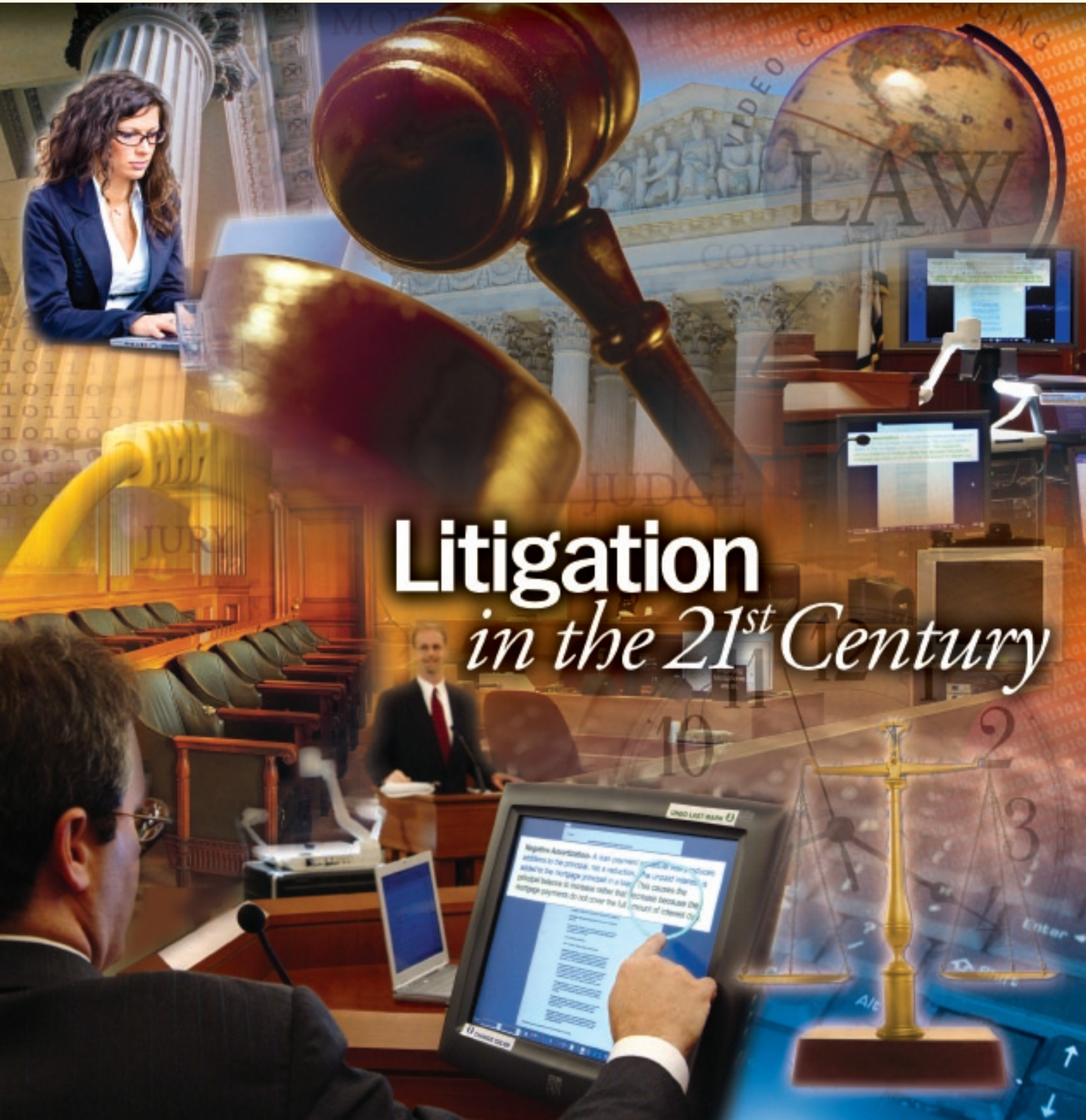
VIEWS & VISIONS

A publication of Bowles Rice McDavid Graff & Love LLP

Fall 2008



In this issue ...

Litigation in the 21st Century

Fall 2008

Thomas A. Heywood
Bowles Rice McDavid Graff & Love LLP
Litigation in the 21st Century....3

Joyce E. McConnell
West Virginia University College of Law
Preparing 21st Century Litigators: Collaboration Required....4

Louise Everett Graham
University of Kentucky College of Law
Preparing the Next Generation of Litigators....6

Andrew G. Fusco
Bowles Rice McDavid Graff & Love LLP
Rethinking Business Litigation in the 21st Century....8

Allan N. Karlin
West Virginia Association for Justice
What Happened to the Legal Profession?....10

The Honorable Carrie L. Webster
West Virginia House of Delegates
The Prospect of Future Tort Reform in West Virginia....12

T. J. Obrokta, Jr.
BrickStreet Insurance
A Workers' Compensation Success Story....14

Gerard R. Stowers
Bowles Rice McDavid Graff & Love LLP
Litigation Before – and After – Computers....16

The Honorable Evan H. Jenkins
West Virginia Senate
West Virginia State Medical Association
Reform Works!....18

Dr. Austin Wallace
West Virginia Mutual Insurance Company
Looking Back to the Future: West Virginia Medical Liability Reform....20

Marc E. Williams
Defense Research Institute
The Future of Civil Justice Reform....22

David C. Hardesty, Jr.
West Virginia University College of Law
Bowles Rice McDavid Graff & Love LLP
Dealing with Conflict in Organizations – One Leader's Perspective....26

Stuart A. McMillan
Bowles Rice McDavid Graff & Love LLP
Fear of the Unknown: Punitive Damages and Risk Avoidance....28

Timothy C. Wills
Bowles Rice McDavid Graff & Love LLP
Impact of Litigation on Businesses in the Electronic Age....30

Phyllis A. LeTart
Charles Town Races & Slots, Inc.
E-mails Present New Challenges in Business Communications....32

Brian M. Peterson
Bowles Rice McDavid Graff & Love LLP
The Benefits of Tech-Savvy Legal Counsel....34

Richard E. Katz
Katz Consulting Group
Trends in Electronic Litigation Support and Trial Presentation....36

Steven Cohen
West Virginia Citizens Against Lawsuit Abuse
Legal Reform is Key to Job Creation in West Virginia....38

Ronda L. Harvey
Bowles Rice McDavid Graff & Love LLP
Deliberate Intent: Can Employer Inspections of the Worksite Preserve the Actual Knowledge Defense?....40

Litigation in the 21st Century

Thomas A. Heywood
Bowles Rice McDavid Graff & Love LLP

FROM OUR
MANAGING
PARTNER

Tom Heywood is Managing Partner of Bowles Rice and a former chief of staff to the Honorable Gaston Caperton, Governor of the State of West Virginia. He has significant experience in health care, corporate, finance and commercial law, and is recognized as one of the *Best Lawyers in America* by publishers Woodward & White.

Mr. Heywood is active in the community and in various West Virginia business and trade associations. He serves on the boards of many charitable organizations, including Vision Shared, Imagine West Virginia, the West Virginia Venture Connection, the West Virginia Entrepreneurs Forum, Discover the Real West Virginia Foundation, Thomas Memorial Hospital, West Virginia University Hospitals, the Clay Center and the Kanawha County Library Foundation.

Webster's dictionary tells us that to litigate is "to carry on a legal contest by judicial process." In this issue of *Views & Visions*, we turn to leaders from around our region for their insights as to how legal contests by judicial process are changing, and will continue to change in the years ahead.

We begin, appropriately, with students of the law, and a consideration of how and what we teach future litigators. The talented and accomplished deans of both the West Virginia University and University of Kentucky Colleges of Law share their observations about how evolving trends in litigation are transforming legal education, and tell how these excellent schools are leading this transformation.

Many of our authors offer their experience and insights into how evolving technology and other trends are reshaping litigation. These articles cause me to reflect on and better appreciate my own experience grappling with different technologies and processes from those I learned when I first began the practice of law over 25 years ago. I hope that these articles afford you an opportunity for reflection and appreciation, too.

In recent years we have witnessed much in the way of litigation reform, including both proposed reform and reforms that have been enacted into law. Many talented and thoughtful leaders from our legal profession, our medical community, our insurance community and our region offer their views on such reforms, and also about the very nature and tenor of our current discourse about litigation reform.

As in every issue of *Views & Visions*, we strive to present divergent and sometimes competing views. We do so in the belief and conviction that it is through open and candid discussion and debate that we gain a better and more mature understanding of the issues, and will be better able to fashion effective systems and processes to resolve disputes by judicial process.

We are especially pleased to publish articles in this edition of *Views & Visions* by Professor David C. Hardesty, Jr. and Andrew G. Fusco.

David is a full-time professor at the West Virginia University College of Law and a former President of WVU. Prior to his public service, David was a partner at Bowles Rice, where he was a coach and mentor to me and many others. David has recently agreed to serve in an Of Counsel capacity with our law firm, and we enthusiastically welcome him back. In his article, David explores conflict resolution from a broader perspective, and offers sage advice to leaders of all organizations.

On October 1, 2008, Andy Fusco and three of his colleagues – Tom Linkous, Steve Prunty and Jason Walls – joined Bowles Rice. We are delighted to welcome Andy, Tom, Steve and Jason to our firm. Each of these talented and experienced lawyers adds immensely to our ability to serve our clients in North Central West Virginia and across the region. Andy is a former prosecutor and has extensive experience in many areas of complex civil litigation, and he writes in this edition on evolving issues in antitrust and business litigation.

I thank all of our authors for taking the time to share their thoughts, observations and suggestions, and also for the leadership each of them has demonstrated throughout their careers. Our communities, lives and opportunities are better, thanks to the talents and hard work of these outstanding men and women.

Many if not most people in our society come to know the legal profession through the lens of litigation. There is perhaps no activity that better defines who we are and what we do as lawyers. For this reason and many others, we are delighted to present the views and visions of so many accomplished leaders on litigation in the 21st century. I hope their articles will provide you with food for thought, useful information and a better understanding of the newest challenges facing all participants in "legal contests by judicial process." V

Preparing 21st Century Litigators: Collaboration Required

Joyce E. McConnell, Dean
West Virginia University College of Law

Dean Joyce E. McConnell assumes the duties as dean of the West Virginia University College of Law with a well established and distinguished career as a legal scholar and administrator, having previously served two terms as the College of Law Associate Dean for Academic Affairs.

She has been a faculty member at the College of Law for 12 years, taught at the City University of New York for eight years and was a visiting professor at the University of Maryland. Her teaching has been primarily in the area of property law, specifically First-Year Property, Natural Resources and Land-Use Planning. She also teaches Gender and Law, and skills classes, such as Interviewing, Counseling and Negotiating.

Dean McConnell earned her LL.M. from Georgetown University Law Center, her J.D. from Antioch College of Law and her B.A. degree from Evergreen State College. Before entering law teaching, she clerked for the Honorable Melvin Welles, Chief Judge of the National Labor Relations Board. She also served as a clinical teaching fellow at the Center for Applied Legal Studies at Georgetown University Law Center.

Three new trends in the practice of law are now driving the legal education of tomorrow's litigators: vanishing trials, the increasing use of alternative dispute resolution processes and emerging technologies. These trends pose new challenges in training the next generation of litigators.

The challenges are significant. Law schools must now offer a wider range of courses and smaller classes, housed in facilities vastly different from those built a mere 20 years ago.

Once the full picture of these trends and the resources necessary for law schools to respond to these trends comes into focus, it becomes clear that collaboration between legal professionals and legal educators is essential to develop lawyers prepared for a 21st century practice.

In examining these trends, we first must look at the challenges posed by the vanishing trial. For the past 20 or more years, the ultimate in skills training for future litigators has been a course in trial advocacy. This course provides students with the necessary foundation to evaluate the strengths and weaknesses of a case, and requires students to practice essential trial skills such as selecting jurors, crafting opening statements and closing arguments, examining and cross-examining witnesses, objecting to evidence, arguing motions, qualifying expert witnesses, introducing documentary evidence and submitting jury instructions.

However, because most of today's legal conflicts do not reach trial, a course in trial advocacy, although still critically important, is not enough. It no longer sufficiently prepares students for practice because 21st century litigators will rarely use these skills.

In contrast, the vanishing trial requires law schools to emphasize pre-trial litigation skills. Pre-trial practice is where the action of litigation

now occurs, and most litigators spend the majority of their time on discovery and pre-trial motions. Thus, to prepare students for the demands of the changing practice, law schools must now offer courses in both trial advocacy and pre-trial litigation.

An interesting question discussed by law professors is whether pre-trial litigation should be taught before trial advocacy, in a progression that mirrors the chronology of a litigation practice, or whether pre-trial litigation should be taught after trial advocacy. Students have difficulty conducting pre-trial litigation without understanding what it takes to win at trial.

This question poses the classic "chicken and egg" problem, a dilemma that cannot be resolved. However, this question does underscore the critical differences between pre-trial and trial skills.

The second trend in modern legal practice, the increasing use of alternative dispute resolution processes, is both a result of and a contributor to the vanishing trial. A litigator in any given case may be called upon to negotiate, arbitrate, or mediate a case; each process requires the litigator to use different skills. Aspiring litigators must practice these skills because they are now as essential to success as pre-trial litigation and trial advocacy skills.

Consequently, law schools must give their students opportunities to practice these alternative but necessary skills, whether through classes or through extracurricular offerings such as the Alternative Dispute Resolution Society.

The final trend shaping legal education is emerging technology, which requires law schools to teach the adaptive use of technology in all aspects of litigation practice. Electronic information retention, production and transmission are essential to every law practice, and an increasing number of courts accept pleadings and other documents in electronic format. Furthermore, many litigators find software tools like Microsoft PowerPoint helpful in presenting their cases to juries. However, these technologies are rapidly changing, and law schools are constantly challenged to develop a pedagogy that not only teaches the use of current technology, but also empowers future litigators to acquire the skills they need to remain open and responsive to technological change.

In sum, these three trends continuously challenge law school curriculums to remain responsive and relevant to modern legal practice. Training litigators for the 21st century now requires law schools to offer new skills courses, smaller classes and redesigned and technologically equipped facilities. To meet these challenges, law schools need additional creative, financial and human resources.

Legal education is a shared partnership between educators and legal professionals. Examples of productive collaboration abound: lawyers work with law professors to develop advanced skills courses; practitioners dedicate their time to teach small, upper-level skills classes; members of the profession support law schools by making charitable donations and by supporting public and private funding opportunities.

Although we may wish for a simpler time when a single course in trial advocacy was all the skills training future litigators needed, we must embrace the complexities of the modern legal curriculum. We must take pride in encouraging the bar, the bench and legal educators to help transform today's law students into 21st century litigators. V

Photos courtesy of the WVU College of Law.

Preparing The Next Generation of Litigators

Louise Everett Graham
Dean and Wendall H. Ford Professor of Law
University of Kentucky College of Law

Louise Graham is currently serving as the interim dean of the University of Kentucky College of Law. She was born in Beeville, Texas, and received both her undergraduate and law degrees from the University of Texas.

After graduation from law school, she clerked for the Honorable Homer T. Thornberry on the United States Fifth Circuit Court of Appeals. She has taught for 30 years at the University of Kentucky College of Law. She teaches contracts, family law and a seminar in Law and Literature.

Along with Judge James E. Keller, she is the author of the treatise *Kentucky Domestic Relations*. Her law review articles have appeared in the *Kentucky Law Journal*, the *Wayne Law Review* and the *Santa Clara Law Review*.

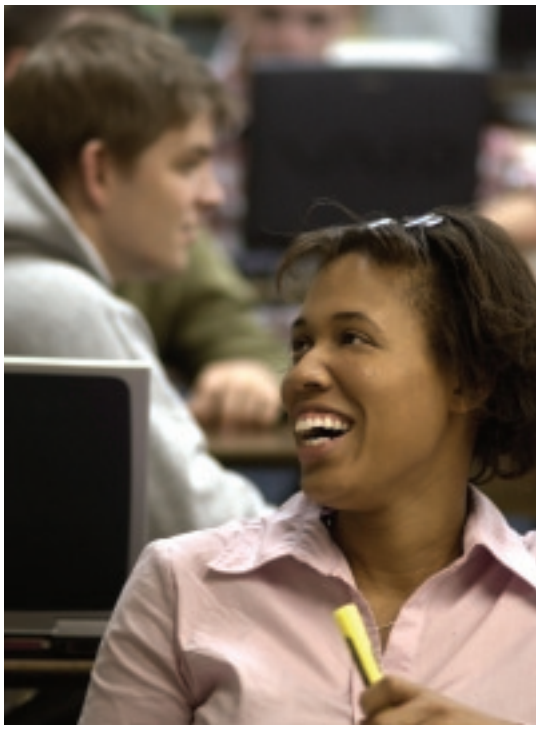
One hundred years ago, when the University of Kentucky opened the doors to our College of Law, neither Dean Lafferty nor his students could imagine many of the changes that seem commonplace today.

As I write this essay on my computer, I realize that my time as a law professor has incorporated significant change as well. Gone are the typewriters. Today, students come to class armed with laptop computers. We have electronic screens in every classroom and we use PowerPoint as often as we use the white board.

And yet with all these changes, law school would be remarkably familiar to anyone who has been a law student. We continue to teach many of the same concepts we have always taught. We have added Internet Law and Bioethics to our curriculum, but these additions have not really changed our core content.

Now, as we envision training litigators for the new century, we are examining both the content and process of law teaching. Our students and their employers tell us that we give graduates the theoretical content needed to practice law. In other words, we teach students the rules. But the changing world of law practice requires more.

Substantive content is only part of the knowledge required to practice law.[1] While law schools generally do a good job with this area, some criticize the work we do in the other areas. The ABA has recently mandated that all law schools introduce a "professional skills development" requirement. Every law student must now complete a course with a substantial practical experience component. Students like this "hands-on" experience. At the University of Kentucky College of Law, several courses will satisfy this requirement. Our litigation skills classes and many of our externships are good opportunities for concrete experience with lawyering work. We also



will be thinking about additional ways to inculcate professional values into our students as we prepare them for a lifetime in the profession.

At the same time, we face some challenges. Two obvious issues come to mind. The first is technology; the second, resources. Just as technology has changed our classrooms, it will change the future of litigation. We already know that courtroom demonstrations today can effectively show matters such as the discrepancy between a witness's current statement and a deposition. Documents under discussion in court can appear on a screen visible to both judge and jury. Accident reconstruction can be displayed electronically. Twenty-first century lawyers must be able to use these graphic displays to illustrate a point. As the world becomes more visual, they must be able to convey not only by words but in other ways as well.

I'm sure we do not need to tell practitioners about the increased resources needed to support

technological advance. For those in the academy, the resource issue is twofold. Professional education has witnessed steeply rising tuition costs and will continue to do so for several decades. Students who borrow money for law school are incurring increasing debt, despite our alumni's generous giving toward scholarships. A second resource issue entwines with our need to provide additional skills development. Legal education has always been inexpensive, at least compared to the medical school model. To the extent that we give law students more hands-on, one-on-one training, our resource needs may begin to resemble those of a medical education. We are concerned that increased resource demand may affect access not only to legal education, but also access to justice for a significant part of the population.

