THE WEST VIRGINIA STATE BAR 2015 ANNUAL MEETING

April 16-18, 2015
Daniels, WV

Role Reversal: You Ask the Questions

Honorable Robert Burnside
Honorable John Hutchison
Honorable H.L. Kirkpatrick
Judges of the Circuit Court of Raleigh County

The Expansion of Arbitration Law in West Virginia

Justice Menis E. Ketchum

I. Arbitration is here to stay.

1) Adhesion contracts are typical. 90% of all agreements executed today are form agreements that are offered on a "take-it-or-leave-it" basis.

2) Agreements are getting longer. In 1980, the typical credit card contract was about 400 words long; today many top 20,000 words.

3) Agreements are getting more complex. The average American reads at a 9^{th} grade level; a typical credit card contract is written at a 12^{th} grade level. Some can only be understood by someone at an 18^{th} grade level – meaning six years of college.

4) Today, many contracts are form consumer agreements on the internet. An agreement is revealed on a screen and the consumer "clicks" his/her acceptance.

5) *Almost all these agreements contain an arbitration provision*.

6) Circuit courts are going to be swamped with the enforceability issue of these arbitration agreements until the law is settled. In the last three years the WV Supreme Court has issued more than 20 decisions relating to the enforceability of arbitration agreements.

7) Prediction: Within the next 10 years you will sign a form arbitration agreement when you go to the hospital or doctor.

II. Federal Arbitration Act – (FAA).

1) "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

2) Section 2 of the FAA mostly applies to:

    a. A written provision

    b. In either

        i. A maritime transaction or

        ii. A contract *affecting* interstate commerce. *Allied-Bruce Terminix Companies v. Dobson*, 513 U.S. 265, 277 (1995) (the phrase "involving commerce" "signals an intent to exercise Congress' commerce power to the full.").

    c. To settle any controversy arising out of the transaction or contract by arbitration.

3) The U.S. Supreme Court has repeatedly said that arbitration agreements are to be enforced.

    a. The FAA reflects an "emphatic federal policy in favor of arbitral dispute resolution." *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc*., 473 U.S. 614, 631 (1985).

    b. "[Q]uestions of arbitrability [must] ... be addressed with a healthy regard for the federal policy favoring arbitration." *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp*., 460 U.S. 1, 24–25 (1983).

    c. The purpose of the FAA is to "ensure that private arbitration agreements are enforced'" *AT&T Mobility v. Conception*, 131 S.Ct. 1740, 1748 (2011).

    d. Courts must rigorously enforce arbitration agreements according to their terms. *Amer. Express Co. v. Italian Colors Rest.*, 570 U.S. ___, 133 S.Ct. 2304 (2013).

4) In 1977, the W.Va. Supreme Court agreed, stating: "In spite of all the reasons for being suspicious of arbitration, the weight of modern, enlightened authority favors arbitration as a preferred means of conflict resolution." *Board of Education v. W. Harley Miller, Inc*., 160 W. Va. 473, 482, 236 S.E.2d 439, 445 (1977).

III. FAA Preemption.

1) Any state law, statute or common law rule that treats arbitration with disfavor is preempted by FAA. *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984); Syllabus Point 8, *Brown v. Genesis Healthcare Corp.*, 228 W.Va. 646, 724 S.E.2d 250 (2011).

2) In enacting the FAA, Congress "withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

3) "When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1747 (2011).

4) Examples of W.Va. laws favoring judicial resolution that are (or are probably) displaced or preempted by the FAA:

    a. Nursing Home Act – Any waiver by patient of right to bring lawsuit is null and void, § 16-5c-15c. Syllabus Point 11, *Brown v. Genesis Healthcare Corp.*, 228 W.Va. 646, 724 S.E.2d 250 (2011).

    b. Residential Care Communities Act and Assisted Living Residences Act – Any waiver of the right to bring a lawsuit is null and void, and contrary to public policy, § 16-5N-15 and § 16-5D-15.

    c. Consumer Credit and Protection Act – Consumer has the right to bring a lawsuit for violation of Act in a circuit court, § 46A-6-106.

    d. Labor Management Relations Act – Suits involving contract between an employer and a labor organization may be brought in state court, § 21-1A-7.

    e. Petroleum Products Franchise Act – Producers or dealers may bring a lawsuit for violation of Act in a circuit court, § 47-11C-6.

    f. W.Va. Constitution – in a dispute exceeding $20 in value there is a right to a jury trial, Article III, § 13.

IV. The Exceptions to FAA preemption.

1) General state contract law.

   a. Section 2 of the FAA states that arbitration provisions "shall be valid, irrevocable, and enforceable" UNLESS "such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C § 2.

   b. If the arbitration provision is invalid under general state contract law then it is unenforceable. However, it must be a state law that applies to *all contracts*, not just to arbitration provisions or arbitration agreements.

   c. Nothing in the FAA overrides normal rules of contract interpretation. "Generally applicable contract defenses—such as laches, estoppel, waiver, fraud, duress, or unconscionability—may be applied to invalidate an arbitration agreement." Syllabus Point 9, *Brown v. Genesis Nursing Home*, 228 W.Va. 646, 724 S.E.2d 250 (2011).

   d. Arbitration provisions must be treated like any other contract. A law that specifically targets them for disfavor is preempted. Conversely, a law can't elevate arbitration contracts a level of importance above all other contracts. The FAA "simply ensures that private agreements to arbitrate are enforced according to their terms." Syllabus Point 7, *Brown v. Genesis Nursing Home*, 228 W.Va. 646, 724 S.E.2d 250 (2011).

2) Congressional mandates

   a. Congress can override the FAA mandate by adopting a contrary congressional command. The command must be specific and clear. *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665 (2012).

   b. Examples:

      i. Commodity Whistleblower Incentives and Protection Act, 7 U.S.C. § 26 ("No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section.")

      ii. Dodd-Frank Act, 15 U.S.C. § 1639c ("No residential mortgage loan . . . may include terms which require arbitration . . ."); *State ex rel. Ocwen Loan Servicing, LLC v. Webster*, 2013 WL 6050723 (Nov. 13, 2013).

V. Circuit Court's Role.

1) Where there is an arbitration agreement or provision, and a party moves to compel that a dispute be sent to arbitration, the trial court is limited to two tasks:

    a. Determining if an enforceable arbitration agreement exists between the parties; and

    b. Determining if the dispute falls within the scope of the arbitration agreement.

2) Most of the time trial courts will be asked to determine if, under state contract law, the arbitration provision is unenforceable because it is either:

    a. Unconscionable

    b. Non-existent, because no arbitration agreement was formed.

Sources

Rent-A-Center West v. Jackson, 561 U.S. ___, 130 S. Ct. 2772 (2010).

Syl. Pt. 2, *State ex rel. TD Ameritrade, Inc. v. Kaufman*, 225 W.Va. 250, 692 S.E.2d 293 (2010)

VI. Doctrine of Severability (the fantastic doctrine).

1) The party opposing arbitration can only oppose the arbitration provision. If the parties do not challenge the arbitration provision, then it is presumed valid and enforceable and any other dispute about the agreement must be decided by an arbitrator. Syllabus Point 4, *State ex rel. Richmond American Homes v. Sanders*, 228 W.Va. 125, 717 S.E.2d 909 (2011).

2) If the party challenges the entire contract as unenforceable, or challenges provisions other than the arbitration provision, then the challenge fails. It is the job of the arbitrator to determine the enforceability of the entire contract.

3) The challenging party must sever the arbitration clause from the rest of the contract and make a "discrete challenge to the validity of the arbitration clause" only.

4) The trial court only determines if the arbitration provision is enforceable under principles of state contract law.

5) In 1967, Justice Black derided the severability doctrine as "fantastic." In 2010, four dissenting Justices called the doctrine "akin to Russian Nesting Dolls".

Sources

Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967).

Rent-A-Center West v. Jackson, 561 U.S. ___, 130 S. Ct. 2772 (2010).

State ex rel. Richmond American Homes v. Sanders, 228 W.Va. 125, 717 S.E.2d 909 (2011).

VII. How do we interpret a severed bare-bones arbitration clause affecting interstate commerce under WV contract laws?

> ***Any claim or dispute that arises from, or is related to, this agreement shall be resolved by arbitration in accordance within the rules of the American Arbitration Association.***

1) To make some sense out of the severability doctrine, the W.Va. Supreme Court held that a trial court can look at the arbitration provision in the context of the entire contract, under general contract law, to determine the validity of the *severed* arbitration provision.

2) "[T]he trial court may rely on general principles of state contract law in determining the enforceability of the arbitration clause. If necessary, the trial court may consider the context of the arbitration clause within the four corners of the contract, or consider any extrinsic evidence detailing the formation and use of the contract." Syllabus Point 4, *State ex rel. Richmond Am. Homes v. Sanders*, 228 W.Va. 125, 717 S.E.2d 909 (2011)

3) Examples:

4) An arbitration clause where party gives up claims for breach of warranty or consequential damages.

5) Consideration for the arbitration provision. Syl. Pt. 6, *Dan Ryan Builders, Inc. v. Nelson*, 230 W.Va. 281, 737 S.E.2d 550 (2012) ("The formation of a contract with multiple clauses only requires consideration for the entire contract, and not for each individual clause."). .

6) Some states hold that since the arbitration provision is severed then there must be separate consideration for the arbitration provision.

7) We have held that under our general contract law that so long as the overall contract is supported by sufficient consideration, there is no requirement of separate consideration for separate contract (arbitration) provisions. Syl. Pt. 4, *Kirby v. Lion Enterprises, Inc*., 13-0379, 2014 WL 902542 (W.Va. Mar. 7, 2014) (modifying prior law to say that an arbitration clause in a contract need not be specifically "bargained for.").

VIII. Exception to severability doctrine: Delegation Clauses.

> ***The Arbitrator shall have exclusive authority to resolve any dispute relating to this Agreement's enforceability including any claim that all or any part of this Agreement is void or voidable.***

1) A "delegation provision" delegates to the arbitrator the authority to resolve any dispute about the enforceability of the arbitration provision.

2) The Supreme Court has held that a "delegation provision" is valid and the arbitrator determines his/her own jurisdiction, i.e., whether the arbitration provision is unconscionable (enforceable). *Rent-A-Center., West, Inc. v. Jackson*, 561 U.S. 63 (2010)

3) If there is a delegation provision, then all issues about the enforceability of the contract are decided by the arbitrator and not the trial court, except one: whether the delegation clause is enforceable.

4) Trend – Some courts are holding when the arbitration provision incorporates the AAA rules this is a delegation to the arbitrator to decide all enforceability issues. This is because the AAA rules give the arbitrator the power to rule on his/her own jurisdiction. *See, Cartagena Enterprises v. J. Walter Thompson Co*., 2013 WL 566 4992 (S.D.N.Y. 2013).

IX. Ordinarily, the trial judge's role boils down to determining if the arbitration provision is unenforceable because it is unconscionable (unfair) under WV's general contract law.

1) Unconscionability means an overall or gross imbalance, one-sidedness, or lop-sidedness in a contract. A court is justified in refusing to enforce the contract as written if it is unconscionable.

2) The standard for determining unconscionability is a discretion standard.

> A court in its equity powers is charged with the *discretion* to determine, on a *case-by-case basis*, whether a contract provision is so harsh and overly unfair that it should not be enforced under the doctrine of unconscionability. Syl. 9, *Dan Ryan Builders v. Nelson*, 230 W.Va. 281, 737 S.E.2d 550 (2012).

3) In most cases (but not all) the contract provisions (arbitration) must be **both** procedurally unconscionable and substantively unconscionable.

X. Procedural Unconscionability: Unfairness in Making the Contract

1) Procedural unconscionability involves inequities, improprieties, or unfairness in the bargaining process and the formation of the contract.

2) Adhesive contracts are an example of procedural unconscionability. Contracts of adhesion are drafted by the party of superior bargaining strength, and the other party must accept it or reject it. It is submitted by one party on the basis of "this or nothing." Syllabus Point 18, *Brown v. Genesis Healthcare Corp.*, 228 W. Va. 646, 724 S.E.2d 250 (2011).

3) Every purchase or agreement on the internet is adhesive.

4) An adhesion contract is not procedurally unconscionable *per se*.

   Whether a contract is adhesive is only a relevant factor in determining whether the contract is procedurally unconscionable. It is the starting point because there are good adhesive contracts.

   "A contract of adhesion should receive greater scrutiny than a contract with bargained-for terms to determine if it imposes terms that are oppressive, unconscionable or beyond the reasonable expectations of an ordinary person." Syllabus Point 18, *Brown*.

5) Example of an adhesive arbitration provision that was found to be enforceable: *State ex rel. AT&T Mobility v. Wilson*, 226 W.Va. 572, 703 S.E.2d 543 (2010) and *Shorts v. AT&T Mobility*, 2013 WL 2995944 (W.Va. No. 11-1649, June 17, 2013) (memorandum decision); *AT&T Mobility v. Concepcion*, 131 S.Ct. 1740 (2011).

   The AT&T cell service arbitration provision was found conscionable because:

   a. AT&T pays the costs of arbitration;

   b. There is no restriction on remedies, i.e. punitive damages and attorney's fees may be awarded;

   c. A customer's billing address determines the venue of arbitration;

   d. A customer may opt to have an in-person hearing, a telephonic hearing, or a "desk arbitration";

   e. AT&T may not seek attorney's fees; and

   f. AT&T is required to pay customers either the arbitration award or $10,000 plus double attorney's fees if the award is more than AT&T's last settlement offer.

XI. Factors to determine if there is procedural unconscionability.

To determine if an adhesive contract (or any contract) is procedurally unconscionable involves a fact-intensive analysis involving a range of factors including:

a. Age.

b. Literacy.

c. Business sophistication of the complaining party.

d. Imbalance in bargaining power

e. Level of education.

f. Social economic status.

g. Bad behavior on the part of the merchant, including the use of pressure tactics to obtain hasty signatures.

h. Hidden or unduly complex contract terms; fine print buried in small print.

i. The adhesive nature of the contract.

j. Whether terms were explained to the "weaker" party.

k. The setting in which the contract was formed; did the parties have a reasonable opportunity to consider and understand the terms of the contract.

l. Good behavior of merchant such as using simple and concise contractual language; large, bold typeface to call attention to important provisions.

m. Opt out provisions – if the consumer can reject the arbitration provision and the stronger party will still complete the transaction, the provision may not unconscionable. *State ex rel. Ocwen Loan Servicing v. Webster*, ___ S.E.2d ___, 2013 WL 6050723 (W.Va. Nov. 13, 2013) (per curiam).

Sources

Brown v. Genesis Healthcare Corp., 228 W.Va. 646, 681-83, 724 S.E.2d 250, 285-87 (2011).

XII. Substantive Unconscionability: Unfairness in the Terms of the Contract

1) It is unfairness in the contract itself.

2) The focus of the inquiry is whether the terms of the contract is one-sided and will have an overly harsh effect on the weaker party.

3) More simply put, it refers to whether the terms of the contract are, in a commercial sense, unreasonably favorable to the more powerful party.

XIII. Factors to determine if there is substantive unconscionability.

1) Commercial reasonableness of the contract terms.

2) The purpose and effect of the terms. Are the terms unfair or so one-sided as to lead to absurd results? *See Art's Flower Shop, Inc. v. Chesapeake and Potomac Telephone Co. of West* Virginia, *Inc.*, 186 W.Va. 613, 413 S.E.2d 670 (1991) (telephone company breached contract to place ad in Yellow Pages; contract was unconscionable because it limited damages to twice the cost of the ad).

3) The allocation of the risks between the parties.

4) Public policy concerns – federal and state statutes, constitution, case decisions and common law.

5) Allocation of risks – high costs to weaker party – so high it could preclude a litigant from using arbitration. The risk that the claimant may have to bear substantial costs would deter him/her/it from going to arbitration. *Dunlap v. Berger,* 211 W.Va. 549, 567 S.E.2d 265 (2002); *State ex rel. Richmond American Homes v. Sanders,* 228 W.Va. 125, 137-38, 717 S.E.2d 909, 921-22 (2011); *Green Tree Financial Corp.–Alabama v. Randolph*, 531 U.S. 79, 90 (2000).

6) Waiving claims against stronger party, e.g., breach of warranty, punitive damages.

7) Mutuality of obligation.

   A contract that lacks mutual, reciprocal obligations (for instance, the weaker party has to arbitrate all claims while the stronger party reserves the right to go to court) may be so one sided and unreasonably unfair to one party that it is unconscionable.

   Lack of mutuality does not automatically render an agreement unconscionable; the trial court must still assess the agreement in light of the facts and circumstances. *Dan Ryan Builders v. Nelson*, 737 S.E.2d 550 (2012).

   For example, *State ex. rel. Ocwen Loan v. Webster*, ___ S.E.2d __ (2013). A loan agreement had an arbitration provision. The agreement let the bank use the judicial process for foreclosure and unlawful detainer. The Court found it was not unconscionable because both parties could use the judicial process under West Virginia law to enforce these provisions.

8) Not allowing attorney fees that can be awarded under consumer status. *State ex.rel. Ocwen Loan v. Webster*, ___ S.E.2d ___ (2013).

9) The W.V. and U.S. Supreme Court have recognized that if high costs to arbitrate a claim essentially prohibits access to the forum to obtain relief, then contract is substantively unconscionable.

10) However, if there is affordable access despite the fact that the claim will cost more to litigate than the claim is worth does not allow for voiding the arbitration provision. *Amer. Express Co. v. Italians Colors Rest.*, ___ U.S. ___, 133 S.Ct. 2304 (2012) (cost of litigating single antitrust claim was "several hundred thousand dollars" while recovery averaged $12,850; still, Court found clause precluding class arbitrations was enforceable because individual parties could still pursue individual claims).

11) Limitations on discovery. However, an arbitration agreement may specify that discovery can be limited pursuant to the rules of procedure of the arbitration forum selected in the agreement.

    U.S. Supreme Court cases acknowledge that simplified procedures in arbitration necessarily limit the formalities of court-based discovery. *State ex rel. Ocwen Loan Servicing, LLC v. Webster*, ___ S.E.2d ___, 2013 WL 6050723 (Nov. 13, 2013).

XIV. Sliding scale approach.

1) In most cases, determining if all or part of a contract is unconscionable, there must be some small measure of BOTH procedural and substantive unconscionability. Syllabus Point 20, *Brown v. Genesis Healthcare Corp*., 228 W. Va. 646, 681-83, 724 S.E.2d 250, 285-87 (2011).

2) The W.Va. Supreme Court has adopted a sliding scale approach:

   a. The more substantively oppressive the contract terms, the less evidence of procedural unconscionability is required, and vise-versa.

   b. The more procedurally unconscionable the less substantive unfairness the contract term.

3) Why adopt a sliding scale approach?

   a. If just need procedural unconscionability then every insurance contract in the state is void.

   b. If just need substantive unconscionably then a contract negotiated for weeks between two large corporations with teams of lawyers would be void because they agreed to unfair terms.

4) Not all cases require both procedural and substantive unconscionability. Examples where either may be acceptable:

   a. Consumer Protection Act cases: contract "induced by unconscionable conduct" or "unconscionable at the time it was made." § 46A-2-121.

   b. Rent-to-Own agreements: "unconscionable at the time it was made" or "induced by unconscionable conduct." § 46B-2-2.

XV. Remedy if there is unconscionability.

If a court finds an arbitration provision is unconscionable, or any part of an arbitration agreement to be unconscionable, the court may:

a. Refuse to enforce the arbitration agreement; or

b. Enforce the remainder of the arbitration agreement without the unconscionable clause; or

c. Limit the application of any unconscionable clause to avoid any unconscionable result.

Source

Syl. Pt. 16, *Brown v. Genesis Healthcare*, 228 W.Va. 646, 724 S.E.2d 250 (2011).

XVI. Enforcement of an Arbitration Award.

1) If a court grants a motion to compel arbitration, it may stay the lawsuit. Then, after arbitration, upon motion, the court may reduce the award to judgment.

2) If there is no lawsuit pending, a party may file a lawsuit, usually a declaratory judgment action to enforce the arbitration award.

3) Arbitration awards are not easily impeached. Mistakes of fact and law are not grounds to set aside an arbitration award, unless mistakes are so glaring as to shock the conscience and warrant the conclusion that the arbitrators were biased, prejudiced, or influenced by some ulterior motive. Syl. 1 & 2, *Boomer Coal & Coke Co. v. Osenton*, 101 W.Va. 683, 133 S.E. 381 (1926). See also, *Clinton Water Ass'n v. Farmers Construction Co,* 163 W.Va. 85, 254 S.E.2d 692 (1939) (arbitration award is binding and may only be attacked on the basis of fraud or on those grounds set out in *W.Va. Code*, 55-10-4).

XVII. Specific Problem Areas.

1) THE ARBITRATION FORUM LISTED IN THE ARBITRATION AGREEMENT CAN'T SERVE.

In *Credit Acceptance Corp. v. Front*, 231 W.Va. 518, 745 S.E.2d 556 (2013), the plaintiffs sued because an installment purchase agreement violated the consumer protection act. The credit company moved to compel arbitration.

The arbitration clause in the agreement allowed the parties to select either the National Arbitration Forum or the American Arbitration Association as the arbitration forum.

The circuit court found that the National Arbitration Forum stopped doing arbitrations and the American Arbitration Association did not do these type arbitrations.

Issue: Does the subsequent unavailability of one of the selected arbitration forums materially change the contract and render them unenforceable?

a. If one of the forums remain then use that forum.

b. If all arbitration forums are unavailable then the court can appoint a substitute forum if the choice of the arbitration forum was merely an *ancillary logistical concern rather than an integral part of the agreement.*

The concurring opinion clears up the difference between the forum being a logistical concern or an integral part of the agreement.

In order for the choice of the forum to be an integral concern and prohibit the appointment of an arbitrator by the court, the agreement must unambiguously express the parties' intent not to arbitrate in the event the designated arbitration forum becomes unavailable.

If the arbitration provision does not specifically say we are not arbitrating if one or both forums are unavailable then the court appoints an arbitrator.

2) CLASS ACTION WAIVERS.

The U.S. Supreme Court in *AT&T Mobility v. Conception*, ___ U.S. ___, 131 S.Ct. 1740 (2011), deemed class-action waivers in arbitration agreements to be enforceable. They are not unconscionable. Likewise, the W.Va. Supreme Court has found that a class-action waiver does not automatically render an arbitration agreement unenforceable. *State ex rel. Ocwen Loan Servicing LLC v. Webster*, 2013 WL 6050723 (Nov. 13, 2013); *State ex rel. Richmond American Homes v. Sanders*, 228 W.Va. 125, 717 S.E.2d 909 (2011); *State ex rel. AT & T Mobility, LLC v. Wilson*, 226 W.Va. 572, 703 S.E.2d 543 (2010).

In other words, the provision that requires the plaintiff to bring an individual arbitration claim and does not allow for a class action of similar claims is enforceable.

Further, the U.S. Supreme Court has said, "An arbitrator may employ class procedures only if the parties have authorized them." *Oxford Health Plans LLC v. Sutter*, 133 S.Ct. 2064 (2013). In *Oxford*, the parties' agreement merely said "no civil action" could be filed and "all disputes shall be submitted to final and binding arbitration . . . with one arbitrator." The arbitrator interpreted this phrase to mean that the arbitration clause "expresses the parties' intent that class arbitration can be maintained." The Supreme Court refused to vacate the arbitrator's decision.

3) CLICK-WRAP AGREEMENTS AND INCORPORATION OF AN ARBITRATION AGREEMENT BY REFERENCE.

The facts in *State ex rel. U-Haul of W.Va. v. Zakaib*, ___ S.E.2d ___, 2013 WL 6224331 (No. 13-0181, Nov. 26, 2013) are:

a. Some customers were shown the rental agreement, page by page, on a computer terminal. They clicked at the bottom of each page acknowledging that he "accepted" the page.

b. At the end of the last page the customer clicked that he accepted the agreement and "the addendum to the agreement"

c. There was no mention of an arbitration provision in the agreement shown on the screen.

d. A U-Haul employee printed out the click-wrap agreement and put it in a folder and gave it to the customer.

e. On the outside of the folder was the title "Addendum." Inside the folder was an arbitration clause.

f. Issues:

    a. Was there mutuality of assent to form an agreement?

    b. Was the arbitration agreement in the folder incorporated by reference?

g. The Court ruled that the arbitration clause inside the addendum had not been incorporated into the signed contract, because the customers never assented to the clause.

4) WHERE THERE ARE MULTIPLE DEFENDANTS, AND ONLY SOME HAVE ARBITATION AGREEMENTS WITH THE PLAINTIFF.

In *State ex rel Johnson Controls v. Tucker*, 229 W.Va. 486, 729 S.E.2d 808(2013) seven defendants were sued. The seven defendants filed cross-claims against one another. Three defendants had arbitration agreements with the plaintif and moved for arbitration; the other four defendants did not. The three defendants moved to stay the lawsuit and require the claims against them be arbitrated.

Judge found piecemeal litigation would be very slow and expensive and cause the litigation of an issue multiple times. She found the provisions unconscionable and ordered a joint trial.

The Court found the "circuit court's orders are eminently reasonable logical and just" . . . but also directly contrary to the FAA.

Problem: U.S. Supreme Court had held that the FAA requires that in a dispute that has multiple claims, some arbitrable and some not, the matter must be sent to arbitration even if it will lead to piecemeal litigation. The lawsuit must be stayed until arbitration is concluded.

The Court therefore forced the plaintiff to arbitrate its claims against three defendants, and litigate claims against the other four. Further, all seven defendants would be forced to litigate their cross claims. "The FAA permits courts to protect parties from grossly unfair, unconscionable bargains; it does not permit courts to protect commercial litigants from stupid or inefficient bargains willingly and deliberately entered into."

5) MEDICAL SURROGATES AND MEDICAL POWERS OF ATTORNEY.

In *State ex rel. AMFM v. King*, ___ W.Va. __, 740 S.E.2d 66 (2013), the Court held medical surrogates and medical powers of attorney have authority to make medical decisions.

However, they do not have the right under state contract law to agree to submit future disputes with the medical provider to arbitration.

However, a general power of attorney ordinarily grants someone the authority to sign arbitration agreements.

6) EMPLOYEE HANDBOOK ARBITRATION AGREEMENTS.

New v. Gamestop, Inc., ___ S.E.2d ___ , 2013 WL 5976104 (W.Va. 2013) (per curiam), the employee was given an employee handbook. The handbook said an employee "does not have, nor does this Handbook constitute, an employment contract."

Included with, but set apart from the rest of the handbook, was a separately numbered, fourteen-page arbitration agreement.

The separate, adhesive arbitration agreement was signed by the employee.

The Court looked at the factors of unconscionability and found the employee presented no evidence why the arbitration agreement was procedurally unconscionable or substantively unconscionable. On the facts presented, the Court enforced the arbitration agreement.

7) OPT OUT PROVISIONS FOR THE WEAKER PARTY.

In *State ex.rel. Ocwen v. Webster*, ___ S.E.2d ___ (2013) (per curiam), a homeowner obtained a loan secured by a deed of trust. The trust deed had an arbitration provision.

It stated above the signature line, in large caps, "IF YOU DECLINE TO SIGN THIS AGREEMENT, LENDER WILL NOT REFUSE TO COMPLETE THE LOAN TRANSACTION. . ."

The court held the homeowner proved none of the various factors that may lead to procedural unconscionability and this provision was a factor weighing against unconscionability.

8) ATTORNEY'S FEES.

In *State ex rel. Ocwen v. Webster*, ___ S.E.2d ___ (2013) (per curiam), the arbitration agreement prohibited either party from obtaining an award of attorney fees. Therefore, neither the loan company nor the consumer could be awarded attorney fees under our Consumer Protection Act.

The Court found that the Consumer Protection Act did not *require* an award of attorney fees, but merely gave courts discretion to award fees. Since the Act gave the discretion to award attorney fees to either party, the Court held "we decline to find the requirement that neither party be responsible for the other's attorney fees to be unconscionable."

9) NON-SIGNATORIES.

Sometimes non-signatories are bound by contracts (arbitration agreements). We have no case discussing this issue in detail or that adopts a syllabus on when non-signatories are bound by a contract (arbitration).

In *State ex rel. Richmond Homes v. Saunders*, 228 W.Va. 125, 717 S.E.2d 909 (2011) the court in footnote 13 stated that ordinarily a non-signatory to an arbitration clause can't be forced to arbitrate. There are a number of theories under which non-signatories may be bound. They arise out of common law principles of contract and agency.

They are:

a. Incorporation by reference.

b. Assumption.

c. Agency.

d. Veil piercing/alter ego.

e. Estoppel.

Sources

Syllabus Point 3, *State ex rel. United Asphalt Suppliers, Inc. v. Sanders*, 204 W.Va. 23, 511 S.E.2d 134 (1998) ("A court may not direct a nonsignatory to an agreement containing an arbitration clause to participate in an arbitration proceeding absent evidence that would justify consideration of whether the nonsignatory exception to the rule requiring express assent to arbitration should be invoked.").

10) FAILURE TO READ THE CONTRACT

A party's failure to read an arbitration agreement before signing does not excuse a person from being bound.

"A court can assume that a party to a contract has read and assented to its terms, and absent fraud, misrepresentation, duress, or the like, the court can assume that the parties intended to enforce the contract as drafted." *New v. GameStop, Inc.*, ___ S.E.2d ___, 2013 WL 5976104 (Nov. 6, 2013) (per curiam).

Truancy, Dropouts and Drugs

Justice Robin Jean Davis
Judge Alan D. Moats

WV CONSTITUTION

- The Legislature shall provide, by general law, for a thorough and efficient system of free schools.

  Article XII, Section 1

- Education is a fundamental constitutional right in this state.

West Virginia Supreme Court of Appeals

WHAT WE KNOW ABOUT TRUANCY

- Truancy of elementary-age children is an indication of neglect and abuse.

WHAT WE KNOW ABOUT TRUANCY

- Absenteeism is proven to be the highest predictor of school failure.

WHAT WE KNOW ABOUT TRUANCY

- Frequent absences are one of the most common indicators that a student is disengaging from the learning process and likely to drop out of school early.

WHAT WE KNOW ABOUT TRUANCY

- Truancy is a risk factor for serious juvenile delinquency and adult crime.

How many absences

are

Reasonable

in one school year?

Most People

Say

5 or Less.

Barbour and Taylor Counties

2009-2010 ABSENCES

Percent with more than 10 absences

50%

United States

40 Yrs ago – #1 graduation rate in the world

- Today - # ~~19~~ 21

What We Know About High School Dropouts

- Every 26 seconds a student drops out of school.
- 7,000 students drop out every school day.

8 out of 10 (80%)

dropouts end up in PRISON

75% of all prison inmates are high school dropouts.

More than 80% of prison inmates are functionally illiterate.

Mattie C. Stewart Foundation

DROPOUT RATES

TAYLOR COUNTY

25.3% AVERAGE OVER LAST 5 YEARS

BARBOUR COUNTY

20.92% AVERAGE OVER LAST 5 YEARS

Kids Count Data Center

Taylor County

2000 – #5 lowest dropout rate in state

2005 - #1 **Highest** dropout rate

2006 - #1

2007 - #1

2008 - #1

2009 - #2

Kids Count Data Center

Recent Term of Court

44 Indictments

31 Dropouts

11 people were between 18 and 24

13 High School Graduates

- 1 – Cannot read or write
- 3 – Some College
- 2 – College Degree

BARBOUR AND TAYLOR COUNTIES

SPIKE IN CRIME IN

AGE GROUP 18 – 25 YEARS

OVER LAST FIVE YEARS

State of West Virginia

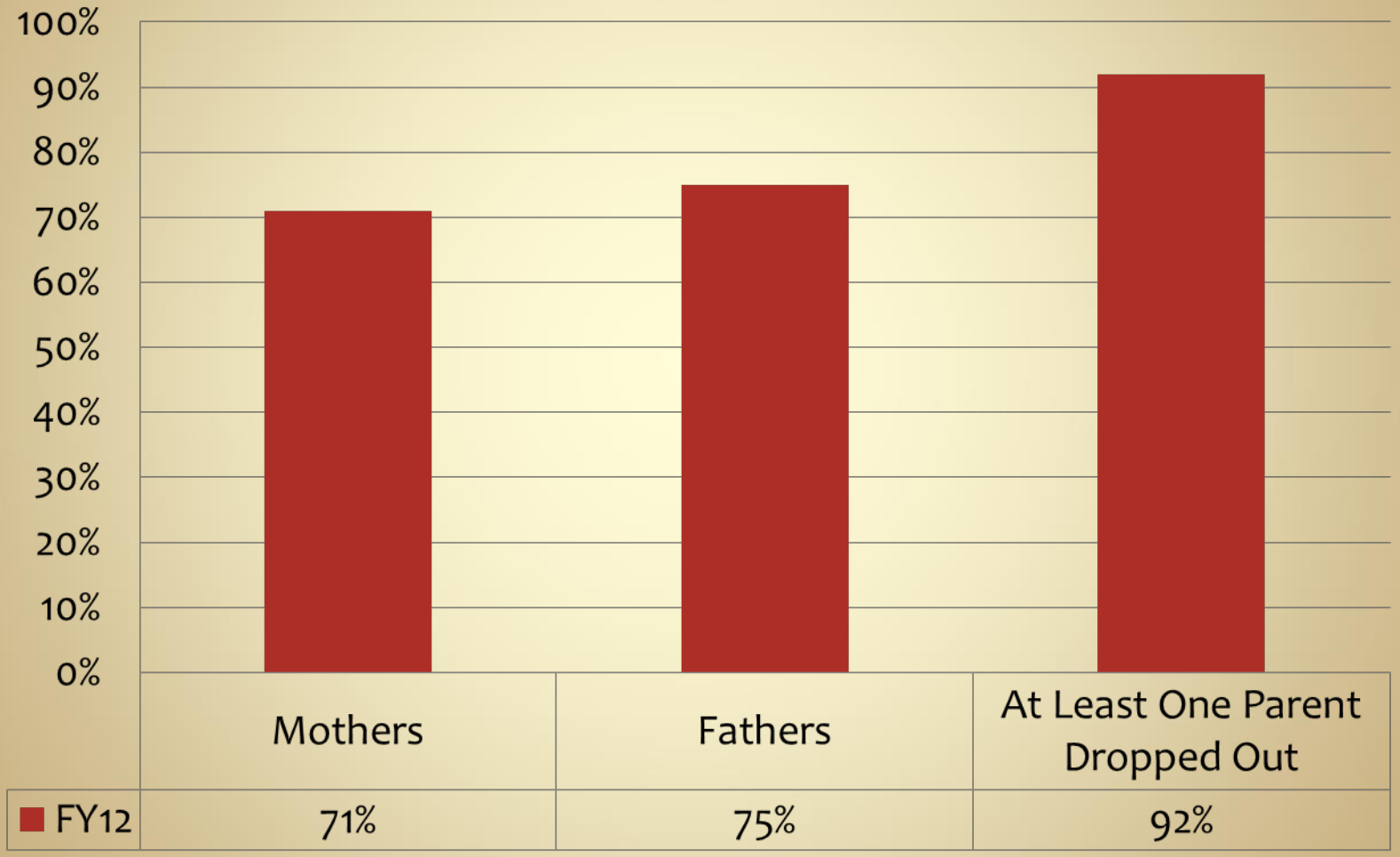
2000/2001 – 2009/2010

Dropouts

34,547

Barbour County

Percentage of Parents of Dropouts Who Were Dropouts Themselves



Prison Population

1991 – 1,630 Inmates

2011 – 6,870 Inmates

Barbour and Taylor Counties

85% OF ALL

CRIMES ARE DRUG RELATED.

#1 Drug Problem: Abuse of Prescription Narcotics

West Virginia

Highest rate of prescription drug use in USA

Forbes.com

Most common illicit drug use:

1. **Marijuana**
2. **Prescription pain killers**

West Virginia

The second highest drug overdose death rate in the nation, mostly from abuse of prescription pain relievers.

CDC (2010)

The school system is

a reflection of the

larger Community.

Drugs are a serious Problem in the school system.

Children who are **Truant**

are more likely to be

involved with **illegal drugs.**

Whose problem is it?

- School system?
- Court system?
- DHHR?
- Law enforcement?

The entire community.

What are

the

consequences?

1. Affects entire learning process
2. Crime
3. Lack of skilled work force
4. Abuse and neglect
5. Low standard of living
6. Low property values
7. Trend continues
8. _____
9. _____
10. _____

Intervention Must Start at the Elementary School Level

- Attendance Procedures

- Attendance Incentive Programs

Truancy Examples

Student # 1:	Days Absent:
K	68.5
1st	53
2nd	23
3rd	54.5
4th	34
5th	42.5

Student # 2:	Days Absent:
K	66.5
1st	43

Student # 3:	Days Absent:
K	26.5
1st	59.5
2nd	33.5
3rd	41

Types of Parents and Children

- Parents Care – Child Cares
- Parents Care – Child Doesn’t Care
- Parents Don’t Care – Child Cares
- Parents Don’t Care – Child Doesn’t Care

Our Approach

- Collaborative
- Educational neglect and abuse petitions
- Juvenile petitions for truancy
- All cases go before the Judge
- Case plans developed by DHHR
- Do it, redo it, do it differently.

Collaboration – The Key to Success

- County Schools
- Circuit Courts
- Prosecuting Attorney's Office
- Juvenile Probation Office
- Department of Health and Human Resources
- Medical Community
- Mentoring Programs
- Public Awareness
- Media Support
- Support from Community

We Can Make A Difference

BARBOUR COUNTY

% with 10 or More Absences

2008 – 74%

2009 – 48%

2010 – 45%

2011 – 48%

2012- 43%

Barbour County

% with 10 or more unexcused absences

2008 – 56%

2009 – 17%

2010 – 14%

2011 – 16%

2012 – 8%

Mass Litigation

Judge John A. Hutchison
10th Judicial Circuit

Timeline of Procedural Issues & Important Cases

Pre-July 1, 1999----July 1, 1999----2001-----2002----2005-----2006-----May 2008

Rule 26 goes into effect

Allman v. MacQueen, addresses "daunting task of trial management"

Appalachian Power Co. v. MacQueen, Requires Rule 42, R.C.P. (consolidation of cases) analysis under the Ranson case

Mobil Corp. v. Gaughn, holds that Ranson findings are longer required

In re Tobacco Litigation, finds that it is permissible to bifurcate the trial into separate liability and damages phases

In re Flood – Pending in Supreme Court

Rule 26 Proposed Amendments

Types of Mass Cases

GRANTED:

1998 Phen-fen
1999 Tobacco
2000 Asbestos
2000 Rezulin
2001 Hearing Loss
2002 Asbestos Unfair Trading Practices
2002 Flood Damage
2003 Lower Extremity Injuries
2003 Overweight Trucks

REFUSED:

1999 Creosote (untimely filed)
2002 Jim Walter Homes
2003 Bulb & Glass Manufacturer
2003 Welding Fumes Manganese
2004 Polyacrylamide

WITHDRAWN:

2004 Welding Fumes
2005 Silica

Rule 26 Definition of "Mass Litigation"

Two or more civil actions pending in one or more circuit courts:

a.) involving common questions of law or fact in mass accidents or single catastrophic events in which a number of people are injured; or

Rule 26 Definition of "Mass Litigation"

Two or more civil actions pending in one or more circuit courts:

b.) involved question of law or fact in "personal injury mass torts" allegedly incurred upon numerous claimants in connection with widely available or mass marketed products and their manufacture, design, use, implantation, ingestion, or exposure; or

Rule 26 Definition of "Mass Litigation"

Two or more civil actions pending in one or more circuit courts:

c.) involving common question of law or fact in "property damage mass torts" allegedly incurred upon numerous claimants in connections with claims for replacement or repair of allegedly defective products, including those in which claimants seek compensation for the failure of the product to perform as intended with resulting damage to the product itself or other property, with or without personal injury overtones; or

Rule 26 Definition of "Mass Litigation"

Two or more civil actions pending in one or more circuit courts:

d.) involving common questions of law or fact in "economic loss" cases incurred by numerous claimants asserting defect claims similar to those in property damage circumstances which are in the nature of consumer fraud or warranty actions on a grand scale including allegations of the existence of a defect without actual product failure or injury.

What must happen in order to be referred and heard by the Mass Litigation Panel?

WHO: Any party, Judge, or Administrative Director of the Court may file

WHAT: both a "Motion to Refer to Mass Litigation Panel" and the Docketing Statement

WHEN: within 6 MONTHS after the filing date of the case in which the motion is being filed (however Judge and Administrative Director may file at any time)

WHERE: In any CIRCUIT COURT where a qualified case is pending

Motion to Refer to Mass Litigation Panel Must Identify:

1. Nature of the action sought to be referred
2. Number of plaintiffs
3. Number of defendants
4. Number of actions pending
5. Basis for request
6. A list of the particular cases in all the circuits for which a referral is being requested
7. If known, whether additional related actions may be filed in the future

Motion to Refer to Mass Litigation Panel

- Shall be served on all the parties, all judges in actions which are the subject of the motion and the Administrative Director
- Any party shall have 20 days after the motion is filed to file a reply memorandum stating its position and opposition
- Any affected judge may file a reply memorandum within 10 days thereafter (proposed rules extend to 20 days)

Then What?

After the response periods have expired, the Circuit Judge will forward motion and all reply memoranda to Chief Justice

The Chief Justice will either

Act directly on the motion and reply memoranda

Direct the panel to conduct a hearing and make findings of fact and recommendations

The Chief Justice will then enter an Order granting or denying the motion

Proposed Amendments

DISCLAIMER – these proposed amendments have not yet been submitted to the Supreme Court and are in draft form only!!

The Supreme Court may refuse, amend, or issue the rules for comment

Definition of "Liaison Counsel"

Attorneys designated by the presiding judge to act on behalf of counsel and other parties in addition to their own clients and charged with essentially administrative matters including:

- communications between the court and other counsel
- receiving and distributing notices, orders, motions, and briefs on behalf of the group
- convening meetings of counsel
- advising parties of developments
- and otherwise assisting in the coordination of activities and positions

Definition of "Lead Counsel"

Attorneys designated by the presiding judge and charged with:

- formulating and presenting position on substantive and procedural issues during the litigation by initiating and organizing discovery requests and responses,
- conducting the principal examination of deponents,
- employing experts,
- arranging for support services,
- and serving as the principal attorneys for the trial for the group and organizing and coordinating the work of the other attorneys on the trial team

Definition of "Certificate of Service"

The document prepared by liaison counsel from the Notices of Appearance and certified by the presiding judge as the official certificate of service for the case.

All counsel shall file a Notice of Appearance to include the name of the attorney and name of the party they represent, name of firm, mailing address, telephone number, fax number, and email address.

A Notice of Withdrawal shall be filed once counsel is no longer counsel for the party for whom a Notice of Appearance has been filed.

Transfer of Actions

- If granted, the Office of the Clerk of the Supreme Court of Appeals shall sent a copy of the order granting the referral to the Mass Litigation Panel to the circuit court(s) where the action is filed, the chair of the Mass Litigation Panel, and all parties.
- Upon receipt of order granting the referral, the circuit court clerk(s) shall forward the entire case file to the Office of the Clerk of the Supreme Court of Appeals.
- Once, assigned to the Mass Litigation Panel, all documents to be filed in the case shall be filed with the OFFICE OF THE CLERK OF THE SUPREME COURT OF APPEALS, clearly identifying the Mass Litigation Panel number assigned to the case.

Assignment of Transferred Actions

- Upon receipt of the referral order, the Panel chair shall, with the advice and consent of the Panel, select and assign one or more Panel judges to preside.

- **When a case is assigned to more than one member of the Panel, to the extent possible, appropriate measures shall be adopted to ensure uniformity of decisions, including the requirement that **all pre-trial dispositive motions be decided by a majority of the judges assigned to preside over the case.**

Removal of Class Actions

If any case transferred to the Panel becomes certified as a class action pursuant to Rule 23, R.C.P., the Panel may request the Chief Justice remove the case from the Panel and transfer it to the appropriate venue

Relevant case citations:

State ex rel. Appalachian Power Co. v. MacQueen, 198 W.Va. 1, 479 S.E.2d 300 (1996).

State ex rel. Allman v. MacQueen, 209 W.Va. 726, 551 S.E.2d 369 (2001).

State ex rel. Mobil Corp. v. Gaughn, 211 W.Va. 330, 565 S.E.2d 793 (2002).

In re Tobacco Litigation, 218 W.Va. 301, 624 S.E.2d 738 (2005).

In re Flood Litigation, 216 W.Va. 534, 607 S.E.2d 863 (2004).

MENTAL CAPACITY, UNDUE INFLUENCE AND CONSENT IN ELDER ABUSE

Judge John A. Hutchison

September 12, 2014

THE TRUTH ABOUT ELDER ABUSE:

Older persons deserve honor and respect . . . not abuse. Reaching old age should be a time to treasure grandchildren and to reminisce about the past. Unfortunately, many of our elder West Virginians reach their so-called golden years abused and alone. People don't like to talk about this shameful secret but the sad truth is that many elderly are taken advantage of by the very people who are supposed to care for them.

ELDER ABUSE IS……..

- A Crime
- Affecting both provincial & rural areas
- Going unpunished
- Predictable
- Being committed in homes where there are also other forms of abuse

FACTS & FIGURES

- The U.S. has 44 million persons age 60 or older, and 36 million people with disabilities
- In the most recent year studied, nationally Adult Protective Services completed 364,512 investigations of abuse, neglect, or exploitation involving older persons living at home (in private, non-institutional settings). Of these, an estimated 43% were confirmed.
- In the last decade, the number of domestic elder abuse reports investigated has increased by more than 150 percent.
- Almost 62% of all cases of abuse, neglect, or exploitation of adults living at home involve mistreatment by others and 38% involve self-neglect.

National Center on Elder Abuse

THE TYPICAL VICTIM IS:

- Female (67.6%)
- Median age of 77.9
- White (66.4%)
- Living in a community setting
- Access to limited financial resources
- One or more functional impairments

WVDDR website

THE TYPICAL PERPETRATOR:

- A family member (64.5%)
- Adult children (30%)
- Other relative (17.8%)
- Spouse (14.8%)
- Grandchildren (1.9%)
- Service provider (12.9%)
- Friend/neighbor (10%)
- All others (9.4% self neglect not included)
- Unknown (1.5%)

ELDER ABUSE IS EXPLODING

- Fastest growing age group
- No known cure for dementia etc.
- Victims often do not report
- Third fastest growth job is home care
- Minimal background checks
- High temptation, low risk factors

Elder Abuse in the News

- http://www.wchstv.com/news/features/eyewitness-news/stories/Deputies-Say-Multiple-People-Arrested-In-Elder-Abuse-Case-29556.shtml#.VBCkOvldVic

MRS. JOHNSON

Recognizing the issues of competency and undue influence and

ISSUES FACING VULNERABLE ADULTS:

ISOLATION – not participating in activities that require contact with people. Those most at risk are frail or chronically ill, widowed or divorced, and living alone. They are also more likely to be female and may also have reduced resources.

Isolation can lead to self-neglect. Often can lead people to the point that they deny any physical or mental problems and refuse help from family and friends.

AVOID STEREOTYPING OF SENIORS

- Forgetful
- Senile
- Longwinded
- Fragile
- Grumpy
- Disabled

FINANCIAL ABUSE

- Theft
- Credit card fraud
- Real Property transfers
- Home Improvement scams
- Telemarketing & sweepstakes scams
- Investment fraud

FORMS OF THEFT

- By larceny - a taking of property
- By trick - consent is based on deceit or fraud
- By embezzlement - property is entrusted to thief
- By undue influence

TYPICAL THEFT SCENARIOS

- Jewelry
- Checks
- ATM card
- Credit card & identity theft
- Transfer of title - POA & quitclaim deed
- Bogus investment scams
- Sweepstakes/telemarketing frauds
- Home improvement scams
- Excessive charging by unlicensed contractors & other merchants
- Theft by undue influence

UNDERSTANDING THE DYNAMICS

- Fears of many seniors
- Leads to underreporting
- Feelings of shame
- Concern that exposure will lead to loss of independence
- Sometimes accompanied by threats from perpetrator

ISSUES FACING VULNERABLE ADULTS:

SELF-NEGLECT – when individuals fail to provide themselves with whatever is necessary to prevent physical or emotional harm and pain.

The reasons that vulnerable adults neglect their own needs are often complicated, and frequently people are unaware of the severity of the situation. Cause can include depression, loss of motivation, frustration, grief, substance abuse, and sacrificing for others (often family members) at the expense of their own unmet needs.

ISSUES FACING VULNERABLE ADULTS:

MEDICATION/SUBSTANCE ABUSE – using medications wisely and substance abuse are concerns that apply to all age groups. But due to several factors, the elderly are at greater risk for having trouble in both areas.

Factors increasing the risk of abuse include:

- the amount of medications prescribed are generally greater than the amount prescribed to younger population
- unforeseen and unexpected changes in an individual's reaction to medications as body ages
- confusion resulting from having to remember instructions for several different medications

REASONS FOR OVERMEDICATION

- Lack of understanding - giving medication round the clock instead of as needed
- For convenience, giving all medications at same time
- Giving medication with alcohol or over the counter meds to increase sedative effects
- To keep patient docile and compliant
- To control behavior
- To keep from wandering away
- As an alternative to physical restraint

SIGNS OF OVER-MEDICATION

- Disoriented
- Falls asleep when talking
- Sleeps all day and up all night
- Similar to being intoxicated
- Slurred speech, shaky hands, trembling voice
- Passive behavior

REASONS FOR UNDERMEDICATING

- Thinks that person should not need medication
- Thinks that patient's mental state is deteriorating because of medication
- Thinks that withholding of meds might hasten patient's death
- Wants patient to suffer
- Is using meds for own use

COMMON MEDICATIONS

- Tranquilizers/Anti-anxiety:
  - Valium
  - Librium
  - Donatal
  - Phenobarbital
  - Ativan
  - Restoril
  - Triazolzam
  - Xanax & Lorazepam

COMMON MEDICATIONS

- Pain:
  - Vicodin
  - Tylenol & Codeine
  - Percocet
  - Talwin
  - Oxycondone
  - Dilaudid
  - Morphine
  - Demoral

COMMON MEDICATIONS

- Anti-depressants:
  - Paxil
  - Zoloft
- Sleep medications:
  - Halcion
  - Luminal
  - Nembutal
  - Seconal & Dalmane

ISSUES FACING VULNERABLE ADULTS:

FRAUD AND EXPOLOTATION – sadly con-artists, drug addicts, and other opportunists often prey upon the elderly

Various types of fraud and exploitation can include thieving caregivers, religious con-artists, financial abuse by family members, home equity fraud, telemarketing fraud, mail fraud, health-services fraud, credit card fraud, and identity theft fraud to name a few.

UNDUE INFLUENCE

- Victim ‘was pushed in a direction that he did not want to go.’
- The influence by suspect was sufficient to remove the voluntariness of the transaction
- No longer free will
- Victim has been evaluated by a geriatric psychiatrist/psychologist

HOME IMPROVEMENT SCAMS

- Roofs, driveways, painting
- “Just in the area”
- Work in pairs
- Pick-up truck
- Want cash
- Use inferior materials
- Leave without trace

CLASSIC NEGLECT CASES

- Deprivation of medical attention
- Deprivation of food
- Lack of hygiene
- Lack of ventilation, heat or light
- Over-medicated
- Under-medicated

THE CLASSIC NEGLECTED VICTIM

- Malnourished
- Semi-comatose
- Dehydrated
- Bed sores, rashes, lice
- Coated with fecal matter/ urine stained
- Inadequately clothed
- Untrimmed toenails, matted hair

SIGNS OF NEGLECT

- Dry lips, pallor or excessive weight loss
- Dirty or inappropriate clothing for weather
- Shivering or low body temperature which might indicate hypothermia
- Lack of dentures, glasses or hearing aid
- Signs of infrequent bathing
- Physical or mental deterioration with no medical reason
- Confinement
- Elderly person is seen wandering dangerously
- Lack of groceries
- Inadequate or over medication
- Cooking and housekeeping standards that could lead to illness or accidents

TERMS DEFINED BY LAW

ABUSE – the infliction or threat to inflict physical pain or injury on or the imprisonment of any incapacitated adult or facility resident

NEGLECT – two definitions

1. the failure to provide the necessities of life to an incapacitated adult or facility resident with intent to coerce or physically harm said person
2. the unlawful expenditure or willful dissipation of the funds or other assets owned or paid to or for the benefit of an incapacitated adult or facility resident

TERMS DEFINED BY LAW

INCAPACITATED ADULT – any person who by reason of physical, mental, or other infirmity is unable to physically carry on the daily activities of life necessary to sustaining life and reasonable health. *Note, this assessment is generally made by a medical, social service, mental health professional, etc.*

INCOMPETENT ADULT– any person that is unable to make independent decisions on their own behalf. *Note, incompetence is a legal determination made by the court.*

UNDER W.V. LAW, THE FOLLOWING GROUPS ARE MANDATORY REPORTERS:

- Medical professionals
- Dental professionals
- Mental health professionals
- Christian science practitioners
- Religious healers
- Social service workers
- Law enforcement officers
- Humane officer
- State and regional long-term care ombudsman
- Employees of any nursing home or other residential facility

MANDATORY REPORTING REQUIREMENTS

If a mandatory reporter has reasonable cause to believe that an incapacitated adult or facility resident is, has been, or is likely to be neglected, abused, or placed in an emergency situation the person **shall** report the circumstances

- **immediately** by telephone to the department's local adult protective services

- followed by a written report **within 48 hours**

Note, in addition to legally mandated reporters, ANY individual may report suspected abuse and neglect

CHAPTER 44C. UNIFORM ADULT GUARDIANSHIP AND PROTECTIVE PROCEEDINGS JURISDICTION ACT

Effective as of July 10, 2009

UNIFORM ADULT GUARDIANSHIP AND PROTECTIVE PROCEEDINGS JURISDICTION ACT

The act addresses the issue of jurisdiction over adult guardianships, conservatorships, and other protective proceedings.

The objective is to ensure that only one state has jurisdiction at any one time.

DEFINITIONS UNDER THE ACT

Adult - an individual who has attained 18 years of age

Guardian - a person appointed to make decisions regarding the **person** of an incapacitated adult

Conservator - a person appointed to manage the **property** of an incapacitated adult

Incapacitated person - an adult for whom a guardian has been appointed

Protected person - an adult for whom a protective order has been issued

Protective order - an order appointing a conservator or other order related to management of an adult's property

UNIFORM ADULT GUARDIANSHIP AND PROTECTIVE PROCEEDINGS JURISDICTION ACT

The state with primary jurisdiction is the "home state" in which the adult has lived for at least six consecutive months immediately before the beginning of the guardianship or protective proceeding

However, IF

1. the adult does not have a home state, or
2. the home state declines to exercise jurisdiction, or
3. the adult has a home state but no proceedings are pending before that state AND no objections are raised as to jurisdiction

THEN a "significant-connection state" will have jurisdiction to appoint a guardian or issue a protective order if the court concludes that it is an appropriate forum

UNIFORM ADULT GUARDIANSHIP AND PROTECTIVE PROCEEDINGS JURISDICTION ACT

The "significant-connection state" is a state, other than the home state, with which an individual has a significant connections other than mere physical presence and in which substantial evidence is available

Factors considered in determining whether an individual has a significant connection with a particular state:

1. The location of the individual's family
2. The length of time the individual was was physically present in the state and the duration of any absence
3. The location of the individual's property, and
4. The extent to which the individual has to the state such as voting registration, state or local tax return filing, vehicle registration, driver's license, social relationships,and receipt of services

UNIFORM ADULT GUARDIANSHIP AND PROTECTIVE PROCEEDINGS JURISDICTION ACT

A court otherwise lacking jurisdiction has special jurisdiction to do any of the following:

1. Appoint a guardian in an emergency for a term of up to 90 days for an individual who is physically present in the state,
2. Issue a protective order with respect to real or tangible personal property located in the state,
3. Appoint a guardian or conservator for an incapacitated or protected person for whom a provisional order to transfer the proceeding from another state has been issued

UNIFORM ADULT GUARDIANSHIP AND PROTECTIVE PROCEEDINGS JURISDICTION ACT

Other than *special jurisdiction* as just defined, once a court has jurisdiction, this jurisdiction is EXCLUSIVE and CONTINUES until the proceeding is terminated or transferred.

WEST VIRGINIA CHILD V. ELDER COMPARISONS

Child Protective Services

- 407 Staff Members
- 16 Trainers
- Federally Funded
- 2912 Referrals in 6/09
  - 1793 Accepted
  - All deal with alleged Child Abuse and Neglect.

Adult Protective Services

- 59 Staff Members
- 1 Trainer
- State Funded
- 1134 Referrals in 6/09

Programs

- Guardianship
  - (If DHHR is Guardian then the Sheriff or his designee is conservator)
- Health Care Surrogates
- Adult Family Care
- Adult Protective Services
- Preventative Services
- Homeless Care
- Unclaimed Remains

RALEIGH COUNTY
ADULT PROTECTIVE SERVICES

- 1 Supervisor
- 5 Adult Protective Service Workers

June 2009 Statistics

- Adult Family Care – 3 cases
- Adult Protective Care – 1 Case
- Referral Investigations – 63 Cases
- Assessments – 15 Cases
- Guardianships – 13 Cases
- Heath Surrogates – 38 Cases

Decisions:

- Least Restrictive
- Placement Based on Medical Needs
- Must use MDT Process

CRIMINAL ISSUES IN WEST VIRGINIA

- West Virginia Code §61-2-29

  "Abuse of Neglect of Incapacitated Adult"

  - Maximum penalty – Not less than 2 nor more than 10 years
- West Virginia Code § 61-2-10A

  "Violent Crimes Against the Elderly (person over 65 years of age)"

  - Not subject to Supervision or Probation except for Community Service to Older Adults

Dilapidated and Abandoned Property

Professor Jesse Richardson
WVU College of Law

Abandoned and Dilapidated Buildings Glade Springs Resort April 17, 2015

WVU LAW
LAND USE & SUSTAINABLE DEVELOPMENT LAW CLINIC

Presentation Overview

- Background/Concerns
- Identifying Properties
- Options for Local Governments

Braxton County
Photo Courtesy Lilly Photography

Statutory Definitions

"Vacant building" - "a building or other structure that is unoccupied, or unsecured and occupied by one or more unauthorized persons for an amount of time as determined by [an] ordinance" §8-12-16c(b)(2)

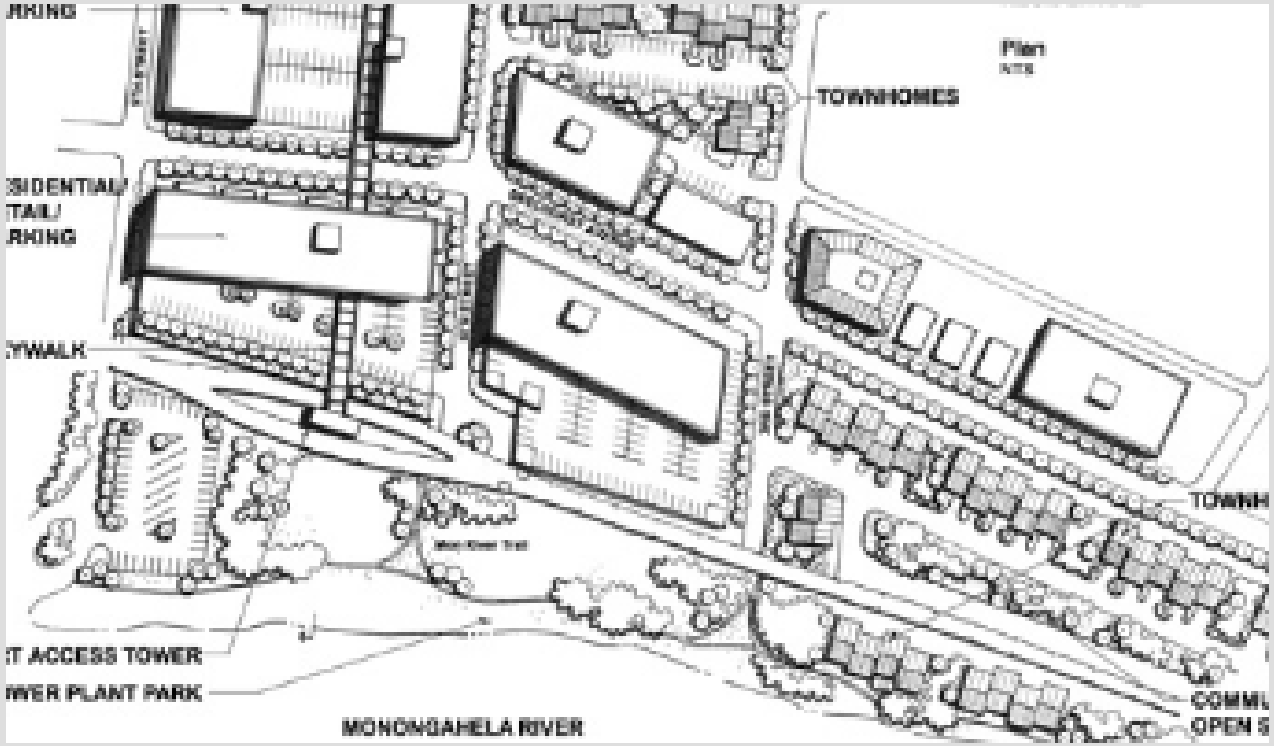
"Vacant property" - "a property on which no building is erected and no routine activity occurs" §8-12-16c(b)(3)

Uninhabitable - "unsafe, unsanitary, dangerous or detrimental to the public safety or welfare" §7-1-3ff (a)

-The Building Code and Property Maintenance Code have different terms and definitions

Why do we care?- Potential for Alternative Uses

- New occupants– residential or commercial
- Better use for irregular or small lot layout
- Stymies infill development
- Insufficient green space, parks, or recreational facilities



Why do we care? -Hazards

- Presence of public nuisances or hazardous waste sites
- Trash
- Vermin
- Fire
- Crime

Photo Courtesy Lilly Photography

Who should be involved?- Stakeholders

- Neighbors
- Local business owners
- Elected officials
- Code enforcement department
- Police department
- Fire department
- Utility department
- Board of education
- Hospital administrator
- College or university president
- Non-profit organizations
- Housing authorities
- Pastors of local churches
- Economic development authorities
- Family resource networks

Identification of Vacant/Uninhabitable Buildings

- Structural Defects
- Health Hazards
- Vacancies
- Lack of Necessary Utilities

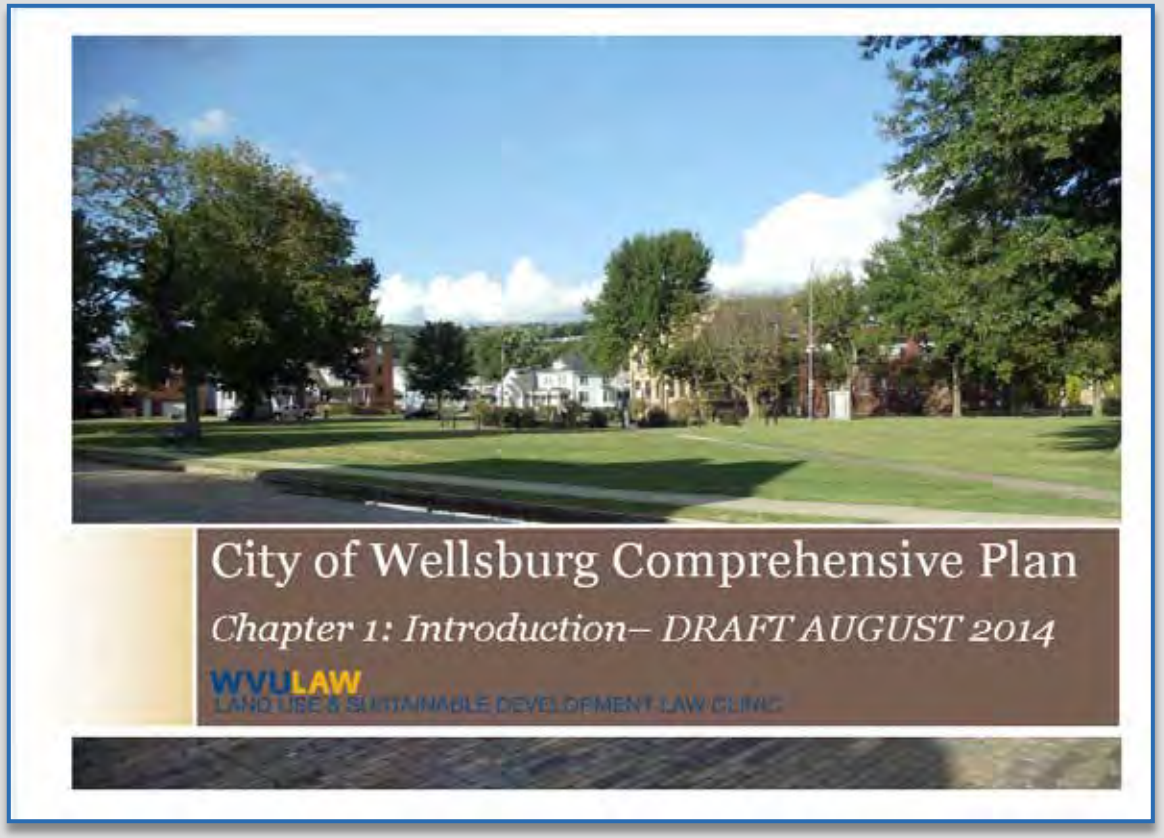
Windshield Surveys

- Posted Notice
- Boarded Up
- No Yard Maintenance
- Excessive Mail Piling Up
- For Sale Signs
- Missing Doors or Windows
- Building shows burn marks or structural damage
- Building has been vandalized

Charleston, WV
Photo Courtesy Lilly Photography

Tools for Prevention: Comprehensive Plans

- Process to determine community's vision and what it aspires to be in the future
- Serves as a blueprint for future development
- Policy document
- Prioritization of Projects



Required Components of a Comprehensive Plan

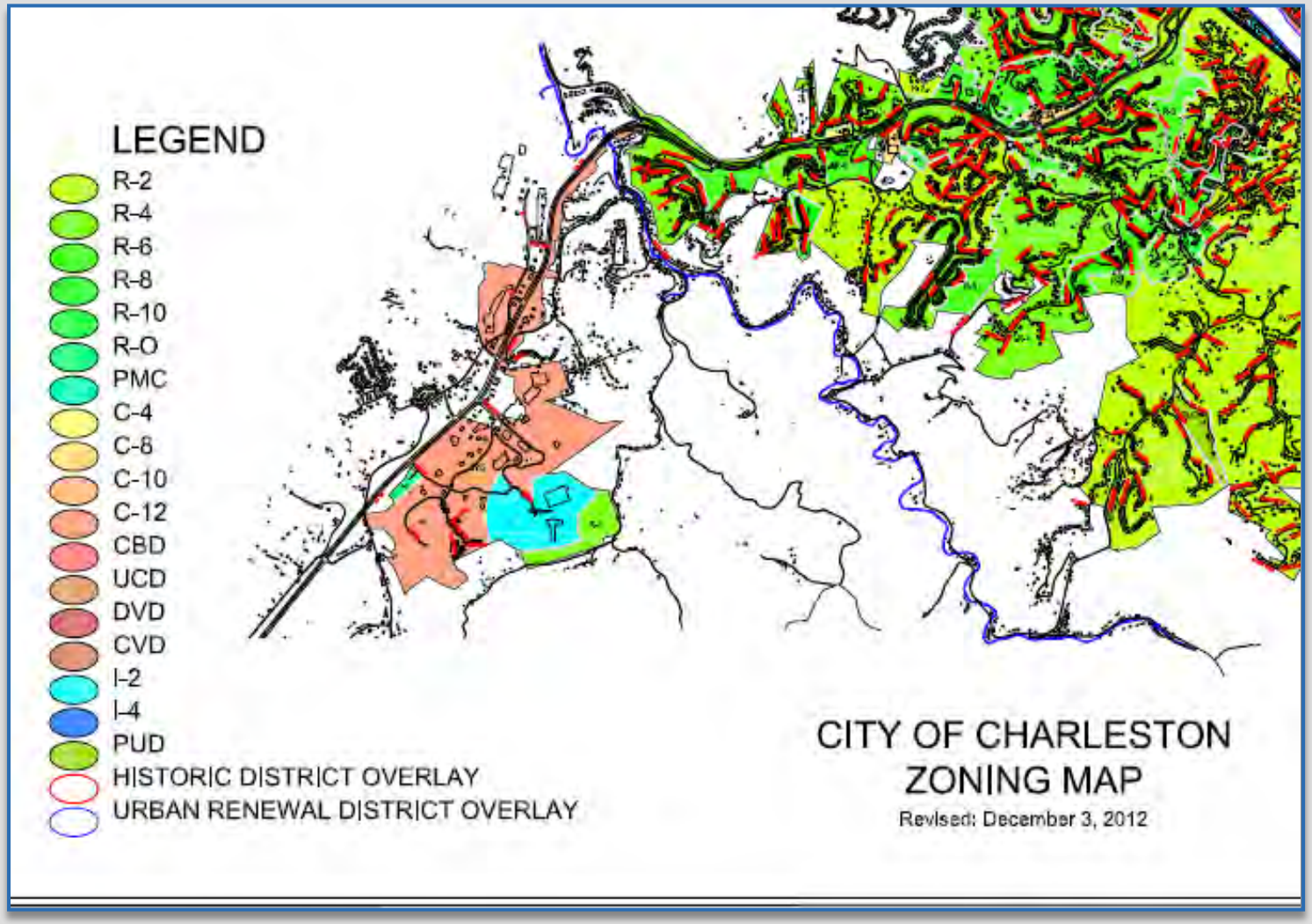
- Land use
- **Housing**
- Transportation
- Infrastructure
- Public Services
- Rural
- Recreation
- Economic development
- Community design
- Preferred development areas
- **Renewal and/or redevelopment**
- Financing
- **Historic preservation**

Zoning Ordinance

"Zoning" means the division of a municipality or county into districts or zones which specify permitted and conditional uses and development standards for real property within the districts or zones." W. Va. Code §8A-1-1(gg).

