of light on West Virginia’s legal horizon. We remain hopeful this represents dawn — not dusk.

Stowers . . . continued from p. 21

and demands to his client? Unquestionably. Does the standard of care require lawyers to make every conceivable argument in court even if suggested by a client? Probably not. What if an argument suggested by client is not made, and the case is lost? May the client file a malpractice claim? Such a claim may be “filed” but whether such a claim will be successful depends upon the applicable standard of care. Should



a lawyer attempting to win a case have performed additional legal research? If you go to the doctor and complain of a headache, is the doctor required to order an expensive MRI? These and similar questions depend upon the applicable standard of care.

If this sounds similar to the issues facing physicians, it is. Many of the same rules and precedents apply. The tort crisis in West Virginia affects not only physicians and health care providers, but all professionals. Today DPIC insures only one West Virginia design company and no lawyers or accountants. Tort reform “for physicians only” leaves all other professionals exposed to the existing rules not changed

by medical malpractice reforms. Should “caps” on medical malpractice awards be applicable to all professional claims? Today there are no “caps” for professionals other than physicians.

We sometimes hear a lawyer referred to as “a lawyer’s lawyer.” This is a common expression at Bowles Rice. We are proud to be asked to defend other lawyers. We are also equally proud to be asked to defend our fellow professionals in other fields. De-

fending malpractice claims against architects, engineers, accountants and other professionals is part of our everyday practice. We are very proud that other professionals and their insurance carriers think enough of our legal skills to call upon us when a professional liability claim raises its ugly head. It is indeed rewarding to provide these clients with representation against claims that strike at the very heart of their own professional judgment. ■

Harvey . . . continued from p. 13

Post-accident

Conduct a thorough investigation of the accident. A thorough investigation is important for many reasons. First, it can identify the cause of the accident, which will go a long way toward preventing future accidents. Second, it may identify cause(s) other than the specific unsafe working condition alleged by the employee in a deliberate intent civil action. Also, taking the time and man hours to conduct a thorough investigation tells the employee that the employer is concerned about safety and is doing whatever is necessary to prevent another employee from suffering the same injuries. This implicit message may be the “soft touch” that stops an employee from suing his employer.

How do you conduct a thorough investigation? Each accident is different and unique, and there are certain accident-specific investigation techniques which can only be determined at the time of the investigation. Generally, however, the following guidelines will help assure that the accident is investigated thoroughly: (1) Photograph the accident scene and take accurate measurements. (2) Locate and interview all witnesses. (3) As soon as practical, ask the injured employee what caused the accident. (4) Perform a root cause analysis. (5) Interview the supervisor and trainer of the injured employee to determine if the employee had other problems that could have contributed to accident. (6) Prepare a detailed and thorough incident report.

If the accident was caused by an unsafe condition, barricade the area, prevent employees from entering the area and take steps to eliminate the unsafe condition.

Show concern for the injured employee. Finally, an employer’s sympathetic reaction to the employee’s injury may prevent the employee from retaliating with a lawsuit. The injured employee’s supervisor or another company representative should visit the employee in the hospital or at home during treatment and convalescence. If the employee is not able to return to work for some time, the supervisor should also maintain contact by calling the employee periodically to see how the employee is feeling and to inquire if the supervisor can provide some assistance. Such gestures of compassion may weigh in the employer’s favor when the employee is trying to decide whether to bring a deliberate intent lawsuit.

Even if an employer has a stellar safety program, runs a very safe shop and is compassionate and caring to boot, a disgruntled injured employee may nevertheless file a deliberate intent action. When that happens, call us! ■



Nate Bowles, Jr., a member in the firm, concentrates his practice on natural resources, real estate, commercial litigation and antitrust law. Mr. Bowles is active in the professional bar, especially in matters involving civil representation of the poor. He was elected to the Board of Directors of the Legal Aid Society of Charleston in 1988, serving as President from 1990 to 1995. He was invited to testify in support of continued funding of the Legal Services Corporation before the U.S. Senate Subcommittee on Commerce, Justice, State and Judiciary Appropriations in 1995. In 2001, Mr. Bowles was elected as the first President of Legal Aid of West Virginia, Inc., West Virginia's single legal aid program.

Avoiding the Battle

*P. Nathan Bowles, Jr., Esquire
Bowles Rice McDavid Graff & Love PLLC*

Our firm's lore includes a story about one of our founders, Arthur G. "Guy" Stone. Some time before 1950, Mr. Stone was walking in downtown Charleston with a client. As they approached a corner, the client pointed across the street and asked, "Guy, what is that building over there?"

"Why, Charlie," replied Mr. Stone, "don't you know, that's the County Courthouse?"

"That's what I thought," said the client. "But I want you to know that the day I set foot in that courthouse is the day you stop being my lawyer."