Finally, we believe that 21st century lawyers must work collaboratively with other professions. While law school has long been a place of adversarial methodology, we think that in the 21st century more lawyers will work in teams with others whose training brings a variety of strengths to the enterprise. We cannot educate our law students in all of those disciplines, but we help them to develop managerial capacity and to enhance their ability to solve complex problems.

It is an exciting task. Our students are bright, challenging and prepared for a new century. It is our task to guide them forward into the profession, a task that we welcome. V

[1] Law schools across the country, including our own at the University of Kentucky, are responding to the American Bar Association's move toward "outcome measures" as a determinant of accreditation. The ABA's guiding document, the Section on Legal Education's *Report of the Outcome Measures Committee*, notes that professional education encompasses three distinct "apprenticeships." The first is the intellectual apprenticeship, which is the creation of a knowledge base that serves lawyers in their work. The second is the "forms of expert practice" shared by professionals, and the third is the apprenticeship of "identity and purpose," which includes those values to which the profession aspires.

Photos courtesy of the University of Kentucky College of Law.

Rethinking Business Litigation in the 21st Century

Andrew G. Fusco, Partner
Bowles Rice McDavid Graff & Love LLP

Andrew G. Fusco is a Bowles Rice partner and serves on the firm's executive committee. He practices in the firm's Cranberry Square office in Morgantown, West Virginia, in the areas of general and complex litigation and corporate transactional and governance matters. He has represented clients in 24 states and 12 foreign countries.

Mr. Fusco's litigation experience includes product liability, antitrust and unfair competition, RICO, contract disputes and white-collar criminal defense and intellectual property infringement. His transactional experience includes mergers and acquisitions, financing, joint ventures, research and development ventures and product and technology licensing in the U.S. and abroad. He also has extensive experience in Pharmaceutical Law and First Amendment Law.

He is the author of "Antitrust Law" in the *West Virginia Practice Handbook* and has written numerous articles in books and journals, including the *Baker Street Journal* and *Obiter Dictum*.

He is a 1970 graduate of West Virginia University with a BSBA in Finance and received his JD in 1973 from the WVU Law Center. He has practiced law in Morgantown since 1973.

Participants in history do not always appreciate the scope and impact of events around them. Often, it is only through the wide-angle lens of retrospection that one can really appreciate change, be it social, technological or otherwise. It is not surprising, then, that many of us fail to appreciate the monumental changes that have occurred in the area of commercial litigation in the last few years, and those that are occurring even as this is being written. Likewise, we may fail to appreciate the peril that accompanies uncertainty in a changing legal world.

Reflecting on the latter half of the last century, it is only now that we can truly comprehend how the invention of xerography, for instance, and computerized word processing, have revolutionized business and litigation in all disciplines. Without the ability to rapidly reproduce documents, or to produce new ones, the mergers and multi-decade litigation that characterized the U.S. business environment from 1960 to 2000 could not have occurred. Those who began practicing law in the days of carbon paper, for example, understand just how impossible it would have been to litigate the AT &T breakup, or the ITT or Microsoft antitrust cases, without the advances of technology afforded after mid-century.

As we move into the 21st century, however, we are confronted with new challenges in litigation, many spawned by the same technological advances that facilitated the surge in business litigation in the late 20th century. How many litigants or litigators, for example, ever thought about such things as e-discovery 10 or 15 years ago? And what about Metadata? Or forensic copies of hard drives? Data-mining? Electronic filing and electronic document production?

And through all of this, antitrust litigation (probably more properly called "competition" litigation) has become the giant gorilla in the courtroom.[1] Becoming a litigant in an antitrust

or competition case will strain the resources and test the mettle of even the strongest of companies. It is incumbent, then, that a course be mapped with a cautious eye toward issues that could drag the unwitting business into the antitrust litigation quagmire. The best guides are business lawyers and business litigators who know the landscape and can negotiate safe passage before problems arise.

Not surprisingly, the changing environment in world economies and global competition has had similar effects worldwide on the nature of business and competition litigation. And globalization is an unavoidable fact of life – countries like India, Kenya, Senegal, China and even the former Soviet Bloc countries – some once havens for intellectual property scofflaws and rampant anticompetitive business practices – now are creating their own competition laws and regulatory agencies.[2] Cross-border enforcement and cooperation among international regulators is commonplace, although never dreamed of 20 years ago.

Even businesses whose core products and services are purely domestic will be affected by the globalization and expansion of competition law and enforcement. While such regulation would seem to have little effect on American companies that do not directly do business overseas, nothing could be farther from the truth. The fact that an American company buys products from a supplier who imports them from overseas, or that an American company sells products to a customer who will export them overseas, or that an American company belongs to a trade group active in foreign lobbying, each are factors – among dozens or more – that can drag a domestic company into an international regulatory dispute.

Not only can such antitrust scrutiny and enforcement be expensive and oppressive in and of itself, the risk is exacerbated because laws and procedures vary dramatically from country to country. In the European Union, for instance, the recognition of the privilege between an attorney and a corporate client is far more restrictive than in the United States. Consequently, documents may be required to be produced in connection with an EU investigation that would be exempt from production here.

By producing such documents, then, does one necessarily face the nullification of the privilege that otherwise would exist in the U.S.? What if the documents are later sought in a U. S. proceeding—can their production in Europe be declared a waiver for purposes of unrelated litigation in this country? Unfortunately, there are no definitive answers to these questions. The only thing that can be stated with certainty is that the murky waters of business regulation in international commerce never have been more fraught with danger or demons.

Traditional notions of jurisprudence are not all wearing well in the face of a new technological age that not long ago could have been imagined only in the pages of science fiction. For example, while jurisdiction over a person or entity once was reasonably straightforward and confined within the marked borders of states and nations, courts now routinely struggle to apply a construct of personal jurisdiction that stays both firmly rooted in traditional notions of jurisprudence and fluidly coursing through the ether of global electronic trade.

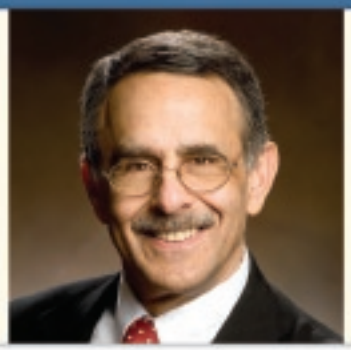
Consensus has yet to be reached on the extent to which "virtual" presence via the Internet expands the exposure of an otherwise local business to national or international regulation and litigation. Courts must grapple with the question of whether or not merely advertising a product or communicating about a product into a foreign jurisdiction is sufficient to allow an inference of a jurisdictional presence necessary to allow suit to be brought against that person in the foreign jurisdiction. Such concerns are common in defamation cases, where most jurisdictions allow suit to be brought wherever the defamation is "published." For Internet purposes, read "published" as meaning "read" and the scope of the problem is apparent – jurisdiction could exist virtually world-wide (no pun intended). And, by that theory, the publisher could be hailed into court anywhere the material was read to answer charges of defamation and claims for damages.

Fortunately, the U. S. Court of Appeals for the Fourth Circuit has taken a far less expansive view of jurisdiction in Internet cases and that offers some protections to residents of West Virginia and other states within the Fourth Circuit.[3] While that law would apply to suits brought within this jurisdiction, however, what law would or should apply if a plaintiff elects to sue in New York, or California, or Maine or Hawaii – states located in other federal circuits that may not subscribe to the Fourth Circuit's view of the issue?

Having painted the bleakness of the antitrust litigation horizon, it would be an error not to point out that the American system of jurisprudence already is responding to the challenge. As economies and markets grow and evolve, it is essential that the laws that govern them also must evolve and recent decisions reflect the unique flexibility of American law.

For example, look no further than the U. S. Supreme Court's decision last year in *Leegin v. PSKS*.[4] That decision essentially invalidated, at least in the federal jurisprudence, the former rule that made resale price maintenance *per se* illegal since the *Dr. Miles*[5] case was decided almost 100 years ago. The everyday realities of

(continued on p. 42)



What Happened to the Legal Profession?

Allan N. Karlin, President
West Virginia Association for Justice

Allan N. Karlin obtained his undergraduate degree from Yale, *summa cum laude*, in 1969 and his J.D. in 1974 from Boalt Hall, University of California, Berkeley, where he was Order of the Coif.

From 1974 through 1981 Mr. Karlin was employed by the North Central West Virginia Legal Aid Society as an attorney and, from 1976 through 1981, as director.

Since 1981, he has been in private practice, representing plaintiffs in personal injury cases, discrimination, sexual harassment, wrongful discharge cases and civil rights cases. Mr. Karlin is currently president of the West Virginia Association for Justice. He is a member of the Ethics Committee of the National Employment Lawyers. He previously served as chairperson of the West Virginia Lawyer Disciplinary Board.

He is a regular presenter at Continuing Legal Education programs in West Virginia and an adjunct lecturer at the West Virginia University College of Law, where he has taught a course in Pre-Trial Litigation. He has been recognized for his work as an employment lawyer in the *Best Lawyers in America* and selected for membership in the American College of Trial Lawyers and The College of Labor & Employment Lawyers. He also is a member of the West Virginia and National Employment Lawyers Association, the American Association for Justice and the Mountain State Bar.

In law school we are led to believe that members of the Bar are bound together by a common core of ideals, that a law license is a privilege that carries with it the responsibility to protect the integrity of the profession and to promote the public interest. Roscoe Pound, the noted legal scholar, articulated this professional ideal years ago:

> The term [professionalism] refers to a group pursuing a learned art as a common calling in the spirit of public service – no less a public service because it may incidentally be a means of livelihood. Pursuit of the learned art in the spirit of a public service is the primary purpose.[1]

Yet, in the early years of the 21st century, the law licenses we hold in common no longer bind us to a shared vision of our obligations or our responsibilities to the public. To the contrary, our profession is increasingly divided by differing economic interests, differing values and differing views about the nature of legal practice. For litigators, in particular, the divisions that separate us in the courtroom also divide us in the political arena, where we support different legislative and judicial candidates and work on opposite sides of pending legislation. Our opinions about the merits of a judicial decision or the fairness of legislation often appear to be shaped by our own interests, those of our clients and those of the interest groups with whom we are aligned. The positions we advocate and the candidates we support are often based on how a particular case, a particular law or even an amendment of a procedural rule will give us or our clients an advantage in the courtroom or on appeal, not on values we share as lawyers.

The present state of the Bar has no single cause. Law has become a business, no different in many respects from the businesses that many of us represent. As a business, Pound's "pursuit of the learned art" has given way to the "pursuit of the cash flow" to meet payroll and to pay for modern technology, support staff and the salaries and benefits that we have come to expect. There is no sin in becoming entrepreneurs, devising strategies to find and retain clients, developing new types of cases or areas of practice or pursuing more effective and efficient ways to run our offices. However, the economic demands of our legal *businesses* are not necessarily inconsistent with the professional ideal.

The notion that we share a "common calling in the spirit of public service" has also been fractured by the same economic and political divisions that divide our clients and polarize so much of our country today. In a product liability case, the issue is not just whether a particular product is dangerous, but whether the case threatens to undermine the capability of businesses to innovate and the economy to grow. A case expanding the rights of employees represents, depending upon one's point of view, the right of working people to fairness in the workplace or judicial activism that will cause entrepreneurs to invest their money elsewhere. And, a few years ago, medical malpractice became a battleground in a political struggle that, according to some, impaired the rights of injured patients or, according to others, determined whether doctors would be driven from the state.

In part, our differing opinions result from the fact that our views evolve from our differing experiences. Those of us who spend our time with disabled individuals and grieving families have a very different set of experiences from our colleagues who spend similar time with those accused of causing the injuries. Lawyers who represent working people who contend that they are victims of sexual harassment or discrimination have very different experiences from those who represent management employees accused of wrongdoing. These differences inevitably affect our perceptions of our cases, of the laws applicable to those cases, and of the latest legislative proposals of the Chamber of Commerce or the AFL-CIO.

When we do find areas of agreement, we are constrained from speaking out by our economic interests and those of our clients. Recently, I asked a defense attorney to join me in taking a public position on a matter of professional concern. He told me that he agreed with my position, but that his firm represented a client whose interests were adverse to what I proposed and, as a result, he could not speak out with me. A few years ago, in the midst of debate over whether medical malpractice litigation was causing doctors to flee West Virginia in droves, some defense attorneys told me privately that they considered the proposals advanced by the medical community to be too extreme, but that they could not contradict their clients publicly. Our private agreements about legal issues often remain private because we cannot speak out in the polarized world in which we practice.

The issue facing us today is whether we can change the discourse within the profession to bridge some of the divisions that have developed over the years. We cannot expect to eliminate all disagreement; however, there is no reason that we cannot work together on issues that unite us. In a small state like West Virginia, we have a special opportunity to do so. Many of us know each other and, despite our differences, often share a mutual respect. We should be able to use those relationships to bridge our differences and find areas of common ground.

Many of us have joined together to support Legal Aid of West Virginia in its annual campaigns. Others have worked through the West Virginia State Bar, an organization that continues to bring representatives from all segments of the Bar together on worthy programs. Members of four different bar associations have begun meeting to discuss problems arising out of judicial elections. My organization, the West Virginia Association for Justice, has invited representatives of the defense bar to speak at our programs and, earlier this year, the Defense Trial Counsel of West Virginia joined the West Virginia Association for Justice in sponsoring a fundraiser for the Innocence Project.

There is more we can do. When media sound bites distort decisions in complicated cases, we can speak out together in defense of our courts. Principled criticism of judges and justices remains our right, but we need to jointly challenge inappropriate attacks on judicial officials whenever they occur, including intemperate and misleading attacks in political campaigns.

We can come together to educate the public about legal issues and the judicial system. I remain astounded at the public's lack of information about the laws that affect their lives. Why aren't students in high school taught about the laws that will govern them when they enter the work force, buy homes, use credit cards, marry or divorce? Why aren't there more opportunities for adults to learn about our legal system? It is time to play a leadership role in expanding the opportunities for West Virginians to learn about West Virginia and federal law.

Many of us who disagree about the merits of the collateral source rule or third party bad faith litigation share a common concern about civil liberties. Is it unrealistic to imagine members of the defense and plaintiffs' Bar working together on an important case involving the Bill of Rights?

We have a common interest in improving the public perception of the profession and our integrity. Criticism of attorneys seems to be endemic to the times. Although we have brought some of that criticism upon ourselves, many of the persistent attacks on lawyers are based on unfair stereotypes and caricatures. We should not hesitate to criticize each other in good faith. However, we should come to the defense of our colleagues when they are unfairly attacked, recognizing that attacks on the integrity of any one segment of the Bar undermine the public perception of the entire Bar.

I don't purport to have the answers. However, we need to come together on common issues and common projects or Pound's notion of professionalism will become an archaic ideal. V

[1] Pound, Roscoe (1953), *The Lawyer from Antiquity to Modern Times.* St. Paul, Minn.: West Publishing Co., p. 5.

The Prospect of Future Tort Reform in West Virginia

The Honorable Carrie L. Webster
West Virginia House of Delegates

Delegate Carrie Webster was elected to represent Kanawha County's thirty-first delegate district in 2000, and is completing her fourth term in the West Virginia House of Delegates. She is the chairwoman of the House Judiciary Committee, the first female in state history to hold this position.

Delegate Webster also serves on the House Rules Committee. Her legislative interim committee assignments include the Joint Commission on Economic Development, the Select Committee on Seniors and PEIA, and the Legislative Oversight Committee on the Regional Jail and Correctional Facility Authority. In 2007, Governor Manchin appointed Delegate Webster to serve on the WV Industrial Council, which oversees the regulation of the state's workers' compensation system.

Delegate Webster earned her B.A. in 1988 and her J.D. in 1997 from West Virginia University. She currently practices law with Bucci, Bailey and Javins, L.C., in Charleston, West Virginia.

To provide both a legal *and* legislative perspective to a discussion of the prospect of future tort reform in West Virginia, this article includes a brief discussion of the state's civil justice system and the general purpose of tort law, followed by a summary of legal reform recently passed by the West Virginia legislature and, finally, comments on the status of several legal reform topics under current legislative interim study and specific legislative proposals that will likely be introduced in the upcoming session. I also will discuss future legal reform initiatives that are emerging from pending tort and contract litigation, including my personal observations about their prospects of legislative success.

What Exactly *Is* Tort Reform?

Before attending law school, I did not even know the word "tort" had legal meaning. Truth be told, I probably thought it was some rich dessert (i.e. "torte"). As funny as that is now, in reality, it underscores the fact that most in our society simply have no idea what a "tort" is, or what "tort reform" means or is intended to do.

By definition, a "tort" refers to a wrongful civil act that is intentionally or negligently committed by another. Tort laws permit parties to seek legal redress for their injuries and damages. Thus, when an individual or business sustains injuries to their person or property as a result of a wrongful act, they can seek compensation and other legal relief through our civil justice system, provided they establish and prove four basic elements: duty, breach, causation and damages.[1]

As law students, we are taught that our court system promotes equity and fairness for all, regardless of one's economic status. As state lawmakers, we repeatedly are told that our court system is not business-friendly and inhibits our state's ability to attract businesses and to stimulate economic growth. Business and other related groups advise us that changes to our current tort laws are needed to deter frivolous lawsuits and to reduce costly and time-consuming litigation for corporations and businesses who are forced to defend them.

To be sure, our elected leaders embrace the sacred role our civil justice system plays in society. We must preserve and promote a court system that is equitable, fair and accessible to all citizens. We are likewise committed to improving our state's economy and doing what we can to deter frivolous lawsuits. Those seemingly cohesive goals sometimes clash when lawmakers are asked to pass laws that restrict an individual's right to seek compensation and limit or immunize a tortfeasor from liability and/or damages for certain acts. Because legal reforms raise complex legal issues and impact important public policy, it is our moral responsibility and duty, as state policymakers, to carefully evaluate and balance these competing interests. That is why it is so important that proponents of legal reform provide lawmakers with detailed information about their proposal or legislation, including reliable, supporting evidence and why it is (or is not) needed.

It also is important to clarify that "tort reform" is not necessarily synonymous with "civil justice reform." Our civil justice system is designed to promote equity and fairness when a legal dispute occurs in law, whether in contract, real property, criminal or tort. "Tort reform" focuses on substantive changes to specific tort laws, while, at least from my perspective, civil justice reform refers to broader, institutional changes that potentially impact all areas of civil law.

Did We Go Too Far or Do We Need to Do More?

The past eight years have resulted in significant reform of West Virginia's tort system. Many applaud these efforts, but say we must do more. Others claim these recent changes unfairly restrict worker and consumer rights, and should either

be repealed or modified. Regardless of one's position or point of view, a discussion about current tort reform initiatives and the prospect of their future legislative success requires a review of the statutory changes that we recently have passed.

The most recent cycle of tort reform began in 2001, when skyrocketing physician insurance rates prompted legislative passage of sweeping medical liability reform and the creation of a physician mutual insurance company. The objective of the legislative response was to keep doctors in the state and to make medical liability coverage available and affordable to participating healthcare providers. During this same time period, the state legislature undertook unprecedented reform and privatization of West Virginia's workers' compensation system.

Other reform initiatives include limitations on joint and several liability, the elimination of third-party bad faith claims against insurance companies, revisions to venue statutes, modifications to the deliberate intent statute, and adoption of a "Right to Cure" law for sellers and merchants of certain consumer products and services. We also passed other "business friendly" laws, including the creation of an insurance fraud unit, an increase in coal truck weight limits on state roads, and the approval of other insurance reforms.