- Tool to implement the comprehensive plan
- Used to promote the orderly development of land

Zoning Map & Overlay Zones



Floating Zones

- Zone described in the zoning text, but not designated on a zoning map
- Zone “floats” over a jurisdiction until someone asks to be rezoned to that category, but it continues to “float” for potential use on other parcels
- Cumberland, Maryland

Performance Standards

- Focus on effect, rather than use
- Any use allow so long as certain criteria related to environmental impact and aesthetics are met
- Examples: Stormwater runoff, light, dust, noise, ability to view from the street
- Performance standards are "zoning" *DeCoals, Inc. v. Board of Zoning Appeals of Westover*, 284 S.E.2d 856 (W.V. 1981).

Federal Grant Programs for Building Rehab

- **Community Development Block Grants (CDBG)**
  - HUD program
  - $$ to local govs/non-profits for redevelopment, demolition, establishing land banks
- **HOME Investment Partnerships Program**
  - HUD program
  - $$ for states/local governments for building/rehabbing affordable housing
- **American Recovery & Reinvestment Act of 2009 (ARRA)**
  - $$ for renovations/promoting energy efficiency
  - Administered by “Recovery Board”

West Virginia Grant Programs

- **WV Weatherization Assistance**
  - $$ for low-income WV residents to improve homes' energy efficiency
- **WV Housing Development Fund**
  - *Demolition Program*
    - Resources for local governments to acquire/remove vacant/dilapidated properties
  - *Land Development Program*
    - Loans for developers to create infrastructure improvements
  - *Mini-Mod Rehab Program*
    - $$ to landlords for renovations
  - *Septic Systems Loans*
    - $$ for eligible households to repair/replace septic systems

Post Hoc Options for Local Governments

- **Counties**
  - Authority to regulate unsafe and unsanitary buildings
  - Authority to issue orders & impose civil penalties
- **Municipalities**
  - Authority to regulate unsafe and unsanitary buildings
  - Authority to issue orders & impose civil penalties
  - Authority to create a Property Registration System for Uninhabitable & Vacant Structures

Regulate Unsafe & Unsanitary Buildings

- State gives local governments plenary power to adopt ordinances to regulate dwellings or buildings unfit for human habitation
  - For Counties see §7-1-3ff
  - For Towns/Cities see §8-12-16

…if building is unfit for human habitation based on…

- Dilapidation
- Increased Fire Hazard or Accident Hazard
- Lack of Ventilation, Light or Sanitary Facilities
- Anything Detrimental to Public Health or Safety

Must designate an Enforcement Agency

Who is involved:

Counties

- County Engineer
- County Health Officer
- Fire Chief
- County Litter Control Officer
- One or two members at large selected
- Sheriff (ex officio)

Municipalities

- The Mayor
- Municipal Engineer or Building Inspector
- One member at large
- Ranking health officer and fire chief (ex officio members)

Issue Orders & Initiate Civil Action

- Local government can require owner(s) to:
  - Repair
  - Alter
  - Improve
  - Vacate
  - Close
  - Remove
  - Demolish
  - Clean up
- Pursuant to §8-12-16 & §7-1-3ff

Upon Failure of Owner to Perform Ordered Duties…

Counties

- Advertise & seek contractor to make ordered repairs
- Place a lien for the amount of the contractor's costs
- To order & decree the sale of the land to satisfy the lien
- To order payment of all costs incurred by the county with respect to the property.

Municipalities

- File a lien against the real property in question for an amount that reflects all costs incurred by the municipality.
- Institute a civil action against the landowner for costs incurred by the municipality.

Registration of Uninhabitable Buildings

- Municipalities only
- Property registration system for uninhabitable structures that violate applicable building code
- Property owner assessed a fee
- Code enforcement officer posts written notice
- Make repairs within 45 days
- Pay fee or after 2 years, the municipality may receive the property by forfeiture

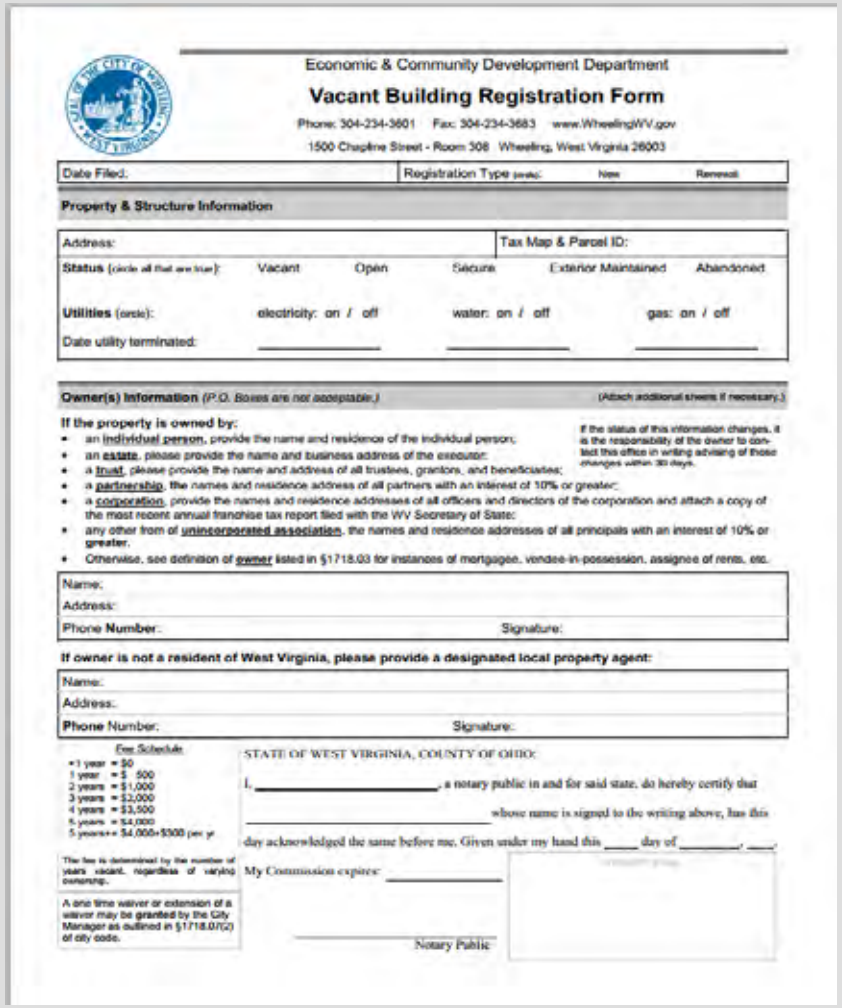
Registration of Vacant Buildings and Property

- Municipalities only
- Vacant buildings subject to registry charged a fee
- Failure to pay fee authorizes municipality to create a lien
  - Municipality may commence a civil action to collect unpaid debt
- Good faith waiver may be granted
  - If there are signs of fixing up or actively selling/renting property

Registration of Vacant Buildings (Con't)

City of Wheeling

- Less than 1 year = 0$
- 1 year - $200
- 2 years = $400
- 3 years = $600
- 4 years = $800
- 5 years = $1600
- Over 5 years = $1600 plus $300 per additional year.



Economic & Community Development Department

Vacant Building Registration Form

Phone: 304-234-3601 Fax: 304-234-3683 www.WheelingWV.gov

1500 Chapline Street - Room 308 Wheeling, West Virginia 26003

Date Filed: | Registration Type (circle): New Renewal

Property & Structure Information

Address: | Tax Map & Parcel ID:

Status (circle all that are true): Vacant Open Secure Exterior Maintained Abandoned

Utilities (circle): electricity: on / off water: on / off gas: on / off

Date utility terminated: _____ _____ _____

Owner(s) Information (P.O. Boxes are not acceptable.) (Attach additional sheets if necessary.)

If the property is owned by:

- an **individual person**, provide the name and residence of the individual person;
- an **estate**, please provide the name and business address of the executor;
- a **trust**, please provide the name and address of all trustees, grantors, and beneficiaries;
- a **partnership**, the names and residence address of all partners with an interest of 10% or greater;
- a **corporation**, provide the names and residence addresses of all officers and directors of the corporation and attach a copy of the most recent annual franchise tax report filed with the WV Secretary of State;
- any other from of **unincorporated association**, the names and residence addresses of all principals with an interest of 10% or greater.
- Otherwise, see definition of **owner** listed in §1718.03 for instances of mortgagee, vendee-in-possession, assignee of rents, etc.

If the status of this information changes, it is the responsibility of the owner to contact this office in writing advising of those changes within 30 days.

Name:
Address:
Phone Number: Signature:

If owner is not a resident of West Virginia, please provide a designated local property agent:

Name:
Address:
Phone Number: Signature:

Fee Schedule

- 1 year = $0
- 1 year = $ 500
- 2 years = $1,000
- 3 years = $2,000
- 4 years = $3,500
- 5 years = $4,000
- 5 years+ = $4,000+$300 per yr

The fee is determined by the number of years vacant, regardless of varying ownership.

A one time waiver or extension of a waiver may be granted by the City Manager as outlined in §1718.07(2) of city code.

STATE OF WEST VIRGINIA, COUNTY OF OHIO:

I, _____, a notary public in and for said state, do hereby certify that _____ whose name is signed to the writing above, has this day acknowledged the same before me. Given under my hand this ____ day of _____, ____.

My Commission expires: _____

_____
Notary Public

Use of Fees from Registry

- Improve Public Safety Efforts
- Monitoring & Administration
- Repairs & Demolition

What's new…

- New language added in June 2014 to relevant sections of West Virginia Code:
  - Sections 8-12-16, 8-12-16a and 8-12-16c
    - The new language defines what an "owner" and "landowner" are for purposes of these sections.
- For 8-12-16c which is the vacant property registry
  - It also defines "vacant property."
  - Adds new paragraph which states, in part, that:
    - A vacant structures registration ordinance does not require a municipality to "undertake repairs, demolition or maintenance measures which remain as obligations and responsibilities of the owner…"

Building and Property Maintenance Codes

- WV Code section 29-3-5b promulgates rules for the statewide building code
  - Each local jurisdiction which adopts the State Building Code is responsible for enforcement of the building code as provided in West Virginia Code 7-1-3n and 8-12-13
- Both counties and municipalities can adopt the building code
- West Virginia State Fire Commission has established Title 87 Legislative Rule which lays out the specifics of the state building code

Building Code and Code Enforcement

- A jurisdiction can choose to adopt one/none/both *in toto* (with a few exceptions):
  - 2012 edition of the International Building Code
  - 2012 edition of the International Property Maintenance Code

International Building Code- Unsafe Structures

- Part of adopting the Building Code is to have a building code official and additional building inspectors as needed.
  - In WV there is a certification process through the State Fire Commission
- A structure is “unsafe” if:
  - Inadequate means of egress facilities
  - Inadequate light and ventilation
  - Constitute a fire hazard
  - Otherwise dangerous to human life or public welfare
  - Involve illegal or improper occupancy or inadequate maintenance
  - Vacant structure not secured against entry
- Building Official
  - Has discretion in making decision to make safe, take down or remove unsafe structure.

International Property Maintenance Code

- Code Official is directed to enforce provisions of IPMC
- Provides some instruction for providing adequate notice of violation
- Defines unsafe structures in part as:
  - *One that is found to be dangerous to the life, health, property or safety of the public or the occupants of the structure by not providing minimum safeguards to protect or warn occupants in the event of fire, or because such structure contains unsafe equipment or is so damaged, decayed, dilapidated, structurally unsafe…that partial or complete collapse is possible*
- Provides additional guidance if there is "imminent danger"

IPMC (Con't)

- There are general requirements for:
  - Exterior Property Areas
  - Exterior Structure
  - Interior Structure
  - Light, Ventilation and Occupancy
  - Fire Safety
- IPMC is much less cumbersome than the IBC.
  - IPMC focuses on existing conditions
    - Heavy emphasis on dilapidated and abandoned properties.

Communities Prioritizing Projects

- Code Violations
- Comprehensive Plan
- Zoning Ordinance
- Urban Renewal Authority
- Historic Preservation Designation
- Potential for Alternative Uses
- Condition of Title
- Character of Neighborhood
- Declared Disaster Areas
- Physical and Geological Factors

Condition of Title

- Too many owners
- Cannot find owner
  - How do you provide adequate notice?
- Inability to determine or find owner(s) of the land
- Existing Liens

Rhone County
Photo Courtesy Lilly Photography

Character of the Neighborhood

- Historic Neighborhood
- Blight Concentration
- Mixed Uses
- Lack of Necessary Businesses
- Loss of Population
- Increased crime and juvenile delinquency rates

Disaster Areas

- Flooding
- Hurricanes
- Derechos
- Earthquakes
- Fires
- Tornadoes

Photo courtesy West Virginia Homes Blog

Physical and Geological Factors

- Submerged lands
- Lands subject to periodic flooding
- Unusual topography
- Presence of features that would make development by private enterprise uneconomical.

Economic Feasibility

- Cost of Demolition/Market Costs
- Partially or Completely Fix

Some other WV tools…

- Urban Renewal Authorities
- Land Reuse Agencies (act like a land bank)

- Neither is a solution but both are notable tools when addressing vacant and dilapidated structures.

Urban Renewal Authority

- Creates a Redevelopment Plan for designated “slum” or “blighted” areas.
  - Community needs to have a comprehensive plan in place
- Authority to purchase and lease property
- Authority to sue or to be sued
- Power of Eminent Domain

Land Banks

- "Governmental or nonprofit entities that acquire, hold, and manage foreclosed or abandoned properties"
- Goals may include:
  - Affordable housing
  - Increasing tax base
  - Stabilizing neighborhoods
  - Green spaces
  - Consolidated abandoned lots to facilitate development
  - Revitalizing brownfields

Land Banks

- Acquire abandoned and/or vacant properties
- Temporarily manage
- Convey to third parties to return to productive use

WV Land Stewardship Act

- West Virginia Code §§31-21-1, et seq.
- Creates nonprofit West Virginia Land Stewardship Corporation
- Certified sites
- Inventory

WV Land Reuse Agency Authorization Act

- Senate Bill 579 (2014), West Virginia Code §§31-18E-1, et seq.
- Focus on vacant, abandoned and tax-delinquent properties
- Counties, municipalities or two or more counties or municipalities who enter into an agreement may create a land reuse agency
- Land Reuse Agencies may not acquire land by eminent domain or acquire land "obtained by the power of eminent domain by any means." West Virginia Code §§31-18E-8, et seq.

Huntington Land Banking Program

- Home Rule Pilot Program
- Provides model for statute
- Over 50 properties listed on website
- Funded by 1% interest per month earned on tax liens

Other Resources

WEST VIRGINIA Redevelopment Collaborative

BROWNFIELDS WEST VIRGINIA ASSISTANCE CENTERS

HUB CAP Communities of Achievement Program
AN INITIATIVE OF WEST VIRGINIA COMMUNITY DEVELOPMENT HUB

Blueprint COMMUNITIES®

Dilapidated, Vacant & Uninhabitable Structures

Katherine C. Garvey, Director
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Jared B. Anderson, Supporting Land Use Attorney
Annie Eisenberg, Clinic Fellow
Land Use and Sustainable Development Law Clinic at the
West Virginia University College of Law

I. Background

a. Difference between Dilapidated, Vacant & Uninhabitable Structures
   i. Vacant: "a building or other structure that is unoccupied, or unsecured and occupied by one or more unauthorized persons for an amount of time as determined by [an] ordinance" W. VA. CODE §8-12-16c(a)
   ii. Uninhabitable: "unsafe, unsanitary, dangerous or detrimental to the public safety or welfare" §7-1-3ff (a)
   iii. Dilapidated: not defined in statute, but a commonly used term. [1]
   iv. 58,106 units or 1/14 homes in West Virginia fall within one of these categories according to the American Community Survey (2005-2009)[2]
      1. **Example:** Richwood has identified 110 abandoned structures in a population of 2,000 people.

b. The Problem with Dilapidated Buildings
   i. Health & Safety Concerns[3]
   ii. Lot/Building could have Alternative Use(s)
   iii. Perception/Barrier to Economic Development

c. Identifying Dilapidated Buildings
   i. Dilapidated structures can be identified by structural defects, the presence of health hazards, vacancy and a lack of necessary utilities (i.e. water and electricity).
   ii. Structural Defects
      1. Dilapidated structures
      2. Defective construction
      3. Faulty maintenance

[1] See the West Virginia HUB Dilapidated and Vacant Building Toolkit available at http://wvhub.org/chapter-1-preventing-vacancy-and-dilapidated-buildings (accessed September 13, 2013).
[2] American Community Survey, West Virginia, Housing, available at http://www.census.gov/acs/www/ (accessed September 13, 2013).
[3] Matthew J. Samsa, *Reclaiming Abandoned Properties: Using Public Nuisance Suits and Land Banks to Pursue Economic Redevelopment*, 56 Clev. St. L. rev. 189, 196 (2008), Joe Deneault, *Clean up blighted properties,* The Charleston Gazette, Sept. 21, 2010, *available at* Lexis-Nexis.

iii. Health Hazards
    1. Presence of public nuisances or hazardous waste sites
    2. Trash
    3. Vermin
    4. Fire hazards
iv. Vacancies
    1. Vacant and abandoned buildings
    2. Vacant lots
    3. Low percentage of occupancy in buildings
    4. High turnover rate for leased properties
v. Lack of Necessary Utilities
    1. Insufficient light, air or ventilation
    2. Lack of access to utilities such as water, sewer, electric power, or heating
vi. Most Common Way to Identify Abandoned Buildings: the Windshield Survey
    1. Posted Notice
    2. Boarded Up windows and doors
    3. No Yard Maintenance
    4. Excessive Mail Piling Up
    5. For Sale Signs
    6. Missing Doors or Windows
    7. Building shows burn marks/ fire damage
    8. Building has been vandalized
    9. Significant and obvious structural damage (i.e. roof caving in).

II. Options for Local Governments

a. Options for County & Municipal Government
    i. Counties have the authority to regulate unsafe and unsanitary buildings. Counties have authority to adopt ordinances regulating the repair, alteration or improvement, or the vacating and closing or removal or demolition, buildings, unfit for human habitation §7-1-3ff (a)
        1. Reasons the building may be unfit for human habitation "dilapidation, defects increasing the hazard of fire, accidents, lack of ventilation, light or sanitary facilities or any other conditions prevailing in any dwelling or building, which would cause the dwellings or other buildings to be unsafe, unsanitary, dangerous

or detrimental to the public safety or welfare, whether the result of natural or manmade force or effect." §7-1-3ff (a), §8-12-16 (a).

2. Buildings utilized for farm purposes on land actually being used for farming are exempt. §7-1-3ff (a)

ii. Counties & municipalities must create an enforcement agency to enforce such ordinances.

1. The enforcement agency for a county must include:
    a. County engineer (or other technically qualified county employee or consulting engineer),
    b. County health officer or his or her designee,
    c. Fire chief from a county fire company,
    d. County litter control officer, if county chooses to hire one and
    e. One or two members at-large selected by the county commission to serve two-year terms.
    f. The county sheriff shall serve as an ex officio member of the enforcement agency and will act as the county officer charged with enforcing the orders of the county commission under this section. §7-1-3ff (c)
2. The enforcement agency for a municipality must include:
    a. The Mayor,
    b. Municipal engineer or building inspector and
    c. One member at-large, to be selected by and to serve at the will and pleasure of the mayor.
    d. The ranking health officer and fire chief shall serve as ex officio members of the enforcement agency. §8-12-16(b).
3. Note: No one on the planning commission is required to serve, but may be selected at large.

iii. Any ordinances adopted must provide fair and equitable rules of procedure to guide the enforcement agency and conduct. For specifics on process see §7-1-3ff.

1. Any entrance upon premises for the purpose of making examinations shall be made in a manner as to cause the least possible inconvenience to the persons in possession. §7-1-3ff (e).

iv. County Authority to issue orders and impose civil penalties.

1. The county commission has authority to order the owner or owners thereof to repair, alter, improve, vacate, remove, close, clean up or demolish the dwelling or building in question or to

remove or clean up any accumulation of refuse or debris, overgrown vegetation or toxic spillage or toxic seepage within a reasonable time and to impose daily civil monetary penalties on the owner or owners who fail to obey an order. §7-1-3ff (f) (7)

a. **Example**: Brooke County gives owners 30 days to repair or remove dilapidated structures or they will be fined $100 per day. Section 4.5 A [4] Brooke County Dilapidated Building Ordinance.

2. Upon the failure of the owner or owners to perform the ordered duties… the county commission may advertise for and seek contractors to make the ordered repairs, alterations or improvements or the ordered demolition, removal or clean up. §7-1-3ff (g)
3. A civil proceeding may be brought in circuit court by the county commission against the owner or owners of the private land:
    a. To a lien for the amount of the contractor's costs in making these ordered repairs, alterations or improvements or ordered demolition, removal or clean up, together with any daily civil monetary penalty imposed;
    b. to order and decree the sale of the private land in question to satisfy the lien;
    c. to order and decree that the contractor may enter upon the private land in question at any and all times necessary to make ordered repairs, alterations or improvements, or ordered demolition, removal or clean up; and
    d. to order the payment of all costs incurred by the county with respect to the property and for reasonable attorney fees and court costs incurred in the prosecution of the action. §7-1-3ff (h)

v. Municipalities have the authority to issue orders and impose penalties. §8-12-16(d).

1. The governing body of every municipality has plenary power and authority to adopt an ordinance requiring the owner or owners of any dwelling or building under determination of the State Fire Marshal, as provided in section twelve, article three, chapter twenty-nine of this code, or under order of the enforcement agency of the municipality, to pay for the costs of repairing,

altering or improving, or of vacating and closing, removing or demolishing any dwelling or building.

2. Every municipality:
    a. May file a lien against the real property in question for an amount that reflects all costs incurred by the municipality for repairing, altering or improving, or of vacating and closing, removing or demolishing any dwelling or building; and
    b. May institute a civil action in a court of competent jurisdiction against the landowner or other responsible party for all costs incurred by the municipality with respect to the property and for reasonable attorney fees and court costs incurred in the prosecution of the action.

vi. County commissions have the power and authority to receive and accept grants, subsidies, donations and services in kind consistent with the objectives of this section. §7-1-3ff (i)
    1. **Example**: the Brooke County Commission was awarded a $20,978 Governor's Community Partnership Grant to demolish houses and buildings that have been condemned.

vii. Several Counties have adopted an ordinance to mirror §7-1-3ff
    1. Berkeley County
    2. Brooke County
    3. Jefferson County
    4. Kanawha County
    5. Mineral County
    6. Monongalia County
    7. Monroe County
    8. Raleigh County
    9. Upshur County
    10. Wood County

b. Options for Municipal Government §8-12-16a
    i. Registration of Uninhabitable Property
        1. Municipalities have the authority to create a property registration system for any real property improved by a structure that is uninhabitable and violates the applicable building code.
        2. An owner of real property subject to the registration shall be assessed a fee as provided by the ordinance.

3. The mayor of the municipality shall appoint a code enforcement officer
4. After inspecting the property, if the officer determines the property is uninhabitable and violates the applicable building code, then the officer shall post a written notice on the property (for details see Appendix A)
5. Within forty-five days of receipt of the notification by the owner(s), the property owner may:
    a. Make and complete any repairs to the property that violate the applicable building code; or
    b. Provide written information to the officer showing that repairs are forthcoming in a reasonable period of time.
        i. The officer may re-inspect the property at any time to determine where in the process the repairs fall.
6. If the fee is paid, then the municipality shall record a release of the fee in the office of the clerk of the county commission of the county where the property is located and if different, in the office of the clerk of the county commission of the county where the property is assessed for real property taxes.
7. If an owner fails to pay the fee, then the officer shall annually post the written notice on the property and send the written notice to the owner(s) by certified mail.
8. If a registration fee remains delinquent for two years from the date it was placed on record in the clerk of the county commission in which the property is located and assessed, the municipality may take action to receive the subject property by means of forfeiture. Should the municipality take the steps necessary to receive the subject property, the municipality then becomes the owner of record and takes the property subject to all liens and real and personal property taxes.

ii. Registration of Vacant Buildings

1. A municipality may establish by ordinance a vacant building registration program. [4]

[4] Note: The state statute is modeled after the City of Wheeling's Ordinance (attached). In 2007, the State of West Virginia adopted 8-1-5a, which established the Home Rule Pilot Project and gave authority to the City of Wheeling to pass an ordinance to deal with vacant structures. In 2008, the West Virginia legislature began to address the issue of vacant/dilapidated structures by adopting 8-12-16c, which establishes the procedures for a vacant housing registration system, the conditions for a forfeiture action, and gives municipalities the authority to create an ordinance to carry these systems out. In 2009, under the authority

2. "vacant building" means a building or other structure that is unoccupied, or unsecured and occupied by one or more unauthorized persons for an amount of time as determined by the ordinance.
    a. New buildings under construction are exempt
    b. Upon a finding for good cause on a case-by-case basis, upon request by the property owner, a building may be exempt from registration §8-12-16c (a)
3. An owner of real property subject to registration may be charged a fee or fees as provided by ordinance.
    a. **Example**: the City of Wheeling assesses fees for vacant buildings as follows:
        i. Less than 1 year on registry = $0
        ii. 1 year - $200
        iii. 2 years = $400
        iv. 3 years = $600
        v. 4 years = $800
        vi. 5 years = $1600
        vii. Over 5 years = $1600 plus $300 per additional year.
    b. The ordinance may require that when the owner of the vacant building resides outside of the state that the owner provide the name and address of a person who resides within the state who is authorized to accept service of process and notices of fees §8-12-16c (c).
4. The ordinance may authorize the municipality to institute a civil action against the property owner and/or file a lien on real property for unpaid and delinquent vacant building registration fees.
    a. Before any lien is filed, the municipality shall give notice to the property owner or owner's agent
    b. The ordinance shall permit a property owner to challenge any determination made pursuant to the ordinance. The administrative procedures adopted pursuant to the ordinance shall include the right to appeal to the circuit

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given to them via the Home Rule Pilot Project, and in pursuance of 8-12-16a, the City of Wheeling, West Virginia adopted Ordinance 1718, which established Wheeling's own vacant structure registration program.

court of the county in which the property is located. §8-12-16c (d).

5. The governing body of a municipality shall deposit the fee into a separate account, which shall be used to:
    a. Improve public safety efforts, especially for police and fire personnel, who most often contend with the dangerous situations manifested in vacant properties;
    b. Monitor and administer this section; and
    c. Repair, close or demolish a vacant structure as authorized by section sixteen, article twelve, chapter eight. §8-12-16c (f).

iii. Known Municipalities with ordinances under §8-12-16

1. Barboursville
2. Beckley
3. Buckhannon
4. Charles Town
5. Charleston
6. Clarksburg
7. Elkins
8. Fayetteville
9. Glen Dale
10. Hurricane
11. Kenova
12. Lewisburg
13. Montgomery
14. Moundsville
15. New Cumberland
16. Oak Hill
17. Parkersburg
18. Point Pleasant
19. Ranson
20. Ripley
21. Spencer
22. St. Albans
23. Summersville
24. Vienna
25. Weirton
26. Wellsburg
27. Westover
28. Wheeling
29. Winfield

iv. Ordinances for Moundsville, Buckhannon and Wheeling are in the Appendix.

c. Tax Sale

i. Frequently at tax sales for dilapidated buildings no one bids on the property and the municipality retains the property.

III. Grants and Tax Incentives

a. Federal Grants
    i. Community Development Block Grant (CDBG)
        1. Administered by HUD
        2. $$ for local governments and non-profits to establish financing mechanisms to purchase/redevelop foreclosed homes and abandoned properties; establish land banks; and demolish blighted structures.
            a. E.g., Martinsburg is a CDBG recipient
    ii. HOME Investment Partnerships Program (HOME)
        1. HUD program
        2. Provides formula grants to states & localities for building, buying, and rehabbing affordable housing for rent or sale to low-income people
            a. Martinsburg also receives HOME funds
    iii. American Recovery and Reinvestment Act of 2009 (ARRA)
        1. Allocates $$ for housing renovations, improving drainage/wastewater systems, and improving dwelling energy efficiency.
        2. The ARRA is likely a one-time funding stream so it should not be depended upon for any additional funding.
b. West Virginia Grants
    i. West Virginia Housing Development Fund
        1. Demolition Program
            a. $$ to cities/counties to acquire/remove vacant and dilapidated properties
        2. Land Development Program
            a. Provides low, fixed-rate interest loans to builders and developers to buy land and install infrastructure improvements to create buildable subdivision lots and commercial developments
        3. Mini-Mod Rehab Program
            a. Provides landlords affordable financing to renovate existing apt units
        4. On-Site Septic Systems Loan Program
            a. Helps eligible households repair or replace on-site septic systems or connect to a public treatment system
    ii. West Virginia Weatherization Assistance Program

1. For households below certain income threshold, provides assistance to reduce energy costs by improving homes' energy efficiency

c. Federal Tax Credits
    i. IRS New Markets Tax Credit (NMTC)
        1. Tax credits for investing in corporations or partnerships qualifying as "Community Development Entities;" CDEs must have serving low-income communities among its primary missions
        2. Credit totals 39% of original investment amount over 7-year period
        3. Several corporations receive credit to provide debt and equity financing to businesses/other CDEs throughout Appalachia
    ii. Low-Income Housing Tax Credit (LIHTC)
        1. Based on section 42 of Internal Revenue Code
        2. Awarded to developers of qualified projects; developers receive dollar for dollar credit against federal tax liability over 10-year period
    iii. Energy Tax Credits
        1. Used to finance solar and fuel cell transactions and wind and biomass facilities
        2. Can be residential or larger scale
        3. 10% credit for cost of certain projects, 30% for cost of others
    iv. Historic Preservation Tax Credit (HTC)
        1. 20% tax credit for qualifying rehabilitation costs: historic building must be income-producing and work must be minimum of $5,000 or exceeding building's depreciable basis by at least one dollar (whichever is greater)
d. West Virginia Tax Credits
    i. Historic Preservation Tax Incentives Program
        1. Conducted in partnership with federal program
        2. For homeowners, 20% state income tax credit for rehab of historic private residences
        3. For commercial/income-producing buildings, tax credit = 10% of capital investment in building
        4. Example: Snodgrass Tavern, Hedgesville, WV, built in 1742, is part of both programs
    ii. Energy Tax Credits

1. $2,000 tax credit for residential solar water heating, solar space heating, and photovoltaics cells

iii. Tax Increment Financing (TIF)

1. Not tax forgiveness, just dedication of tax $$ for specific use
2. Takes "snapshot" of property taxes in starting year then project is financed with bond for up to 30 years. All TIF plans must go through WV Development Office
    a. Example: Morgantown/Granville ballpark

IV. How to Prioritize Properties

a. This section includes factors that may be considered when deciding which projects to prioritize for redevelopment.

b. Comprehensive Plans Chapter 8A

1. Process to determine community's vision and what it aspires to be in the future
2. Serves as a blueprint for future development
3. Policy document
4. Required Elements of a Comprehensive Plan
    a. Land use
    b. Housing
    c. Transportation
    d. Infrastructure
    e. Public Services
    f. Rural
    g. Recreation
    h. Economic development
    i. Community design
    j. Preferred development areas
    k. Renewal and/or redevelopment
    l. Financing
    m. Historic preservation
5. **Example**: City of Ranson has incorporated an integrated redevelopment plan that considers economic, housing and transportation factors.
6. **Example**: Fairmont will incorporate a special study area the "Beltline" into its next comprehensive plan update. This plan considers dilapidated buildings and Brownfields.

ii. Zoning Ordinance

1. "Zoning" means the division of a municipality or county into districts or zones which specify permitted and conditional uses and

development standards for real property within the districts or zones." W. Va. Code §8A-1-1 (gg).

2. Tool to implement the comprehensive plan
3. Used to promote the orderly development of land
4. Zoning map could have overlay zones that directly or indirectly focus on redevelopment

iii. Urban Renewal Authority §16-18-1 et seq.

1. A "slum clearance and redevelopment authority" or "urban renewal authority" may be created by resolution to address slum and blighted areas if :
    a. one or more slum or blighted areas (as herein defined) exist in such community, and
    b. That the redevelopment of such area or areas is necessary in the interest of the public health, safety, morals or welfare of the residents of such community. §16-18-4.
2. Powers of an authority. §16-18-5
    a. To sue and to be sued; to have a seal and to alter the same at pleasure; to have perpetual succession; to make and execute contracts and other instruments necessary or convenient to the exercise of the powers of the authority;
    b. To prepare or cause to be prepared and recommend redevelopment plans to the governing body of the community or communities within its area of operation.
    c. To arrange or contract for the furnishing or repair, by any person or agency, public or private, of services, privileges, works, streets, roads, public utilities or other facilities for or in connection with a redevelopment project; and (notwithstanding anything to the contrary contained in this article or any other provision of law), to agree to any conditions that it may deem reasonable and appropriate attached to federal financial assistance and imposed pursuant to federal law relating to the determination of prevailing salaries or wages or compliance with labor standards, in the undertaking or carrying out of a redevelopment project, and to include in any contract let in connection with such a project, provisions to fulfill such of said conditions as it may deem reasonable and appropriate.

d. Within its area of operation, to purchase, lease, obtain options upon, acquire by gift, grant, bequest, devise, eminent domain or otherwise, any real or personal property or any interest therein, together with any improvements thereon, necessary or incidental to a redevelopment project; to hold, improve, clear or prepare for redevelopment any such property; to sell, lease, exchange, transfer, assign, subdivide, retain for its own use, mortgage, pledge, hypothecate or otherwise encumber or dispose of any real or personal property or any interest therein; to enter into contracts with redevelopers of property containing covenants, restrictions and conditions regarding the use of such property for residential, commercial, industrial, recreational purposes or for public purposes in accordance with the redevelopment plan and such other covenants, restrictions and conditions as the authority may deem necessary to prevent a recurrence of slum or blighted areas or to effectuate the purposes of this article; to make any of the covenants, restrictions or conditions of the foregoing contracts covenants running with the land, and to provide appropriate remedies for any breach of any such covenants or conditions, including the right in the authority to terminate such contracts and any interest in the property created pursuant thereto; to borrow money and issue bonds and provide security for loans or bonds; to insure or provide for the insurance of any real or personal property or operations of the authority against any risks or hazards, including the power to pay premiums on any such insurance; and to enter into any contracts necessary to effectuate the purposes of this article. No statutory provision with respect to the acquisition, clearance or disposition of property by other public bodies shall restrict an authority or other public body exercising powers hereunder, in such functions, unless the Legislature shall specifically so state.
e. To invest any funds held in reserves or sinking funds or any funds not required for immediate disbursement, in

property or securities in which savings banks may legally invest funds subject to their control; to redeem its bonds at the redemption price established therein or to purchase its bonds at less than redemption price, all bonds so redeemed or purchased to be cancelled.

f. To acquire real property in an urban renewal area prior to approval of an urban renewal plan, or approval of any modifications of the plan, demolish and remove any structure on the property, and pay all costs related to the acquisition, demolition or removal, including any administrative or relocation expense, provided it shall be deemed necessary by an authority, and with the approval of the local governing body which shall assume the responsibility to bear any loss that may arise as the result of the exercise of the authority under this section, in the event that the real property is not made part of the urban renewal project.

g. To borrow money and to apply for and accept advances, loans, grants, contributions and any other form of financial assistance from the federal government, the state, county, municipality or other public body or from any sources, public or private, for the purposes of this article, to give such security as may be required and to enter into and carry out contracts in connection therewith; an authority, notwithstanding the provisions of any other law, may include in any contract for financial assistance with the federal government for a redevelopment project such conditions imposed pursuant to federal law as the authority may deem reasonable and appropriate and which are not inconsistent with the purposes of this article.

h. Acting through one or more commissioners or other persons designated by the authority, to conduct examinations and investigations and to hear testimony and take proof under oath at public or private hearings on any matter material for its information; to administer oaths, and to issue commissions for the examination of witnesses who are outside of the state or unable to attend

before the authority, or excused from attendance; to make available to appropriate agencies or public officials (including those charged with the duty of abating or requiring the correction of nuisances or like conditions or of demolishing unsafe or insanitary structures or eliminating slums or conditions of blight within its area of operation) its findings and recommendations with regard to any building or property where conditions exist which are dangerous to the public health, safety, morals or welfare.

i. Within its area of operation, to make or have made all surveys, appraisals, studies and plans (but not including the preparation of a general plan for the community) necessary to the carrying out of the purposes of this article.
j. To prepare plans and provide reasonable assistance for the relocation of families displaced from a redevelopment project area.
k. To make such expenditures as may be necessary to carry out the purposes of this article;

iv. Historic Preservation Designation
    1. Interactive Map Viewer shows areas preserved by the West Virginia State Historic Preservation Office and National Register of Historic Places.
v. Potential for Alternative Uses
    1. Certain lots may be irregular or small lot layout, have insufficient street capacity or have insufficient green space, parks, or recreational facilities.
    2. Example: A dilapidated building in a busy business district may be demolished to create additional parking spaces for local businesses.
vi. Condition of Title
    1. Too many owners
    2. Government title
    3. Inability to determine or find owner(s) of the land
vii. Character of the Neighborhood
    1. Historic Neighborhood
    2. Blighted or Slum area
    3. Mixed Uses

4. Adult Businesses
5. Loss of Population
6. Increased crime and juvenile delinquency rates

viii. Crime Statistics
1. Patterns and trends
2. Identify hot spots
3. Traffic and accident analysis

ix. Declared Disaster Areas
1. Flooding
2. Hurricanes
3. Derechos
4. Earthquakes
5. Fires
6. Tornadoes

x. Physical and Geological Factors
1. Submerged lands
2. Lands subject to periodic flooding
3. Unusual topography
4. Presence of features that would make development by private enterprise uneconomical

xi. Economic Feasibility
1. Cost of Demolition/Market Costs
2. Partially or Completely Fix

Example: Municipal League resolution to provide large and small cities access to insurance settlements where homes are listed as a total loss.

xii. Other Factors
1. Beautification Committee
2. Downtown or Mainstreet WV/ On Trac Program

c. Other Resources
i. Blueprint Communities
1. Richwood, Sophia, Hinton, etc.

ii. Sustainable Communities
1. Fayette County

iii. Communities of Achievement

iv. Brownfields Program

v. West Virginia Mainstreet

d. Stakeholders

i. Neighbors
ii. Local business owners
iii. Elected officials
iv. Code enforcement department
v. Police department
vi. Fire department
vii. Utility department
viii. Board of education
ix. Hospital administrator
x. College or university president
xi. Non-profit organizations
xii. Housing authorities
xiii. Pastors of local churches
xiv. Economic development authorities
xv. Family resource networks

V. Land Banks

a. Land banks are "governmental or nonprofit entities that acquire, hold, and manage foreclosed or abandoned properties"[5]
b. Goals of a land bank might include: (a) providing affordable housing; (b) putting property back on the tax rolls; (c) stabilizing declining neighborhoods by repairing, removing, or redeveloping abandoned property; (d) developing green spaces; (e) collecting and joining abandoned lots into one consolidated, developable site; and (f) facilitating the revitalization of brownfields.[6]
c. The technique has been used for the preservation of farmland, wetlands, and other environmentally sensitive land, as well as the assemblage of land for major industrial development projects. However, the technique has fallen out of favor for inner-city redevelopment because of displacement controversies arising out of the old urban renewal program and still raises concerns among neighborhood advocates.[7]
d. The use of eminent domain as a means of acquiring property is essential if the land bank's purposes are not to be thwarted by private landowners who are unwilling to sell their property. It would be consistent with the principles of *Berman v. Parker* to uphold the exercise of the power of eminent domain by a land bank on the grounds that the condemnation was for the purposes of a

[5] U.S. DEP'T OF HOUS. & URBAN DEV., REVITALIZING FORECLOSED PROPERTIES WITH LAND BANKS 1 (2009) [hereinafter REVITALIZING].
[6] Julie A. Tappendorf and Brent O. Denzin, Turning Vacant Properties into Community Assets Through Land Banking, 43 Urb. Law. 801 (Summer 2011).
[7] ABA Leg. Guide to Affordable Housing Dev. S 4.III.B (2011).

project which was for the benefit of the community and that the land bank's use of that property bore a reasonable relation to those public purposes.[8]

e. The principal disadvantages of land banking as a means of controlling land development are the lack of funds necessary to acquire land on a large scale, the adverse effect of removing property from the tax rolls, and the political hostility toward public land ownership.[9]
f. Funding possibilities
    i. Housing and Economic Recovery Act (HERA) of 2008
    ii. American Recovery and Reinvestment Act (ARRA) of 2009
    iii. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010
    iv. Tax Increment Financing
    v. Local Partnerships with Lenders
g. The operation of most land banks generally follows a three-step cycle: (1) acquiring abandoned and/or vacant property; (2) temporarily managing the property; and (3) conveying it to third parties who return it to productive use.[10]
h. Usually "[l]and banks acquire properties through tax foreclosure, intergovernmental transfers, nonprofit transfers, and open-market purchases."[11] The most common form of acquisition for land banks is a transfer of property due to tax foreclosure.[12]
i. West Virginia Land Stewardship Act, West Virginia Code §§31-21-1, et seq.
    i. Creates West Virginia Land Stewardship Corporation (nonprofit), establishes voluntary land stewardship, provides for certified sites and addresses land bank programs.
    ii. Balances environmental issues and economic development.
    iii. Establishes inventory of development ready sites and provides increased certainty.
    iv. Corporation may engage in land banking.
j. West Virginia Land Reuse Agency Authorization Act (Senate Bill 579 (2014), West Virginia Code §§31-18E-1, et seq.)
    i. Focus on vacant, abandoned and tax-delinquent properties.
    ii. Counties, municipalities or two or more counties or municipalities who enter into an agreement may create a land reuse agency.

[8] § 34:11.Land banking, 4 Am. Law. Zoning § 34:11 (5th ed.).
[9] § 34:11.Land banking, 4 Am. Law. Zoning § 34:11 (5th ed.).
[10] Frank S. Alexander, *Land Bank Strategies for Renewing Urban Land*, 14 J. AFFORDABLE HOUSING & COMMUNITY DEV. L., 140, 150 (2005).
[11] U.S. DEP'T OF HOUS. & URBAN DEV., REVITALIZING FORECLOSED PROPERTIES WITH LAND BANKS 2 (2009)
[12] Frank S. Alexander, *Land Bank Strategies for Renewing Urban Land*, 14 J. AFFORDABLE HOUSING & COMMUNITY DEV. L., 140, 151 (2005).

iii. Land Reuse Agencies may not acquire land by eminent domain or acquire land "obtained by the power of eminent" "by any means". West Virginia Code §§31-18E-8, et seq.
iv. Presumably, local governments may condemn "blighted properties", but 2006 amendments to the West Virginia Code in response to the *Kelo* decision makes such condemnations more difficult.
v. Land Reuse Agencies are tax exempt.

k. City of Huntington Land Bank Fast Track Authority (August 2009)
   i. Established under the Home Rule Pilot Program under Huntington's Urban Renewal Authority.
   ii. Provides the model for the state enabling statute.
   iii. Funded by 1% interest per month earned on tax liens.
   iv. Over 50 properties listed on the city's website.
   v. Huntington's ordinance attached as Appendix V.

VI. Floating Zones

a. A floating zone is a zone not designated on a zoning map, although the requirements within the zone may be similar to those in a fixed zone. A floating zone for dilapidated buildings can 'float' over a distressed block during a period of revitalization and then move to another area once the issues of the current floating zone have been addressed.
b. The City of Cumberland, Maryland utilizes floating zoning to incentivize businesses to invest in dilapidated and vacant commercial structures, whose redevelopment is impractical under a "single principal land use classification." 6.17.01(4).
c. Floating zones open up the blighted areas to multiple different uses, increasing the range of businesses that are able to invest in revitalizing the structure. In Cumberland the parcels must be "discontinued or abandoned," at least two gross acres, and not less than 50,000 sq. ft. of floor area. Ordinance, 6.17.01(1)-(3). For a complete copy of Cumberland's Floating Zoning ordinance, see Appendix I.

APPENDIX I

Cumberland, Maryland's Floating Zoning Ordinance

5.01.12

Rehabilitation and Redevelopment Floating Zone District (RR)

"Certain areas of the City contain abandoned structures that were originally used for industrial, warehouse, or other employment purposes but which are now nonconforming in the district in which they are located. These structures are no longer useful and constitute a detriment to the surrounding neighborhoods and could adversely affect the City's taxable assessment base. The purpose of the

Rehabilitation and Redevelopment Floating Zone District is to allow and provide incentive for the reuse, rehabilitation, and redevelopment of such structures in a manner that will allow them to be restored to the active tax rolls and inventory of land in the City, while preserving the integrity of the neighborhood in which they are located. Performance standards have been developed to address compatibility of proposed developments with adjacent residential areas, as set forth in Section 6.14."

6.17 ADAPTIVE REUSE FLOATING ZONE DISTRICT

6.17.01 Applicability

The Adaptive Reuse Floating Zone may be applied in any zoning district by approval of the Mayor and Council of the City of Cumberland to properties that satisfy the following criteria, as supported by and/or specifically designated within the Comprehensive Plan:

(1) The property contains a gross area of not less than two (2) acres.

(2) The property contains one or more enclosed structures containing not less than fifty thousand (50,000) square feet of floor area either individually or in combination. Not less than seventy-five (75) percent of the principal use structure on the property must be retained and integrated into the project design.

(3) The principal or primary use or occupation of the subject property has been discontinued or abandoned.

(4) The nature of the property, building design, former use, or the potential return on

investment for comprehensive redevelopment of the site make it impractical or infeasible for successful redevelopment to occur under a single principal land use classification.

(5) No portion of the proposed project site will be concurrently zoned RR – Rehabilitation and Redevelopment Floating Zone.

6.17.02 Master Plan Submission & Approval

(1) An application for a zoning map amendment to apply the Adaptive Reuse Floating Zone to a specific property shall be accompanied by a Comprehensive Master Redevelopment Plan (in one or more documents) detailing compliance with the performance standards specified in Section 6.17.03 and containing the following information, as may be specifically applicable to the proposed project:

(a) A title page specifying the name of the project, the date of the plan, and the identity of the development company, developer, and/or all principals or investors in the project.

(b) A statement summarizing the nature of the proposed redevelopment/revitalization project and addressing the proposed project's compliance with each of the applicability criteria listed in Section 6.17.01.

(c) A detailed and comprehensive listing of the land use classifications, as specified in the Use Regulations Table of Section 6.02 of this Ordinance, that are proposed to be permitted within the project and a map and/or narrative to explain how these uses would be arranged in the project and how they would relate to and be made compatible or consistent with existing uses and zoning classifications of the areas surrounding the project site, including any buffer strips that may be required under Section 13 of this Ordinance. The listing shall specify the square footage of floor space and/or land area that is to be dedicated to each land use within the project.

(d) An Overall Site Development Plan for the project identifying the boundaries of all existing or proposed lots of record within the project to be conveyed or transferred, all buildings to be demolished and/or rehabilitated, any new buildings to be constructed on the property, and all existing and proposed streets, alleys, and off-street parking facilities within the project. The Overall Site Development Plan shall also clearly depict all public and/or common land easements (including the proposed use and provisions for perpetual maintenance of all common areas) within the project and any streets or other lands proposed to be dedicated to the city. Said site plan shall be prepared in accordance with the applicable requirements specified in Section 8 of this Ordinance for

a —Major Site Plan.‖ The site plan may refer to appropriate sections of the Comprehensive Master Redevelopment Plan for information to satisfy specific submission requirements. Where new lots of record or adjustments to the boundaries of existing lots of record are proposed, the Overall Site Development Plan shall include all pertinent & essential subdivision Preliminary Plat submission specifications required by Section 23-19 or Section 23-60 of the Subdivision Regulations.

(e) A statement or table identifying the specific Off-Street Parking and Loading/Unloading Area Requirements (including handicapped parking provisions in compliance with the Americans with Disabilities Act) for the project by proposed land use classification.

(f) A Master Signage Plan for the property depicting the location of all proposed directional and advertising signage within the development and diagrams for each proposed sign type depicting the materials, sign height, and sign area. The Master Signage Plan shall identify and justify any and all specific changes or deviations from the applicable requirements in Section 14 of the Zoning Ordinance that are proposed for the project.

(g) A trip generation assessment of the proposed uses in the project based on the Institute of Traffic Engineers' Trip Generation Manual, as amended. The projected trip generation rate for the proposed project shall be compared to the trip generation rate for the previous abandoned or discontinued use of the site. The assessment shall convey in tabular and/or narrative form for both the proposed and previous site uses, the specific use classifications that were utilized for traffic generation, the square footage or area factors used for each use classification, the appropriate trip generation factor applied from the Trip Generation Manual, and the total number of peak hour trips calculated. The Director of Engineering may require a comprehensive project traffic study if the project buildout trip generation exceeds the trip generation of the prior use of the site, and/or if the potential traffic impacts of the project on adjoining public streets and intersections could reduce the level of service to a —D‖ or lower, the project adjoins a public street or intersection that has been identified as —unsafe‖ or a —high accident location,‖ the project site lacks adequate access to distribute the projected traffic in a safe manner, or the project has a potentially significant impact on a highway owned and maintained by the State of Maryland. If the Director of Engineering determines that a comprehensive traffic study is necessary, such study and associated recommendations shall be prepared and appended to the Comprehensive Master Redevelopment Plan and reviewed by the Director of Engineering prior to a formal recommendation of approval or denial from the Planning Commission.

(h) Any specific infrastructure (water, sewer, street, or other utility) details and specifications that may be required by the Director of Engineering.

(i) An Engineering Report regarding the structural soundness of the buildings on the property for the proposed uses, unless such report is waived by a Building/Zoning Official based on a visual inspection of the building(s).

(j) Any proposed architectural renderings and/or elevations that may be desired to depict the design of the project and/or specific improvements.

(k) Verification of Conceptual Stormwater Management Plan approval for the project by the Director of Engineering.

(l) A determination of any and all areas within the project site that are located within the one hundred year (base) flood elevation and/or a floodway as depicted on the applicable Flood Insurance Rate Map and/or Flood Insurance Study prepared by the Federal Emergency Management Agency.

Any specific infrastructure (water, sewer, street, or other utility) details and specifications that may be required by the Director of Engineering.

An Engineering Report regarding the structural soundness of the buildings on the property for the proposed uses, unless such report is waived by a Building/Zoning Official based on a visual inspection of the building(s).

(m) A map of the site depicting the location of any non-tidal wetland areas within the project site that may require a special permit from the U.S. Army Corps of Engineers and/or the Maryland Department of Environment. A determination letter from the U.S Army Corps of Engineers and the Maryland Department of Environment verifying that no such non-tidal wetland areas exist on the project site may be provided in lieu of the required wetlands map.

(n) If the proposed project is located within a local historic district or is subject to Section 106 review and approval, a listing of and map depicting all eligible historic structures on the site and their proposed disposition (removal, rehabilitation, or expansion) shall be included in the Comprehensive Master Redevelopment Plan.

(o) Additional technical appendices, as may be warranted.

(2) An Application and Comprehensive Master Redevelopment Plan shall be filed, reviewed, approved, and amended in the same manner as a Zoning Map Amendment, as governed by

Section 15 of this Ordinance. An applicant may present to staff and/or the Planning Commission a Preliminary Conceptual Proposal of the project prior to the filing of a formal Zoning Map Amendment. The purpose of said Preliminary Conceptual Plan shall be to engage in non-binding discussions about the project concept and the formal review process, special staff or outside approvals that may be required by the Planning Commission as part of the Application, and the need for special information or project details to be included in the Comprehensive Master Redevelopment Plan. The Zoning Map Amendment may be approved by the Mayor and Council, based on findings that the proposed project will be compatible with neighboring uses and the area of the city where it will be located, consistent with the general spirit and intent of the Comprehensive Plan, and satisfies both the applicability requirements and performance standards specified in Sections 6.17.01 and 6.17.03, respectively.

(3) If a proposed project is located within a locally-zoned Historic District and the demolition of any structure on the site is proposed, the Planning Commission shall not recommend approval or denial to the Mayor and Council of an Adaptive Reuse Floating Zone petition until the Historic Preservation Commission has approved or denied the project.

(4) The Planning Commission shall not recommend approval or denial to the Mayor and Council of an Adaptive Reuse Floating Zone petition until the Director of Engineering has determined that a special traffic impact study for the project is either not required or, if required, has been approved, a Conceptual Stormwater Management Plan for the project has been approved, and the manner of connection to municipal utilities has been approved.

(5) The Planning Commission shall not recommend approval to the Mayor and Council of an Adaptive Reuse Floating Zone petition until the Overall Site Development Plan for the project (including any proposed subdivision or resubdivision of the development site) has been approved or conditionally approved by the Planning Commission—in the case of a major site plan and/or subdivision/resubdivision—or by the Zoning Administrator—in the case of a minor site plan and/or subdivision/resubdivision.

(6) Where the subdivision or resubdivision of the project site has been proposed, the approval of the Rezoning petition and Comprehensive Master Redevelopment Plan by the Mayor and City Council shall authorize the applicant to proceed with the preparation of a Final Plat of subdivision for approval by the Planning Commission.

6.17.03 PERFORMANCE STANDARDS

All proposed uses shall comply with the following:

(a) The General Performance Standards specified in Section 6.08 of this Ordinance.

(b) The Off-Street Parking and Loading/Unloading requirements specified in Section 12 of this ordinance. The provision of the required parking areas shall be depicted on the Overall Site Development Plan or verified through a draft transferable perpetual parking agreement to be signed by the owner of the project and the parking facility. Any and all public transit improvements shall be depicted on the Overall Site Development Plan.

(c) The Buffer Strip requirements of Section 13 of this Ordinance. Where practicable (taking into consideration existing site constraints and elevation changes), buffers shall be designed to afford the most attractive and effective transitions between the project and neighboring residential areas surrounding the project.

(d)All proposed signage shall be consistent with the specific requirements in Section 14 of this Ordinance, based on the general zoning district classifications for the land uses proposed within the project. The Signage Plan shall be designed to effectively direct traffic from the project entrances and surrounding streets to destinations within the site with a reasonable amount of advertising for individual businesses in a comprehensive form and pattern that will effectively prevent sign competition and visual clutter.

(1) When the project consists of multiple buildings or principal uses, entrances to the site should feature signs identifying the project name with directional signage to specific use areas or buildings within the project. Individual and special business identification signage shall be confined to the internal areas of the project as may be necessary to announce arrival of the traveling public to specific business destinations.

(2) In all projects, sign types, frequency, size (sign area), and height shall be appropriate, readable, and not excessive for the functional classification and posted travel speeds of the streets within and adjacent to the project site. The height, location, size (sign area), and amount of visual information contained on each sign should be designed and placed so that it is legible from the adjoining streets, clearly visible within the standard field of view of approaching vehicles (without compromising or interfering with required intersection site distances and traffic regulatory, warning, and guide signs), and able to be discerned and comprehended within 8 seconds at an average or normal reading speed.

(3) Signage shall be arranged and located in manner that will minimize visual clutter and driver confusion.

(4) Freestanding pedestrian directory signs may be provided within parking lots containing fifty (50) or more parking spaces and/or at the main entrances to each building containing multiple uses or tenants.

(5) Off-Premise Signs or Outdoor Advertising shall not be permitted within the Adaptive Reuse Floating Zone.

(6) All proposed signage within a local historic district shall be approved by the Historic Preservation Commission prior to any recommendation of approval of the Comprehensive Master Redevelopment Plan by the Planning Commission.

(e) The proposed project shall provide adequate access/egress points and internal streets to safely distribute and accommodate the traffic generated by the site and provide for essential emergency access and services, as determined by the Director of Engineering.

(f) Any and all proposed manufacturing uses shall be conducted in buildings that are enclosed on all sides.

(g) No outdoor storage of materials or products shall be permitted within the project.

(h) The project shall be connected to and served by basic municipal utilities owned and operated by the City of Cumberland.

APPENDIX II

Buckhannon, West Virginia's Vacant Structures Ordinance

ORDINANCE NO. 367 OF THE CITY OF BUCKHANNON, AN ORDINANCE: (1) AMENDING ORDINANCE NO. 170 OF THE CITY OF BUCKHANNON, i.e., BUCKHANNON'S HOUSING ENFORCEMENT ORDINANCE; (2) ADOPTING THE STATUTORY PROVISIONS OF CHAPTER 8, ARTICLE 12, SECTION 16a. OF THE WEST VIRGINIA CODE, AS AMENDED, ENTITLED "REGISTRATION OF UNINHABITABLE PROPERTY"; AND (3) ADOPTING THE STATUTORY PROVISIONS OF CHAPTER 8, ARTICLE 12, SECTION 16c. OF THE WEST VIRGINIA CODE, AS AMENDED, ENTITLED "REGISTRATION OF VACANT BUILDINGS; REGISTRATION

FEES; PROCEDUR ES F OR ADMINISTRATION AND ENFORCEMENT "

WHEREAS, the provisions of Chapter 8, Article 12, Section 16 of the West Virginia Code, as amended, confer plenary power and authority upon municipalities, including The City of Buckhannon, to adopt ordinances regulating the repair, alteration, or improvement, or the vacating and closing or removal or demolition, or any combination thereof, of any dwellings or other buildings unfit for human habitation due to dilapidation, defects increasing the hazard of fire, accidents or other calamities, lack of ventilation, light or sanitary facilities or any other conditions prevailing in any dwelling or building, whether used for human habitation or not, which would cause such dwellings or other buildings to be unsafe, unsanitary, dangerous or detrimental to the public safety or welfare; and,

WHEREAS**,** the Council of the City of Buckhannon adopted Ordinance No. 170, sometimes referred to as the City of Buckhannon's Housing Enforcement Ordinance, that was effectuated on July 15, 1974; and,

WHEREAS**,** the State Legislature amended the immediately foregoing authorizing state statute in 2008; and,

WHEREAS, the Council desires to amend the City's Housing Enforcement

Ordinance to incorporate the amendments to the authorizing state statute

WHEREAS, the State Legislature further enacted (1) the provisions of Chapter 8, Article 12, Section 16a. of the West Virginia Code, entitled "Registration of uninhabitable property" in 2008, and (2) the provisions of Chapter 8, Article 12, Section 16c. of the West Virginia Code, entitled "Registration of vacant buildings; registration fees; procedures for administration and enforcement" in 2010; and,

WHEREAS, the Council desires to implement by ordinance the statutory provisions of both Chapter 8, Article 12, Section 16a. and 16c. of the West Virginia Code; and,

WHEREAS, the Council of the City of Buckhannon is committed to becoming more vigilant respecting all matters involving dwellings or buildings determined to be unfit for human habitation, or alternatively vacant buildings or other structures due to said dwellings, buildings or other structures threatening the health, safety and general welfare of the residents of the City of Buckhannon.

NOW, THEREFORE, BE IT ORDAINED AND ENACTED BY THE COUNCIL OF THE CITY OF BUCKHANNON, AS FOLLOWS:

ARTICLE I – ADOPTION OF AMENDED HOUSING ENFORCEMENT ORDINANCE:

Section 1: There is hereby created the City of Buckhannon Housing Enforcement Board which shall consist of the Mayor, the City Engineer, and one member at large to be selected by and to serve at the will and pleasure of the Council of the City of Buckhannon. The City Health Officer and Fire Chief shall serve as ex officio members of the Housing Enforcement Board, but shall have no voting rights or privileges on the Board.

Section 2: The Council of the City of Buckhannon shall designate and appoint an officer to be known as the City of Buckhannon Housing Enforcement Officer. The Housing Enforcement Officer shall exercise the powers herein granted along with any and all other powers currently granted or as may be granted in the future to such officer pursuant to the statutory provisions of Chapter 8, Article 12, Sections 16, 16a., and 16b. of the West Virginia Code, as amended. The Housing Enforcement Officer shall serve at the will and pleasure of the City Council. The Housing Enforcement Officer may or may not be one and the same person as the City of Buckhannon's Zoning Officer. The Housing Enforcement Officer shall be paid such compensation as may be prescribed by the City Council.

Section 3: The Housing Enforcement Officer is charged with the responsibility and authority to formally investigate any and all dwellings or other buildings or structures alleged to be unfit for human habitation due to dilapidation, defects increasing the hazard of fire, accidents or other calamities, lack of ventilation, light or sanitary facilities or any other conditions prevailing in any dwelling or other buildings or structures, whether used for human habitation or not, which would cause such dwellings or other buildings or structures to be unsafe, unsanitary, dangerous or detrimental to the public safety or welfare. The initiation of any investigation by the Housing Enforcement Officer may occur either (a) as a consequence of the Housing Enforcement Officer's own observation; (b)

from a citizen complaint lodged with the Housing Enforcement Officer or (c) as referred by the City Council. The Housing Enforcement Officer in conducting investigations or discharging any duties established pursuant to this Ordinance shall have the right upon granting reasonable notice to the occupants thereof, i.e., a minimum of twenty-four (24) hours written notice delivered to the occupants thereof, to enter upon and within at all reasonable times, any lots, dwellings and other buildings and structures situated within the corporate limits of the City of Buckhannon. Any entrance upon or within any premises by the Housing Enforcement Officer for the purpose of making any investigation authorized by this Ordinance shall be made in a manner as to cause the least possible inconvenience to the persons in possession of the premises. In the event that there are no occupants of the premises to be investigated, then reasonable written notice shall be delivered to the owner of the premises.

Section 4: (A) Upon any determination by the Housing Enforcement Officer that any dwelling or other building or structure is unfit for human habitation due to dilapidation, defects increasing the hazard of fire, accidents or other calamities, lack of ventilation, light or sanitary facilities or any other conditions prevailing in any dwelling or other buildings or structures, whether used for human habitation or not, which would cause such dwellings or other buildings or structures to be unsafe, unsanitary, dangerous or detrimental to the public safety or welfare, the Housing Enforcement Officer then promptly shall submit to the Housing Enforcement Board a written, preliminary report concerning the condition of such dwelling or other building or structure and the Housing Enforcement Board thereafter shall conduct a hearing respecting the investigation and report.

(B) Written notice of not less than ten (10) days shall be served upon both the owner and any occupants of the premises, and which notice shall establish: (a) the date, time and place for the hearing; (b) the nature of the complaint; (c) the opportunity of the owner and/or occupants to present testimony and other evidence concerning the matter; and (d) the possible ordering by the Housing Enforcement Board of the razing and demolition of the dwelling or other building or structure if the violating conditions are not abated within a reasonable period of time, i.e., a minimum of thirty (30) days following the hearing date and commencement of razing and demolition.

(C) The hearing before the Housing Enforcement Board on the matter shall be an informal hearing and strict rules of procedure or evidence shall be followed or required. The owner and/or occupants may be represented by legal counsel. Any owner or occupant of the premises involved, or their legal counsel, or any other interested person, shall have the right to examine the written report of the Housing Enforcement Officer and further shall have the right to file a written answer to such report and to appear in person or by counsel, and offer

testimony and other evidence at the time and place fixed in the notice for the hearing on the matter.

Section 5: If following the hearing, the Housing Enforcement Board determines by a majority vote that the investigated dwelling or other building or structure is unfit for human habitation due to dilapidation, defects increasing the hazard of fire, accidents or other calamities, lack of ventilation, light or sanitary facilities or any other conditions prevailing in any dwelling or other buildings or structures, whether used for human habitation or not, which would cause such dwellings or other buildings or structures to be unsafe, unsanitary, dangerous or detrimental to the public safety or welfare, then the Housing Enforcement Board shall state in writing its findings of fact in support of such determination, and then shall issue and cause to be served upon the owner, occupants and any other interested parties, an order requiring the owner to undertake the following:

(A) The repair, alteration or improvement of the dwelling or other building or structure within a specified time to permit the repair, alteration or improvement of the premises so as to abate the violating conditions, said repair, alteration or improvement period to be a minimum of thirty (30) days, or

(B) The razing, demolition and removal of the dwelling or other building or structure.

Section 6: (A) If the owner fails to comply with the order of the Housing Enforcement Board to repair, alter or improve, or alternatively to raze, demolish and remove the dwelling or other building or structure, the Housing Enforcement Board may cause said dwelling or other building or structure to be repaired, altered or improved, or to be vacated and closed from and after the date specified in the order of the Housing Enforcement Board for the repair, alteration or improvement of the premises. The Housing Enforcement Officer then shall cause to be posted upon the premises a notice bearing the following: "This building has been determined to be unfit for human habitation due to dilapidation, defects increasing the hazard of fire, accidents or other calamities, lack of ventilation, light or sanitary facilities or other conditions prevailing in the dwelling or other building or structure, whether used for human habitation or not, which would cause such dwelling or other building or structure to be unsafe, unsanitary, dangerous or detrimental to the public safety or welfare. The use or occupancy of this dwelling or other building or structure is prohibited and unlawful." (B) If the owner fails to comply with an order of the Housing Enforcement Board to repair, alter or improve, or raze, demolish and remove, the Housing Enforcement Board may cause such dwelling or other building or structure to be razed, demolished and removed upon such

conditions as the Housing Enforcement Board may prescribe and at the exclusive cost and expense of the owner thereof.

Section 7: All costs of any repairs, alterations, improvements, vacating, closing, razing, demolition and/or removal of any dwelling or other building or structure under orders of the Housing Enforcement Board shall constitute a lien against the subject real estate upon which such costs were incurred. Any and all cost incurred respecting asbestos inspection and/or abatement shall be deemed to be a cost of any razing, demolition and/or removal. If the dwelling or other building or structure is razed, demolished and removed by the Housing Enforcement Board, the Board shall attempt to sell such materials from such premises as can be salvaged and shall credit the proceeds of such sale against the cost of the razing, demolition and removal.