The client died a wealthy man.

While this firm takes pride in how our lawyers prepare and try cases before judges and juries, we also consider it important to keep matters out of court that do not belong there. If a client can enforce his or her rights without suing or can settle a claim before suit is filed, that almost always counts as a victory.

What can business people do in today's litigious society to avoid litigation? As much as we would like to have your litigation business, we would just as soon that our clients, as we say in our demand letters, "avoid the unnecessary hardship and expense of a legal action."

Good Contracts Make Good Customer Relations. Sometimes business disputes find their way to court because the two sides have different understandings about what their deal was. Written contracts, even short confirmatory letters, can prevent disputes over what was in the handshake deal. Far from being offended, most people appreciate it when a business person takes the time to put into writing what the sides have orally agreed to. For example:

"Dear Jerry:

Confirming our conversation of today, we will spread up to 20 tons of rock on your road to resolve the claim that our trucks damaged it last fall. We will do the work when the weather breaks, but by April 30th at the latest.

*Very truly yours,
George"*

This letter would take less than ten minutes to dictate, read, sign and mail. Written in January, it will prevent Jerry from insisting in March that George rock the road, right then, as he promised. Unlike ink on paper, memories about who said what can fade over time.

If a business uses form contracts, confirmatory letters or deal-specific contracts, it can avoid litigation if those writings cover the range of contingencies and are written clearly. If the contract states in plain English what respective obligations each party as-

sumes, who assumes what risk, what is to happen if something goes wrong and how any remaining dispute will be resolved, it may keep the contracting parties out of court.

In many commercial disputes, the law, in the form of the Uniform Commercial Code, will in effect write a contract for parties who do not write their own, or whose written contract fails to cover a particular issue. Disputes can blow up into litigation when a party does not know what the UCC provides. If a business deals in areas covered by the UCC (including the sale of goods), the business owner should know what the UCC says about his or her business. If the business wants to vary some result provided by the Code, it should do so in writing, using language that the other side understands and agrees to. For instance, Kodak film carries a written disclaimer which limits the liability of Kodak to the cost of the film. Kodak will not pay for the customer to return to Myrtle Beach to capture that once in a lifetime sunset photo he took.



Arbitration can end a dispute in weeks or months instead of a year or years.

Decide In Advance Who Pays What.

No matter what the subject of the transaction, if the parties agree in advance on the remedy, they may avoid litigation in the event of a breach because the parties know what the outcome will be. For instance, a construction contract may provide liquidated damages of \$200 per day if the building is not completed on time. This avoids arguments about what the true damages are and defines the remedy in the event the project runs behind by ten days. We found a lease recorded in Kanawha County in the 1950s which exchanged free radio time for rent for land for a station's broadcast tower. One clause provided that in the event a nuclear war forced the station off the air, any missed time would be made up once hostilities ended.

Put it in Writing: "You Can't Sue Me in Court."

More and more commercial contracts contain provisions which require that disputes be arbitrated, not litigated. A well written arbitration clause can cut the expense and time required to resolve a dispute which cannot be settled. Arbitration has its drawbacks, too, such as the inability to effectively appeal an arbitrator's decision, but arbitration does have advantages of swiftness and sureness.

In order to be enforceable, an arbitration clause must contain certain essential elements, such as the qualifications and number of arbitrators (typically one or three),

Continued on p. 30

Bowles . . . continued from p. 29

the method of selecting an arbitrator and what procedures the arbitrator will use.

In practice, arbitration can end a dispute in weeks or months instead of a year or years. Legal bills for representation in arbitration are usually less than bills for litigating the same dispute in public courts. Like 90 percent or more of the cases filed in court, a case sent to arbitration may also be settled by agreement because the same factor of uncertainty of a third party's decision exists in both arbitration and litigation.

Though arbitration enjoys a newfound popularity, it has a long history. Coal leases and coal sales agreements

written in the early 1900s often contained arbitration clauses. Disagreements could be resolved in private by people knowledgeable about the industry, instead of being tried in a public forum before jurors who may have biases and lack technical knowledge.

In addition to arbitration, contracts may also provide for non-binding mediation as a prerequisite for arbitration or filing a lawsuit. In mediation, a trained third party tries to move the sides toward a settlement. The mediator has no authority to resolve the dispute and cannot require the parties to settle, but a skilled mediator often can bring each side to the realization that some voluntary settlement is preferable to an unknown outcome.



Sometimes the best victory is a battle avoided in the first place.

There is one caveat to use of arbitration clauses in consumer contracts. The West Virginia Supreme Court recently issued decisions which can limit the enforceability of arbitration clauses in consumer contracts. In theory, our court will still enforce an arbitration clause in a consumer contract if the clause has a reasonable mechanism for arbitrating disputes in a practical way and does not substantially limit the remedies to which the consumer may be entitled. If your company has an arbitration clause in its consumer contracts, you may want to review that clause and possibly modify it to bring it in line, as nearly as possible, with the recent West Virginia Supreme Court decisions.