The 2009 Legislative Session

When the 2009 West Virginia Legislative Session convenes, business and consumer groups will unquestionably ask legislators to modify existing tort laws. Although many bills will be introduced on this topic, I predict a few issues will garner the most attention and focus. First, the business community will undoubtedly seek comprehensive reform of general tort law, similar to the state's medical liability laws. Second, industry groups representing coal, oil and gas have asked legislators to clarify the legal definition of "shallow wells" and to support other legal initiatives to increase their global competitiveness. Third, citing a potentially adverse impact on its industry without legislative relief, the timber industry will likely pursue changes in state law in response to recent court rulings issued in conjunction with pending "flood litigation."

Recent state court decisions also will shape business and industry's upcoming legislative agenda. For example, the decision by West Virginia Supreme Court justices to not hear the appeals filed in several cases involving large jury awards against state businesses has resulted in a business-sponsored push for legal reform that would require automatic state appellate review of cases where punitive damages have been awarded. Party litigants in the pending *Dupont* appeal argue that

the due process protections afforded by the 14th amendment to our U.S. Constitution require *de novo* review of certain punitive damage awards, a review that does not currently exist in West Virginia's court system or, arguably, under the state constitution. Governor Manchin submitted an *amicus* brief in support of this due process argument.[2]

Recent punitive damage awards also have reignited a push for monetary caps. While I do not personally dispute the adverse economic impact these awards sometimes have on corporations, I cannot ignore the important role that punitive damages are designed to play in our society – encouraging corporate accountability and deterring future misconduct by others who are similarly situated.

Punitive Damages

Because many people do not understand the purpose of punitive damages, they often are mistakenly led to believe that the jury system promotes "jackpot justice" and "runaway verdicts." Thus, if lawmakers decide to actively consider capping punitive damage awards, we need to fully understand how these limitations differ from a court-imposed assessment that requires a punitive damage award to be "rationally related" to the amount of compensatory damages. For example, in *Hamrick v. CAMC* (citations omitted), after a jury rendered a verdict in favor of a Charleston physician, the presiding circuit judge significantly reduced a large punitive damage award against the defendant hospital because the amount was not "rationally related" to the compensatory damages award.

In *Hamrick*, and in most cases, the courts do an exemplary job of following the law and administering justice, without unnecessary legislative intervention. Our jury system may be imperfect, but its foundation is solid. Even though the facts and circumstances of a particular case may result in a different verdict than we *think* we would have reached, we need to constantly remind ourselves that we were not the judge nor on the jury who heard the case and, therefore, should not become a "Monday morning quarterback."

Judicial Selection

Another issue that is generating considerable interest is the method used to select our state and circuit judges. The Joint Judiciary Committee of the legislature is currently conducting an interim study of the judicial selection process to determine whether non-partisan election, merit-based appointment or any other alternative selection method offers greater judicial impartiality and independence than our existing one, which elects our judicial officers by the popular vote of our electorate.

(continued on p. 46)

A Workers' Compensation Success Story

T. J. Obrokta, Jr., Senior Vice President
BrickStreet Insurance

Thomas J. "T. J." Obrokta Jr., JD, is Senior Vice President and General Counsel of BrickStreet Mutual Insurance Company. Previously, he was General Counsel for the West Virginia Workers' Compensation Commission.

Mr. Obrokta has a bachelor's degree in economics from Columbia University and earned a law degree from the West Virginia University College of Law in 1994. Before joining the Workers' Compensation Commission, he served as the Assistant Tax Commissioner for the State of West Virginia.

From 1994 through 2001, Mr. Obrokta was in private practice in Huntington, West Virginia and Norfolk, Virginia, representing management in labor and employment matters.

Mr. Obrokta is a member of the West Virginia and Virginia State Bars, the United States District Court for the Southern District of West Virginia and the United States Courts of Appeals for the Fourth and Sixth Circuits.

Debate is often held over whether carefully drafted legislative reforms can truly impact the legal environment in West Virginia. Additional debate is held on the severity of the reforms needed to tangibly impact our legal environment. Proposed reforms are all too often the extremes of near-Machiavellian proposals versus cosmetic changes that do little to reform the legal environment. Fortunately, the reforms to the workers' compensation statutes in 2003 and 2005 show that measured, balanced reforms *can* have a significant and positive impact on our state's legal environment in a way that is equitable to all parties involved.

In late 2002 and early 2003, West Virginia's workers' compensation system was in a cash flow crisis. The state-run system had about $600 million in assets but was losing $200 million a year, which meant that the system would be out of cash to pay workers' benefits sometime in 2006. Additionally, there was a long-term multi-billion dollar unfunded liability.

To address the financial crises, then-Governor Bob Wise, along with Senate President Earl Ray Tomblin and House Speaker Bob Kiss, showed bold leadership through the passage of Senate Bill (SB) 2013. SB 2013 was a sweeping piece of legislation that reformed the system on four fronts: 1) medical treatment; 2) benefit payment; 3) premium collection; and 4) litigation.

Litigation reform occurred in both the administrative law bodies created to adjudicate workers' compensation disputes, the Office of Judges (OOJ) and the Board of Review (BOR), and the West Virginia Supreme Court of Appeals.

The primary focus of the litigation reform contained in SB 2013 was the elimination of the so-called rule of liberality. This judicially established rule essentially held that any evidence submitted by an injured worker would dictate the resolution of the matter in litigation. The "Rule" led the employer community to spend significant resources litigating cases that were difficult to win, regardless of the evidence presented on behalf of the employer. SB 2013 eliminated this rule and replaced it with a traditional "preponderance of the evidence" standard that required the OOJ to weigh the credibility and reliability of the evidence submitted by the injured worker and the employer in reaching its decision.

Another litigation reform found in SB 2013 addressed a significant impediment to settlement of claims. Prior to SB 2013, the parties to a workers' compensation claim could only settle the indemnity components of the workers' compensation award. For the first time, SB 2013 permitted, with only a narrowly tailored exception, the settlement of the medical component of the claim as well.

Additional litigation reform found in SB 2013 focused on appellate procedures that governed workers' compensation litigation. The appellate process was largely depoliticized by the creation of a three-person appellate tribunal called the Board of Review. Each member of the BOR must be selected from a nominating committee comprised of the president of the West Virginia State Bar, two members of the West Virginia State Bar Workers' Compensation Committee (one representing employers and one representing injured workers), the dean of the West Virginia University College of Law and the chairman of the Judicial Investigation Committee. The BOR also was charged with issuing detailed, written decisions specifying the

law and facts relied upon to sustain, reverse or modify the OOJ's decision.

The overhauling of the appellate process extended to the West Virginia Supreme Court of Appeals. SB 2013 required that the Court could reverse or modify decisions of the BOR only if the BOR's findings were not supported by any evidence, were in clear violation of constitutional statutory provisions or were erroneous conclusions of law. The Court was restricted from re-weighing the evidence and, if it reversed or modified the BOR's decision on the basis that its findings of fact were not supported by any evidence, the Court was required to state with specificity why the evidence relied upon by the Board did not satisfy the standard.

The cumulative effect of the reforms found in SB 2013 is tangible. Since passage of SB 2013 in 2003, protests to the Office of Judges have fallen to the following remarkable levels:

2003 – 25,000+
2004 – 26,201
2005 – 18,975
2006 – 14,784
2007 – 11,794
2008 – 7,954 (projected)

In addition to the precipitous decrease in protests since SB 2013 was passed, the results are even more encouraging since the passage and implementation of Governor Joe Manchin's historic workers' compensation privatization legislation in 2005 (SB1004). Through this legislation, BrickStreet Mutual Insurance Company became West Virginia's sole private workers' compensation carrier on January 1, 2006, and, since that time, protest totals have continued to dramatically fall. Furthermore, like any other private insurance carrier, BrickStreet has taken on the duty of defending its insureds in workers' compensation litigation. This has saved employers millions of dollars in legal fees that they had been paying under the previously run state system. Accordingly, not only did privatization lower rates significantly for many West Virginia businesses, privatization generated an additional benefit to employers in the form of savings on legal fees.

The passage of SB 2013 in 2003 and Governor Manchin's privatization of the workers' compensation system through SB 1004 in 2005 have shown that measured, balanced reforms can have a significant and positive impact on our state's legal environment in a way that is equitable to all parties involved. Governors Manchin and Wise, along with legislative, business and labor leaders across West Virginia, should be applauded for their significant contributions to this success story.

Litigation Before – and After – Computers

Gerard R. Stowers, Partner
Bowles Rice McDavid Graff & Love LLP

Gerard R. Stowers is a partner in the Charleston office of Bowles Rice and is the leader of the firm's Litigation practice groups. He has more than 32 years' experience in all aspects of commercial and civil litigation, including insurance coverage disputes, personal injury defense, automotive cases, workplace accidents, construction law, commercial disputes, personal injury defense, products liability, legal malpractice defense and employer liability litigation.

His litigation experience includes more than 100 civil jury and bench trials in federal and state courts, as well as appeals before the West Virginia Supreme Court of Appeals and the U.S. Court of Appeals for the Fourth Circuit.

He is a charter member and current officer of the West Virginia Defense Trial Counsel and is a member of the West Virginia State Bar, West Virginia Bar Association, the American Bar Association and the Kanawha County Bar Association.

He is a 1976 graduate of the West Virginia University College of Law, where he was Order of the Coif, a member of the Order of Barristers and Articles Editor of the *West Virginia Law Review*. He is listed in *Best Lawyers in America 2009* and among "America's Leading Lawyers for Business" by *Chambers USA 2008*.

The collection of articles in this issue of *Views & Visions* addresses the dramatic change in litigation that each of us has experienced and anticipates in the future. As the articles reveal, there are many trends that impact this practice, but no trend has had an impact like that of the introduction of computers. The most significant change to the litigation practice resulting from this trend is the switch from a "paper-driven" practice to a "paperless," or electronic, practice.

It is hard for me to believe, but when I began the practice of law in 1976, the fax machine had not yet been introduced into the Bowles Rice law office, or any other local law office to my knowledge. Personal computers had not been invented. Primitive copy machines were slow, copies hard to read, and fumes from the copier chemicals were nearly overwhelming. Sometimes the ink on the documents "disappeared" after a few weeks in the file. Carbon paper was being phased out and Wite-Out® was a staple in the supply closet. The IBM Selectric typewriter was the mechanism for generating the paper in the office. `Courier was the font of choice.` The idea of covering up one's opponent with paper was nothing but cheap braggadocio.

Letters arrived once a day though the mail and pithy replies to these letters were considered prompt if mailed within a day or two. Dictation was still performed with a secretary, skilled in shorthand and armed with a steno pad. The new dictaphones contained a magnetic belt at least four inches wide.

I remember well when the IBM salesmen demonstrated the mag card typewriter. This device, which in 1980 cost about $10,000 per work station, actually remembered words which had been typed on the page and could reprint the same words if the cards were reinserted in the machine. About one page per card was the norm, so a 30-page brief took about 30 cards to record to magnetic media. These 30 cards were protectively secured with a rubber band so that their order would not be lost to the mag card operator.

Bowles Rice was the first law firm in the state to use a laser printer. The IBM 6670 was nearly eight feet long, four feet high, and occupied its own room. A secretary, after entering the room, duly fed the mag cards into the laser printer, and magically (per our expectations at that time), perfectly printed laser copies were spit out – eight feet away – on the other end. For the first time, a lawyer could dictate into a magnetic dictaphone machine, words could be typed onto magnetic cards, and those cards could ultimately be fed into the giant machine that could print as many perfect copies as one wanted. Copiers got faster, giant collators were added to automatically sort the copies, and the quality improved until it was hard to tell the difference between the original and the copy. Generally, if the paper was warm to the touch, it was a copy. The original was cool.

About this same time, fax machines came along. The first of these machines "whirled" a single page of paper on a long cylindrical device as the page of text was read and transmitted over a phone line to the receiving party. Later, whole documents could be fed into the fax machine much like today. Using the fax machine, letters from opposing counsel could be answered the same day, and pithy responses that were previously expected after several days could now be expected by way of fax, before the close of business. Combining these early technologies, a particularly aggressive litigator could keep the opposition busy by dictating, mag carding, laser printing, and faxing seemingly endless motions, letters and notices. The "paper wars" were on in the litigation world.

Civility began to lose its stature. The velocity of the practice of law was increasing, and the forethought formerly imposed by the intricacies of document preparation began to disappear. I am sure that

those who formerly wrote handcrafted letters with a quill and ink well gave more thought to their measured words than lawyers armed with dictaphones, mag cards, copiers and fax machines.

None of us who have practiced law for these many years could have ever imagined the impact of the personal computer when they first became available. Locally, I remember when ComputerLand first opened on Lee Street in Charleston. ComputerLand sold small personal computers with screens and 5 ½-inch "floppy" computer disks, with an A drive for the program, and a B drive for the data. The C drive or "C> prompt" had not been invented yet, but was not far behind. Soon after the "C> prompt" came along, these devices were networked. For the first time, forms could be readily stored on the network, recalled from memory and modified to fit the situation. Letters, motions, interrogatories, subpoenas, requests for documents, pleadings, briefs and other assorted documents from the litigator's arsenal could be summoned at will, printed nearly instantly and faxed or mailed to opposing counsel.

As a result of these advances, litigators first learned the concept of the "scorched earth" defense – a nuclear version of litigation, where no point or issue, no matter how minor or trivial, went unanswered. Reams of paper could be generated on virtually any point and duly filed with the clerk of the court and served on opposing counsel. This happened regularly at 4:59 in the evening and especially on Friday evenings, shortly before the close of business for the weekend. Occasionally, Saturday morning faxes appeared on your desk. The only bottleneck in the process was the need for case law or legal authorities to support the arguments that were made in the seemingly endless stream of briefs and motions. Ironically, the Mead Data Paper Company soon came to the rescue with a product trade-named "Lexis."

In the last century – pre-Y2K – most law firms had libraries. These were real libraries, with thousands of volumes of law books that took up valuable floor space and required attendants to stack and sort the updates. Many law libraries were imposing and often positioned so that clients could observe the impressive reserve of law books maintained by the firm.

Lexis put the law libraries on electronic media, accessible over the phone line or on CDs. The first Lexis legal research terminal was not as large as the first laser printer, but was at least the size of a regular desk. The built-in green and white screen was about eight inches square, with a keyboard. The lawyer simply typed into the terminal a Boolean search of words and terms, and within a few minutes, the terminal returned a list of cases matching the inquiry. In the early days of Lexis, young associates challenged each other to races to see if one lawyer could find a case in the library before another could find the same point on the Lexis terminal. It wasn't long before the

(continued on p. 44)

Reform Works!

The Honorable Evan H. Jenkins, Executive Director
West Virginia State Medical Association

Senator Evan Jenkins has served as Executive Director of the West Virginia State Medical Association (WVSMA) since 1999. Founded in 1867, the WVSMA is the state's largest physician organization dedicated to improving the health of West Virginia. Prior to joining the WVSMA, Evan served as general counsel to the West Virginia Chamber of Commerce from 1992 to 1999.

Evan was first elected to the West Virginia House of Delegates in 1994 representing Cabell and Wayne counties and re-elected twice in 1996 and 1998. He was elected to the West Virginia State Senate in 2002 and in 2006. He has held several legislative leadership positions during his 12 years of public service and championed many reform initiatives including medical liability reform and workers' compensation reform. Evan's record of advocacy and accomplishments earned him the recognition as the most "Pro-Jobs" legislator two years in a row.

In 2006, Evan received the highest honor bestowed by the American Medical Association to a medical society executive for meritorious achievement. That same year, the US Chamber of Commerce also rewarded his accomplishments by recognizing the WVSMA as the national grassroots organization of the year.

One of the most hotly debated public policy issues tackled by the West Virginia Legislature in the last 10 years was the reform of our state's medical liability system. In the late 1990s and early 2000s, West Virginia's healthcare system was in crisis. Our state's litigious environment caused medical liability insurance companies to either leave the state or pass along mounting losses to physicians through significant premium rate increases. Many physicians faced with an insurance availability and affordability crisis were forced to leave the state or quit practicing medicine. Access to care by our state's sick and injured was in jeopardy.

During my 12 years of service in the West Virginia Legislature, I have seen time and again just how quickly the Legislature shifts its focus from one crisis to the next. After legislation is passed, issues are placed squarely in the rear-view mirror and, with time, attention fades. Important lessons can be learned, however, from a periodic look back to see if the legislative steps taken to address a problem achieved their intended goal.

Looking back now at several key indicators, it is clear the medical liability reforms passed in 2001 (HB 601) and 2003 (HB 2122) worked! Their effectiveness can also serve as a "success story" that can, and should, be replicated in other areas of our civil justice system.

Claim Filings

Liability insurance rates are heavily impacted by three factors – claim frequency (number of suits filed); severity (average size of settlements and jury awards) and "shock losses" (judgments exceeding $1 million). Prior to 2001, medical liability insurance companies conducting business in multiple states, including West Virginia, reported that while severity and "shock losses" were on par here, they did see a significantly higher number of suits filed per insured in West Virginia than in other states. In an effort to weed out the high number of meritless suits being filed, the 2001

medical liability reform legislation included a requirement that, with few exceptions, any medical liability suit filed must contain a statement (certificate of merit) from an independent medical expert indicating that there is evidence that medical negligence may have occurred. Over the last six years, the number of suits filed has been cut in half, with much of the credit going to the vetting requirement contained in HB 601.

Insurance Company Financial Performance

While there was little public sympathy for the poor financial performance reported by the insurance companies in the late 1990s, the public did engage when physicians were driven out of state or out of practice because of skyrocketing insurance premium rates. Double-digit premium

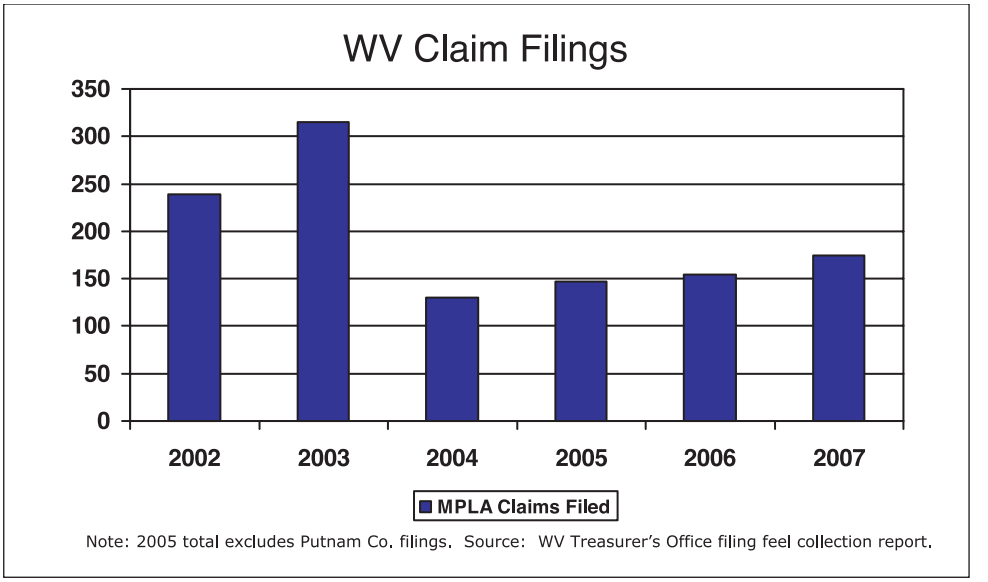
rate hikes, year after year, were imposed to make up for the companies' mounting losses. For example, some OB/GYNs and neurosurgeons saw their premium rates rise to over $150,000 per year. In addition to the "certificate of merit" provision contained in the 2001 reform, both sets of reforms in 2001 and 2003 contained a number of other substantive provisions designed to control cost and bring balance to our litigation system. The significance of the reforms' impact can easily be seen on the improvement in the carriers' financial condition. Double-digit premium increases just a few years ago have turned around and rates have actually dropped for most physicians by more than 25 percent in just the last two years.