Section 8: All notices or orders issued by the Housing Enforcement Board shall be served upon the owner and/or occupants thereof in such a manner as prescribed by the laws of the State of West Virginia for service of legal documents, and in addition thereto, all such notices and orders shall be posted in a conspicuous place upon the premises. A copy of all such complaints or orders further shall be filed for record in the Office of the Clerk of the County Commission of Upshur County, West Virginia, and such filing shall be deemed to have the same legal force and effect as a lis pendens notice authorized pursuant to the laws of the State of West Virginia.

Section 9: Any owner or other person affected by an order issued by the Housing Enforcement Board may petition the Circuit Court of Upshur County, West Virginia for an injunction restraining the Housing Enforcement Board and/or the Housing Enforcement Officer from carrying out the provisions of such order, and the Housing Enforcement Board and/or Housing Enforcement Officer shall fully comply in all respects with any order issued by the Circuit Court in connection with any injunction hearing. The City Attorney shall represent the Housing Enforcement Board and/or Housing Enforcement Officer in any such proceedings before the Circuit Court.

Section 10: (A) The owner or other person exercising dominion or control over any dwelling or other building or structure determined by the Housing Enforcement Board to be unfit for human habitation, and who shall fail to comply with any order of the Housing Enforcement Board, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than One Hundred Dollars ($100.00) nor more than Five Hundred Dollars ($500.00) for each offense, and in addition thereto, may be ordered confined for a period not exceeding thirty (30) days.

(B) Any occupant or lessee or any other person who fails to comply with any order to vacate any dwelling or other building or structure, or who remains in occupancy or possession of any building or structure that has been ordered to be vacated, shall be guilty of a misdemeanor and shall be fined not less than One Hundred Dollars ($100.00) nor more than Five Hundred Dollars ($500.00) for each offense, and in addition thereto, may be ordered confined for a period not exceeding thirty (30) days.

(C) Any person who removes any notice or order of the Housing Enforcement Board posted as required pursuant to this Ordinance shall be guilty of a misdemeanor and upon conviction thereof shall be fined not less than One Hundred Dollars ($100.00) nor more than Five Hundred Dollars ($500.00) for each offense, and in addition thereto, may be ordered confined for a period not exceeding thirty (30) days.

(D) Any person who obstructs, impedes or interferes with the Housing Enforcement Officer or any other person in their performance and discharge of duties and requirements of this Ordinance shall be guilty of a misdemeanor and upon conviction thereof shall be fined not less than One Hundred Dollars ($100.00) nor more than Five Hundred Dollars ($500.00) for each offense, and in addition thereto, may be ordered confined for a period not exceeding thirty (30) days.

Section 11: No officer, agent or employee of the City of Buckhannon, or any member of the Housing Enforcement Board of the City of Buckhannon or the Housing Enforcement Officer shall be held personally liable for any damage incurred or alleged to have been incurred as a result of any act required, permitted or authorized to be performed in the discharge of duties pursuant to this Ordinance or any notice or order issued by the Housing Enforcement Board. Any suit brought against any such officer, agent or employee of the City, or any member of the Housing Enforcement Board or the Housing Enforcement Officer shall be defended by the City of Buckhannon.

ARTICLE II – REGISTRATION OF UNINHABITABLE PROPERTY:

Section 1: There is hereby created the City of Buckhannon's Registry of Uninhabitable Property. The owner of any real property improved by a structure that has been determined to be uninhabitable and violates the City's Building Code shall register their property with the Housing Enforcement Officer, said Housing Enforcement Officer being hereby specifically designated and appointed by the City Council as being the City's Code Enforcement Officer.

Section 2: The Housing Enforcement Officer shall investigate and determine whether any real property situated within the corporate limits violates the provisions of the City's Building Code.

Section 3: After inspecting property, if the Housing Enforcement Officer determines the property is uninhabitable and violates the City's Building Code, then:

(A) The Housing Enforcement Officer shall post a written notice on the property which shall include: (1) an explanation of the violation(s); (2) a description of the registration; (3) the date the fee will be assessed; (4) an explanation of how to be removed from the registration; (5) an explanation of the appeals process; (6) a statement that if the fee is not paid, then the property is subject to forfeiture; and,

(B) Within five (5) business days of the inspection and the posting of property, the Housing Enforcement Officer shall by certified mail, send a copy of the notice that was posted to the owner(s) of the property at the last known address according to the county property tax records.

Section 4: Within forty-five (45) days of receipt of the notification by the owner(s), the property owner may: (A) Make and complete any repairs to the property that violate the City's Building Code; or (B) Provide written information to the officer showing that repairs are forthcoming in a reasonable period of time.

Section 5: After the repairs are made, the owner may request a reinspection of the property to ensure compliance with the applicable building code. If the Housing Enforcement Officer finds the violations are fixed, the owner is not subject to the registration and no fee will be incurred.

Section 6: The Housing Enforcement Officer may reinspect the property at any time to determine where in the process the repairs fall.

Section 7: Within ninety (90) days of receipt of the notification by the owner(s), the property owner has the right to appeal the decision of the officer to the Housing Enforcement Board.

Section 8: If an appeal is not filed within ninety (90) days, the property is registered and the fee is assessed to the owner(s) on the date specified in the notice. The notice of the fee shall be recorded in the Upshur County Clerk's Office.

Section 9: If the Housing Enforcement Board affirms the registration and assessment of the registration fee, the property owner has the right to appeal the decision of the enforcement agency to the Upshur County Circuit Court within thirty (30) days of the

decision. If the decision is not appealed in a timely manner to the circuit court, then the property is registered and the fee is assessed on the date specified in the notice. The notice of the fee shall be recorded in the Upshur County Clerk's Office.

Section 10: After all fees are paid, and at such time as the property is no longer determined to be uninhabitable either as a result of improvements to the property that make the property habitable, or the uninhabitable structure being razed and removed, the municipality shall record a release of the fee in the Upshur County Clerk's Office.

Section 11: If an owner fails to pay the fee, then the Housing Enforcement Officer shall annually post the written notice on the property and send the written notice to the owner(s) by certified mail.

Section 12: If a registration fee remains delinquent for two years from the date it was placed on record in the Upshur County Clerk's Office, the City may take action to receive the subject property by means of forfeiture. In the event the City takes the steps necessary to receive the subject property, the City then becomes the owner of record and takes the property subject to all liens and real and personal property taxes.

Section 13: An owner subject to property registration pursuant to this Article II, shall be assessed a monthly fee in the amount of $0.02 per square foot of the uninhabitable structure, said square footage to be determined from the records maintained by the Upshur County Assessor's Office.

Section 14: Any and all funds realized from the imposition of the fee authorized pursuant to this Article II are hereby declared to be dedicated to a special account to be established by the City Treasurer for the purpose of facilitating the City's razing, demolition and removal of uninhabitable dwellings and other buildings and structures situated within the corporate limits, or may otherwise be expended to discharge the functions, duties and expenses of the City's Housing Enforcement Board and/or Housing Enforcement Officer.

ARTICLE III – REGISTRATION OF VACANT BUILDINGS; REGISTRATION FEES; PROCEDURES FOR ADMINSTRATION AND ENFORCEMENT:

Section 1: There is hereby created the City of Buckhannon's Registry of Vacant Buildings. For purposes of this Article III, the term "vacant building" means a building or other structure that has been unoccupied for six months or longer, or unsecured and occupied by one or more unauthorized persons for six months or longer, PROVIDED, that a new building under construction or a building that by definition is exempted by ordinance of the municipality, is not deemed a vacant building: PROVIDED FURTHER, however, that the City Council shall on a case by case basis, upon the written request of the property owner, exempt

vacant buildings from registration upon a finding for good cause shown that a person will be unable to occupy the buildings for a determinant period of time.

Section 2: An owner subject to property registration pursuant to this Article III, shall be assessed a monthly fee in the amount of $0.01 per square foot of all vacant buildings, said square footage to be determined from the records maintained by the Upshur County Assessor's Office.

Section 3: Any owner subject to property registration pursuant to this Article III upon six months of their property becoming vacant, shall register their property as being vacant with the City's Housing Enforcement Officer. The Housing Enforcement Officer shall determine the appropriate monthly fee after conferring with the Upshur County Assessor's Office.

Section 4: In any event that the owner of a vacant building resides outside the State of West Virginia, then the owner shall designate a person residing within the State who shall be authorized to accept service of process and notices of fees due and owing pursuant to this Article III on behalf of the owner and who shall be designated by the owner as a responsible, local party or agent for the purposes of notification in the event of any emergency affecting the public health, safety or welfare as attributable to the owner's vacant building.

Section 5: The City is authorized to institute a civil action against the owner of any vacant property and/or file a lien on real property for unpaid and delinquent vacant building registration fees. Before any lien is filed, the City shall give notice to the property owner or owner's agent, by certified mail, return receipt requested, stating that the City will file the lien unless the delinquent fees are paid by a date stated in the notice, which shall be not less than thirty (30) days from the date the notice is received by the owner or the owner's agent, which shall be the date of delivery shown on the signed certified mail return receipt card. If service of the notice cannot be attained by certified mail, notice may be affected by posting of the notice at the property or by publication.

Section 6: Within thirty (30) days of receipt of the notification by the owner(s), the property owner has the right to appeal the decision of the officer to the Housing Enforcement Board.

Section 7: If an appeal is not filed within thirty (30) days, the property is registered and the fee is assessed to the owner(s) on the date specified in the notice. Section 8: If the Housing EnforcementBoard affirms the registration and assessment of the registration fee, the property owner has the right to appeal the decision of the enforcement agency to the Upshur County Circuit Court within thirty (30) days of the Board's decision. If the decision is

not appealed in a timely manner to the circuit court, then the property is registered and the fee is assessed on the date specified in the notice.

Section 9: The City shall deposit all fees collected pursuant to this Article III into a special account, which funds shall be used to:

(A) improve public safety efforts, especially for police and fire personnel, who most often contend with the dangerous situations manifested in vacant properties;

(B) monitor and administer this Article III; and,

(C) repair, close or demolish a vacant structure as authorized pursuant to Article I of this Ordinance.

ARTICLE IV – SEVERABILITY: The provisions of this Ordinance are severable and if any provision or part thereof shall be held invalid for any reason by a court of competent jurisdiction, such invalidity shall not affect or impair any of the other provisions or parts of this Ordinance. It is hereby declared to be the intent of the City Council that this Ordinance nevertheless would have been adopted if such invalid provision or part thereof had not been included herein.

ARTICLE V - EFFECTIVE DATE: This Ordinance shall be deemed effective thirty (30) days following the third (3rd) reading, passage and adoption by the Council of the City of Buckhannon, i.e., September 15, 2012.

FIRST READING:	July 19, 2012
SECOND READING:	August 2, 2012
THIRD READING, PASSAGE & ADOPTION:	August 16, 2012

_____
Kenneth T. Davidson, Mayor

CERTIFICATE OF ENACTMENT

I, Richard C. Clemens, City Recorder, do hereby certify that the foregoing Ordinance No. 367 was lawfully ordained and enacted by the Council of the City of Buckhannon at a regular session of the said Council assembled on August 16, 2012.

_____
Richard C. Clemens, City Recorder

APPENDIX III

Moundsville, West Virginia Vacant Structures Ordinance

ARTICLE 1107

Registration of Vacant or Uninhabitable Buildings

CROSS REFERENCES

Nuisance abatement and demolition - see HEALTH & SANITATION Art. 1105

1107.01 VACANT BUILDING REGISTRATION PROGRAM AND UNINHABITABLE BUILDING REGISTRATION PROGRAM.

There is hereby established in the City of Moundsville a vacant building registration program and also an uninhabitable building registration program.

(Ord. 9-7-10)

1107.02 DEFINITIONS; EXEMPTIONS.

(a) For purposes of this article, the term "vacant building" means: (1) A building or other structure that is unoccupied; or

(2) A building that is unsecured and occupied by one or more unauthorized persons continuously or intermittently for a period of time greater than one week.

(b) For purposes of this article, the term "uninhabitable building" means a building or other structure that is not capable or fit for occupancy because it violates the Moundsville Building Code to such an extent as to make it unsafe for human occupancy for residency or business purposes.

(c) Provided, that a new building under construction or a building that is exempted by ordinance, is not deemed a vacant or uninhabitable building: provided, however, that the governing body of a municipality, shall on a case by case basis, upon request by the property owner, or owner's agent, exempt a vacant building from registration upon a finding for good cause shown that the person will be unable to temporarily occupy the building for a determinant period of time for a good reason. Such an exemption, if granted by City Council, shall only be granted for a specific period of time to be established by City Council, which may be extended by council for good cause.

(d) For purposes of this article, the term "owner" means the owner of record based on land records at the Office of the Clerk of the County Commission, and includes any co-owner, or any person or entity with legal, financial or equitable interest in the property on which the vacant building is situate, at the time the registration fee imposed hereunder becomes due and owing. (Ord. 9-7-10)

1107.03 REGISTRATION REQUIRED; INSPECTION; FEE.

(a) Registration: At the time of the adoption of this article, all owners of real estate within the City of Moundsville upon which is situate a vacant building shall register the same with the City within thirty (30) days after the building is found to meet the definition of a vacant building by the Building Inspector or other City agent designated by the City Manager. The registration form shall require information from the registrant deemed necessary by the City to meet the purposes of this article. Additionally, the Building Inspector or other designated City agent, may require that the owner provide a professional opinion (architect, engineer, etc.) to determine the structural integrity of the building, any repairs necessary to ensure its structural integrity and that it will be safe for entry by fire fighters and police officers in time of emergency, and that the building and its contents do not present a hazard

to the public during the time the building remains vacant. Owners failing to comply or repair may be subjected to prosecution under this article and/or to other provisions of the City Code dealing with violations of the Building Code, orders to repair or raze, public nuisance, building nuisance, and the like.

(b) Inspection: At the time of registration, the Building Inspector, or other designated City agent, shall determine whether it is necessary for an inspection of the structure so as to determine occupancy, and to identify any public safety issues needing addressed. Other City officials having an interest in the public safety, such as the Fire Chief, Police Chief, City Engineer, and the like, may attend the inspection. If the owner fails or refuses to consent to and arrange for an inspection, the City will seek an administrative search warrant from a court of competent jurisdiction, which shall include the municipal court, which is hereby conferred such authority hereunder.

(c) Vacant Building: There is hereby imposed on any owner of real property upon which there is situate a vacant building, an annual registration fee, the full amount of which shall be

due upon initial assessment thereof, for that calendar year or any part thereof remaining, without deduction or proration for the partial year, and the annual fee shall also be due for each subsequent year by January 15th of the said calendar year, and continuing each year thereafter until the owner shall apply for, and be granted an exemption or otherwise present proof to the building inspector that the real property no longer meets the definition of having a vacant building situate thereon. Said fee shall be based on the duration of the vacancy as determined by the following scale:

(1) No fee for properties that are vacant for less than one year (registration is nevertheless required).

(2) $200.00 for properties that are vacant for at least one year but less than two years.

(3) $400.00 for properties that are vacant for at least two years but less than three (4) $600.00 for properties that are vacant for at least three years but less than four (5) $800.00 for properties that are vacant for at least four years but less than five (6) $1,600.00 for properties that are vacant for at least five years, plus an additional $300.00 for each years in excess of five years.

(d) Uninhabitable Building: If a building or structure is also uninhabitable such that it is in violation of the Building Code and unsafe for occupancy, there shall be a separate and

additional fee added to the above vacant building fee, in the amount of one hundred dollars ($100.00) per calendar year or any part thereof, including those uninhabitable for less than one year, due upon initial assessment thereof, and due for each subsequent year by January 15th of the said calendar year, and continuing each year thereafter until the owner shall apply for, and be granted an exemption or otherwise present proof to the building inspector that the real property no longer meets the definition of having an uninhabitable building situate thereon.

(e) In no instance shall the registration of a vacant or uninhabitable building and the payment of the registration fees be construed to excuse or exonerate the owner, agent or responsible party from compliance with any other Building or Housing Code requirement of the City. The owner at the time of determination of vacancy or uninhabitability shall be the responsible party for the initial registration and fee, and the owner as of January 1st of each calendar year shall be responsible for each annual registration and fee thereafter, for each respective ensuing year. (Ord. 9-7-10)

1107.04 ABSENTEE OWNERS.

When the owner of the vacant or uninhabitable building resides outside of the State of West Virginia, the owner shall provide the name and address of a person who resides within the State who is authorized to accept service of process and notices under this article on behalf of the owner and who is designated as a responsible, local party or agent for the purposes of notification in the event of an emergency affecting the public health, safety or welfare.

(Ord. 9-7-10)

1107.05 PROCEDURE FOR IMPOSITION OF VACANT BUILDING FEE; COLLECTION; LIENS ON REAL ESTATE.

The building inspector shall investigate and determine whether a building is vacant within the meaning of this article. If determined to be vacant, there shall be imposed upon the owner, the registration fee designated herein. Notice of said registration fee shall be posted at the vacant property and sent by certified mail to the property owner at the last known address according to the county property tax records.

Such registration fee for a vacant building shall be subject to payment and collection by any legal means available for the collection of any other municipal fee or tax. Additionally, the City, at its election, may institute a civil action against the property owner and/or file a lien on real property for unpaid and delinquent vacant building registration fees. If any lien is to be filed before or without resorting to judgment from civil action, the City shall give notice to the property owner or owner's agent, by personal service upon such person by a credible

person over the age of eighteen years, or by certified mail, return receipt requested, that the City will file the lien unless the delinquent fees are paid by a date stated in the notice, which must be no less than thirty (30) days from the date of personal service of the notice, or thirty (30) days from the date of delivery of the notice shown on a signed certified mail return receipt card. In the event service cannot be obtained by personal service or certified mail, service may be had by publication of said notice in a newspaper of general circulation in Marshall County, once a week for two consecutive weeks, advising that the City will file the lien unless the delinquent fees are paid by a date stated in the notice, which must be no less than thirty (30) days from the date of last publication.

(Ord. 9-7-10)

1107.06 APPEAL AS TO VACANT BUILDING.

A property owner may challenge any determination regarding an alleged vacant building made pursuant to this article by filing with the City a written statement of the grounds for the challenge within thirty (30) days of any determination or assessment by which the owner is aggrieved, which shall be an appeal heard by City Council within thirty (30) days of the filing thereof. Any person aggrieved by the decision of City Council may appeal the same to the Circuit Court of Marshall County within thirty (30) days of the decision of City Council.

(Ord. 9-7-10)

1107.07 USE OF VACANT BUILDING REGISTRATION FEE.

The City shall deposit the vacant building registration fee into a separate account, which shall be used to:

(a) Improve public safety efforts, especially for police and fire personnel, who most often contend with the dangerous situations manifested in vacant properties;

(b) Monitor and administer this article; and

(c) Repair, close or demolish a vacant structure as authorized by law. (Ord. 9-7-10)

1107.08 PROCEDURE FOR IMPOSITION OF UNINHABITABLE BUILDING REGISTRATION FEE.

(a) The passage of this article confirms the Mayor's and City Manager's appointment of the City building inspector as the code enforcement officer hereunder as envisioned by the state law authorizing this article.

(b) The Building Inspector shall investigate and determine whether real property violates provisions of the applicable Building Code of the Municipality, such that it would be an uninhabitable building under this article.

(c) After inspecting the property, if the officer determines the property is uninhabitable and violates the applicable Building Code, then:

(1) The officer shall post a written notice on the property which shall include: A. An explanation of the violation(s);

B. A description of the registration;

C. The date the fee will be assessed;

D. An explanation of how to be removed from the registration;

E. An explanation of the appeals process; and

F. A statement that if the fee is not paid, then the property is subject to forfeiture; and

(2) Within five business days of the inspection and the posting of the property, the officer shall, by certified mail, send a copy of the notice that was posted to the owner(s) of the property at the last known address according to the county property tax records.

(d) Within forty-five (45) days of receipt of the notification by the owner(s), the property owner may:

(1) Make and complete any repairs to the property that violate the applicable Building Code; or

(2) Provide written information to the officer showing that repairs are forthcoming in a reasonable period of time.

(e) After the repairs are made, the owner may request a reinspection of the property to ensure compliance with the applicable Building Code. If the officer finds the violations are fixed, the owner is not subject to the registration and no fee will be incurred.

(f) The officer may reinspect the property at any time to determine where in the process the repairs fall.

(g) Within ninety (90) days of receipt of the notification by the owner(s), the property owner has the right to appeal the decision of the officer to the City Building Enforcement Agency.

(h) If an appeal is not filed within ninety (90) days, the property is registered and the uninhabitable building registration fee is assessed to the owner(s) on the date specified in the notice. The notice of the fee shall be recorded in the office of the clerk of the county commission of the county where the property is located and if different, in the office of the clerk of the

county commission of the county where the property is assessed for real property taxes.

(i) If the Enforcement Agency affirms the registration and assessment of the uninhabitable building registration fee, the property owner has the right to appeal the decision of the Enforcement Agency to the Circuit Court within thirty (30) days of the decision. If the decision

is not appealed in a timely manner to the Circuit Court, then the property is registered and the fee is assessed on the date specified in the notice. The notice of the fee shall be recorded in the office of the clerk of the county commission of the county where the property is located and if different, in the office of the clerk of the county commission of the county where the property is assessed for real property taxes.

(j) A fee assessed under this section for an uninhabitable building shall be recorded in the same manner as a lien is recorded in the office of the Clerk of the County Commission of the County.

(k) If the uninhabitable building registration fee is paid, then the Municipality shall record a release of the fee in the office of the clerk of the county commission of the county where the property is located and if different, in the office of the clerk of the county commission of the county where the property is assessed for real property taxes.

(l) If an owner fails to pay the uninhabitable building registration fee, then the officer shall annually post the written notice on the property and send the written notice to the owner(s) by certified mail.

(m) If an uninhabitable building registration fee remains delinquent for two years from the date it was placed on record in the clerk of the county commission in which the property is located and assessed, the Municipality may take action to receive the subject property by means of forfeiture by filing an action in the Circuit Court. Should the Municipality take the steps necessary to receive the subject property, the municipality then becomes the owner of record and takes the property subject to all liens and real and personal property taxes.

(Ord. 9-7-10)

1107.09 ADDITIONAL REQUIREMENTS.

The owner of real property upon which is situate a vacant and/or uninhabitable building shall also comply with the following:

(a) Exterior property areas shall be mowed regularly and non-cultivated gardens maintained at no more than 17 inches of growth. All noxious weeds are prohibited.

(b) Electrical service shall be provided to the building via temporary pole service on the exterior of the structure or create a permanent service for the structure and install two GFCI protected receptacles.

(c) NEC and OSHA compliant string lighting shall be provided to the entire structure so that it may be illuminated as needed to view the structure.

(d) Unstable interior and exterior surfaces and components are to be removed. (e) Unstable or unsound accessory buildings are to be razed or renovated.

(f) All loose, deteriorated, missing, or broken windows and doors are to be covered by using wood sheet goods or better, to be cut and neatly fit to the opening.

(g) All loose or deteriorated trim, gutter or overhang extensions (masonry or frame) are to be repaired, securely reattached, or removed to prevent falling. (h) Any utilities need to be connected to the structure.

(i) Regular routine monitoring of the structure shall occur by the owner to ensure that the building is kept in compliance with the above items.

(Ord. 9-7-10)

1107.99 CRIMINAL PENALTIES.

Whoever violates any provision of this article by knowingly and intentionally failing to comply with any provision, registration, fee, notice, assessment, or order issued hereunder is guilty of a misdemeanor and shall be fined not more than five hundred dollars ($500.00) for each offense. Each day such violation continues may constitute a separate offense.

(Ord. 9-7-10)

APPENDIX IV

Wheeling, West Virginia Vacant Structures Ordinance

CITY OF WHEELING ORDINANCE

VACANT BUILDING REGISTRATION PROGRAM

Wheeling, WV – The City of Wheeling, in accordance with Section 1718 of the Codified Ordinances of the City of Wheeling (Vacant Structure Code), announces the Vacant Building Registration Program and the process in which to register vacant buildings. Wheeling City Council passed this ordinance on July 21, 2009.

A building is deemed vacant and must register if no person conducts a business or resides in any part of the building, has one or more building code violations, and has been without utility services for 30 days.

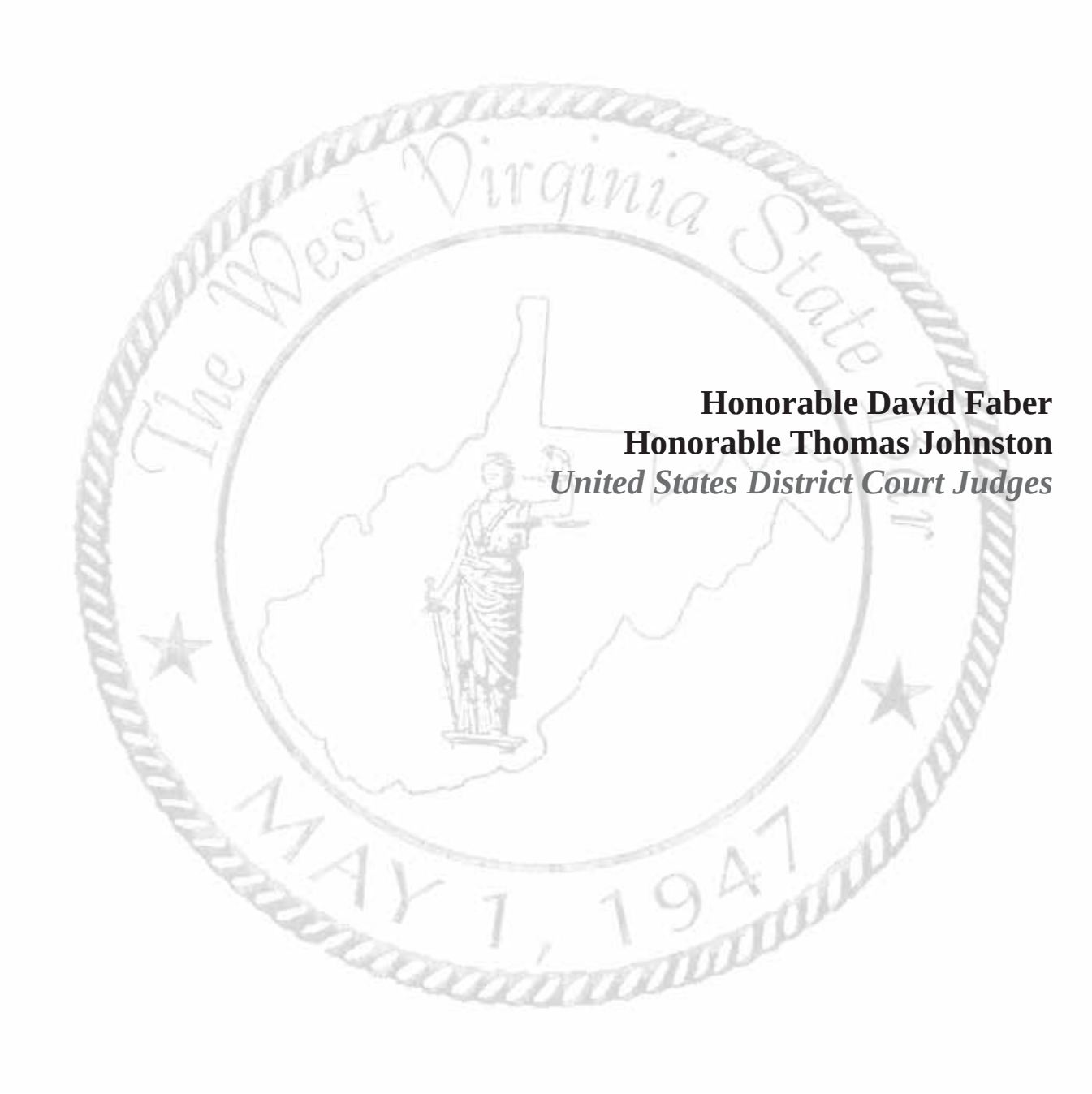
There is no fee to register a building, however a fee will be assessed based on the duration of the vacancy. The fees for vacant buildings are as follows:

- Less than one year = $0
- 1 year = $200
- 2 years = $400
- 3 years = $600
- 4 years = $800
- 5 years = $1600
- 5 years+ = $1600 plus $300 per year

Owners of vacant buildings have until October 1, 2009 to register. Forms are availableby clicking here or by stopping by 1500 Chapline Street, Room 308, Wheeling, WV 26003. A building that becomes vacant after October 1, 2009 has 30 days to register with the City.

For more information or to have questions addressed contact Nancy Prager, Director of Economic and Community Development, at (304) 234-3701 or at nprager@wheelingwv.gov.

Federal Court Q&A



Honorable David Faber
Honorable Thomas Johnston
United States District Court Judges

CONTACT THE WV STATE BAR FOR ADDITIONAL MATERIALS

A View of 2015 Tort Legislation from Both Sides of the Bar

Anthony Majestro
President of the West Virginia Association for Justice

Charles Printz
President of the Defense Trial Counsel of West Virginia, Inc.

THE WEST VIRGINIA STATE BAR ANNUAL MEETING
April 18, 2015
Glade Springs, West Virginia

"Significant Civil Justice Legislation from the 2015 Legislature"

Anthony J. Majestro
Powell & Majestro, PLLC
President, West Virginia Association for Justice

Comparative Fault Reform- H.B. 2002

I. Existing Law

In *Bradley v. Appalachian Power Co.*, 163 W.Va. 332, 256 S.E.2d 879, (1979) the West Virginia Supreme Court overturned the doctrine of contributory negligence and comparative fault instituted the doctrine of comparative fault by stating, "A party is not barred from recovering damages in a tort action so long as his negligence or fault does not equal or exceed the combined negligence or fault of the other parties involved in the accident." *Id.* at Syl. Pt. 3; *see alsoHersch v. E-T Enterprises, L.P. et al.*, 232 W.Va. 305, 752 S.E.2d 336 (2013).

II. Changes to Existing Liability Law in H.B 2002

A. Liability based upon percentage of fault (55-7-13a(b)):

1. Liability to be determined by percentage of fault of plaintiff, defendants, and nonparties; determination elaborated on in W.Va. Code § 55-7-13d(a)(1).

2. Total percentage of fault must be 0% or 100%

B. Definitions under H.B. 2002:

1. "Compensatory damages" means economic and noneconomic loss.

2. "Defendant" definition only for purposes of determining obligation to pay

under chapter.

a. includes counterclaim, cross-claim and third-party defendants

3. "Fault"

a. injury or death to a person(s)

b. damage to property

c. economic injury

d. specifically includes, but not limited to, negligence, malpractice, strict product liability, absolute liability, assumption of the risk and liability under W.Va. Code § 23-4-2.

4. "Plaintiff" means any person asserting a claim

C. Joint liability eliminated with exception:

1. 55-7-13c(a):

a. Each defendant only liable for its percentage of fault

b. Separate judgments against each liable defendant for its percentage of fault

c. Joint liability may be imposed upon defendants who "consciously conspire" and "deliberately pursue" a tortious act causing injury

d. Jointly liable defendants have right of contribution

2. Some defendants are jointly and severally liable if, proximately causing the injury, (55-7-13c(h)):

a. conduct constitutes DUI under W.Va. Code §17C-5-2

b. conduct constitutes criminal conduct

c. conduct constitute illegal hazardous waste dumping under W.Va.

Code §22-18-3

(1) This subprovision has statement that this "section" does not apply to W.Va. Code § 29-12A, W.Va. Code § 46, and W.Va. Code § 55-7B.

3. 55-7-13c(d):

a. Plaintiff may ask reallocation of uncollectible portion of judgment to other liable defendants

b. Plaintiff must make good faith effort to collect but be unsuccessful

c. Time limit to request reallocation- one year after judgment becomes final by:

(1) lapse of time for appear or

(2) exhaustion of appeal

d. Limitations on reallocation (55-7-13c(d)(1)

4. Contract rights of indemnity or contribution not affected by 55-7-13c (55-7-13c(f)

5. Fault allocated to immune defendant shall not be assigned to other defendant (55-7-13d(g)

D. Judgment amount determination:

1. 55-7-13c(b)- To determine each liability defendant's judgment amount, court multiplies percentage of fault of defendant by total compensatory damage award.

2. 55-7-13c(c)- Effect of plaintiff's fault:

a. Plaintiff is barred from recovery if plaintiff's fault is greater than

the combined fault of all other liable parties

b. Plaintiff's recovery is reduced by plaintiff's percentage of fault.

3. Settling nonparties' fault to be considered (55-7-13d(a)(2))

4. Nonsettling nonparties' fault to be considered if defendant gives notice

5. Where nonparties assessed a fault percentage, plaintiff's recovery reduced proportionally (55-7-13d(a)(3))

6. No defenses or immunities effected (55-7-13d(a)(4)

7. Assessment of fault percentage to nonparties does not subject nonparties to liability (55-7-13d(a)(5))

8. Jury must answer special interrogatories as to assessment of fault percentage (55-7-13d(a)(6))

E. Imputed fault:

1. Defendants acting as agent or servant or otherwise imputed liability under statute or common law may be held liable for portion of fault attributed to another party (55-7-13d(b))

F. Plaintiff's felony crime precludes recovery (55-7-13d(c)):

1. Plaintiff cannot recover for injuries sustained as the result of the commission, attempted commission or fleeing from the commission of a felonious act

2. Plaintiff must be convicted of the felonious act

3. If plaintiff deceased, jury must find that plaintiff committed felonious act

G. Burden of proof of comparative fault is the person asserting comparative fault (55-7-13d(d))

H. Act does not create a cause of action (55-7-13d(e))

I. Act does not impair immunities under statute or common law (55-7-13d(e))

J. Application

1. This “section” applies for all cases arising or accruing after effective date of enactment (55-7-13d(f)), May 25, 2015.

K. Provisions are severable (55-7-13d(g)

SIGNIFICANT CIVIL JUSTICE LEGISLATION FROM THE 2015 LEGISLATURE

Anthony J. Majestro
Powell & Majestro, PLLC
President, West Virginia Association for Justice

Bill	Description and Link
SB 3	**Trespasser liability.** "Codifying common law on the duties owed to trespassers". Property owner owes no duty except willful and wanton injury. Authorized "justifiable force" to repel criminal trespasser. Effective date April 29, 2015 http://www.legis.state.wv.us/Bill_Text_HTML/2015_SESSIONS/RS/pdf_bills/SB3%20ENR%20PRINTED.pdf
SB 6	**MPLA Bill.** Provides that holding companies that operate nursing homes are covered by the MPLA. Administrative actions capped by MPLA. Also adds numerous other entities to MPLA including pharmacies. Effective from Passage (March 10, 2015) http://www.legis.state.wv.us/Bill_Text_HTML/2015_SESSIONS/RS/pdf_bills/sb6%20sub1%20enr2%20PRINTED.pdf
SB 12	**Final wage payment bill.** Makes final wages payable on next regular payday. Fringe benefits payable on date agreed to in employment contract. Changes liquidated damages for unpaid wages from 3x to 2x. Excludes from WPCA coverage fringe benefits which, by agreement, are due but are to be paid at a future date or upon conditions which are ascertainable. Effective date June 12, 2015. http://www.legis.state.wv.us/Bill_Text_HTML/2015_SESSIONS/RS/pdf_bills/SB12%20SUB1%20enr%20PRINTED.pdf

SB 13	**Open and obvious.** Owner of property not liable for injuries caused by danger that is open, obvious, reasonably apparent or well known to the person injured. Effective from Passage – February 18. 2015 http://www.legis.state.wv.us/Bill_Text_HTML/2015_SESSIONS/RS/pdf_bills/SB13%20SUB1%20ENR%20PRINTED.pdf
SB 37	**Revised Uniform Arbitration Act** Adopts the Revised Uniform Arbitration Act. Creates procedures for arbitration proceedings and judicial proceedings to confirm arbitration awards or compel cases to arbitration. Effective July 1, 2015 http://www.legis.state.wv.us/Bill_Text_HTML/2015_SESSIONS/RS/bills/SB37%20SUB1%20enr.pdf
SB 315	**UDAP Consumer Protection Act bill.** Codifies the Supreme Court of Appeals Opinion in Smith v. Bayer setting causation standards for misrepresentations and omissions. Provides that conduct explicitly authorized by regulatory agencies is not a violation of WVCCPA. Effective Date June 12, 2015 http://www.legis.state.wv.us/Bill_Text_HTML/2015_SESSIONS/RS/bills/SB315%20SUB1%20enr.pdf

SB 344	**Front and back pay and damages on firing.** Improperly discharged employee must mitigate damages by seeking employment in the period of time after discharge. Effective June 8, 2015 http://www.legis.state.wv.us/Bill_Text_HTML/2015_SESSIONS/RS/pdf_bills/SB344%20SUB1%20enr%20PRINTED.pdf
SB 411	**Creating Asbestos Bankruptcy Trust Claims Transparency Act and Asbestos and Silica Claims Priorities Act.** Provides for new bankruptcy trust disclosure requirements on claimants and penalties for failure to comply. Codifies much of current practices set forth in case management order. Effective June 9, 2015 http://www.legis.state.wv.us/Bill_Text_HTML/2015_SESSIONS/RS/pdf_bills/SB411%20SUB1%20enr%20PRINTED.pdf
SB 421	**Caps on punitive damages.** Establishes punitive damage caps at 4 times compensatory damages, or $500,000 whichever is the greater sum. Effective date June 8, 2015 http://www.legis.state.wv.us/Bill_Text_HTML/2015_SESSIONS/RS/pdf_bills/SB421%20SUB1%20enr%20PRINTED.pdf

SB 542	**Clarifying provisions of Consumer Credit and Protection Act relating to debt collection** Significant changes regarding telephone calls to consumers and other substantive provisions. Changes penalties to flat $1,000.00 per violation to be adjusted for inflation going forward. Effective June 12, 2015 http://www.legis.state.wv.us/Bill_Text_HTML/2015_SESSIONS/RS/bills/SB542%20SUB1%20enr.pdf
SB 578	**Relating to occupational disease claims** Allows employee to settle workers compensation claims arising out of an occupational disease for a lump sum, thereby waiving future damages. Requires legal counsel. Effective June 8, 2015. http://www.legis.state.wv.us/Bill_Text_HTML/2015_SESSIONS/RS/pdf_bills/sb578%20enr%20PRINTED.pdf
HB 2002	**Comparative fault** Repealing joint and several liability doctrine. Providing for reallocation of uncollectable judgments to solvent defendants consistent with fault allocations. Effective May 25, 2015 http://www.legis.state.wv.us/Bill_Text_HTML/2015_SESSIONS/RS/pdf_bills/HB2002%20SUB%20ENR%20PRINTED.pdf

HB 2010	**Nonpartisan election of judges.** Provides that judges, supreme court justices, family law judges and magistrates run in a non-partisan election to be held on the date of the primary elections. Effective June 8, 2015 http://www.legis.state.wv.us/Bill_Text_HTML/2015_SESSIONS/RS/pdf_bills/HB2010%20SECOND%20SUB%20ENR%20PRINTED.pdf
HB 2011	**Deliberate intent** Makes numerous substantive changes to elements of claim. Changes venue rules for deliberate intent cases. Effective June 12, 2015. http://www.legis.state.wv.us/Bill_Text_HTML/2015_SESSIONS/RS/bills/HB2011%20ENR.pdf
HB 2790	**Mandatory minimums.** Raises mandatory minimum auto insurance coverage to $25,000 per person, $50,000 per accident, and $25,000 per accident for property damage. However, no longer requires that named excluded from policy covered up to minimum limits. Effective June 9, 2015 http://www.legis.state.wv.us/Bill_Text_HTML/2015_SESSIONS/RS/pdf_bills/HB2790%20SUB%20ENR%20PRINTED.pdf

ENROLLED

Senate Bill No. 3

(BY SENATORS PALUMBO, LEONHARDT, BOLEY, FERNS, D. HALL, KARNES, MAYNARD, NOHE, SYPOLT, TRUMP, BLAIR, WILLIAMS, PLYMALE, KIRKENDOLL, STOLLINGS AND COLE (MR. PRESIDENT))

[Passed January 29, 2015; in effect ninety days from passage.]

AN ACT to amend the Code of West Virginia, 1931, as amended, by adding thereto a new section, designated §55-7-27, relating to liability of possessor of real property for harm to a trespasser.

Be it enacted by the Legislature of West Virginia:

That the Code of West Virginia, 1931, as amended, be amended by adding thereto a new section, designated §55-7-27, to read as follows:

ARTICLE 7. ACTIONS FOR INJURIES.

§55-7-27. Liability of possessor of real property for harm to a trespasser.

(a) A possessor of real property, including an owner, lessee or other lawful occupant, owes no duty of care to a trespasser except in those circumstances where a common-law right-of-action existed as of the effective date of this section, including the duty to refrain from willfully or wantonly causing the trespasser injury.

(b) A possessor of real property may use justifiable force to repel a criminal trespasser as provided by section twenty-two of this article.

(c) This section does not increase the liability of any possessor of real property and does not affect any immunities from or defenses to liability established by another section of this code or available at common law to which a possessor of real property may be entitled.

(d) The Legislature intends to codify and preserve the common law in West Virginia on the duties owed to trespassers by possessors of real property as of the effective date of this section.

ENROLLED

COMMITTEE SUBSTITUTE

FOR

Senate Bill No. 12

(SENATORS CARMICHAEL, BOLEY, FERNS, GAUNCH, D. HALL, M. HALL, KARNES, MULLINS, SYPOLT, NOHE, TRUMP, BLAIR AND COLE (MR. PRESIDENT), *ORIGINAL SPONSORS*)

[Passed March 13, 2015; in effect ninety days from passage.]

AN ACT to amend and reenact §21-5-1 and §21-5-4 of the Code of West Virginia, 1931, as amended, relating to payment of wages by employers; defining terms; providing for how payments may be made; requiring certain payments by the next regular payday; providing for payments pursuant to certain agreements; reducing amount of liquidated damages available for violation of this section; providing instance when liquidated damages are not available; clarifying that section does not address whether overtime pay is due; authorizing payment by mail if requested by employee; and establishing date paid if payment mailed pursuant to employee request.

Be it enacted by the Legislature of West Virginia:

That §21-5-1 and §21-5-4 of the Code of West Virginia, 1931, as amended, be amended and reenacted, all to read as follows:

ARTICLE 5. WAGE PAYMENT AND COLLECTION.

§21-5-1. Definitions.

As used in this article:

(a) The term "firm" includes any partnership, association, joint-stock company, trust, division of a corporation, the administrator or executor of the estate of a deceased individual, or the receiver, trustee or successor of any of the same, or officer thereof, employing any person.

(b) The term "employee" or "employees" includes any person suffered or permitted to work by a person, firm or corporation.

(c) The term "wages" means compensation for labor or services rendered by an employee, whether the amount is determined on a time, task, piece, commission or other basis of calculation. As used in sections four, five, eight-a, ten and twelve of this article, the term "wages" shall also include then accrued fringe benefits capable of calculation and payable directly to an employee: *Provided,* That nothing herein contained shall require fringe benefits to be calculated contrary to any agreement between an employer and his or her employees which does not contradict the provisions of this article.

(d) The term "commissioner" means Commissioner of Labor or his or her designated representative.

(e) The term "railroad company" includes any firm or corporation engaged primarily in the business of transportation by rail.

(f) The term "special agreement" means an arrangement filed with and approved by the commissioner whereby a person, firm or corporation is permitted upon a compelling showing of good cause to establish regular paydays less frequently than once in every two weeks: *Provided,* That in no event shall the employee be paid in full less frequently than once each calendar month on a regularly established schedule.

(g) The term "deductions" includes amounts required by law to be withheld, and amounts authorized for union or club dues, pension plans, payroll savings plans, credit unions, charities and hospitalization and medical insurance.

(h) The term "officer" shall include officers or agents in the management of a corporation or firm who knowingly permit the corporation or firm to violate the provisions of this article.

(i) The term "wages due" shall include at least all wages earned up to and including the twelfth day immediately preceding the regular payday.

(j) The term "construction" means the furnishing of work in the fulfillment of a contract for the construction, alteration, decoration, painting or improvement of a new or existing building, structure, roadway or pipeline, or any part thereof, or for the alteration, improvement or development of real property: *Provided,* That construction performed for the owner or lessee of a single family dwelling or a family farming enterprise is excluded.

(k) The term "minerals" means clay, coal, flagstone, gravel, limestone, manganese, sand, sandstone, shale, iron ore and any other metallurgical ore.

(l) The term "fringe benefits" means any benefit provided an employee or group of employees by an employer, or which is required by law, and includes regular vacation, graduated vacation, floating vacation, holidays, sick leave, personal leave, production incentive bonuses, sickness and accident benefits and benefits relating to medical and pension coverage.

(m) The term "employer" means any person, firm or corporation employing any employee.

(n) The term "doing business in this state" means having employees actively engaged in the intended principal activity of the person, firm or corporation in West Virginia.

§21-5-4. Cash orders; employees separated from payroll before paydays.

(a) In lieu of lawful money of the United States, any person, firm or corporation may compensate employees for services by cash order which may include checks, direct deposits or money orders on banks convenient to the place of employment where suitable arrangements have been made for the cashing of the checks by employees or deposit of funds for employees for the full amount of wages.

(b) Whenever a person, firm or corporation discharges an employee, or whenever an employee quits or resigns from employment, the person, firm or corporation shall pay the employee's wages due for work that the employee performed prior to the separation of employment on or before the next regular payday on which the wages would otherwise be due and payable: *Provided,* That fringe benefits, as defined in section one of this article, that are provided an employee pursuant to an agreement between the employee and employer and that are due, but pursuant to the terms of the agreement, are to be paid at a future date or upon additional

conditions which are ascertainable are not subject to this subsection and are not payable on or before the next regular payday, but shall be paid according to the terms of the agreement. For purposes of this section, "business day" means any day other than Saturday, Sunday or any legal holiday as set forth in section one, article two, chapter two of this code.

(c) Payment under this section may be made in person in any manner permissible under section three of this article, through the regular pay channels or, if requested by the employee, by mail. If the employee requests that payment under this section be made by mail, that payment shall be considered to have been made on the date the mailed payment is postmarked.

(d) When work of any employee is suspended as a result of a labor dispute, or when an employee for any reason whatsoever is laid off, the person, firm or corporation shall pay in full to the employee not later than the next regular payday, either through the regular pay channels or by mail if requested by the employee, wages earned at the time of suspension or layoff.

(e) If a person, firm or corporation fails to pay an employee wages as required under this section, the person, firm or corporation, in addition to the amount which was unpaid when due, is liable to the employee for two times that unpaid amount as liquidated damages. This section regulates the timing of wage payments upon separation from employment and not whether overtime pay is due. Liquidated damages that can be awarded under this section are not available to employees claiming they were misclassified as exempt from overtime under state and federal wage and hour laws. Every employee shall have a lien and all other rights and remedies for the protection and enforcement

of his or her salary or wages, as he or she would have been entitled to had he or she rendered service therefor in the manner as last employed; except that, for the purpose of liquidated damages, the failure shall not be deemed to continue after the date of the filing of a petition in bankruptcy with respect to the employer if he or she is adjudicated bankrupt upon the petition.

ENROLLED

COMMITTEE SUBSTITUTE

FOR

Senate Bill No. 13

(SENATORS NOHE, BOLEY, FERNS, D. HALL, KARNES, MAYNARD, MULLINS, SYPOLT, TRUMP, BLAIR, WILLIAMS AND COLE (MR. PRESIDENT), *ORIGINAL SPONSORS*)

[Passed February 18, 2015; in effect from passage.]

AN ACT to amend the Code of West Virginia, 1931, as amended, by adding thereto a new section, designated §55-7-27, relating to the liability of a possessor of real property for injuries caused by open and obvious hazards; reinstating and codifying the open and obvious doctrine of common law as it existed prior to judicial abolition; clarifying that this section does not create, recognize or ratify claim or cause of action; stating legislative intent; and providing for judicial application.

Be it enacted by the Legislature of West Virginia:

That the Code of West Virginia, 1931, as amended, be amended by adding thereto a new section, designated §55-7-27, to read as follows:

ARTICLE 7. ACTIONS FOR INJURIES.

§55-7-27. Limiting civil liability of a possessor of real property for injuries caused by open and obvious hazards.

(a) A possessor of real property, including an owner, lessee or other lawful occupant, owes no duty of care to protect others against dangers that are open, obvious, reasonably apparent or as well known to the person injured as they are to the owner or occupant, and shall not be held liable for civil damages for any injuries sustained as a result of such dangers.

(b) Nothing in this section creates, recognizes or ratifies a claim or cause of action of any kind.

(c) It is the intent and policy of the Legislature that this section reinstates and codifies the open and obvious hazard doctrine in actions seeking to assert liability against an owner, lessee or other lawful occupant of real property to its status prior to the decision of the West Virginia Supreme Court of Appeals in the matter of *Hersh v. E-T Enterprises, Limited Partnership*, 232 W. Va. 305 (2013). In its application of the doctrine, the court as a matter of law shall appropriately apply the doctrine considering the nature and severity, or lack thereof, of violations of any statute relating to a cause of action.

ENROLLED

COMMITTEE SUBSTITUTE

FOR

Senate Bill No. 37

(Senator Palumbo, *original sponsor*)

[Passed March 14, 2015; in effect July 1, 2015.]

AN ACT to amend and reenact §55-10-1, §55-10-2, §55-10-3, §55-10-4, §55-10-5, §55-10-6, §55-10-7 and §55-10-8 of the Code of West Virginia, 1931, as amended; and to amend said code by adding thereto twenty-five new sections, designated §55-10-9, §55-10-10, §55-10-11, §55-10-12, §55-10-13, §55-10-14, §55-10-15, §55-10-16, §55-10-17, §55-10-18, §55-10-19, §55-10-20, §55-10-21, §55-10-22, §55-10-23, §55-10-24, §55-10-25, §55-10-26, §55-10-27, §55-10-28, §55-10-29, §55-10-30, §55-10-31, §55-10-32 and §55-10-33, all relating generally to arbitration; providing for a short title; making legislative findings; defining terms; defining notice under article; defining when article applies; prescribing effect of agreements to arbitrate; identifying nonwaivable provisions of article; allowing for application for judicial relief under article; providing required method for notice of application for judicial relief; making agreement to arbitrate valid unless legal or equitable reason for revocation exists; delineating decisions to be made by judge and arbitrator; providing for terms by which arbitration may continue if challenged; providing for process

for motions to compel or stay arbitration; providing for provisional remedies to protect effectiveness of arbitration proceedings; providing process for initiation of arbitration; providing for consolidation of separate arbitration proceedings; providing for appointment of arbitrator and default process for appointing arbitrator if not agreed by the parties; requiring neutrality of arbitrators; requiring disclosure by arbitrators of matters likely to affect impartiality; requiring majority of arbitrators to agree to exercise powers; providing immunity for arbitrators; providing exceptions to arbitrator immunity; providing that arbitrator incompetence to testify to same extent as judges; providing exceptions to arbitrator incompetence to testify; providing for attorneys' fees and costs for challenges from which arbitrators are immune from civil liability; providing general process for arbitration; providing for appointment of replacement arbitrator if necessary; allowing parties to be represented by a lawyer in arbitrations; outlining procedure for witnesses, issuance of subpoenas, depositions, discovery and protective orders in arbitrations; providing for judicial enforcement of discovery-related orders by arbitrator; providing for judicial enforcement of preaward ruling by arbitrator; providing for record of an award and requirements for making an award; providing an exemption from the award provisions in the case of arbitration conducted or administered by a self-regulatory organization as defined by the Securities Exchange Act of 1934, the Commodity Exchange Act or regulations adopted under those acts; allowing change of an award by arbitrator upon motion under certain conditions; providing that certain remedies and fees and costs of arbitration may be a part of arbitration award; allowing for confirmation by court of an award upon motion; providing process and grounds for vacating an award by a court; providing process and grounds for modification or correction of an award upon motion; providing that court shall enter a judgment upon

confirmation of an award and may add certain reasonable attorneys' fees and costs; providing for jurisdiction over arbitration agreements by a court of this state; providing venue; providing that appeals may be taken from certain orders related to arbitration proceedings; requiring uniform application and construction of act; providing that this act shall conform with the Electronic Signatures in Global and National Commerce Act; and clarifying that the act does not affect an action or proceeding commenced or right accrued before the effective date of the article.

Be it enacted by the Legislature of West Virginia:

That §55-10-1, §55-10-2, §55-10-3, §55-10-4, §55-10-5, §55-10-6, §55-10-7 and §55-10-8 of the Code of West Virginia, 1931, as amended, be amended and reenacted; and that said code be amended by adding thereto twenty-five new sections, designated §55-10-9, §55-10-10, §55-10-11, §55-10-12, §55-10-13, §55-10-14, §55-10-15, §55-10-16, §55-10-17, §55-10-18, §55-10-19, §55-10-20, §55-10-21, §55-10-22, §55-10-23, §55-10-24, §55-10-25, §55-10-26, §55-10-27, §55-10-28, §55-10-29, §55-10-30, §55-10-31, §55-10-32 and §55-10-33, all to read as follows:

ARTICLE 10. ARBITRATION.

§55-10-1. Short title.

This article may be cited as the Revised Uniform Arbitration Act.

§55-10-2. Declaration of public policy; legislative findings.

The Legislature finds that:

(1) Arbitration, as a form of alternative dispute resolution, offers in many instances a more efficient and cost-effective alternative to court litigation.

(2) The United States has a well-established federal policy in favor of arbitral dispute resolution, as identified both by the Federal Arbitration Act, 9 U.S.C. §1, *et seq.*, and the decisions

of the Supreme Court of the United States.

(3) Arbitration already provides participants with many of the same procedural rights and safeguards as traditional litigation, and ensuring that those rights and safeguards are guaranteed to participants will ensure that arbitration remains a fair and viable alternative to court litigation and guarantee that no party to an arbitration agreement is unfairly prejudiced by agreeing to an arbitration agreement or provision.

§55-10-3. Definitions.

In this article:

"Arbitration organization" means an association, agency, board, commission or other entity that is neutral and initiates, sponsors or administers an arbitration proceeding or is involved in the appointment of an arbitrator.

"Arbitrator" means an individual appointed to render an award, alone or with others, in a controversy that is subject to an agreement to arbitrate.

"Court" means a circuit court in this state.

"Knowledge" means actual knowledge.

"Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture or government; governmental subdivision, agency or instrumentality; public corporation; or any other legal or commercial entity.

"Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

§55-10-4. Notice.

(a) Except as otherwise provided in this article, a person gives notice to another person by taking action that is reasonably necessary to inform the other person in ordinary course, whether or

not the other person acquires knowledge of the notice.

(b) A person has notice if the person has knowledge of the notice or has received notice.

(c) A person receives notice when it comes to the person's attention or the notice is delivered at the person's place of residence or place of business or at another location held out by the person as a place of delivery of such communications.

§55-10-5. When article applies.

(a) This article governs an agreement to arbitrate made on or after July 1, 2015.

(b) This article governs an agreement to arbitrate made before July 1, 2015, if all the parties to the agreement or to the arbitration proceeding so agree in a record. Such record may be made at any point and, for the mutual covenants contained therein, no additional consideration is required by either party.

(c) Any agreement to arbitrate renewed of continued on or after July 1, 2015, shall be governed by this agreement and, for the mutual covenants contained therein, no additional consideration is required by either party.

§55-10-6. Effect of agreement to arbitrate; nonwaivable provisions.

(a) Except as otherwise provided in subsections (b) and (c) of this section, a party to an agreement to arbitrate or to an arbitration proceeding may waive or the parties may vary the effect of the requirements of this article to the extent permitted by law.

(b) Before a controversy arises that is subject to an agreement to arbitrate, a party to the agreement may not:

(1) Waive or agree to vary the effect of the requirements of sections seven, eight, ten, nineteen, twenty-eight or thirty of this article;

(2) Agree to unreasonably restrict the right under section eleven of this article to notice of

the initiation of an arbitration proceeding;

(3) Agree to unreasonably restrict the right under section fourteen of this article to disclosure of any facts by a neutral arbitrator; or

(4) Waive the right under section eighteen of this article of a party to an agreement to arbitrate to be represented by a lawyer at any proceeding or hearing under this article, but an employer and a labor organization may waive the right to representation by a lawyer in a labor arbitration.

(c) A party to an agreement to arbitrate or arbitration proceeding may not waive, or the parties may not vary the effect of, the requirements of this section or sections five, nine, sixteen, twenty, twenty-two, twenty-four, twenty-five, twenty-six, twenty-seven, thirty-one, thirty-two or thirty-three of this article.

§55-10-7. Application for judicial relief.

(a) Except as otherwise provided in section thirty of this article, an application for judicial relief under this article must be made by motion to a West Virginia circuit court as specified in section twenty-nine of this article and heard in accordance with the rules of civil procedure governing motions.

(b) Unless a civil action involving the agreement to arbitrate is pending, notice of an initial motion to the court under this article must be served in the manner provided by law for the service of a summons in a civil action. Otherwise, notice of the motion must be given in the manner provided by the rules of civil procedure for serving motions in pending cases.

§55-10-8. Validity of agreement to arbitrate.

(a) An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable and irrevocable except

upon a ground that exists at law or in equity for the revocation of a contract.

(b) The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.

(c) An arbitrator shall decide whether a condition precedent to arbitration has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable: *Provided*, That the decision as to whether the arbitration agreement is enforceable shall be made by a court of competent jurisdiction, if requested by any party to the arbitration or agreement, pursuant to section nine of this article.

(d) If a party to a judicial proceeding challenges the existence of, or claims that a controversy is not subject to, an agreement to arbitrate, the arbitration proceeding may continue pending final resolution of the issue by the court, unless the court otherwise orders.

§55-10-9. Motion to compel or stay arbitration.

(a) On motion of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement:

(1) If the refusing party does not appear or does not oppose the motion, the court shall order the parties to arbitrate; and

(2) If the refusing party opposes the motion, the court shall proceed summarily to decide the issue and order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate.

(b) On motion of a person alleging that an arbitration proceeding has been initiated or threatened but that there is no agreement to arbitrate, the court shall proceed summarily to decide the issue. If the court finds that there is an enforceable agreement to arbitrate, it shall order the parties to arbitrate.

(c) If the court finds that there is no enforceable agreement, it may not, pursuant to subsection (a) or (b) of this section, order the parties to arbitrate.

(d) The court may not refuse to order arbitration because the claim subject to arbitration lacks merit or grounds for the claim have not been established.

(e) If a proceeding involving a claim referable to arbitration under an alleged agreement to arbitrate is pending in court, a motion under this section must be made in that court. Otherwise a motion under this section may be made in any court as provided in section twenty-nine of this article.

(f) If a party makes a motion to the court to order arbitration, the court on just terms shall stay any judicial proceeding that involves a claim alleged to be subject to the arbitration until the court renders a final decision under this section.

(g) If the court orders arbitration, the court on just terms shall stay any judicial proceeding that involves a claim subject to the arbitration. If a claim subject to the arbitration is severable, the court may limit the stay to that claim.

§55-10-10. Provisional remedies.

(a) Before an arbitrator is appointed and is authorized and able to act, the court, upon motion of a party to an arbitration proceeding and for good cause shown, may enter an order for provisional remedies to protect the effectiveness of the arbitration proceeding to the same extent and under the same conditions as if the controversy were the subject of a civil action.

(b) After an arbitrator is appointed and is authorized and able to act:

(1) The arbitrator may issue such orders for provisional remedies, including interim awards, as the arbitrator finds necessary to protect the effectiveness of the arbitration proceeding and to promote the fair and expeditious resolution of the controversy to the same extent and under the same conditions as if the controversy were the subject of a civil action; and

(2) A party to an arbitration proceeding may move the court for a provisional remedy only if the matter is urgent and the arbitrator is not able to act timely or the arbitrator cannot provide an adequate remedy.

(c) A party does not waive a right of arbitration by making a motion under subsection (a) or (b) of this section.

§55-10-11. Initiation of arbitration.

(a) A person initiates an arbitration proceeding by giving notice in a record to the other parties to the agreement to arbitrate in the agreed manner between the parties or, in the absence of agreement, by certified or registered mail, return receipt requested and obtained, or by service as authorized for the commencement of a civil action. The notice must describe the nature of the controversy and the remedy sought.

(b) Unless a person objects for lack or insufficiency of notice under section seventeen of this article not later than the beginning of the arbitration hearing, the person by appearing at the hearing waives any objection to lack of or insufficiency of notice.

§55-10-12. Consolidation of separate arbitration proceedings.

(a) Except as otherwise provided in subsection (c) of this section, upon motion of a party to an agreement to arbitrate or to an arbitration proceeding, the court may order consolidation of separate arbitration proceedings as to all or some of the claims if:

(1) There are separate agreements to arbitrate or separate arbitration proceedings between the same persons or one of them is a party to a separate agreement to arbitrate or a separate arbitration proceeding with a third person;

(2) The claims subject to the agreements to arbitrate arise in substantial part from the same transaction or series of related transactions;

(3) The existence of a common issue of law or fact creates the possibility of conflicting decisions in the separate arbitration proceedings; and

(4) Prejudice resulting from a failure to consolidate is not outweighed by the risk of undue delay or prejudice to the rights of or hardship to parties opposing consolidation.

(b) The court may order consolidation of separate arbitration proceedings as to some claims and allow other claims to be resolved in separate arbitration proceedings.

(c) The court may not order consolidation of the claims of a party to an agreement to arbitrate if the agreement prohibits consolidation.

§55-10-13. Appointment of arbitrator; service as a neutral arbitrator.

(a) If the parties to an agreement to arbitrate agree on a method for appointing an arbitrator, that method must be followed, unless the method fails. If the parties have not agreed on a method, the agreed method fails or an arbitrator appointed fails or is unable to act and a successor has not been appointed, the court, on motion of a party to the arbitration proceeding, shall appoint the arbitrator. An arbitrator so appointed has all the powers of an arbitrator designated in the agreement to arbitrate or appointed pursuant to the agreed method.

(b) An individual who has a known, direct and material interest in the outcome of the arbitration proceeding or a known, existing and substantial relationship with a party may not serve as an arbitrator required by an agreement to be neutral.

§55-10-14. Disclosure by arbitrator.

(a) Before accepting appointment, an individual who is requested to serve as an arbitrator, after making a reasonable inquiry, shall disclose to all parties to the agreement to arbitrate and arbitration proceeding and to any other arbitrators any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator in the arbitration proceeding, including:

(1) A financial or personal interest in the outcome of the arbitration proceeding; and

(2) An existing or past relationship with any of the parties to the agreement to arbitrate or the arbitration proceeding, their counsel or representatives, a witness or another arbitrator.

(b) An arbitrator has a continuing obligation to disclose to all parties to the agreement to arbitrate and arbitration proceeding and to any other arbitrators any facts that the arbitrator learns after accepting appointment which a reasonable person would consider likely to affect the impartiality of the arbitrator.

(c) If an arbitrator discloses a fact required by subsection (a) or (b) of this section to be disclosed and a party timely objects to the appointment or continued service of the arbitrator based upon the fact disclosed, the objection may be a ground under section twenty-five of this article for vacating an award made by the arbitrator.

(d) If the arbitrator did not disclose a fact as required by subsection (a) or (b) of this section, upon timely objection by a party, the court, under section twenty-five of this article, may vacate an award.

(e) An arbitrator appointed as a neutral arbitrator who does not disclose a known, direct and material interest in the outcome of the arbitration proceeding or a known, existing and substantial relationship with a party is presumed to act with evident partiality under section twenty-five of this article.

(f) If the parties to an arbitration proceeding agree to the procedures of an arbitration organization or any other procedures for challenges to arbitrators before an award is made, substantial compliance with those procedures is a condition precedent to a motion to vacate an award on that ground under section twenty-five of this article.

§55-10-15. Action by majority.

If there is more than one arbitrator, the powers of an arbitrator must be exercised by a majority of the arbitrators, but all of them shall conduct the hearing under section seventeen of this article.

§55-10-16. Immunity of arbitrator; competency to testify; attorney's fees and costs.

(a) An arbitrator or an arbitration organization acting in that capacity is immune from civil liability to the same extent as a judge of a court of this state acting in a judicial capacity.

(b) The immunity afforded by this section supplements any immunity under other law.

(c) The failure of an arbitrator to make a disclosure required by section fourteen of this article does not cause any loss of immunity under this section.

(d) In a judicial, administrative or similar proceeding, an arbitrator or representative of an arbitration organization is not competent to testify, and may not be required to produce records as to any statement, conduct, decision or ruling occurring during the arbitration proceeding, to the same extent as a judge of a court of this state acting in a judicial capacity. This subsection does not apply:

(1) To the extent necessary to determine the claim of an arbitrator, arbitration organization or representative of the arbitration organization against a party to the arbitration proceeding; or

(2) To a hearing on a motion to vacate an award under section twenty-five of this article if the moving party establishes prima facie that a ground for vacating the award exists.

(e) If a person commences a civil action against an arbitrator, arbitration organization or representative of an arbitration organization arising from the services of the arbitrator, organization or representative or if a person seeks to compel an arbitrator or a representative of an arbitration organization to testify or produce records in violation of subsection (d) of this section, and the court decides that the arbitrator, arbitration organization or representative of an arbitration organization is immune from civil liability or that the arbitrator or representative of the organization is not

competent to testify, the court shall award to the arbitrator, organization or representative reasonable attorneys' fees and other reasonable expenses of litigation.

§55-10-17. Arbitration process.

(a) An arbitrator may conduct an arbitration in such manner as the arbitrator considers appropriate for a fair and expeditious disposition of the proceeding. The authority conferred upon the arbitrator includes the power to hold conferences with the parties to the arbitration proceeding before the hearing and, among other matters, determine the admissibility, relevance, materiality and weight of any evidence.

(b) An arbitrator may decide a request for summary disposition of a claim or particular issue:

(1) If all interested parties agree; or

(2) Upon request of one party to the arbitration proceeding if that party gives notice to all other parties to the proceeding, and the other parties have a reasonable opportunity to respond.

(c) If an arbitrator orders a hearing, the arbitrator shall set a time and place and give notice of the hearing not less than five days before the hearing begins. Unless a party to the arbitration proceeding makes an objection to lack or insufficiency of notice not later than the beginning of the hearing, the party's appearance at the hearing waives the objection. Upon request of a party to the arbitration proceeding and for good cause shown, or upon the arbitrator's own initiative, the arbitrator may adjourn the hearing, from time to time, as necessary but may not postpone the hearing to a time later than that fixed by the agreement to arbitrate for making the award unless the parties to the arbitration proceeding consent to a later date. The arbitrator may hear and decide the controversy upon the evidence produced although a party who was duly notified of the arbitration proceeding did not appear. The court, on request, may direct the arbitrator to conduct the hearing promptly and render a timely decision.

(d) At a hearing under subsection (c) of this section, a party to the arbitration proceeding has a right to be heard, to present evidence material to the controversy and to cross examine witnesses appearing at the hearing.

(e) If an arbitrator ceases or is unable to act during the arbitration proceeding, a replacement arbitrator must be appointed in accordance with section thirteen of this article to continue the proceeding and to resolve the controversy.

§55-10-18. Representation by lawyer.

A party to an arbitration proceeding may be represented by a lawyer licensed to practice law in the State of West Virginia.

§55-10-19. Witnesses; subpoenas; depositions; discovery.

(a) An arbitrator may issue a subpoena for the attendance of a witness and for the production of records and other evidence at any hearing and may administer oaths. A subpoena must be served in the manner for service of subpoenas in a civil action and, upon motion to the court by a party to the arbitration proceeding or the arbitrator, enforced in the manner for enforcement of subpoenas in a civil action.

(b) In order to make the proceedings fair, expeditious and cost effective, upon request of a party to or a witness in an arbitration proceeding, an arbitrator may permit a deposition of any witness to be taken for use as evidence at the hearing, including a witness who cannot be subpoenaed for or is unable to attend a hearing. The arbitrator shall determine the conditions under which the deposition is taken.

(c) An arbitrator may permit such discovery as the arbitrator decides is appropriate in the circumstances, taking into account the needs of the parties to the arbitration proceeding and other affected persons and the desirability of making the proceeding fair, expeditious and cost effective.