If You Make a Mistake, Take the Initiative. We sometimes see clients with problems that are more serious or more complicated than they need be because the client sought to ignore or minimize the matter when it first arose. One defendant, with a perfectly defensible position, suffered a default judgment because he or she did not open a registered letter from the West Virginia Secretary of State containing a summons and lawsuit until after the date for filing a defense. The excuse? “I thought it was just some tax we owed and would pay later.”

Sometimes clients want to tell their lawyer a version of the facts that minimizes or conceals weak points (which every case has). In the end, this prevents the lawyer from doing his or her job. The time to assess a client’s exposure and a case’s settlement value is as early as possible, not when the jury begins deliberations.

Although some dissatisfied customers view legitimate complaints as potential entry tickets in the legal lotto, many complaints can be resolved by taking prompt notice and trying to satisfy the customer before a small irritation becomes a major infection. Did we forget to bring your side dish until you had finished your main course? How about a complimentary dessert?

Though the customer is not always right, some fights based on “the principle of the thing” can prove exponentially more costly than settling early and, in the process, returning to the normal course of business. One need not admit fault in order to settle or to

be truly sorry that a customer felt offended. Paying more than one “should” in order to return to the task of generating profits can be a principled stand as well.

Don’t Be Dead Right. Sometimes a client wants to take a position which reminds me of the cartoon that appeared many years ago in *The Saturday Evening Post*. A driver approaching an intersection turns his head to a passenger and says, “Don’t worry, we have the right of way.” Meanwhile, a speeding car heads for the intersection from the left, with robbers shooting back at a pursuing police car. It sometimes happens that a client, in our opinion, has an airtight legal case, but still would be well advised to settle, or compromise, because of practical concerns.

The experienced litigators in our firm have a saying, “You lose some that you should win, and you win some that you should lose.” If the legal system was as precise and predictable as mathematical and scientific laws, there would be little need for judges, jurors or (shudder) lawyers. In litigation, people, not computers, make decisions. Though unbiased judges and jurors are the ideal, they do not exist, and will not, as long as human beings fill those roles.

A good defense attorney can persuade jurors and judges to put aside sympathy, but in doing so, they do not do away with sympathy; they only persuade that sympathy should not form the basis for a decision. Even lawyers most skilled in this art cannot enter

Continued on p.32

Bowles . . . continued from p. 31

the jury room, where anyone is free to argue, “This poor lady’s badly hurt. The doctor’s insurance will pay, not the doctor. Let’s say that we believe the plaintiff’s expert and give the woman some money to make her life easier. Oh, and remember that her lawyer will get forty percent of whatever we award.”

Our firm is justifiably proud of its record in persuading judges to throw out cases which do not deserve to go to trial, in persuading appellate courts that the trial result was wrong and in persuading jurors that our client should pay nothing to the plaintiff. Such results are even more satisfying, professionally speaking, when the harm is indeed horrendous, such as a tragic death, and we know our client did nothing wrong. Defending such cases entails risks, however, because the decision maker, usually a jury, can ignore plain facts and hand the plaintiff a verdict worth several times the amount the plaintiff would have accepted for settling the “big damages — small liability” case.

Who are the people the jury will see? Is the plaintiff literally a little old lady, a widow? Is the defendant a large corporation, personified by an egotistical, brash male? Just such a cast of characters in a courthouse drama can turn logic on its head, and lead a jury to find that it did snow in July.

In one of my first cases, the late Roger Tompkins and I represented a widow whose husband died in a tragic accident. The defendant’s insurer denied coverage, citing a policy exclusion. Roger, a Rhodes Scholar, suggested

that I try a couple of arguments which I did not think would work.

“Try them anyway,” said Roger. “As long as you can make a plausible argument, you never know which nail the judge will hang his hat on.” (Even Rhodes Scholars sometimes end sentences with prepositions.)

Sure enough, the trial court found that the policy did cover the accident and we soon settled for policy limits. The court agreed with my argument that a decided case which went the other way had significantly different facts. Then again, was the judge simply touched by the plight of the widow and orphans?

The theme of this issue of *Views & Visions* is the nature of litigation. Our firm works hard, fights hard and fairly and we usually achieve the right result. Litigation is, by definition, unpredictable, however, because it entails putting the authority to decide in the hands of third parties.