Improved Access to Care

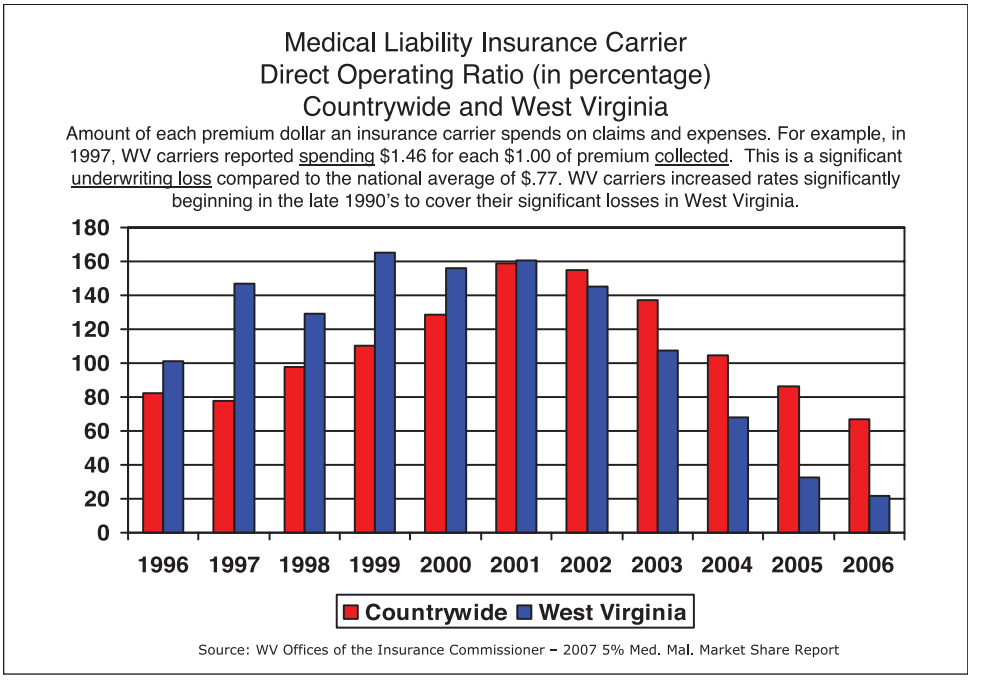
The more stable liability system and lower premium rates caused by the 2001 and 2003 reforms have brought a renewed sense of optimism and improved attitude about the attractiveness of practicing medicine in West Virginia. Data from the West Virginia Board of Medicine clearly demonstrates a turnaround in the number of physicians seeking licensure to practice medicine in West Virginia. The steady decline in new licensure activity bottomed out in 2001, and we have seen a dramatic turnaround after the passage of the reforms in 2001 and 2003.

Word of Caution

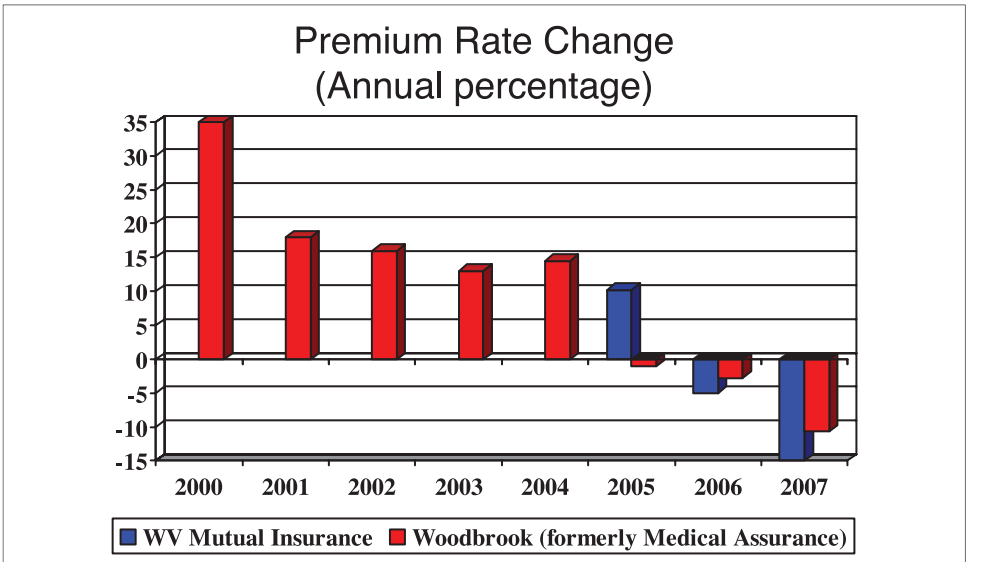
By these and several other objective measures, the legislative reforms have achieved their goals of preserving access to care. The question remains, however, will the positive results last? The reforms certainly have their critics. Plaintiff lawyers who fought against their passage in the first place have vowed to work to have the reforms undone through the judicial system. To date, their repeated efforts have succeeded in getting the West Virginia Supreme Court of Appeals to strike down several of the reforms' minor provisions and we wait to see how the Court rules on the more substantive components of the law. So the question remains, will the reforms stand? We could be one decision away from being plunged back into a full-blown crisis. W



Note: 2005 total excludes Putnam Co. filings. Source: WV Treasurer's Office filing feel collection report.



Source: WV Offices of the Insurance Commissioner – 2007 5% Med. Mal. Market Share Report



Source: WV Offices of the Insurance Commissioner – 2007 5% Med. Mal. Market Share Report

Looking Back to the Future: West Virginia Medical Liability Reform

Dr. Austin Wallace, Vice Chairman of the Board
West Virginia Mutual Insurance Company

R. Austin Wallace, MD, FACS, is a native of St. Albans and an alumnus of the University of Virginia and the WVU School of Medicine. He has been engaged in the private practice of Otolaryngology/Head and Neck Surgery with Eye and Ear Clinic Physicians, Inc., since finishing residency training at WVU in 1981.

Dr. Wallace has been Vice-Chair of the Board of Directors of the West Virginia Mutual Insurance Co. since its inception in 2004, and he is immediate past president of the West Virginia State Medical Association.

He has served as president of the Physicians Alliance of West Virginia and of the West Virginia Academy of Otolaryngology. Dr. Wallace has been chief of the CAMC Department of Otolaryngology on multiple occasions, and he is a board examiner with the American Academy of Otolaryngic Allergy.

Dr. Wallace is a Clinical Professor of Otolaryngology with the WVU Medical Center.

For medical professional liability, litigation later in the 21st century may depend on what, if any, changes take place to modify reforms won early in the century. Late in the last century (you know, back in the 20th century), medical malpractice insurance companies in West Virginia collectively suffered disastrous underwriting losses. These culminated with a combined ratio of greater than 160 percent for all state malpractice companies in 1999, and just over 140 percent in 2000, compared to a national average of around 115 percent both years. ("Combined ratio" is the percentage costs of claim payments and administration as compared to total premium dollars. Anything over 100 percent means the insurance company costs were greater than premium collected.)

Admittedly, some of the problem was the soft market of the mid-1990s causing an ill-advised drop in premiums nationwide that could not be supported actuarially. However, our situation in West Virginia was worsened by a medical malpractice lawsuit rate far greater than the national norm, coupled with a richly deserved reputation as "tort hell" (American Tort Reform Association).

When St. Paul first cancelled medical liability insurance for all West Virginia general and trauma surgeons and then exited the medical liability market altogether six months later, West Virginia was left without insurance carriers willing to write new business in our state, leaving over 1400 physicians without any prospect of coverage.

The West Virginia Legislature then stepped in. House Bill 601 was enacted which allowed coverage of these physicians under the state Board of Risk and Insurance Management (BRIM). The bill also provided for a provider tax credit for medical malpractice insurance premiums, and it contained some civil liability reforms. These reforms included elimination of third-party bad faith claims against physicians; provision for a 12-person jury with a non-unanimous 9 out of 12 verdict; requirement for a notice of claim 30 days prior to filing a lawsuit accompanied by a screening certificate of merit (CoM); and an enabling framework for the formation of a mutual insurance company.

These reforms proved insufficient to attract new insurers to the West Virginia market so, through the strong efforts of the West Virginia State Medical Association and the entire Care Coalition (including the defense bar), House Bill 2122 was passed in March 2003.

This sweeping piece of legislation contained the following reforms:

- "experts" must have been in active practice in the specialty 60 percent of the time within five years;
- non-economic damages were capped at $250,000, rising to $500,000 in certain more severe cases;
- an absolute cap on damages of $500,000 was established for trauma cases;
- joint liability was eliminated;
- payments to plaintiffs were reduced by collateral source payments;

- a framework for a Patient Injury Compensation Fund was established;
- medical injury litigation was limited to injured patients;
- "loss of chance" provisions were strengthened and imputed liability through "ostensible agency" was eliminated; and
- a state loan for 80 percent of the $30 million capitalization of a mutual insurance company surplus ($24 million) was enabled from the tobacco settlement trust, with the additional $6 million coming from assessments of physicians and insurance companies.

Just one year later, in March 2004, through the strong efforts of that insurance company, the West Virginia Mutual Insurance Company (WVMIC), in concert with the West Virginia State Medical Association, an "I'm Sorry" bill was passed. This bill allowed caregivers to express sympathy to patients for their losses without those words being held against them later as an admission of wrongdoing.

How have these significant pieces of legislation worked? *Very well.* The number of medical liability suits filed in West Virginia dropped in 2002 after institution of required Certificates of Merit, and even more dramatically after passage of HB 2122 in 2003. Along with this were dramatic drops in the number of paid claims. It is very apparent that the requirement of a Certificate of Merit has dramatically curtailed the filing of frivolous lawsuits that were clogging the West Virginia court system.

More importantly, the out-migration of physicians from the state has been stopped. Since the 2003 civil justice reforms, West Virginia has realized a net increase of 200 actively practicing physicians, thus helping to ensure access to high quality health care. A further distinct public health benefit may have emerged from the reforms as reported in a recent study by researchers in the Actuarial Science Department at the University of Wisconsin, hardly a bastion of conservative thought. They found that states with medical malpractice caps had lower percentages of residents without health insurance, presumably from a decrease in defensive medicine costs. Interestingly, ***The Charleston Gazette*** reported on August 29, 2007, that while the national average was15.8 percent, West Virginia experienced a decline in the percent of uninsured citizens from 16.5 percent in 2005 to 13.5 percent in 2006. Fifty-nine thousand previously uninsured West Virginians had obtained health insurance. Coincidence? I think not.

So now we turn our attention to the rest of the 21st century. With the present situation working so well, why would anyone want to return to the "bad old days"? Why would trial lawyers want to do away with reforms that obviously work? It may be, as the bank robber Willie Sutton once observed on another matter, "That's where the money is." However, despite rhetoric about reduced plaintiff access to the civil justice system, the ***Wheeling Intelligencer/News Register*** observed that this is definitely not the case in an editorial on August 26, 2008.

> "…the State Medical Association revealed [this week] that the number of malpractice lawsuits has been growing for the past three years. One hundred seventy-four of them were filed last year, compared to 130 the previous year… That certainly doesn't sound as if the door to the courtroom has been barred to those who have genuine grounds to sue health providers."

Two setbacks to the tort reforms have occurred. The West Virginia Supreme Court decision in *Louk vs. Cormier* returned us to a unanimous six-person jury in 2005, and the *Hinchman vs. Gillette* decision allows plaintiff counsel the opportunity to correct a flawed CoM without penalty.

There are other threats on the horizon. One Supreme Court justice has publicly stated that the pre-lawsuit requirements of the CoM violate the state constitution, and that all such procedural rules must be made by the Supreme Court, not the legislature. Thus it is very possible that this, or a future Supreme Court, may choose to undo the successful tort reforms enacted by our Legislature.

No additional reforms are needed for medical professional liability at the moment. The rear view mirror shows us how bad things can be, but right now the view through the windshield is very good. We have stabilized the situation in West Virginia. What we need now is to hold on to our progress – remaining mindful of our past as we move into the future. V

The Future of Civil Justice Reform

Marc E. Williams, President
Defense Research Institute

Marc E. Williams is a West Virginia native and a partner in the Huntington and Charleston offices of Huddleston Bolen LLP, where he maintains an active trial and appellate practice in commercial litigation, mass torts, class actions, employment law and transportation law. He is listed in the *Best Lawyers in America*, *West Virginia SuperLawyers* and *Chambers USA*.

He is President of DRI – The Voice of the Defense Bar, the 23,000 member international organization of lawyers who defend the interests of businesses and individuals in civil litigation. He also serves on the board of directors of Lawyers for Civil Justice, a Washington, DC-based organization of lawyers and corporate counsel who advocate for civil justice issues. Additionally, he is on the board of the National Foundation for Judicial Excellence, a Chicago-based organization that sponsors education symposia for state court appellate judges.

Mr. Williams is a graduate of Marshall University and the West Virginia University College of Law, where he won five awards for written and oral advocacy, as well as the Patrick Duffy Koontz Award, recognizing academic leadership and achievement at the College of Law. From 1990 to 2006, he served as an adjunct professor in the Graduate College of Marshall University, where he taught two classes each year on Sports Law.

In his book ***The Rule of Lawyers***, Walter Olson of the Manhattan Institute warned of the emergence of a new political ruling class funded with the proceeds of civil litigation. The contingency fee bar, flush with millions (if not billions) obtained from settlements with the tobacco, pharmaceutical and medical device industry, would reinvest this money in political parties, legislative, executive and judicial elections, creating an environment where they could influence all three branches of government.

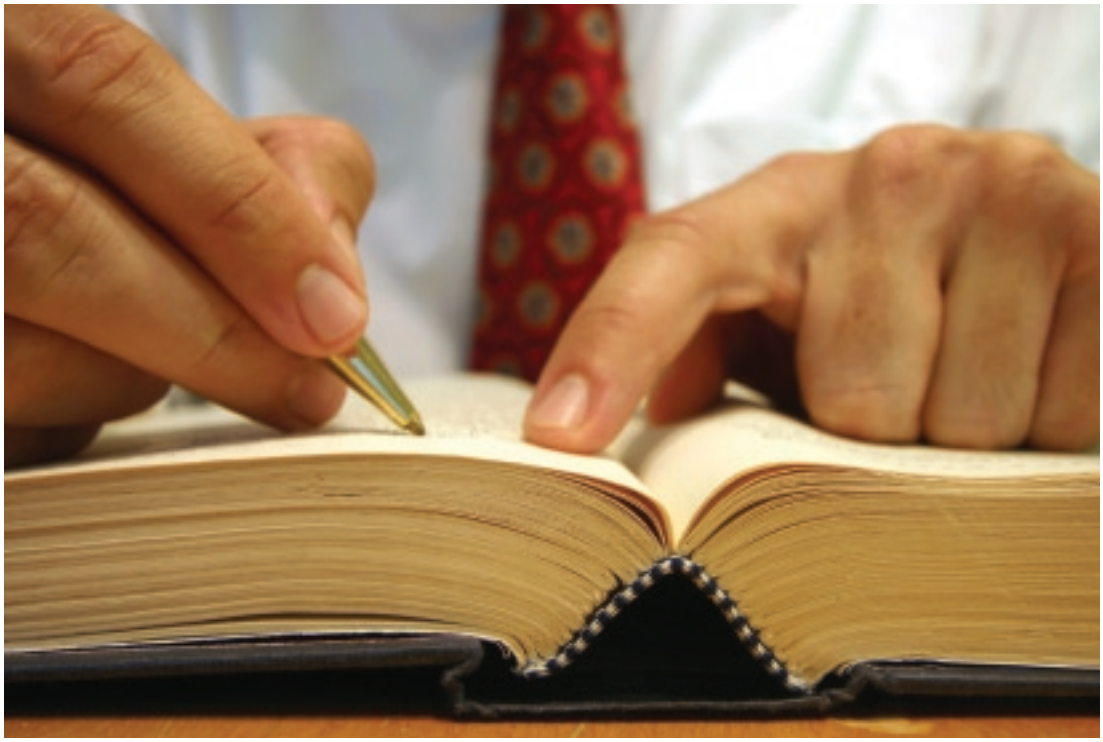
For the last decade, Olson's predictions seemed prescient. Plaintiffs' lawyers, like Mississippi's Dickie Scruggs, bragged of how lawsuit money could be used to purchase influence such that an out-of-state defendant had no chance of prevailing, regardless of the merits of the defense.