(d) If an arbitrator permits discovery under subsection (c) of this section, the arbitrator may order a party to the arbitration proceeding to comply with the arbitrator's discovery-related orders, issue subpoenas for the attendance of a witness and for the production of records and other evidence at a discovery proceeding and take action against a noncomplying party to the extent a court could if the controversy were the subject of a civil action in this state.

(e) An arbitrator may issue a protective order to prevent the disclosure of privileged information, confidential information, trade secrets and other information protected from disclosure to the extent a court could if the controversy were the subject of a civil action in this state.

(f) All laws compelling a person under subpoena to testify and all fees for attending a judicial proceeding, a deposition or a discovery proceeding as a witness apply to an arbitration proceeding as if the controversy were the subject of a civil action in this state.

(g) The court may enforce a subpoena or discovery-related order for the attendance of a witness within this state and for the production of records and other evidence issued by an arbitrator in connection with an arbitration proceeding in another state upon conditions determined by the court so as to make the arbitration proceeding fair, expeditious and cost effective. A subpoena or discovery-related order issued by an arbitrator in another state must be served in the manner provided by law for service of subpoenas in a civil action in this state and, upon motion to the court by a party to the arbitration proceeding or the arbitrator, enforced in the manner provided by law for enforcement of subpoenas in a civil action in this state.

§55-10-20. Judicial enforcement of preaward ruling by arbitrator.

If an arbitrator makes a preaward ruling in favor of a party to the arbitration proceeding, the party may request the arbitrator to incorporate the ruling into an award under section twenty-one of this article. A prevailing party may make a motion to the court for an expedited order to confirm the

award under section twenty-four of this article, in which case the court shall summarily decide the motion. The court shall issue an order to confirm the award unless the court vacates, modifies or corrects the award under section twenty-five or twenty-six of this article.

§55-10-21. Award.

(a) An arbitrator shall make a record of an award. Such record should set forth findings of fact and conclusions of law that support the award. The record must be signed or otherwise authenticated by any arbitrator who concurs with the award. The arbitrator or the arbitration organization shall give notice of the award, including a copy of the award, to each party to the arbitration proceeding.

(b) An award must be made within the time specified by the agreement to arbitrate or, if not specified therein, within the time ordered by the court. The court may extend, or the parties to the arbitration proceeding may agree in a record to extend, the time. The court or the parties may do so within or after the time specified or ordered. A party waives any objection that an award was not timely made unless the party gives notice of the objection to the arbitrator before receiving notice of the award.

(c) This section does not apply to an arbitration conducted or administered by a self-regulatory organization as defined by the Securities Exchange Act of 1934 (15 U. S.C. §78C), the Commodity Exchange Act (7 U. S. C. §1, *et seq.*) or regulations adopted under those acts.

§55-10-22. Change of award by arbitrator.

(a) On motion to an arbitrator by a party to an arbitration proceeding, the arbitrator may modify or correct an award:

(1) Upon a ground stated in section twenty-six of this article;

(2) Because the arbitrator has not made a final and definite award upon a claim submitted by

the parties to the arbitration proceeding; or

(3) To clarify the award.

(b) A motion under subsection (a) of this section must be made and notice given to all parties within twenty days after the moving party receives notice of the award.

(c) A party to the arbitration proceeding must give notice of any objection to the motion within ten days after receipt of the notice.

(d) If a motion to the court is pending under section twenty-four, twenty-five or twenty-six of this article, the court may submit the claim to the arbitrator to consider whether to modify or correct the award:

(1) Upon a ground stated in section twenty-four of this article;

(2) Because the arbitrator has not made a final and definite award upon a claim submitted by the parties to the arbitration proceeding; or

(3) To clarify the award.

(e) An award modified or corrected pursuant to this section is subject to sections twenty-one, twenty-four, twenty-five and twenty-six of this article.

§55-10-23. Remedies; fees and expenses of arbitration proceeding.

(a) An arbitrator may award punitive damages or other exemplary relief if such an award is authorized by law in a civil action involving the same claim and the evidence produced at the hearing justifies the award under the legal standards otherwise applicable to the claim.

(b) An arbitrator may award reasonable attorney's fees and other reasonable expenses of arbitration if such an award is authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitration proceeding.

(c) As to all remedies other than those authorized by subsections (a) and (b) of this section,

an arbitrator may order such remedies as the arbitrator considers just and appropriate under the circumstances of the arbitration proceeding. The fact that such a remedy could not or would not be granted by the court is not a ground for refusing to confirm an award under section twenty-four of this article or for vacating an award under section twenty-three of this article.

(d) An arbitrator's award shall provide for the payment of expenses and fees, together with other expenses to be split among the parties, as provided by the parties' agreement or the rules of the arbitration organization.

(e) If an arbitrator awards punitive damages or other exemplary relief under subsection (a) of this section, the arbitrator shall specify in the award the basis in fact justifying and the basis in law authorizing the award and state separately the amount of the punitive damages or other exemplary relief.

§55-10-24. Confirmation of award.

After a party to an arbitration proceeding receives notice of an award, the party may make a motion to the court for an order confirming the award at which time the court shall issue a confirming order unless the award is modified or corrected pursuant to section twenty-two or twenty-six of this article or is vacated pursuant to section twenty-five of this article.

§55-10-25. Vacating award.

(a) Upon motion to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if:

(1) The award was procured by corruption, fraud or other undue means;

(2) There was:

(A) Evident partiality by an arbitrator appointed as a neutral arbitrator;

(B) Corruption by an arbitrator; or

(C) Misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;

(3) An arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy or otherwise conducted the hearing contrary to section seventeen of this article, so as to prejudice substantially the rights of a party to the arbitration proceeding;

(4) An arbitrator exceeded the arbitrator's powers;

(5) There was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under section seventeen of this article not later than the beginning of the arbitration hearing; or

(6) The arbitration was conducted without proper notice of the initiation of an arbitration as required in section nine so as to prejudice substantially the rights of a party to the arbitration proceeding.

(b) A motion under this section must be filed within ninety days after the moving party receives notice of the award pursuant to section twenty-one of this article or within ninety days after the moving party receives notice of a modified or corrected award pursuant to section twenty-two of this article, unless the moving party alleges that the award was procured by corruption, fraud or other undue means, in which case the motion must be made within ninety days after the ground is known or by the exercise of reasonable care would have been known by the moving party.

(c) If the court vacates an award on a ground other than that set forth in subdivision (5), subsection (a) of this section, it may order a rehearing. If the award is vacated on a ground stated in subdivision (1) or (2), subsection (a) of this section, the rehearing must be before a new arbitrator. If the award is vacated on a ground stated in subdivision (3), (4) or (6), subsection (a) of this section, the rehearing may be before the arbitrator who made the award or the arbitrator's successor. The

arbitrator must render the decision in the rehearing within the same time as that provided in section twenty-one of this article for an award.

(d) If the court denies a motion to vacate an award, it shall confirm the award unless a motion to modify or correct the award is pending.

§55-10-26. Modification or correction of award.

(a) Upon motion made within ninety days after the moving party receives notice of the award pursuant to section nineteen of this article or within ninety days after the moving party receives notice of a modified or corrected award pursuant to section twenty-two of this article, the court shall modify or correct the award if:

(1) There was an evident mathematical miscalculation or an evident mistake in the description of a person, thing or property referred to in the award;

(2) The arbitrator has made an award on a claim not submitted to the arbitrator and the award may be corrected without affecting the merits of the decision upon the claims submitted; or

(3) The award is imperfect in a matter of form not affecting the merits of the decision on the claims submitted.

(b) If a motion made under subsection (a) of this section is granted, the court shall modify or correct and confirm the award as modified or corrected. Otherwise, unless a motion to vacate is pending, the court shall confirm the award.

(c) A motion to modify or correct an award pursuant to this section may be joined with a motion to vacate the award.

§55-10-27. Judgment on award; attorneys' fees and litigation expenses.

(a) Upon granting an order confirming, vacating without directing a rehearing, modifying or correcting an award, the court shall enter a judgment in conformity therewith. The judgment may

be recorded, docketed and enforced as any other judgment in a civil action.

(b) A court may allow reasonable costs of the motion and subsequent judicial proceedings.

(c) On application of a prevailing party to a contested judicial proceeding under section twenty-four, twenty-five or twenty-six of this article, the court may add reasonable attorneys' fees and other reasonable expenses of litigation incurred in a judicial proceeding after the award is made to a judgment confirming, vacating without directing a rehearing, modifying or correcting an award.

§55-10-28. Jurisdiction.

(a) A court of this state having jurisdiction over the controversy and the parties may enforce an agreement to arbitrate.

(b) An agreement to arbitrate providing for arbitration in this state confers exclusive jurisdiction on the court to enter judgment on an award under this article.

§55-10-29. Venue.

A motion pursuant to section seven of this article must be made in the circuit court of the county in which the agreement to arbitrate specifies the arbitration hearing is to be held or, if the hearing has been held, in the circuit court of the county in which it was held. Otherwise, the motion may be made in the court of any county in which an adverse party resides or has a place of business or, if no adverse party has a residence or place of business in this state, in the circuit court of Kanawha County, West Virginia. All subsequent motions must be made in the court hearing the initial motion unless the court otherwise directs.

§55-10-30. Appeals.

(a) An appeal may be taken from:

(1) An order denying a motion to compel arbitration;

(2) An order granting or denying a motion to compel arbitration issued in an action filed

pursuant to the provisions of chapter forty-six-a of this code;

(3) An order granting a motion to stay arbitration;

(4) An order confirming or denying confirmation of an award;

(5) An order modifying or correcting an award;

(6) An order vacating an award without directing a rehearing; or

(7) A final judgment entered pursuant to this article.

(b) An appeal under this section must be taken as from an order or a judgment in a civil action.

§55-10-31. Uniformity of application and construction.

In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

§55-10-32. Electronic Signatures in Global and National Commerce Act.

The provisions of this article governing the legal effect, validity or enforceability of electronic records or signatures, and of contracts performed with the use of such records or signatures, shall conform to the requirements of Section 102 of the Electronic Signatures in Global and National Commerce Act, Pub. L. No. 106-229, 114 Stat. 464 (2000).

§55-10-33. Savings clause.

This article does not affect an action or proceeding commenced or right accrued before this article takes effect.

ENROLLED

COMMITTEE SUBSTITUTE

FOR

Senate Bill No. 315

(Senator Mullins, *original sponsor*)

[Passed March 14, 2015; in effect ninety days from passage.]

AN ACT to amend and reenact §46A-6-101, §46A-6-102, §46A-6-105 and §46A-6-106 of the Code of West Virginia, 1931, as amended, all relating to civil actions filed under the Consumer Protection Act; providing statement of legislative intent that courts be guided by federal court and agency interpretations of similar federal statutes; clarifying who may bring private cause of action; establishing requirement of out-of-pocket loss proximately caused by alleged violation in actions for damages; and providing right to demand a jury trial.

Be it enacted by the Legislature of West Virginia:

That §46A-6-101, §46A-6-102, §46A-6-105 and §46A-6-106 of the Code of West Virginia, 1931, as amended, be amended and reenacted, all to read as follows:

ARTICLE 6. GENERAL CONSUMER PROTECTION.

§46A-6-101. Legislative declarations; statutory construction.

(1) The Legislature hereby declares that the purpose of this article is to complement the body of federal law governing unfair competition and unfair, deceptive and fraudulent acts or practices in order to protect the public and foster fair and honest competition. It is the intent of the Legislature

that, in construing this article, the courts be guided by the policies of the Federal Trade Commission and interpretations given by the Federal Trade Commission and the federal courts to Section 5(a)(1) of the Federal Trade Commission Act (15 U. S. C. § 45(a)(1)), as from time to time amended, and to the various other federal statutes dealing with the same or similar matters. To this end, this article shall be liberally construed so that its beneficial purposes may be served.

(2) It is, however, the further intent of the Legislature that this article not be construed to prohibit acts or practices which are reasonable in relation to the development and preservation of business or which are not injurious to the public interest, nor does this article repeal by implication the provisions of articles eleven, eleven-a and eleven-b, chapter forty-seven of this code.

§46A-6-102. Definitions.

When used in this article, the following words, terms and phrases, and any variations thereof required by the context, shall have the meaning ascribed to them in this article except where the context indicates a different meaning:

(1) "Advertisement" means the publication, dissemination or circulation of any matter, oral or written, including labeling, which tends to induce, directly or indirectly, any person to enter into any obligation, sign any contract or acquire any title or interest in any goods or services and includes every word device to disguise any form of business solicitation by using such terms as "renewal", "invoice", "bill", "statement" or "reminder" to create an impression of existing obligation when there is none or other language to mislead any person in relation to any sought-after commercial transaction.

(2) "Consumer" means a natural person to whom a sale or lease is made in a consumer transaction and a "consumer transaction" means a sale or lease to a natural person or persons for a personal, family, household or agricultural purpose.

(3) "Cure offer" means a written offer of one or more things of value, including, but not limited to, the payment of money, that is made by a merchant or seller and that is delivered by certified mail to a person claiming to have suffered a loss as a result of a transaction or to the attorney for such person.

(4) "Merchantable" means, in addition to the qualities prescribed in section three hundred fourteen, article two, chapter forty-six of this code, that the goods conform in all material respects to applicable state and federal statutes and regulations establishing standards of quality and safety of goods and, in the case of goods with mechanical, electrical or thermal components, that the goods are in good working order and will operate properly in normal usage for a reasonable period of time.

(5) "Sale" includes any sale, offer for sale or attempt to sell any goods for cash or credit or any services or offer for services for cash or credit.

(6) "Trade" or "commerce" means the advertising, offering for sale, sale or distribution of any goods or services and shall include any trade or commerce, directly or indirectly, affecting the people of this state.

(7) "Unfair methods of competition and unfair or deceptive acts or practices" means and includes, but is not limited to, any one or more of the following:

(A) Passing off goods or services as those of another;

(B) Causing likelihood of confusion or of misunderstanding as to the source, sponsorship, approval or certification of goods or services;

(C) Causing likelihood of confusion or of misunderstanding as to affiliation, connection or association with or certification by another;

(D) Using deceptive representations or designations of geographic origin in connection with

goods or services;

(E) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation or connection that he does not have;

(F) Representing that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used or secondhand;

(G) Representing that goods or services are of a particular standard, quality or grade, or that goods are of a particular style or model if they are of another;

(H) Disparaging the goods, services or business of another by false or misleading representation of fact;

(I) Advertising goods or services with intent not to sell them as advertised;

(J) Advertising goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;

(K) Making false or misleading statements of fact concerning the reasons for, existence of or amounts of price reductions;

(L) Engaging in any other conduct which similarly creates a likelihood of confusion or of misunderstanding;

(M) The act, use or employment by any person of any deception, fraud, false pretense, false promise or misrepresentation, or the concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any goods or services, whether or not any person has in fact been misled, deceived or damaged thereby;

(N) Advertising, printing, displaying, publishing, distributing or broadcasting, or causing to be advertised, printed, displayed, published, distributed or broadcast in any manner, any statement or representation with regard to the sale of goods or the extension of consumer credit including the rates, terms or conditions for the sale of such goods or the extension of such credit, which is false, misleading or deceptive or which omits to state material information which is necessary to make the statements therein not false, misleading or deceptive;

(O) Representing that any person has won a prize, one of a group of prizes or any other thing of value if receipt of the prize or thing of value is contingent upon any payment of a service charge, mailing charge, handling charge or any other similar charge by the person or upon mandatory attendance by the person at a promotion or sales presentation at the seller's place of business or any other location: *Provided,* That a person may be offered one item or the choice of several items conditioned on the person listening to a sales promotion or entering a consumer transaction if the true retail value and an accurate description of the item or items are clearly and conspicuously disclosed along with the person's obligations upon accepting the item or items; such description and disclosure shall be typewritten or printed in at least eight point regular type, in upper or lower case, where appropriate; or

(P) Violating any provision or requirement of article six-b of this chapter.

(8) "Warranty" means express and implied warranties described and defined in sections three hundred thirteen, three hundred fourteen and three hundred fifteen, article two, chapter forty-six of this code and expressions or actions of a merchant which assure the consumer that the goods have described qualities or will perform in a described manner.

46A-6-105. Exempted transactions.

This article does not apply to acts done by the publisher, owner, agent or employee of a newspaper, periodical or radio or television station in the publication or dissemination of an advertisement, when the owner, agent or employee did not have knowledge of the false, misleading or deceptive character of the advertisement, did not prepare the advertisement and did not have a direct financial interest in the sale or distribution of the advertised goods or services.

§46A-6-106. Private causes of action.

(a) Subject to subsections (b) and (c) of this section, any person who purchases or leases goods or services and thereby suffers an ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice prohibited or declared to be unlawful by the provisions of this article may bring an action in the circuit court of the county in which the seller or lessor resides or has his or her principal place of business or is doing business, or as provided for in sections one and two, article one, chapter fifty-six of this code, to recover actual damages or $200, whichever is greater. The court may, in its discretion, provide such equitable relief it considers necessary or proper. Any party to an action for damages under this subsection has the right to demand a jury trial.

(b) No award of damages in an action pursuant to subsection (a) may be made without proof that the person seeking damages suffered an actual out-of-pocket loss that was proximately caused by a violation of this article. If a person seeking to recover damages for a violation of this article alleges that an affirmative misrepresentation is the basis for his or her claim then he or she must prove that the deceptive act or practice caused him or her to enter into the transaction that resulted in his or her damages. If a person seeking to recover damages for a violation of this article alleges that the concealment or omission of information is the basis for his or her claim, then he or she must prove that the person's loss was proximately caused by the concealment or omission.

(c) Notwithstanding the provisions of subsections (a) and (b) of this section, no action, counterclaim, cross-claim or third-party claim may be brought pursuant to the provisions of this section until the person has informed the seller or lessor in writing and by certified mail, return receipt requested, of the alleged violation and provided the seller or lessor twenty days from receipt of the notice of violation but ten days in the case a cause of action has already been filed to make a cure offer: *Provided,* That the person shall have ten days from receipt of the cure offer to accept the cure offer or it is deemed refused and withdrawn.

(d) If a cure offer is accepted, the seller or lessor has ten days to begin effectuating the agreed upon cure and the cure must be completed within a reasonable time.

(e) Any applicable statute of limitations is tolled for the twenty-day period set forth in subsection (c) of this section or for the period the effectuation of the cure offer is being performed, whichever is longer.

(f) Nothing in this section prevents a person that has accepted a cure offer from bringing a civil action against a seller or lessor for failing to timely effect the cure offer.

(g) Any permanent injunction, judgment or order of the court under section one hundred eight, article seven of this chapter for a violation of section one hundred four of this article is prima facie evidence in an action brought pursuant to the provisions of this section that the respondent used or employed a method, act or practice declared unlawful by section one hundred four of this article.

(h) Where an action is brought pursuant to the provisions of this section, it is a complete defense that a cure offer was made, accepted and the agreed upon cure was performed. If the finder of fact determines that the cure offer was accepted and the agreed upon cure performed, the seller or lessor is entitled to reasonable attorney's fees and costs attendant to defending the action.

(i) No cure offer is admissible in any proceeding initiated pursuant to the provisions of this article unless the cure offer is delivered by a seller or lessor to the person claiming loss or to any attorney representing such person prior to the filing of the seller or lessee's initial responsive pleading in such proceeding. If the cure offer is timely delivered by the seller or lessor, then the seller or lessee may introduce the cure offer into evidence at trial. The seller or lessor is not liable for the person's attorney's fees and court costs incurred following delivery of the cure offer unless the actual damages found to have been sustained and awarded, without consideration of attorney's fees and court costs, exceed the value of the cure offer.

ENROLLED

COMMITTEE SUBSTITUTE

FOR

Senate Bill No. 344

(SENATORS TRUMP, CARMICHAEL AND BLAIR, *ORIGINAL SPONSORS*)

[Passed March 10, 2015; in effect ninety days from passage.]

AN ACT to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article, designated §55-7E-1, §55-7E-2 and §55-7E-3, all relating to setting adequate and reasonable amounts of compensatory damages available to an employee in statutory and common law wrongful or retaliatory discharge causes of action and other employment law claims; setting forth definitions; setting forth legislative findings and declaration of public policy; placing duty to mitigate damages on plaintiffs in employment-related lawsuits and causes of action; and requiring a judge to make a finding on the appropriateness of remedy versus reinstatement before front pay damages are to be considered by a jury.

Be it enacted by the Legislature of West Virginia:

That the Code of West Virginia, 1931, as amended, be amended by adding thereto a new article, designated §55-7E-1, §55-7E-2 and §55-7E-3, all to read as follows:

ARTICLE 7E. DUTY TO MITIGATE DAMAGES IN EMPLOYMENT CLAIMS.

§55-7E-1. Definitions.

In this article:

(a) "Back pay" means the wages that an employee would have earned, had the employee not suffered from an adverse employment action, from the time of the adverse employment action through the time of trial.

(b) "Front pay" means the wages that an employee would have earned, had the employee not suffered from an adverse employment action, from the time of trial through a future date.

§55-7E-2. Legislative findings and declaration of purpose.

(a) The Legislature finds that:

(1) Employees of this state are entitled to be free from unlawful discrimination, wrongful discharge and unlawful retaliation in the workplace. Employers are often confronted with difficult choices in the hiring, discipline, promotion, layoff and discharge of employees.

(2) The citizens and employers of this state are entitled to a legal system that provides adequate and reasonable compensation to those persons who have been subjected to unlawful employment actions, a legal system that is fair, predictable in its outcomes, and a legal system that functions within the mainstream of American jurisprudence.

(3) The goal of compensation remedies in employment law cases is to make the victim of unlawful workplace actions

whole, including back pay; reinstatement or some amount of front pay in lieu of reinstatement; and under certain statutes, attorney's fees for the successful plaintiff.

(4) In West Virginia, the amount of damages recently awarded in statutory and common law employment cases have been inconsistent with established federal law and the law of surrounding states. This lack of uniformity in the law puts our state and its businesses at a competitive disadvantage.

(b) The purpose of this article is to provide a framework for adequate and reasonable compensation to those persons who have been subjected to an unlawful employment action, but to ensure that compensation does not far exceed the goal of making a wronged employee whole.

§55-7E-3. Statutory or common law employment claims; duty to mitigate damages.

(a) In any employment law cause of action against a current or former employer, regardless of whether the cause of action arises from a statutory right created by the Legislature or a cause of action arising under the common law of West Virginia, the plaintiff has an affirmative duty to mitigate past and future lost wages, regardless of whether the plaintiff can prove the defendant employer acted with malice or malicious intent, or in willful disregard of the plaintiff's rights. The malice exception to the duty to mitigate damages is abolished. Unmitigated or flat back pay and front pay awards are not an available remedy. Any award of back pay or front pay by a commission, court or jury shall be reduced by the amount of interim earnings or the amount earnable with reasonable diligence by the plaintiff. It is the defendant's burden to prove the lack of reasonable diligence.

(b) In any employment law claim or cause of action, the trial court shall make a preliminary ruling on the appropriateness of the remedy of reinstatement versus front pay if such remedies are sought by the plaintiff. If front pay is determined to be the appropriate remedy, the amount of front pay, if any, to be awarded shall be an issue for the trial judge to decide.

ENROLLED

COMMITTEE SUBSTITUTE

FOR

Senate Bill No. 411

(SENATORS TAKUBO, CARMICHAEL, FERNS, GAUNCH AND MULLINS, *ORIGINAL SPONSORS*)

[Passed March 11, 2015; in effect ninety days from passage.]

AN ACT to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article, designated §55-7E-1, §55-7E-2, §55-7E-3, §55-7E-4, §55-7E-5, §55-7E-6, §55-7E-7, §55-7E-8, §55-7E-9, §55-7E-10 and §55-7E-11; and that said code be amended by adding thereto a new article, designated §55-7F-1, §55-7F-2, §55-7F-3, §55-7F-4, §55-7F-5, §55-7F-6, §55-7F-7, §55-7F-8, §55-7F-9 and §55-7F-10, all relating to procedures for determining liability for exposures to asbestos or silica; setting forth findings and purposes; setting forth definitions; requiring disclosures of existing and potential asbestos bankruptcy trust claims; establishing legal standards and procedures for the handling of certain asbestos and silica claims; providing for sanctions; establishing procedures for set offs and credits; establishing medical criteria procedures for certain asbestos and silica claims; providing for statute of limitations standards and other limitations on liability; and providing for applicability future asbestos and silica claims.

Be it enacted by the Legislature of West Virginia:

That the Code of West Virginia, 1931, as amended, be amended by adding thereto a new article, designated §55-7E-1, §55-7E-2, §55-7E-3, §55-7E-4, §55-7E-5, §55-7E-6, §55-7E-7, §55-7E-8, §55-7E-9, §55-7E-10 and §55-7E-11; and that said code be amended by adding thereto a new article, designated §55-7F-1, §55-7F-2, §55-7F-3, §55-7F-4, §55-7F-5, §55-7F-6, §55-7F-7, §55-7F-8, §55-7F-9 and §55-7F-10, all to read as follows:

ARTICLE 7E. ASBESTOS BANKRUPTCY TRUST CLAIMS TRANSPARENCY ACT.

§55-7E-1. Short title.

This article shall be known and may be cited as the Asbestos Bankruptcy Trust Claims Transparency Act.

§55-7E-2. Findings and purpose.

(a) The West Virginia Legislature finds that:

(1) The United States Supreme Court in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 598 (1997) described the asbestos litigation as a crisis;

(2) Approximately one hundred employers have declared bankruptcy at least partially due to asbestos-related liability;

(3) These bankruptcies have resulted in a search for more solvent companies, resulting in over eight thousand five hundred companies being named as asbestos defendants, including many small- and medium-sized companies, in industries that cover eighty-five percent of the United States economy;

(4) Scores of trusts have been established in asbestos-related bankruptcy proceedings to form a multibillion dollar asbestos bankruptcy trust compensation system outside of the tort system, and new asbestos trusts continue to be formed;

(5) Asbestos claimants often seek compensation for alleged asbestos-related conditions from solvent defendants in civil actions and from trusts or claims facilities formed in asbestos bankruptcy proceedings;

(6) There is limited coordination and transparency between these two paths to recovery;

(7) An absence of transparency between the asbestos bankruptcy trust claim system and the civil court systems has resulted in the suppression of evidence in asbestos actions and potential fraud;

(8) West Virginia's Mass Litigation Panel has previously entered cases management orders that apply substantive transparency provisions requiring plaintiffs to disclose, among other things, any claims that may exist against asbestos bankruptcy trusts; and

(9) It is in the interest of justice that there be transparency for claims made in the asbestos bankruptcy trust claim system and for claims made in civil asbestos litigation.

(b) It is the purpose of this article to:

(1) Provide transparency for claims made in the asbestos bankruptcy trust claim system and for claims made in civil asbestos litigation; and

(2) Reduce the opportunity for fraud or suppression of evidence in asbestos actions.

§55-7E-3. Definitions.

For the purpose of this article:

(1) "Asbestos action" means a claim for damages or other civil or equitable relief presented in a civil action arising out of, based on or related to the health effects of exposure to asbestos, including loss of consortium, wrongful death, mental or emotional injury, risk or fear of disease or other injury, costs of medical monitoring or surveillance and any other derivative claim made by or on behalf of a person exposed to asbestos or a representative, spouse, parent, child or other relative of that person. The term does not include a claim for compensatory benefits pursuant to workers' compensation law or for veterans' benefits as defined by article seven-f of this chapter.

(2) "Asbestos trust" means a government-approved or court-approved trust, qualified settlement fund, compensation fund or claims facility created as a result of an administrative or legal action, a court-approved bankruptcy, or pursuant to 11 U. S. C. §524(g) or 11 U. S. C. §1121(a) or other applicable provision of law, that is intended to provide compensation to claimants arising out of, based on or related to the health effects of exposure to asbestos.

(3) "Plaintiff" means a person asserting an asbestos action, a decedent if the action is brought through or on behalf of an estate, or a parent or guardian if the action is brought through or on behalf of a minor or incompetent.

(4) "Trust claims materials" means a final executed proof of claim and all other documents and information related to

a claim against an asbestos trust, including claims forms and supplementary materials, affidavits, depositions and trial testimony, work history, medical and health records, documents reflecting the status of a claim against an asbestos trust, and if the asbestos trust claim has settled, all documents relating to the settlement of the asbestos trust claim.

(5) "Trust governance documents" means all documents that relate to eligibility and payment levels, including claims payment matrices, trust distribution procedures or plans for reorganization, for an asbestos trust.

§55-7E-4. Required disclosures by plaintiff.

(a) For each asbestos action filed in this state, the plaintiff shall provide all parties with a sworn statement identifying all asbestos trust claims that have been filed by the plaintiff or by anyone on the plaintiff's behalf, including claims with respect to asbestos-related conditions other than those that are the basis for the asbestos action or that potentially could be filed by the plaintiff against an asbestos trust. The sworn statement shall be provided no later than one hundred twenty days prior to the date set for trial for the asbestos action. For each asbestos trust claim or potential asbestos trust claim identified in the sworn statement, the statement shall include the name, address and contact information for the asbestos trust, the amount claimed or to be claimed by the plaintiff, the date the plaintiff filed the claim, the disposition of the claim and whether there has been a request to defer, delay, suspend or toll the claim. The sworn statement shall include an attestation from the plaintiff, under penalties of perjury, that the sworn statement is complete and is based on a good faith investigation of all potential claims against asbestos trusts.

(b) The plaintiff shall make available to all parties all trust claims materials for each asbestos trust claim that has

been filed by the plaintiff or by anyone on the plaintiff's behalf against an asbestos trust, including any asbestos-related disease.

(c) The plaintiff shall supplement the information and materials provided pursuant to this section within ninety days after the plaintiff files an additional asbestos trust claim, supplements an existing asbestos trust claim or receives additional information or materials related to any claim or potential claim against an asbestos trust.

(d) Failure by the plaintiff to make available to all parties all trust claims materials as required by this article shall constitute grounds for the court to extend the trial date in an asbestos action.

§55-7E-5. Discovery; use of materials.

(a) Trust claims materials and trust governance documents are presumed to be relevant and authentic and are admissible in evidence. No claims of privilege apply to any trust claims materials or trust governance documents.

(b) A defendant in an asbestos action may seek discovery from an asbestos trust. The plaintiff may not claim privilege or confidentiality to bar discovery and shall provide consent or other expression of permission that may be required by the asbestos trust to release information and materials sought by a defendant.

§55-7E-6. Scheduling trial; stay of action.

(a) A court shall stay an asbestos action if the court finds that the plaintiff has failed to make the disclosures required under section four of this article within one hundred twenty days prior to the trial date.

(b) If, in the disclosures required by section four of this article, a plaintiff identifies a potential asbestos trust claim, the judge shall have the discretion to stay the asbestos action until the plaintiff files the asbestos trust claim and provides all parties with all trust claims materials for the claim. The plaintiff shall also state whether there has been a request to defer, delay, suspend or toll the claim against the asbestos trust.

§55-7E-7. Identification of additional or alternative asbestos trusts by defendant.

(a) Not less than ninety days before trial, if a defendant identifies an asbestos trust claim not previously identified by the plaintiff that the defendant reasonably believes the plaintiff can file, the defendant shall meet and confer with plaintiff to discuss why defendant believes plaintiff has an additional asbestos trust claim, and thereafter the defendant may move the court for an order to require the plaintiff to file the asbestos trust claim. The defendant shall produce or describe the documentation it possesses or is aware of in support of the motion.

(b) Within ten days of receiving the defendant's motion under subsection (a) of this section, the plaintiff shall, for each asbestos trust claim identified by the defendant, make one of the following responses:

(1) File the asbestos trust claim;

(2) File a written response with the court setting forth the reasons why there is insufficient evidence for the plaintiff to file the asbestos trust claim; or

(3) File a written response with the court requesting a determination that the plaintiff's expenses or attorney's fees

and expenses to prepare and file the asbestos trust claim identified in the defendant's motion exceed the plaintiff's reasonably anticipated recovery from the trust.

(c) (1) If the court determines that there is a sufficient basis for the plaintiff to file the asbestos trust claim identified by a defendant, the court shall order the plaintiff to file the asbestos trust claim and shall stay the asbestos action until the plaintiff files the asbestos trust claim and provides all parties with all trust claims materials no later than thirty days before trial.

(2) If the court determines that the plaintiff's expenses or attorney's fees and expenses to prepare and file the asbestos trust claim identified in the defendant's motion exceed the plaintiff's reasonably anticipated recovery from the asbestos trust, the court shall stay the asbestos action until the plaintiff files with the court and provides all parties with a verified statement of the plaintiff's history of exposure, usage or other connection to asbestos covered by the asbestos trust.

(d) Not less than thirty days prior to trial in an asbestos action, the court shall enter into the record a trust claims document that identifies each claim the plaintiff has made against an asbestos trust.

§55-7E-8. Valuation of asbestos trust claims; judicial notice.

(a) If a plaintiff proceeds to trial in an asbestos action before an asbestos trust claim is resolved, the filing of the asbestos trust claim may be considered as relevant and admissible evidence.

(b) Trust claim materials that are sufficient to entitle a claim to consideration for payment under the applicable trust governance documents may be sufficient to support a jury

finding that the plaintiff may have been exposed to products for which the asbestos trust was established to provide compensation and that such exposure may be a substantial factor in causing the plaintiff's injury that is at issue in the asbestos action.

§55-7E-9. Setoff; credit.

In any asbestos action in which damages are awarded, a defendant is entitled to a setoff or credit in the amount of the valuation established under the applicable trust governance documents, including payment percentages for asbestos trust claims pending at trial and any amount the plaintiff has been awarded from an asbestos trust claim that has been identified at the time of trial. If multiple defendants are found liable for damages, the court shall distribute the amount of setoff or credit proportionally between the defendants, according to the liability of each defendant.

§55-7E-10. Failure to provide information; sanctions.

A plaintiff who fails to provide all of the information required under this article is subject to sanctions as provided in the West Virginia Rules of Civil Procedure and any other relief for the defendants that the court considers just and proper.

§55-7E-11. Application.

The provisions of this article apply to all asbestos actions filed on or after the effective date of this article.

ARTICLE 7F. ASBESTOS AND SILICA CLAIMS PRIORITIES ACT.

§55-7F-1. Short title.

This article shall be known and may be cited as the Asbestos and Silica Claims Priorities Act.

§55-7F-2. Findings and purpose.

(a) The West Virginia Legislature finds that:

(1) Asbestos is a mineral that was widely used prior to the 1980s for insulation, fireproofing and other purposes;

(2) Millions of American workers and others were exposed to asbestos, especially during and after World War II and prior to the promulgation of regulations by the Occupational Safety and Health Administration in the early 1970s;

(3) Exposure to asbestos has been associated with various types of cancer, including mesothelioma and lung cancer, as well as nonmalignant conditions such as asbestosis and diffuse pleural thickening;

(4) Diseases caused by asbestos often have long latency periods;

(5) Although the use of asbestos has dramatically declined since the 1970s and workplace exposures have been regulated since 1971 by the Occupational Safety and Health Administration, past exposures will continue to result in significant claims of death and disability as a result of such exposure;

(6) Over the years, West Virginia courts have been deluged with asbestos lawsuits;

(7) The United States Supreme Court in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 598 (1997), described the asbestos litigation as a crisis;

(8) Lawyer-sponsored x-ray screenings have been used to amass large numbers of claims by unimpaired plaintiffs;

(9) One of the country's most prolific B-readers was a doctor from West Virginia;

(10) Approximately one hundred employers have declared bankruptcy at least partially due to asbestos-related liability;

(11) These bankruptcies have resulted in a search for more solvent companies, resulting in over eight thousand five hundred companies being named as asbestos defendants nationally and many in West Virginia, including many small- and medium-sized companies, in industries that cover eighty-five percent of the United States economy;

(12) Silica is a naturally occurring mineral as the earth's crust is over ninety percent silica, and crystalline silica dust is the basic component of sand, quartz and granite;

(13) Silica-related illness, including silicosis, can develop from the prolonged inhalation of respirable silica particles;

(14) Silica claims, like asbestos claims, have involved individuals with no demonstrable physical impairment, and plaintiffs have been identified through the use of for-profit, screening companies;

(15) Silica screening processes have been found subject to substantial abuse and potential fraud;

(16) The cost of compensating plaintiffs who have no present asbestos-related or silica-related physical impairment, and the cost of litigating their claims, jeopardizes the ability of defendants to compensate people with cancer and other serious asbestos-related diseases and adversely affects defendant companies;

(17) Concerns about statutes of limitations and available funds can prompt unimpaired asbestos and silica claimants to bring lawsuits in order to protect against losing their rights to future compensation should they become impaired;

(18) Trial consolidations, joinders and similar trial procedures used by some courts to handle asbestos and silica cases can undermine the appropriate functioning of the courts, deny due process to plaintiffs and defendants and encourage the filing of cases by unimpaired asbestos and silica plaintiffs; and

(19) The public interest requires giving priority to the claims of exposed individuals who are sick in order to help preserve, now and for the future, defendants' ability to compensate people who develop cancer and other serious asbestos-related diseases, as well as silica-related injuries, and to safeguard the jobs, benefits and savings of workers in West Virginia and the well-being of the West Virginia economy.

(b) It is the purpose of this article to:

(1) Give priority to asbestos and silica claimants who can demonstrate actual physical impairment caused by exposure to asbestos or silica;

(2) Toll the running of the statutes of limitations for persons who have been exposed to asbestos or to silica but who have no present physical impairment caused by such exposure;

(3) Enhance the ability of the courts to supervise and manage asbestos and silica cases;

(4) Reduce the opportunity for fraud in asbestos and silica litigation; and

(5) Conserve the defendants' resources to allow compensation to present and future claimants with physical impairment caused by exposure to asbestos or silica.

§55-7F-3. Definitions.

For the purpose of this article:

(1) "AMA Guides to the Evaluation of Permanent Impairment" means the American Medical Association's Guides to the Evaluation of Permanent Impairment in effect at the time of the performance of any examination or test on the exposed person required under this article.

(2) "Asbestos" means chrysotile, amosite, crocidolite, tremolite asbestos, anthophyllite asbestos, actinolite asbestos, asbestiform winchite, asbestiform richterite, asbestiform amphibole minerals and any of these minerals that have been chemically treated or altered, including all minerals defined as asbestos in 29 C. F. R. §1910 at the time an asbestos action is filed.

(3) "Asbestos action" means a claim for damages or other civil or equitable relief presented in a civil action arising out of, based on or related to the health effects of exposure to asbestos, including loss of consortium, wrongful death, mental or emotional injury, risk or fear of disease or other injury, costs of medical monitoring or surveillance and any other derivative claim made by or on behalf of a person exposed to asbestos or a representative, spouse, parent, child or other relative of that person. The term does not include a claim for compensatory benefits pursuant to workers' compensation law or for veterans' benefits.

(4) "Asbestosis" means bilateral diffuse interstitial fibrosis of the lungs caused by inhalation of asbestos fibers.

(5) "Board-certified in internal medicine" means a physician who is certified by the American Board of Internal Medicine or the American Osteopathic Board of Internal Medicine and whose certification was current at the time of the performance of any examination and rendition of any report required by this article.

(6) "Board-certified in occupational medicine" means a physician who is certified in the subspecialty of occupational medicine by the American Board of Preventive Medicine or the American Osteopathic Board of Preventive Medicine and whose certification was current at the time of the performance of any examination and rendition of any report required by this article.

(7) "Board-certified in pathology" means a physician who holds primary certification in anatomic pathology or clinical pathology from the American Board of Pathology or the American Osteopathic Board of Pathology, whose certification was current at the time of the performance of any examination and rendition of any report required by this act, and whose professional practice is principally in the field of pathology and involves regular evaluation of pathology materials obtained from surgical or postmortem specimens.

(8) "Board-certified in pulmonary medicine" means a physician who is certified in the subspecialty of pulmonary medicine by the American Board of Internal Medicine or the American Osteopathic Board of Internal Medicine and whose certification was current at the time of the performance of any examination and rendition of any report required by this article.

(9) "Certified B-reader" means an individual who has qualified as a National Institute for Occupational Safety and Health (NIOSH) "final" or "B-reader" of x-rays under 42 C.

F. R. §37.51(b), whose certification was current at the time of any readings required under this article, and whose B-reads comply with the NIOSH B-Reader's Code of Ethics, Issues in Classification of Chest Radiographs and Classification of Chest Radiographs in Contested Proceedings.

(10) "Chest x-ray" means chest films taken in accordance with all applicable state and federal regulatory standards and taken in the posterior-anterior view.

(11) "DLCO" means diffusing capacity of the lung for carbon monoxide, which is the measurement of carbon monoxide transfer from inspired gas to pulmonary capillary blood.

(12) "Exposed person" means a person whose exposure to asbestos or silica or to asbestos-containing or silica-containing products is the basis for an asbestos or silica action.

(13) "FEV1" means forced expiratory volume in the first second, which is the maximal volume of air expelled in one second during performance of simple spirometric tests.

(14) "FEV1/FVC" means the ratio between the actual values for FEV1 over FVC.

(15) "FVC" means forced vital capacity, which is the maximal volume of air expired with maximum effort from a position of full inspiration.

(16) "ILO" system and "ILO scale" mean the radiological ratings and system for the classification of chest x-rays of the International Labor Office provided in Guidelines for the Use of ILO International Classification of Radiographs of Pneumoconioses in effect on the day any x-rays of the exposed person were reviewed by a certified B-reader.

(17) "Nonmalignant condition" means any condition that can be caused by asbestos or silica other than a diagnosed cancer.

(18) "Official statements of the American Thoracic Society" means lung function testing standards set forth in statements from the American Thoracic Society including standardizations of spirometry, standardizations of lung volume testing, standardizations of diffusion capacity testing or single-breath determination of carbon monoxide uptake in the lung and interpretive strategies for lung function tests, which are in effect on the day of the pulmonary function testing of the exposed person.

(19) "Pathological evidence of asbestosis" means a statement by a board-certified pathologist that more than one representative section of lung tissue uninvolved with any other disease process demonstrates a pattern of peribronchiolar or parenchymal scarring in the presence of characteristic asbestos bodies graded 1(B) or higher under the criteria published in Asbestos-Associated Diseases, 106 Archive of Pathology and Laboratory Medicine 11, Appendix 3 (October 8, 1982), or grade one or higher in Pathology of Asbestosis, 134 Archive of Pathology and Laboratory Medicine 462-80 (March 2010) (Tables 2 and 3), or as amended at the time of the exam, and there is no other more likely explanation for the presence of the fibrosis.

(20) "Pathological evidence of silicosis" means a statement by a board-certified pathologist that more than one representative section of lung tissue uninvolved with any other disease process demonstrates complicated silicosis with characteristic confluent silicotic nodules or lesions equal to or greater than one centimeter and birefringent crystals or other demonstration of crystal structures consistent with silica (well-organized concentric whorls of collagen surrounded by

inflammatory cells) in the lung parenchyma and no other more likely explanation for the presence of the fibrosis exists, or acute silicosis with characteristic pulmonary edema, interstitial inflammation, and the accumulation within the alveoli of proteinaceous fluid rich in surfactant.

(21) "Plaintiff" means a person asserting an asbestos or silica action, a decedent if the action is brought through or on behalf of an estate, and a parent or guardian if the action is brought through or on behalf of a minor or incompetent.

(22) "Plethysmography or body (BOX) plethysmography" means the test for determining lung volume in which the exposed person is enclosed in a chamber equipped to measure pressure, flow or volume change.

(23) "Predicted lower limit of normal" means any test value is the calculated standard convention lying at the fifth percentile, below the upper ninety-five percent of the reference population, based on age, height and gender, according to the recommendations by the American Thoracic Society and as referenced in the applicable AMA Guides to the Evaluation of Permanent Impairment, primarily National Health and Nutrition Examination Survey (NHANES) predicted values, or as amended.

(24) "Pulmonary function test" means spirometry, lung volume testing and diffusion capacity testing, including appropriate measurements, quality control data and graphs, performed in accordance with the methods of calibration and techniques provided in the applicable AMA Guides to the Evaluation of Permanent Impairment and all standards provided in the Official Statements of the American Thoracic Society in effect on the day pulmonary function testing of the exposed person was conducted.

(25) "Qualified physician" means a board-certified internist, pathologist, pulmonary specialist or specialist in occupational and environmental medicine, as may be appropriate to the actual diagnostic specialty in question, that meets all of the following requirements:

(A) The physician has conducted a physical examination of the exposed person and has taken or has directed to be taken under his or her supervision, direction and control, a detailed occupational, exposure, medical, smoking and social history from the exposed person, or the physician has reviewed the pathology material and has taken or has directed to be taken under his or her supervision, direction and control, a detailed history from the person most knowledgeable about the information forming the basis of the asbestos or silica action;

(B) The physician has treated or is treating the exposed person, and has or had a doctor-patient relationship with the exposed person at the time of the physical examination or, in the case of a board-certified pathologist, examined tissue samples or pathological slides of the exposed person;

(C) The physician prepared or directly supervised the preparation and final review of any medical report under this article; and

(D) The physician has not relied on any examinations, tests, radiographs, reports or opinions of any doctor, clinic, laboratory or testing company that performed an examination, test, radiograph or screening of the exposed person in violation of any law, regulation, licensing requirement or medical code of practice of the state in which the examination, test or screening.

(26) "Radiological evidence of asbestosis" means a quality 1 or 2 chest x-ray under the ILO system, showing bilateral small, irregular opacities (s, t or u) occurring primarily in the lower lung zones graded by a certified B-reader as at least 1/0 on the ILO scale.

(27) "Radiological evidence of diffuse bilateral pleural thickening" means a quality 1 or 2 chest x-ray under the ILO system, showing diffuse bilateral pleural thickening of at least b2 on the ILO scale and blunting of at least one costophrenic angle as classified by a certified B-reader.

(28) "Radiological evidence of silicosis" means a quality 1 or 2 chest x-ray under the ILO system, showing bilateral predominantly nodular or rounded opacities (p, q or r) occurring in the lung fields graded by a certified B-reader as at least 1/0 on the ILO scale or A, B or C sized opacities representing complicated silicosis or acute silicosis with characteristic pulmonary edema, interstitial inflammation, and the accumulation within the alveoli of proteinaceous fluid rich in surfactant.

(29) "Silica" means a respirable crystalline form of silicon dioxide, including quartz, cristobalite and tridymite.

(30) "Silica action" means a claim for damages or other civil or equitable relief presented in a civil action arising out of, based on or related to the health effects of exposure to silica, including loss of consortium, wrongful death, mental or emotional injury, risk or fear of disease or other injury, costs of medical monitoring or surveillance and any other derivative claim made by or on behalf of a person exposed to silica or a representative, spouse, parent, child or other relative of that person. The term does not include a claim for compensatory benefits pursuant to workers' compensation law, veterans' benefits or claims brought by a person as a subrogee by virtue

of the payment of benefits under a workers' compensation law. The term does not include any administrative claim or civil action related to coal workers' pneumoconiosis.

(31) "Silicosis" means simple silicosis, acute silicosis, accelerated silicosis or chronic silicosis caused by the inhalation of respirable silica. "Silicosis" does not mean coal workers' pneumoconiosis.

(32) "Spirometry" means a test of air capacity of the lung through a spirometer to measure the volume of air inspired and expired.

(33) "Supporting test results" means copies of the following documents and images:

(A) Pulmonary function tests, including printouts of the flow volume loops, volume time curves, DLCO graphs, lung volume tests and graphs, quality control data and other pertinent data for all trials and all other elements required to demonstrate compliance with the equipment, quality, interpretation and reporting standards set forth herein;

(B) B-reading and B-reader reports;

(C) Reports of x-ray examinations;

(D) Diagnostic imaging of the chest;

(E) Pathology reports; and

(F) All other tests reviewed by the diagnosing physician or a qualified physician in reaching the physician's conclusions.

(34) "Timed gas dilution" means a method for measuring total lung capacity in which the subject breathes into a

spirometer containing a known concentration of an inert and insoluble gas for a specific time, and the concentration of that inert and insoluble gas in the lung is compared to the concentration of that type of gas in the spirometer.

(35) "Total lung capacity" means the volume of gas contained in the lungs at the end of a maximal inspiration.

(36) "Veterans' benefits" means a program for benefits in connection with military service administered by the Veterans' Administration under Title 38 of the United States Code.

(37) "Workers' compensation law" means a law relating to a program administered by the United States or a state to provide benefits, funded by a responsible employer or its insurance carrier, for occupational diseases or injuries or for disability or death caused by occupational diseases or injuries. The term includes the Longshore and Harbor Workers' Compensation Act, 33 U. S. C. §§901 *et seq.*, and the Federal Employees' Compensation Act, Chapter 81 of Title 5 of the United States Code, but does not include the Federal Employers' Liability Act of April 22, 1908, 45 U. S. C. §§51 *et seq.*

§55-7F-4. Filing claims; establishment of a prima facie case; additional required information for new nonmalignant claims; individual actions to be filed.

(a) A plaintiff in an asbestos or silica action alleging a nonmalignant condition shall file within ninety days of filing the complaint or other initial pleading a detailed narrative medical report and diagnosis, signed by a qualified physician and accompanied by supporting test results, constituting prima facie evidence that the exposed person meets the requirements of this article. The report shall not be prepared

by a lawyer or person working for or on behalf of a lawyer or law firm.

(b) A defendant in an asbestos or silica action shall be afforded a reasonable opportunity before trial to challenge the adequacy of the prima facie evidence that the exposed person meets the requirements of this article. An asbestos or silica action shall be dismissed without prejudice upon a finding that the exposed person has failed to make the prima facie showing required by this article.

(c) A plaintiff in an asbestos or silica action filed on or after the effective date of this article shall also include an information form with the complaint for nonmalignant conditions containing all of the following:

(1) The name, address, date of birth, social security number, marital status, occupation and employer of the exposed person and any person through which the exposed person alleges exposure;

(2) The plaintiff's relationship to the exposed person or the person through which the exposure is alleged;

(3) To the best of the plaintiff's ability, the location and manner of each alleged exposure, including the specific location and manner of exposure for any person through which the exposed person alleges exposure, the beginning and ending dates of each alleged exposure and the identity of the manufacturer of the specific asbestos or silica product for each exposure when this information is reasonably available;

(4) The identity of the defendant or defendants against whom the plaintiff asserts a claim;

(5) The specific asbestos-related or silica-related disease claimed to exist; and

(6) Any supporting documentation relating to subdivisions (3), (4) and (5) of this subsection.

(d) Asbestos and silica actions must be individually filed. No asbestos or silica action filed on or after the effective date of this article shall be permitted on behalf of a group or class of plaintiffs.

§55-7F-5. Elements of proof for asbestos actions alleging a nonmalignant asbestos-related condition.

(a) No asbestos action related to an alleged nonmalignant asbestos-related condition may be brought or maintained in the absence of prima facie evidence that the exposed person has a physical impairment for which asbestos exposure was a substantial contributing factor. The plaintiff shall make a prima facie showing of claim for each defendant and include a detailed narrative medical report and diagnosis signed under oath by a qualified physician that includes all of the following:

(1) Radiological or pathological evidence of asbestosis or radiological evidence of diffuse bilateral pleural thickening or a high-resolution computed tomography scan showing evidence of asbestosis or diffuse pleural thickening;

(2) A detailed occupational and exposure history from the exposed person or, if that person is deceased, from the person most knowledgeable about the exposures that form the basis of the action, including identification of all of the exposed person's principal places of employment and exposures to airborne contaminants and whether each place of employment involved exposures to airborne contaminants,

including asbestos fibers or other disease causing dusts or fumes, that may cause pulmonary impairment and the nature, duration, and level of any exposure;

(3) A detailed medical, social and smoking history from the exposed person or, if that person is deceased, from the person most knowledgeable, including a thorough review of the past and present medical problems of the exposed person and their most probable cause;

(4) Evidence verifying that at least fifteen years have elapsed between the exposed person's date of first exposure to asbestos and the date of diagnosis;

(5) Evidence from a personal medical examination and pulmonary function testing of the exposed person or, if the exposed person is deceased, from the person's medical records, that the exposed person has or the deceased person had a permanent respiratory impairment rating of at least Class 2 as defined by and evaluated pursuant to the AMA's Guides to the Evaluation of Permanent Impairment or reported significant changes year to year in lung function for FVC, FEV1 or DLCO as defined by the American Thoracic Society's Interpretative Strategies for Lung Function Tests, 26 European Respiratory Journal 948-68, 961-62, Table 12 (2005) and as updated;

(6) Evidence that asbestosis or diffuse bilateral pleural thickening, rather than chronic obstructive pulmonary disease, is a substantial factor to the exposed person's physical impairment, based on a determination the exposed person has:

(A) Forced vital capacity below the predicted lower limit of normal and FEV1/FVC ratio (using actual values) at or above the predicted lower limit of normal;

(B) Total lung capacity, by plethysmography or timed gas dilution, below the predicted lower limit of normal; or

(C) A chest x-ray showing bilateral small, irregular opacities (s, t or u) graded by a certified B-reader as at least 2/1 on the ILO scale; and

(7) The specific conclusion of the qualified physician signing the report that exposure to asbestos was a substantial contributing factor to the exposed person's physical impairment and not more probably the result of other causes. An opinion that the medical findings and impairment are consistent with or compatible with exposure to asbestos, or words to that effect, do not satisfy the requirements of this subdivision.

(b) If the alleged nonmalignant asbestos-related condition is a result of an exposed person living with or having extended contact with another exposed person who, if the asbestos action had been filed by the other exposed person would have met the requirements of subdivision (2), subsection (a) of this section, and the exposed person alleges extended contact with the other exposed person during the relevant time period, the detailed narrative medical report and diagnosis shall include all of the information required by subsection (a) of this section, except that the exposure history required under subdivision (2), subsection (a) of this section shall describe the exposed person's history of exposure to the other exposed person.

§55-7F-6. Elements of proof for silica actions alleging silicosis.

No silica action related to alleged silicosis may be brought or maintained in the absence of prima facie evidence that the exposed person has a physical impairment as a result of silicosis. The plaintiff shall make a prima facie showing of

claim for each defendant and include a detailed narrative medical report and diagnosis signed under oath by a qualified physician that includes all of the following:

(1) Radiological or pathological evidence of silicosis or a high-resolution computed tomography scan showing evidence of silicosis;

(2) A detailed occupational and exposure history from the exposed person or, if that person is deceased, from the person most knowledgeable about the exposures that form the basis of the action, including identification of all principal places of employment and exposures to airborne contaminants and whether each place of employment involved exposures to airborne contaminants, including silica or other disease causing dusts or fumes, that may cause pulmonary impairment and the nature, duration and level of any exposure;

(3) A detailed medical, social and smoking history from the exposed person or, if that person is deceased, from the person most knowledgeable, including a thorough review of the past and present medical problems and their most probable cause;

(4) Evidence that a sufficient latency period has elapsed between the exposed person's date of first exposure to silica and the day of diagnosis;

(5) Evidence based upon a personal medical examination and pulmonary function testing of the exposed person or, if the exposed person is deceased, based upon the person's medical records, demonstrating that the exposed person has or the deceased person had a permanent respiratory impairment rating of at least Class 2 as defined by and evaluated pursuant to the AMA's Guides to the Evaluation of

Permanent Impairment or reported significant changes year to year in lung function for FVC, FEV1 or DLCO as defined by the American Thoracic Society's Interpretative Strategies for Lung Function Tests, 26 European Respiratory Journal 948-68, 961-62, Table 12 (2005) and as updated; and

(6) The specific conclusion of the qualified physician signing the report that exposure to silica was a substantial contributing factor to the exposed person's physical impairment and not more probably the result of other causes. An opinion stating that the medical findings and impairment are consistent with or compatible with exposure to silica, or words to that effect, do not satisfy the requirements of this subdivision.

§55-7F-7. Evidence of physical impairment.

Evidence relating to physical impairment, including pulmonary function testing and diffusing studies, offered in any action governed by this article or article seven-e of this chapter, shall:

(1) Comply with the quality controls, equipment requirements, methods of calibration and techniques set forth in the AMA's Guides to the Evaluation of Permanent Impairment and all standards set forth in the Official Statements of the American Thoracic Society which are in effect on the date of any examination or pulmonary function testing of the exposed person required by this article;

(2) Not be obtained and may not be based on testing or examinations that violate any law, regulation, licensing requirement, or medical code of practice of the state in which the examination, test, or screening was conducted, or of this state; and

(3) Not be obtained under the condition that the plaintiff or exposed person retains the legal services of the attorney or law firm sponsoring the examination, test or screening.

§55-7F-8. Procedures.

(a) Evidence relating to the prima facie showings required under this article shall not create any presumption that the exposed person has an asbestos-related or silica-related injury or impairment and shall not be conclusive as to the liability of any defendant.

(b) No evidence shall be offered at trial, and the jury shall not be informed of:

(1) The grant or denial of a motion to dismiss an asbestos or silica action under the provisions of this article; or

(2) The provisions of this article with respect to what constitutes a prima facie showing of asbestos or silica-related impairment.

(c) Until a court enters an order determining that the exposed person has established prima facie evidence of impairment, no asbestos or silica action shall be subject to discovery, except discovery related to establishing or challenging the prima facie evidence or by order of the trial court upon motion of one of the parties and for good cause shown.

(d) *Consolidation of cases.* –

(1) A court may consolidate for trial any number and type of nonmalignant asbestos or silica actions with the consent of all the parties. In the absence of such consent, the court may consolidate for trial only asbestos or silica actions relating to the exposed person and members of that person's household.

(2) No class action or any other form of mass aggregation relating to more than one exposed person and members of that person's household shall be permitted.

(3) The provisions of this subsection do not preclude consolidation of cases by court order for pretrial or discovery purposes.

§55-7F-9. Statute of limitations; two-disease rule.

(a) With respect to an asbestos or silica action not barred by limitations as of this article's effective date, an exposed person's cause of action shall not accrue, nor shall the running of limitations commence, prior to the earlier of the date:

(1) The exposed person received a medical diagnosis of an asbestos-related impairment or silica-related impairment;

(2) The exposed person discovered facts that would have led a reasonable person to obtain a medical diagnosis with respect to the existence of an asbestos-related impairment or silica-related impairment; or

(3) The date of death of the exposed person having an asbestos-related or silica-related impairment.

(b) Nothing in this section shall be construed to revive or extend limitations with respect to any claim for asbestos-related impairment or silica-related impairment that was otherwise time-barred on the effective date of this article.

(c) Nothing in this section shall be construed so as to adversely affect, impair, limit, modify, or nullify any settlement or other agreements with respect to an asbestos or silica action entered into prior to the effective date of this article.

(d) An asbestos or silica action arising out of a nonmalignant condition shall be a distinct cause of action from an action for an asbestos-related or silica-related cancer. Where otherwise permitted under state law, no damages shall be awarded for fear or increased risk of future disease in an asbestos or silica action.

§55-7F-10. Application.

This article shall apply to all asbestos actions and silica actions filed on or after the effective date of this article.

ENROLLED

COMMITTEE SUBSTITUTE

FOR

Senate Bill No. 421

(SENATORS TRUMP, CARMICHAEL,
BLAIR AND GAUNCH, *ORIGINAL SPONSORS*)

[Passed March 10, 2015; in effect ninety days from passage.]

AN ACT to amend the Code of West Virginia, 1931, as amended, by adding thereto a new section, designated §55-7-27, relating generally to treatment of punitive damages in civil actions; providing for limitations on punitive damages in civil actions; providing for when punitive damages may be awarded in civil actions; and providing for a bifurcated trial, upon request, for civil actions involving punitive damages.

Be it enacted by the Legislature of West Virginia:

That the Code of West Virginia, 1931, as amended, be amended by adding thereto a new section, designated §55-7-27, to read as follows:

ARTICLE 7. ACTIONS FOR INJURIES.

§55-7-27. Limitations on punitive damages.

(a) An award of punitive damages may only occur in a civil action against a defendant if a plaintiff establishes by clear and convincing evidence that the damages suffered were the result of the conduct that was carried out by the defendant with actual malice toward the plaintiff or a conscious, reckless and outrageous indifference to the health, safety and welfare of others.

(b) Any civil action tried before a jury involving punitive damages may, upon request of any defendant, be conducted in a bifurcated trial in accordance with the following guidelines:

(1) In the first stage of a bifurcated trial, the jury shall determine liability for compensatory damages and the amount of compensatory damages, if any.

(2) If the jury finds during the first stage of a bifurcated trial that a defendant is liable for compensatory damages, then the court shall determine whether sufficient evidence exists to proceed with a consideration of punitive damages.

(3) If the court finds that sufficient evidence exists to proceed with a consideration of punitive damages, the same jury shall determine if a defendant is liable for punitive damages in the second stage of a bifurcated trial and may award such damages.

(4) If the jury returns an award for punitive damages that exceeds the amounts allowed under subsection (c) of this section, the court shall reduce any such award to comply with the limitations set forth therein.

(c) The amount of punitive damages that may be awarded in a civil action may not exceed the greater of four times the amount of compensatory damages or $500,000, whichever is greater.

ENROLLED

COMMITTEE SUBSTITUTE

FOR

Senate Bill No. 542

(Senators D. Hall, Carmichael, M. Hall,
Gaunch, Trump, Blair and Nohe, *original sponsors*)

[Passed March 14, 2015; in effect ninety days from passage.]

AN ACT to amend and reenact §46A-2-125, §46A-2-126 and §46A-2-128 of the Code of West Virginia, 1931, as amended; to amend and reenact §46A-3-112 and §46A-3-113 of said code; to amend and reenact §46A-5-101 and §46A-5-106 of said code; and to amend said code by adding thereto a new section, designated §46A-5-107, all relating to clarifying permitted and prohibited actions with regard to the prohibition on oppression and abuse in the course of debt collection; clarifying permitted and prohibited actions with regard to the prohibition of unreasonable publication; clarifying permitted and prohibited actions and communications with regard to the prohibition on the use of unfair or unconscionable means in the course of debt collection; increasing permitted delinquency charges; modifying damages and penalties for violations; modifying the limitation of actions brought under this chapter; adjusting time allowed after discovery to correct an error without liability in certain circumstances; adjusting damages for inflation; and specifying venue of an action or proceeding brought by a consumer.

Be it enacted by the Legislature of West Virginia:

That §46A-2-125, §46A-2-126 and §46A-2-128 of the Code of West Virginia, as amended, be amended and reenacted; that §46A-3-112 and §46A-3-113 of said code be amended and reenacted; that §46A-5-101 and §46A-5-106 of said code be amended and reenacted; and that said code be amended by adding thereto a new section, designated §46A-5-107, all to read as follows:

ARTICLE 2. CONSUMER CREDIT PROTECTION.

§46A-2-125. Oppression and abuse.

No debt collector shall unreasonably oppress or abuse any person in connection with the collection of or attempt to collect any claim alleged to be due and owing by that person or another. Without limiting the general application of the foregoing, the following conduct is deemed to violate this section:

(a) The use of profane or obscene language or language that is intended to unreasonably abuse the hearer or reader;

(b) Engaging any person in telephone conversation without disclosure of the caller's identity and with the intent to annoy, harass or threaten any person at the called number;

(c) Causing expense to any person in the form of long distance telephone tolls, telegram fees or other charges incurred by a medium of communication, by concealment of the true purpose of the communication; and

(d) Calling any person more than thirty times per week or engaging any person in telephone conversation more than ten times per week, or at unusual times or at times known to be inconvenient, with intent to annoy, abuse, oppress or threaten any person at the called number. In determining whether a debt collector's conduct violates this section, the debt collector's conduct will be evaluated from the standpoint of a reasonable person. In the absence of knowledge of circumstances to the contrary, a debt collector shall assume that the convenient time for

communicating with a consumer is after eight o'clock antemeridian and before nine o'clock postmeridian, local time at the consumer's location.

§46A-2-126. Unreasonable publication.

No debt collector shall unreasonably publicize information relating to any alleged indebtedness or consumer. For purposes of this section, a debt collector does not unreasonably publicize information relating to any alleged indebtedness by identifying themselves to the debtor by name, identifying the debt collector's employer by name, if expressly requested by the debtor, or by providing a telephone number or other contact information to the debtor. Without limiting the general application of the foregoing, the following conduct is deemed to violate this section:

(a) The communication to any employer or his agent before judgment has been rendered of any information relating to an employee's indebtedness other than through proper legal action, process or proceeding;

(b) The disclosure, publication or communication of information relating to a consumer's indebtedness to any relative or family member of the consumer if such person is not residing with the consumer, except through proper legal action or process or at the express and unsolicited request of the relative or family member;

(c) The disclosure, publication or communication of any information relating to a consumer's indebtedness to any other person other than a credit reporting agency, by publishing or posting any list of consumers, commonly known as "deadbeat lists", except lists to prevent the fraudulent use of credit accounts or credit cards, by advertising for sale any claim to enforce payment thereof, or in any manner other than through proper legal action, process or proceeding; and

(d) The use of any form of communication to the consumer, which ordinarily may be seen by any other persons, that displays or conveys any information about the alleged claim other than the

name, address and phone number of the debt collector.

Nothing in this chapter shall prohibit a creditor or debt collector from communicating with any person other than the consumer for the purpose of acquiring or confirming the consumer's location information provided they do so in a manner consistent with the provisions of 15 U. S. C. § 1692b, as the same may be amended from time to time. For purposes of this section, "communication" or "communicating" or any derivation of those terms shall not include the filing of a complaint or other document, pleading or filing with any court.

§46A-2-128. Unfair or unconscionable means.

No debt collector may use unfair or unconscionable means to collect or attempt to collect any claim. Without limiting the general application of the foregoing, the following conduct is deemed to violate this section:

(a) The seeking or obtaining of any written statement or acknowledgment in any form that specifies that a consumer's obligation is one incurred for necessaries of life where the original obligation was not in fact incurred for such necessaries;

(b) The seeking or obtaining of any written statement or acknowledgment in any form containing an affirmation of any obligation by a consumer who has been declared bankrupt except where such affirmation is obtained pursuant to applicable bankruptcy law;

(c) The collection or the attempt to collect from the consumer all or any part of the debt collector's fee or charge for services rendered: *Provided,* That attorney's fees, court costs and other reasonable collection costs and charges necessary for the collection of any amount due upon delinquent educational loans made by any institution of higher education within this state may be recovered when the terms of the obligation so provide. Recovery of attorney's fees and collection costs may not exceed thirty-three and one-third percent of the amount due and owing to any such

institution: *Provided, however,* That nothing contained in this subsection shall be construed to limit or prohibit any institution of higher education from paying additional attorney fees and collection costs as long as such additional attorney fees and collection costs do not exceed an amount equal to five percent of the amount of the debt actually recovered and such additional attorney fees and collection costs are deducted or paid from the amount of the debt recovered for the institution or paid from other funds available to the institution;

(d) The collection of or the attempt to collect any interest or other charge, fee or expense incidental to the principal obligation unless such interest or incidental fee, charge or expense is expressly authorized by the agreement creating or modifying the obligation and by statute or regulation;

(e) Any communication with a consumer made more than seventy-two hours after the debt collector receives written notice, either on paper or electronically, from the consumer or his or her attorney that the consumer is represented by an attorney specifically with regard to the subject debt. To be effective under this subsection, such notice must clearly state the attorney's name, address and telephone number and be sent to the debt collector's registered agent, identified by the debt collector at the office of the West Virginia Secretary of State or, if not registered with the West Virginia Secretary of State, then to the debt collector's principal place of business. Communication with a consumer is not prohibited under this subsection if the attorney fails to answer correspondence, return phone calls or discuss the obligation in question, or if the attorney consents to direct communication with the consumer. Regular account statements provided to the consumer and notices required to be provided to the consumer pursuant to applicable law shall not constitute prohibited communications under this section; and

(f) When the debt is beyond the statute of limitations for filing a legal action for collection,

failing to provide the following disclosure informing the consumer in its initial written communication with such consumer that:

(1) When collecting on a debt that is not past the date for obsolescence provided for in section 605(a) of the Fair Credit Reporting Act, 15 U. S. C. 1681c: "The law limits how long you can be sued on a debt. Because of the age of your debt, (INSERT OWNER NAME) cannot sue you for it. If you do not pay the debt, (INSERT OWNER NAME) may report or continue to report it to the credit reporting agencies as unpaid"; and

(2) When collecting on debt that is past the date for obsolescence provided for in section 605(a) of the Fair Credit Reporting Act, 15 U. S. C. 1681c: "The law limits how long you can be sued on a debt. Because of the age of your debt, (INSERT OWNER NAME) cannot sue you for it and (INSERT OWNER NAME) cannot report it to any credit reporting agencies."