Sometimes litigation is the only way to resolve a dispute, other than the ancient techniques of trial by combat and the like, and we think that we can present a client’s case as well as anyone in the nation, as our record bears out. Sometimes, however, the best victory is a battle avoided in the first instance. Well written contracts, tools such as arbitration and mediation, and reasoned resolutions, backed by the ability to litigate when necessary, can minimize trips to the courthouse, and allow our clients to devote their resources to their business. ■

Mold Litigation: A Growing Issue

Fazal A. Shere, Esquire
Bowles Rice McDavid Graff & Love PLLC



Fazal Shere, a member of the firm, concentrates his practice in civil litigation in matters relating to products liability, deliberate intent, consumer credit protection, construction disputes, environmental law, appeals and federal criminal defense. Mr. Shere is admitted to practice in West Virginia and Kentucky and is fluent in the languages of Urdu and Hindi.

Mold is postured as the next big toxic tort following a wave of multimillion-dollar verdicts, new legislation and media attention. Building owners, builders, suppliers, building occupants and insurance companies have become familiar, or are rapidly becoming so, with the legal exposures and health hazards associated with mold.

What is Mold? Mold is a microscopic organism that only becomes visible upon accumulation of numerous individual spores. Mold spores can lie dormant for extensive periods awaiting the ideal conditions to colonize an area. Typically, mold can proliferate in diverse conditions, but an enclosed moist area serves as the ideal basis for mold colonization. Mold growth peaks within a temperature range of 40 to 100 degrees Fahrenheit, the temperature range for most climate controlled buildings, and they flourish on water-damaged building materials.

Health Effects Resulting from Mold Exposure. Generally, physicians categorize mold-related illnesses as either “Sick Building Syndrome” or “Building Related Illness.” Individuals with generalized symptoms such as headaches, dizziness and fatigue are diagnosed with “Sick Building Syndrome,” while those with symptoms that qualify as a case-definable disease, such as hypersensitivity, pneumonitis or new onset asthma are considered to have a “Building Related Illness.”

With respect to *Stachybotrys*, the current mold *de jour*, defendants have argued that peer-reviewed medical literature does not support a cause-and-effect relationship between exposure in indoor air and any medical disease outcome. Conversely, plaintiffs link *Stachybotrys* to the death of first born children in the 10th plague in the Book of Exodus and to the halting of the Mongol invasion of Russia in the 13th century by causing the death of horses, as well as the onset of diseases such as allergic rhinitis, dermatitis, sinusitis, conjunctivitis, aggravation of asthma, chronic fatigue, diarrhea, nervous disorder, cardiovascular alteration, immunodepression, haemostatic derangement, skin toxicity, decreased reproductive capacity and bone marrow damage, all of these resulting allegedly from exposure to myotoxins produced by molds.

The Recent Rise in Mold Litigation. Is mold litigation the next asbestos? There have been sizeable verdicts in mold litigation and resulting legislation and regulations in California. Mold resembles asbestos in being newsworthy litigation and spawning reactive lawmakers, overnight experts, novel scientific theories and a national cadre of plaintiff lawyers. Conversely, mold differs from asbestos and other toxic torts by not having a defined group of defendants. Also, by acting proactively, a potential defendant can reduce mold exposure.

Continued on p. 34

Shere . . . continued from p. 33

Mold litigation is often inextricably linked to construction detail. The infestation of mold can severely damage a building and cause bodily injury to its occupants. When this occurs, homeowners, renters and office workers often sue building owners, builders, contractors, developers, architects and insurance companies in an attempt to assign blame. To efficiently manage mold litigation, an in-depth understanding of construction parameters, codes and regulations, indoor air quality and HVAC issues, toxic tort law and medical and scientific issues associated with mold, is vital.

Common Claims in Mold Litigation.

Negligence claims include failure to maintain a safe environment within a structure, failure to properly install, operate or maintain the HVAC system, to monitor indoor air quality, negligent selection or supervision of construction professionals and negligent design of a structure. As a defense, a defendant may offer proof of compliance with applicable laws, regulations and other industry standards.

Strict liability applies to product manufacturers for the manufacture of a defective product. For instance, a manufacturer of leaking pipes that introduce moisture to a structure may be liable under strict liability for mold infestation. At this time, courts are undecided as to whether a build-

ing constitutes a “product.” Strict liability claims based on a home being considered a “product” are most likely to be successful when the plaintiff is an unsophisticated home buyer and the defendant is a developer or general contractor involved in the mass production of homes.

Breach of contract and related claims are based upon contract provisions such as warranty, scope of work, indemnity and any provisions relating to the final product. Akin to breach of contract claims are claims for implied warranties of habitability, workmanlike construction and suitability of a building or product for its intended use.

Fraud and misrepresentation claims arise when a plaintiff buyer alleges that a defendant seller stated that a structure was free of mold damage, when the



A manufacturer of leaking pipes that introduce moisture to a structure may be liable under strict liability for mold infestation.

defendant knew the structure was infested or that it contained mold. *Infliction of emotional distress* claims arise out of extreme and outrageous conduct that causes the plaintiff emotional distress.