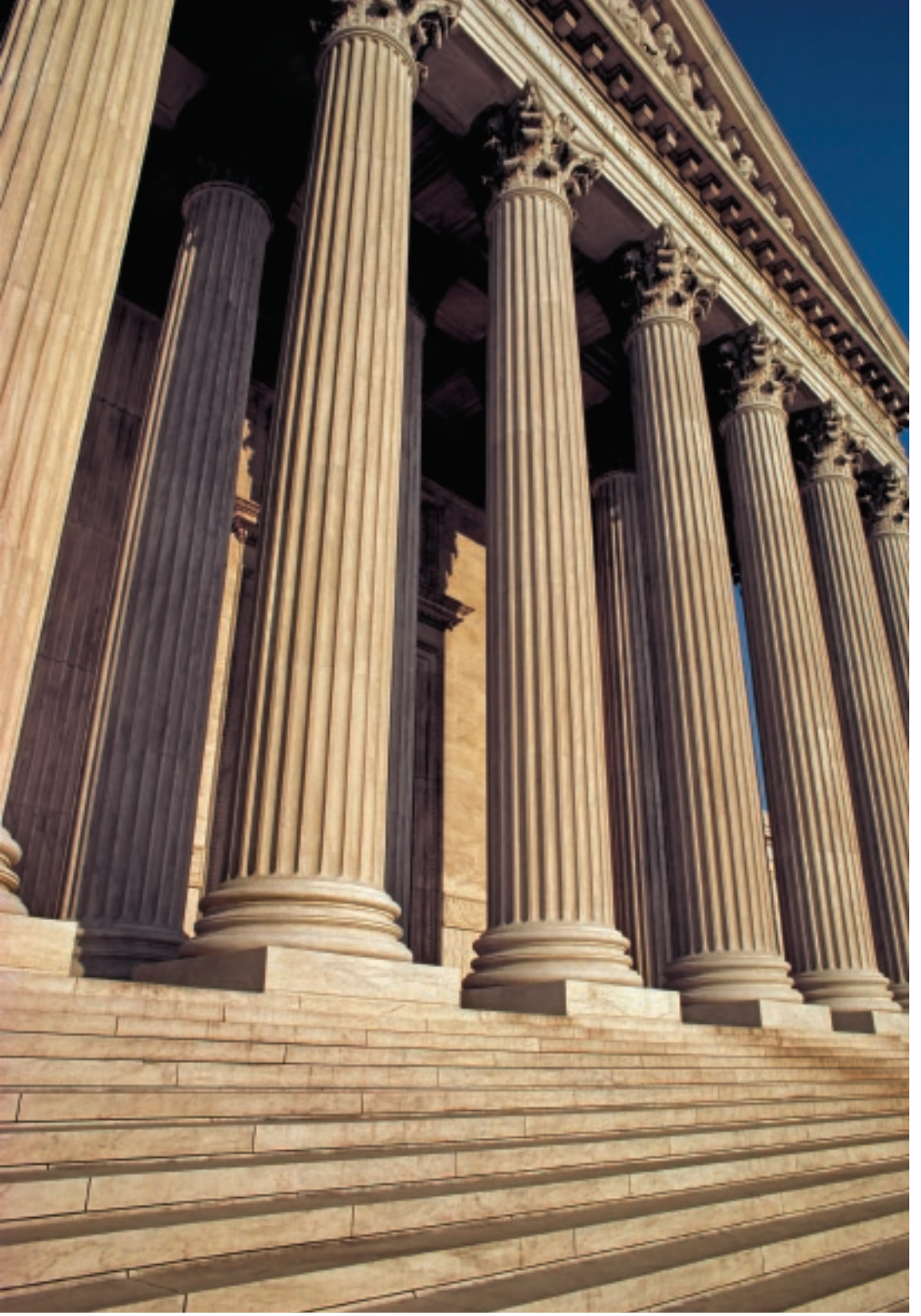
Today, the environment is very different. Business interests, realizing that the only way to defeat the heavily financed and organized plaintiffs' bar

DRI™
The Voice of the Defense Bar

was to organize and commit resources to civil justice reform, have attacked the issue through a combination of political activism and grassroots organization. The result has been a dramatic shift of the civil justice pendulum. Tort reform efforts have been wildly successful in curbing the excesses of a system that was well on the way from being a system designed to identify fault and provide compensation based on that fault, to one merely transferring wealth from those who have it to those who can prove that they have been injured.

Today, we have a system that is much more in balance, although in some jurisdictions, the reform efforts have gone so far as to impair substantive





rights. Many in the organized defense bar, while sympathetic and supportive of reform efforts that would fix the system's excesses, believe that reforms that inhibit a wrongly injured plaintiff from recovering the full amount of his damages from a responsible party are as bad as a change to the system that would remove fault from a determination of compensation. The excesses of the system, however, continue to be exposed by advocacy groups; Scruggs is now a guest of the Federal Bureau of Prisons, and many judges who were more concerned with supporting an election constituency than in doing justice have been removed from the bench. Defense lawyers have been proud to be supportive of these efforts, but as our friends in the plaintiffs' bar ask us, why do something that would result in less work for you?

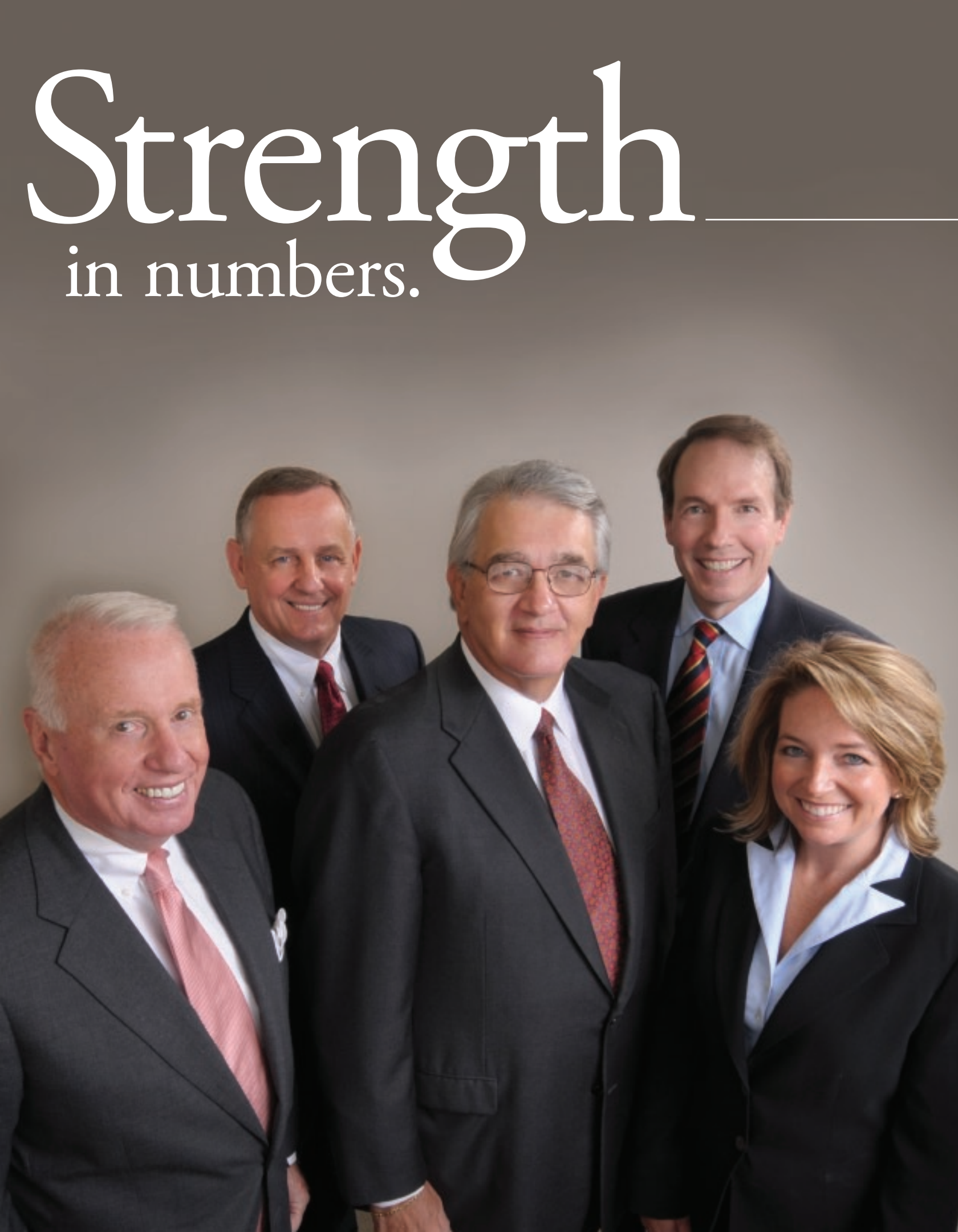
Unlike the plaintiffs' bar, lawyers involved in defending the interests of corporations and individuals in civil litigation have no direct pecuniary interest in civil justice reform. When plaintiffs' lawyers lobby legislatures or Congress for expanded opportunities to sue, it is returned to them in the form of contingency fee awards. To the extent that defense lawyers support tort reform, however, the end result is less litigation and, thus, less work. I have always stated that this gives defense lawyers heightened credibility in the great debate involving civil justice reform. As guardians of the civil justice system, we find ourselves being advocates for reform that would strengthen the system, but at the same time diminish the amount of work that we have available to handle!

I tend to believe, however, that such changes are cyclical, and that as the political make-up in Washington and in state capitals changes, we will find that many of the accomplishments in restoring balance to the system will be under attack by labor and the contingency fee bar. There is just too much money at stake for them to go quietly into the night.

So with this back-and-forth political struggle, what lessons have we learned? I believe strongly that our efforts at civil justice reform must change. While businesses want certainty of cost in litigation, our commitment to the civil jury trial (a unique feature of our system) makes that impossible. Instead, we should be focusing our efforts on guaranteeing that we have the best judges possible, comprehensive judicial review of verdicts and substantive rules that are enforced to ensure fairness of trials.

How do we accomplish these goals? The business community must continue to be active in the election or selection of judges. We must recruit fair-minded lawyers who are committed to a balanced civil justice system and provide them the resources to be competitive in presenting their vision of justice to the electorate. And we should insist that courts exercise the duty to review jury verdicts for improprieties and error, regardless of who prevails at trial. We have to be a participant in the process, but our guiding star must be on reforms that make the system fair for all participants. V

Strength in numbers.



David C. Hardesty, Jr.
Of Counsel

We are pleased to announce that Morgantown attorneys Andrew G. Fusco, Thomas L. Linkous, Steven M. Prunty and Jason M. Walls recently joined the terrific team of Bowles Rice attorneys (pictured below) who serve our clients in North Central West Virginia from two Morgantown-area offices. In the photo at left, Andy Fusco (center) is flanked by Robert W. Dinsmore, Billy Atkins, Managing Partner Thomas A. Heywood and Kimberly S. Croyle.

We also are delighted to announce that David C. Hardesty, Jr. has returned to Bowles Rice in an Of Counsel capacity. David was with Bowles Rice for nearly 20 years before leaving in 1995 to serve as President of West Virginia University. Now a full-time professor of law at WVU, David will be available to consult with the firm and our clients on a variety of matters, primarily during summer months.

This exciting Morgantown growth enables Bowles Rice to better serve all of our clients across the region, with 120 lawyers located in seven offices in West Virginia, Kentucky and Virginia.

Billy Atkins

Gregory W. Bailey

Charles T. Berry

Jeremy D. Bragg

Kimberly S. Croyle

Robert W. Dinsmore

Andrew G. Fusco

Ashley P. Hardesty

Leonard B. Knee

Thomas L. Linkous

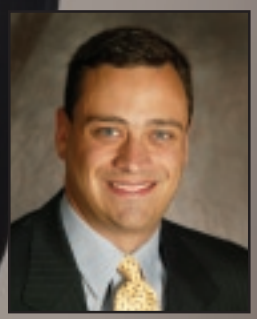
Rebecca J. Oblak

Paul E. Parker, III

Lynn C. Photiadis

Steven M. Prunty

Jason M. Walls



C. Seth Wilson

Charles C. Wise, III

Bowles Rice
McDavid Graff & Love LLP
Attorneys at Law

Dealing with Conflict in Organizations – One Leader's Perspective

David C. Hardesty, Jr., Professor of Law and President Emeritus
West Virginia University
Of Counsel, Bowles Rice McDavid Graff & Love LLP

David C. Hardesty, Jr. is President Emeritus and Professor of Law at West Virginia University. Prior to his career in academia, he was a partner in the Charleston office of Bowles Rice (1973 to 1995) and practiced in the areas of state and local taxation, corporate and banking and administrative law. He recently rejoined the firm in an Of Counsel capacity.

Mr. Hardesty was State Tax Commissioner during Senator John D. Rockefeller IV's first term as governor of West Virginia (1977-1980). He also served as chairman of the National 4-H Council, was a director and officer in the Big East Conference, a member of the Bowl Championship Series Presidential Oversight Committee, and a founding director of the Blanchette Rockefeller Neurosciences Institute.

He earned his undergraduate degree from West Virginia University in 1967, where he served as Student Body President. He was the University's 16th Rhodes Scholar, and graduated from Oxford University with a B.A. in 1969. Mr. Hardesty received his law degree from Harvard University in 1973 and received a master's degree from Oxford University in 1983.

Mr. Hardesty recently was asked to speak on the subject of conflict resolution at a Signature Series seminar in the Bowles Rice Morgantown office. What follows is a short summary of the content of that presentation.

The basic question is: How shall I approach conflict in my organization?

Litigation is the most traditional and basic form of formal conflict resolution in our society. In recent years, other structured but less formal forms of conflict resolution have been used more and more: arbitration, mediation and even private judging. All of these processes have the capability of producing a satisfactory resolution to a conflict. Thus, when things just cannot be worked out, highly trained professionals and their assistants follow established procedural rules that structured conflict resolution processes, presenting their cases to neutral arbiters. In the end, facts are applied to existing legal principles and a resolution is usually achieved.

This essay, addressed to organizational leaders and managers, suggests a frame of mind or leadership attitude that leaders of organizations might adopt toward conflicts and conflict resolution. Here are ten tips you might find useful:

1. Above all, expect conflicts to arise.

Conflict is inherent in any leadership role. Don't be surprised when conflicts arise between your employees, or between your employees and one or more of the organization's vendors, partners or regulators. When you were offered and accepted a role as a leader, you actually volunteered to take on conflicts for the organization. Differences of values, opinions, facts, one's understanding of the law, viewpoints and roles all create conflicts. The higher one rises in any organization, the more conflict of every kind is encountered. Conflict and conflict resolution processes are part of the job. Try not to get overly stressed out when a problem has to be resolved using time proven processes. It is "part of the job."

2. Understand your role: chief administrators are, in part, chief judges of the organization.

CEOs and other executives are leaders who are expected to provide vision to the organization, to be sure. They are also chief administrators and, importantly, in many organizations, they are the final arbiter of disputes. Internally, the leader's obligation is to administer the organization's policies and procedures fairly and evenly. In the end, you may be asked to be a neutral arbiter of conflicts between or among the people who you employ. Or you may be requested to ask third parties (regulators, vendors and others) to work with you to resolve conflicts that have arisen between your organization and the third party. In all of these cases, whether the conflict is internal or external, it is up to you to make sure the organization handles such conflicts fairly and efficiently.

3. Make your expectations clear and transparent.

Your managers and employees need to know what your expectations are for compliance with company policies. They must know that you will not show improper favoritism, that you will enforce organizational values, policies, laws and regulations, and that you will certainly take action when they are not being enforced. Establishing clear expectations and enforcing them are major factors in achieving expected behaviors.

4. Build a reputation for integrity and consistency.

Of all the traits admired in leaders, honesty is by far the most important. And consistency is a big part of this trait – treating like cases alike, and similarly

situated people equally. Your reputation for integrity and consistency will not only help you in a conflict situation, it will prevent many conflicts.

5. Establish ways to communicate and keep lines of communication open.
Think about this idea: conflict resolution schemes are in many ways structured communications between parties. They provide formal and proven ways to exchange views and information. To the extent that you can establish clear channels of communications before conflicts arise, and keep lines of communications open after conflicts arise, your ability to prevent and resolve conflicts may be greatly enhanced.

6. Prepare for conflict before it occurs.
To the extent that some conflicts are inevitable, it makes good sense to prepare for them. In this regard, you are well advised to retain and get to know good legal counselors, study different techniques for conflict resolution, and otherwise educate yourself and your staff as to the root causes of conflicts and the best means of avoiding, handling and resolving them. Take the mystery out of conflict resolution processes before conflict occurs.

7. Be thoughtful and discreet.
Public comments on behalf of your organization should reflect mature judgment, not pour gasoline on the fire. Careless comments can create conflict, interfere with resolution and be very costly. This is especially true when you are in the midst of a resolution process and in crisis management, when urgency and importance intersect to create stress on the entire organization.

8. Don't preach, teach!
In explaining organizational policies (which are often the sources of conflicts) and the various stages of conflict resolution procedures, try to explain the "why we do things" behind the "how we do things." People can and do reason for themselves, and an even-handed explanation can go a long way to establishing the kind of relationships that resolve conflicts more easily. Good leaders are, above all, good teachers, although they sometimes don't recognize this aspect of their own personality.

9. Explain outcomes to constituencies.
When conflicts are resolved, a teaching moment has arrived. Take time to explain what the problem was that gave rise to the conflict, how it was processed, and how it was resolved. The goal is, of course, to avoid repetition of mistakes. We all make mistakes. We should all learn from our mistakes, as well as the mistakes of others.

10. Learn from conflict.
The military has a process called "after action review." The process involves asking those involved in an action to review what happened and share what they have learned with others. The process is used to continuously improve the reviewing unit's strategy, tactics, communications, logistics and more. When we learn from conflicts, we learn how to prevent them and manage them in the future.

We all have it within ourselves to avoid conflicts, and to easily resolve the conflicts, that inevitably arise in the course of our workday. After sharing these concepts with an audience, I was told by one participant that these tips seemed like common sense. I think she was right. V

Fear of the Unknown: Punitive Damages and Risk Avoidance

Stuart A. McMillan, Partner
Bowles Rice McDavid Graff & Love LLP

Stuart A. McMillan is a partner in the Charleston office of Bowles Rice. His primary practice areas include civil trial and appellate litigation, and he tries cases in both federal and state courts throughout West Virginia. He has tried numerous cases to verdict, including libel, defamation, trespass and bodily injury lawsuits.

Mr. McMillan is experienced in, and frequently lectures on, issues pertaining to civil litigation. He earned his bachelor of arts degree in 1988 from Vanderbilt University and his law degree in 1993 from West Virginia University, where he was a member of the traveling Lugar Trial Team and Moot Court.

Active in many community and professional organizations, Mr. McMillan is a member of the Kanawha County Bar Association, the West Virginia Bar Association, Tort and Insurance Committee of the American Bar Association and Judicial Improvement Committee. He is a member of the Board of Governors and chairs the judicial improvement committee of the West Virginia State Bar. He also is an executive board member of the YMCA in Charleston.

In recent years, there has been much discussion within the legal community regarding the increased frequency of jury awards which reach the millions, and even hundreds of millions, of dollars. Whenever we hear about a seemingly inflated or unfair jury verdict, the component of the judgment which strikes us as remarkable is often the award of punitive damages. Punitive damages are derived from the common law and are designed to punish a defendant for prior reprehensible conduct and deter the defendant from future bad conduct. However, as a matter of due process, an award of punitive damages should have a reasonable relationship to the damages actually suffered by a plaintiff.

Until thirty years ago, punitive damages had little significance in our jurisprudence. In the 1970s, the largest punitive damage award on record was $250 thousand. However, that began to change in recent decades. Not long ago, a California jury awarded a plaintiff $28 billion dollars. This amount doubles the gross domestic product of over 100 nations.

In one West Virginia case, *TXO v. Alliance Production, Inc.*, the West Virginia Supreme Court upheld a jury award of $19,000 in compensatory damages, accompanied by $10 million in punitive damages – a punitive to compensatory damages ratio of 526:1. In a recent case from the Circuit Court of Kanawha County, West Virginia, a jury awarded zero economic damages, but nonetheless awarded punitive damages in the millions of dollars.

These seemingly discordant awards capture headlines, and their increasing prevalence has dramatically changed the litigation landscape. As a result, litigants often agree to inflated settlements in order to avoid the risk posed by the uncertainty of the punitive award. Clearly, an understanding of the role of punitive damages and a court's power to control their application is essential knowledge for both lawyers and litigants.

Generally, punitive damages are recoverable only in tort claims, which include fraud, libel, bodily injury and other actions. Punitive damages are not recoverable in breach of contract claims. Damages for breach of contract typically involve only economic losses and their calculation usually requires only the straightforward application of objective economic formulae. Also, our legislature

has excluded punitive damages from certain types of cases such as "deliberate intent" actions against a plaintiff's employer. Otherwise, the decision as to whether a jury may consider punitive damages is left to the discretion of the trial court judge.