ARTICLE 3. FINANCE CHARGES AND RELATED PROVISIONS.

§46A-3-112. Delinquency charges on precomputed consumer credit sales or consumer loans.

(1) With respect to a precomputed consumer credit sale or consumer loan, refinancing or consolidation, the parties may contract for a delinquency charge on any installment not paid in full within ten days after its scheduled due date in an amount not exceeding the greater of:

(a) Five percent of the unpaid amount of the installment, not to exceed$30; or

(b) An amount equivalent to the deferral charge that would be permitted to defer the unpaid amount of the installment for the period that it is delinquent.

(2) A delinquency charge under subdivision (a), subsection (1) of this section may be collected only once on an installment however long it remains in default. No delinquency charge may be collected with respect to a deferred installment unless the installment is not paid in full within ten days after its deferred due date. A delinquency charge may be collected at the time it accrues or at

any time thereafter.

(3) No delinquency charge may be collected on an installment which is paid in full within ten days after its scheduled or deferred installment due date, even though an earlier maturing installment or a delinquency or deferral charge on an earlier installment may not have been paid in full. For purposes of this subsection, payments shall be applied first to current installments, then to delinquent installments and then to delinquency and other charges.

(4) If two installments, or parts thereof, of a precomputed consumer credit sale or consumer loan are in default for ten days or more, the creditor may elect to convert such sale or loan from a precomputed sale or loan to one in which the sales finance charge or loan finance charge is based on unpaid balances. In such event, the creditor shall make a rebate pursuant to the provisions on rebate upon prepayment, refinancing or consolidation as of the maturity date of any installment then delinquent and thereafter may make a sales finance charge or loan finance charge as authorized by the appropriate provisions on sales finance charges or loan finance charges for consumer credit sales or consumer loans. The amount of the rebate may not be reduced by the amount of any permitted minimum charge. If the creditor proceeds under this subsection, any delinquency or deferral charges made with respect to installments due at or after the maturity date of the delinquent installments shall be rebated and no further delinquency or deferral charges shall be made.

(5) The commissioner shall prescribe by rule the method or procedure for the calculation of delinquency charges consistent with the other provisions of this chapter where the precomputed consumer credit sale or consumer loan is payable in unequal or irregular installments.

§46A-3-113. Delinquency charges on nonprecomputed consumer credit sales or consumer loans repayable in installments.

(1) In addition to the continuation of the sales finance charge or loan finance charge on a

delinquent installment with respect to a nonprecomputed consumer credit sale or consumer loan, refinancing or consolidation, repayable in installments, the parties may contract for a delinquency charge on any installment not paid in full within ten days after its scheduled due date of five percent of the unpaid amount of the installment, not to exceed $30.

(2) A delinquency charge under subsection (1) of this section may be collected only once on an installment however long it remains in default. A delinquency charge may be collected at the time it accrues or at any time thereafter.

(3) No delinquency charge may be collected on an installment which is paid in full within ten days after its scheduled or deferred installment due date, even though an earlier maturing installment or a delinquency or deferral charge on an earlier installment may not have been paid in full. For purposes of this subsection, payments shall be applied first to current installments, then to delinquent installments and then to delinquency and other charges.

ARTICLE 5. CIVIL LIABILITY AND CRIMINAL PENALTIES.

§46A-5-101. Effect of violations on rights of parties; limitation of actions.

(1) If a creditor or debt collector has violated the provisions of this chapter applying to collection of excess charges, security in sales and leases, disclosure with respect to consumer leases, receipts, statements of account and evidences of payment, limitations on default charges, assignment of earnings, authorizations to confess judgment, illegal, fraudulent or unconscionable conduct, any prohibited debt collection practice, or restrictions on interest in land as security, assignment of earnings to regulated consumer lender, security agreement on household goods for benefit of regulated consumer lender, and renegotiation by regulated consumer lender of a loan discharged in bankruptcy, the consumer has a cause of action to recover: (a) Actual damages; and (b) a right in an action to recover from the person violating this chapter a penalty of $1,000 per violation:

Provided, That the aggregate amount of the penalty awarded shall not exceed the greater of $175,000 or the total alleged outstanding indebtedness: *Provided, however,* That in a class action the aggregate limits on the amount of the penalty set forth above shall be applied severally to each named plaintiff and each class member such that no named plaintiff nor any class member may recover in excess of the greater of $175,000 or the total alleged outstanding indebtedness. With respect to violations arising from consumer credit sales, consumer leases, or consumer loans, or from sales as defined in article six of this chapter, no action pursuant to this subsection may be brought more than four years after the violations occurred. This limitations period shall apply to all actions filed on or after September 1, 2015.

(2) If a creditor has violated the provisions of this chapter respecting authority to make regulated consumer loans, the loan is void and the consumer is not obligated to pay either the principal or the loan finance charge. If he has paid any part of the principal or of the finance charge, he has a right to recover in an action the payment from the person violating this chapter or from an assignee of that person's rights who undertakes direct collection of payments or enforcement of rights arising from the debt. With respect to violations arising from regulated consumer loans made pursuant to revolving loan accounts, no action pursuant to this subsection may be brought more than four years after the violation occurred. With respect to violations arising from other regulated consumer loans, no action pursuant to this subsection may be brought more than four years after the violation occurred. This limitations period shall apply to all actions filed on or after September 1, 2015.

(3) A consumer is not obligated to pay a charge in excess of that allowed by this chapter and if he has paid an excess charge, he has a right to a refund. A refund may be made by reducing the consumer's obligation by the amount of the excess charge. If the consumer has paid an amount in

excess of the lawful obligation under the agreement, the consumer may recover in an action the excess amount from the person who made the excess charge or from an assignee of that person's rights who undertakes direct collection of payments from or enforcement of rights against the consumer arising from the debt.

(4) If a creditor or debt collector has contracted for or received a charge in excess of that allowed by this chapter, the consumer may, in addition to recovering such excess charge, also recover from the creditor or the person liable in an action a penalty of $1,000 per violation: *Provided,* That the aggregate amount of the penalty awarded shall not exceed the greater of $175,000 or the total alleged outstanding indebtedness: *Provided, however,* That in a class action the aggregate limits on the amount of the penalty set forth above shall be applied severally to each named plaintiff and each class member such that no named plaintiff nor any class member may recover in excess of the greater of $175,000 or the total alleged outstanding indebtedness. With respect to excess charges arising from consumer credit sales, consumer leases, or consumer loans, no action pursuant to this subsection may be brought more than four years after the time the excess charge was made.. This limitations period shall apply to all actions filed on or after September 1, 2015.

(5) Except as otherwise provided, a violation of this chapter does not impair rights on a debt.

(6) If an employer discharges an employee in violation of the provisions prohibiting discharge, the employee may within ninety days bring a civil action for recovery of wages lost as a result of the violation and for an order requiring the reinstatement of the employee. Damages recoverable shall not exceed lost wages for six weeks.

(7) A creditor or debt collector has no liability for a penalty under subsection (1) or (4) of this section if, after discovering an error and prior to the institution of an action under this section or the

receipt of written notice of the error, the creditor notifies the person concerned of the error and corrects the error: (a) Within fifteen days if the error affects no more than two persons; or (b) within sixty days if the error affects more than two persons. If the violation consists of a prohibited agreement, giving the consumer a corrected copy of the writing containing the error is sufficient notification and correction. If the violation consists of an excess charge, correction shall be made by an adjustment or refund.

(8) If the creditor or debt collector establishes by a preponderance of evidence that a violation is unintentional or the result of a bona fide error of fact notwithstanding the maintenance of procedures reasonably adapted to avoid any such violation or error, no liability is imposed under subsections (1), (2) and (4) of this section and the validity of the transaction is not affected.

§46A-5-106. Adjustment of damages for inflation.

In any claim brought under this chapter applying to illegal, fraudulent or unconscionable conduct or any prohibited debt collection practice, the court may adjust the damages awarded pursuant to section one hundred one of this article to account for inflation from 12:01 a.m. on September 1, 2015, to the time of the award of damages in an amount equal to the consumer price index. Consumer price index means the last consumer price index for all consumers published by the United States Department of Labor.

§46A-5-107. Venue.

Any civil action or other proceeding brought by a consumer to recover actual damages or a penalty, or both, from creditor or a debt collector, founded upon illegal, fraudulent or unconscionable conduct, or prohibited debt collection practice, or both, shall be brought either in the circuit court of the county in which the plaintiff has his or her legal residence at the time of the civil action, the circuit court of the county in which the plaintiff last resided in the state of West Virginia, or in the

circuit court of the county in which the creditor or debt collector has its principal place of business or, if the creditor or debt collector is an individual, in the circuit court of the county of his or her legal residence. With respect to causes of action arising under this chapter, the venue provisions of this section shall be exclusive of and shall supersede the venue provisions of any other West Virginia statute or rule.

ENROLLED

Senate Bill No. 578

(BY SENATORS TRUMP, CARMICHAEL, FERNS, GAUNCH, D. HALL, KARNES, LEONHARDT, MAYNARD, NOHE AND WILLIAMS)

[Passed March 10, 2015; in effect ninety days from passage.]

AN ACT to amend and reenact §23-4-8d of the Code of West Virginia, 1931, as amended; and to amend and reenact §23-5-7 of said code, all relating to authorization of compromise and settlement of occupational disease claims; permitting final settlement of medical benefits for nonorthopedic occupational disease claims; and requiring claimant be represented by legal counsel in these claims.

Be it enacted by the Legislature of West Virginia:

That §23-4-8d of the Code of West Virginia, 1931, as amended, be amended and reenacted; and that §23-5-7 of said code be amended and reenacted, all to read as follows:

ARTICLE 4. DISABILITY AND DEATH BENEFITS.

§23-4-8d. Occupational pneumoconiosis claims never closed for medical benefits with exception of settled claims.

Notwithstanding the provisions of subdivision (4), subsection (a), section sixteen of this article, with the exception of claims settled pursuant to article five, section seven of this chapter, a request for medical services, durable medical goods or other medical supplies in an occupational pneumoconiosis claim may be made at any time.

ARTICLE 5. REVIEW.

§23-5-7. Compromise and settlement.

(a) The claimant, the employer and the Workers' Compensation Commission, the successor to the commission, other private insurance carriers and self-insured employers, whichever is applicable, may negotiate a final settlement of any and all issues in a claim wherever the claim is in the administrative or appellate processes: *Provided,* That in the settlement of medical benefits for nonorthopedic occupational disease claims, the claimant shall be represented by legal counsel. If the employer is not active in the claim, the commission, the successor to the commission, other private insurance carriers and self-insured employers, whichever is applicable, may negotiate a final settlement with the claimant and the settlement shall be made a part of the claim record. Except in cases of fraud, no issue that is the subject of an approved settlement agreement may be reopened by any party, including the commission, the successor to the commission, other private insurance carriers and self-insured employers, whichever is applicable. Any settlement agreement may provide for a lump-sum payment or a structured payment plan, or any combination thereof, or any other basis as the parties may agree. If a self-insured employer later fails to make the agreed-upon payment, the commission shall assume the obligation to make the payments and shall recover the amounts paid or to be paid from the self-insurer employer and its sureties or guarantors or both as provided in sections five and five-a, article two of this chapter.

(b) Each settlement agreement shall provide the toll-free number of the West Virginia State Bar Association and shall provide the injured worker with five business days to revoke the executed agreement. The Insurance Commissioner may void settlement agreements entered into by an unrepresented injured worker which are determined to be unconscionable pursuant to criteria established by rule of the commissioner.

(c) The amendments to this section enacted during the regular session of the Legislature in the year 2015 apply to all settlement agreements executed after the effective date.

ENROLLED

COMMITTEE SUBSTITUTE

for

H. B. 2002

(BY DELEGATE(S) WAGNER, OVERINGTON, A. EVANS, ANDERSON, WAXMAN, SHOTT, KELLY, E. NELSON, FOLK, ESPINOSA AND MR. SPEAKER (MR. ARMSTEAD))

[Passed February 24, 2015; in effect ninety days from passage.]

AN ACT to repeal §55-7-13 and §55-7-24 of the Code of West Virginia, 1931, as amended; and to amend said code by adding thereto four new sections, designated §55-7-13a, §55-7-13b, §55-7-13c and §55-7-13d, all generally relating to predicating actions for damages upon principles of comparative fault; establishing the comparative fault standard; abolishing joint liability and implementing several liability; establishing how to consider the fault of parties and nonparties to a civil action; establishing how to consider the fault of, and the amounts paid by, settling parties; establishing how to reallocate any portion of a judgment a plaintiff is unable to collect; providing for the use of special interrogatories; establishing certain exceptions to several liability; clarifying fault may be imputed to another person who was acting as an agent or servant of another; establishing limits on liability where a plaintiff is involved in a felony criminal act; providing for the burden of proof and limitations; and defining terms.

Be it enacted by the Legislature of West Virginia:

That §55-7-13 and §55-7-24 of the Code of West Virginia, 1931, as amended, be repealed; and that said code be amended by adding thereto four new sections, designated §55-7-13a, §55-7-13b, §55-7-13c and §55-7-13d, all to read as follows:

ARTICLE 7. ACTIONS FOR INJURIES.

§55-7-13a. Modified comparative fault standard established.

(a) For purposes of this article, "comparative fault" means the degree to which the fault of a person was a proximate cause of an alleged personal injury or death or damage to property, expressed as a percentage. Fault shall be determined according to section thirteen-c of this article.

(b) In any action based on tort or any other legal theory seeking damages for personal injury, property damage, or wrongful death, recovery shall be predicated upon principles of comparative fault and the liability of each person, including plaintiffs, defendants and nonparties who proximately caused the damages, shall be allocated to each applicable person in direct proportion to that person's percentage of fault.

(c) The total of the percentages of comparative fault allocated by the trier of fact with respect to a particular incident or injury must equal either zero percent or one hundred percent.

§55-7-13b. Definitions.

As used in this article:

"Compensatory damages" means damages awarded to compensate a plaintiff for economic and noneconomic loss.

"Defendant" means, for purposes of determining an obligation to pay damages to another under this chapter, any person against whom a claim is asserted including a counter-claim defendant, cross-claim defendant or third-party defendant.

"Fault" means an act or omission of a person, which is a proximate cause of injury or death to another person or persons, damage to property, or economic injury, including, but not limited to, negligence, malpractice, strict product liability, absolute liability, liability under section two, article four, chapter twenty-three of this code or assumption of the risk.

"Plaintiff" means, for purposes of determining a right to recover under this chapter, any person asserting a claim.

§55-7-13c. Liability to be several; amount of judgment; allocation of fault.

(a) In any action for damages, the liability of each defendant for compensatory damages shall be several only and may not be joint. Each defendant shall be liable only for the amount of compensatory damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against each defendant for his or her share of that amount. However, joint liability may be imposed on two or more defendants who consciously conspire and deliberately pursue a common plan or design to commit a tortious act or omission. Any person held jointly liable under this section shall have a right of contribution from other defendants that acted in concert.

(b) To determine the amount of judgment to be entered against each defendant, the court, with regard to each defendant, shall multiply the total amount of compensatory damages recoverable by the plaintiff by the percentage of each defendant's fault and, subject to subsection (d) of this section, that amount shall be the maximum recoverable against that defendant.

(c) Any fault chargeable to the plaintiff shall not bar recovery by the plaintiff unless the plaintiff's fault is greater than the combined fault of all other persons responsible for the total amount of damages, if any, to be awarded. If the plaintiff's fault is less than the combined fault of all other persons, the plaintiff's recovery shall be reduced in proportion to the plaintiff's degree of fault.

(d) Notwithstanding subsection (b) of this section, if a plaintiff through good faith efforts is unable to collect from a liable defendant, the plaintiff may, not later than one year after judgment becomes final through lapse of time for appeal or through exhaustion of appeal, whichever occurs later, move for reallocation of any uncollectible amount among the other parties found to be liable.

(1) Upon the filing of the motion, the court shall determine whether all or part of a defendant's proportionate share of the verdict is uncollectible from that defendant and shall reallocate the uncollectible amount among the other parties found to be liable, including a plaintiff at fault, according to their percentages at fault: *Provided,* That the court may not reallocate to any defendant an uncollectible amount greater than that defendant's percentage of fault multiplied by the uncollectible amount: *Provided, however,* That there shall be no reallocation against a defendant whose percentage of fault is equal to or less than the plaintiff's percentage of fault.

(2) If the motion is filed, the parties may conduct discovery on the issue of collectibility prior to a hearing on the motion.

(e) A party whose liability is reallocated under subsection (d) of this section is nonetheless subject to contribution and to any continuing liability to the plaintiff on the judgment.

(f) This section does not affect, impair or abrogate any right of indemnity or contribution arising out of any contract or agreement or any right of indemnity otherwise provided by law.

(g) The fault allocated under this section to an immune defendant or a defendant whose liability is limited by law may not be allocated to any other defendant.

(h) Notwithstanding any other provision of this section to the contrary, a defendant that commits one or more of the followings acts or omissions shall be jointly and severally liable:

(1) A defendant whose conduct constitutes driving a vehicle under the influence of alcohol, a controlled substance, or any other drug or any combination thereof, as described in section two, article five, chapter seventeen-c of this code, which is a proximate cause of the damages suffered by the plaintiff;

(2) A defendant whose acts or omissions constitute criminal conduct which is a proximate cause of the damages suffered by the plaintiff; or

(3) A defendant whose conduct constitutes an illegal disposal of hazardous waste, as described in section three, article eighteen, chapter twenty-two of this code, which conduct is a proximate cause of the damages suffered by the plaintiff.

(i) This section does not apply to the following statutes:

(1) Article twelve-a, chapter twenty-nine of this code;

(2) Chapter forty-six of this code; and

(3) Article seven-b, chapter fifty-five of this code.

§55-7-13d. Determination of fault; imputed fault; plaintiff's involvement in felony criminal act; burden of proof; limitations; applicability; severability.

(a) *Determination of fault of parties and nonparties.*

(1) In assessing percentages of fault, the trier of fact shall consider the fault of all persons who contributed to the alleged damages regardless of whether the person was or could have been named as a party to the suit.

(2) Fault of a nonparty shall be considered if the plaintiff entered into a settlement agreement with the nonparty or if a defending party gives notice no later than one hundred-eight days after service of process upon said defendant that a nonparty was wholly or partially at fault. Notice shall be filed with the court and served upon all parties to the action designating the nonparty and setting forth the nonparty's name and last-known address, or the best identification of the nonparty which is possible under the circumstances, together with a brief statement of the basis for believing such nonparty to be at fault;

(3) In all instances where a nonparty is assessed a percentage of fault, any recovery by a plaintiff shall be reduced in proportion to the percentage of fault chargeable to such nonparty. Where a plaintiff has settled with a party or nonparty before verdict, that plaintiff's recovery will be reduced in proportion to the percentage of fault assigned to the settling party or nonparty.

(4) Nothing in this section is meant to eliminate or diminish any defenses or immunities, which exist as of the effective date of this section, except as expressly noted herein;

(5) Assessments of percentages of fault for nonparties are used only as a vehicle for accurately determining the fault of

named parties. Where fault is assessed against nonparties, findings of such fault do not subject any nonparty to liability in that or any other action, or may not be introduced as evidence of liability or for any other purpose in any other action; and

(6) In all actions involving fault of more than one person, unless otherwise agreed by all parties to the action, the court shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings, indicating the percentage of the total fault that is allocated to each party and nonparty pursuant to this article. For this purpose, the court may determine that two or more persons are to be treated as a single person.

(b) *Imputed fault.* – Nothing in this section may be construed as precluding a person from being held liable for the portion of comparative fault assessed against another person who was acting as an agent or servant of such person, or if the fault of the other person is otherwise imputed or attributed to such person by statute or common law. In any action where any party seeks to impute fault to another, the court shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings, on the issue of imputed fault.

(c) *Plaintiff's involvement in felony criminal act.* – In any civil action, a defendant is not liable for damages that the plaintiff suffers as a result of the negligence or gross negligence of a defendant if such damages arise out of the plaintiff's commission, attempt to commit or fleeing from the commission of a felony criminal act: *Provided,* That the plaintiff has been convicted of such felony, or if deceased, the jury makes a finding that the decedent committed such felony.

(d) *Burden of proof.* – The burden of alleging and proving comparative fault shall be upon the person who seeks to establish such fault.

(e) *Limitations.* – Nothing in this section creates a cause of action. Nothing in this section alters, in any way, the immunity of any person as established by statute or common law.

(f) *Applicability.* – This section applies to all causes of action arising or accruing on or after the effective date of its enactment.

(g) *Severability.* – The provisions of this section are severable from one another, so that if any provision of this section is held void, the remaining provisions of this section shall remain valid.

SECOND ENROLLMENT

COMMITTEE SUBSTITUTE

for

H. B. 2010

(BY DELEGATE(S) KESSINGER, MCCUSKEY, BORDER, SHOTT, ROWAN, FRICH, WESTFALL, LANE, ANDERSON, SOBONYA AND FAIRCLOTH)

[Amended and again passed March 10, 2015;
as a result of the objections of the Governor;
in effect ninety days from passage.]

AN ACT to amend and reenact §3-1-16 and §3-1-17 of the Code of West Virginia, 1931, as amended; to amend and reenact §3-4A-11a of said code; to amend and reenact §3-5-4 of said code; to amend said code by adding thereto four new sections, designated §3-5-6a, §3-5-6b, §3-5-6c and §3-5-6d; to amend and reenact §3-5-7, §3-5-13 and §3-5-13a of said code; to amend and reenact §3-10-3 of said code; to amend and reenact §3-12-3, §3-12-6, §3-12-10, §3-12-11, §3-12-12 and §3-12-14 of said code; to amend and reenact §6-5-1 of said code; to amend and reenact §50-1-1 and §50-1-6 of said code; to amend and reenact §51-1-1 of said code; and to amend and reenact §51-2A-5 of said code, all relating to electoral

reforms of the West Virginia judiciary generally; requiring the election of justices of the Supreme Court of Appeals, circuit court judges, family court judges and magistrates be on a nonpartisan basis; requiring that elections to certain offices be on a division basis when more than one justice of the Supreme Court of Appeals, circuit judge, family court judge or magistrate is to be elected; providing for the timing and frequency of election; providing for the commencement of terms of office; establishing ballot design and printing; providing that elections for justice of the Supreme Court of Appeals, circuit judge, family court judge or magistrate are to be held on the same date as the primary election; requiring nonpartisan ballots be used; establishing filing announcement of candidacies, including the timing, location and information necessary thereto; providing for the order of appearance of offices on the ballot; establishing ballot content; providing the procedures for the filling of vacancies in the offices of justices of the Supreme Court of Appeals, circuit judge, family court judge or magistrate; providing occasions for special elections to be held to fill vacancies; providing that unsuccessful nonpartisan candidates can be selected to fill ballot vacancies in a general election; providing for the continuing applicability of the West Virginia Supreme Court of Appeals Public Campaign Financing Program; modifying the amount of public campaign financing available to qualifying candidates in a contested election; and removing public campaign financing from qualifying candidates in an uncontested election.

Be it enacted by the Legislature of West Virginia:

That §3-1-16 and §3-1-17 of the Code of West Virginia, 1931, as amended, be amended and reenacted; that §3-4A-11a of said code be amended and reenacted; that §3-5-4 of said code be amended and reenacted; that said code be amended by adding thereto four new sections, designated §3-5-6a, §3-5-6b, §3-5-6c and §3-5-6d; that §3-5-7, §3-5-13 and §3-5-13a of said code be amended and reenacted; that §3-10-3 of said code be amended and reenacted; that §3-12-3, §3-12-6, §3-12-10, §3-12-11, §3-12-12 and §3-12-14 of said code be amended

and reenacted; that §6-5-1 of said code be amended and reenacted; that §50-1-1 and §50-1-6 of said code be amended and reenacted; that §51-1-1 of said code be amended and reenacted; and that §51-2A-5 of said code be amended and reenacted, all to read as follows:

CHAPTER 3. ELECTIONS.

ARTICLE 1. GENERAL PROVISIONS AND DEFINITIONS.

§3-1-16. Election of state officers.

(a) At the general election to be held in 1968, and every fourth year thereafter, there shall be elected a Governor, Secretary of State, Treasurer, Auditor, Attorney General and Commissioner of Agriculture. At the general election in 1968, and every second year thereafter, there shall be elected a member of the State Senate for each senatorial district, and a member or members of the House of Delegates of the state from each county or each delegate district.

(b) At the time of the primary election to be held in the year 2016, and every twelfth year thereafter, there shall be elected one justice of the Supreme Court of Appeals, and at the time of the primary election to be held in 2020, and every twelfth year thereafter, two justices of the Supreme Court of Appeals and at the time of the primary election to be held in 2024, and every twelfth year thereafter, two justices of the Supreme Court of Appeals. Effective with the primary election held in the year 2016, the election of justices of the Supreme Court of Appeals shall be on a nonpartisan basis and by division as set forth more fully in article five of this chapter.

§3-1-17. Election of circuit judges; county and district officers; magistrates.

(a) There shall be elected, at the time of the primary election to be held in 2016, and every eighth year thereafter, one judge of

the circuit court of every judicial circuit entitled to one judge, and one judge for each numbered division of the judicial circuit in those judicial circuits entitled to two or more circuit judges; and at the time of the primary election to be held in 2016, and in every fourth year thereafter, the number of magistrates prescribed by law for the county. Beginning with the election held in the year 2016, an election for the purpose of electing judges of the circuit court, or an election for the purpose of electing magistrates, shall be upon a nonpartisan ballot printed for the purpose.

(b) There shall be elected, at the general election to be held in 1992, and every fourth year thereafter, a sheriff, prosecuting attorney, surveyor of lands, and the number of assessors prescribed by law for the county; and at the general election to be held in 1990, and every second year thereafter, a commissioner of the county commission for each county; and at the general election to be held in 1992, and every sixth year thereafter, a clerk of the county commission and a clerk of the circuit court for each county.

(c) Effective with the primary election of 2016, all elections for judge of the circuit courts in the respective circuits and magistrates in each county will be elected on a nonpartisan basis and by division as set forth more fully in article five of this chapter.

ARTICLE 4A. ELECTRONIC VOTING SYSTEMS.

§3-4A-11a. Ballots tabulated electronically; arrangement, quantity to be printed, ballot stub numbers.

(a) The board of ballot commissioners in counties using ballots upon which votes may be recorded by means of marking with electronically sensible ink or pencil and which marks are tabulated electronically shall cause the ballots to be printed or

displayed upon the screens of the electronic voting system for use in elections.

(b) (1) For the primary election, the heading of the ballot, the type faces, the names and arrangement of offices and the printing of names and arrangement of candidates within each office are to conform as nearly as possible to sections thirteen and thirteen-a, article five of this chapter.

(2) For the general election, the heading of the ballot, the straight ticket positions, the instructions to straight ticket voters, the type faces, the names and arrangement of offices and the printing of names and the arrangement of candidates within each office are to conform as nearly as possible to section two, article six of this chapter, except as otherwise provided in this article.

(3) Effective with the primary election held in 2016, and thereafter, the following nonpartisan elections are to be separated from the partisan ballot and separately headed in display type with a title clearly identifying the purpose of the election and constituting a separate ballot wherever a separate ballot is required under this chapter:

(A) Nonpartisan elections for judicial offices, by division, of:

(i) Justice of the Supreme Court of Appeals;

(ii) Judge of the circuit court;

(iii) Family court judge; and

(iv) Magistrate;

(B) Nonpartisan elections for Board of Education; and

(C) Any question to be voted upon;

(4) Both the face and the reverse side of the ballot may contain the names of candidates only if means to ensure the secrecy of the ballot are provided and lines for the signatures of the poll clerks on the ballot are printed on a portion of the ballot which is deposited in the ballot box and upon which marks do not interfere with the proper tabulation of the votes.

(5) The arrangement of candidates within each office is to be determined in the same manner as for other electronic voting systems, as prescribed in this chapter. On the general election ballot for all offices, and on the primary election ballot only for those offices to be filled by election, except delegate to national convention, lines for entering write-in votes are to be provided below the names of candidates for each office, and the number of lines provided for any office shall equal the number of persons to be elected, or three, whichever is fewer. The words "WRITE-IN, IF ANY" are to be printed, where applicable, directly under each line for write-ins. The lines are to be opposite a position to mark the vote.

(c) Except for electronic voting systems that utilize screens upon which votes may be recorded by means of a stylus or by means of touch, the primary election ballots are to be printed in the color of ink specified by the Secretary of State for the various political parties, and the general election ballot is to be printed in black ink. For electronic voting systems that utilize screens upon which votes may be recorded by means of a stylus or by means of touch, the primary ballots and the general election ballot are to be printed in black ink. All ballots are to be printed, where applicable, on white paper suitable for automatic tabulation and are to contain a perforated stub at the top or bottom of the ballot, which is to be numbered sequentially in the same manner as provided in section thirteen, article five of this chapter, or are to be displayed on the screens of the electronic voting system upon which votes are recorded by means of a stylus or touch. The number of ballots printed and the packaging

of ballots for the precincts are to conform to the requirements for paper ballots provided in this chapter.

(d) In addition to the official ballots, the ballot commissioners shall provide all other materials and equipment necessary to the proper conduct of the election.

ARTICLE 5. PRIMARY ELECTIONS AND NOMINATING PROCEDURES.

§3-5-4. Nomination of candidates in primary elections.

(a) At each primary election, the candidate or candidates of each political party for all offices to be filled at the ensuing general election by the voters of the entire state, of each congressional district, of each state senatorial district, of each delegate district, and of each county in the state shall be nominated by the voters of the different political parties, except that no presidential elector shall be nominated at a primary election.

(b) In primary elections a plurality of the votes cast shall be sufficient for the nomination of candidates for office. Where only one candidate of a political party for any office in a political division, including party committeemen and delegates to national conventions, is to be chosen the candidate receiving the highest number of votes therefor in the primary election shall be declared the party nominee for such office. Where two or more such candidates are to be chosen in the primary election, the candidates constituting the proper number to be so chosen who shall receive the highest number of votes cast in the political division in which they are candidates shall be declared the party nominees and choices for such offices, except that:

(1) Candidates for the office of commissioner of the county commission shall be nominated and elected in accordance with the provisions of section ten, article nine of the Constitution of the State of West Virginia and the requirements of section one-b, article one, chapter seven of this code;

(2) Members of county boards of education shall be elected at primary elections in accordance with the provisions of sections five and six of this article;

(3) Candidates for the House of Delegates shall be nominated and elected in accordance with the residence restrictions provided in section two, article two, chapter one of this code.

(c) In case of tie votes between candidates for party nominations or elections in primary elections, the choice of the political party shall be determined by the executive committee of the party for the political division in which such persons are candidates.

§3-5-6a. Election of justices of the Supreme Court of Appeals.

(a) An election for the purpose of electing a justice or justices of the Supreme Court of Appeals shall be held on the same date as the primary election, as provided by law, upon a nonpartisan ballot by division printed for this purpose. For election purposes, in each election at which shall be elected more than one justice of the Supreme Court of Appeals, the election shall be by numbered division corresponding to the number of justices being elected. Each justice shall be elected at large from the entire state.

(b) In each nonpartisan election by division for a justice of the Supreme Court of Appeals, the candidates for election in each numbered division shall be tallied separately, and the board of canvassers shall declare and certify the election of the eligible candidate receiving the highest numbers of votes cast within a numbered division to fill any full terms.

(c) In case of a tie vote under this section, section twelve, article six of this chapter controls in breaking the tie vote.

§3-5-6b. Election of circuit judges.

(a) An election for the purpose of electing a circuit court judge or judges shall be held on the same date as the primary election in their respective circuits, as provided by law, upon a nonpartisan ballot by division printed for this purpose.

(b) In each nonpartisan election by division for a circuit court judge, the candidates for election in each numbered division shall be tallied separately, and the board of canvassers shall declare and certify the election of the eligible candidate receiving the highest numbers of votes cast within a numbered division to fill any full terms.

(c) In case of a tie vote under this section, section twelve, article six of this chapter controls in breaking the tie vote.

§3-5-6c. Election of family court judges.

(a) An election for the purpose of electing a family court judge or judges shall be held on the same date as the primary election in their respective circuits, as provided by law, upon a nonpartisan ballot by division printed for this purpose.

(b) In each nonpartisan election by division for a family court judge, the candidates for election in each numbered division shall be tallied separately, and the board of canvassers shall declare and certify the election of the eligible candidate receiving the highest numbers of votes cast within a numbered division to fill any full terms.

(c) In case of a tie vote under this section, section twelve, article six of this chapter controls in breaking the tie vote.

§3-5-6d. Election of magistrates.

(a) An election for the purpose of electing a magistrate or magistrates by division shall be held on the same date as the

primary election in their respective circuits, as provided by law, upon a nonpartisan ballot by division printed for this purpose.

(b) In each nonpartisan election by division for a magistrate, the candidates for election in each numbered division shall be tallied separately, and the board of canvassers shall declare and certify the election of the eligible candidate receiving the highest numbers of votes cast within a numbered division to fill any full terms.

(c) In case of a tie vote under this section, section twelve, article six of this chapter controls in breaking the tie vote.

§3-5-7. Filing announcements of candidacies; requirements; withdrawal of candidates when section applicable.

(a) Any person who is eligible and seeks to hold an office or political party position to be filled by election in any primary or general election held under the provisions of this chapter shall file a certificate of announcement declaring his or her candidacy for the nomination or election to the office.

(b) The certificate of announcement shall be filed as follows:

(1) Candidates for the House of Delegates, the State Senate, circuit judge, family court judge, and any other office or political position to be filled by the voters of more than one county shall file a certificate of announcement with the Secretary of State.

(2) Candidates for an office or political position to be filled by the voters of a single county or a subdivision of a county, except for candidates for the House of Delegates, State Senate, circuit judge or family court judge, shall file a certificate of announcement with the clerk of the county commission.

(3) Candidates for an office to be filled by the voters of a municipality shall file a certificate of announcement with the recorder or city clerk.

(c) The certificate of announcement shall be filed with the proper officer not earlier than the second Monday in January before the primary election day and not later than the last Saturday in January before the primary election day and must be received before midnight, eastern standard time, of that day or, if mailed, shall be postmarked by the United States Postal Service before that hour. This includes the offices of justice of the Supreme Court of Appeals, circuit court judge, family court judge and magistrate, which are to be filled on a nonpartisan and division basis at the primary election.

(d) The certificate of announcement shall be on a form prescribed by the Secretary of State on which the candidate shall make a sworn statement before a notary public or other officer authorized to administer oaths, containing the following information:

(1) The date of the election in which the candidate seeks to appear on the ballot;

(2) The name of the office sought; the district, if any; and the division, if any;

(3) The legal name of the candidate and the exact name the candidate desires to appear on the ballot, subject to limitations prescribed in section thirteen, article five of this chapter;

(4) The county of residence and a statement that the candidate is a legally qualified voter of that county; and the magisterial district of residence for candidates elected from magisterial districts or under magisterial district limitations;

(5) The specific address designating the location at which the candidate resides at the time of filing, including number and street or rural route and box number and city, state and zip code;

(6) For partisan elections, the name of the candidate's political party and a statement that the candidate: (A) Is a

member of and affiliated with that political party as evidenced by the candidate's current registration as a voter affiliated with that party; and (B) has not been registered as a voter affiliated with any other political party for a period of sixty days before the date of filing the announcement;

(7) For candidates for delegate to national convention, the name of the presidential candidate to be listed on the ballot as the preference of the candidate on the first convention ballot; or a statement that the candidate prefers to remain "uncommitted";

(8) A statement that the person filing the certificate of announcement is a candidate for the office in good faith;

(9) The words "subscribed and sworn to before me this _____ day of _____, 20____" and a space for the signature of the officer giving the oath.

(e) The Secretary of State or the board of ballot commissioners, as the case may be, may refuse to certify the candidacy or may remove the certification of the candidacy upon receipt of a certified copy of the voter's registration record of the candidate showing that the candidate was registered as a voter in a party other than the one named in the certificate of announcement during the sixty days immediately preceding the filing of the certificate: *Provided,* That unless a signed formal complaint of violation of this section and the certified copy of the voter's registration record of the candidate are filed with the officer receiving that candidate's certificate of announcement no later than ten days following the close of the filing period, the candidate may not be refused certification for this reason.

(f) The certificate of announcement shall be subscribed and sworn to by the candidate before some officer qualified to administer oaths, who shall certify the same. Any person who knowingly provides false information on the certificate is guilty

of false swearing and shall be punished in accordance with section three, article nine of this chapter.

(g) Any candidate for delegate to a national convention may change his or her statement of presidential preference by notifying the Secretary of State by letter received by the Secretary of State no later than the third Tuesday following the close of candidate filing. When the rules of the political party allow each presidential candidate to approve or reject candidates for delegate to convention who may appear on the ballot as committed to that presidential candidate, the presidential candidate or the candidate's committee on his or her behalf may file a list of approved or rejected candidates for delegate and the Secretary of State shall list as "uncommitted" any candidate for delegate who is disapproved by the presidential candidate.

(h) A person may not be a candidate for more than one office or office division at any election: *Provided,* That a candidate for an office may also be a candidate for President of the United States, for membership on political party executive committees or for delegate to a political party national convention: *Provided, however,* That an unsuccessful candidate for a nonpartisan office in an election held concurrently with the primary election may be appointed under the provisions of section nineteen of this article to fill a vacancy on the general ballot.

(i) A candidate who files a certificate of announcement for more than one office or division and does not withdraw, as provided by section eleven, article five of this chapter, from all but one office prior to the close of the filing period may not be certified by the Secretary of State or placed on the ballot for any office by the board of ballot commissioners.

§3-5-13. Form and contents of ballots.

The following provisions apply to the form and contents of election ballots:

(1) The face of every primary election ballot shall conform as nearly as practicable to that used at the general election.

(2) The heading of every ballot is to be printed in display type. The heading is to contain a ballot title, the name of the county, the state, the words "Primary Election" and the month, day and year of the election. The ballot title of the political party ballots is to contain the words "Official Ballot of the (Name) Party" and the official symbol of the political party may be included in the heading.

(A) The ballot title of any separate paper ballot or portion of any electronic or voting machine ballot for all judicial officer shall commence with the words "Nonpartisan Ballot of Election of Judicial Officers" and each such office shall be listed in the following order:

(i) The ballot title of any separate paper ballot or portion of any electronic or voting machine ballot for all justices of the Supreme Court of Appeals shall contain the words "Nonpartisan Ballot of Election of Justice(s) of the Supreme Court of Appeals of West Virginia". The names of the candidates for the Supreme Court of Appeals shall be printed by division without references to political party affiliation or registration.

(ii) The ballot title of any separate paper ballot or portion of any electronic or voting machine ballot for all circuit court judges in the respective circuits shall contain the words "Nonpartisan Ballot of Election of Circuit Court Judge(s)". The names of the candidates for the respective circuit court judge office shall be printed by division without references to political party affiliation or registration.

(iii) The ballot title of any separate paper ballot or portion of any electronic or voting machine ballot for all family court judges in the respective circuits shall contain the words

"Nonpartisan Ballot of Election of Family Court Judge(s)". The names of the candidates for the respective family court judge office shall be printed by division without references to political party affiliation or registration.

(iv) The ballot title of any separate paper ballot or portion of any electronic or voting machine ballot for all magistrates in the respective circuits shall contain the words "Nonpartisan Ballot of Election of Magistrate(s)". The names of the candidates for the respective magistrate office shall be printed by division without references to political party affiliation or registration.

(B) The ballot title of any separate paper ballot or portion of any electronic or voting machine ballot for the Board of Education is to contain the words "Nonpartisan Ballot of Election of Members of the _____ County Board of Education". The districts for which less than two candidates may be elected and the number of available seats are to be specified and the names of the candidates are to be printed without reference to political party affiliation and without designation as to a particular term of office.

(C) Any other ballot or portion of a ballot on a question is to have a heading which clearly states the purpose of the election according to the statutory requirements for that question.

(3) (A) For paper ballots, the heading of the ballot is to be separated from the rest of the ballot by heavy lines and the offices shall be arranged in columns with the following headings, from left to right across the ballot: "National Ticket", "State Ticket", "County Ticket" and, in a presidential election year, "National Convention" or, in a nonpresidential election year, "District Ticket". The columns are to be separated by heavy lines. Within the columns, the offices are to be arranged in the order prescribed in section thirteen-a of this article.

(B) For voting machines, electronic voting devices and any ballot tabulated by electronic means, the offices are to appear in the same sequence as prescribed in section thirteen-a of this article and under the same headings as prescribed in paragraph (A) of this subdivision. The number of pages, columns or rows, where applicable, may be modified to meet the limitations of ballot size and composition requirements subject to approval by the Secretary of State.

(C) The title of each office is to be separated from preceding offices or candidates by a line and is to be printed in bold type no smaller than eight point. Below the office is to be printed the number of the district, if any, the number of the division, if any, and the words "Vote for _____" with the number to be nominated or elected or "Vote For Not More Than _____" in multicandidate elections. For offices in which there are limitations relating to the number of candidates which may be nominated, elected or appointed to or hold office at one time from a political subdivision within the district or county in which they are elected, there is to be a clear explanation of the limitation, as prescribed by the Secretary of State, printed in bold type immediately preceding the names of the candidates for those offices on the ballot in every voting system. For counties in which the number of county commissioners exceeds three and the total number of members of the county commission is equal to the number of magisterial districts within the county, the office of county commission is to be listed separately for each district to be filled with the name of the magisterial district and the words "Vote for One" printed below the name of the office: *Provided,* That the office title and applicable instructions may span the width of the ballot so as it is centered among the respective columns.

(D) The location for indicating the voter's choices on the ballot is to be clearly shown. For paper ballots, other than those tabulated electronically, the official primary ballot is to contain

a square formed in dark lines at the left of each name on the ballot, arranged in a perpendicular column of squares before each column of names.

(4) (A) The name of every candidate certified by the Secretary of State or the board of ballot commissioners is to be printed in capital letters in no smaller than eight point type on the ballot for the appropriate precincts. Subject to the rules promulgated by the Secretary of State, the name of each candidate is to appear in the form set out by the candidate on the certificate of announcement, but in no case may the name misrepresent the identity of the candidate nor may the name include any title, position, rank, degree or nickname implying or inferring any status as a member of a class or group or affiliation with any system of belief.

(B) The city of residence of every candidate, the state of residence of every candidate residing outside the state, the county of residence of every candidate for an office on the ballot in more than one county and the magisterial district of residence of every candidate for an office subject to magisterial district limitations are to be printed in lower case letters beneath the names of the candidates.

(C) The arrangement of names within each office must be determined as prescribed in section thirteen-a of this article.

(D) If the number of candidates for an office exceeds the space available on a column or ballot page and requires that candidates for a single office be separated, to the extent possible, the number of candidates for the office on separate columns or pages are to be nearly equal and clear instructions given the voter that the candidates for the office are continued on the following column or page.

(5) When an insufficient number of candidates has filed for a party to make the number of nominations allowed for the office

or for the voters to elect sufficient members to the Board of Education or to executive committees, the vacant positions on the ballot shall be filled with the words "No Candidate Filed": *Provided,* That in paper ballot systems which allow for write-ins to be made directly on the ballot, a blank line shall be placed in any vacant position in the office of Board of Education or for election to any party executive committee. A line shall separate each candidate from every other candidate for the same office. Notwithstanding any other provision of this code, if there are multiple vacant positions on a ballot for one office, the multiple vacant positions which would otherwise be filled with the words "No Candidate Filed" may be replaced with a brief detailed description, approved by the Secretary of State, indicating that there are no candidates listed for the vacant positions.

(6) In presidential election years, the words "For election in accordance with the plan adopted by the party and filed with the Secretary of State" is to be printed following the names of all candidates for delegate to national convention.

(7) All paper ballots are to be printed in black ink on paper sufficiently thick so that the printing or marking cannot be discernible from the back: *Provided,* That no paper ballot voted pursuant to the provisions of 42 U. S. C. §1973, *et seq.*, the Uniformed and Overseas Citizens Absentee Voting Act of 1986, or federal write-in absentee ballot may be rejected due to paper type, envelope type, or notarization requirement. Ballot cards and paper for printing ballots using electronically sensible ink are to meet minimum requirements of the tabulating systems and are to conform in size and weight to ensure ease in tabulation.

(8) Ballots are to contain perforated tabs at the top of the ballots and are to be printed with unique sequential numbers from one to the highest number representing the total number of ballots printed. On paper ballots, the ballot is to be bordered by

a solid line at least one sixteenth of an inch wide and the ballot is to be trimmed to within one-half inch of that border.

(9) On the back of every official ballot or ballot card the words "Official Ballot" with the name of the county and the date of the election are to be printed. Beneath the date of the election there are to be two blank lines followed by the words "Poll Clerks".

(10) The face of sample paper ballots and sample ballot labels are to be like other official ballots or ballot labels except that the word "sample" is to be prominently printed across the front of the ballot in a manner that ensures the names of candidates are not obscured and the word "sample" may be printed in red ink. No printing may be placed on the back of the sample.

§3-5-13a. Order of offices and candidates on the ballot; uniform drawing date.

(a) The order of offices for state and county elections on all ballots within the state shall be as prescribed herein. When the office does not appear on the ballot in an election, then it shall be omitted from the sequence. When an unexpired term for an office appears on the ballot along with a full term, the unexpired term shall appear immediately below the full term.

NATIONAL TICKET: President (and Vice President in the general election), United States Senator, member of the United States House of Representatives.

STATE TICKET: Governor, Secretary of State, Auditor, Treasurer, Commissioner of Agriculture, Attorney General, State Senator, member of the House of Delegates, any other multicounty office, state executive committee.

COUNTY TICKET: Clerk of the circuit court, county commissioner, clerk of the county commission, prosecuting

attorney, sheriff, assessor, surveyor, congressional district executive committee, senatorial district executive committee in multicounty districts, delegate district executive committee in multicounty districts.

NATIONAL CONVENTION: Delegate to the national convention — at-large, delegate to the national convention — congressional district.

DISTRICT TICKET: County executive committee.

(b) Except for office divisions in which no more than one person has filed a certificate of announcement, the arrangement of names for all offices shall be determined by lot according to the following provisions:

(1) On the fourth Tuesday following the close of the candidate filing, beginning at nine o'clock a. m., a drawing by lot shall be conducted in the office of the clerk of the county commission in each county. Notice of the drawing shall be given on the form for the certificate of announcement and no further notice shall be required. The clerk of the county commission shall superintend and conduct the drawing and the method of conducting the drawing shall be prescribed by the Secretary of State.

(2) Except as provided herein, the position of each candidate within each office division shall be determined by the position drawn for that candidate individually: *Provided,* That if fewer candidates file for an office division than the total number to be nominated or elected, the vacant positions shall appear following the names of all candidates for the office.

(3) Candidates for delegate to national convention who have filed a commitment to a candidate for president shall be listed alphabetically within the group of candidates committed to the

same candidate for president and uncommitted candidates shall be listed alphabetically in an uncommitted category. The position of each group of committed candidates and uncommitted candidates shall be determined by lot by drawing the names of the presidential candidates and for an uncommitted category.

(4) A candidate or the candidate's representative may attend the drawings.

ARTICLE 10. FILLING VACANCIES.

§3-10-3. Vacancies in offices of state officials, United States Senators and judges.

(a) Any vacancy occurring in the offices of Secretary of State, Auditor, Treasurer, Attorney General, Commissioner of Agriculture, or in any office created or made elective to be filled by the voters of the entire state, is filled by the Governor of the state by appointment and subsequent election to fill the remainder of the term, if required by section one of this article.

(b) Any vacancy occurring in the offices of Justice of the Supreme Court of Appeals, judge of a circuit court or judge of a family court is filled by the Governor of the state by appointment and subsequent election to fill the remainder of the term, as required by subsection (d) of this section. If an election is required under subsection (d) of this section, the Governor, circuit court or the chief judge thereof in vacation, is responsible for the proper proclamation by order and notice required by section one of this article.

(c) Any vacancy in the office of magistrate is appointed according to the provisions of section six, article one, chapter fifty of this code, and subsequent election to fill the remainder of the term, as required by subsection (d) of this section.

(d) (1) When the vacancy in Justice of the Supreme Court of Appeals, judge of the circuit court, judge of a family court or magistrate occurs after the eighty-fourth day before a general election, and the affected term of office ends on the thirty-first day of December following the next election, the person appointed to fill the vacancy shall continue in office until the completion of the term.

(2) When the vacancy occurs before the close of the candidate filing period for the primary election, the vacancy shall be filled by election in the nonpartisan judicial election held concurrently with the primary election, and the appointment shall continue until a successor is elected and certified.

(3) When the vacancy occurs after the close of candidate filing for the primary election and not later than eighty-four days before the general election, the vacancy shall be filled by election in a nonpartisan judicial election held concurrently with the general election, and the appointment shall continue until a successor is elected and certified.

(e) When an election to fill a vacancy is required to be held at the general election according to the provisions of subsection (d) of this section, a special candidate filing period shall be established. Candidates seeking election to any unexpired term for Justice of the Supreme Court of Appeals, judge of a circuit court, judge of the family court or magistrate shall file a certificate of announcement and pay the filing fee no earlier than the first Monday in August and no later than seventy-seven days before the general election.

ARTICLE 12. WEST VIRGINIA SUPREME COURT OF APPEALS PUBLIC CAMPAIGN FINANCING PILOT PROGRAM.

§3-12-3. Definitions.

As used in this article, the following terms and phrases have the following meanings:

(1) "Candidate's committee" means a political committee established with the approval of or in cooperation with a candidate or a prospective candidate to explore the possibilities of seeking a particular office or to support or aid his or her nomination or election to an office in an election cycle. If a candidate directs or influences the activities of more than one active committee in a current campaign, those committees shall be considered one committee for the purpose of contribution limits.

(2) "Certified candidate" means an individual seeking election to the West Virginia Supreme Court of Appeals who has been certified in accordance with section ten of this article as having met all of the requirements for receiving public campaign financing from the fund.

(3) "Contribution" means a gift subscription, assessment, payment for services, dues, advance, donation, pledge, contract, agreement, forbearance or promise of money or other tangible thing of value, whether conditional or legally enforceable, or a transfer of money or other tangible thing of value to a person, made for the purpose of influencing the nomination, election or defeat of a candidate. An offer or tender of a contribution is not a contribution if expressly and unconditionally rejected or returned. A contribution does not include volunteer personal services provided without compensation: *Provided,* That a nonmonetary contribution is to be considered at fair market value for reporting requirements and contribution limitations.

(4) "Exploratory contribution" means a contribution of no more than $1,000 made by an individual adult, including a participating candidate and members of his or her immediate family, during the exploratory period but prior to filing the declaration of intent. Exploratory contributions may not exceed $20,000 in the aggregate.

(5) "Exploratory period" means the period during which a participating candidate may raise and spend exploratory contributions to examine his or her chances of election and to qualify for public campaign financing under this article. The exploratory period begins on January 1 the year before the election in which the candidate may run for Justice of the Supreme Court of Appeals and ends on the last Saturday in January of the election year.

(6) "Financial agent" means any individual acting for and by himself or herself, or any two or more individuals acting together or cooperating in a financial way to aid or take part in the nomination or election of any candidate for public office, or to aid or promote the success or defeat of any political party at any election.

(7) "Fund" means the Supreme Court of Appeals Public Campaign Financing Fund created by section five of this article.

(8) "Immediate family" or "immediate family members" means the spouse, parents, step-parents, siblings and children of the participating candidate.

(9) "Nonparticipating candidate" means a candidate who is:

(A) Seeking election to the Supreme Court of Appeals;

(B) Is neither certified nor attempting to be certified to receive public campaign financing from the fund; and

(C) Has an opponent who is a participating or certified candidate.

(10) "Nonpartisan judicial election campaign period" means the period beginning on the first day of the primary election filing period, as determined under section seven, article five of

this chapter, and ending on the day of the nonpartisan judicial election.

(11) "Participating candidate" means a candidate who is seeking election to the Supreme Court of Appeals and is attempting to be certified in accordance with section ten of this article to receive public campaign financing from the fund.

(12) "Person" means an individual, partnership, committee, association and any other organization or group of individuals.

(13) "Qualifying contribution" means a contribution received from a West Virginia registered voter of not less than $1 nor more than $100 in the form of cash, check or money order, made payable to a participating candidate or the candidate's committee, or in the form of an electronic payment or debit or credit card payment, received during the qualifying period.

(14) "Qualifying period" means the period during which participating candidates may raise and spend qualifying contributions in order to qualify to receive public campaign financing.

For candidates seeking to be placed on the nonpartisan judicial election ballot, the qualifying period begins on September 1 preceding the election year and ends on the last Saturday in January of the election year.

§3-12-6. Sources of revenue for the fund.

Revenue from the following sources shall be deposited in the fund:

(1) All exploratory and qualifying contributions in excess of the established maximums;

(2) Money returned by participating or certified candidates who fail to comply with this article;

(3) Unspent or unobligated moneys allotted to certified candidates and remaining unspent or unobligated on the date of the nonpartisan judicial election for which the money was distributed;

(4) If a certified candidate loses, all remaining unspent or unobligated moneys;

(5) Civil penalties levied by the State Election Commission against candidates for violations of this article;

(6) Civil penalties levied by the Secretary of State pursuant to section seven, article eight of this chapter;

(7) Voluntary donations made directly to the fund;

(8) Any interest income or other return earned on the money's investment;

(9) On or before July 1, 2010, and for two successive years thereafter, the State Auditor shall authorize the transfer of the amount of $1 million from the Purchasing Card Administration Fund established in section ten-d, article three, chapter twelve of this code to the fund created by this article;

(10) On or before July 1, 2015, the state Auditor shall authorize the transfer of the amount of $400,000 from the Purchasing Card Administration Fund established in section ten-d, article three, chapter twelve of this code to the fund created by this article; and

(11) Money appropriated to the fund.

§3-12-10. Certification of candidates.

(a) To be certified, a participating candidate shall apply to the State Election Commission for public campaign financing from the fund and file a sworn statement that he or she has complied and will comply with all requirements of this article throughout the applicable campaign.

(b) Upon receipt of a notice from the Secretary of State that a participating candidate has received the required number and amount of qualifying contributions, the State Election Commission shall determine whether the candidate or candidate's committee:

(1) Has signed and filed a declaration of intent as required by section seven of this article;

(2) Has obtained the required number and amount of qualifying contributions as required by section nine of this article;

(3) Has complied with the contribution restrictions of this article;

(4) Is eligible, as provided in section nine, article five of this chapter, to appear on the nonpartisan judicial election ballot; and

(5) Has met all other requirements of this article.

(c) The State Election Commission shall process applications in the order they are received and shall verify a participating candidate's compliance with the requirements of subsection (b) of this section by using the verification and sampling techniques approved by the State Election Commission.

(d) The State Election Commission shall determine whether to certify a participating candidate as eligible to receive public campaign financing no later than three business days after the candidate or the candidate's committee makes his or her final report of qualifying contributions or, if a challenge is filed under subsection (g) of this section, no later than six business days after the candidate or the candidate's committee makes his or her final report of qualifying contributions. A certified candidate shall comply with this article through the nonpartisan judicial election campaign period.

(e) No later than two business days after the State Election Commission certifies that a participating candidate is eligible to receive public campaign financing under this section, the State Election Commission, acting in concert with the State Auditor's office and the State Treasurer's office, shall cause a check to be issued to the candidate's campaign depository account an amount equal to the public campaign financing benefit for which the candidate qualifies under section eleven of this article, minus the candidate's qualifying contributions, and shall notify all other candidates for the same office of its determination.

(f) If the candidate desires to receive public financing benefits by electronic transfer, the candidate shall include in his or her application sufficient information and authorization for the State Treasurer to transfer payments to his or her campaign depository account.

(g) Any person may challenge the validity of any contribution listed by a participating candidate by filing a written challenge with the State Election Commission setting forth any reason why the contribution should not be accepted as a qualifying contribution. If a contribution is challenged under this subsection, the State Election Commission shall decide the validity of the challenge no later than the end of the next business day after the day that the challenge is filed, unless the State Election Commission determines that the candidate whose contribution is challenged has both a sufficient qualifying

number and amount of qualifying contributions to be certified as a candidate under this section without considering the challenge. Within five business days of a challenge, the candidate or candidate's committee who listed any contribution that is the subject of a challenge may file a report with the State Election Commission of an additional contribution collected pursuant to section nine of this article for consideration as a qualifying contribution.

(h) A candidate's certification and receipt of public campaign financing may be revoked by the State Election Commission, if the candidate violates this article. A certified candidate who violates this article shall repay all moneys received from the fund to the State Election Commission.

(i) The determination of any issue before the State Election Commission is the final administrative determination. Any meetings conducted by the State Elections Commission to certify a candidate's eligibility to receive funds under this article shall not be subject the public notice and open meeting requirements of article nine-a, chapter six of this code, but the commission shall concurrently provide public notice of any decision and determination it makes which impacts the candidate's eligibility to receive funds pursuant to this article. Any person adversely affected by a decision of the State Election Commission under this article may appeal that decision to the circuit court of Kanawha County.

(j) A candidate may withdraw from being a certified candidate and become a nonparticipating candidate at any time with the approval of the State Election Commission. Any candidate seeking to withdraw shall file a written request with the State Election Commission, which shall consider requests on a case-by-case basis. No certified candidate may withdraw until he or she has repaid all moneys received from the fund: *Provided,* That the State Election Commission may, in

exceptional circumstances, waive the repayment requirement. The State Election Commission may assess a penalty not to exceed $10,000 against any candidate who withdraws without approval.

§3-12-11. Schedule and amount of Supreme Court of Appeals Public Campaign Financing Fund payments.

(a) The State Election Commission, acting in concert with the State Auditor's office and the State Treasurer's office, shall have a check issued within two business days after the date on which the candidate is certified, to make payments from the fund for the nonpartisan judicial election campaign period available to a certified candidate.

In a contested nonpartisan judicial election, a certified candidate shall receive $525,000 in campaign financing from the fund, minus the certified candidate's qualifying contributions.

(b) The State Election Commission shall authorize the distribution of campaign financing moneys to certified candidates in equal amounts. The commission shall propose a legislative rule on distribution of funds.

(c) The State Election Commission may not authorize or direct the distribution of moneys to certified candidates in excess of the total amount of money deposited in the fund pursuant to section six of this article. If the commission determines that the money in the fund is insufficient to totally fund all certified candidates, the commission shall authorize the distribution of the remaining money proportionally, according to each candidate's eligibility for funding. Each candidate may raise additional money in the same manner as a nonparticipating candidate for the same office up to the unfunded amount of the candidate's eligible funding.

§3-12-12. Restrictions on contributions and expenditures.

(a) A certified candidate or his or her committee may not accept loans or contributions from any private source, including the personal funds of the candidate and the candidate's immediate family, during the nonpartisan judicial election campaign period except as permitted by this article.

(b) After filing the declaration of intent and during the qualifying period, a participating candidate may not spend or obligate more than he or she has collected in exploratory and qualifying contributions. After the qualifying period and through the nonpartisan judicial election campaign period, a certified candidate may spend or obligate any unspent exploratory or qualifying contributions and the moneys he or she receives from the fund under the provisions of section eleven of this article.

(c) A participating or certified candidate may expend exploratory and qualifying contributions and funds received from the fund only for lawful election expenses as provided in section nine, article eight of this chapter. Moneys distributed to a certified candidate from the fund may be expended only during the nonpartisan judicial election campaign period for which funds were dispersed. Money from the fund may not be used:

(1) In violation of the law;

(2) To repay any personal, family or business loans, expenditures or debts; or

(3) To help any other candidate.

(d) A certified candidate or his or her committee shall return to the fund any unspent and unobligated exploratory contributions, qualifying contributions or moneys received from the fund within forty-eight hours after the date on which the candidate ceases to be certified.

(e) A certified candidate or his or her committee shall return to the fund any unspent or unobligated public campaign financing funds no later than five business days after the nonpartisan judicial election.

(f) A contribution from one person may not be made in the name of another person.

(g) A participating or certified candidate or his or her committee receiving qualifying contributions or exploratory contributions from a person not listed on the receipt required by sections eight and nine of this article is liable to the State Election Commission for the entire amount of that contribution and any applicable penalties.

(h) A certified candidate accepting any benefits under the provisions of this article shall continue to comply with all of its provisions throughout the nonpartisan judicial election campaign period.

(i) A participating or certified candidate or his or her financial agent shall provide the Secretary of State with all requested campaign records, including all records of exploratory and qualifying contributions received and campaign expenditures and obligations, and shall fully cooperate with any audit of campaign finances requested or authorized by the State Election Commission.

§3-12-14. Duties of the State Election Commission; Secretary of State.

(a) In addition to its other duties, the State Election Commission shall carry out the duties of this article and complete the following as applicable:

(1) Prescribe forms for reports, statements, notices and other documents required by this article;

(2) Make an annual report to the Legislature accounting for moneys in the fund, describing the State Election Commission's activities and listing any recommendations for changes of law, administration or funding amounts;

(3) Propose emergency and legislative rules for legislative approval, in accordance with article three, chapter twenty-nine-a of this code, as may be necessary for the proper administration of this article;

(4) Enforce this article to ensure that moneys from the fund are placed in candidate campaign accounts and spent as specified in this article;

(5) Monitor reports filed pursuant to this article and the financial records of candidates to ensure that qualified candidates receive funds promptly and to ensure that moneys required by this article to be paid to the fund are deposited in the fund;

(6) Cause an audit of the fund to be conducted by independent certified public accountants ninety days after a nonpartisan judicial election. The State Election Commission shall cooperate with the audit, provide all necessary documentation and financial records to those persons conducting the audit and shall maintain a record of all information supplied by the audit;

(7) In consultation with the State Treasurer and the State Auditor, develop a rapid, reliable method of conveying funds to certified candidates. In all cases, the commission shall distribute funds to certified candidates in a manner that is expeditious, ensures accountability and safeguards the integrity of the fund;

(8) Regularly monitor the receipts, disbursements, obligations and balance in the fund to determine whether the fund will have sufficient moneys to meet its obligations and

sufficient moneys available for disbursement during the nonpartisan judicial election campaign period; and

(9) Transfer a portion of moneys maintained in the fund to the West Virginia Investment Management Board for their supervised investment, after consultation with the State Treasurer, the State Auditor and the West Virginia Investment Management Board.

(b) In addition to his or her other duties, the Secretary of State shall carry out the duties of this article and complete the following as applicable:

(1) Prescribe forms for reports, statements, notices and other documents required by this article;

(2) Prepare and publish information about this article and provide it to potential candidates and citizens of this state;

(3) Prepare and publish instructions setting forth methods of bookkeeping and preservation of records to facilitate compliance with this article and to explain the duties of candidates and others participating in elections under this article;

(4) Propose emergency and legislative rules for legislative approval in accordance with article three, chapter twenty-nine-a of this code as may be necessary for the proper administration of this article;

(5) Enforce this article to ensure that moneys from the fund are placed in candidate campaign accounts and spent as specified in this article;

(6) Monitor reports filed pursuant to this article and the financial records of candidates to ensure that qualified candidates receive funds promptly and to ensure that moneys required by this article to be paid to the fund are deposited in the fund;

(7) Ensure public access to the campaign finance reports required pursuant to this article, and whenever possible, use electronic means for the reporting, storing and display of the information; and

(8) Prepare a voters' guide for the general public listing the names of each candidate seeking election to the Supreme Court of Appeals. Both certified and nonparticipating candidates shall be invited by the State Election Commission to submit a statement, not to exceed five hundred words in length, for inclusion in the guide. The guide shall identify the candidates that are certified candidates and the candidates that are nonparticipating candidates. Copies of the guide shall be posted on the website of the Secretary of State, as soon as may be practical.

(c) To fulfill their responsibilities under this article, the State Election Commission and the Secretary of State may subpoena witnesses, compel their attendance and testimony, administer oaths and affirmations, take evidence and require, by subpoena, the production of any books, papers, records or other items material to the performance of their duties or the exercise of their powers.

(d) The State Election Commission may also propose and adopt procedural rules to carry out the purposes and provisions of this article and to govern procedures of the State Election Commission as it relates to the requirements of this article.

CHAPTER 6. GENERAL PROVISIONS RESPECTING OFFICERS.

ARTICLE 5. TERMS OF OFFICE; MATTERS AFFECTING THE RIGHT TO HOLD OFFICE.

§6-5-1. When terms of office to begin.

The terms of officers, except when elected or appointed to fill vacancies, shall begin respectively as follows: That of

Governor, Secretary of State, State Superintendent of Free Schools, Treasurer, Auditor, Attorney General and Commissioner of Agriculture, on the first Monday after the second Wednesday of January next after their election; that of a member of the Legislature, on December 1, next after his or her election; and that of the justices of the Supreme Court of Appeals, the judges of the several circuit courts, the judges of the family and other inferior courts, the county commissioners, prosecuting attorneys, surveyors of land, assessors, sheriffs, clerks of the circuit, or other inferior courts, clerks of the county commissions, magistrates, on January 1, next after their election.

Whenever a person is elected or appointed to fill a vacancy, his or her term shall be as prescribed by chapter three of this code.

CHAPTER 50. MAGISTRATE COURTS.

ARTICLE 1. COURTS AND OFFICERS.

§50-1-1. Magistrate court created.

There is hereby created in each county of this state a magistrate court with such numbers of magistrates for each court as are hereafter provided. There shall be elected by the voters of each county, at the general election to be held in 1976, and in every fourth year thereafter, such number of magistrates as is provided in section two of this article. The filing fee for the office of magistrate shall be one percent of the annual salary. The term of magistrates shall be for four years and shall begin on January 1, of the year following the year of election.

Effective with the primary election of 2016, all elections for magistrates will be on a nonpartisan basis by division. Beginning in 2016, there will no longer be primary elections held for magistrates and all elections for magistrates are to be held in the nonpartisan judicial election as set forth in article five, chapter

three of this code. All indications of party identification on election ballots for magistrate shall be omitted.

§50-1-6. Vacancy in office of magistrate.

Subject to the provisions of section one, article ten, chapter three of this code, when a vacancy occurs in the office of magistrate, the judge of the circuit court, or the chief judge thereof if there is more than one judge of the circuit court, shall fill the same by appointment.

At a nonpartisan judicial election in which a magistrate is elected for an unexpired term, the circuit judge, or the chief judge thereof if there is more than one judge of the circuit court, shall cause a notice of such election to be published prior to such election as a Class II-0 legal advertisement in compliance with the provisions of article three, chapter fifty-nine of this code, and the publication area for such publication shall be the county involved.

CHAPTER 51. COURTS AND THEIR OFFICERS.

ARTICLE 1. SUPREME COURT OF APPEALS.

§51-1-1. Justices.

The Supreme Court of Appeals shall consist of five justices, elected and qualified according to the Constitution and the laws of this state, any three of whom shall constitute a quorum. Effective with the primary election of 2016, all elections for justices will be on a nonpartisan basis by division. Beginning in 2016, there will no longer be primary elections held for the office of justice and all elections for justice are to be held in the nonpartisan judicial election as set forth in article five, chapter three of this code. All indications of party identification on election ballots for that office shall be omitted.

ARTICLE 2A. FAMILY COURTS.

§51-2A-5. Term of office of family court judge; initial appointment; elections.