Damages claims are sought for traditional property and personal injury damages, as well as stigma damages, which is the diminution in property value due to the stigma associated with mold. Plaintiffs may also seek damages for medical monitoring and screening at the site to avoid a future occurrence of contamination.

Methods for Minimizing Mold Contamination. Mold contamination of a building generally involves four elements: (1) the source, (2) the HVAC system, (3) transport pathways, and (4) occupants. Controlling humidity and moisture levels is vital to limiting mold proliferation. Excessive moisture may be curtailed by running the air conditioner constantly during humid months and installing exhaust fans in moisture-rich areas like kitchens and bathrooms. Humidity should be maintained below 60 percent, preferably between 30 and 50 percent. Once flooding has occurred or mold contamination is suspected, special attention should be paid to occupants' health complaints and an Indoor Environmental Quality (IEQ) evaluation should be performed. Investigators conducting the mold sampling should wear protective outerwear to prevent repeated exposure to mold spores and toxins, such as full-face, powered, air-purifying respirators, protective eye covering and disposable clothing cov-

ering their entire body. This precaution limits any future liability for exposure to the mold investigators themselves.

Insurance Coverage of Mold Claims.

The insurance industry is facing a steadily increasing number of claims for mold-related damages under both property and liability insurance policies. Based on mold exposure at their homes and workplace, plaintiffs are claiming personal injury such as respiratory problems and cognitive defects and water damage to their personal property and interiors of homes and apartments. Whether under property or liability policies, claims for insurance coverage raises questions of: (1) what is the appropriate *trigger* of coverage, (2) were the damages at issue *fortuitous*, and (3) does an *exclusion* apply?

Coverage Triggers. Mold may cause damage to a structure throughout the terms of numerous successive insurance policies. Courts have applied at least four different triggers to mold claims. Under the "manifestation trigger," coverage is triggered as damage or injury becomes manifest. The "installation trigger" places liability on the policy effective at the date of the installation of material that causes property damage, regardless of when the damage becomes manifest. Under the "initial exposure trigger," liability is placed on the policy effective on the date that an injured person or damaged property is exposed to the injury-causing agent. Finally, under the "continuous injury trigger," coverage begins on the date that mold exposure

Continued on p. 36

Shere . . . continued from p. 35

first occurs and continues until the date that the damage becomes manifest, with all policies in effect during that period being triggered.

Fortuity. A property insurer may contend that mold infestation was not fortuitous, such as when the building owner knows at the time it purchases insurance that the roof has leaked, allowing water to accumulate. Insureds can attack fortuity-based arguments by asserting that: (1) all-risk policies are to be construed broadly in favor of coverage, and (2) the fortuity analysis turns on the insured's actual and subjective state of mind at the inception of the policy period, not on what the insurer contends the insured objectively "should have known."

Exclusions. Insurance companies have relied on exclusions such as the pollution exclusions, mold exclusions, business risk exclusions and the "expected and intended" exception to deny coverage for mold claims. In the seminal case of *Pipefitters Welfare Educational Fund v. Westchester Fire Insurance Company*, the Court used a common sense approach to pollution exclusions, with the test being whether a reasonable policyholder would characterize the hazard as "pollution." If the answer is no, then a *Pipefitter* analysis would find the policy ambiguous and construe its language in favor of coverage.

As a general rule, insurers must be very careful in denying coverage, as large jury verdicts have resulted for bad faith denials of coverage. In 2001 alone, juries returned a \$32 million verdict

in compensatory and punitive damages in Texas and \$4.25 million in Arizona for insurance bad faith refusal to cover mold remediation.

Mold litigation, despite conflicting scientific testimony regarding exposure and health risks, must be taken very seriously. Upon receipt of a complaint or other claim, a party should immediately notify its direct carriers on all policies for which the potential defendant is primarily or secondarily insured, to carrier of policies for which the potential defendant is an additional insured and, if applicable, to carriers of those parties to whom the potential defendant owes an indemnity or defense. In addition to insurance carriers, the potential defendant should also immediately notify all other potentially liable parties, individually every building professional involved in the project, as well as the owner. ■

Indemnification: Who Pays for This?

*Michael J. Schessler, Esquire
Bowles Rice McDavid Graff & Love PLLC*

Nothing sends a bigger chill down the spine of a corporate executive than receiving a certified letter from a Court Clerk or being handed papers by someone standing in the outer office. Opening that envelope is like standing over a precipice, staring down into that bottomless money pit known as “tort hell.” Almost no matter what the envelope contains, the executive knows it will damage the bottom line because even the successful defense of a meritless suit costs money.