Plaintiffs must satisfy a heightened evidentiary threshold before a court will allow a jury to consider punitive damages. Courts should only allow the jury to consider punitive damages if the facts of the case raise a genuine issue that the conduct of the defendant goes beyond negligence or poor judgment and enters the realm of intentional, reckless or generally reprehensible. For this reason, defense lawyers routinely file a motion early in the litigation to preclude the jury from considering punitive damages. If punitive damages are considered, however, it is the jury that determines the final monetary value of the award, and juries' views on punitive damages vary greatly. Where some juries may award no punitive damages, others may enter awards that are ten times, or larger, the size of the compensatory award.

It is unnerving to any business to see the potential risk posed by the increasing size of punitive damage awards. Moreover, punitive damages are not typically covered by standard liability insurance policies. In other words, where a claim against a company includes both compensatory and punitive damages, a business may be covered against an award of compensatory damages, but is not likely to be covered for the punitive damages. In light of recent cases, this is a sobering thought for many business owners.

For example, in a case involving a failure by BMW to disclose paint damage on a new car, an Alabama jury awarded the plaintiff $4,000 in compensatory damages, and $4 million in punitive damages. This figure was ultimately reduced to a more reasonable number by both the Alabama Supreme Court and the Supreme Court of the United States. Also, just a few years ago, a West Virginia jury awarded a plaintiff approximately $5 million in compensatory damages and a whopping $34 million in punitive damages. That award was reviewed by the West Virginia Supreme Court, not for its size, but for the manner in which the trial court instructed the jury regarding its assessment of punitive damages.

In recent decisions, the United States Supreme Court has attempted to provide guidelines for the review of the constitutionality of punitive damages awards. It is difficult and ineffective for an appeals court to find that a particular punitive award is simply too high without following some legal calculus to reach its conclusion. The guidelines provided by the Supreme Court involve first asking whether the harm is economic or non-economic in nature. A non-economic harm, such as bodily injury, should justify a higher punitive damage award than a purely economic harm.

The Supreme Court also instructed courts to consider the "reprehensibility" of the defendant's conduct. What specifically did the defendant do? What were the defendant's intentions? What actions did the defendant take to prevent likely unpleasant consequences? Further, the Court has explained that the conduct to be punished by an award of punitive damages must be limited to the conduct which gave rise to the harm to that particular plaintiff. Although the Court has not embraced a specific ratio between an award of punitive damages and an award of compensatory damages, the Court has cautioned that, under normal circumstances, the ratio should not reflect a multiplier in excess of single digits. Where there is a very large compensatory award, the ratio should be closer to one-to-one.

In a break from traditional understanding of the application of punitive damages, the Court recently found that the

(continued on p. 45)

Impact of Litigation on Businesses in the Electronic Age

Timothy C. Wills, Partner
Bowles Rice McDavid Graff & Love LLP

Timothy C. Wills is a partner in the Lexington, Kentucky office of Bowles Rice and concentrates his practice in the areas of labor and employment law, litigation, construction law and business transactions.

Mr. Wills has represented employers in all facets of labor relations and employment law. He regularly represents employers in employment discrimination cases and assists employers in formulating litigation-avoidance measures, including personnel manuals and procedures. He also has labor-management relations experience, including union representation elections, decertification proceedings, collective bargaining negotiations and labor arbitrations.

He has a defense-oriented litigation practice and has represented defendants in federal and state courts. He has defended cases involving commercial and business disputes, products liability, and accidents in the manufacturing, construction, surface and underground coal mining industries. He also has represented companies and carriers in insurance coverage disputes.

He received his J.D. degree from the University of Kentucky College of Law in 1974.

Technology has dramatically changed how businesses process and store information. Personal computers and laser printers have made typewriters a fading memory of the past. Desk calendars and day-timers have been replaced by personal data assistants (PDAs) and BlackBerrys. E-mails, text messages and voice messaging systems have circumvented person-to-person communications. We use these devices not only as methods of conducting business but also storing information.

Electronically stored information (ESI) includes any form of electronic information, including e-mails, text messages, voice mails, digital images, Internet usage, spreadsheets, etc. ESI is much easier and less expensive to store with a few clicks than the dreaded practice of reviewing records and deciding what information to retain or discard. Sounds great – except if your company becomes involved in a lawsuit. Here is why:

Discovery is the phase of a lawsuit where parties are required to produce information to the other side which is reasonably calculated to lead to admissible evidence. Traditionally, parties in a lawsuit had statutory and common law duties to preserve and produce relevant information to the opposing side. Due to the ability to store information inexpensively, businesses are now storing more information than ever before and are not discarding outdated or even useless information. Consequently, ESI has increased both the volume and sources of information available to adverse parties in litigation.

Like documents, ESI is subject to being discovered. The *Zubulake v. UBS Warburg* series of opinions issued by the United States District Court for the Southern District of New York dealt extensively with the ESI phenomenon in litigation.[1] *Zubulake* set new standards for parties to preserve, review and produce ESI to opposing parties. The Court in *Zubulake* also imposed devastating sanctions on the company which failed to properly preserve and produce ESI to the plaintiff in discovery.

Less than two years ago, amendments were made to the Federal Rules of Civil Procedure which incorporated many of the concepts in *Zubulake* and provided how parties should address e-discovery issues in litigation. In essence, a business now has the duty to preserve relevant ESI not only after a lawsuit has been filed, but also where there is a reasonable anticipation of future litigation. Failure to preserve and produce ESI can result in sanctions being imposed against the business such as monetary damages, including the opposing party's attorney's fees and costs, or even an adverse finding by the court on relevant case issues. Sounds bad. But there is hope.

A party may be excused from producing ESI where it is no longer available because it was destroyed pursuant to the customary and normal practices of the business. This means that a court cannot impose sanctions against a business if it discards ESI in accordance with a system operated in good faith.[2]

These recent changes in the law make it necessary for businesses to develop strategies for retaining and discarding ESI. It is now imperative for companies to address and manage their ESI well before a lawsuit is even anticipated. Instead of

formulating information retention policies, many companies are initiating information retention programs which specifically address the management of its ESI.

A successful information retention program begins with the formation of a steering committee or team. Ideally, the team should consist of an executive employee who will be the internal authority for deciding which information is kept or destroyed. This executive information "czar" also should serve as the point person for dealing with outside ESI vendors and legal counsel.

Other members of the team will include records management employees who will be charged with implementing and administering the information retention program. Risk/compliance employees also should be members of the team, to identify the active and potential claims against the company. Information technology professionals also are needed on the team, to assess how much information should be stored and how to make it readily accessible. IT professionals may be in-house or out-sourced. There has been an increasing number of IT vendors which specialize in searching ESI for relevant data and storing that data in a readily accessible format.

Rounding out the team is legal counsel. Legal counsel is necessary to ensure that the obligations of the business for retaining and producing ESI are satisfied. Legal counsel will be needed to advise when the duty to preserve ESI arises and how this preservation, or "legal hold," program will be implemented, monitored and maintained. After *Zubulake V,* legal counsel must ensure that all back-up media required to be preserved is identified and stored in a safe place. In cases where there are a small number of backup tapes, counsel should actually take possession of the tapes to eliminate the inadvertent misplacement of the data.

Businesses also should update their record retention policies to specify: (1) when documents and ESI may be destroyed; (2) how data will be organized when it is stored; and (3) how documents and ESI will be obtained from company employees both periodically and when they leave the organization. This policy should encompass retrieving data from employee laptops, thumb drives or memory sticks, BlackBerrys, digital cameras, PDAs, cell phones and PCs at home if used for business. The record retention policy should also provide how documents and ESI should be handled which contain trade secrets, confidential and proprietary information, or information subject to the attorney-client privilege.

Dedicating the resources to implement and administer a proactive information retention program should greatly reduce the expense of having to comply with an opposing party's document request under the time constraints imposed by court rules. Developing an information retention process which is repeatable also should result in future cost savings and improvements. In addition, the program will greatly minimize the chance for the inadvertent disclosure of privileged data to the opposing side.

(continued on p. 45)

E-mails Present New Challenges in Business Communications

Phyllis A. LeTart, Vice President - Legal & Business Affairs
Charles Town Races & Slots, Inc.

Phyllis A. LeTart has served as Vice President – Legal and Business Affairs for Charles Town Races & Slots in Charles Town, West Virginia since June 2004. She has general responsibility for all legal matters, the risk management function and serves as the company's Compliance Officer.

Previously, from 1985 to 2004, she was Vice President – General Counsel for the Sands Casino Hotel in Atlantic City, New Jersey. She also was in private practice in Cleveland, Ohio from 1982 to 1984.

Ms. LeTart received her law degree from Case Western Reserve University, School of Law in 1982 and her undergraduate degree in Business Administration from the University of Akron, College of Business Administration in 1979.

This article will focus on the challenges presented with the advent of our newest form of communication, e-mail. My perspective comes from 24 years of experience as house counsel for two different companies in the gaming and hospitality business. Both companies entertain millions of customers in their places of business each year, have large numbers of employees and significant turnover.

While e-mail has certainly revolutionized business communication, it also has presented counsel with corresponding challenges in dealing with this new form of discoverable material. However, I have found that a number of tried-and-true methods of practice that worked well in the prior century should not be abandoned, as they work equally well today.

First, it is imperative for counsel and senior management to establish a company culture where all levels of management understand their responsibility. Everyone must recognize and understand that the facts are the facts and their obligation is to cooperate, produce the records requested and always be truthful. It is the job of the lawyers to deal with the facts as they are presented. There is nothing more harmful than for counsel to be surprised. With this culture in place, the rest of the challenges can be dealt with more easily.

Building a file as soon as you have reason to believe there may be litigation has never been more important. Retrieving records when there is no press of a deadline and when the records are "fresh" and easy to retrieve is much less disruptive of business and saves many hours of management time. The worst that can happen is that you have done a little work which proved, in the long run, to be unnecessary.

Managers should be trained on the appropriate content of e-mail communication and to whom e-mails should be sent. Most often, when a manager writes an e-mail, the prospect of litigation is never considered. Most managers view e-mail as

a quick, casual form of communication and an opportunity to easily "copy in" (include) everyone possible who may, or in some cases may not, have the slightest interest. Educating managers on some basic rules of e-mail can be very helpful. I see these basic rules as follows:

No less care should be put in writing an e-mail than the writer would place in writing a letter on which their signature is placed.

The life of an e-mail is forever and may in the future be read to a jury or by a third-party fact-finder. The question to be asked before you send an e-mail is: Will I, my company or another individual be embarrassed by the content or form of the e-mail?

A business e-mail is not an appropriate place for jokes. An e-mail does not convey facial expressions or body language and can most often be misunderstood, creating discord between co-workers.

Send copies of an e-mail only to those individuals who have a business need to know the information being conveyed. Wildly copying in individuals serves no useful business purpose, clutters the e-mail system and expands the circle of search in discovery.

E-mail technology is a wonderful tool, but it also has had the negative effect of reducing phone calls and personal visits to the offices of colleagues in situations where everyone would be better served with a personal conversation. In personal conversations, opinions can be expressed frankly, potential misunderstandings cleared up or eliminated and if it is truly necessary to memorialize the meeting in writing, that can easily be accomplished.

Clearly, there is nothing revolutionary in my comments – just some practical views from an in-house perspective on establishing a good foundation before you even begin to work on discovery requests. V

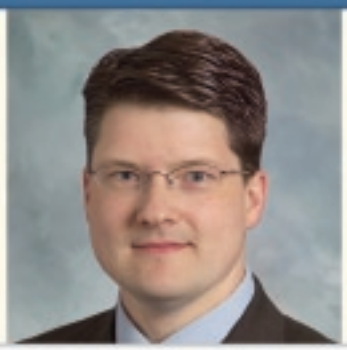
Charles Town Races & Slots, located in Charles Town, West Virginia in the state's eastern panhandle, is a world-class entertainment venue featuring over 5,000 slot machines, live and simulcast horse racing and a wide range of dining options.

It is one of the fastest growing destinations in the region, drawing more than four million visitors every year. The complex covers 113 acres that includes a 3/4-mile thoroughbred track, a training track and a complex that houses 1,400 horses.

Penn National Gaming acquired the facility in 1997, which has since contributed more than $1 billion in state taxes to West Virginia and over $28 million in taxes to Jefferson County and five nearby municipalities. Total employment is more than 1,200 workers and the facility is responsible for creating an additional 3,800 indirect jobs.

The $21 million, four-story Inn at Charles Town opened earlier this year and offers 153 guest rooms, including 18 suites overlooking the thoroughbred race track.

Photos courtesy of Charles Town Races & Slots, Inc.



The Benefits of Tech-Savvy Legal Counsel

Brian M. Peterson, Partner
Bowles Rice McDavid Graff & Love LLP

Brian M. Peterson is a partner in the Martinsburg, West Virginia office of Bowles Rice. He is a member of the Litigation Practice Group and admitted to practice in both West Virginia and Virginia.

Mr. Peterson's practice includes employment, civil rights, premises liability, state and local government defense and personal injury. He regularly counsels and advises business clients on a wide variety of labor and employment issues and defends employers against claims of discrimination, harassment and retaliation.

A graduate of West Virginia University, he received his bachelor of arts degree, *summa cum laude*, and was inducted into Phi Beta Kappa. He received his law degree in 1998 from the West Virginia University College of Law, where he was editor-in-chief of the *West Virginia Journal of Law & Technology* and an associate editor of the *West Virginia Law Review.*

Computers have fundamentally changed the practice of law, creating a "digital divide" among lawyers. Unlike the digital divide in the world at large, the divide in the legal profession is mostly self-imposed. While tech-savvy lawyers embrace technology, technophobic lawyers eschew it. Tech-savvy lawyers not only invest in technology, they incorporate it into their practices to improve client service. Increasingly, clients are realizing that even though their problems may not be "high-tech," they greatly benefit from hiring tech-savvy legal counsel.

The advantages of a paperless workflow

Employing a law firm that embraces technology can save your business money. For example, in our office, we scan every document that is part of a litigation case file. Instead of mailing paper copies of every pleading and motion to our litigation clients, we can e-mail them. Over the course of a case, this saves hundreds of dollars in photocopying, postage and fax charges.

Having paperless files has strategic benefits as well. Our lawyers and staff have immediate access to complete case files, and any document can be pulled up, circulated and reviewed in seconds. Even closed cases dating back to 2005, when our paperless workflow began, can be searched instantaneously. When clients call to discuss strategy and next steps, we can talk with specificity about documents rather than in vague generalities. This allows the lawyer and client to maximize their strategic planning time.

Having an entire firm with digitized files multiplies the strategic advantage. When you hire a lawyer in a law firm with a centralized document repository, the lawyer working on your case has access to the work product of scores of other lawyers in the firm. So, for example, when your attorney drafts a complex contract for you, she might have access to hundreds of similar agreements drafted by other lawyers in the firm. Instead of spending hours drafting the contract from scratch, she can modify an existing work product in half the time. The result is a better work product produced at a fraction of the cost.

Keeping pace with a changing legal environment

Computer technology has had its biggest impact on the legal profession in the area of litigation. Nearly everyone today uses computers and the Internet to conduct business. American businesses have more than 90 percent of their information stored electronically, and 70 percent of it never gets

printed. So, when litigation arises, the most important evidence is often in an electronic format rather than paper. Any organization that uses e-mail can expect to have its e-mail requested in discovery, requiring the company to identify, search, process, convert and produce the data in a digital format. This process is called electronic discovery, or "e-discovery," and it is quickly becoming the norm. In 2007, $2.79 billion was spent on e-discovery, an increase of 43 percent from 2006.

A tech-savvy lawyer understands how to operate in this environment, and can guide your company through the labyrinthine process of e-discovery. In some cases, tech-savvy law firms can avoid the cost of hiring computer experts by handling e-discovery in-house. Lawyers unfamiliar or uncomfortable with technology are more likely to ignore electronic evidence, which could seriously impair their clients' cases.

Technology is a double-edged sword. The same trends that make American workers more productive can make the cost of litigation more expensive. If your lawyer communicates, strategizes and collaborates with you in the same way he would have 15 years ago, you should expect more. However, when implemented correctly, technology allows lawyers to provide more efficient, higher quality legal services at a lower cost.

Photo (above) courtesy of Rick Barbero, The Register-Herald

Trends in Electronic Litigation Support and Trial Presentation

Richard E. Katz, President
Katz Consulting Group, LLC

Richard Katz is an attorney and the president and founder of Katz Consulting Group.

A 1987 graduate of the University of Colorado, Boulder, and a 1995 Order of the Coif graduate from the West Virginia University College of Law, Mr. Katz's legal practice consisted of civil litigation for both plaintiffs and defendants in the areas of personal injury, products liability and mass tort, as well as criminal defense work.

Throughout law school and practice, Mr. Katz has advocated the proper and effective use of modern technology and communication strategies in all phases of litigation, a subject on which he frequently lectures, both locally and nationally.

Since its inception in 1999, Katz Consulting Group has worked as a technology partner with top lawyers and law firms throughout the United States, on cases both large and small.

Katz Consulting Group was formed 10 years ago with a simple goal in mind – to help lawyers use new technologies to better strategize, organize and present their cases. The legal pads, leather-bound reporters, paper files and flip charts of old have largely given way in the modern practice to Internet-connected computers and smartphones, litigation document databases, streaming video and multimedia, wired courtrooms and electronic presentation software.

As the second decade of the 21st century approaches, there are a number of notable trends taking place in litigation support, communications and trial presentation.

Electronic Discovery, Data Collection and Forensic Preservation

The exponential growth of electronically stored information (ESI) and electronic communications brings with it discovery and litigation management opportunities and challenges. The December 2006 Amendments to the Federal Rules of Civil Procedure regarding ESI-related issues have placed an even greater focus on the need to identify, preserve, collect, review and produce relevant electronic evidence.

Qualified litigation support firms routinely provide assistance to law firms and their clients regarding electronic discovery best practices, proper forensic preservation and data collection protocols and procedures, ESI processing and methods for searching, reviewing and producing electronic evidence. We expect to see continued growth in the volume of electronic evidence in cases both large and small, with a focus on the increased use of electronic tools to tackle these 21st century challenges.

Digital Video – Depositions and Documentation

The use of digital video to record, preserve and play back testimony continues to increase. In the absence of live testimony, there is no better way to convey tone, emotion and essential nonverbal

communication to a juror or decision maker. Deposition video and realtime transcripts are routinely streamed over the Internet to remote parties, and digital video files can be synchronized to the transcript for instantaneous retrieval, search, editing and presentation, using sophisticated trial presentation software.

No longer used solely when witnesses are "unavailable" to testify in court, video testimony is now easy to edit and share, and is routinely used for client and expert review, focus group and mock trial sessions, mediations, hearings and other presentations to the court.

Forensic Animation

Forensic animation visually demonstrates complex concepts, products, processes or series of events, and is routinely used to support and explain the testimony of both lay and expert witnesses. Properly conceived and presented, a quality animation can be the key to simplifying the complex in a persuasive and visually powerful manner.

Gone are the days where rudimentary animations of people, objects and scenery were represented by simple blocks and shapes. Highly detailed, photorealistic animations are now the norm, and can be developed and produced at very reasonable cost. No longer the sole province of the "big case," forensic animation is used in cases of all types and sizes.