(a) Beginning with the election to be conducted in the year 2016, family court judges shall be elected. In family court circuits having two or more family court judges there shall be, for election purposes, numbered divisions corresponding to the number of family court judges in each area. Each family court judge shall be elected at large by the entire family court circuit. In each numbered division of a family court circuit, the candidates for nomination or election shall be voted upon and the votes cast for the candidates in each division shall be tallied separately from the votes cast for candidates in other numbered divisions within the family court circuit. The candidate or candidates receiving the highest number of the votes cast within a numbered division shall be nominated or elected, as the case may be. Effective with the primary election of 2016, all elections for family court judges in the respective circuits will be on a nonpartisan basis by division. Beginning in 2016, there will no longer be primary elections held for family court judges and all elections for family court judges are to be held in the nonpartisan judicial election as set forth in article five, chapter three of this code. All indications of party identification on election ballots for family court judge shall be omitted.

(b) The term of office for all family court judges elected in 2002 shall be for six years, commencing on January 1, 2003, and ending on December 31, 2008. Subsequent terms of office for family court judges elected thereafter shall be for eight years.

ENROLLED

COMMITTEE SUBSTITUTE

for

H. B. 2790

(BY DELEGATE(S) WESTFALL, WAXMAN, SHOTT AND FRICH)

[Passed March 11, 2015;
in effect ninety days from passage.]

AN ACT to amend and reenact §17D-4-2, §17D-4-7 and §17D-4-12 of the Code of West Virginia, 1931, as amended; to amend and reenact §33-6-31 and §31-6-31d of said code; and to amend said code by adding thereto a new section, designated §33-6-31h, all relating to proof of financial responsibility limits for motor vehicles; increasing the minimum amounts of proof required; providing that insurers are not required to offer new or increased uninsured or underinsured motor vehicle coverage when coverage is increased to meet the increased requirements of proof of financial responsibility; providing that insurers who issue policies with named driver exclusions are not required to provide any coverage upon an insured vehicle covering the excluded driver,

notwithstanding the requirements of proof of financial responsibility.

Be it enacted by the Legislature of West Virginia:

That §17D-4-2, §17D-4-7 and §17D-4-12 of the Code of West Virginia, 1931, as amended, be amended and reenacted; that §33-6-31 and §33-6-31d of said code be amended and reenacted; and that said code be amended by adding thereto a new section, designated §33-6-31h , all to read as follows:

CHAPTER 17D. MOTOR VEHICLE SAFETY RESPONSIBILITY LAW.

ARTICLE 4. PROOF OF FINANCIAL RESPONSIBILITY FOR THE FUTURE.

§17D-4-2. "Proof of financial responsibility" defined.

As used in this chapter:

(a)"Proof of financial responsibility" means proof of ability to respond in damages for liability, on account of accident occurring subsequent to the effective date of the proof, arising out of the ownership, operation, maintenance or use of a motor vehicle, trailer or semitrailer in the amount of $20,000 because of bodily injury to or death of one person in any one accident, and, subject to the limit for one person, in the amount of $40,000 because of bodily injury to or death of two or more persons in any one accident, and in the amount of $10,000 because of injury to or destruction of property of others in any one accident.

(b) Beginning January 1, 2016, "proof of financial responsibility" means proof of ability to respond in damages for liability, on account of accident occurring subsequent to the effective date of the proof, arising out of the ownership, operation, maintenance, or use of a motor vehicle, trailer or

semitrailer in the amount of $25,000 because of bodily injury to or death of one person in any one accident, and, subject to the limit for one person, in the amount of $50,000 because of bodily injury to or death of two or more persons in any one accident, and in the amount of $25,000 because of injury to or destruction of property of others in any one accident: *Provided,* That proof of financial responsibility provided by an insurance policy in effect on December 31, 2015 in the minimum amounts required in subdivision (a) of this section shall continue to provide adequate proof of financial responsibility required by this chapter until the policy expires or is renewed.

17D-4-7. Payments sufficient to satisfy requirements.

(a) Judgments herein referred to shall, for the purpose of this chapter only, are deemed satisfied:

(1) When $20,000 has been credited upon any judgment or judgments rendered in excess of that amount because of bodily injury to or death of one person as the result of any one accident; or

(2) When, subject to such limit of $20,000 because of bodily injury to or death of one person, the sum of $40,000 has been credited upon any judgment or judgments rendered in excess of that amount because of bodily injury to or death of two or more persons as the result of any one accident; or

(3) When $10,000 has been credited upon any judgment or judgments rendered in excess of that amount because of injury to or destruction of property of others as a result of any one accident.

(b) Notwithstanding the provisions of subsection (a) of this section, judgments herein referred to that are rendered upon a cause of action that arose on or after January 1, 2016, for the purpose of this chapter only, are deemed satisfied:

(1) When $25,000 has been credited upon any judgment or judgments rendered in excess of that amount because of bodily injury to or death of one person as the result of any one accident; or

(2) When, subject to such limit of $25,000 because of bodily injury to or death of one person, the sum of $50,000 has been credited upon any judgment or judgments rendered in excess of that amount because of bodily injury to or death of two or more persons as the result of any one accident; or

(3) When $25,000 has been credited upon any judgment or judgments rendered in excess of that amount because of injury to or destruction of property of others as a result of any one accident.

(c) Payments made in settlement of any claims because of bodily injury, death or property damage arising from such accident shall be credited in reduction of the amounts provided for in this section.

§17D-4-12. "Motor vehicle liability policy" defined; scope and provisions of policy.

(a) A "motor vehicle liability policy" as the term is used in this chapter means an "owner's policy" or an "operator's policy" of liability insurance certified as provided in section ten or section eleven of this article as proof of financial responsibility, and issued, except as otherwise provided in section eleven, by an insurance carrier duly authorized to transact business in this state, to or for the benefit of the person named therein as insured.

(b) Such owner's policy of liability insurance:

(1) Shall designate by explicit description or by appropriate reference all vehicles with respect to which coverage is thereby to be granted; and

(2) Shall insure the person named therein and any other person, as insured, using any such vehicle or vehicles with the express or implied permission of such named insured, against loss from the liability imposed by law for damages arising out of the ownership, operation, maintenance or use of such vehicle or vehicles within the United States of America or the Dominion of Canada, subject to limits exclusive of interest and costs, with respect to each such vehicle, in the amounts required in section two of this article.

(c) Such operator's policy of liability insurance shall insure the person named as insured therein against loss from the liability imposed upon him or her by law for damages arising out of the use by him or her of any motor vehicle not owned by him or her, within the same territorial limits and subject to the same limits of liability as are set forth above with respect to an owner's policy of liability insurance.

(d) Such motor vehicle liability policy shall state the name and address of the named insured, the coverage afforded by the policy, the premium charged therefor, the policy period, and the limits of liability, and shall contain an agreement or be endorsed that insurance is provided thereunder in accordance with the coverage defined in this chapter as respects bodily injury and death or property damage, or both, and is subject to all the provisions of this chapter.

(e) Such motor vehicle liability policy need not insure any liability under any workers' compensation law nor any liability on account of bodily injury to or death of an employee of the insured while engaged in the employment, other than domestic, of the insured, or while engaged in the operation, maintenance or repair of any such vehicle nor any liability for damage to property owned by, rented to, in charge of or transported by the insured.

(f) Every motor vehicle liability policy is subject to the following provisions which need not be contained therein:

(1) The liability of the insurance carrier with respect to the insurance required by this chapter shall become absolute whenever injury or damage covered by said motor vehicle liability policy occurs; the policy may not be canceled or annulled as to such liability by an agreement between the insurance carrier and the insured after the occurrence of the injury or damage; no statement made by the insured or on his or her behalf and no violation of the policy defeats or voids the policy.

(2) The satisfaction by the insured of a judgment for such injury or damage is not a condition precedent to the right or duty of the insurance carrier to make payment on account of such injury or damage.

(3) The insurance carrier may settle any claim covered by the policy, and if such settlement is made in good faith, the amount thereof shall be deductible from the limits of liability specified in subdivision (2), subsection (b) of this section.

(4) The policy, the written application therefor, if any, and any rider or endorsement which does not conflict with the provisions of this chapter constitutes the entire contract between parties.

(g) Any policy which grants the coverage required for a motor vehicle liability policy may also grant any lawful coverage in excess of or in addition to the coverage specified for a motor vehicle liability policy and such excess or additional coverage is not subject to the provisions of this chapter. With respect to a policy which grants such excess or additional coverage, the term "motor vehicle liability policy" applies only to that part of the coverage which is required by this section.

(h) Any motor vehicle liability policy may provide that the insured shall reimburse the insurance carrier for any payment the insurance carrier would not have been obligated to make under the terms of the policy except for the provisions of this chapter.

(i) Any motor vehicle liability policy may provide for the prorating of the insurance thereunder with other valid and collectible insurance.

(j) The requirements for a motor vehicle liability policy may be fulfilled by the policies of one or more insurance carriers which policies together meet such requirements.

(k) Any binder issued pending the issuance of a motor vehicle policy fulfills the requirements for such a policy.

CHAPTER 33. INSURANCE.

ARTICLE 6. THE INSURANCE POLICY.

§33-6-31. Motor vehicle policy; omnibus clause; uninsured and underinsured motorists' coverage; conditions for recovery under endorsement; rights and liabilities of insurer.

(a) No policy or contract of bodily injury liability insurance, or of property damage liability insurance, covering liability arising from the ownership, maintenance or use of any motor vehicle, may be issued or delivered in this state to the owner of such vehicle, or may be issued or delivered by any insurer licensed in this state upon any motor vehicle for which a certificate of title has been issued by the Division of Motor Vehicles of this state, unless it contains a provision insuring the named insured and any other person, except a bailee for hire and any persons specifically excluded by any restrictive endorsement attached to the policy, responsible for the use of or using the motor vehicle with the consent, expressed or implied, of the

named insured or his or her spouse against liability for death or bodily injury sustained or loss or damage occasioned within the coverage of the policy or contract as a result of negligence in the operation or use of such vehicle by the named insured or by such person: *Provided,* That in any such automobile liability insurance policy or contract, or endorsement thereto, if coverage resulting from the use of a nonowned automobile is conditioned upon the consent of the owner of such motor vehicle, the word "owner" shall be construed to include the custodian of such nonowned motor vehicles. Notwithstanding any other provision of this code, if the owner of a policy receives a notice of cancellation pursuant to article six-a of this chapter and the reason for the cancellation is a violation of law by a person insured under the policy, said owner may by restrictive endorsement specifically exclude the person who violated the law and the restrictive endorsement shall be effective in regard to the total liability coverage provided under the policy, including coverage provided pursuant to the mandatory liability requirements of section two, article four, chapter seventeen-d of this code, but nothing in such restrictive endorsement may be construed to abrogate the "family purpose doctrine".

(b) Nor may any such policy or contract be so issued or delivered unless it contains an endorsement or provisions undertaking to pay the insured all sums which he or she is legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle, within limits which shall be no less than the requirements of section two, article four, chapter seventeen-d of this code, as amended from time to time: *Provided,* That such policy or contract shall provide an option to the insured with appropriately adjusted premiums to pay the insured all sums which he or she shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle up to an amount of $100,000 because of bodily injury to or death of one person in any one accident and, subject

to said limit for one person, in the amount of $300,000 because of bodily injury to or death of two or more persons in any one accident and in the amount of $50,000 because of injury to or destruction of property of others in any one accident: *Provided, however,* That such endorsement or provisions may exclude the first $300 of property damage resulting from the negligence of an uninsured motorist: *Provided further,* That such policy or contract shall provide an option to the insured with appropriately adjusted premiums to pay the insured all sums which he or she is legally entitled to recover as damages from the owner or operator of an uninsured or underinsured motor vehicle up to an amount not less than limits of bodily injury liability insurance and property damage liability insurance purchased by the insured without set off against the insured's policy or any other policy. Regardless of whether motor vehicle coverage is offered and provided to an insured through a multiple vehicle insurance policy or contract, or in separate single vehicle insurance policies or contracts, no insurer or insurance company providing a bargained for discount for multiple motor vehicles with respect to underinsured motor vehicle coverage may be treated differently from any other insurer or insurance company utilizing a single insurance policy or contract for multiple covered vehicles for purposes of determining the total amount of coverage available to an insured. "Underinsured motor vehicle" means a motor vehicle with respect to the ownership, operation or use of which there is liability insurance applicable at the time of the accident, but the limits of that insurance are either: (i) Less than limits the insured carried for underinsured motorists' coverage; or (ii) has been reduced by payments to others injured in the accident to limits less than limits the insured carried for underinsured motorists' coverage. No sums payable as a result of underinsured motorists' coverage may be reduced by payments made under the insured's policy or any other policy.

(c) As used in this section, the term "bodily injury" includes death resulting therefrom and the term "named insured" means

the person named as such in the declarations of the policy or contract and also includes such person's spouse if a resident of the same household and the term "insured" means the named insured and, while resident of the same household, the spouse of any such named insured and relatives of either, while in a motor vehicle or otherwise, and any person, except a bailee for hire, who uses, with the consent, expressed or implied, of the named insured, the motor vehicle to which the policy applies or the personal representative of any of the above; and the term "uninsured motor vehicle" means a motor vehicle as to which there is no: (i) Bodily injury liability insurance and property damage liability insurance both in the amounts specified by section two, article four, chapter seventeen-d of this code, as amended from time to time; (ii) there is such insurance, but the insurance company writing the same denies coverage thereunder; or (iii) there is no certificate of self-insurance issued in accordance with the provisions of said section. A motor vehicle shall be deemed to be uninsured if the owner or operator thereof be unknown: *Provided,* That recovery under the endorsement or provisions is subject to the conditions hereinafter set forth.

(d) Any insured intending to rely on the coverage required by subsection (b) of this section shall, if any action be instituted against the owner or operator of an uninsured or underinsured motor vehicle, cause a copy of the summons and a copy of the complaint to be served upon the insurance company issuing the policy, in the manner prescribed by law, as though such insurance company were a named party defendant; such company shall thereafter have the right to file pleadings and to take other action allowable by law in the name of the owner, or operator, or both, of the uninsured or underinsured motor vehicle or in its own name.

Nothing in this subsection prevents such owner or operator from employing counsel of his or her own choice and taking any action in his or her own interest in connection with such proceeding.

(e) If the owner or operator of any motor vehicle which causes bodily injury or property damage to the insured is unknown, the insured, or someone in his or her behalf, in order for the insured to recover under the uninsured motorist endorsement or provision, shall:

(1) Within twenty-four hours after the insured discover, and being physically able to report the occurrence of such accident, the insured, or someone in his or her behalf, reports the accident to a police, peace or to a judicial officer, unless the accident has already been investigated by a police officer;

(2) Notify the insurance company, within sixty days after such accident, that the insured or his or her legal representative has a cause or causes of action arising out of such accident for damages against a person or persons whose identity is unknown and setting forth the facts in support thereof; and, upon written request of the insurance company communicated to the insured not later than five days after receipt of such statement, make available for inspection the motor vehicle which the insured was occupying at the time of the accident; and

(3) Upon trial establish that the motor vehicle, which caused the bodily injury or property damage, whose operator is unknown, was a "hit and run" motor vehicle, meaning a motor vehicle which causes damage to the property of the insured arising out of physical contact of such motor vehicle therewith, or which causes bodily injury to the insured arising out of physical contact of such motor vehicle with the insured or with a motor vehicle which the insured was occupying at the time of the accident. If the owner or operator of any motor vehicle causing bodily injury or property damage be unknown, an action may be instituted against the unknown defendant as "John Doe", in the county in which the accident took place or in any other county in which such action would be proper under the provisions of article one, chapter fifty-six of this code; service of

process may be made by delivery of a copy of the complaint and summons or other pleadings to the clerk of the court in which the action is brought, and service upon the insurance company issuing the policy shall be made as prescribed by law as though such insurance company were a party defendant. The insurance company has the right to file pleadings and take other action allowable by law in the name of John Doe.

(f) An insurer paying a claim under the endorsement or provisions required by subsection (b) of this section is subrogated to the rights of the insured to whom such claim was paid against the person causing such injury, death or damage to the extent that payment was made. The bringing of an action against the unknown owner or operator as John Doe or the conclusion of such an action does not constitute a bar to the insured, if the identity of the owner or operator who caused the injury or damages complained of, becomes known, from bringing an action against the owner or operator theretofore proceeded against as John Doe. Any recovery against such owner or operator shall be paid to the insurance company to the extent that such insurance company has paid the insured in the action brought against such owner or operator as John Doe, except that such insurance company shall pay its proportionate part of any reasonable costs and expenses incurred in connection therewith, including reasonable attorney's fees. Nothing in an endorsement or provision made under this subsection, nor any other provision of law, operates to prevent the joining, in an action against John Doe, of the owner or operator of the motor vehicle causing injury as a party defendant, and such joinder is hereby specifically authorized.

(g) No such endorsement or provisions may contain any provision requiring arbitration of any claim arising under any such endorsement or provision, nor may anything be required of the insured except the establishment of legal liability, nor may

the insured be restricted or prevented in any manner from employing legal counsel or instituting legal proceedings.

(h) The provisions of subsections (a) and (b) of this section do not apply to any policy of insurance to the extent that it covers the liability of an employer to his or her employees under any workers' compensation law.

(i) The commissioner of insurance shall formulate and require the use of standard policy provisions for the insurance required by this section, but use of such standard policy provisions may be waived by the commissioner in the circumstances set forth in section ten of this article.

(j) A motor vehicle is uninsured within the meaning of this section, if there has been a valid bodily injury or property damage liability policy issued upon such vehicle, but which policy is uncollectible, in whole or in part, by reason of the insurance company issuing such policy upon such vehicle being insolvent or having been placed in receivership. The right of subrogation granted insurers under the provisions of subsection (f) of this section does not apply as against any person or persons who is or becomes an uninsured motorist for the reasons set forth in this subsection.

(k) Nothing contained herein prevents any insurer from also offering benefits and limits other than those prescribed herein, nor does this section prevent any insurer from incorporating in such terms, conditions and exclusions as may be consistent with the premium charged.

(l) The Insurance Commissioner shall review on an annual basis the rate structure for uninsured and underinsured motorists' coverage as set forth in subsection (b) of this section and shall report to the Legislature on said rate structure on or before January 15, 1983, and on or before January 15, of each of the next two succeeding years.

(m) For insurance policies in effect on December 31, 2015, including motor vehicle insurance policies and liability policies that are of an excess or umbrella type that cover automobile liability, insurers are not required to make a new offer of uninsured and underinsured motor vehicle coverage upon the renewal if the liability coverage is increased solely to meet the requirements of the increased minimum required financial responsibility limits set forth in subdivision (b), section two, article four, chapter seventeen-d of this code. Those insurers that have issued policies that carry limits of coverage below the minimum required financial responsibility limits in effect on December 31, 2015 shall increase such limits to an amount equal to or above the new minimum required financial responsibility limits when the policy is renewed but not later than December 31, 2016.

§33-6-31d. Form for making offer of optional uninsured and underinsured coverage.

(a) Optional limits of uninsured motor vehicle coverage and underinsured motor vehicle coverage required by section thirty-one of this article shall be made available to the named insured at the time of initial application for liability coverage and upon any request of the named insured on a form prepared and made available by the Insurance Commissioner. The contents of the form shall be as prescribed by the commissioner and shall specifically inform the named insured of the coverage offered and the rate calculation therefor, including, but not limited to, all levels and amounts of such coverage available and the number of vehicles which will be subject to the coverage. The form shall be made available for use on or before the effective date of this section. The form shall allow any named insured to waive any or all of the coverage offered.

(b) Any insurer who issues a motor vehicle insurance policy in this state shall provide the form to each person who applies

for the issuance of such policy by delivering the form to the applicant or by mailing the form to the applicant together with the applicant's initial premium notice. The applicant shall complete, date and sign the form and return the form to the insurer within thirty days after receipt thereof. No insurer or agent thereof is liable for payment of any damages applicable under any optional uninsured or underinsured coverage authorized by section thirty-one of this article for any incident which occurs from the date the form was mailed or delivered to the applicant until the insurer receives the form and accepts payment of the appropriate premium for the coverage requested therein from the applicant: *Provided,* That if prior to the insurer's receipt of the executed form the insurer issues a policy to the applicant which provides for such optional uninsured or underinsured coverage, the insurer is liable for payment of claims against such optional coverage up to the limits provided therefor in such policy. The contents of a form described in this section which has been signed by an applicant creates a presumption that such applicant and all named insureds received an effective offer of the optional coverages described in this section and that such applicant exercised a knowing and intelligent election or rejection, as the case may be, of such offer as specified in the form. Such election or rejection is binding on all persons insured under the policy.

(c) Any insurer who has issued a motor vehicle insurance policy in this state which is in effect on the effective date of this section shall mail or otherwise deliver the form to any person who is designated in the policy as a named insured. A named insured shall complete, date and sign the form and return the form to the insurer within thirty days after receipt thereof. No insurer or agent thereof is liable for payment of any damages in any amount greater than any limits of such coverage, if any, provided by the policy in effect on the date the form was mailed or delivered to such named insured for any incident which occurs

from the date the form was mailed or delivered to such named insured until the insurer receives the form and accepts payment of the appropriate premium for the coverage requested therein from the applicant. The contents of a form described in this section which has been signed by any named insured creates a presumption that all named insureds under the policy received an effective offer of the optional coverages described in this section and that all such named insured exercised a knowing and intelligent election or rejection, as the case may be, of such offer as specified in the form. Such election or rejection is binding on all persons insured under the policy.

(d) Failure of the applicant or a named insured to return the form described in this section to the insurer as required by this section within the time periods specified in this section creates a presumption that such person received an effective offer of the optional coverages described in this section and that such person exercised a knowing and intelligent rejection of such offer. Such rejection is binding on all persons insured under the policy.

(e) The insurer shall make such forms available to any named insured who requests different coverage limits on or after the effective date of this section. No insurer is required to make such form available or notify any person of the availability of such optional coverages authorized by this section except as required by this section.

(f) Notwithstanding any of the provisions of article six of this chapter to the contrary, including section thirty-one-f, for insurance policies in effect on December 31, 2015, insurers are not required to offer or obtain new uninsured or underinsured motorist coverage offer forms as described in this section on any insurance policy to comply with the amount of the minimum required financial responsibility limits set forth in subsection (b), section two, article four, chapter seventeen-d of this code. All

such offer forms that were executed prior to January 1, 2016, shall remain in full force and effect.

§33-6-31h. Excluded drivers; definitions; legislative findings; restrictive endorsements.

(a) For purposes of this section, the following definitions apply:

(1) A "motor vehicle liability policy" means an "owner's policy" or an "operator's policy" of liability insurance certified as provided in section twelve, article four, chapter seventeen-d of this code.

(2) "Excluded driver" means any driver specifically excluded from coverage under section thirty- one, article six, chapter thirty-three of this code.

(3) "Minimum financial responsibility limits" means those limits defined in section two, article four, chapter seventeen-d of this code.

(b) The Legislature finds that:

(1) The explicit, plain language of a motor vehicle liability policy between an insurer and its insureds should control its effect;

(2) Where insurers are required by the common law to provide minimum financial responsibility limits coverage for excluded drivers, consumers not excluded by restrictive endorsement are negatively impacted;

(3) The decision of the Supreme Court of Appeals of West Virginia in *Jones v. Motorists Mutual Insurance Company*, 177 W. Va. 763 (1987) interpreted chapter seventeen-d of this code to require insurers to provide minimum financial responsibility limits of coverage to excluded drivers; and

(4) It is not the intent of the legislature to require insurers to provide minimum financial responsibility limits of coverage to excluded drivers.

(c) When any person is specifically excluded from coverage under the provisions of a motor vehicle liability policy by any restrictive endorsement to the policy, the insurer is not required to provide any coverage, including both the duty to indemnify and the duty to defend, for damages arising out of the operation, maintenance or use of any motor vehicle by the excluded driver, notwithstanding the provisions of chapter seventeen-d of this code.

I've Read the New Rules of Professional Conduct - Now What?

Ann L. Haight

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DEFENSE TRIAL COUNSEL of WEST VIRGINIA
Voice of The Civil Defense Bar

THE WEST VIRGINIA STATE BAR ANNUAL MEETING
April 18, 2015
Glade Springs, West Virginia

"A View of 2015 Legislation From Both Sides of the Bar"

Deliberate Intent Reform - H.B. 2011

I. Background

A. Code §23-4-2 enacted 1913, provides immunity from common law claims and exceptions to immunity;

B. *Mandolitis v. Elkins Industries*, 161 W.Va. 695 (1978) - recognized and expanded deliberate intent cause of action;

C. Legislative amendments 1983, 1994, 2005, required/revised five elements of proof:

(1) Specific unsafe working condition;

(2) Actual knowledge;

(3) Violation of statute, rule, or industry standard;

(4) Intentional exposure;

(5) Serious compensable injury or death.

D. Erosion by the Courts

(1) "actual knowledge" and violation of statute requirements.

(2) For example, *Ryan v. Clonch Industries*, 219 W.Va. 664 (2000) and *McComas v. ACF Industries*, 232 W.Va. 19 (2013)

E. The new law, H.B. 2011:

(1) Imposes standing requirements;

(2) Redefines "actual knowledge";

(3) Provides clarity and alternatives for proving "serious compensable injury";

(4) Revises specificity of work rules and industry standards upon which alleged violations are based.

II. Standing

A. A claim for benefits must have been filed, §23-4-2(c).

B. Verified expert statement served with complaint, identifying, per §23-4-2(d)(2)(C):

(1) Knowledge of workplace safety rules;

(2) The specific unsafe working condition causing injury;

(3) Specific statutes, rules, standards violated by employer;

III) "Actual knowledge" Redefined, with Wiggle Room, §23-4-2(d)(2)(B)(ii)

A. "Actual knowledge" is presumed where failure to conduct legally required inspection intended to identify specific unsafe working condition;

(1) Addresses *Ryan v. Clonch Industries*;

B. "Actual knowledge" is not what managers/supervisors "should have known";

(1) Counters *McComas v. ACF Industries*;

C. "Actual knowledge" could be circumstantial, e.g., prior accidents, near misses, complaints or regulatory citations but based on "documentary or other credible evidence".

IV) The Specific Statute, Rule or Safety Standard – Redux, §23-4-2(d)(2)(B)(iii)

A. If violation of an industry safety standard, must be a "consensus written rule" made by an organization of industry members.

(1) Exemption for volunteer fire departments as to National Fire Codes;

B. If a statute, rule or regulation or if a violation of a statute, rule or regulation is alleged, it must be:

(1) "Specifically applicable" to the work condition causing injury;

(2) Intended to address the "specific hazard";

(3) Applicable as a matter of law.

V) Four Ways to Prove "Serious Compensable Injury," §23-4-2-(d)(2)(B)(v)

A. Permanent whole body impairment of at least 13% (AMA 4th Edition), independent of preexisting impairment; or

B. No impairment rating but significant disfigurement or permanent loss of a body organ, function or system; or

C. Physician certification that the condition at issue is likely to cause death within eighteen (18) months; or

D. If the "serious compensable injury" is occupational pneumoconiosis, the following rules apply:

(1) Board certified pulmonologist must certify that the pulmonary impairment is at least 15%;

(2) The certification is confirmed by valid testing, and;

(3) Cause of action must be filed within one year from the date the employee "meets the requirements."

VI) Miscellaneous New Provisions

A. Venue, §23-4-2(e);

(1) Keeps venue in county where injury occurred or at location of employer's "principal place of business";

(2) Contrast with Code §56-1-1.

B. Blood test evidence, §23-4-2(a);

(1) Employee deemed intoxicated and intoxication is the proximate cause of the injury if

a. 0.05% alcohol by weight and tested within two hours; or
b. Evidence of on or off job use of nonprescribed controlled substances.

C. Bifurcation of discovery, §23-42(d)(2)(C)(iii)

(1) Liability from damages;

(2) Leave of court.

D. Effect date, July 1, 2015.

ENROLLED

COMMITTEE SUBSTITUTE

FOR

H. B. 2011

(By Delegates Hanshaw, Shott, E. Nelson, Rohrbach,
Sobonya, Weld, Espinosa, Statler and Miller)

[Passed March 14, 2015, in effect ninety days from passage.]

AN ACT to amend and reenact §23-4-2 of the Code of West Virginia, 1931, as amended, relating generally to a workplace employee injury caused by the deliberate intention of the employer required for the employer to lose immunity from a lawsuit; defining actual knowledge; eliminating obsolete language referring to the West Virginia Workers Compensation Fund and board of managers; establishing standards related to blood tests administered after accident; providing that intoxication shown by a positive blood test for alcohol or drugs that meet certain thresholds is the proximate cause of any injury; clarifying provisions outlining who may assert claims on behalf of an employee under this section; requiring that a claim for worker's compensation benefits be filed prior to bringing a cause of action under this section unless good cause is shown; providing that actual knowledge must be specifically proven by the employee or other person seeking to recover under this section and shall not be deemed or presumed; providing an employee may prove actual knowledge by evidence of an employer's intentional or deliberate failure to conduct a legally required inspection, audit or assessment; establishing actual knowledge is not established by what an employee's

immediate supervisor or management personnel should have known had they exercised reasonable care or been more diligent; establishing that proof of actual knowledge of prior accidents, near misses, safety complaints or citations must be proven by documentary or other credible evidence; defining a commonly accepted and well-known safety standard within the industry or business of the employer; exempting certain codes or standards from applying to volunteer fire departments, municipal fire departments and emergency medical response personnel if those entities have followed rules promulgated by the Fire Commission; requiring that if the unsafe working condition relates to a violation of a state or federal safety provision that safety provision must address the specific work, working conditions and hazards involved; establishing that the applicability of state or federal safety provisions is a matter for judicial determination; defining generally serious compensable injury; establishing four categories of serious compensable injury including an injury rated at a whole person impairment of at least thirteen percent (13%) and other threshold requirements, an injury or condition likely to result in death within eighteen (18) months from the date of the filing of the complaint, an injury not capable of whole person impairment if it causes permanent serious disfigurement, causes permanent loss or significant impairment of function of any bodily organ or system, or results in objectively verifiable bilateral or multi-level dermatomal radiculopathy and is not a physical injury that has no objective medical evidence to support a diagnosis, or if an employee suffers from complicated pneumoconiosis or pulmonary massive fibrosis and that condition has resulted in an impairment rating of at least fifteen percent (15%); establishing certification requirements for the categories of serious compensable injury; requiring that a verified

statement submitted from a person with knowledge and expertise of the workplace safety, statutes, rules, regulations and consensus industry standards specifically applicable to the industry and workplace involved in an injury be served with any complaint asserting certain causes of action brought under this section; providing for the minimum contents of the required verified statement; limiting the use of the required verified statement during litigation; providing for consideration of bifurcation of discovery in certain circumstances; establishing the venue in which claims under this section may be brought; providing that actions accruing prior to the effective date are not affected; and establishing the effective date of July 1, 2015, for the amendments to this section.

Be it enacted by the Legislature of West Virginia:

That §23-4-2 of the Code of West Virginia, 1931, as amended, be amended and reenacted to read as follows:

ARTICLE 4. DISABILITY AND DEATH BENEFITS.

§23-4-2. Disbursement where injury is self-inflicted or intentionally caused by employer; legislative declarations and findings; "deliberate intention" defined.

(a) Notwithstanding anything contained in this chapter, no employee or dependent of any employee is entitled to receive any sum under the provisions of this chapter on account of any personal injury to or death to any employee caused by a self-inflicted injury or the intoxication of the employee. Upon the occurrence of an injury which the employee asserts, or which reasonably appears to have, occurred in the course of and resulting from the employee's employment, the employer may require the employee to undergo a blood test for the purpose of determining the existence or nonexistence of evidence of intoxication: *Provided,* That the employer must have a

reasonable and good faith objective suspicion of the employee's intoxication and may only test for the purpose of determining whether the person is intoxicated. If any blood test for intoxication is given following an accident, at the request of the employer or otherwise, and if any of the following are true, the employee is deemed intoxicated and the intoxication is the proximate cause of the injury:

(1) If a blood test is administered within two hours of the accident and evidence that there was, at that time, more than five hundredths of one percent, by weight, of alcohol in the employee's blood; or

(2) If there was, at the time of the blood test, evidence of either on or off the job use of a nonprescribed controlled substance as defined in the West Virginia Uniform Controlled Substances Act, West Virginia Code §60A-2-201, *et seq.*, Schedules I, II, III, IV and V.

(b) For the purpose of this chapter, the commission may cooperate with the Office of Miners' Health, Safety and Training and the State Division of Labor in promoting general safety programs and in formulating rules to govern hazardous employments.

(c) If injury results to any employee from the deliberate intention of his or her employer to produce the injury or death, the employee, or, if the employee has been found to be incompetent, his or her conservator or guardian, may recover under this chapter and bring a cause of action against the employer, as if this chapter had not been enacted, for any excess of damages over the amount received or receivable in a claim for benefits under this chapter. If death results to any employee from the deliberate intention of his or her employer to produce the injury or death, the representative of the estate may recover under this chapter and bring a cause of action, pursuant to section six, article seven of chapter fifty-five of this code, against the employer, as if this chapter had not been

enacted, for any excess of damages over the amount received or receivable in a claim for benefits under this chapter. To recover under this section, the employee, the employee's representative or dependent, as defined under this chapter, must, unless good cause is shown, have filed a claim for benefits under this chapter.

(d)(1) It is declared that enactment of this chapter and the establishment of the workers' compensation system in this chapter was and is intended to remove from the common law tort system all disputes between or among employers and employees regarding the compensation to be received for injury or death to an employee except as expressly provided in this chapter and to establish a system which compensates even though the injury or death of an employee may be caused by his or her own fault or the fault of a co-employee; that the immunity established in sections six and six-a, article two of this chapter is an essential aspect of this workers' compensation system; that the intent of the Legislature in providing immunity from common lawsuit was and is to protect those immunized from litigation outside the workers' compensation system except as expressly provided in this chapter; that, in enacting the immunity provisions of this chapter, the Legislature intended to create a legislative standard for loss of that immunity of more narrow application and containing more specific mandatory elements than the common law tort system concept and standard of willful, wanton and reckless misconduct; and that it was and is the legislative intent to promote prompt judicial resolution of the question of whether a suit prosecuted under the asserted authority of this section is or is not prohibited by the immunity granted under this chapter.

(2) The immunity from suit provided under this section and under sections six and six-a, article two of this chapter may be lost only if the employer or person against whom liability is asserted acted with "deliberate intention". This requirement may be satisfied only if:

(A) It is proved that the employer or person against whom liability is asserted acted with a consciously, subjectively and deliberately formed intention to produce the specific result of injury or death to an employee. This standard requires a showing of an actual, specific intent and may not be satisfied by allegation or proof of: (i) Conduct which produces a result that was not specifically intended; (ii) conduct which constitutes negligence, no matter how gross or aggravated; or (iii) willful, wanton or reckless misconduct; or

(B) The trier of fact determines, either through specific findings of fact made by the court in a trial without a jury, or through special interrogatories to the jury in a jury trial, that all of the following facts are proven:

(i) 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;

(ii) 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.

(I) In every case actual knowledge must specifically be proven by the employee or other person(s) seeking to recover under this section, and shall not be deemed or presumed: *Provided,* That actual knowledge may be shown by evidence of intentional and deliberate failure to conduct an inspection, audit or assessment required by state or federal statute or regulation and such inspection, audit or assessment is specifically intended to identify each alleged specific unsafe working condition.

(II) Actual knowledge is not established by proof of what an employee's immediate supervisor or management personnel should have known had they exercised reasonable care or been

more diligent.

(III) Any proof of the immediate supervisor or management personnel's knowledge of prior accidents, near misses, safety complaints or citations from regulatory agencies must be proven by documentary or other credible evidence.

(iii) 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.

(I) If the specific unsafe working condition relates to a violation of a commonly accepted and well-known safety standard within the industry or business of the employer, that safety standard must be a consensus written rule or standard promulgated by the industry or business of the employer, such as an organization comprised of industry members: *Provided,* That the National Fire Protection Association Codes and Standards or any other industry standards for Volunteer Fire Departments shall not be cited as an industry standard for Volunteer Fire Departments, Municipal Fire Departments and Emergency Medical Response Personnel as an unsafe working condition as long as the Volunteer Fire Departments, Municipal Fire Departments and the Emergency Medical Response Personnel have followed the Rules that have been promulgated by the Fire Commission.

(II) If the specific unsafe working condition relates to a violation of a state or federal safety statute, rule or regulation that statute, rule or regulation:

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

(b) Must be intended to address the specific hazard(s) presented by the alleged specific unsafe

working condition; and,

(c) The applicability of any such state or federal safety statute, rule or regulation is a matter of law for judicial determination.

(iv) That notwithstanding the existence of the facts set forth in subparagraphs (i) through (iii), inclusive, of this paragraph, the person or persons alleged to have actual knowledge under subparagraph (ii) nevertheless intentionally thereafter exposed an employee to the specific unsafe working condition; and

(v) That the employee exposed suffered serious compensable injury or compensable death as defined in section one, article four, chapter twenty-three as a direct and proximate result of the specific unsafe working condition. For the purposes of this section, serious compensable injury may only be established by one of the following four methods:

(I) It is shown that the injury, independent of any preexisting impairment:

(a) Results in a permanent physical or combination of physical and psychological injury rated at a total whole person impairment level of at least thirteen percent (13%) as a final award in the employees workers' compensation claim; and

(b) Is a personal injury which causes permanent serious disfigurement, causes permanent loss or significant impairment of function of any bodily organ or system, or results in objectively verifiable bilateral or multi-level dermatomal radiculopathy; and is not a physical injury that has no objective medical evidence to support a diagnosis; or

(II) Written certification by a licensed physician that the employee is suffering from an injury or condition that is caused by the alleged unsafe working condition and is likely to result in death within eighteen (18) months or less from the date of the filing of the complaint. The certifying

physician must be engaged or qualified in a medical field in which the employee has been treated, or have training and/or experience in diagnosing or treating injuries or conditions similar to those of the employee and must disclose all evidence upon which the written certification is based, including, but not limited to, all radiographic, pathologic or other diagnostic test results that were reviewed.

(III) If the employee suffers from an injury for which no impairment rating may be determined pursuant to the rule or regulation then in effect which governs impairment evaluations pursuant to this chapter, serious compensable injury may be established if the injury meets the definition in subclause (I)(*b*).

(IV) If the employee suffers from an occupational pneumoconiosis, the employee must submit written certification by a board certified pulmonologist that the employee is suffering from complicated pneumoconiosis or pulmonary massive fibrosis and that the occupational pneumoconiosis has resulted in pulmonary impairment as measured by the standards or methods utilized by the West Virginia Occupational Pneumoconiosis Board of at least fifteen percent (15%) as confirmed by valid and reproducible ventilatory testing. The certifying pulmonologist must disclose all evidence upon which the written certification is based, including, but not limited to, all radiographic, pathologic or other diagnostic test results that were reviewed: *Provided*, That any cause of action based upon this clause must be filed within one year of the date the employee meets the requirements of the same.

(C) In cases alleging liability under the provisions of paragraph (B) of this subdivision:

(i) The employee, the employee's guardian or conservator, or the representative of the employee's estate shall serve with the complaint a verified statement from a person with knowledge

and expertise of the workplace safety statutes, rules, regulations and consensus industry safety standards specifically applicable to the industry and workplace involved in the employee's injury, setting forth opinions and information on:

(I) The person's knowledge and expertise of the applicable workplace safety statutes, rules, regulations and/or written consensus industry safety standards;

(II) The specific unsafe working condition(s) that were the cause of the injury that is the basis of the complaint; and

(III) The specific statutes, rules, regulations or written consensus industry safety standards violated by the employer that are directly related to the specific unsafe working conditions:

Provided, however, That this verified statement shall not be admissible at the trial of the action and the Court, pursuant to the Rules of Evidence, common law and subclause two-c, subparagraph (iii), paragraph (B), subdivision (2), subsection (d), section two, article four, chapter twenty-three of this code, retains responsibility to determine and interpret the applicable law and admissibility of expert opinions.

(ii) No punitive or exemplary damages shall be awarded to the employee or other plaintiff;

(iii) Notwithstanding any other provision of law or rule to the contrary, and consistent with the legislative findings of intent to promote prompt judicial resolution of issues of immunity from litigation under this chapter, the employer may request and the court shall give due consideration to the bifurcation of discovery in any action brought under the provisions of subparagraphs (i) through (v), of paragraph (B) such that the discovery related to liability issues be completed before discovery related to damage issues. The court shall dismiss the action upon motion for summary judgment if it finds pursuant to rule 56 of the rules of civil procedure that one or more of the facts required to

be proved by the provisions of subparagraphs (i) through (v), inclusive, paragraph (B) of this subdivision do not exist, and the court shall dismiss the action upon a timely motion for a directed verdict against the plaintiff if after considering all the evidence and every inference legitimately and reasonably raised thereby most favorably to the plaintiff, the court determines that there is not sufficient evidence to find each and every one of the facts required to be proven by the provisions of subparagraphs (i) through (v), inclusive, paragraph (B) of this subdivision; and

(iv) The provisions of this paragraph and of each subparagraph thereof are severable from the provisions of each other subparagraph, subsection, section, article or chapter of this code so that if any provision of a subparagraph of this paragraph is held void, the remaining provisions of this act and this code remain valid.

(e) Any cause of action brought pursuant to this section shall be brought either in the circuit court of the county in which the alleged injury occurred or the circuit court of the county of the employer's principal place of business. With respect to causes of action arising under this chapter, the venue provisions of this section shall be exclusive of and shall supersede the venue provisions of any other West Virginia statute or rule.

(f) The reenactment of this section in the regular session of the Legislature during the year 2015 does not in any way affect the right of any person to bring an action with respect to or upon any cause of action which arose or accrued prior to the effective date of the reenactment.

(g) The amendments to this section enacted during the 2015 session of the Legislature shall apply to all injuries occurring on or after July 1, 2015.

DEFENSE TRIAL COUNSEL of WEST VIRGINIA
Voice of The Civil Defense Bar

Bowles Rice

Deliberate Intent Reform - H.B. 2011

The West Virginia State Bar Annual Meeting
April 18, 2015

Charles F. Printz, Jr.

President, Defense Trial Counsel of West Virginia

Partner, Bowles Rice LLP

Background

- Code §23-4-2 enacted 1913, provides immunity from common law claims and exceptions to immunity
- *Mandolitis v. Elkins Industries*, 161 W.Va. 695 (1978) - recognized and expanded deliberate intent cause of action
- Legislative amendments 1983, 1994, 2005, required/revised five elements of proof
- Erosion by the Courts
- The new law, H.B. 2011

Standing

- A claim for benefits must have been filed, §23-4-2(c)
- Verified expert statement served with complaint, identifying, per §23-4-2(d)(2)(C)

"Actual Knowledge"
Redefined, with Wiggle Room

- "Actual knowledge" is presumed where failure to conduct legally required inspection intended to identify specific unsafe working condition
- "Actual knowledge" is not what managers/supervisors "should have known"
- "Actual knowledge" could be circumstantial, e.g., prior accidents, near misses, complaints or regulatory citations but based on "documentary or other credible evidence"

§23-4-2(d)(2)(B)(ii)

The Specific Statute, Rule or Safety Standard – Redux

- If violation of an industry safety standard, must be a "consensus written rule" made by an organization of industry members.
- If a statute, rule or regulation or if a violation of a statute, rule or regulation is alleged, it must be:
  - "Specifically applicable" to the work condition causing injury
  - Intended to address the "specific hazard"
  - Applicable as a matter of law

§23-4-2(d)(2)(B)(iii)

Four Ways to Prove "Serious Compensable Injury"

- Permanent whole body impairment of at least 13% (AMA 4th Edition), independent of preexisting impairment; or
- No impairment rating but significant disfigurement or permanent loss of a body organ, function or system; or
- Physician certification that the condition at issue is likely to cause death within eighteen (18) months; or

Four Ways to Prove "Serious Compensable Injury"

- If the "serious compensable injury" is occupational pneumoconiosis, the following rules apply:
  - Board certified pulmonologist must certify that the pulmonary impairment is at least 15%;
  - The certification is confirmed by valid testing, and;
  - Cause of action must be filed within one year from the date the employee "meets the requirements."

§23-4-2-(d)(2)(B)(v)

Miscellaneous New Provisions

- Venue, *§23-4-2(e)*
- Blood test evidence, *§23-4-2(a)*
- Bifurcation of discovery, *§23-42(d)(2)(C)(iii)*
- Effect date, July 1, 2015

QUESTIONS?

Thank You

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THE WEST VIRGINIA STATE BAR ANNUAL MEETING
April 18, 2015
Glade Springs, West Virginia

"A View of 2015 Legislation From Both Sides of the Bar"

Medical Professional Liability Act Reform – S.B. 6

I. Background

A. Medical tort reform 4.0;

(1) Enactment of MPLA and previous amendments of 1986, 2001, 2003;

B. What's the crisis now?

(1) *Phillips v. Larry's Drive-In Pharmacy*, 220 W.Va. 484 (2007) (pharmacy not a healthcare provider);

(2) *Riggs v. WVU Hospitals, Inc.*, 221 W.Va. 646 (2007) (J. Davis concurring) (administration of infection control program may create premises liability);

(3) *Manor Care, Inc. v. Douglas*, 234 W.Va. 57 (2014) (negligent conduct, nursing home understaffing held outside MPLA; 7:1 ratio of punitive damages upheld);

II. The Big Changes; Enlarging the Umbrella:

A. "Healthcare" redefined to include "any act, service or treatment" performed or which should have been performed "by any…person supervised by or acting under direction of a healthcare provider" during care, treatment or confinement, including "staffing, medical transport, custodial care or basic care, infection control, positioning, hydration, nutrition and similar patient services[.]" Also includes the healthcare process of employment, credentialing, privileging, and supervision. §55-7B-2(e)

B. "Healthcare facility" redefined to include any pharmacy, nursing home, assisted living facility, (among others), and any entity providing healthcare and "any related entity to the healthcare facility." §55-7B-2(f)

C. "Healthcare provider" redefined to include (after a long list of business entities and healthcare occupations) any person taking actions or providing service treatment (per a care plan), or "an officer, employer or agent of a healthcare provider acting in the scope of…employment." §55-7B-2(g)

D. "Related entity" a new term, is defined as any entity under direct or indirect, partial or complete, control or ownership of a healthcare provider or healthcare facility. This gives "upstream coverage" to parent companies, holding companies, affiliates, subsidiaries, etc. §55-7B-2(n)

III) Collateral Sources Applied Against Past Medical Expenses, §55-7B-2(n)

A. Reacting to *Kenney v. Liston*, 233 W.Va. 620 (2014), Syl. Pts. 2, 4, 6, and 7 (no offsets, write offs, adjustments, discounts, etc. allowed under collateral source rule);

B. Allows verdict for past medicals to be limited to those expenses actually paid or based upon obligation to pay;

IV) Certain Information Not Admissible, §55-7B-7(a)

C. Rebuttable presumption that following information not admissible:

(1) Surveys, audits, reviews, reports of a healthcare provider or facility;

(2) Disciplinary actions against a provider's license, registration or certificate;

(3) Accreditation reports;

(4) Civil or criminal penalties.

D. Rebuttable presumption that a healthcare facility or provider has "appropriate staffing" if it meets "minimum staffing requirements under state law."

E. Information may be admissible if it:

(1) Applies to the injured person; or

(2) Involves substantially similar conduct within one year of the particular incident; and

(3) It is otherwise admissible under West Virginia Rules of Evidence;

F. Separation of powers concerns.

V) MPLA Tweaks

A. Protecting constitutionality:

(1) Increasing CPI cap on noneconomic loss from up to 50% of $250,000.00/$500,000.00 to 150%, §55-7B-8(c);

(2) Adding CPI index not to exceed 150% of trauma cap of $500,000.00, §55-7B-9(c)(l).

B. Anti-stacking; one cap:

(1) Vicarious liability only if a provider's agent does not have liability coverage of $1,000,000.00 aggregate "for each occurrence", §55-7B-9(g)

(2) Trauma liability limited to $500,000.00 "for each occurrence" regardless of the number of parties plaintiff or defendant or the number of distributees in a wrongful death action, §55-7B-9(c)(a)

C. Adding to expert competency standard;

(1) Expert opinion also must be "grounded on scientifically valid peer reviewed studies if available", §55-7B-7(a)(4)

(2) Separation of powers/interference with rule making. *Mayhorn v. Logan Med'l Fdn.*, 193 W.Va. 42 (1994), overruling in part *Gilman v. Choi*, 185 W.Va. 177 (1990) (Rule 702 is paramount authority for determining whether experts qualify to give an opinion);

(3) Standards in this statute are for competency which Legislature may regulate under language of Rule 601. *Gilman v. Choi*.

D. Changing "shall not" to "may not"

(1) Code §55-7B-9a(g) now reads that the Court "may not" reduce the jury's verdict of economic loss damages by collateral source payments.

(2) Code §55-7B-9c(a) now reads that the total amount of civil damages recoverable (from trauma care) "mat not exceed" $500,000.00 for each occurrence.

ENROLLED

COMMITTEE SUBSTITUTE

FOR

Senate Bill No. 6

(SENATORS FERNS, BOLEY, CARMICHAEL, GAUNCH, LEONHARDT, MULLINS, NOHE, TRUMP, BLAIR, PLYMALE, STOLLINGS, COLE (MR. PRESIDENT) AND TAKUBO, *ORIGINAL SPONSORS*)

[Passed March 10, 2015; in effect from passage.]

AN ACT to amend and reenact §55-7B-1, §55-7B-2, §55-7B-7, §55-7B-8, §55-7B-9, §55-7B-9a, §55-7B-9c, §55-7B-10 and §55-7B-11 of the Code of West Virginia, 1931, as amended; and to amend said code by adding thereto two new sections, designated §55-7B-7a and §55-7B-9d, all relating to medical professional liability generally; providing additional legislative findings and purposes related to medical professional liability; amending existing definitions of "collateral source", "health care", "health care facility", "health care provider" and "medical professional liability" and creating a new definition for "related entity" all of which expand the scope of the Medical Professional Liability Act; modifying the qualifications for the competency of experts who testify in medical professional liability actions; providing rebuttable presumptions and evidentiary requirements relating to state and federal reports, disciplinary actions, accreditation reports, assessments and staffing; modifying the maximum amount of recovery for, and availability of, noneconomic damages;

clarifying amounts of medical professional liability insurance coverage that must exist to receive noneconomic damages limitations; clarifying that a health care provider is not vicariously liable unless the alleged agent does not maintain certain insurance; clarifying eligibility for, and application of, emergency medical services caps; providing a methodology for determining the amount of trauma care caps to account for inflation; providing certain limitations of verdicts for past medical expenses of the plaintiff; establishing effective date; and providing for severability.

Be it enacted by the Legislature of West Virginia:

That §55-7B-1, §55-7B-2, §55-7B-7, §55-7B-8, §55-7B-9, §55-7B-9a, §55-7B-9c, §55-7B-10 and §55-7B-11 of the Code of West Virginia, 1931, as amended, be amended and reenacted; and that said code be amended by adding thereto two new sections, designated §55-7B-7a and §55-7B-9d, all to read as follows:

ARTICLE 7B. MEDICAL PROFESSIONAL LIABILITY.

§55-7B-1. Legislative findings and declaration of purpose.

The Legislature finds and declares that:

The citizens of this state are entitled to the best medical care and facilities available and that health care providers offer an essential and basic service which requires that the public policy of this state encourage and facilitate the provision of such service to our citizens;

As in every human endeavor the possibility of injury or death from negligent conduct commands that protection of the public served by health care providers be recognized as an important state interest;

Our system of litigation is an essential component of this state's interest in providing adequate and reasonable compensation to those persons who suffer from injury or death as a result of professional negligence, and any limitation placed on this system must be balanced with and considerate of the need to fairly compensate patients who have been injured as a result of negligent and incompetent acts by health care providers;

Liability insurance is a key part of our system of litigation, affording compensation to the injured while fulfilling the need and fairness of spreading the cost of the risks of injury;

A further important component of these protections is the capacity and willingness of health care providers to monitor and effectively control their professional competency, so as to protect the public and ensure to the extent possible the highest quality of care;

It is the duty and responsibility of the Legislature to balance the rights of our individual citizens to adequate and reasonable compensation with the broad public interest in the provision of services by qualified health care providers and health care facilities who can themselves obtain the protection of reasonably priced and extensive liability coverage;

In recent years, the cost of insurance coverage has risen dramatically while the nature and extent of coverage has diminished, leaving the health care providers, the health care facilities and the injured without the full benefit of professional liability insurance coverage;

Many of the factors and reasons contributing to the increased cost and diminished availability of professional

liability insurance arise from the historic inability of this state to effectively and fairly regulate the insurance industry so as to guarantee our citizens that rates are appropriate, that purchasers of insurance coverage are not treated arbitrarily and that rates reflect the competency and experience of the insured health care providers and health care facilities;

The unpredictable nature of traumatic injury health care services often results in a greater likelihood of unsatisfactory patient outcomes, a higher degree of patient and patient family dissatisfaction and frequent malpractice claims, creating a financial strain on the trauma care system of our state, increasing costs for all users of the trauma care system and impacting the availability of these services, requires appropriate and balanced limitations on the rights of persons asserting claims against trauma care health care providers, this balance must guarantee availability of trauma care services while mandating that these services meet all national standards of care, to assure that our health care resources are being directed towards providing the best trauma care available;

The cost of liability insurance coverage has continued to rise dramatically, resulting in the state's loss and threatened loss of physicians, which, together with other costs and taxation incurred by health care providers in this state, have created a competitive disadvantage in attracting and retaining qualified physicians and other health care providers;

Medical liability issues have reached critical proportions for the state's long-term health care facilities, as: (1) Medical liability insurance premiums for nursing homes in West Virginia continue to increase and the number of claims per bed has increased significantly; (2) the cost to the state Medicaid program as a result of such higher premiums has grown considerably in this period; (3) current medical

liability premium costs for some nursing homes constitute a significant percentage of the amount of coverage; (4) these high costs are leading some facilities to consider dropping medical liability insurance coverage altogether; and (5) the medical liability insurance crisis for nursing homes may soon result in a reduction of the number of beds available to citizens in need of long-term care; and

The modernization and structure of the health care delivery system necessitate an update of provisions of this article in order to facilitate and continue the objectives of this article which are to control the increase in the cost of liability insurance and to maintain access to affordable health care services for our citizens.

Therefore, the purpose of this article is to provide a comprehensive resolution of the matters and factors which the Legislature finds must be addressed to accomplish the goals set forth in this section. In so doing, the Legislature has determined that reforms in the common law and statutory rights of our citizens must be enacted together as necessary and mutual ingredients of the appropriate legislative response relating to:

(1) Compensation for injury and death;

(2) The regulation of rate making and other practices by the liability insurance industry, including the formation of a physicians' mutual insurance company and establishment of a fund to assure adequate compensation to victims of malpractice; and

(3) The authority of medical licensing boards to effectively regulate and discipline the health care providers under such board.

§55-7B-2. Definitions.

(a) "Board" means the State Board of Risk and Insurance Management.

(b) "Collateral source" means a source of benefits or advantages for economic loss that the claimant has received from:

(1) Any federal or state act, public program or insurance which provides payments for medical expenses, disability benefits, including workers' compensation benefits, or other similar benefits. Benefits payable under the Social Security Act and Medicare are not considered payments from collateral sources except for Social Security disability benefits directly attributable to the medical injury in question;

(2) Any contract or agreement of any group, organization, partnership or corporation to provide, pay for or reimburse the cost of medical, hospital, dental, nursing, rehabilitation, therapy or other health care services or provide similar benefits, but excluding any amount that a group, organization, partnership, corporation or health care provider agrees to reduce, discount or write off of a medical bill;

(3) Any group accident, sickness or income disability insurance, any casualty or property insurance, including automobile and homeowners' insurance, which provides medical benefits, income replacement or disability coverage, or any other similar insurance benefits, except life insurance, to the extent that someone other than the insured, including the insured's employer, has paid all or part of the premium or made an economic contribution on behalf of the plaintiff; or

(4) Any contractual or voluntary wage continuation plan provided by an employer or otherwise or any other system intended to provide wages during a period of disability.

(c) "Consumer Price Index" means the most recent Consumer Price Index for All Consumers published by the United States Department of Labor.

(d) "Emergency condition" means any acute traumatic injury or acute medical condition which, according to standardized criteria for triage, involves a significant risk of death or the precipitation of significant complications or disabilities, impairment of bodily functions or, with respect to a pregnant woman, a significant risk to the health of the unborn child.

(e) "Health care" means:

(1) Any act, service or treatment provided under, pursuant to or in the furtherance of a physician's plan of care, a health care facility's plan of care, medical diagnosis or treatment;

(2) Any act, service or treatment performed or furnished, or which should have been performed or furnished, by any health care provider or person supervised by or acting under the direction of a health care provider or licensed professional for, to or on behalf of a patient during the patient's medical care, treatment or confinement, including, but not limited to, staffing, medical transport, custodial care or basic care, infection control, positioning, hydration, nutrition and similar patient services; and

(3) The process employed by health care providers and health care facilities for the appointment, employment, contracting, credentialing, privileging and supervision of health care providers.

(f) "Health care facility" means any clinic, hospital, pharmacy, nursing home, assisted living facility, residential care community, end-stage renal disease facility, home health agency, child welfare agency, group residential facility, behavioral health care facility or comprehensive community mental health center, intellectual/developmental disability center or program, or other ambulatory health care facility, in and licensed, regulated or certified by the State of West Virginia under state or federal law and any state-operated institution or clinic providing health care and any related entity to the health care facility.

(g) "Health care provider" means a person, partnership, corporation, professional limited liability company, health care facility, entity or institution licensed by, or certified in, this state or another state, to provide health care or professional health care services, including, but not limited to, a physician, osteopathic physician, physician assistant, advanced practice registered nurse, hospital, health care facility, dentist, registered or licensed practical nurse, optometrist, podiatrist, chiropractor, physical therapist, speech-language pathologist and audiologist, occupational therapist, psychologist, pharmacist, technician, certified nursing assistant, emergency medical service personnel, emergency medical services authority or agency, any person supervised by or acting under the direction of a licensed professional, any person taking actions or providing service or treatment pursuant to or in furtherance of a physician's plan of care, a health care facility's plan of care, medical diagnosis or treatment; or an officer, employee or agent of a health care provider acting in the course and scope of the officer's, employee's or agent's employment.

(h) "Medical injury" means injury or death to a patient arising or resulting from the rendering of or failure to render health care.

(i) "Medical professional liability" means any liability for damages resulting from the death or injury of a person for any tort or breach of contract based on health care services rendered, or which should have been rendered, by a health care provider or health care facility to a patient. It also means other claims that may be contemporaneous to or related to the alleged tort or breach of contract or otherwise provided, all in the context of rendering health care services.

(j) "Medical professional liability insurance" means a contract of insurance or any actuarially sound self-funding program that pays for the legal liability of a health care facility or health care provider arising from a claim of medical professional liability. In order to qualify as medical professional liability insurance for purposes of this article, a self-funding program for an individual physician must meet the requirements and minimum standards set forth in section twelve of this article.

(k) "Noneconomic loss" means losses, including, but not limited to, pain, suffering, mental anguish and grief.

(l) "Patient" means a natural person who receives or should have received health care from a licensed health care provider under a contract, expressed or implied.

(m) "Plaintiff" means a patient or representative of a patient who brings an action for medical professional liability under this article.

(n) "Related entity" means any corporation, foundation, partnership, joint venture, professional limited liability company, limited liability company, trust, affiliate or other entity under common control or ownership, whether directly or indirectly, partially or completely, legally, beneficially or constructively, with a health care provider or health care

facility; or which owns directly, indirectly, beneficially or constructively any part of a health care provider or health care facility.

(o) "Representative" means the spouse, parent, guardian, trustee, attorney or other legal agent of another.

§55-7B-7. Testimony of expert witness on standard of care.

(a) The applicable standard of care and a defendant's failure to meet the standard of care, if at issue, shall be established in medical professional liability cases by the plaintiff by testimony of one or more knowledgeable, competent expert witnesses if required by the court. A proposed expert witness may only be found competent to testify if the foundation for his or her testimony is first laid establishing that: (1) The opinion is actually held by the expert witness; (2) the opinion can be testified to with reasonable medical probability; (3) the expert witness possesses professional knowledge and expertise coupled with knowledge of the applicable standard of care to which his or her expert opinion testimony is addressed; (4) the expert witness's opinion is grounded on scientifically valid peer-reviewed studies if available; (5) the expert witness maintains a current license to practice medicine with the appropriate licensing authority of any state of the United States: *Provided,* That the expert witness's license has not been revoked or suspended in the past year in any state; and (6) the expert witness is engaged or qualified in a medical field in which the practitioner has experience and/or training in diagnosing or treating injuries or conditions similar to those of the patient. If the witness meets all of these qualifications and devoted, at the time of the medical injury, sixty percent of his or her professional time annually to the active clinical practice in his or her medical field or specialty, or to teaching in his or her medical field or speciality in an accredited

university, there shall be a rebuttable presumption that the witness is qualified as an expert. The parties shall have the opportunity to impeach any witness's qualifications as an expert. Financial records of an expert witness are not discoverable or relevant to prove the amount of time the expert witness spends in active practice or teaching in his or her medical field unless good cause can be shown to the court.

(b) Nothing contained in this section limits a trial court's discretion to determine the competency or lack of competency of a witness on a ground not specifically enumerated in this section.

§55-7B-7a. Admissibility and use of certain information.

(a) In an action brought, there is a rebuttable presumption that the following information may not be introduced unless it applies specifically to the injured person or it involves substantially similar conduct that occurred within one year of the particular incident involved:

(1) A state or federal survey, audit, review or other report of a health care provider or health care facility;

(2) Disciplinary actions against a health care provider's license, registration or certification;

(3) An accreditation report of a health care provider or health care facility; and

(4) An assessment of a civil or criminal penalty.

(b) In any action brought, if the health care facility or health care provider demonstrates compliance with the minimum staffing requirements under state law, the health

care facility or health care provider is entitled to a rebuttable presumption that appropriate staffing was provided.

(c) Information under this section may only be introduced in a proceeding if it is otherwise admissible under the West Virginia Rules of Evidence.

§55-7B-8. Limit on liability for noneconomic loss.

(a) In any professional liability action brought against a health care provider pursuant to this article, the maximum amount recoverable as compensatory damages for noneconomic loss may not exceed $250,000 for each occurrence, regardless of the number of plaintiffs or the number of defendants or, in the case of wrongful death, regardless of the number of distributees, except as provided in subsection (b) of this section.

(b) The plaintiff may recover compensatory damages for noneconomic loss in excess of the limitation described in subsection (a) of this section, but not in excess of $500,000 for each occurrence, regardless of the number of plaintiffs or the number of defendants or, in the case of wrongful death, regardless of the number of distributees, where the damages for noneconomic losses suffered by the plaintiff were for: (1) Wrongful death; (2) permanent and substantial physical deformity, loss of use of a limb or loss of a bodily organ system; or (3) permanent physical or mental functional injury that permanently prevents the injured person from being able to independently care for himself or herself and perform life-sustaining activities.

(c) On January 1, 2004, and in each year thereafter, the limitation for compensatory damages contained in subsections (a) and (b) of this section shall increase to account for inflation by an amount equal to the Consumer

Price Index published by the United States Department of Labor, not to exceed one hundred fifty percent of the amounts specified in said subsections.

(d) The limitations on noneconomic damages contained in subsections (a), (b), (c) and (e) of this section are not available to any defendant in an action pursuant to this article which does not have medical professional liability insurance in the aggregate amount of at least $1 million for each occurrence covering the medical injury which is the subject of the action.

(e) If subsection (a) or (b) of this section, as enacted during the 2003 regular session of the Legislature, or the application thereof to any person or circumstance, is found by a court of law to be unconstitutional or otherwise invalid, the maximum amount recoverable as damages for noneconomic loss in a professional liability action brought against a health care provider under this article shall thereafter not exceed $1 million.

§55-7B-9. Several liability.

(a) In the trial of a medical professional liability action under this article involving multiple defendants, the trier of fact shall report its findings on a form provided by the court which contains each of the possible verdicts as determined by the court. Unless otherwise agreed by all the parties to the action, the jury shall be instructed to answer special interrogatories, or the court, acting without a jury, shall make findings as to:

(1) The total amount of compensatory damages recoverable by the plaintiff;

(2) The portion of the damages that represents damages for noneconomic loss;

(3) The portion of the damages that represents damages for each category of economic loss;

(4) The percentage of fault, if any, attributable to each plaintiff; and

(5) The percentage of fault, if any, attributable to each of the defendants.

(b) In assessing percentages of fault, the trier of fact shall consider only the fault of the parties in the litigation at the time the verdict is rendered and may not consider the fault of any other person who has settled a claim with the plaintiff arising out of the same medical injury: *Provided,* That, upon the creation of the Patient Injury Compensation Fund provided for in article twelve-c, chapter twenty-nine of this code, or of some other mechanism for compensating a plaintiff for any amount of economic damages awarded by the trier of fact which the plaintiff has been unable to collect, the trier of fact shall, in assessing percentages of fault, consider the fault of all alleged parties, including the fault of any person who has settled a claim with the plaintiff arising out of the same medical injury.

(c) If the trier of fact renders a verdict for the plaintiff, the court shall enter judgment of several, but not joint, liability against each defendant in accordance with the percentage of fault attributed to the defendant by the trier of fact.

(d) To determine the amount of judgment to be entered against each defendant, the court shall first, after adjusting the verdict as provided in section nine-a of this article, reduce the adjusted verdict by the amount of any preverdict settlement arising out of the same medical injury. The court shall then, with regard to each defendant, multiply the total amount of damages remaining, with interest, by the

percentage of fault attributed to each defendant by the trier of fact. The resulting amount of damages, together with any post-judgment interest accrued, shall be the maximum recoverable against the defendant.

(e) Upon the creation of the Patient Injury Compensation Fund provided for in article twelve-c, chapter twenty-nine of this code, or of some other mechanism for compensating a plaintiff for any amount of economic damages awarded by the trier of fact which the plaintiff has been unable to collect, the court shall, in determining the amount of judgment to be entered against each defendant, first multiply the total amount of damages, with interest, recoverable by the plaintiff by the percentage of each defendant's fault and that amount, together with any post-judgment interest accrued, is the maximum recoverable against said defendant. Prior to the court's entry of the final judgment order as to each defendant against whom a verdict was rendered, the court shall reduce the total jury verdict by any amounts received by a plaintiff in settlement of the action. When any defendant's percentage of the verdict exceeds the remaining amounts due the plaintiff after the mandatory reductions, each defendant shall be liable only for the defendant's pro rata share of the remainder of the verdict as calculated by the court from the remaining defendants to the action. The plaintiff's total award may never exceed the jury's verdict less any statutory or court-ordered reductions.

(f) Nothing in this section is meant to eliminate or diminish any defenses or immunities which exist as of the effective date of this section, except as expressly noted in this section.

(g) Nothing in this article is meant to preclude a health care provider from being held responsible for the portion of fault attributed by the trier of fact to any person acting as the health care provider's agent or servant or to preclude

imposition of fault otherwise imputable or attributable to the health care provider under claims of vicarious liability. A health care provider may not be held vicariously liable for the acts of a nonemployee pursuant to a theory of ostensible agency unless the alleged agent does not maintain professional liability insurance covering the medical injury which is the subject of the action in the aggregate amount of at least $1 million for each occurrence.

§55-7B-9a. Reduction in compensatory damages for economic losses for payments from collateral sources for the same injury.

(a) In any action arising after the effective date of this section, a defendant who has been found liable to the plaintiff for damages for medical care, rehabilitation services, lost earnings or other economic losses may present to the court, after the trier of fact has rendered a verdict, but before entry of judgment, evidence of payments the plaintiff has received for the same injury from collateral sources.

(b) In a hearing held pursuant to subsection (a) of this section, the defendant may present evidence of future payments from collateral sources if the court determines that:

(1) There is a preexisting contractual or statutory obligation on the collateral source to pay the benefits;

(2) The benefits, to a reasonable degree of certainty, will be paid to the plaintiff for expenses the trier of fact has determined the plaintiff will incur in the future; and

(3) The amount of the future expenses is readily reducible to a sum certain.