Fortunately, with a little careful planning, such damages can often be legitimately transferred to another party. The legal term for such shifting of liability is “indemnification,” which is a fancy way of saying “someone else is going to pay for this.”

Insurance Indemnity. The most commonly known form of indemnification arises from insurance. Simply stated, a business may purchase insurance to “indemnify” the company from both the expenses of a lawsuit and the potential damage award or settlement necessary to resolve the claim. This type of indemnification requires planning and foresight to spread the risk of losses caused by employee injury, customer injury, employee negligence and other claims.

Insurance indemnity is based upon the contract with an insurance carrier to

pay for the defense of the lawsuit and any settlement or company’s judgment arising out of a lawsuit, dispute or claim. This is not “cost-free” to the corporation; rather, it requires a substantial expenditure by the company to secure coverage, and often requires payment of a substantial deductible up front. However, insurance provides the best protection — or indemnification — from the substantial expenses which may arise from a lawsuit. Once the policy has been obtained, it is generally advisable to set aside funds equal to the deductible as a means of protecting the corporate bottom line from a sudden shock. If the company deals in a particularly litigious area, a commensurately larger set-aside might be necessary based on the incidence and cost of previous lawsuits.

Insurance indemnity is not foolproof, nor is it without pitfalls. The insurance obtained must cover the ordinary risks faced by the particular business. A classic example would be a restaurant which has a liquor license to sell alcohol, but only carries a general liability policy. If a claim based on serving too much alcohol to a patron arises, the general liability policy ordinarily excludes liquor liability coverage, so a separate policy must be acquired to provide that coverage. The same is true if the business owns automobiles. In addition to general liability policy, it must have separate auto-



Mike Schessler, a member of the firm, has significant experience in legal and engineering professional malpractice defense, liquor liability and stable and recreational liability defense, as well as commercial and contract litigation. He is a member of Leadership: West Virginia.

Continued on p. 38

Schessler . . . continued from p. 37

mobile insurance. In addition, the carrier will often increase the premium or impose a surcharge when the policy is renewed, but this is usually less than the cost of the claim. It would be cost-effective to have your company's insurance policies evaluated to see if they cover the ordinary risks incurred in your business.

Contractual Indemnity.

Contractual indemnity most often arises when a company performing services agrees to assume liability for any injuries, damages or claims which arise out of their operations on your property. For example, your company's written work or purchase order for a window washing contractor should require the service provider to "indemnify" and hold your business harmless

from any and all claims of damages or personal injury that may result from their work; e.g., from the contractor employee's hurt back, an injury to your employee who trips over a squeegee or to a passerby struck by a falling bucket. While your employee or the passerby may not have a good claim against your company, it is a claim nonetheless, which will cost money to defend and to settle. The written con-

tract with the service provider should contain language showing that the service provider agrees and holds your company harmless from any damages arising out of their operations. The contract should further stipulate that the service provider shall be insured for any such liability. Moreover, the

written purchase order with a service provider should include a provision requiring them to pay any and all expenses, including attorneys' fees, if a claim should arise out of their operations. Such an agreement may increase the cost of your service contract, but in the long run, may save the company substantially.



Review your company's insurance policies to be sure they cover ordinary risks incurred in your business.

An indemnity agreement with a company that has no ability to pay is

absolutely useless. To make sure the company can indemnify and hold your company harmless, require that your company be named as a second insured on the service provider's policy for the duration of this job and for any claims that arise out of that particular job. Having insurance to cover the indemnification agreement, whereby one assumes your risk, makes that agreement specifically enforceable in court regardless of the circumstances

of the incident. Accordingly, all company purchase orders and purchasing arrangements should be reviewed from time to time to prevent catastrophic loss to the company by someone else's actions. This is a service well worth its minimal cost and can be accomplished by a simple review of standard purchase orders and procedures.

Legal Indemnity. Indemnity can also arise by operation of law. For example, a store owner who sells candles may be exposed to potential liability if the candle purchaser leaves it burning unattended and consequently burns down his or her house. Such liability is based on a party's "failure to warn" of potential hazards, and even the most meritless claims based on this theory can prove costly to defend. Fortunately for our store owner, however, a manufacturer based in the United States *is* legally required to indemnify a seller from any claim that a given product is *defective* — although even this assurance may prove cold comfort to a seller trading in products manufactured outside America where manufacturers may not be subject to legal action.

Enforcing this right to indemnity often requires the store owner to settle the case and then initiate a separate action to recover losses. This is not indemnification, but rather another expensive litigation nightmare. While a store owner can protect himself from this scenario by obtaining general liability insurance which covers product liability claims (including claims of property damage and personal in-

jury caused by a defective product), an alternate means to obtain indemnification from product liability actions exists through vendor agreements. These are either franchise or sales agreements in which the manufacturer agrees to indemnify and hold the seller harmless from any claims of defects in their products. Such agreements, in writing and focused on the intent of the parties to do business with one another under certain conditions, can be enforced.