Electronic Trial Presentation Software

Specialized software such as inData Corporation's Trial Director continues to push the boundaries of electronic evidence management and trial presentation. Common features include:

- Transcript Management, including keyword and Boolean search capabilities; issue coding and reporting and exhibit linking
- Video Management, to view and edit video deposition; instantaneously create and play video designations and impeachment clips and synchronize deposition exhibits for contemporaneous playback
- Document Management, to code documents for easy searching; provide full-text document searching; and exhibit foldering and outlines
- Trial Presentation, including "tear out" document sections to focus jury attention; side-by-side document comparisons; on-the-fly highlighting and annotation; and closed-captioned video deposition playback

With more powerful features and a simplified, easy-to-use interface, trial presentation software allows lawyers to more effectively and efficiently organize and present their cases during focus groups, mediation, court hearings and trials.

(continued on p. 43)

Legal Reform is Key to Job Creation in West Virginia

Steven Cohen, Executive Director
West Virginia Citizens Against Lawsuit Abuse

Steve Cohen has been executive director of West Virginia Citizens Against Lawsuit Abuse (www.wvcala.org) since 2005. The previous year, he was communications director for Justice Brent Benjamin's campaign for the Supreme Court.

A resident of Wheeling, Mr. Cohen came to West Virginia after earning his master's degree in public administration from the University of Southern California, while serving as a legislative aide to two members of the California congressional delegation. He was press secretary to former West Virginia Governor Gaston Caperton.

Cohen also holds an M.A. from West Virginia University and a B.S.B.A from Georgetown.

Bob Mauk, one of the founders of West Virginia Citizens Against Lawsuit Abuse

Bob Mauk remembers the day, more than a dozen years ago. As an executive at a Huntington firm then operating as Inco Alloys, Mauk was charged with scouting expansion sites for the specialty metals manufacturer. But along with the good news of the business expanding, Mauk distinctly remembers, there was bad news: "Look outside West Virginia." The reason: West Virginia's love affair with lawsuits.

The concerns with the Mountain State legal climate then were multiple and serious. Employers have been too exposed to frivolous lawsuits. Courts have been too cozy with the so-called "lawsuit industry." Over the years, West Virginia has had a well-earned reputation for jackpot justice and legal extortion. The state has been perceived as a jurisdiction where courts dispense cash, not justice.

As Mauk chatted with friends at his Kiwanis luncheons and in other conversations, he discovered that Inco Alloys wasn't the only employer reluctant to create more jobs in West Virginia. Mauk and others, concerned about their children leaving the state for jobs elsewhere, decided to create a vehicle for public education and reform. West Virginia Citizens Against Lawsuit Abuse (WV CALA) would be a way to educate the public about the costs and consequences of meritless lawsuits and jackpot awards. The goals of the group have included making the state more attractive for jobs, more accessible for healthcare and easier on taxpayer and consumer budgets – all by working for a more equitable state court system. Starting in the mid-1990s, WV CALA became the state's watchdog against legal excess. Through research, public events, mailings, media appearances, phone calls, advertising and networking, WV CALA embarked on a crusade to fix a troubled lawsuit system.

Public interest in the project has been phenomenal, with more than 30,000 West Virginia households joining the cause. Personal injury lawsuits and class action cases were once seen as unimportant to the public at large, but now people better understand how excessive court awards can affect entire communities. Jobs may move to other states, doctors may stop certain risky practices, such as delivering babies, and costs at the store may rise. After several years of WV CALA's education campaign, three in four West Virginians polled said it was time to reform the legal system.

Some important reforms have changed elements of the state legal system. These include medical liability reform, limiting out-of-state lawsuits, insurer third-party rules, the bonding process for

a party appealing a lower court decision, some so-called "joint and several" liability reforms and notification requirements for the attorney general.

Problems remain, however. For the past two years, Forbes magazine has ranked West Virginia as the worst state for job creation, largely because of its reputation for lawsuits. The state has been branded a "judicial hellhole" every year since 2002, when the American Tort Reform Foundation launched its annual survey of state legal climates.

While West Virginia addressed a medical liability crisis early this decade when doctors in West Virginia were on the verge of a mass exodus, the reforms of medical malpractice laws that stabilized the healthcare system have been challenged by the plaintiffs' bar. As a spokesperson for the West Virginia State Medical Association observed, the state is "one Supreme Court decision away" from being thrust back into a healthcare crisis.

Questionable expert witness testimony remains a problem in some cases. When "medical evidence" was presented to a West Virginia court from a doctor who does not exist, WV CALA highlighted the mockery of justice. A check with three medical licensing boards revealed no record of the phantom doctor, and the doctor's listed address was found to be a vacant lot. To dramatize this blatant lawsuit abuse, WV CALA took a search dog there with media in tow.

A Bridgeport radiologist was paid close to $10 million by plaintiffs' lawyers to perform mass screenings on patients, many of whom were allegedly never examined. Such lawsuit mills drew attention from not only WV CALA but also the Wall Street Journal, which noted that the radiologist had claimed seeing 515 patients on a single day, more than one a minute.

WV CALA, ever the public watchdog, criticized an attorney general who hires his campaign contributors to file lawsuits on behalf of the state – allowing them to rake in multi-million dollar legal fees at public expense. This practice cries out for a strong Sunshine law to bring accountability to the office.

In West Virginia there is a lawsuit standard of "No Proof? No Problem!" for medical monitoring cases. One can file a lawsuit without any evidence of actual injury.

Despite a new "joint and several liability" law in West Virginia defendants can still be held responsible for injuries they did not cause.

WV CALA uses a variety of techniques to build public awareness of the need to curb lawsuit abuse. To link the loss of jobs to legal woes in West Virginia, WV CALA staged its own version of the Academy Awards, using a mock Oscar presentation to the motion picture "The Departed," as exemplifying West Virginia's estimated loss of 16,000 jobs due to lawsuit abuse. For the Bridgeport doctor reading more than 500 X rays in a day without ever seeing most of the patients, WV CALA awarded a mock Oscar for "best film editing." A WV CALA educational mail piece used an arresting photo of a man in a gas mask to explain that "something stinks in the attorney general's office" as a lead-in to presenting its evidence of legal ethics problems in that state office.

Most of WV CALA's messages are dead serious, however. The problem of lawsuit abuse is a burden on our state's workers, retirees, healthcare consumers, taxpayers and family members. Excessive lawsuits have impacts that thread throughout the fabric of the state's citizens and the economy.

After leading the group for nearly a decade, Bob Mauk no longer chairs. Now retired from the company that no longer has a West Virginia footprint, his days are spent on the golf course, fishing, visiting his grandchildren out of state, working with his church and charming community groups as a singer in a barbershop quartet. Improving the legal climate here so families can stay together will be his legacy. Taking over at the helm of WV CALA is Tom O'Neill, a West Virginian with a background in small business and the law, who looks to bring greater awareness of the need for fair courts to the public through this ever-expanding and always busy non-profit group. V

Deliberate Intent: Can Employer Inspections of the Worksite Preserve the Actual Knowledge Defense?

Ronda L. Harvey, Partner
Bowles Rice McDavid Graff & Love LLP

Ronda L. Harvey is a partner in the Charleston office of Bowles Rice and a member of the Litigation Practice Group. She concentrates her practice in deliberate intent actions, products liability and insurance bad faith and coverage cases. She also has represented defendants in mass tort and complex products liability civil actions.

Ms. Harvey is a member of the Defense Research Institute and the Defense Trial Counsel of West Virginia. She has defended several national clients in product liability litigation, including pathology laboratories and manufacturers of medical equipment, mining roof bolts, boom cranes and respirators.

In 1984, she graduated, *magna cum laude*, with a bachelor of science degree from West Virginia University. She earned her law degree in 1993 from West Virginia University College of Law, where she was a member of the Lugar Trial Association.

She is the past president of both the West Virginia Bar Association and its Young Lawyers Division. She is a member of the executive committee of the Kanawha County Bar Association and was recently named the chairperson of the West Virginia Chamber of Commerce Civil Justice Reform Committee.

Your employee is injured on the job. You race to the hospital, check on his condition, and console his family. Later, you assist him in filing a workers' compensation claim to assure that both his medical bills are paid and he continues to receive compensation while he is off work due to his injury. Months, maybe two years later, you are served with a "deliberate intent" suit by your injured employee. Deliberate intent!?! You certainly didn't intend that your employee would suffer an injury. How can he allege that you deliberately injured him? You also might wonder what happened to an employer's workers' compensation immunity from a civil lawsuit.

Background of the Deliberate Intent Exception to Workers' Compensation Immunity

The workers' compensation immunity is not absolute, nor has it ever been. Since the 1913 inception of the Workers' Compensation Act, the Act has included, in one form or another, a deliberate intent exception to the immunity from suit protection granted to employers. In 1978, the West Virginia Supreme Court decided the historic case of *Mandolidis v. Elkins Indus., Inc.*, 161 W.Va. 695, 246 S.E.2d 908 (1978), which interpreted the Act's "deliberate intent" exception as allowing a civil suit if the injury was caused by the employer's willful, wanton and reckless conduct. The decision led to great dispute over what type of conduct was actionable. In 1982, the legislature passed a resolution creating a joint interim commission to study the far-reaching effects of the *Mandolidis* decision. The Mandolidis Commission submitted proposed legislation, which was enacted in 1983. Since that time, the legislation has been altered and the statute currently in place allows an employee to sue his employer if the employee could prove the following five separate elements:

1. That a specific unsafe working condition existed in the workplace which presented a high degree of risk and a strong probability of serious injury or death;

2. That the employer, prior to the injury, had actual knowledge of the existence of the specific unsafe working condition and of the high degree of risk and the strong probability of serious injury or death presented by the specific unsafe working condition;

3. That the specific unsafe working condition was a violation of a state or federal safety statute, rule or regulation, whether cited or not, or of a commonly accepted and well-known safety standard within the industry or business of the employer . . . which statute, rule, regulation or

standard was specifically applicable to the particular work and working condition involved, as contrasted with a statute, rule, regulation or standard generally requiring safe workplaces, equipment or working conditions;

4. That the employer intentionally exposed the employee to the specific unsafe working condition; and

5. That exposure to the specific unsafe working condition proximately caused the employee to suffer serious compensable injury or death.

If an employee cannot prove one of the five required elements, the statute requires the court to grant summary judgment -- in other words, dismiss the case before it proceeds to trial. This rarely happens in state court.

Recent Development Regarding the Actual Knowledge Requirement

One of the five elements – the actual knowledge requirement – recently has been reviewed by the West Virginia Supreme Court of Appeals in *Ryan v. Clonch Industries, Inc.*, 219 W.Va. 664, 639 S.E.2d 756 (2006). In the *Ryan* case, Mr. Ryan was employed as a "banding man" in a lumberyard owned by the defendant. The job duties of a banding man included cutting metal banding from a coil, placing the bands around pallets of lumber, tightening the bands and crimping the ends together. On his third day as a banding man, Mr. Ryan was struck in the left eye by a piece of metal banding when he was in the process of cutting the metal banding. Mr. Ryan brought a deliberate intent action. He alleged that the defendant's failure to provide him with safety glasses was a specific unsafe working condition. To prove the third element – violation of a specific safety regulation, Mr. Ryan relied upon the defendant's admitted violation of a certain OSHA regulation requiring the employer to inspect the workplace and assess what personal protective equipment was necessary. The defendant argued that Mr. Ryan could not prove actual knowledge because the defendant had not performed the workplace assessment required by the OSHA regulation and, thus, had no actual knowledge that safety glasses were necessary for the task Mr. Ryan was performing. The West Virginia Supreme Court held that "where the defendant employer has failed to perform a reasonable evaluation to identify hazards in the workplace ***in violation of a statute, rule or regulation imposing a mandatory duty to perform the same***, the performance of which may have readily identified certain workplace hazards, the defendant employer is prohibited from denying that it possessed 'a subjective realization' of the hazard asserted."

Based on the holding, employees now argue that *Ryan v. Clonch* places a general requirement on employers to inspect the workplace, and if an employee is injured, the injury was the result of the employer's failure to inspect the workplace, discern the unsafe working condition and correct it. Further, employers cannot defend the deliberate intent action by relying on a lack of actual knowledge of the unsafe working condition. This argument may be compelling and difficult for an injured employee to resist asserting in a deliberate intent action. However, this argument extends the holding of *Ryan v. Clonch* far beyond its limits.

The employees' argument is flawed because it changes the fundamental nature of a deliberate intent action. The legislature enacted this statutory cause of action to protect employees from "the malicious employer, not to punish the stupid one." The workers' compensation system is essentially a "no fault" system. Because an employer contributes to the employee's workers' compensation, the employer is immune from suit, unless the employee can prove all five elements of the deliberate intent statute. If employers can be liable because they should have inspected and corrected the unsafe working condition, then the standard for proving a deliberate intent case is reduced to a mere negligence standard, or "should have known," standard.

While employers cannot "hide their heads in the sand" and it is good practice to inspect the workplace, certainly not all injuries are the result of an employer's failure to inspect. Also, an employer's failure to inspect can only take away the actual knowledge defense if the employer had a duty to inspect.

Are Employers Required to Inspect the Workplace?

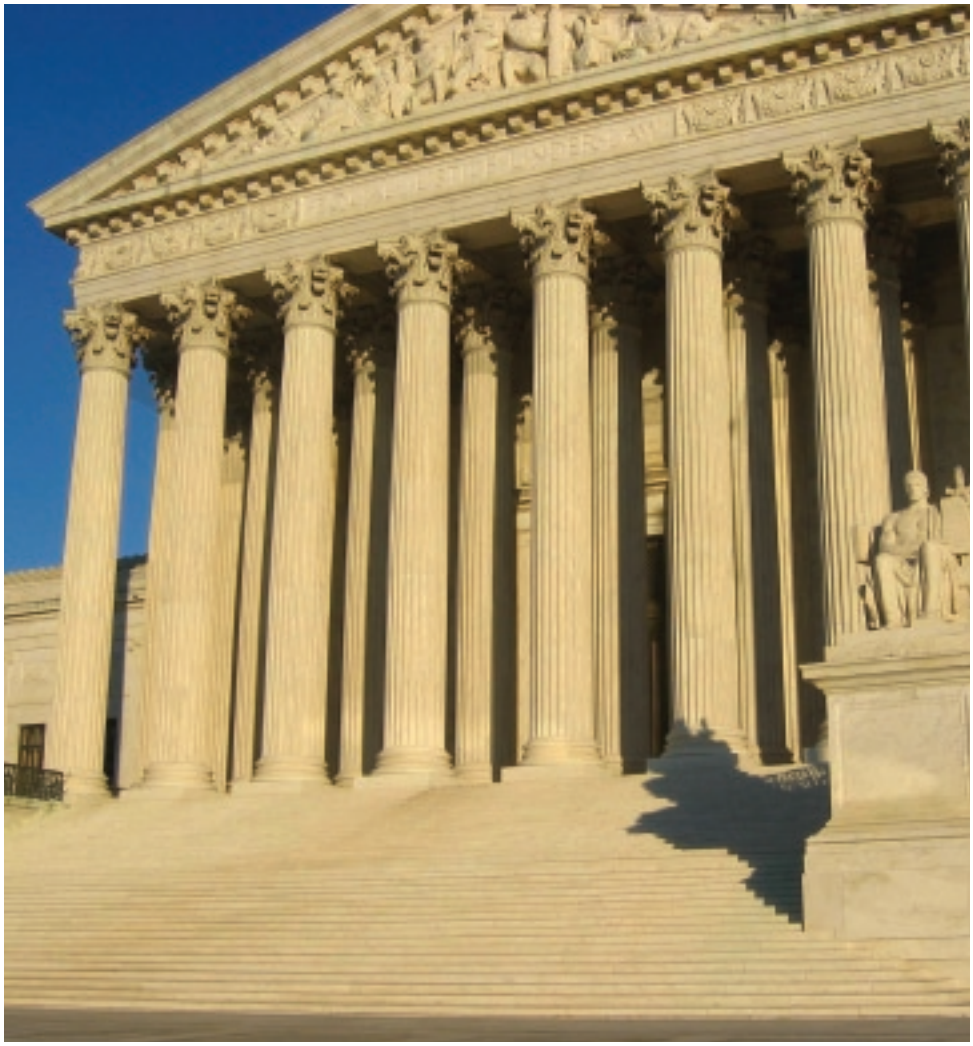
Under *Ryan v. Clonch*, employers cannot ignore a mandatory affirmative duty to inspect and discover a specific unsafe condition. Thus, to protect your business from a deliberate intent claim, you should be aware of all regulations, rules, statutes and standards that place an affirmative duty on the employer to inspect. If you have such a duty, you should inspect; and if you discover an unsafe condition as a result of your inspection, you should correct it.

How Often Should Employers Inspect the Workplace?

While some regulations, standards, etc. place a mandatory, affirmative duty on employers to inspect the workplace for specific unsafe conditions, few designate time frames for inspections. The employer must determine how often it is practical and reasonable to inspect. It may be reasonable to conduct some maintenance inspections quarterly or monthly. Other tools or items that are subject to more rigorous use perhaps should be inspected weekly or even daily.

Employers should view inspections as an opportunity to determine and correct unsafe working conditions, not just as a tool to avoid a future lawsuit. An employer that approaches the inspections with such an attitude is more apt to avoid a future deliberate intent lawsuit than the employer that simply goes through the motions of inspecting to preserve the employer's actual knowledge defense in a future deliberate intent claim. Employees are certainly cognizant of their employer's efforts to prevent accidents. Employers that put forth the time and effort to correct unsafe conditions will not only reap the benefit of less employee accidents, but are also less likely to face a deliberate intent claim because the employee will infer that his employer has his best interest at heart and did everything the employer could to prevent the employee's injury.

(Fusco continued from p. 9)



doing business within a sales and distribution network changed dramatically overnight (notwithstanding the fact that *Leegin* did nothing to invalidate state antitrust laws barring RPM).

No less dramatic was the High Court's establishment of a new pleading standard in antitrust cases – introducing "plausibility" as a necessary predicate to survival of a complaint beyond the motion to dismiss stage.[6] In the former practice, a complaint could be dismissed only if no set of facts conceivably was provable by the plaintiff to support a claim and recovery. Nonetheless, the Supreme Court abandoned a hard and fast rule that had survived since 1957.[7] The old rule allowed many cases to unfairly progress laboriously and expensively through discovery and motion practice before ultimate dismissal.

No doubt, other rules and axioms we have honored historically will fall by the way as courts and legislatures try to reshape traditional constitutional and regulatory concepts into the 21st century mold. While any effective system of jurisprudence must be malleable to adapt to changing times and technologies, however, the very flexibility which is the hallmark of a mature legal system flies in the face of venerable notions such as *stare decisis*, once thought to protect forever a precedent once established. Not unexpectedly, the devil is in the details and good business practice demands that the cautious entrepreneur tread warily in those areas where antitrust and competition lawyers now fear to tread.

The problem, of course, is that the fundamental and pervasive characteristic of any effective and just legal system is, very simply, *predictability*. Antitrust and competition law as we know it today is a far different discipline than what our predecessors dealt with in the 1950s and 1960s, and the challenge for today's business counselor is to help guide the client through the morass of uncertainty and unpredictability that face business, both here and globally. Business cannot be suspended until law catches up. Decisions must be made with an eye toward minimizing risk while at the same time maximizing effectiveness – in a world, and in state, national and international markets – where the only certainty is that uncertainty will prevail for the foreseeable future.