(c) In a hearing held pursuant to subsection (a) of this section, the plaintiff may present evidence of the value of

payments or contributions he or she has made to secure the right to the benefits paid by the collateral source.

(d) After hearing the evidence presented by the parties, the court shall make the following findings of fact:

(1) The total amount of damages for economic loss found by the trier of fact;

(2) The total amount of damages for each category of economic loss found by the trier of fact;

(3) The total amount of allowable collateral source payments received or to be received by the plaintiff for the medical injury which was the subject of the verdict in each category of economic loss; and

(4) The total amount of any premiums or contributions paid by the plaintiff in exchange for the collateral source payments in each category of economic loss found by the trier of fact.

(e) The court shall subtract the total premiums the plaintiff was found to have paid in each category of economic loss from the total collateral source benefits the plaintiff received with regard to that category of economic loss to arrive at the net amount of collateral source payments.

(f) The court shall then subtract the net amount of collateral source payments received or to be received by the plaintiff in each category of economic loss from the total amount of damages awarded the plaintiff by the trier of fact for that category of economic loss to arrive at the adjusted verdict.

(g) The court may not reduce the verdict rendered by the trier of fact in any category of economic loss to reflect:

(1) Amounts paid to or on behalf of the plaintiff which the collateral source has a right to recover from the plaintiff through subrogation, lien or reimbursement;

(2) Amounts in excess of benefits actually paid or to be paid on behalf of the plaintiff by a collateral source in a category of economic loss;

(3) The proceeds of any individual disability or income replacement insurance paid for entirely by the plaintiff;

(4) The assets of the plaintiff or the members of the plaintiff's immediate family; or

(5) A settlement between the plaintiff and another tortfeasor.

(h) After determining the amount of the adjusted verdict, the court shall enter judgment in accordance with the provisions of section nine of this article.

§55-7B-9c. Limit on liability for treatment of emergency conditions for which patient is admitted to a designated trauma center; exceptions; emergency rules.

(a) In any action brought under this article for injury to or death of a patient as a result of health care services or assistance rendered in good faith and necessitated by an emergency condition for which the patient enters a health care facility designated by the Office of Emergency Medical Services as a trauma center, including health care services or assistance rendered in good faith by a licensed emergency medical services authority or agency, certified emergency medical service personnel or an employee of a licensed emergency medical services authority or agency, the total amount of civil damages recoverable may not exceed

DEFENSE TRIAL COUNSEL of WEST VIRGINIA
Voice of The Civil Defense Bar

Bowles Rice

Medical Professional Liability Act Reform – S.B. 6

The West Virginia State Bar Annual Meeting
April 18, 2015

Charles F. Printz, Jr.

President, Defense Trial Counsel of West Virginia

Partner, Bowles Rice LLP

Background

- Medical tort reform 4.0
- What's the crisis now?
  - *Phillips v. Larry's Drive-In Pharmacy*
  - *Riggs v. WVU Hospitals*
  - *Manor Care v. Douglas*

The Big Changes - Enlarging the Umbrella

- Redefined Terms:
  - Healthcare
  - Healthcare Facility
  - Healthcare Provider
- New Terms:
  - Related Entity

Collateral Sources Applied Against Past Medical Expenses

- *Kenney v. Liston*, 233 W.Va. 620 (2014) (no offsets, write offs, adjustments, discounts, etc. allowed under collateral source rule)
- New statute allows past medicals to be limited to those expenses actually paid or based upon obligation to pay

§55-7B-2(n)

Certain Information Not Admissible

- Rebuttable presumption that certain information is not admissible, e.g., audits, disciplinary actions, accreditation reports, civil/criminal penalties.
- Rebuttable presumption that a healthcare facility or provider has "appropriate staffing" if it meets "minimum staffing requirements under state law."
- Information may be admissible if it:
  - Applies to the injured person; or
  - Involves substantially similar conduct within one year of the particular incident; and
  - It is otherwise admissible under West Virginia Rules of Evidence
- Separation of powers concerns

§55-7B-7(a)

MPLA Tweaks

- Protecting constitutionality
- Anti-stacking; one cap
- Adding to expert competency standard
- Changing “shall not” to “may not”

QUESTIONS?

Thank You

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I've Read the New Rules of Professional Conduct – Now What?

1. Some things never change
    a. A review and commentary on ODC Statistics 2012 – 2014
    b. Lawyer Disciplinary Board Annual Reports 2012-2014
    c. Summary

2. The times they are a'changing
    a. Informed Consent confirmed in writing
    b. Engagement/Declination/Disengagement/Closing forms/examples
    c. Ghostwriting
    d. Metadata

3. Reminders
    a. Don't ignore ODC
    b. Succession Plans
    c. LAPS

4. References/Sources

WV State Bar

Lawyer Disciplinary Board

Statistics

(Pulled from 2012 – 2014)

Types of Cases Giving Rise to the Filing of Disciplinary Complaints[1]:

Type of Case	2014	2013	2012
Criminal	26%	20%	23%
Miscellaneous	15%	20%	18%
Domestic	12%	17%	12%
Personal Injury	9%	6%	6%
Real Estate	8%	5%	6%
Prosecutor	7%	7%	8%
Estate	5%	5%	5%
Habeas	4%	5%	7%
Conviction	3%	5%	2%
Office Procedures	2%	3%	1%
Contract	2%	< 1%	1%
Business	1%	1%	2%
Abuse & Neglect	1%	2%	2%
Bankruptcy	1%	< 1%	2%
Compensation	1%	1%	1%
Employment	1%	< 1%	1%
Impairment	< 1%	< 1%	< 1%
Reinstatement	< 1%	< 1%	< 1%
Reciprocal	< 1%	---	< 1%

[1] Information pulled from ODC Annual Reports for 2012, 2013, 2014.

Types of Complaints Where Investigative Panel Issued Admonishments to Lawyers[1]

Type of Complaint	2014	2013	2012
Failure to Communicate	**25%**	**30%**	**27%**
Lying or not responding to ODC	**18%**	**7%**	**8%**
Lack of diligence	**16%**	**20%**	**16%**
Unlawful practice	7%	3%	--
Fairness to Opposing Party	3%	6%	6%
Conflicts of interest	3%	2%	12%
Withdrawal problems	3%	2%	2%
Lack of candor to the tribunal	3%	1%	--
Lawyers committing a crime	3%	1%	4%
Dishonesty/lack of truthfulness	3%	1%	4%
Trust account violations	2%	2%	4%
Delaying litigation	2%	2%	--
Competence	2%	2%	2%
Frivolous litigation	2%	--	--
Independence of lawyers	2%	--	--
Prejudice to the administration of justice	2%	6%	6%
Ex parte/improper contact with judge/juror	2%	--	--
Fees	--	7%	6%
Trial publicity	--	2%	--
Communication with represented party	--	2%	--
Assisting others to violate ethics rules	--	2%	--
Confidentiality			2%
Failure to Supervise non-lawyers			2%

Types of Complaints Where Lawyers Disciplined by Supreme Court of Appeals of West Virginia [1]

Type of Complaint	2014	2013	2012
Trust Account Violations	19%	5%	7%
Dishonesty/Lack of Truthfulness	16%	8%	6%
Prejudice to the Administration of Justice	15%	10%	5%
Failure to Communicate	14%	22%	30%
Lack of diligence	7%	11%	15%
Conflicts of Interest	7%	--	< 1%
Lying or Not Responding to the Bar/ODC	5%	8%	13%
Lack of Candor before the Tribunal	4%	3%	--
Competence	3%	2%	4%
Fairness to opposing party/counsel	3%	10%	--
Prosecutorial Misconduct	3%	--	--
Communicating with Represented party	1%	--	--
Advertising/Solicitations	1%	--	--
Assisting others to violate ethics rules	1%	--	--
Withdrawal Problems (Files; refunds)	--	8%	--
Lawyer committing a crime	--	5%	3%
Delaying litigation	--	3%	2%
Failure to supervise non-lawyers	--	3%	--
Fees	--	2%	< 1%
Failure to abide by client objectives	--	--	1%
Frivolous litigation	--	--	< 1%
Fairness to Opposing Party/Counsel	--	--	< 1%

Types of Complaints Filed [1] - which will the new rules likely NOT affect?

Type of Complaint	2014	2013	2012
Failure to Communicate	392	362	337
No violation alleged	290	187	243
Lack of diligence	220	180	196
Prejudice to the Administration of Justice	123	97	82
Failure to abide by Client's objectives	110	137	116
Dishonesty/Lack of truthfulness	105	--	77
Trust Account Violations	69	53	36
Conflicts of Interest	63	40	56
Delaying litigation	56	42	40
Fees	44	29	35
Competence	40	37	34
Withdrawal Problems (Files; refunds)	39	48	54
Lack of candor before the tribunal	26	16	13
Lawyer committing a crime	18	23	22
Failure to respect rights of 3rd persons	17	15	20
Assisting others to violate ethics rules	16	10	17
Assist Judge in unethical conduct	--	3	1
Confidentiality	13	7	11
Fairness to opposing party/counsel	12	13	18
Prosecutorial misconduct	8	9	6
Failure to supervise non-lawyers	6	7	2
Advertising/Solicitation	6	3	8
Unlawful Practice	5	8	5
Misleading unrepresented party	4	3	6
Trial publicity	3	2	3
Ex parte/improper contact with judge/juror	2	5	
Independence of Lawyers	2	6	2

Types of Complaints Filed [1] - which will the new rules likely NOT affect?

Type of Complaint	2014	2013	2012
Communicating with represented party	2	4	2
Sexual contact with client	1	1	3
Frivolous litigation	1	9	8
Failure to Report unethical conduct	--	5	--
Lying or not responding to ODC	--	1	--
Implying influence over government	--	--	1

Types of Complaints Filed [1] - which could the New Rules directly effect?

Type of Complaint	2014	2013	2012
Failure to Communicate	392	362	337
No violation alleged	290	187	243
Lack of diligence	220	180	196
Prejudice to the Administration of Justice	123	97	82
Failure to abide by Client's objectives	110	137	116
Dishonesty/Lack of truthfulness	105	--	77
Trust Account Violations	69	53	36
Conflicts of Interest	63	40	56
Delaying litigation	56	42	40
Fees	44	29	35
Competence	40	37	34
Withdrawal Problems (Files; refunds)	39	48	54
Lack of candor before the tribunal	26	16	13
Lawyer committing a crime	18	23	22
Failure to respect rights of 3rd persons	17	15	20
Assisting others to violate ethics rules	16	10	17
Assist Judge in unethical conduct	--	3	1
Confidentiality	13	7	11
Fairness to opposing party/counsel	12	13	18
Prosecutorial misconduct	8	9	6
Failure to supervise non-lawyers	6	7	2
Advertising/Solicitation	6	3	8
Unlawful Practice	5	8	5
Misleading unrepresented party	4	3	6
Trial publicity	3	2	3
Ex parte/improper contact with judge/juror	2	5	
Independence of Lawyers	2	6	2

Types of Complaints Filed [1] - which could the New Rules directly effect?

Type of Complaint	2014	2013	2012
Communicating with represented party	2	4	2
Sexual contact with client	1	1	3
Frivolous litigation	1	9	8
Failure to Report unethical conduct	--	5	--
Lying or not responding to ODC	--	1	--
Implying influence over government	--	--	1

ANNUAL REPORTS OF THE

WEST VIRGINIA STATE BAR

LAWYER DISCIPLINARY BOARD

2014

2013

2012

ANNUAL REPORT OF THE LAWYER DISCIPLINARY BOARD 2014

Pursuant to Rule 1.11 of the Rules of Lawyer Disciplinary Procedure, the Lawyer Disciplinary Board submits this Annual Report on the operation of the lawyer disciplinary system.

Introduction

The Lawyer Disciplinary Board is the governing body for the Office of Disciplinary Counsel. The Board consists of twenty-two (22) members, fifteen (15) are lawyers and seven (7) are lay persons, and are all volunteers appointed to serve by the West Virginia State Bar Board of Governors. The Lawyer Disciplinary Board meets to consider and issue formal ethics opinions, render informal advisory opinions, establish policies, and address other issues it deems appropriate which relate to lawyer discipline. The members are appointed on July 1 to a three (3) year term, and each member may serve two terms. There were no new members appointed in 2014.

The Board is divided into an Investigative Panel comprised of five (5) lawyers and two (2) laymembers; and a Hearing Panel comprised of ten (10) lawyers and five (5) lay members. The Investigative Panel reviews complaints and determines whether probable cause exists to formally charge a lawyer with a violation of the Rules of Professional Conduct. When formal charges are issued, the Chair of the Hearing Panel appoints a three (3) member subcommittee (two (2) lawyers and one (1) layperson) from the Hearing Panel to conduct evidentiary hearings and make a recommended disposition to the Supreme Court of Appeals of West Virginia. The Hearing Panel Subcommittee also conducts hearings for reciprocal disciplinary proceedings, mitigation hearings, and reinstatement petitions.

The Office of Disciplinary Counsel serves as the prosecuting authority for violations of the Rules of Professional Conduct. Disciplinary Counsel provide informal ethics advice to all members of the West Virginia State Bar. Such informal advice may be obtained, without charge to the requesting party, by calling the Office of Disciplinary Counsel during business hours at (304) 558-7999, or by submitting a written request addressed to the Office of Disciplinary Counsel, City Center East, Suite 1200 C., 4700 MacCorkle Avenue, S.E., Charleston, West Virginia 25304.

Lawyer Disciplinary Board Activity

The full Board met three (3) times from January 1, 2014 through December 31, 2014. The Board considered two (2) requests for formal ethics opinions pursuant to Rule 2.16 of the Rules of Lawyer Disciplinary Procedure. There was one formal Legal Ethics Opinion issued in 2014.

The Investigative Panel met four (4) times from January 1, 2014 through December 31, 2014. It issued twenty-six (26) investigative panel admonishments and fourteen (14) Statements of Charges against attorneys.

Hearing Panel Subcommittees presided over ten (10) evidentiary hearings on formal charges; one (1) hearing on a reciprocal case; and two (2) reinstatement hearings.

Statistics

During the 2014 calendar year, the Office of Disciplinary Counsel received seven hundred and twenty (720) new formal complaints against West Virginia lawyers.

Disciplinary Counsel addressed and concluded seven hundred and one (701) formal complaints. Of those 701 dispositions: two hundred and seventy-nine (279) were closed by ODC without an investigation; two hundred and sixty-two (262) were closed by the Chief Lawyer after an investigation by ODC; including, the admonishments listed above, the Investigative Panel closed one hundred and eighteen (118) complaints after an investigation by ODC; and the Supreme Court of Appeals of West Virginia issued a total of thirty-one (31) decisions which encompassed forty-two (42) complaints.

In addition to the cases that resulted in disciplinary action, ODC filed one (1) petition seeking the immediate suspension of an attorney pursuant to Rule 3.27, the case was dismissed as moot based upon a disqualification order issued by the Circuit Court. At the end of 2014, there were two additional 3.27 petitions pending at the Court.

By motion of the ODC, the Court dismissed a Statement of Charges with two (2) complaints on attorney based upon the death of the attorney; dismissed a Statement of Charges with five (5) complaints after the attorney was disbarred by earlier disciplinary decision of the Court; dismissed a pending Statement of Charges with one (1) complaint after the attorney consented to disbarment; and dismissed another pending Statement of Charges with one (1) complaint after the attorney consented to disbarment.

The Court granted two (2) petitions seeking the appointment of a trustee pursuant to Rule 3.29 after the death of an attorney, disability or abandonment by lawyers. At the end of 2014,

there was one 3.29 petition that was pending before the Court.

The Court granted three (3) petitions filed by lawyers seeking voluntary resignation.

The Court granted one (1) petition filed by a lawyer seeking reinstatement to the practice of law from suspension and also denied one (1) petition seeking reinstatement after disbarment.

The Court also issued two (2) decisions in which the ODC and its Lawyer Disciplinary Board were the subject of a petition for *writ* of *prohibition* and a petition for *writ* of *mandamus,* both were denied.

Further, the Supreme Court of Appeals issued two (2) disbarment decisions pursuant to Rule 3.25 of the Rules of Lawyer Disciplinary Procedure, wherein 2 lawyers [2 complaints] who were the subject of pending disciplinary proceedings tendered a sealed affidavit to the Court stating his/her voluntary consent to disbarment. There are no specific findings of rule violations in these matters.

Finally, the Court dismissed one (1) disciplinary matter with a finding that no violation occurred.

Of the types of cases giving rise to the filing of ethics complaints in 2014, criminal law generated the highest number of ethics complaints filed, which represented 26% of the total number of complaints filed.

The Office of Disciplinary Counsel received and addressed six hundred and fifty-nine (659) requests for informal advice from attorneys across the State during the year. Attorneys are encouraged to call the office for informal advice before they act in any matter with unclear ethical implications.

ODC also handled fifty-two (52) matters on an informal basis. Informal complaints generally involve communication issues or the return of the client's file.

Special Counsel Cases

Pursuant to the Rules of Judicial Disciplinary Procedure, the Chief Lawyer Disciplinary Counsel also serves as special judicial counsel when counsel for the Judicial Investigation Commission has a conflict of interest. From January 1, 2014, to December 31, 2014, she completed investigations for 31 judicial complaints. Of those 31 complaints, 29 were closed, including a disciplinary proceeding which resulted in disciplinary action against a judicial officer by the Supreme Court. *See* In re Wilfong, 765 S.E. 2d 283 (WV 10/30/2014).

Personnel

The Chief Lawyer Disciplinary Counsel, as well as other Disciplinary Counsel, made thirty-two (32) continuing legal education presentations for various entities during the year. This included a series of seminars taught by the Chief Counsel throughout the State regarding the amendments to the Rules of Professional Conduct, which became effective on January 1, 2015.

Budget and Operations

The Lawyer Disciplinary Board/Office of Disciplinary Counsel's budget was set at one million, one hundred forty-six thousand, eight hundred seventy-six dollars and thirty cents ($1,146,876.30) for the 2013-2014 fiscal year. This figure includes all expenses incurred by the Board and the Office of Disciplinary Counsel, and for trustees appointed pursuant to petitions filed by ODC. The Office of Disciplinary Counsel staff is comprised of five attorneys, four legal assistants and a full-time clerk/receptionist.

The Office of Disciplinary Counsel collected twenty-two thousand, two hundred thirty-seven dollars and fifty-six cents ($22,237.56) in costs from attorneys who had costs assessed in disciplinary proceedings.

List of Disciplinary Cases Decided by the Court

The following is a list of the hearing cases decided by the Supreme Court, with a short summary of each case.

Office of Disciplinary Counsel v. Desiree Lynette Garnes, 14-0004 (WV 1/8/14): Pursuant to a Petition filed by the Office of Disciplinary Counsel under Rule 3.29 of the Rules of Lawyer Disciplinary Procedure after learning of Respondent's death, the Supreme Court of Appeals of West Virginia ordered that the Chief Judge of Cabell County, West Virginia appoint a trustee to inventory Respondent's files and protect the interests of her clients.

Lawyer Disciplinary Board v. Harold S. Albertson, No. 12-1225 (WV 1/8/14): Pursuant to the recommendation made by the Hearing Panel Subcommittee, the Supreme Court of Appeals of West Virginia ordered that Respondent's license to practice law be annulled. Respondent was also ordered to pay restitution in the amount of $500.00 to Mr. Cosby and to pay the costs of the disciplinary proceeding.

Office of Disciplinary Counsel v. Harold S. Albertson, No. 13-1165 (WV 1/8/14): The Supreme Court dismissed as moot Disciplinary Counsel's petition filed pursuant to Rule 3.27 of the Rules of Lawyer Disciplinary Procedure because Respondent's law license was annulled in Supreme Court Docket No. 12-1225.

Lawyer Disciplinary Board v. Richard T. Busch, No. 12-0174 (WV 3/7/14): On March 7, 2014, the Supreme Court of Appeals of West Virginia issued a Mandate Order which suspended Respondent Richard T. Busch's license to practice law in the State of West Virginia for three (3) years. The Court further ordered that prior to being reinstated to the practice of law 1) Respondent be evaluated by a licensed mental health provider and follow any protocol set forth; 2) that Respondent complete an additional twelve (12)

hours of Continuing Legal Education with a focus in ethics; 3) Respondent reimburse the Lawyer Disciplinary Board pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure. The Court Ordered that should Respondent be reinstated to the practice of law, that he be placed on two (2) years of probation with supervised practice by an active attorney in his geographic area in good standing with the West Virginia State Bar.

Lawyer Disciplinary Board v. Donna M. Price, No. 11-1345 (WV 3/25/14): Pursuant to the recommendation of the Hearing Panel Subcommittee, based on a finding that Respondent violated Rules 1.1 and 1.3 of the Rules of Professional Conduct, the Supreme Court ordered that Respondent: (1) be reprimanded for her conduct; (2) undergo supervised practice for three years; (3) during the three years of supervised practice, Respondent shall complete an additional 9 hours of CLE per year in the areas of ethics, office management, civil or criminal procedure and the substantive areas in which she practices law; and (4) pay the costs of the disciplinary proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

Lawyer Disciplinary Board v. Harold S. Albertson, No. 13-1135 (WV 4/2/14): Based on the recommendation made by the Hearing Panel Subcommittee, because Respondent's license to practice law was annulled in No. 12-1225 on January 8, 2014, the Supreme Court of Appeals dismissed this matter without prejudice. The Court further ordered that, should Respondent ever petition for reinstatement of his law license, that all issues contained in this matter may be prosecuted at that time.

Lawyer Disciplinary Board v. Ira M. Haught, No. 12-0528 (WV 4/29/14): Based upon a finding that Respondent violated Rules 1.15(a), 8.1(a), 8.4(c) and 8.4(d), the Supreme Court of Appeals ordered that Respondent's law license be suspended for one year. In addition, the Court also ordered as follows: (1) upon successful reinstatement to the practice of law Respondent's law practice shall be supervised for two years; (2) upon successful reinstatement to the practice of law Respondent shall compete an additional nine hours of CLE in ethics and office management; (3) upon successful reinstatement to the practice of law Respondent shall have his office account audited for two consecutive years in accordance with the specifications set forth by the Office of Disciplinary Counsel; and (4) Respondent shall pay the costs of the disciplinary proceeding in the amount of $2,404.72.

Lawyer Disciplinary Board v. Donna M. Price, No. 13-0478 (WV 5/27/14): Based on a finding that Respondent violated Rule 8.1(b) of the Rules of Professional Conduct, the Supreme Court ordered that Respondent: (1) be reprimanded for her conduct; (2) undergo three years of supervision to run concurrent with the supervised practice ordered in No. 11-1345; (3) complete an additional nine hours per year of CLE for three years, in addition to the CLE hours already required; and (4) shall pay ½ of the costs incurred in this disciplinary proceeding.

Lawyer Disciplinary Board v. Charles C. Amos, No. 13-0065 (*Opinion* 6/4/14) (7/7/14 - Mandate): The Supreme Court issued its *Per Curiam Opinion* ordering: (1) that Respondent's law license be suspended for 75 days with automatic reinstatement; (2) that Respondent cannot engage in abuse and neglect proceedings for one year; (3) that Respondent continue counseling with a mental health provider for a period of at least one year and provide proof of the same to ODC; and (4) that Respondent pay the costs of the disciplinary proceeding.

Lawyer Disciplinary Board v. George P. Stanton, No. 13-0138 (Opinion 6/5/14)(7/7/14 - Mandate): The Supreme Court issued hits *Per Curiam Opinion* ordering: (1) that Respondent's license to practice law shall be suspended for a period of three years; (2) Respondent shall comply with the duties for suspended lawyers set out in Rule 3.28 of the Rules of Lawyer Disciplinary Procedure; and (3) Respondent shall pay the costs of the disciplinary proceeding. The Mandate shall issue after thirty days.

Lawyer Disciplinary Board v. Joseph Tauber, No. 13-0481 (6/10/14): The Supreme Court of Appeals of West Virginia suspended the license to practice law of Respondent Joseph Tauber for a period of Thirty (30) days pursuant to Rule 3.20 of the Rules of Lawyer Disciplinary Procedure. In addition, due to the aggravating factor in this proceeding, it was further ordered that Respondent be required to seek reinstatement to the practice of law in West Virginia only through the procedure set forth in Rule 3.32 of the Rules of Lawyer Disciplinary Procedure. Respondent was also ordered to pay costs of the proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

Lawyer Disciplinary Board v. David B. Daugherty, No. 14-0572 (6/10/14): Pursuant to Rule 3.25 of the Rules of Lawyer Disciplinary, Respondent filed his voluntary consent to disbarment and, accordingly, the Supreme Court of Appeals of West Virginia ordered that Respondent's law license be annulled.

Lawyer Disciplinary Board v. David B. Daugherty, No. 14-0329 (6/17/14): Because Respondent's law license was annulled in Supreme Court No. 14-0572, this case was dismissed from the Court's docket.

Reinstatement Petition of L. Dante DiTrapano, No 12-0677 (6/18/14): The Supreme Court of Appeals of West Virginia denied Petitioner's Petition for Reinstatement and Ordered him to pay the costs of the proceedings pursuant to Rule 3.33(g) of the Rules of Lawyer Disciplinary Procedure.

Office of Disciplinary Counsel v. Richard K. Wehner, No. 14-0610 (6/25/14): Pursuant to a 3.29 Petition of the Rules of Lawyer Disciplinary Procedure filed following Mr. Wehner's death, the Supreme Court of Appeals of West Virginia authorized the Honorable Lawrence S. Miller, Jr., Chief Judge of the Preston County Circuit Court to appoint a trustee to inventory Mr. Wehner's files and take such action necessary to protect his clients.

Reinstatement Petition of Gregory G. Michael, No. 11-1069 (9/3/14): The Supreme Court of Appeals of West Virginia granted Petitioner's Petition for Reinstatement. The Court further Ordered that Petitioner be subject for probation for a period of two years and that 1) Petitioner employ Jane Reynolds as his office manager to assist him with his law license management during the two year period; 2) that Petitioner be supervised for a period of two years by an attorney in good standing with the West Virginia State Bar who actively practices in the 19th Judicial Circuit or Marion County; 3) that Petitioner shall limit his practice to court appointed work in the 19th Judicial Circuit during the probationary period; 4) that Petitioner shall participate as a volunteer and member of the Lawyers Assistance Program; 5) that Petitioner shall attend monthly counseling; 6) that Petitioner shall refrain from any and all alcohol consumption; and 7) that Petitioner shall pay the costs incurred during the reinstatement proceedings.

Lawyer Disciplinary Board v. Steven J. Conifer, No . 13-1316 and No. 14-0619 (9/3/14): Pursuant to Rule 3.25 of the Rules of Lawyer Disciplinary, Respondent filed his voluntary consent to disbarment and, accordingly, the Supreme Court of Appeals of West Virginia ordered that Respondent's law license be annulled and dismissed the formal Statement of Charges filed on or about December 30, 2013.

Lawyer Disciplinary Board v. Amanda M. Ream, No. 13-0492 (9/3/14): The Supreme Court of Appeals of West Virginia suspended Respondent Amanda M. Ream's license to practice law in the State of West Virginia for one year. The Court further ordered that Respondent be required to undergo an independent psychiatric evaluation and comply with any additional treatment protocol prior to petitioning for reinstatement; that after reinstatement to the practice of law, Respondent be placed on probation for one year; that Respondent's practice be supervised for a period of one year by an attorney agreed a upon between the Office of Disciplinary Counsel and Respondent; that Respondent be ordered to perform fifty (50) hours of community service during the one year of probation and supervised practice; that

Respondent complete an additional six (6) hours of Continuing Legal Education in ethics and office management; and that Respondent reimburse the costs of his disciplinary proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

Lawyer Disciplinary Board v. Richard W. Hollandsworth, No. 14-0022 (WV 9/18/14): Based on a finding that Respondent violated the following Rules of Professional Conduct: 1.3 - lack of diligence; 1.4(a) and 1.4(b) - failure to communicate; 3.2 - failure to expedite litigation; and 8.4(d) - conduct prejudicial to the administration of justice; the Supreme Court of Appeals of West Virginia ordered that: (1) Respondent be suspended from the practice of law for ninety days, beginning on 9/18/14, with automatic reinstatement of his law license pursuant to Rule 3.31 of the Rules of Lawyer Disciplinary Procedure; (2) that he shall complete an additional nine hours of continuing legal education during the current reporting period, specifically three hours in the area of ethics and office management, and six hours concerning the representation of clients in petitions for writ of habeas corpus; (3) upon reinstatement he shall be placed on one year of probation with supervised practice by an attorney in his geographic area, who is agreed upon by the Office of Disciplinary Counsel and respondent; and (4) respondent shall pay the costs of the disciplinary proceedings.

Lawyer Disciplinary Board v. Jeffrey S. Rodgers, No. 13-0721 (WV 10/15/14): Based on a finding that Respondent violated Rules 1.3, 1.4(a), 1.4(b), 1.15(a) and 1.15(b) of the Rules of Professional Conduct, the Supreme Court of Appeals of West Virginia ordered: (1) that Respondent be reprimanded; (2) that he issue a refund in the amount of $1,356.47 to the Complainant; (3) that he have a certified accountant audit his office accounts for two consecutive years; (4) that he complete an addition nine hours of CLE in the area of ethics and office management during his next reporting period; and (5) that he pay the costs of the disciplinary proceeding.

Lawyer Disciplinary Board v. Olen L. York, III, No. 12-1149 (WV 10/15/14): Based on finding Respondent violated Rules 1.15(a); 1.15(b); 1.15(c); 8.4(c); and 8.4(d) of the Rules of Professional Conduct, the Supreme Court of Appeals of West Virginia ordered that: (1) Respondent be prohibited from admission to the West Virginia State Bar for no less than one year; (2) Respondent be prohibited from appearing in any West Virginia state court for no less than one year; (3) should Respondent ever seek admission to the West Virginia State Bar in the future, that he be required to first take 12 hours in Continuing Legal Education with a focus on law office management and/or legal ethics; and (4) Respondent be ordered to pay the costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

Lawyer Disciplinary Board v. Benjamin F. White, No. 12-1172 (WV 10/30/14): Based on finding Respondent violated Rules 1.15(b) and 1.15(c) of the Rules of Professional Conduct, the Supreme Court of Appeals of West Virginia ordered that: (1) Respondent be reprimanded; (2) that he be ordered to take an additional six hours of Continuing Legal Education with a focus on law office management and ethics; and (3) that he be ordered to pay costs of the proceedings.

Lawyer Disciplinary Board v. Stephen L. Hall, No. 13-0180: Based on finding Respondent violated Rules 8.2(a) and 8.4(d), the Supreme Court of Appeals of West Virginia ordered that: (1) Respondent be suspended for a period of thirty days; (2) that he complete an additional three hours of Continuing Legal Education in the area of ethics; and (3) that Respondent pay the costs of the proceedings. (The mandate in this matter has not yet been entered.)

Lawyer Disciplinary Board v. Anthony F. Serreno, No. 14-0693 (WV 10/29/14) Based upon Respondent's death and a Motion filed by the Office of Disciplinary Counsel, the Supreme Court of Appeals of West Virginia dismissed the previously filed Statement of Charges against Respondent.

Lawyer Disciplinary board v. Anthony J. Partipilo, No. 13-0070 (WV 10/30/14) The Supreme Court of Appeals of West Virginia that: (1) Respondent be prohibited from practicing before any court in the State of West Virginia for a period of two years from the date of the order; (2) that he be prohibited from involving himself with or in any case now pending or which may hereafter be brought before any court in the State of West Virginia for a period of two years from the date of the order, whether on an advisory basis or otherwise; and (3) Respondent be prohibited from, either directly or through the services of third parties, engaging in or permitting his employees or agents to engage in the following conduct withing the state of West Virginia - (a) making false or misleading communications about a lawyer or his services; (b) providing anything of value to a person for recommending respondent's services; (c) soliciting for pecuniary gain, either in-person or by telephone or via any electronic transmission, professional employment from a prospective client with whom the respondent has no family or prior professional relationship; (d) soliciting professional employment for or on behalf of Respondent or his employees or agenda a desire not to be solicited or his solicitation involves coercion, duress or harassment; and (e) otherwise violating any of the West Virginia Rules of Professional Conduct. Respondent was also ordered to pay costs of the proceedings.

Resignation Petition of Mark M. Jones, No. 14-1011 (WV 10/30/14): The Supreme Court granted Mr. Jones's petition for resignation from the West Virginia State Bar.

Resignation Petition of Juan Oscar Rosello, No. 14-0657 (WV 10/30/14): The Supreme Court granted Mr. Rosello's petition for resignation from the West Virginia State Bar.

Resignation Petition of Carolyn Ann McLain, No. 14-0769 (WV 11/18/14): The Supreme Court granted Ms.McLain's petition for resignation from the West Virginia State Bar.

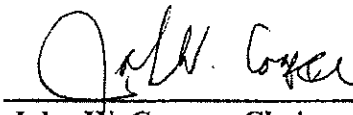
Lawyer Disciplinary Board v. John F. Hussell, IV, No. 13-0544 (WV 12/29/14): This case was dismissed by Supreme Court of Appeals of West Virginia.

Lawyer Disciplinary Board v. John C. Scotchel, No. 11-0728 (*Opinion* filed 11/25/14): Based upon a finding that Respondent violated Rules 1.5(a), 1.5(b), 1.15(b), 8.1(b), 8.4(c) and 8.4(d) of the Rules of Professional Conduct by collecting unreasonable fees, the Supreme Court of Appeals of West Virginia issued an Opinion which made a finding that Respondent's law license should be annulled, and that he also must pay the costs of the disciplinary proceeding.

Annual Report as Required by the Rules of Lawyer Disciplinary Procedure

The following statistical reports for 2014 are attached hereto: (1) Office of Disciplinary Counsel Statistics for Lawyer Discipline and Complaints; (2) Lawyer Disciplinary Board and Office of Disciplinary Counsel Annual Caseload Statistics; and (3) WV Office of Disciplinary Counsel Statistics for: 12/31/2104.

LAWYER DISCIPLINARY BOARD/
OFFICE OF DISCIPLINARY COUNSEL
Respectfully Submitted By:



John W. Cooper, Chairperson
Lawyer Disciplinary Board

OFFICE OF DISCIPLINARY COUNSEL STATISTICS FOR LAWYER DISCIPLINE AND COMPLAINTS: 2014

Number of **complaints** which resulted in **discipline** by Supreme Court of Appeals in 2014[1]:	[14 lawyers]	20 complaints
Lawyers disciplined by Supreme Court:	8	Solo practitioner
	2	Two lawyers in office
	0	Three lawyers in office
	4	Four or more lawyers in office
Length of practice of lawyers disciplined by Supreme Court:	0	Less than 5 years
	1	Between 5 and 10 years
	4	Between 10 and 15 years
	2	Between 15 and 20 years
	7	20 years or more

1

In 2014, ODC filed one (1) petition seeking the immediate suspension of an attorney pursuant to Rule 3.27, the case was dismissed as moot based upon a disqualification order issued by the Circuit Court.

By motion of the ODC, the Court: dismissed a Statement of Charges with two (2) complaints on attorney based upon the death of the attorney; dismissed a Statement of Charges with five (5) complaints after the attorney was disbarred by earlier disciplinary decision of the Court; dismissed a pending Statement of Charges with one (1) complaint after the attorney consented to disbarment; and dismissed another pending Statement of Charges with one (1) complaint after the attorney consented to disbarment.

The Court granted two (2) petitions seeking the appointment of a trustee pursuant to Rule 3.29 after the death of an attorney, disability or abandonment by lawyers.

The Court granted three (3) petitions filed by lawyers seeking voluntary resignation.

The Court granted one (1) petition filed by a lawyer seeking reinstatement to the practice of law from suspension and also denied one (1) petition seeking reinstatement after disbarment.

The Court also issued two (2) decisions in which the ODC and its Lawyer Disciplinary Board were the subject of a petition for *writ* of *prohibition* and a petition for *writ* of *mandamus*, both were denied.

Further, the Supreme Court of Appeals issued two (2) disbarment decisions pursuant to Rule 3.25 of the Rules of Lawyer Disciplinary Procedure, wherein 2 lawyers [2 complaints] who were the subject of pending disciplinary proceedings tendered a sealed affidavit to the Court stating his/her voluntary consent to disbarment. There are no specific findings of rule violations in these matters.

Finally, the Court dismissed one (1) disciplinary matter with a finding that no violation occurred.

Types of ethical violations committed in cases where lawyers were disciplined by the Supreme Court[2] (note: lawyers usually disciplined for more than one violation)

19%	Trust account violation
16%	Dishonesty/Lack of Truthfulness
15%	Prejudice to the Admin. of Justice
14%	Failure to communicate
7%	Lack of diligence
7%	Conflicts of Interest
5%	Lying or not responding to the Bar
4%	Lack of candor before the tribunal
3%	Competence
3%	Fairness to opposing party/counsel
3%	Prosecutorial Misconduct
1%	Communicating w/ represented party
1%	Advertising / Solicitation
1%	Assisting others to violate ethics rules

[2]Figures do not equal 100, due to rounding.

Number complaints where lawyers were issued Investigative Panel Admonishments in 2014:	26	
Type of conduct giving rise to these in cases where lawyers were disciplined Investigative Panel Admonishments[3] [lawyer may have been admonished for more than one rule violation]	25%	Failure to communicate
	18%	Lying or not responding to ODC
	16%	Lack of diligence
	7%	Unlawful practice
	3%	Fairness to opposing party
	3%	Conflicts of interest
	3%	Withdrawal problems
	3%	Lack of candor to tribunal
	3%	Lawyers committing a crime
	3%	Dishonesty/lack of truthfulness
	2%	Trust account violations
	2%	Delaying litigation
	2%	Competence
	2%	Frivolous litigation
	2%	Independence of lawyers
	2%	Prejudice to the administration of justice
	2%	Ex parte / Improper contact with judge/juror

[3]Figures do not equal 100, due to rounding.

Breakdown of disciplinary complaints FILED in 2014 (complaints usually have more than one violation alleged; includes merit-less complaints):

392	Failure to communicate
290	No violation alleged
220	Lack of diligence
123	Prejudice to the administration of justice
110	Failure to abide by client's objectives
105	Dishonesty / lack of truthfulness
69	Trust account violations
63	Conflicts of interest
56	Delaying litigation
44	Fees
40	Competence
39	Withdrawal problems (files; refunds)
26	Lack of candor before the tribunal
18	Lawyer Committing a Crime
17	Failure to respect rights of 3rd persons
16	Assisting others to violate ethics rules
13	Confidentiality
12	Fairness to opposing party/counsel
8	Prosecutorial misconduct
6	Failure to supervise non-lawyers
6	Advertising/Solicitation
5	Unlawful practice
4	Misleading unrepresented party
3	Trial publicity
2	Ex parte/improper contact w/ judge/juror
2	Independence of lawyers
2	Communicating w/ represented party
1	Sexual contact with Client
1	Frivolous litigation

Types of cases giving rise to the filing of disciplinary complaints:	26%	Criminal
	15%	Miscellaneous
	12%	Domestic
	9%	Personal Injury
	8%	Real Estate
	7%	Prosecutor
	5%	Estate
	4%	Habeas
	3%	Conviction
	2%	Office Procedures
	2%	Contract
	1%	Business
	1%	Abuse & Neglect
	1%	Bankruptcy
	1%	Compensation
	1%	Employment
	less than1%	Impairment
	less than1%	Reinstatement
	less than1%	Reciprocal

LAWYER DISCIPLINARY BOARD AND OFFICE OF DISCIPLINARY COUNSEL ANNUAL CASELOAD STATISTICS

2004-2014

Year	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
New complaints	663	587	653	577	618	555	517	596	665	602	720
Total # Complaints Closed	702	637	662	618	572	545	520	576	665	629	701
Complaints Closed by Investigative Panel	60	77	50	69	55	62	73	67	94	104	118
Complaints Closed by Chief Disciplinary	356	308	330	308	252	258	239	240	276	273	262
Complaints Not Docketed/ ODC Dismissed	248	220	235	204	221	186	187	213	237	201	279
Supreme Court Cases Decided [# of complaints]	16 [38]	20 [32]	25 [35]	26 [37]	26 [36]	17 [39] *	17 [21]	36 [55]	32 [56]	36 [51]	31 [42]
Hearing Panel Findings Issued [# of complaints]	8 [28]	14 [24]	14 [34]	15 [31]	13 [25]	5 [6] *	11 [24] **	18 [27]	10 [24]	19 [35]	19 [28]
Formal Ethics Opinions	1	2	1	1	0	2	1	0	1	2	1
Informal Ethics Advice	757	716	725	870	701	728	606	710	702	665	659
Informal Complaints	91	101	75	121	96	82	78	67	77	57	53
Costs Collected	$2,024.47	$2,802.33	$4,780.54	$5,244.83	$13,943.08	$6,173.09	$6,436.39	$19,404.17	$8,653.24	$17,097.07	$22,237.56

* There were 4 cases which encompassed 26 complaints before the Hearing Panels at various stages of the hearing process that ultimately lead to those 4 lawyers seeking voluntary disbarment in lieu of proceeding with the disciplinary hearing. The Supreme Court accepted those affidavits and issued decisions disbarring those 4 lawyers.

**There was 1 case which encompassed 2 complaints where the lawyer was in the midst of disciplinary proceedings and then filed for voluntary disbarment in lieu of proceeding with the disciplinary hearing. The Supreme Court accepted the affidavit and issued a decision disbarring the lawyer.

WV Office of Disciplinary Counsel Statistics for: 12-31-14

Total Number of Currently Active Complaints:	449
Complaints Currently Under Investigation:	373
Complaints Currently Awaiting Statement of Charges:	1
Complaints Pending a Hearing:	50
Complaints Awaiting Recommended Decision:	6
Complaints Before the Supreme Court:	19
Complaints Filed This Year:	720
Total Complaints Closed This Year:	701
ODC Closings:	279
CLDC Closings:	262
IP Closings:	118
SupCrt Closings:	42
Formal Charges Filed This Year:	71
Complaints Pending Less Than 6 Months:	231
Complaints Pending More Than 6 Months And Less Than 12 Months:	131
Complaints Pending More Than 12 Months and Less Than 18 Months:	37
Complaints Pending More Than 18 Months and Less Than 24 Months:	24
Complaints Pending More Than 24 Months:	27
Percentage of Complaints Pending More Than 18 Months:	11.33%
Informal Ethics Advice:	659

These figures exclude cases on administrative stay, as permitted by the Rules of Lawyer Disciplinary Procedure. Statistics are kept on a calendar year basis.

ANNUAL REPORT OF THE LAWYER DISCIPLINARY BOARD 2013

Pursuant to Rule 1.11 of the Rules of Lawyer Disciplinary Procedure, the Lawyer Disciplinary Board submits this Annual Report on the operation of the lawyer disciplinary system.

Introduction

The Lawyer Disciplinary Board is the governing body for the Office of Disciplinary Counsel. Until November, 2013, the Board consisted of nineteen (19) members, thirteen (13) lawyers and six (6) laypersons, and are all volunteers appointed to serve by the West Virginia State Bar Board of Governors. By Order entered November 26, 2013, the Supreme Court of Appeals of West Virginia expanded the membership of the Board to twenty-two (22) members, fifteen (15) lawyers and seven (7) laypersons. The Lawyer Disciplinary Board meets to consider and issue formal ethics opinions, render informal advisory opinions, establish policies, and address other issues it deems appropriate which relate to lawyer discipline. The Lawyer Disciplinary Board welcomed three (3) new members this year. The new members are: James R. Akers, II, Esquire; Nicole A. Cofer, Esquire; and Dr. K. Edward Grose.

The Board is divided into an Investigative Panel comprised of five (5) lawyers and two (2) laymembers; and a Hearing Panel comprised of eight (8) lawyers and four (4) laymembers. The Investigative Panel reviews complaints and determines whether probable cause exists to formally charge a lawyer with a violation of the Rules of Professional Conduct. When formal charges are issued, the Chair of the Hearing Panel appoints a three (3) member subcommittee (two (2) lawyers and one (1) layperson) from the Hearing Panel to conduct evidentiary hearings and make a recommended disposition to the Supreme Court of Appeals of West Virginia. The Hearing Panel Subcommittee also conducts hearings for reciprocal disciplinary proceedings, mitigation hearings, and reinstatement petitions.

The Office of Disciplinary Counsel serves as the prosecuting authority for violations of the Rules of Professional Conduct. Disciplinary Counsel provide informal ethics advice to all members of the West Virginia State Bar. Such

informal advice may be obtained, without charge to the requesting party, by calling the Office of Disciplinary Counsel during business hours at (304) 558-7999, or by submitting a written request addressed to the Office of Disciplinary Counsel, City Center East, Suite 1200 C., 4700 MacCorkle Avenue, S.E., Charleston, West Virginia 25304.

Lawyer Disciplinary Board Activity

The full Board met four (4) times from January 1, 2013 through December 31, 2013. The Board considered sixteen (16) requests for ethics advice. There were two formal Legal Ethics Opinions issued in 2013.

The Investigative Panel met five (5) times January 1, 2013 through December 31, 2013. It issued 42 admonishments and seventeen (17) Statements of Charges against attorneys.

Hearing Panel Subcommittees presided over fourteen (14) evidentiary hearings on formal charges; one (1) mitigation hearing; and five (5) reinstatement hearings.

Statistics

During the 2013 calendar year, the Office of Disciplinary Counsel received Six Hundred and Two (602) new formal complaints against West Virginia lawyers.

Disciplinary Counsel addressed and concluded Six Hundred and Twenty-Nine (629) formal complaints. Of those 629 dispositions: Two Hundred and One (201) were closed by ODC without an investigation; Two Hundred and Sixty-Nine (269) were closed by the Chief Lawyer after an investigation by ODC; including, the admonishments listed above, the Investigative Panel closed One Hundred and Four (104) complaints after an investigation by ODC; and the Supreme Court of Appeals of West Virginia issued a total of Thirty-Six (36) decisions which encompassed fifty-one (51) complaints.

In 2013, ODC filed three (3) petitions seeking the immediate suspension of an attorney pursuant to Rule 3.27, the Court granted indefinite suspension in one (1); one (1) was dismissed by motion of the ODC, and one (1) petition was dismissed as moot after the attorney consented to disbarment.

The Court granted two (2) petitions filed by ODC seeking the administrative suspension based on the disability of a lawyer pursuant to Rule 3.23 and one (1) was dismissed by motion of the ODC. By motion of the ODC, the Court dismissed Statement of Charges with four (4) complaints on attorney and a Statement of

Charges encompassing one (1) complaint for another based upon the deaths of the attorneys.

The Court granted three (3) petitions seeking the appointment of a trustee pursuant to Rule 3.29 after the death of an attorney, disability or abandonment by a lawyer.

The Court granted one (1) petition filed by a lawyer seeking voluntary resignation.

The Court granted four (4) petitions filed by a lawyer seeking reinstatement to the practice of law from suspension, dismissed one (1) petition for reinstatement after a suspension, and also denied two (2) petitions seeking reinstatement after disbarment.

The Court also issued two (2) decisions in which disciplinary proceedings were the subject of the petitions for writ of prohibition, one writ was denied and the other was granted in part, denied in part.

Further, the Supreme Court of Appeals issued three (3) disbarment decisions pursuant to Rule 3.25 of the Rules of Lawyer Disciplinary Procedure, wherein lawyers [7 complaints] who were the subject of pending disciplinary proceedings tendered a sealed affidavit to the Court stating his/her voluntary consent to disbarment. There are no specific findings of rule violations in these matters.

Of the types of cases giving rise to the filing of ethics complaints in 2013, criminal cases generated the highest number of ethics complaints filed, which represented 23% of the total number of complaints filed.

The Office of Disciplinary Counsel received and addressed Six Hundred and Sixty-Five (665) requests for informal advice from attorneys across the State during the year. Attorneys are encouraged to call the office for informal advice before they act in any matter with unclear ethical implications.

ODC also resolved Fifty-seven (57) complaints on an informal basis. Informal complaints generally involve communication issues or the return of the client's file.

Personnel

The Chief Lawyer Disciplinary Counsel, as well as Disciplinary Counsel, made thirty (30) legal education presentations for various entities during the year and at the regional meetings scheduled by the State Bar.

Budget and Operations

Nine Hundred Ninety Thousand, Six Hundred Sixty-three Dollars ($990,663.00) was budgeted for the Lawyer Disciplinary Board for the 2012-2013 fiscal year. On or about February 4, 2013, the Supreme Court of Appeals of West Virginia gave the Office of Disciplinary Counsel a one time grant of One Hundred Thousand Dollars ($100,000.00) for the purpose of hiring a fifth attorney. One Million, Fifty-seven Thousand, Two Hundred Seventy-nine Dollars ($1,057,279.00) was expended during that fiscal year. These figures include all expenses incurred by the Board and the Office of Disciplinary Counsel. The Office of Disciplinary Counsel staff is comprised of five attorneys, four legal assistants and a full-time clerk/receptionist. It is also inclusive of all trustees appointed by the Court.

The Office of Disciplinary Counsel collected Seventeen Thousand, Ninety-seven Dollars and Seven Cents ($17,097.07) in costs from attorneys who had costs assessed in disciplinary proceedings.

List of Disciplinary Cases Decided by the Court

The following is a list of the hearing cases decided by the Supreme Court, with a short summary of each case.

Lawyer Disciplinary Board v. D. Michael Burke, No. 11-0813 (WV 01/31/13) The Supreme Court of Appeals of West Virginia issued an opinion and subsequent Order admonishing Respondent for violation of Rules 1.15, 1.3 and 1.4. The Court further ordered Respondent to satisfy any obligations imposed on him in a pending adversary proceeding filed in bankruptcy court and that he pay the costs of the disciplinary proceedings.

Lawyer Disciplinary Board v. John P. Sullivan, No. 12-0005 (WV 2/19/13) The Supreme Court of Appeals of West Virginia suspended the license to practice law of Respondent for a period of thirty (30) days. The Court further Ordered that 1) Respondent follow a plan of supervised practice for a period of two years with a supervising attorney of Respondent's choice, conditioned on the supervising attorney being approved by the ODC and the Respondent agreeing to permit the supervising attorney to respond to inquiries by the ODC; 2) complete an additional nine (9) hours of Continuing Legal Education in the area of ethics and office management; and 3) that Respondent pay costs of the proceedings.

Office of Disciplinary Counsel v. Carl A. Adkins, No. 13-0213 (WV 3/7/13): Based on a Petition filed pursuant to Rule 3.29 of the Rules of Lawyer Disciplinary Procedure due to Respondent's death, the Court ordered that a trustee be appointed to inventory Respondent's files and protect the interests of his clients.

Lawyer Disciplinary Board v. Michael F. Niggemyer, No. 12-0468, (WV 3/7/13): The Supreme Court of Appeals of West Virginia suspended the law license of Michael F. Niggemyer, for a period to eighteen (18) months. The Court further Ordered that Respondent 2) comply with the duties of a suspended lawyer as outlined in Rule 3.28 of the Rules of Lawyer Disciplinary Procedure; 3) that Respondent be required to satisfy and to provide proof of full payment and satisfaction of the August 31, 2011 judgment entered by the Magistrate Court of Marion County in favor of Complainant Gretchen Seipp; 4) that if Respondent seeks reinstatement he shall be required to petition to be reinstated to the practice of law pursuant to the Rules of Lawyer Disciplinary Procedure; 5) that prior to petitioning for reinstatement Respondent shall be required to complete an additional six (6) hours of Continuing Legal Education in the area of ethics, in addition to the hours required during the two-year reporting period in which he seeks reinstatement; 6) prior to petitioning to be reinstated to the practice of law Respondent shall pay the costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure; and 7) if Respondent is successfully reinstated to the practice of law, upon reinstatement the Court shall consider that he be placed on two years probation with supervised practice by an active attorney in his geographic area in good standing with the West Virginia State Bar.

Office of Disciplinary Counsel v. Derek W. Marsteller, No. 12-1319, (WV 3/7/13): Pursuant to a 3.23 Petition filed by the Office of Disciplinary Counsel, the Supreme Court of Appeals of West Virginia administratively suspended the law license of Respondent and authorized the Chief Judge of Cabell County, West Virginia, to appoint a trustee to protect the interests of Respondent's clients. The Court further Ordered that any disciplinary proceedings against Respondent be held in abeyance.

Petition for Reinstatement of Kenneth E. Chittum, No. 12-1269 (WV 3/7/13): Pursuant to Petitioner's amended supplemental petition for reinstatement, Petitioner's license to practice law was reinstated after being suspended indefinitely on or about June 7, 2012.

Office of Disciplinary Counsel v. Michael V. Marlow, No. 13-0284 (WV 3/28/13): Pursuant to a 3.23 Petition filed by the Office of Disciplinary Counsel, the Supreme Court of Appeals of West Virginia administratively suspended Respondent's

license to practice law and that any pending disciplinary proceedings be held in abeyance.

Lawyer Disciplinary Board v. Barry J. Nace, No. 11-0812 (WV 3/28/13): The Supreme Court of Appeals of West Virginia suspended Respondent's license to practice law for 120 days without any requirement for reinstatement; that he provide community service through pro bono work for a total of 50 hours; that he satisfy any obligations imposed on him in the final disposition of the pending adversary proceeding in the United States Bankruptcy Court for the Northern District of West Virginia filed by the bankruptcy trustee, Mr. Trumble; and that he be ordered to pay the costs of the disciplinary proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure. On April 25, 2013, Respondent filed a Motion for rehearing, which was denied by the Court on May 16, 2013. On April 26, 2013, Respondent filed a Motion for Stay of the proceedings so that he may proceed with appealing the Courts decision to the United States Supreme Court. The Court granted the Motion for Stay on or about May 16, 2013.

Office of Disciplinary Counsel v. Marsha Dalton, No. 13-0352 (WV 4/10/13): Based on a Petition filed pursuant to Rule 3.29 of the Rules of Lawyer Disciplinary Procedure due to Respondent's death, the Court ordered that a trustee be appointed to inventory Respondent's files and protect the interests of his clients.

Office of Disciplinary Counsel v. John P. Anderson, No. 13-0386 (WV 4/22/13): Based on a Petition filed pursuant to Rule 3.29 of the Rules of Lawyer Disciplinary Procedure due to Respondent's death, the Court ordered that a trustee be appointed to inventory Respondent's files and protect the interests of his clients.

In Re: Petition for Reinstatement of Douglas A. Smoot, No 12-1207 (WV 05/16/2013): Based upon recommendation of the Hearing Panel Subcommittee, the Supreme Court of Appeals of West Virginia granted Respondent's petition for reinstatement and thereby ordered that he be reinstated to the practice of law in the State of West Virginia.

Reinstatement Petition of Geoffrey I. Ekenasi, No. 12-0826 (WV 5/16/13): The Supreme Court granted the motion filed by the Office of Disciplinary Counsel to dismiss the petition for reinstatement because the Petitioner was not available to participate in the reinstatement proceeding.

Lawyer Disciplinary Board v. W. Kendrick King, No. 13-0047 (WV 5/16/13): Based upon a Petition filed by the Office of Disciplinary Counsel for the Court to accept Respondent's affidavit for disbarment by consent, the Supreme Court of Appeals of West Virginia ordered that, pursuant to Rule 3.25 of the Rules of Lawyer Disciplinary

Procedure, Respondent's license to practice law in the State of West Virginia be annulled.

Lawyer Disciplinary Board v. C. Walker Ferguson, IV, No. 13-0036 (WV 5/17/13): Based upon a motion to dismiss filed by the Office of Disciplinary Counsel following the death of Respondent, the Supreme Court of Appeals of West Virginia dismissed this matter from its docket.

Lawyer Disciplinary Board v. Adam J. Bullian, No. 13-0029 (WV 6/4/13): Pursuant to Rule 3.25 of the Rules of Lawyer Disciplinary Procedure, the Supreme Court of Appeals of West Virginia issued an Order which annulled, by voluntary consent, Respondent Adam J. Bullian's license to practice law in the State of West Virginia.

Olen L. York v. the Office of Disciplinary Counsel and the Lawyer Disciplinary Board, No. 12-1410 (WV 6/5/13): The Court denied Petitioner's Petition for Writ of Prohibition stating that the Office of Disciplinary Counsel and the Lawyer Disciplinary Board lacked jurisdiction to prosecute Petitioner for his alleged violations of the Rules of Professional Conduct because he is not a licensed West Virginia attorney. Petitioner also argued that because he was working as a patent attorney, that federal law preempted state law regulation of the disciplinary matter. The Court held that the Office of Disciplinary Counsel and the Lawyer Disciplinary Board had jurisdiction and that federal law did not preempt the state's disciplinary proceedings in the matter.

State of West Virginia Ex Rel. Michael T. Clifford v. the West Virginia Office of Disciplinary Counsel and the West Virginia Lawyer Disciplinary Board, No. 13-0009 (WV *Opinion* 6/7/13): The Supreme Court found that the denial of a motion to disqualify an attorney due to an alleged conflict of interest does not prevent the attorney from subsequent disciplinary action by the Office of Disciplinary Counsel and the Lawyer Disciplinary Board based upon the same alleged conflict of interest. In determining whether sanctions are appropriate, the denial of the disqualification motion is a matter to be considered. In this case, the Supreme Court reviewed the record and found that the attorney did not have a conflict under the West Virginia Rules of Professional Conduct. Upon receipt of the mandate in this proceeding, the Lawyer Disciplinary Board was directed to file a dismissal motion on the Statement of Charges.

In Re: Petition for Reinstatement of Mark O. Hrutkay, No. 11-0136 (WV 6/12/13): The Court in its consideration of the Petition for Reinstatement, was of the opinion and refused the Respondent's petition for reinstatement saying that given the nature of the conduct that resulted in the Respondent's disbarment, even giving respectful consideration to the recommendation of the Hearing Panel Subcommittee,

that it was not satisfied that Respondent had shown that he possesses the integrity, moral character and legal competence to resume the practice of law. The Court further stated that given the seriousness of the conduct leading to Respondent's disbarment, the commission of a crime involving one of election fraud is of such nature in and of itself that the Court cannot conclude that his reinstatement at this time will not have a justifiable and substantial adverse effect on the public confidence in the administration of justice.

In Re: Petition for Reinstatement of Thomas E. Esposito, No. 11-0671 (WV 6/12/13): The Court in its consideration of the Petition for Reinstatement, was of the opinion and refused the Respondent's petition for reinstatement saying that given the nature of the conduct leading to and resulting in Respondent's disbarment, even giving respectful consideration to the recommendation of the Hearing Panel Subcommittee, that it was not satisfied that Respondent has shown that he possesses the integrity, moral character and legal competence to resume the practice of law. The Court further stated that the seriousness of the conduct leading to Respondent's disbarment, misprision of a felony, is of such a nature in and of itself that the Court cannot conclude at this time that his reinstatement will not have a justifiable and substantial adverse effect on the public confidence in the administration of justice.

Lawyer Disciplinary Board v. Daniel R. Grindo, No. 12-0228 (WV 6/13/13): In a PER CURIAM Opinion, the Supreme Court of Appeals of West Virginia found violations of Rules 1.3, 3.2 and 3.4 of the Rules of Professional Conduct and thereby issued its Opinion 1) that Respondent be reprimanded; 2) that Respondent continue to implement the practice management suggestions contained in the detailed report prepared by Affinity Consulting Group for the purpose of avoiding further problems of the kind that gave rise to the instant disciplinary proceedings; 3) that Respondent, if he has not already done so, cause the law office expert to return to conduct an evaluation of the implementation of the recommended charges; 4) that Respondent shall complete an additional 3 hours of continuing legal education during the 2012-2014 reporting period, specifically in the area of ethics and office management over and above that already required by the Mandatory Legal Education Commission; and 5) that Respondent, pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure, shall pay the costs of the disciplinary proceeding.

Lawyer Disciplinary Board v. H. John Rogers, No. 12-0195 (WV 6/17/13): In a PER CURIAM Opinion, the Supreme Court of Appeals of West Virginia found violations of Rules 8.4(b), 8.4(c) and 8.4(d) of the Rules of Professional Conduct and

thereby issued its Opinion which annulled Respondent H. John Rogers' license to practice law in the State of West Virginia. The ethical violations against Mr. Rogers stem from his *nolo contendere* plea to one count of "false swearing" in violation of W.Va. Code §§ 61-5-2 [1923] and 61-5-3 [1923] and one count of "malicious application to declare a person mentally ill or inebriate" in violation of W.Va. Code § 27-12-1 [2010]. The Court further ordered the Mandate in this case to issue forthwith. The following sanctions are also imposed: 1) that prior to any petition for reinstatement of his law license, Mr. Rogers shall undergo a comprehensive psychological examination by an independent licensed psychiatrist to determine if he is fit to practice law; 2) that Respondent fully comply with any and all treatment protocol expressed by the licensed psychiatrist; 3) that prior to petitioning for reinstatement, Mr. Rogers pay the costs of the lawyer disciplinary proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure; 4) that upon reinstatement, Mr. Rogers' practice be supervised for a period of one year.

Lawyer Disciplinary Board v. Michael T. Clifford, No. 12-1324 (WV 7/18/13): The Supreme Court of Appeals of West Virginia granted Lawyer Disciplinary Board's motion to dismiss statement of charges, for reasons stated in the motion.

In the Matter of Michael Thornsbury, Judge of the Thirtieth Judicial Circuit, Mingo County, No. 13-0828 (8/15/13): The Supreme Court of Appeals of West Virginia suspended Respondent from his judicial position, without pay as well as his license to practice law pending the resolution of his federal indictment. A Petition pursuant to 3.27 of the Rules of Lawyer Disciplinary Procedure was filed by the Judicial Investigation Commission in conjunction with a report filed with the Chief Justice pursuant to Rule 2.14 of the rules of Judicial Disciplinary Procedure.

Office of Disciplinary Counsel v. Mark A. Bramble, No. 13-0829 (8/27/13): Based on a petition filed pursuant to Rule 3.27 of the Rules of Lawyer Disciplinary Procedure, the Supreme Court of Appeals of West Virginia ordered an indefinite suspension of Mr. Bramble's license to practice law in the State of West Virginia.

Office of Disciplinary Counsel v. Karen E. Acord, No. 13-0545 (9/12/13): Pursuant to a Petition for Rule to Show Cause filed by the Office of Disciplinary Counsel, the Supreme Court of Appeals suspended Respondent's license to practice law for failing to comply with the Court's June 19, 2012 order. The order directed Respondent to provide restitution to the Estate of Anna Diem in the amount of $800.00, and also to pay the costs of her disciplinary proceeding pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

Lawyer Disciplinary Board v. Michael S. Santa Barbara, No. 12-0608 (10/4/13): Based on a petition filed pursuant to Rule 3.18 of the Rules of Lawyer Disciplinary Procedure wherein Respondent had pled no contest to and was convicted of brandishing and carrying a concealed weapon, the Supreme Court of Appeals of West Virginia ordered that: (1) Respondent's law license be suspended for three months, suspension to commence at the on July 9, 2013, the date his prior one year suspension concludes; (2) that Respondent cannot petition for reinstatement until he has completed the suspension in this proceeding;(3) that Respondent continue with counseling as ordered in *Santa Barbara I* during this three-month period and the treating counselor shall submit at least one progress report to ODC; and (4) that prior to petitioning for reinstatement Respondent shall pay the costs of these disciplinary proceedings.

Lawyer Disciplinary Board v. Wendelyn A. Elswick, No. 11-0729 (9/26/13): In a PER CURIAM Opinion, the Supreme Court of Appeals of West Virginia found violations of Rules 3.3; 3.4(b); 1.7(b); 5.3; 8.4(c) and 8.4(d) of the Rules of Professional Conduct and suspended Respondent's license to practice law for a period of two (2) years. Additionally, prior to being reinstated to the practice of law, Respondent must be evaluated by a licensed mental health provider and follow any protocol, if any, as directed by the mental health provider; undergo an additional twelve (12) hours of Continuing Legal Education with focus on ethics; pay the costs of the disciplinary proceedings; and that upon reinstatement, Respondent be placed on two (2) years of probation with supervised practice by an active attorney in her geographic area in good standing with the West Virginia State Bar. The Mandate was entered on October 28, 2013.

Lawyer Disciplinary Board v. Chad B. Cissel, No. 12-1290 (10/7/13): Based upon a motion to dismiss filed by the Office of Disciplinary Counsel following the death of Respondent, the Supreme Court of Appeals of West Virginia dismissed this matter from its docket.

Lawyer Disciplinary Board v. C. Michael Sparks, No. 13-1009 (WV 10/11/13): Pursuant to Rule 3.25 of the Rules of Lawyer Disciplinary Procedure, the Supreme Court of Appeals of West Virginia issued an Order which annulled, by voluntary consent, Respondent C. Michael Sparks' license to practice law in the State of West Virginia.

Lawyer Disciplinary Board v. Charles L. Phalen, Jr., No. 12-1265 (WV 10/16/13): In its Order the Supreme Court of Appeals of West Virginia found that Respondent violated Rules 1.4(a) and 1.4(b) *[communication]* of the Rules of Professional Conduct; along with Rule 1.16(d) [declining or terminating representation];, Rule 8.1(b) *[bar admission and disciplinary matters];* Rule 1.3

[diligence] and Ordered 1) that Respondent's license to practice law in the State of West Virginia be suspended for an additional period of six months to run consecutive to the Respondent's current one(1)-year suspension which will conclude on or about November 14, 2013; 2) Respondent shall not petition for reinstatement until the conclusion and satisfaction of said additional six(6)-month suspension; 3) prior to reinstatement, Respondent shall furnish proof that he refunded the unearned fees to certain clients; 4) following any reinstatement, Respondent shall serve one(1) year of probation upon the conclusion of the period of supervised probation ordered in Supreme Court Docket No. 11-1746; and 5) Respondent shall pay the cost of the instant disciplinary proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

Office of Disciplinary Counsel v. James Casimiro, III, No. 13-0995 (WV 10/16/13): Based upon a Petition filed by the Office of Disciplinary Counsel for the Court to accept Respondent's affidavit for disbarment by consent, the Supreme Court of Appeals of West Virginia ordered that, pursuant to Rule 3.25 of the Rules of Lawyer Disciplinary Procedure, Respondent's license to practice law in the State of West Virginia be annulled by voluntary consent.

Reinstatement Petition of Gregory G. Michael, No. 11-1069 (WV 10/16/13): The Supreme Court deferred its ruling on the matter and remanded the case for submission of the psychological evidence relied upon to support the Petitioner's fitness to engage in the practice of law.

Judicial Disciplinary Counsel v. Michael Thornsbury, No. 13-1047 (WV 10/21/13): The Supreme Court of Appeals of West Virginia Pursuant to Rule 3.25 of the Rules of Lawyer Disciplinary Procedure, the Supreme Court of Appeals of West Virginia entered an Order which annulled, by voluntary consent, Respondent Michael Thornsbury's license to practice law in the State of West Virginia.

Lawyer Disciplinary Board v. Barry J. Nace, No. 11-0812 (WV 10/25/13): Having been advised by the Supreme Court of the United States that the petition for a writ of certiorari was denied, pursuant to Revised R.A.P. 26, the opinion previously issued in this matter is now final. Respondent's license to practice law is hereby suspended for 120 days without any requirement for reinstatement and further Ordered that he provide community service through pro bono work for a total of 50 hours and that he satisfy any obligations imposed on him in the final disposition of the pending adversary proceeding in the United States Bankruptcy Court for the Northern District of West Virginia filed by the bankruptcy trustee, Mr. Trumble. He was further Ordered to reimburse the Office of Disciplinary for its costs expended in this matter in the amount of $4,240.92.