Finally, indemnity may also be a selling point for your services. An agreement to indemnify and hold a customer harmless from any claims arising out of your operations or services may be a key marketing angle in our increasingly competitive and litigious society. However, before offering to indemnify and execute a contract, general business liability insurance which insures contracts for indemnification must be obtained. It is not extremely costly to name a customer as a second insured to cover claims which arise out of a particular job. Providing such an agreement to a customer demonstrates pride and confidence in the work completed and your trust in the skill and ability of your employees to perform a job in a safe, professional manner.

Having substantial experience in drafting and enforcing indemnification agreements in court, Bowles Rice litigators are prepared to answer any questions you may have before that certified letter arrives. ■



J. Mark Adkins is an associate in the Charleston Litigation Practice Group where his areas of practice include civil litigation, legal malpractice, professional malpractice, personal injury, commercial disputes and products liability. A native of Salt Rock, West Virginia, Mr. Adkins earned his Bachelor of Arts degree from Centre College in 1994 and received his J.D. in 1997 from the West Virginia University College of Law. Mr. Adkins is a member of the West Virginia Bar Association and serves as President of the Young Lawyers Section, is an officer of the Kanawha County Bar Association, and is a member of the American Bar Association.

A Client's Survival Guide

*J. Mark Adkins, Esquire
Bowles Rice McDavid Graff & Love PLLC*

Regardless of which side you find yourself on, a lawsuit is never an enjoyable affair. Even when the outcome is desirable, the process of getting there is typically frustrating and profoundly stressful. Fortunately, steps can be taken to manage and reduce the stress associated with even the most grueling litigation. Here are a few common sense suggestions to keep you on top of your game while ensuring that your experience as a litigant remains as pain-free as possible:

Schedule an initial face-to-face meeting with your lawyer. This will give you the opportunity to discuss any thoughts, concerns, confusion, or fears you may have regarding the litigation. It will also give your lawyer the opportunity to explain what you might expect throughout the course of the lawsuit. Remember, each case is different. While you may have been involved in several litigation matters in the past, it is always a good idea to discuss each matter with your lawyer in order to formulate strategy and plan your next move as a team.

Consult with your lawyer regarding ways to avoid future litigation. You may find that by adding a simple clause to a standard contract or refining a company policy, you can dramatically reduce the odds of ever again being handed a similar suit. Addressing the fundamental issues before problems arise will afford you the peace of mind

needed to focus on other matters of importance. As with medicine, a small measure of prevention is usually preferable to the cure.

Maintain open lines of communication between you and your lawyer. Remember that during a lawsuit, you and your lawyer must act as a team. Keeping the lines of communication open and freely sharing information is vital to ensure that neither of you is faced with any unnecessary surprises during the course of a lawsuit. Of course, surprises are inevitable in the course of any legal action, but good attorney-client communications can be the key to reducing their frequency and ensuring that unforeseen contingencies do not jeopardize a well-laid strategy.

Do not let a lawsuit take over your life. By its very nature, litigation is an adversarial process, but it should not be one that dominates your normal everyday life. Make sure you put it in the background in order to maintain insight and objectivity. This does not mean you should forget about the lawsuit or be indifferent. As the client, you should remain informed and involved. By controlling the influence the lawsuit has over your life, you can be certain it does not *become* your life.

Avoid quick retaliation against your opposing party before you have the opportunity to think it through. In

Continued on p. 42

Product Liability without the Liability

*D. Keith Randolph, Esquire
Bowles Rice McDavid Graff & Love PLLC*



The legal term used to describe the loss or destruction of evidence in a legal action is “spoliation.” For instance, in a product liability action where the product itself is lost or destroyed after the occurrence giving rise to a lawsuit, the product is said to have been spoliated.

Spoliation is a major concern and problem in product liability suits for two reasons: (1) the product is usually conclusive evidence as to the existence or nonexistence of a design or manufacturing defect; and, (2) the manufacturer has little control over the product following an incident.

West Virginia has yet to resolve how to handle a situation where a product is lost.¹ However, although spoliation presents some uncertainty, there are a number of options a manufacturer can pursue when a product is lost or destroyed. In a recent pronouncement, the West Virginia Supreme Court set forth three options noting that “under certain conditions, where evidence is destroyed, a trial court has the discretion to sanction the defending party by an outright dismissal of claims, the exclusion of countervailing evidence, or a jury instruction on spoliation.”²

The best available option is a dismissal of the claim. In general, where a key piece of evidence is lost, the non-offending party may request the Court dismiss the case based on the offender’s spoliation. In essence, the non-offending party is requesting the Court sanction the offender with dismissal. Although an appropriate option, a dismissal is a harsh sanction that a Court may not look at favorably.