While there is no simple or sure answer, it is clear that vigilance must be the byword and every business should regularly take stock of its circumstances and risks. Just as prudent businesses have for many years conducted regular intellectual property audits, businesses should now be conducting antitrust and competition audits just as frequently. Although definitive answers may be elusive, there is no substitute for advice from an experienced antitrust or competition practitioner who understands the risks and can help the client avoid them. Such planning and precaution certainly will reduce the risk of exposure to costly and protracted antitrust and competition litigation. V

---

[1] In the vernacular, the term "antitrust" has come to include the gamut of trade and competition regulation and cases, although traditional sources of "antitrust law" generally were regarded as the Sherman and Clayton Antitrust Acts, the Federal Trade Commission Act and the Robinson-Patman Act.

[2] See, e.g., Membership Roster of the International Competition Network, available at http://www.internationalcompetitionnetwork.org.

[3] *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 256 (4th Cir. 2002); see also *Carefirst of Maryland, Inc. v. Carefirst Pregnancy Centers, Inc.*, 334 F. 3d 390 (4th Cir. 2003).

[4] *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007).

[5] *Dr. Miles Med. Co. v. John D. Park & Sons*, 220 U.S. 373 (1911).

[6] *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007).

[7] *Conley v. Gibson*, 355 U.S. 41 (1957).

(Katz continued from p. 37)

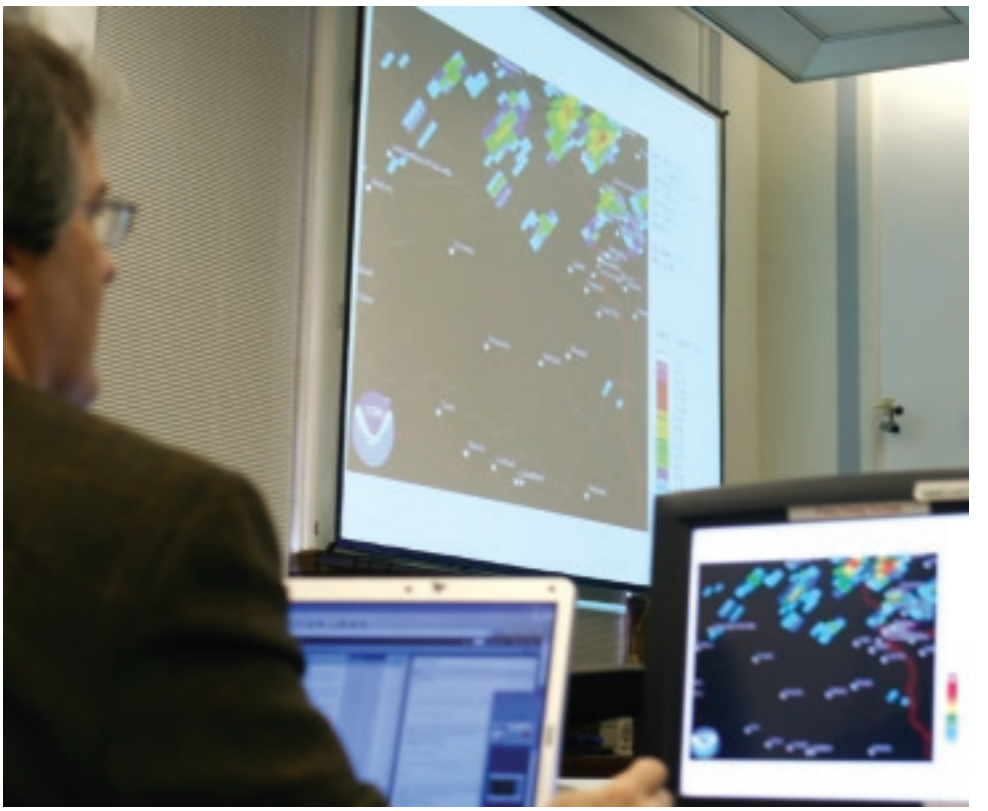
Courtroom Technology

The majority of federal courtrooms in West Virginia are wired for electronic presentation of evidence, and our state courts that are not currently wired are planning to add multimedia presentation capabilities over the next couple of years. Utilizing flat panel displays and projection screens, electronic presentation of computer-based evidence is far more efficient than traditional paper-based presentation, and keeps jurors more engaged, focused and involved throughout the trial process. Used in conjunction with trial presentation software, the wired courtroom is truly a marvel of modern technology and courtroom efficiency.

Electronic Filing and Service

West Virginia's Mass Litigation Panel is now implementing a pilot project for electronic filing and service of motions, pleadings and related documents, and rules governing electronic filing have been presented to the West Virginia Supreme Court of Appeals for review and approval.

Electronic filing and service is the foundation of the paperless court initiative, a critical first step that will greatly improve case processing efficiency, provide immediate access to case documents and automate service to all parties. In the long term, electronic filing and service will become the standard not only in mass litigation matters, but for all West Virginia cases.



Today's law firms have a variety of software, equipment, communication tools and presentation options available, any of which can be used to gain a technological edge in litigation and courtroom practice. This is a trend that will increase significantly as future generations of more tech-savvy lawyers – and jurors – enter the courtroom.

(Stowers continued from p. 17)

Lexis terminal always won. When Bowles Rice built its new Charleston office 11 years ago, it did not contain a law library. The seemingly endless rows of law books were replaced by computers.

Of course, this ability to locate legal authorities by electronic means again increased the velocity of the practice. Cases, secondary sources and statutory law could be found by the computer, merged with forms, motions and canned briefs, and the aggressive litigator could file papers not only with form, but with substance. Litigation again got faster and less civil.

Then came e-mail and the Internet. From my perspective, and with the possible exception of the computer, nothing has changed the practice of litigation as much as e-mail. With e-mail, arguments and contentions, formerly made in letter form and mailed or faxed, could now be hurled instantly from one desk to another. These instant, pithy responses could be typed and sent at the speed of light. Not only could the response be sent to the opposing lawyer, but at the same time copies of the responses and arguments could be sent to the clients, other lawyers in the case, the judge, and anyone else who might be available to read or join in a spirited e-mail exchange. I don't know what it is about e-mail, but even polite disagreements, voiced in an e-mail message, seem more belligerent. In the void created by the absence of actual face-to-face meetings and extended telephone voice interaction, civility between counsel continued to deteriorate.

Since all types of documents and images can be attached to e-mails, the ability to truly overwhelm another attorney with filings is now possible. Clients and litigants use e-mail in their businesses every day. Subpoenas and requests for copies of every party's e-mail communication are routine. Today in federal court in West Virginia, all filings are made with the clerk by e-mail, and notice of all filings is sent to all the other lawyers in a case, also by e-mail. In fact, it is not possible to file a paper pleading or document with the federal clerk, except in cases of emergency. Since all pleadings and legal documents are filed electronically, it only makes sense that these filings be stored in the law office electronically. It is no longer necessary to keep a paper office file related to the case, except for the convenience of the attorney or the staff.

When litigators are not sending pleadings, motions, letters and notices to each other, they can often be found in conference rooms interrogating the opposing party's witnesses in a deposition. The transcript of these interrogations were formerly made by a shorthand reporter, taking down each word in shorthand code. After the deposition, these reporter notes were typed into a transcript in Q & A form. Shorthand reporters were replaced by court reporters using steno machines, as commonly seen on TV. The steno machine is still being used, but is now interfaced with a laptop computer, which can provide a real-time transcript of the questions and answers. These real-time transcripts can be broadcast remotely on the Internet, saved on disk for later review, or shown locally on a flat screen panel.

Depositions today are also routinely videotaped with digital video cameras. Third party vendors can synchronize the videotape with the transcript creating a video presentation of the witness giving the answer to the question, with captions of the text scrolling beneath the picture. The power of this visual and audio presentation in the courtroom can be compelling.

The availability of electronic media gave rise to the electronic courtroom, now found in a few West Virginia counties and all the federal courts located in West Virginia, which allow attorneys and witnesses to present testimony and exhibits by video or by graphical presentations resembling PowerPoint presentations. The jury is generally entertained by the visual displays, attention spans are longer and comprehension is greatly improved. Of course, the expense of the trial has increased accordingly.

Litigation has indeed changed over the years, and it will continue to change during the 21st century. Just as 30 years ago, we could have never predicted the changes we've seen, we cannot now imagine the impacts of the yet uninvented technology. While DNA and digital fingerprint recognition has significantly affected the outcome of many criminal proceedings, so far no one has invented the digital "fool-proof" lie detector that will revolutionize civil proceedings. Until that time, it will be necessary for juries to continue to determine the actual facts in a trial.

In the meantime, we must all hope that there will be a return to civility in the process, and to the end, that professionals can continue to act as professionals, no matter the medium or format. Personally, I am betting on the face-to-face video telephone or the hologram to enhance human interaction and initiate the return of civility to our justice system. V

(Wills continued from p. 31)

Another exception from the duty to review or provide ESI in discovery is where the ESI is not readily accessible without undue burden and cost. Determining which information is not readily accessible is not a task for the fainthearted or the electronically challenged. This will require an analysis of the type of electronic data, how data is stored, whether it has been damaged or fragmented and whether it was produced or created on an obsolete system that cannot be retrieved on a successor system.

The *Commentary on Preservation, Management and Identification of Sources of Information That Are Not Reasonably Accessible* prepared by the Sedona Conference (July 2008) provides a valuable starting point and methodology for this process.[3] The Sedona Conference Commentary displays a decision tree for determining ESI preservation obligations and has developed six guidelines for litigants and courts to follow in determining whether ESI is accessible. Again, this is an analysis that will require IT professional expertise as well as technologically savvy legal counsel who has a firm grasp of the issues involved in the litigation.

Many articles have been written concerning the soaring costs of discovery as a result of the duty to preserve and to produce ESI. A proactive ESI retention program as described in this article will be helpful in reducing these costs but by no means will eliminate them. The problems, costs and complexities of ESI will continue to be a topic to be resolved by the courts. We can expect revised procedures and further amendments to court rules as the litigants, attorneys and their IT experts continue to encounter the challenges presented by ESI to businesses facing litigation.

[1] *Zubulake v. UBS Warburg* ("*Zubulake I*"), 217 F.R.D.309 (S.D.N.Y. 2003). There have been five *Zubulake* decisions four of which have addressed electronic discovery. See *Zubulake III*, 216 F.R.D. 280 (S.D.N.Y. 2003); *Zubulake IV*, 220 F.R.D. 212 (S.D.N.Y. 2003) and *Zubulake V*, 229 F.R.D. 422 (S.D.N.Y. 2004).

[2] Rule 37(e) of the Federal Rules of Civil Procedure.

[3] The Sedona Conference permits individuals to download its selected publications at no charge for their own use subject to the terms of its copyright notice at www.thesedonaconference.org/publications_html.

(McMillan continued from p. 29)

wealth or financial position of the defendant should not be a factor in the assessment. The West Virginia Supreme Court has yet to embrace this finding. On the contrary, the West Virginia Supreme Court still holds that the size of the defendant's pocketbook remains relevant to the punitive damages analysis. In other words, if a defendant is a large multi-national corporation with ample means, that defendant should expect to incur a larger punitive damages verdict than a smaller defendant exhibiting the same conduct.

It bears observing that a large punitive damage award is not automatically reviewed by the West Virginia Supreme Court. This unknown factor raises the risk of going to trial with punitive damages still in play. In short, large punitive damages awards remain a fact of life for lawyers and litigants. In this environment, a responsible, risk-management approach to litigation demands a frank assessment of each case's potential for an award of punitive damages. For now, it appears that punitive damages will remain an uncertain variable in our jurisprudence and, as aptly noted by one of our West Virginia Supreme Court Justices, a viable means by which litigants can attempt to redistribute wealth from without the state to within. [1]

[1] Justice Neely in the case of *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897 (W. Va. 1991).

(Webster continued from p. 13)

A related but growing concern is the method used to fund judicial campaigns. Right now, judges must rely upon a "committee," which solicits contributions from the legal profession, businesses and other groups and individuals who routinely practice before them. At best, it is a clumsy, awkward process for both judges and their contributors. One alternative method is to publicly finance the judicial campaigns of those candidates who will voluntarily accept them, particularly at the state level. This method will be substantially ineffective if we cannot regulate the campaign activities of third-party groups, which are lawfully permitted to spend unlimited funds on political activity without limitation or disclosure of a contributor's name. Legislative attempts to place reasonable restrictions on third-party campaign contributions and to require the disclosure of the contributor's name have been recently struck down by federal courts as unconstitutional. Therefore, any substantive reform of our judicial system must include a workable mechanism to reasonably and constitutionally regulate judicial campaign spending.

Other Proposals Also Expected

Business-endorsed legal reforms are not the only substantive proposals our state legislature will see during the upcoming session. Consumer groups, which vigorously opposed the legal reform we recently enacted, will likely push to repeal those changes or amend the existing statutes with language that provides heightened consumer protections. Other consumer-oriented proposals include the creation of an independent insurance advocate for insurance-related matters, a ban on the use of credit scoring by insurance companies to determine insurance rates, and the adoption of laws that restrict predatory lending practices and regulate the manner in which out-of-state banking institutions can engage in sub-prime mortgage loan agreements with homeowners.

I certainly cannot predict and would similarly decline to speculate about how the legislature will ultimately respond to requests from business groups to expand tort reform, or from consumer groups to repeal or modify the existing tort statutes. It is entirely possible that lawmakers may be reluctant to pass additional reform until we are certain that the current reform initiatives have been effective. On the other hand, there does not seem to be, at this time, any genuine interest in changing or repealing these recent changes. My prediction regarding status of past legal reform? We will likely stay the course.

Tort Reform: Prospects for Future Legislative Action

Our West Virginia Legislature's primary duty is to enact laws to govern our state and create sound public policy on behalf of our citizens. Every year, we carefully consider various proposals from legislators, citizens and interest groups to improve our criminal and civil laws.

In the House of Delegates, the Judiciary Committee has broad jurisdiction over many subjects, including civil and criminal law (i.e., tort reform), judicial proceedings and our courts. This committee handles a majority of bills that are introduced each year. As the Judiciary chair, it is my responsibility to review the assigned legislation. In doing so, I generally consult with my legal staff, committee members and/or other stakeholders before I determine whether each bill should be considered, revised or deferred for future consideration.

As far as future tort reform is concerned, from my perspective efforts by respected business groups like the West Virginia Chamber of Commerce and the Business Industrial Council to enact meaningful legal reform are impeded by activities of other special interest groups that unfairly portray the situation in West Virginia and refuse to acknowledge the state's successful legal and tax reform initiatives. Far more effective are efforts by the State Chamber and other business groups who both recognize and publicly credit lawmakers for passage of the recent legal and business reforms, and also advocate additional reform in a respectful and thoughtful fashion, bringing facts and issues to the table for discussion and dialogue.

In all events, the prospect for future tort reform largely depends on the substance of the specific proposal and whether it is needed or merely desired. Moreover, in light of the recently enacted legal reforms, we must examine the short- and long-term effect of each on the state's business climate to determine whether they adequately addressed those perceived inequities in our judicial system, or whether other contributing factors exist. We also must do our best to ascertain whether these measures had any adverse impact on workers, consumers or the environment.

When legitimate deficiencies in state law are identified and actually supported by credible evidence, lawmakers must strike a balance between competing interests. However, as state policymakers, we should never make wholesale changes to state law based upon the outcome in one particular case. The laws that we pass are not case-specific; they apply to and impact our entire state. We must contemplate changes to our state law as a meticulous surgeon or truth-seeking jurist would – precisely, methodically, thoughtfully and thoroughly.

In closing, I want to remind others that West Virginia's state legislature is comprised of individuals from diverse cultural, religious, educational and socio-economic backgrounds. Contrary to the belief of some, West Virginia lawmakers like to serve because we genuinely care about our state and want to improve the quality of life for our citizens, whom we were elected to represent and protect. Thus, when we need to reform the law, we will do so. That is our job.

---

[1]See *legal-definitions.com* and *merriam-webster.com.*
[2]Our Supreme Court of Appeals recently agreed to hear the *Dupont* appeal. The other two appeals were filed by *Chesapeake Energy, et al*, and *Massey Coal, Inc.*

The Bright Stuff.

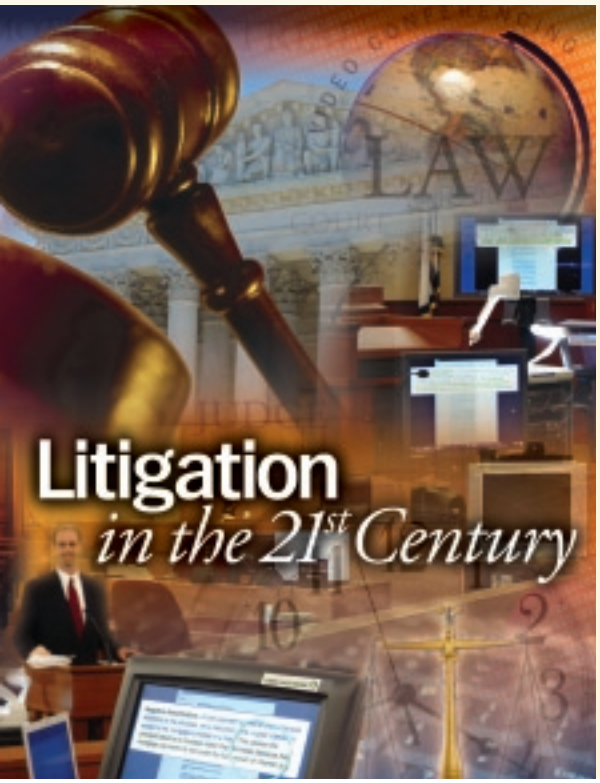
Bowles Rice is pleased to welcome seven outstanding new associates. These talented young lawyers come from several of the country's leading law schools, and are among the best and brightest of their generation. They will join an experienced, respected roster of Bowles Rice lawyers in our expanding practice areas of energy law, real estate law, litigation, commercial and financial services, environmental law and intellectual property law.

Joining Bowles Rice as new associates (from left):
Ross C. Lovely, Lexington; Britt A. Freund, Charleston; Jeremy D. Bragg, Morgantown
Jeffrey M. Shawver, Charleston; Jeffrey R. Soukup, Lexington; Robert E. Akers, Charleston
Luke T. Schmitt, Charleston

Litigation in the 21st Century
Fall 2008

VIEWS & VISIONS

A publication of Bowles Rice McDavid Graff & Love LLP



Charleston, WV
600 Quarrier Street
Charleston, West Virginia 25301
(304) 347-1100

Parkersburg, WV
501 Avery Street, Fifth Floor
Parkersburg, West Virginia 26101
(304) 485-8500

Martinsburg, WV
101 South Queen Street
Martinsburg, West Virginia 25401
(304) 263-0836

Lexington, KY
333 West Vine Street, Suite 1700
Lexington, Kentucky 40507-1639
(859) 252-2202

Morgantown, WV
2400 Cranberry Square
Morgantown, West Virginia 26508
Phone: (304) 594-1000

Morgantown, WV
7000 Hampton Center
Morgantown, West Virginia 26505
(304) 285-2500

Winchester, VA
480 West Jubal Early Drive, Suite 130
Winchester, Virginia 22601
(540) 723-8877

Bowles Rice
McDavid Graff & Love LLP

P. O. Box 1386
Charleston, WV 25325

PRSRT STD
U.S. Postage
PAID
Parkersburg, WV
Permit No. 8