In the context of product liability, a manufacturer can and should go one step further. Rather than requesting dismissal as a sanction, a manufacturer must suggest that disposition is necessary because, without the product, the plaintiff cannot prove the necessary elements of his or her claim.

To succeed on a product liability cause of action, the plaintiff must prove: (1) the existence of a design or manufacturing defect present when the product left the manufacturer’s control; and, (2) that the defect was the proximate cause of the accident. In a product case, often the only way to prove the existence of a defect is to examine and test the product. If the product is unavailable for testing, the plaintiff cannot prove the existence of a defect. Furthermore, in the absence

Keith Randolph is an associate with the firm and focuses his practice on litigation. Mr. Randolph earned his law degree from West Virginia University and spent his last semester clerking for Judge Robert C. Chambers, Huntington Federal District Court. Mr. Randolph received his Bachelor of Arts degree in Criminal Justice from Marshall University in 1993. Upon graduation, he served six years as a West Virginia State Trooper.

Continued on p. 42

¹ *Harrison v. Davis*, 478 S.E.2d 104, 117 (W. Va. 1996); *Tracey v. Cottrell*, 524 S.E.2d 879, 887 (W. Va. 1999).

² *Tracey*, 524 S.E.2d at 887.

Adkins . . . continued from p. 40

almost all lawsuits, the opposing side will take some action that will stir emotion or resentment. In many instances, knee-jerk retaliation can damage your position with the Court and create unnecessary litigation costs. If a situation like this arises, discuss it with your lawyer and find out: (1) Would retaliation benefit or hurt your case; and, (2) is it necessary to retaliate in order to protect your interests?

Make sure you have an open and frank conversation with your lawyer regarding your chances of success or failure. As mentioned earlier, unnecessary surprises should be avoided at all costs. Therefore, early discussions and continuous open lines of communication between you and your law-

yer will enable you to make objective and informed decisions as to how you approach and manage a lawsuit.

Remember that your lawyer is working for you. The client determines the extent of his or her lawyer's control over the litigation and, ultimately, the client decides how a suit will be resolved. You and your lawyer are a team working toward a common objective.

Keep in mind that every lawsuit is different and everyone responds differently. These suggestions are meant to provide you with ideas that can help and guide you through the litigation process. Litigation may not be enjoyable, but it is possible to make the process less stressful. ■

Randolph . . . continued from p. 41

of the product, the plaintiff cannot eliminate other potential causes of the product's failure.

An action on a product has an additional intricacy that makes it susceptible to disposition. An expert is generally required in order to succeed on a product liability cause of action. Without having the product available for inspection, plaintiffs in many cases are unable to obtain an expert to testify as to causation. The absence of an expert by the plaintiff provides an additional basis for summary judgment.

Notwithstanding a manufacturer's options when the product is spoliated, the best bet is to make every effort to

preserve the product. Manufacturers in general take great steps to ensure that their products are properly designed. Most products are not defective; however, proving that requires the product. That being the case, the best way to defend a product liability action is to have the product.

At the outset of any litigation, counsel for the manufacturer should seek entry by the court of a protective order preserving the product for nondestructive testing and analysis. This gives the manufacturer some assurance that the product will be available and also put the court on notice of the manufacturer's efforts to keep the product available for the litigation. ■

Experienced. Effective. Trusted.



Bowles Rice Litigators provide a full range of litigation services and aggressive courtroom representation, including:

Antitrust	Bad Faith
Professional Liability	Mediation / Arbitration
Insurance & Brokerage	Class Action
Products Liability	Condemnation
Toxic Tort	Personal Injury
White Collar Defense	Administrative Hearings

Representing corporate, business and professional entities before federal, state and administrative forums in West Virginia, Kentucky, Virginia and the surrounding region.



Views & Visions

Counselors and the Courtroom

A publication of
Bowles Rice McDavid Graff & Love PLLC

Charleston, WV
600 Quarrier Street
P.O. Box 1386
Charleston, WV 25325-1386
(304) 347-1100

Martinsburg, WV
101 S. Queen Street
P.O. Drawer 1419
Martinsburg, WV 25401
(304) 263-0836

Morgantown, WV
7000 Hampton Center
Suite K
Morgantown, WV 26505
(304) 285-2500

Parkersburg, WV
501 Avery Street
P.O. Box 49
Parkersburg, WV 26101
(304) 485-8500

Lexington, KY
333 West Vine Street
Suite 1201
Lexington, KY 40507
(859) 225-8700

Winchester, VA
3 West Piccadilly Street
Winchester, VA 22601
(540) 723-8877



P.O. Box 1386
Charleston, WV 25325

Visit our website at www.bowlesrice.com.

This is an advertisement