In Re: Harry W. Moore, Jr.'s Petition for Reinstatement of his License to Practice Law, No. 11-1442 (WV 11/5/13): The Supreme Court of Appeals of West Virginia granted Petitioner's Reinstatement Petition with the following conditions: 1) Respondent continue to maintain absolute sobriety; 2) Respondent's practice shall be supervised by an attorney in good standing with the West Virginia State Bar who actively practices in the geographical area in which petitioner locates his practice, and who is acceptable to the ODC; 3) Respondent shall return to the practice of law in a measured manner, the specific terms of which to be agreed upon by the ODC, Respondent, Respondent's supervising attorney, and Respondent's psychologist; 4) Respondent shall attend an approved twelve-step program meeting on average of at lease once daily, with monthly proof of such attendance supplied, in writing, to his supervising attorney; 5) Respondent shall attend regular sessions with his current psychologist, with quarterly reports by his psychologist provided to his supervising attorney; 6) Respondent shall participate shall participate as a volunteer and member of the Lawyers Assistance Program for a total of 50 hours of service with quarterly reports by another member of the Lawyers Assistance Program provided to Respondent's supervising attorney; 7) Respondent shall, at his own expense, be subject to random drug/alcohol screens, upon two-hours notice to him by the ODC, with reports of the results of any screen to be provided to Respondent's supervising attorney; 8) Respondent shall reimburse ODC for its reasonable costs incurred in pursuit of his suspension, the funds expended on his behalf by the Client Protection Fund, the costs incurred in the unsuccessful reinstatement matter, and the costs incurred in the instant case, such payments to be made pursuant to a reasonable payment plan; and 9) Respondent shall satisfy the required state bar membership fees and mandatory continuing legal education requirements.

In Re: Dennie S. Morgan, Jr.'s Petition for Reinstatement of his License to Practice Law, No. 13-0114 (WV 11/20/13): The Supreme Court of Appeals of West Virginia granted Respondent's petition for reinstatement to the practice of law, subject to the following terms and conditions: 1) Respondent's practice shall be supervised for two years; 2) Respondent shall have Barron K. Hensley, Esquire, review and evaluate his office practices and implement any proposed changes, with followup phone calls three months and six months after the commencement of his supervised practice. Written reports are to be submitted to the Office of Disciplinary Counsel to ensure that any additional issues are adequately addressed; 4) Respondent shall have his trust account and all accounts of his law practice business audited for two-year period and provide copies of such audits to the Office of

Disciplinary Counsel; 5) Respondent shall reimburse $1,600.00 to the State Bar's Client Protection Fund for the payment made to Adrian Thomas; 6) prior to reinstatement, Respondent shall satisfy the required state bar membership fees and mandatory continuing legal education requirements pursuant to Rule 3.32(f) of the Rules of Lawyer Disciplinary Procedure; and 7) Respondent shall reimburse the Lawyer Disciplinary Board the costs of these reinstatement proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

Office of Disciplinary Counsel v. Carl J. Dascoli, Jr., No. 13-0923 (WV 11-26-13) Based on a Petition filed by the Office of Disciplinary Counsel pursuant to Rule 3.18 of the Rules of Lawyer Disciplinary Procedure, the Supreme Court of Appeals of West Virginia annulled Respondent's license to practice law

Annual Report as Required by the Rules of Lawyer Disciplinary Procedure

The Office of Disciplinary Counsel Statistics for Lawyer Discipline and Complaints and the Lawyer Disciplinary Board and Office of Disciplinary Counsel Annual Caseload Statistics for 2013 are attached to this Report.

LAWYER DISCIPLINARY BOARD/
OFFICE OF DISCIPLINARY COUNSEL
Respectfully Submitted By:

John W. Cooper, Chairperson
Lawyer Disciplinary Board

LAWYER DISCIPLINARY BOARD AND OFFICE OF DISCIPLINARY COUNSEL ANNUAL CASELOAD STATISTICS 2003-2013

Year	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
New complaints	619	663	587	653	577	618	555	517	596	665	602
Total # Complaints Closed	528	702	637	662	618	572	545	520	576	665	629
Complaints Closed by Investigative Panel	67	60	77	50	69	55	62	73	67	94	104
Complaints Closed by Chief Disciplinary	247	356	308	330	308	252	258	239	240	276	273
Complaints Not Docketed/ ODC Dismissed	192	248	220	235	204	221	186	187	213	237	201
Supreme Court Cases Decided [# of complaints]	22 [29] *	16 [38]	20 [32]	25 [35]	26 [37]	26 [36]	17 [39] **	17 [21]	36 [55]	32 [56]	36 [51]
Hearing Panel Findings Issued [# of complaints]	10 [15]	8 [28]	14 [24]	14 [34]	15 [31]	13 [25]	5 [6] **	11 [24] ***	18 [27]	10 [24]	19 [35]
Formal Ethics Opinions	1	1	2	1	1	0	2	1	0	1	2
Informal Ethics Advice	814	757	716	725	870	701	728	606	710	702	665
Informal Complaints	60	91	101	75	121	96	82	78	67	77	57
Costs Collected	$8,689.56	$2,024.47	$2,802.33	$4,780.54	$5,244.83	$13,943.08	$6,173.09	$6,436.39	$19,404.17	$8,653.24	$17,097.07

*Of the 30 complaints considered by the Supreme Court of Appeals, there was one complaint in a Statement of Charges dismissed by decision of the Supreme Court of Appeals based on a statute of limitations argument. There were also 17 complaints deemed as aggravating factors in a Statement of Charges and the Supreme Court of Appeals ordered restitution made to these Complainants in the Order.

** There were 4 cases which encompassed 26 complaints before the Hearing Panels at various stages of the hearing process that ultimately lead to those 4 lawyers seeking voluntary disbarment in lieu of proceeding with the disciplinary hearing. The Supreme Court accepted those affidavits and issued decisions disbarring those 4 lawyers.

***There was 1 case which encompassed 2 complaints where the lawyer was in the midst of disciplinary proceedings and then filed for voluntary disbarment in lieu of proceeding with the disciplinary hearing. The Supreme Court accepted the affidavit and issued a decision disbarring the lawyer.

OFFICE OF DISCIPLINARY COUNSEL STATISTICS FOR LAWYER DISCIPLINE AND COMPLAINTS: 2013

Number of **complaints** which resulted in **discipline** by Supreme Court of Appeals in 2013[1]:	[11 lawyers]	18 complaints
Lawyers disciplined by Supreme Court:	5	Solo practitioner
	2	Two lawyers in office
	0	Three lawyers in office
	4	Four or more lawyers in office
Length of practice of lawyers disciplined by Supreme Court:	0	Less than 5 years
	1	Between 5 and 10 years
	1	Between 10 and 15 years
	2	Between 15 and 20 years
	7	20 years or more

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[1] In 2013, ODC filed three (3) petitions seeking the immediate suspension of an attorney pursuant to Rule 3.27, the Court granted indefinite suspension in one(1); one (1) was dismissed by motion of the ODC, and one (1) petition was dismissed as moot after the attorney consented to disbarment.

The Court granted two (2) petitions filed by ODC seeking the administrative suspension based on the disability of a lawyer pursuant to Rule 3.23 and one (1) was dismissed by motion of the ODC.

By motion of the ODC, the Court dismissed Statement of Charges with four (4) complaints on attorney and a Statement of Charges encompassing one (1) complaint for another based upon the deaths of the attorneys.

The Court granted three (3) petitions seeking the appointment of a trustee pursuant to Rule 3.29 after the death of an attorney, disability or abandonment by a lawyer.

The Court granted one (1) petitions filed by a lawyer seeking voluntary resignation.

The Court granted four (4) petitions filed by a lawyer seeking reinstatement to the practice of law from suspension, dismissed one (1) petition for reinstatement after a suspension, and also denied two (2) petitions seeking reinstatement after disbarment.

The Court also issued two (2) decisions in which disciplinary proceedings were the subject of the petitions for writ of prohibition, one writ was denied and the other was granted in part, denied in part.

Further, the Supreme Court of Appeals issued three (3) disbarment decisions pursuant to Rule 3.25 of the Rules of Lawyer Disciplinary Procedure, wherein lawyers [7 complaints] who were the subject of pending disciplinary proceedings tendered a sealed affidavit to the Court stating his/her voluntary consent to disbarment. There are no specific findings of rule violations in these matters.

Types of ethical violations committed in cases where lawyers were disciplined Supreme Court (note: lawyers usually disciplined for more than one violation)	22%	Failure to communicate
	11%	Lack of diligence
	10%	Prejudice to the administration of justice
	10%	Fairness to opposing party
	8%	Lying or not responding to ODC
	8%	Withdrawal problems
	8%	Dishonesty/lack of truthfulness
	5%	Trust account violations
	5%	Lawyers committing a crime
	3%	Delaying litigation
	3%	Lack of candor to tribunal
	3%	Failure to supervise non-lawyers
	2%	Fees
	2%	Competence

Number complaints where lawyers were issued Investigative Panel Admonishments in 2013:	42	
Type of conduct giving rise to these Investigative Panel Admonishments[2] [lawyer may have been admonished for more than one rule violation]	30%	Failure to Communicate
	20%	Lack of Diligence
	7%	Lying or not responding to ODC
	7%	Fees
	6%	Prejudice to the administration of justice
	6%	Fairness to opposing party
	3%	Unauthorized practice of law
	2%	Withdrawal Problems
	2%	Delaying litigation
	2%	Trust Account Violations
	2%	Competence
	2%	Trial publicity
	2%	Conflicts of Interest
	2%	Communication with represented party
	2%	Assisting others to violate ethics rules
	1%	Lack of candor before the tribunal
	1%	Dishonesty/Lack of Truthfulness
	1%	Lawyer committing a crime

[2]Figures do not equal 100, due to rounding.

Breakdown of disciplinary complaints FILED in 2013 (complaints usually have more than one violation alleged; includes merit-less complaints):

362	Failure to communicate
197	No violation alleged
180	Lack of diligence
137	Failure to abide by client's objectives
97	Prejudice to the administration of justice
83	Dishonesty / lack of truthfulness
53	Trust account violations
48	Withdrawal problems (files; refunds)
42	Delaying litigation
40	Conflicts of interest
37	Competence
29	Fees
23	Lawyer Committing a Crime
16	Lack of candor before the tribunal
15	Failure to respect rights of 3rd persons
13	Fairness to opposing party/counsel
10	Assisting others to violate ethics rules
9	Prosecutorial misconduct
9	Frivolous litigation
8	Unlawful practice
7	Failure to supervise nonlawyers
7	Confidentiality
6	Independence of lawyers
5	Failure to report unethical conduct
5	Ex parte/improper contact w/ judge/juror
4	Communicating w/ represented party
3	Advertising/Solicitation
3	Assist judge in unethical conduct
3	Misleading unrepresented party
2	Trial publicity
1	Lying or not responding to ODC
1	Sexual contact w/ client

Types of cases giving rise to the filing of disciplinary complaints:	23%	Criminal
	18%	Miscellaneous
	12%	Domestic
	8%	Prosecutor
	7%	Habeas
	6%	Personal Injury
	6%	Real Estate
	5%	Estate
	2%	Conviction
	2%	Business
	2%	Abuse & Neglect
	2%	Bankruptcy
	1%	Office Procedures
	1%	Compensation
	1%	Employment
	1%	Contract
	less than1%	Impairment
	less than1%	Reinstatement
	less than1%	Reciprocal

WV Office of Disciplinary Counsel Statistics For: 12-31-13

Total Number of Currently Active Complaints:	430*
Complaints Currently Under Investigation:	379*
Complaints Currently Awaiting Statement of Charges:	5
Complaints Pending a Hearing:	23
Complaints Awaiting Recommended Decision:	12
Complaints Before the Supreme Court:	10
Complaints Filed This Year:	602
Total Complaints Closed This Year:	629*
ODC Closings:	201
CLDC Closings:	269
IP Closings:	104
SupCrt Closings:	51
Formal Charges Filed This Year:	55
Complaints Pending Less Than 6 Months:	180*
Complaints Pending More Than 6 Months And Less Than 12 Months:	155*
Complaints Pending More Than 12 Months and Less Than 18 Months:	44*
Complaints Pending More Than 18 Months and Less Than 24 Months:	24
Complaints Pending More Than 24 Months:	27
Percentage of Complaints Pending More Than 18 Months:	11.86%*
Informal Ethics Advice:	665

These figures exclude cases on administrative stay, as permitted by the Rules of Lawyer Disciplinary Procedure. Statistics are kept on a calendar year basis.

***These figures were recalculated after it was discovered that four complaint closings were mistakenly not accounted for.**

ANNUAL REPORT OF THE LAWYER DISCIPLINARY BOARD 2012

Pursuant to Rule 1.11 of the Rules of Lawyer Disciplinary Procedure, the Lawyer Disciplinary Board submits this Annual Report on the operation of the lawyer disciplinary system.

Introduction

The Lawyer Disciplinary Board is the governing body for the Office of Disciplinary Counsel. It consists of nineteen (19) members, thirteen (13) lawyers and six (6) laypersons, and are all volunteers appointed to serve by the West Virginia State Bar Board of Governors. The Lawyer Disciplinary Board meets to consider and issue formal ethics opinions, render informal advisory opinions, establish policies, and address other issues it deems appropriate which relate to lawyer discipline. The Lawyer Disciplinary Board welcomed three (3) new members this year. The new members are: Robby J. Aliff, Esquire, and Steven K. Nord, Esquire; and Ms. Priscilla M. Haden.

The Board is divided into an Investigative Panel comprised of five (5) lawyers and two (2) laymembers; and a Hearing Panel comprised of eight (8) lawyers and four (4) laymembers. The Investigative Panel reviews complaints and determines whether probable cause exists to formally charge a lawyer with a violation of the Rules of Professional Conduct. When formal charges are issued, the Chair of the Hearing Panel appoints a three (3) member subcommittee (two (2) lawyers and one (1) layperson) from the Hearing Panel to conduct evidentiary hearings and make a recommended disposition to the Supreme Court of Appeals of West Virginia. The Hearing Panel Subcommittee also conducts hearings for reciprocal disciplinary proceedings, mitigation hearings, and reinstatement petitions.

The Office of Disciplinary Counsel serves as the prosecuting authority for violations of the Rules of Professional Conduct. Disciplinary Counsel provide informal ethics advice to all members of the West Virginia State Bar. Such informal advice may be obtained, without charge to the requesting party, by calling the Office of Disciplinary Counsel during business hours at (304) 558-7999, or by submitting a written request addressed to the Office of Disciplinary Counsel, City Center East, Suite 1200 C., 4700

MacCorkle Avenue, S.E., Charleston, West Virginia 25304.

Lawyer Disciplinary Board Activity

The full Board met four (4) times in person and one (1) time telephonically from January 1, 2012 through December 31, 2012. The Board considered seventeen (17) requests for formal ethics advice. There was one Legal Ethics Opinions issued in 2012. Additionally, there were eight (8) Legal Ethics Opinions that were vacated.

The Investigative Panel met five (5) times in person and two (2) times telephonically from January 1, 2012 through December 31, 2012. It issued twenty-eight (28) admonishments and ten (10) Statements of Charges against attorneys.

Hearing Panel Subcommittees presided over six (6) evidentiary hearings on formal charges; two (2) reinstatement hearings; and one (1) hearing mitigation hearing following a petition filed by the Office.

Statistics

During the 2012 calendar year, the Office of Disciplinary Counsel received six hundred sixty-five (665) formal complaints against West Virginia lawyers. Disciplinary Counsel addressed and concluded six hundred sixty-five (665) formal complaints.

The Supreme Court of Appeals of West Virginia issued a total of thirty-two (32) decisions which encompassed fifty-six (56) complaints in 2012.

Three (3) petitions seeking the immediate suspension of an attorney pursuant to Rule 3.27 were filed. However, all three were ultimately withdrawn by the Office of Disciplinary Counsel. The Court granted five (5) petitions filed by ODC seeking the appointment of a trustee pursuant to Rule 3.29 after the death; suspension; or disability of an attorney. The Court granted two (2) petitions filed by lawyers seeking voluntary resignation. The Court granted one (1) petition filed by lawyers seeking reinstatement to the practice of law. The Court issued decisions in two (2) reciprocal matters pursuant to Rule 3.20 of the Rules of Lawyer Disciplinary Procedure. The Court issued one (1) reprimand.

Further, the Supreme Court of Appeals issued eight (8) disbarment decisions pursuant to Rule 3.25 of the Rules of Lawyer Disciplinary Procedure, wherein two (2) lawyers who were the subject of pending disciplinary proceedings tendered a sealed affidavit to the Court stating his/her voluntary consent to disbarment.

The Court also issued decisions with respect to eight (8) additional lawyers which yielded two (2) disbarments and six (6) suspensions.

Of the types of cases giving rise to the filing of ethics complaints in 2012, criminal cases generated the highest number of ethics complaints filed, which represented 20% of the total number of complaints filed. Of the remaining categories, miscellaneous issues comprised 20%; domestic issues comprised 17%; prosecutor issues had 7%; personal injury and real estate matters each had 6%; habeas issues 5%; conviction 5%; estate matters 5%; office procedures 3%; abuse and neglect 2%; compensation matters 1%; reciprocal 1%; reinstatement 1%; bankruptcy 1%; business matters 1%. Employment; bankruptcy; contract; impairment; and reinstatement all had less than 1% of the total number of complaints filed.

The Office of Disciplinary Counsel received and addressed seven hundred and two (702) requests for informal advice from attorneys across the State during the year. Attorneys are encouraged to call the office for informal advice before they act in any matter with unclear ethical implications. It also resolved seventy seven (77) complaints on an informal basis. Informal complaints generally involve communication issues or the return of the client's file.

Personnel

The Chief Lawyer Disciplinary Counsel, as well as Disciplinary Counsel, made thirty three (33) continuing legal education presentations during the year and at regional meetings scheduled by the State Bar.

In November 2012, the Office of Disciplinary Counsel welcomed a fourth legal assistant, Amanda J. Unrue. In December, the Office welcomed a fifth attorney, Joanne M. Vella Kirby.

Budget and Operations

Nine Hundred Fifty-Seven Thousand Forty Dollars and Eighty-Eight Cents ($957,040.88) was budgeted for the Lawyer Disciplinary Board for the 2011-2012 fiscal year and expended Nine Hundred Forty-Two Thousand and One Dollars ($942,001.00). This figure includes all expenses incurred by the Board and the Office of Disciplinary Counsel. The Office of Disciplinary Counsel staff is comprised of four attorneys, three legal assistants and a full-time clerk/receptionist.

The Office of Disciplinary Counsel collected Eight Thousand Six Hundred and Fifty-

Three Dollars and Twenty-Four Cents ($8,653.24) in costs from attorneys who had costs assessed in disciplinary proceedings.

List of Disciplinary Cases Decided by the Court

The following is a list of the hearing cases decided by the Supreme Court, with a short summary of each case.

Office of Disciplinary Counsel v. John Krivonyak, No. 11-1716 (1/12/2012): Based upon a Petition filed by the Office of Disciplinary Counsel for the Court to accept Respondent's affidavit for disbarment by consent, the Supreme Court of Appeals of West Virginia ordered that, pursuant to Rule 3.25 of the Rules of Lawyer Disciplinary Procedure, Respondent's license to practice law in the State of West Virginia be annulled by voluntary consent.

Lawyer Disciplinary Board v. Martin R. Smith, Jr., No. 11-1374 (1/12/2012): Based upon a Petition filed by the Office of Disciplinary Counsel for the Court to accept Respondent's affidavit for disbarment by consent, the Supreme Court of Appeals of West Virginia ordered that, pursuant to Rule 3.25 of the Rules of Lawyer Disciplinary Procedure, Respondent's license to practice law in the State of West Virginia be annulled by voluntary consent.

Lawyer Disciplinary Board v. Michael A. Esposito, Nos.35724 and 10-4018 (01/26/2012): The Supreme Court of Appeals of West Virginia ordered that Respondent's law license be suspended indefinitely and that Respondent: (1) pay restitution in the amounts of $5,000.00 and $1,900.00 to two of his clients; (2) that he be required to petition for reinstatement pursuant to Rule 3.32 of the Rules of Lawyer Disciplinary Procedure, but may not seek reinstatement for at least two years from the date of the Order; (3) that prior to petitioning for reinstatement, Respondent must undergo an independent psychiatric evaluation to determine whether he is fit to engage in the practice of law and must comply with any treatment protocol stated by the evaluator; (4) that prior to petitioning for reinstatement, Respondent is ordered to complete twelve hours of continuing legal education in ethics, in addition to such ethics hours as is otherwise required to maintain an active license to practice law; (5) that after being reinstated Respondent's law practice shall be supervised for a two-year period by an attorney agreed upon between the Office of Disciplinary Counsel and Respondent; and (6) that he shall pay the costs of both disciplinary proceedings pursuant to Rule 3.15 of the Rules of Law Disciplinary Procedure.

Office of Disciplinary Counsel v. H. John Rogers, No. 12-0101 (2/9//12): The Court granted a Motion filed by the Office of Disciplinary Counsel to dismiss a previously filed Petition pursuant to 3.27 of the Rules of Lawyer Disciplinary Procedure.

Office of Disciplinary Counsel v. David A. Barnabei, No. 34707 (2/9/12): Pursuant to Respondent's motion to reinstate his license to practice law, which was suspended indefinitely on or about December 29, 2009, the Supreme Court of Appeals reinstated his license with conditions. Respondent must (1) follow the recommended treatment plan of his psychologist and provide written reports of his compliance, to the Office of Disciplinary Counsel on a quarterly basis; (2) Respondent's practice shall be supervised by Robert G. McCoid, Esquire, who Respondent shall meet with at least monthly and the supervising attorney shall file monthly reports to the Office of Disciplinary Counsel.

Lawyer Disciplinary Board v. Donald J. Epperly, No. 11-0128 (2/9/2012): Based upon a Petition filed by the Office of Disciplinary Counsel for the Court to accept Respondent's affidavit for disbarment by consent, the Supreme Court of Appeals of West Virginia ordered that, pursuant to Rule 3.25 of the Rules of Lawyer Disciplinary Procedure, Respondent's license to practice law in the State of West Virginia be annulled by voluntary consent.

Office of Disciplinary Counsel v. Brian P. Conaty, No. 12-0026 (2/10/12): The Court granted a Motion filed by the Office of Disciplinary Counsel to dismiss a previously filed Petition pursuant to 3.27 of the Rules of Lawyer Disciplinary Procedure.

Lawyer Disciplinary Board v. Robert E. Wright, No. 23276 (W.Va. 2/10/12): Disciplinary proceedings against attorney had been previously stayed and Respondent was placed on administrative suspension due to his claims that he suffered a neurological condition that made him unable to assist his counsel in defending against the charges. On or about February 1, 2012, the Office of Disciplinary Counsel filed a Motion to Dismiss due to Respondent's death. The Motion was granted.

Lawyer Disciplinary Board v. Richard Wolfe, No. 22900 (W.Va. 2/10/12): Disciplinary proceedings against attorney had been previously stayed.. On or about February 1, 2012, the Office of Disciplinary Counsel filed a Motion to Dismiss due to Respondent's death. The Motion was granted.

Lawyer Disciplinary Board v. Richard L. Lancianese, No. 11-0667 (03/08/2012): Based upon Respondent's consent to the recommendation, and the Court's approval of the Motion filed by the Office of Disciplinary Counsel for the Court to accept its recommendation, the Supreme Court of Appeals of West Virginia ordered that Respondent be suspended from the practice of law in the State of West Virginia for a period of three years; that prior to petitioning for reinstatement, Respondent must complete, in addition to the twelve hours of continuing legal education required by West Virginia State Bar Rules and Regulations, six hours of continuing legal education in law office management; and that Respondent pay the costs of the disciplinary proceeding.

Lawyer Disciplinary Board v. Erika H. Klie Kolenich, No. 11-0091 (03/29/2012): Based upon the recommendation of the Hearing Panel Subcommittee, the Court ordered 1) that Respondent be reprimanded; 2) that Respondent's practice of law be supervised for a period of two years by an attorney agreed upon by Respondent and Office of Disciplinary Counsel; 3) that Respondent complete, during the current two-year reporting period, nine (9) hours of continuing legal education in law office management in addition to the twelve (12) hours of continuing legal education required by West Virginia State Bar Rules and Regulations; and 4) that Respondent pay the costs of the disciplinary proceeding, pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

Lawyer Disciplinary Board v. Jennifer M. McGinley, No. 12-0359 (3/29/2012): Based upon a Petition filed by the Office of Disciplinary Counsel for the Court to accept Respondent's affidavit for disbarment by consent, the Supreme Court of Appeals of West Virginia ordered that, pursuant to Rule 3.25 of the Rules of Lawyer Disciplinary Procedure, Respondent's license to practice law in the State of West Virginia be annulled by voluntary consent.

Lawyer Disciplinary Board v. Kenneth J. Ford, No. 11-0845 (03/29/2012): Based upon the recommendation of the Hearing Panel Subcommittee, the Court ordered 1) that Respondent's license to practice law be annulled; 2) prior to petitioning for reinstatement, pursuant to Rule 3.33 of the Rules of Lawyer Disciplinary Procedure, Respondent must complete, in addition to the twelve hours of continuing legal education required by the West Virginia State Bar Rules and Regulations, Chapter VII, Rules to Govern Mandatory Continuing Legal Education, twelve hours of continuing legal education in ethics; and 3) that Respondent pay the costs of the disciplinary proceeding, pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

Office of Disiciplinary Counsel v. Christopher B. Bledsoe, (WV 4/10/12): Based on a Petition filed pursuant to Rule 3.29 of the Rules of Lawyer Disciplinary Procedure due to Respondent's disbarment, the Court ordered that a trustee be appointed to inventory Respondent's files and protect the interests of his clients.

Lawyer Disciplinary Board v. Scott M. Dolin, No. 11-0510 (05/23/12): Based upon a recommendation by the Hearing Panel Subcommittee, the Supreme Court of Appeals of West Virginia ordered the same sanction imposed by the State of Texas be imposed in West Virginia. Therefore, Respondent's license to practice law in the State of West Virginia was suspended for a period of thirty-six (36) months in accordance with Rule 3.20(e) of the Rules of Lawyer Disciplinary Procedure.

Office of Disciplinary Counsel v. Kenneth E. Chittum, No. 11-1402 (6/7/12): Based upon a Petition for Rule to Show Cause, the Supreme Court of Appeals of West Virginia found Respondent in contempt; suspended his license to practice law indefinitely until such time he has demonstrated full compliance with all the conditions set forth in the mandate of the Court issued on March 1, 2010, including that Respondent have a certified public accountant audit his office accounting records for two consecutive years, consistent with the specifications set forth by the ODC; and remanded to the ODC for further investigation regarding possible misrepresentations by Respondent in the courts of attempting to comply with the Court's directives.

Lawyer Disciplinary Board v. Norman L. Folwell, No. 11-1279 (WV 06/07/12): In a reciprocal disciplinary action, the Supreme Court of Appeals of West Virginia issued a Memorandum Decision which suspended the license to practice law in the State of West Virginia of Norman L. Folwell for a period of two years, with the second year stayed as long as certain conditions are met. As a condition of staying the second year of suspension, Mr. Folwell must complete one year of unsupervised practice, monitored by an attorney appointed by the Office of Disciplinary Counsel who is experienced in law office management. Additionally, Mr. Folwell must not commit any further misconduct. If he fails to comply with either of these conditions, the stay will be lifted and the full two-year suspension will be served.

Lawyer Disciplinary Board v. Michael S. Santa Barbara, No. 10-4011 (WV 7/9/12): For multiple violations of the Rules of Professional Conduct, the Supreme Court of Appeals of West Virginia ordered as follows: (1) that Respondent be suspended from the practice of law for a period of one year; (2) that during the period of suspension Respondent commence and continue to undergo psychological and/or psychiatric counseling to deal with depression and alcohol abuse issues until such time that it is determined by the treating psychologist or psychiatrist that

treatment is no longer necessary. The treating counselor shall submit progress reports to the ODC every six months; (3) That Respondent complete eight hours of continuing legal education in office management and office practice within the next twenty-four (24) months with satisfactory proof of completion provided to the ODC; (4) That, upon reinstatement, Respondent's practice be supervised for one year; and (6) That Respondent reimburse the Board for the costs incurred in the disciplinary proceeding in the sum of $5,280.04, pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

Office of Disciplinary Counsel v. Hiram C. Lewis, IV, No. 12-0729 (WV 6/15/12): Based on a petition filed by the Office of Disciplinary Counsel, the Supreme Court of Appeals of West Virginia ordered that a trustee be appointed by the Chief Judge of the Circuit Court of Clay and/or Monongalia Counties to inventory Respondent's files and protect the interests of Respondent's clients pursuant to Rule 3.29 of the Rules of Lawyer Disciplinary Procedure.

Lawyer Disciplinary Board v. Karen E. Acord, No. 11-1356 (WV 6/19/12): Based upon the recommendation of the Hearing Panel Subcommittee, the Court ordered that: 1) Respondent be reprimanded for her conduct; 2) Respondent shall make restitution to the Estate of Anna Diem in the amount of $800.00; 3) Respondent shall complete an additional three hours of continuing legal education in ethics and/or office management during the 2012-2014 reporting period, in addition to the hours already required; and 4) Respondent pay the costs of the proceedings pursuant to Rule 3.25 of the Rules of Lawyer Disciplinary Procedure.

Office of Disciplinary Counsel v. Belinda S. Morton, No. 12-0469 (WV 6/29/2012): The Office of Disciplinary Counsel filed a petition pursuant to Rules 3.23 and 3.29 of the Rules of Lawyer Disciplinary Procedure, asking for immediate administrative suspension of Ms. Morton's law license and appointment of a trustee to protect her client's interests. The Supreme Court granted the petition for administrative suspension and authorized the Chief Judges of Fayette and Raleigh Counties to appoint a trustee. The Court also ordered that any other pending disciplinary matters be held in abeyance until further order of the Court.

Office of Disciplinary Counsel v. Travis R. Fitzwater, No. 12-0937 (WV 8/14/2012): The Office of Disciplinary Counsel filed a petition pursuant to Rules 3.23 and 3.27 of the Rules of Lawyer Disciplinary Procedure, asking for immediate administrative suspension of Mr. Fitzwater's law license and appointment of a trustee to protect his client's interests. The Supreme Court granted the petition for administrative suspension and authorized the Honorable Susan B. Tucker, Judge of the Circuit Court of Monongalia County to appoint a trustee.

Office of Disciplinary Counsel v. Ashley R. Shreve, No. 12-0831 (WV 8/30/2012): Based upon a petition filed pursuant to Rule 3.25 of the Rules of Lawyer Disciplinary Procedure to accept Respondent's consent to disbarment, the Supreme Court of Appeals of West Virginia ordered that Respondent's license to practice law be annulled.

Office of Disiciplinary Counsel v. James M. Mullins, Jr. No. 12-0989 (WV 8/28/12): Based on a Petition filed pursuant to Rule 3.29 of the Rules of Lawyer Disciplinary Procedure due to Respondent's death, the Court ordered that a trustee be appointed to inventory Respondent's files and protect the interests of his clients.

Resignation Petition of Kathleen G. Dolan, No. 12-0413 (WV 8/30/12): Based upon

a petition filed by Respondent and upon written recommendations of the Investigative Panel of the Lawyer Disciplinary Board, the Supreme Court of Appeals of West Virginia, pursuant to Rule 3.26(d) of the Rules of Lawyer Disciplinary Procedure, granted Respondent's petition to voluntarily resign from the West Virginia State Bar.

Office of Disciplinary Counsel v. Lisa A. Weese, No. 12-1021 (WV 9/20/2012): Based upon a Petition filed by the Office of Disciplinary Counsel for the Court to accept Respondent's affidavit for disbarment by consent, the Supreme Court of Appeals of West Virginia ordered that, pursuant to Rule 3.25 of the Rules of Lawyer Disciplinary Procedure, Respondent's license to practice law in the State of West Virginia be annulled by voluntary consent.

Resignation Petition of Melissa M. Picco, No. 12-1022 (WV 10/18/12): Based upon a petition filed by Respondent and upon written recommendations of the Investigative Panel of the Lawyer Disciplinary Board, the Supreme Court of Appeals of West Virginia, pursuant to Rule 3.26(d) of the Rules of Lawyer Disciplinary Procedure, granted Respondent's petition to voluntarily resign from the West Virginia State Bar.

Lawyer Disciplinary Board v. Charles L. Phalen, Jr., No. 11-1746 (WV 11/14/2012): Based upon the recommendation of the Hearing Panel Subcommittee, the Supreme Court of Appeals of West Virginia ordered: 1) that Respondent be suspended from the practice of law in the State of West Virginia for one (1) year; 2) that Respondent petition for reinstatement pursuant to Rule 3.32 of the Rules of Lawyer Disciplinary Procedure; 3) that prior to petitioning for reinstatement Respondent shall furnish proof that he refunded unearned fees to Rodney Hudson ($3,000), Fawney S. Harshbarger ($2,000), Karen A Taylor ($3,000), Jason Falbo ($2,200) and Cynthia L. White ($3,000); 4) that Respondent complete an additional nine (9) hours of continuing legal education during his reporting period, specifically in office management, over and above that already required;) that following any reinstatement Respondent's practice of law shall be supervised for a one-year period by an attorney agreed upon between the ODC and Respondent; and 6) that he be required to pay the costs of the disciplinary proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

Office of Disciplinary Counsel v. Charles B. Mullins, No. 12-1132 (WV 10/18/2012): Based upon a Petition filed by the Office of Disciplinary Counsel for the Court to accept Respondent's affidavit for disbarment by consent, the Supreme Court of Appeals of West Virginia ordered that, pursuant to Rule 3.25 of the Rules of Lawyer Disciplinary Procedure, Respondent's license to practice law in the State of West Virginia be annulled by voluntary consent.

Office of Disciplinary Counsel v. Thomas Jason Drake, No. 12-1160 (WV 10/18/2012): Based upon a Petition filed by the Office of Disciplinary Counsel for the Court to accept Respondent's affidavit for disbarment by consent, the Supreme Court of Appeals of West Virginia ordered that, pursuant to Rule 3.25 of the Rules of Lawyer Disciplinary Procedure, Respondent's license to practice law in the State of West Virginia be annulled by voluntary consent.

Office of Disciplinary Counsel v. John W. Alderman, No. 35705 (WV 11/18/12): Pursuant to a Rule 3.18 petition filed by the Office of Disciplinary Counsel, the Supreme Court of

Appeals of West Virginia suspended Respondent's license to practice law in the State of West Virginia for a period of two years, with one year served retroactively based on his voluntary withdrawal from legal practice and one year held in abeyance pending two years of supervised practice. Respondent was further ordered to attend daily twelve-step program meetings with written proof of attendance; provide thirty hours of service to the Lawyers' Assistance Committee; participate in random drug screening with two hours notice for two years; and reimbursement to the Office of Disciplinary Counsel for costs incurred in the disciplinary proceeding. Respondent faces a potential one-year suspension should he violate any of the terms set forth in the Order or the terms of his supervised practice.

Office of Disciplinary Counsel v. Joshua M. Robinson, No. 35549 (WV 11/26/12) Pursuant to a Rule 3.18 petition filed by the Office of Disciplinary Counsel, the Supreme Court of Appeals of West Virginia issued an Order which annulled Respondent's license to practice law. The Court further ordered that prior to petitioning for reinstatement, that Respondent undergo a comprehensive psychological examination by an independent licensed psychiatrist to determine whether Respondent is fit to practice law; that he comply with all treatment protocol expressed by the psychiatrist; that Respondent complete an extensive course recommended by the psychiatrist in anger management; that Respondent pay costs of the proceeding; and that upon reinstatement, Respondent be supervised for a period of two years.

Lawyer Disciplinary Board v. David A. Aleshire, No. 35667 (WV 12/10/12) The Supreme Court of Appeals of West Virginia entered an Order suspending Respondent's license to practice law in the State of West Virginia for three years. In addition, Respondent must pay restitution in the amount of $500.00 to Carol J. Harless and provide proof of said restitution prior to petitioning for reinstatement; comply with the duties of a suspended lawyer as outlined in Rule 3.28 of the Rules of Lawyer Disciplinary Procedure; sit for and receive a passing score on the Multistate Professional Responsibility Disclosure Exam prior to petitioning for reinstatement; complete an additional twelve hours of continuing legal education in ethics prior to petitioning for reinstatement; pay the costs incurred in this disciplinary proceeding; and to undergo two years of supervised practice by a member in good standing of the West Virginia State Bar whose practice includes tax and real estate matters.

Annual Report as Required by the Rules of Lawyer Disciplinary Procedure

The Office of Disciplinary Counsel Statistics for Lawyer Discipline and Complaints and the Lawyer Disciplinary Board and Office of Disciplinary Counsel Annual Caseload Statistics for 2012 are attached to this Report.

LAWYER DISCIPLINARY BOARD/
OFFICE OF DISCIPLINARY COUNSEL
Respectfully Submitted By:

Charles J. Kaiser, Jr., Chairperson
Lawyer Disciplinary Board

OFFICE OF DISCIPLINARY COUNSEL STATISTICS FOR LAWYER DISCIPLINE AND COMPLAINTS: 2012

Number of **complaints** which resulted in **discipline** by Supreme Court of Appeals in 2012[1]:	[20 lawyers]	56 complaints
Lawyers disciplined by Supreme Court:	14	Solo practitioner
	2	Two lawyers in office
	0	Three lawyers in office
	4	Four or more lawyers in office
Length of practice of lawyers disciplined by Supreme Court:	0	Less than 5 years
	5	Between 5 and 10 years
	3	Between 10 and 15 years
	4	Between 15 and 20 years
	8	20 years or more

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[1] In 2012, ODC filed 3 petitions seeking the immediate suspension of an attorney pursuant to Rule 3.27, all of these petitions were ultimately withdrawn by ODC.

The Court granted 2 petitions filed by ODC seeking the administrative suspension based on the disability of a lawyer pursuant to Rule 3.23.

By motion of the ODC, the Court dismissed 2 previously stayed matters based upon the deaths of the attorneys.

The Court granted 3 petitions seeking the appointment of a trustee pursuant to Rule 3.29 after the death of an attorney, disability or abandonment by a lawyer.

The Court granted 2 petitions filed by lawyers seeking voluntary resignation.

The Court granted 1 petitions filed by a lawyer seeking reinstatement to the practice of law.

The Court issued decisions in 2 reciprocal matters pursuant to Rule 3.20 of the Rules of Lawyer Disciplinary Procedure.

Further, the Supreme Court of Appeals issued 8 disbarment decisions pursuant to Rule 3.25 of the Rules of Lawyer Disciplinary Procedure, wherein 8 lawyers [13 complaints] who were the subject of pending disciplinary proceedings tendered a sealed affidavit to the Court stating his/her voluntary consent to disbarment. There are no specific findings of rule violations in these matters.

Types of ethical violations committed in cases where lawyers were disciplined Supreme Court[2] (note: lawyers usually disciplined for more than one violation)	30%	Failure to communicate
	15%	Lack of diligence
	13%	Lying or not responding to the bar
	9%	Withdrawal problems
	7%	Trust account violations
	6%	Dishonesty/lack of truthfulness
	5%	Prejudice to the administration of justice
	4%	Competence
	3%	Lawyers committing a crime
	2%	Delaying litigation
	1%	Failure to abide by client objectives
	less than 1%	Fees
	less than 1%	Conflicts
	less than 1%	Frivolous litigation
	less than 1%	Fairness to opposing party

[2]Figures do not equal 100, due to rounding.

Number complaints where lawyers were issued Investigative Panel Admonishments in 2012:	27	
Type of conduct giving rise to these Investigative Panel Admonishments[3] [lawyer may have been admonished for more than one rule violation]	27%	Failure to Communicate
	16%	Lack of Diligence
	12%	Conflicts of Interest
	8%	Lying or not Responding to ODC
	6%	Prejudice to the administration of justice
	6%	Fairness to opposing party
	6%	Fees
	4%	Lawyer committing crime
	4%	Dishonesty/Lack of Truthfulness
	4%	Trust Account Violations
	2%	Confidentiality
	2%	Withdrawal Problems
	2%	Competence
	2%	Failure to Supervise

[3]Figures do not equal 100, due to rounding.

Breakdown of disciplinary complaints FILED in 2012 (complaints usually have more than one violation alleged; includes merit-less complaints):

337	Failure to communicate
243	No violation alleged
196	Lack of diligence
116	Failure to abide by client's objectives
82	Prejudice to the administration of justice
77	Dishonesty / lack of truthfulness
56	Conflict of interest
54	Withdrawal problems (files; refunds)
40	Delaying litigation
36	Trust Account Violations
35	Fees
34	Competence
22	Lawyer Committing a Crime
20	Failure to respect rights of 3rd persons
18	Fairness to opposing party/counsel
17	Assisting others to violate ethics rules
13	Lack of Candor before the tribunal
11	Confidentiality
8	Advertising/Solicitation
8	Frivolous Litigation
6	Prosecutorial Misconduct
6	Misleading unrepresented party
5	Unlawful Practice
3	Sexual contact with client
3	Trial Publicity
2	Failure to Supervise Non-lawyers
2	Independence of Lawyers
2	Communicating w/ represented party
1	Implying influence over government
1	Assist judge in unethical conduct

Types of cases giving rise to the filing of disciplinary complaints:	20%	Criminal
	20%	Miscellaneous
	17%	Domestic
	7%	Prosecutor
	6%	Personal Injury
	5%	Real Estate
	5%	Habeas
	5%	Conviction
	5%	Estate
	3%	Office Procedures
	2%	Abuse & Neglect
	1%	Compensation
	1%	Business
	less than1%	Bankruptcy
	less than1%	Employment
	less than1%	Contract
	less than1%	Impairment
	less than 1%	Reinstatement

LAWYER DISCIPLINARY BOARD AND OFFICE OF DISCIPLINARY COUNSEL ANNUAL CASELOAD STATISTICS

2002-2012

Year	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
New complaints	609	619	663	587	653	577	618	555	517	596	665
Total # Complaints Closed	619	528	702	637	662	618	572	545	520	576	665
Complaints Closed by Investigative Panel	84	67	60	77	50	69	55	62	73	67	94
Complaints Closed by Chief Disciplinary	304	247	356	308	330	308	252	258	239	240	276
Complaints Not Docketed/ ODC Dismissed	193	192	248	220	235	204	221	186	187	213	237
Supreme Court Cases Decided [# of complaints]	20 [38]	22 [29] *	16 [38]	20 [32]	25 [35]	26 [37]	26 [36]	17 [39] **	17 [21]	36 [55]	32 [56]
Hearing Panel Findings Issued [# of complaints]	13 [24]	10 [15]	8 [28]	14 [24]	14 [34]	15 [31]	13 [25]	5 [6] **	11 [24] ***	18 [27]	10 [24]
Formal Ethics	1	1	1	2	1	1	0	2	1	0	1
Informal Ethics Advice	701	814	757	716	725	870	701	728	606	710	702
Informal Complaints	52	60	91	101	75	121	96	82	78	67	77
Costs Collected	$3,481.70	$8,689.56	$2,024.47	$2,802.33	$4,780.54	$5,244.83	$13,943.08	$6,173.09	$6,436.39	$19,404.17	$8,653.24

*Of the 30 complaints considered by the Supreme Court of Appeals, there was one complaint in a Statement of Charges dismissed by decision of the Supreme Court of Appeals based on a statute of limitations argument. There were also 17 complaints deemed as aggravating factors in a Statement of Charges and the Supreme Court of Appeals ordered restitution made to these Complainants in the Order.

** There were 4 cases which encompassed 26 complaints before the Hearing Panels at various stages of the hearing process that ultimately lead to those 4 lawyers seeking voluntary disbarment in lieu of proceeding with the disciplinary hearing. The Supreme Court accepted those affidavits and issued decisions disbarring those 4 lawyers.

***There was 1 case which encompassed 2 complaints where the lawyer was in the midst of disciplinary proceedings and then filed for voluntary disbarment in lieu of proceeding with the disciplinary hearing. The Supreme Court accepted the affidavit and issued a decision disbarring the lawyer.

WV Office of Disciplinary Counsel Statistics For : 12/31/2012

Total Number of Currently Active Complaints:	453
Complaints Currently Under Investigation:	403
Complaints Currently Awaiting Statement of Charges:	11
Complaints Pending a Hearing:	22
Complaints Awaiting Recommended Decision:	9
Complaints Before Supreme Court:	8
Complaints Filed This Year:	665
Total Complaints Closed This Year:	665
ODC Closings:	237
CLDC Closings:	276
IP Closings:	94
SupCrt Closings:	56
Formal Charges Filed This Year:	49
Complaints Pending Less Than 6 Months:	167
Complaints Pending More Than 6 Months And Less Than 12 Month	182
Complaints Pending More Than 12 Months And Less Than 18 Month	45
Complaints Pending More Than 18 Months And Less Than 24 Month	33
Complaints Pending More Than 24 Months:	26
Percentage of Complaints Pending More Than 18 Months:	13.02%
Informal Ethics Advice:	702

These figures exclude cases on administrative stay, as permitted by the Rules of Lawyer Disciplinary Procedure. Statistics are kept on a calendar year basis.

INFORMED CONSENT CONFIRMED IN WRITING

~~Terminology.~~ **RULE 1.0 TERMINOLOGY**

(a) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

~~"Consult" or "consultation" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.~~

(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(c) "Firm" or "law firm" denotes a lawyer or lawyers in a ~~private firm,~~ law partnership, professional corporation, limited liability entity, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization ~~and lawyers employed in a legal services organization. See Comment, Rule 1.10~~.

(d) "Fraud" or "fraudulent" denotes conduct ~~having~~ that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive ~~and not merely negligent misrepresentation or failure to apprise another of relevant information~~.

(e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

(f) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(g) "Partner" denotes a member of a partnership ~~and~~, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

(h) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(i) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(j) "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(k) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

(l) "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(m) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

(n) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or video recording and electronic communications. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

COMMENT

Confirmed in Writing

[1] If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. If a lawyer has obtained a client's informed consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.

Firm

[2] Whether two or more lawyers constitute a firm within paragraph (c) can depend on the specific facts. For example, two practitioners who share space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to another.

[3] With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

[4] Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending on the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these Rules.

Fraud

[5] When used in these Rules, the terms "fraud" or "fraudulent" refer to conduct that is characterized as such under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.

Informed Consent

[6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g., Rules 1.2(c), 1.6(a) and 1.7(b). The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any

explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

[7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. A number of Rules require that a person's consent be confirmed in writing. See Rules 1.7(b) and 1.9(a). For a definition of "writing" and "confirmed in writing," see paragraphs (n) and (b). Other Rules require that a client's consent be obtained in a writing signed by the client. See, e.g., Rules 1.8(a) and (g). For a definition of "signed," see paragraph (n).

Screened

[8] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules 1.11, 1.12 or 1.18.

[9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other information, including information in electronic form, relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other information, including information in electronic form, relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.

[10] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

[20] Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.

[21] The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.

RULE 1.0 TERMINOLOGY

(a) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(c) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, limited liability entity, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

(d) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.

(e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

(f) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(g) "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

(h) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(i) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(j) "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(k) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

(l) "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(m) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

(n) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or video recording and electronic communications. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

COMMENT

Confirmed in Writing

[1] If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. If a lawyer has obtained a client's informed consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.

Firm

[2] Whether two or more lawyers constitute a firm within paragraph (c) can depend on the specific facts. For example, two practitioners who share space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to another.

[3] With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

[4] Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending on the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these Rules.

Fraud

[5] When used in these Rules, the terms "fraud" or "fraudulent" refer to conduct that is

characterized as such under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.

Informed Consent

[6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g., Rules 1.2(c), 1.6(a) and 1.7(b). The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

[7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. A number of Rules require that a person's consent be confirmed in writing. See Rules 1.7(b) and 1.9(a). For a definition of "writing" and "confirmed in writing," see paragraphs (n) and (b). Other Rules require that a client's consent be obtained in a writing signed by the client. See, e.g., Rules 1.8(a) and (g). For a definition of "signed," see paragraph (n).

Screened

[8] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules 1.11, 1.12 or 1.18.

[9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other information, including

information in electronic form, relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other information, including information in electronic form, relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.

[10] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

RULE 1.4 COMMUNICATION

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

COMMENT

[1] Reasonable communication between the lawyer and the client is necessary for the client to effectively participate in the representation.

Communicating with Client

[2] If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or reject the offer. See Rule 1.2(a). Even when a client delegates authority to the lawyer, the client should be kept advised of the status of the matter.

[3] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations-depending on both the importance of the action under consideration and the feasibility of consulting with the client-this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Any decision to outsource part or all of a matter to another lawyer or law firm as a means to accomplish a client's objectives is a client decision based upon informed consent. See Retaining or Contracting With Other Lawyers under the Comment to Rule 1.1. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. A lawyer should promptly respond to or acknowledge client communications.

Explaining Matters

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the

representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(e).

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Withholding Information

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

Declination Letters,

Engagement Letters

&

Closure Letters

Re: Representation Inquiry
Date of Inquiry – _____

Dear Mr.

After reviewing your complete file and presenting this matter to the :LAW FIRM, we have concluded that LAW FIRM is not in a position to further assist you in any potential claims you may or may not have arising out of your _____.

I am sorry we are not able to provide a more favorable reply, and wish you the best in finding counsel to assist you in filing a complaint and seeking a resolution of your matters.

To the extent that you intend to pursue any potential claims, we do encourage you to seek legal counsel as soon as possible, as delay could adversely affect any legal rights that you might have. If you are unable to locate a lawyer on your own, we suggest contacting the West Virginia State Bar Lawyer Referral Service (www.wvlawyerreferral.org/) for possible assistance with locating counsel.

Best Regards,

Re: Representation Inquiry
Date of Inquiry – _____

Dear Mr.

After reviewing your complete file and presenting this matter to the :LAW FIRM, we have concluded that LAW FIRM is not in a position to further assist you in any potential claims you may or may not have arising out of your _____.

I am sorry we are not able to provide a more favorable reply, and wish you the best in finding counsel to assist you in filing a complaint and seeking a resolution of your matters.

To the extent that you intend to pursue any potential claims, we do encourage you to seek legal counsel as soon as possible, as delay could adversely affect any legal rights that you might have. If you are unable to locate a lawyer on your own, we suggest contacting the West Virginia State Bar Lawyer Referral Service (www.wvlawyerreferral.org/) for possible assistance with locating counsel.

Best Regards,

Re: Decline Representation

Dear :

You requested that my firm act as counsel for XXXXXXXXXXX (hereinafter "LLC") with respect to the LLC's redemption of the membership interests, distributional interests and other interests of member XXXXXXXXXXX(collectively "Membership Interests"). Since my initial letter to you datedXXXXXXXXXXX , and our phone conversation of XXXXXXXXXX, I have learned that my firm has a conflict of interest that will make it unethical for me to represent in a manner adverse to XXXXXXXXX. Unfortunately, this conflict cannot be resolved in a manner that would allow us to represent the LLC in this transaction. Therefore, my firm must respectfully decline any representation of LLC with regard to this transaction.

Thank you again for your interest in LAW FIRM. We appreciate you having approached us regarding this matter, and hope that you will keep us in mind for any future legal needs you may have.

Respectfully submitted,

Ann L. Haight

From:
Sent:
To:
Cc:
Subject:

In accordance with our telephone conversation of this morning and the e-mails below, I will not file any answer or other response to the complaint or otherwise make any appearance in the lawsuit and I will not take any further action in this matter.

If my understanding is incorrect, please so advise me immediately, because is the deadline for responding to the complaint.

Two Sample Engagement Letters
(with optional notices)

Letter 1

{Date}

_____
_____
_____

Re: Employment of _____ by _____

Dear _____:

Thank you for selecting _____ to represent you with respect to _____.

This letter will confirm our recent discussion regarding the scope and terms of our engagement.

Our firm has agreed to represent you in [*describe matter*]. While I will be personally responsible for supervising this legal matter, I anticipate that other lawyers and legal assistants in the firm will also be working on this matter.

We will undertake the following work on your behalf [*detail anticipated services by clearly defining and limiting scope of representation*].

[*Straight hourly option*] You have agreed to pay for our services based on the time we spend working on the case. My current hourly rate is $___ per hour. The rates of our associates currently range between $___ and $___ per hour. Legal assistants, who will be utilized where appropriate to avoid unnecessary attorney fees, are charged at $___ per hour. These rates are subject to change once a year, usually in December. Generally you will be billed for all time spent on your matter, including telephone calls and email.

[*Value added billing option*] You have agreed to pay for our services based on the time we spend working on your case, with allowance for reduction or increase in fees under certain circumstances. My current hourly rate is $___ per hour. The rates of our associates currently range between $___ and $___ per hour. Legal assistants, who will be utilized where appropriate to avoid unnecessary attorney fees, are charged at $___ per hour. These rates are subject to change once a year, usually in December. On occasion, time may be written off before a statement is sent because we feel there has been some degree of inefficiency in the work or for other reasons. On the other hand, fees may be raised above hourly rate levels, based on the complexity of the matter, superior results, or other factors. If applied, we will discuss any such increases with you, and believe you will find them appropriate.

We will forward billing statements monthly. They will contain a description of services, including the date, the person rendering the service, the amount of time involved, and a description of the task accomplished. Monthly statements will also itemize monies we have advanced on your behalf, such as service and filing fees, expert witness fees, court reporter fees, and charges for investigation, travel and accommodation, telephone long distance, photocopies and telecopies.

As discussed, our current estimate for this engagement is $_____. [*Detail what the estimate does and does not cover*] This estimate must be viewed as imprecise, since at this time my knowledge of the facts is limited. We will advise you if it appears fees will be significantly higher than this estimate. At such time, you may decide to restrict the scope of our efforts or we may make other adjustments. This estimate does not include cost items.

You have paid us the sum of $_____ as an advance against fees and costs, which we have deposited in our trust account. After your receipt of monthly statements, we will pay the amount of the statement from the trust account. If any portion of the advance is unexpended at the conclusion of the case, it will be refunded to you. If the advance is expended, you have agreed to pay subsequent monthly statements on receipt or you can provide the firm with an additional advance of $ _____. If you choose to pay the charges monthly, an interest charge of one and one-half percent per month will be charged on statement balances not paid within 30 days of billing.

You will appreciate we can make no guarantee of a successful conclusion in any case. However, the attorneys of this firm will use their best efforts on your behalf.

[*Insert any special disclosures that may be appropriate, such as potential conflicts of interest, client confidentiality issues, etc.*]

If this letter fairly states our agreement, please so indicate by signing and returning the enclosed copy in the enclosed business reply envelope. As is always true, if you have any questions or concerns, please call me to discuss them.

We greatly appreciate the opportunity to represent you on this case and look forward to working with you.

Sincerely,

_____

Clients:

_____

Date: _____

_____

Date: _____

Attorneys:

By: _____

Date: _____

Letter 2

AGREEMENT FOR LEGAL SERVICES

The undersigned, hereinafter "clients", employ the law firm of _____, hereinafter "attorneys", to handle all claims of the clients or the clients' minor children or wards against any and all persons arising out of [*Clearly define and limit scope of representation.*]

Clients and attorneys agree as follows:

1) Initial Evaluation: Clients agree to pay the cost of obtaining necessary records and of having an expert evaluate clients' case, and will deposit $_____ with attorneys for this purpose. Any balance remaining will be refunded to clients if attorneys do not accept the case. Attorneys charge no fee for this evaluation.

2) Attorney Fee: Attorneys will receive an attorney fee of one-third of all sums recovered by settlement or trial. In the event an appeal is filed by any party, attorneys will receive forty percent of all sums recovered after the date a notice of appeal is filed. "All sums recovered" includes all monies paid in settlement or award of damages, attorney fees, costs, penalties or interest. The attorney fee will be calculated before deduction of costs. If there is no recovery, no attorney fee will be paid.

3) Costs: As required by attorney ethics rules, clients are responsible for payment of costs. Costs may include, but are not limited to, filing fees, service fees, witness fees, research fees, and charges for investigation, records, medical reports, photographs, exhibits, photocopies, telecopies, telephone long distance, postage, travel and accommodations, videotaping and depositions. Clients agree to pay attorneys $_____ by _____, 20__, to be placed in attorneys' trust account and applied as costs are incurred. If clients are unable to pay all costs as incurred, attorneys may advance costs. Unreimbursed costs will be deducted from any recovery after calculation of the attorney fee.

4) Advice Concerning Attorney Fee: Clients have been informed of the alternative of employing attorneys on an hourly fee basis. This alternative would require payment of a retainer at commencement of the case, payment of costs as incurred, and payment of fees each month at the rate of $___ per hour for partner services, $___ per hour for associate services and $___ per hour for paralegal services. In deciding to employ attorneys on a contingent fee basis, clients have considered the risks involved in this case, the experience and reputation of the attorneys, the uncertainty regarding the number of hours necessary to prosecute the case and the fact that the clients will ultimately decide whether to accept or reject a particular settlement offer. Clients are also informed that clients have the right to petition the court to determine the reasonableness of attorney fees charged by attorneys no later than ___ days following receipt of a written statement of the clients' net recovery and the method of its calculation.

5) Structured Settlement: If any part of a recovery calls for annuity payments in the future, the attorney fee on this portion of the recovery will be computed based on the cost of the annuity, if known, or on the present value of the annuity, and shall be paid from the cash portion of the recovery at the time of settlement.

6) Authority, Duties and Representations: Clients authorize attorneys to file a lawsuit if and when attorneys consider it advisable. Clients will cooperate with attorneys and will timely respond to attorneys' requests. Attorneys will make no settlement of clients' claims without clients' consent. Clients acknowledge that attorneys have made no guarantee of a successful result, and that any statements regarding the merit or outcome of the case are professional opinion only.

7) Associate Counsel: Attorneys reserve the right to associate other attorneys in clients' representation, without additional expense to clients. Clients consent to such association and to a division of attorney fees as may be agreed upon between associated counsel and attorneys.

8) Probate: In the event a death requires commencement of a probate action to prosecute clients' case, clients authorize attorneys to retain probate counsel. Fees and expenses incurred in any probate proceedings will be considered a cost item.

9) Medical and Subrogation Payments: Clients authorize attorneys to pay from clients' share of any recovery any unpaid medical bills or subrogation interests related to clients' claim.

10) Withdrawal and Discharge: If clients discharge attorneys, or if attorneys withdraw for cause, clients agree to pay attorneys a reasonable attorney fee and any unreimbursed costs. The attorney fee shall be, at attorneys' option, either an hourly fee for the attorney and paralegal time expended on the case; the contingency percentage of the last settlement offers; or, a prorata portion of the contingent fee ultimately recovered based on the relative contributions of the case by our firm and any successor law firms, as determined by the law of quantum meruit.

11) Special Power of Attorney: Clients grant to attorneys clients' power of attorney to act as clients' attorneys in fact to do all things necessary and proper in handling clients' case, including the execution of checks, drafts, releases and other agreements pertaining to this case only.

Clients:

_____

Date: _____

_____

Date: _____

Attorneys:

By: _____

Date: _____

Optional additions you might add to your engagement letter:

Social Media Warning:

We strongly encourage you to refrain from participating in social media (Facebook, Twitter, Tumblr, Flickr, Skype, and the like) during the course of representation. Information found on social media websites is not private, can be discoverable, and may be potentially damaging to your interests. Understand that information shared with others be it verbally; in writing via email, text message or letter; or even posted online could lead to the loss of attorney client privilege were that information to relate in any way to the legal matter that we are handling for you.

Given this, we advise you to refrain from communicating with us on any device provided by your employer or any computer, smart phone, or other device that is shared with someone else. In addition when communicating with us, do not use your work email address or a shared email account. You should only use a private email account that is password protected and only accessed from your personal smart phone or computer.

File Retention Policy Notice:

During our representation of you, we will be forwarding to you copies of all pleadings, documents, correspondence, and other information that are generated or received by this firm. These copies will be for your file which I encourage you to bring to every appointment so that both of us have all necessary information in front of us. At the conclusion of representation, we will close your file and retain it for ___ years. Your file will be destroyed after that time unless you instruct me in writing now or at the conclusion of representation that it is your wish to take possession of the file once our ten year retention period has expired.

No Guarantee Notice:

It is difficult to accurately predict the length of time it will take to completely resolve your legal matter. Generally these types of cases take [*provide realistic, worse case estimate of time*]; however this is only an estimate. The actual time required may be greater than currently expected. Further, while we will use our best efforts in representing you, your signature below will serve as your acknowledgement that we can give no assurances as to the final outcome.

Succession Planning/Backup Attorney Notice:

While I strive to deliver excellent legal services to each and every client, I also have an ethical obligation to protect your interests during any extended absences, such as a vacation, or in the event of my unexpected death or disability. To accomplish this I have named [*insert name*] as my backup attorney who will be available during any extended absences or will step in to assist in the winding up of my practice should that ever prove necessary. I will personally provide you advance notice of any planned absences and my

office staff or backup attorney will contact you with information on how to proceed should any unexpected event ever occur.

Fee Dispute Resolution Notice:

While this agreement is intended to prevent any confusion over the terms of our representation, should a fee dispute arise you agree to submit your fee dispute to binding arbitration with [*insert the name of your local bar's fee dispute resolution program*]. By signing below, you acknowledge that you have the right to use other court forums to address fee disputes, but you now agree to compromise those rights by agreeing to submit any fee dispute to binding arbitration. Binding arbitration means that any decision made by the arbitration panel, in your favor or ours, will be final and non-appealable. In short it will have the same effect and enforceability of any similar decision made by a court of law. The arbitration panel hears disputes in [*list locality*]. Our bar association will select the panel from a list of attorney and lay volunteers who have agreed to hear fee disputes. There are no costs associated with obtaining panelists. We encourage you to seek additional independent legal counsel in regard to this issue if you have any concerns about agreeing to submit any fee dispute to binding arbitration.

Early Termination Notice:

An effective working relationship is essential throughout the course of representation. Given this, should you become dissatisfied with our services at any point in time, please do not hesitate to immediately bring your concerns to our attention. Hopefully we will be able to discuss and resolve the matter. If not, you may terminate our representation at any time. In the event you elect to do so, you will remain responsible for the payment of any fees earned as well as any expenses incurred. We may terminate our representation of you only as permitted or required by law or regulation. Please be advised that after reasonable notice, your failure to pay on your financial obligations to us or make deposits when due are two such causes that will result in our terminating representation.

Sample Multiple Client Conflict Waiver Notice:

You have asked us to represent you, [*Client A*] and [*Client B*], jointly in connection with [*full description of matter*]. We would be pleased to do so subject to the following understandings.

Although the interests of both of you in this matter are generally consistent, you both acknowledge that you recognize and understand that differences may exist or become evident during the course of our representation. Notwithstanding these possibilities, the two of you have determined that it is in your individual and mutual interests to have a single law firm represent you jointly in connection with this matter.

Potential conflicts of interest that might arise include but are not limited to: [*Use "Murphy's Law" to discern and describe all reasonably foreseeable ramifications to each client by their agreeing to joint representation*]. In addition, it is possible that a

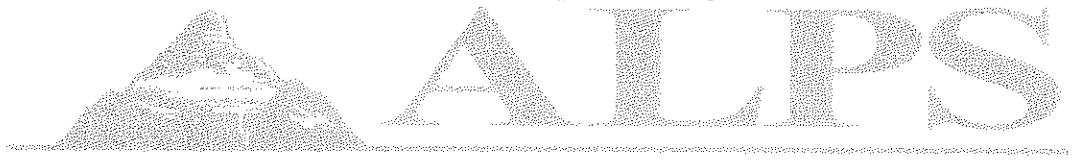
circumstance could arise whereby our continuing with our representation could not occur without it adversely affecting one of you. Should this happen, we will be forced to terminate our representation of you both and it will be necessary for each of you to hire your own independent lawyers.

Accordingly, this confirms the agreement of [*Client A*] and [*Client B*] that we may represent you jointly in connection with the above-described matter. This will also confirm that the two of you have each agreed to waive any conflict of interest arising out of, and that you will not object to, our representation of each other in the matter described herein.

It is further understood and agreed that we may freely convey necessary information provided to us by one client to the other, and that there will be no secrets or confidences as between the two of you.

If you need to discuss the terms of this letter or any related issues, please contact us at your earliest convenience. However, if you agree that the foregoing accurately reflects our understanding, please sign and return the enclosed copy of this letter.

Therefore, we hereby state that we prefer that [Lawyer] represent us in this matter and that we refuse to exercise our right to hire independent lawyers.



Dear

Thank you for contacting me regarding reviewing and advising regarding the NonDisclosure and NonSolicitation Agreement signed by The West Virginia Rules of Professional Conduct suggest that attorneys have written fee agreements with their clients. This letter, when returned signed by you to our office will constitute the written fee agreement with our firm.

1. SCOPE OF SERVICE

You are hiring the undersigned attorney and the law firm of to review the terms of the NonDisclosure and NonSolicitation Agreement with former employer and discuss the validity of the same. We are undertaking this work as an independent law firm organized as a professional limited Liability Company as determined under the laws of the State of West Virginia.

We will provide those legal services reasonably required by such tasks. We will take reasonable steps to keep you informed of progress and to respond to your inquiries. Unless we make a different agreement in writing, this Agreement will govern all future services we perform for you including actual representation in legal matters.

2. YOUR DUTIES

You agree to provide us with any necessary documentation and/or information we need to complete such tasks, to keep us informed of developments, to abide by this Agreement, and to pay our bills on time.

3. LEGAL FEES AND BILLING PRACTICES

We have agreed to represent you in this matter based upon the hourly rates shown below. You agree to pay by the hour at our rates for time spent on your matter by our legal personnel. Legal personnel include attorneys and paralegals.

reserves the right to renegotiate the hourly rates after two (2) years.

4. COSTS AND OTHER CHARGES

We will charge for costs we incur on your behalf in performing legal services under this Agreement. You agree to pay those charges in addition to the hourly fees.

5. BILLING STATEMENTS

We will send you monthly statements for fees and charges incurred. Each statement will be due within thirty (30) days of its date.

6. DISCHARGE AND WITHDRAWAL

You may discharge us at any time. We may withdraw with your consent or for good cause. Good cause includes your breach of this Agreement, your refusal to cooperate with us or to follow our advice on a material matter or any fact or circumstance that would render our continuing representation either unlawful or unethical.

We look forward to the privilege of working with you. Please acknowledge your acceptance of these terms by signing and returning a copy of this letter to our office.

Accepted on behalf of

By:

_____

Date: _____

Re:

Dear Ms.

We are pleased that you have selected the law firm of to represent you in the matter described above. West Virginia rules of professional conduct suggest that attorneys have written fee agreements with their clients. This letter, when returned signed by you to our office, will constitute the written fee contract ("Agreement") with our firm.

1. CONDITIONS

This Agreement will not take effect and we will have no obligation to provide legal service until you return a signed copy of this Agreement.

2. SCOPE OF SERVICE

You are hiring us as attorneys to represent you regarding the above-referenced matter. We are undertaking this work as an independent law firm organized as a professional limited liability company as determined under the laws of the State of West Virginia and not as your employees.

We will provide those legal services reasonably required in such representation, and we will take reasonable steps to keep you informed of progress and to respond to your inquiries. With respect to the above-referenced matter, if necessary and at your request, we will represent you on any appeal without a separate and further agreement. Unless you and we make a different agreement in writing, this Agreement will govern all future services we perform for you. We hope you will understand that we can make no guarantee of a successful conclusion in any case.

3. YOUR DUTIES

You agree to cooperate, to keep us informed of developments, to abide by this Agreement, to pay our bills on time, and to keep us advised of your address and telephone number.

4. LEGAL FEES AND BILLING PRACTICES

You agree to pay by the hour at our rates prevailing at the time that services are provided for time spent on your matter by our legal personnel. "Legal personnel" includes attorneys, paralegals, and legal assistants. My current hourly rate is , and, to the extent is involved in the work on this case, his current hourly rate is rates for other attorneys will vary, depending on the attorney's level of experience and expertise.

We charge for our time in minimum units of 1/10 hours. We will charge you for the time we spend on telephone calls relating to your matter, including calls with you, opposing counsel or Court personnel. The legal personnel assigned to your matter will confer among themselves about the matter as required. We will charge for waiting time in Court and elsewhere and for any actual travel time.

5. COSTS AND OTHER CHARGES

(A) **In General.** We will charge for various items in performing legal services under this Agreement. You agree to pay those charges in addition to the hourly fees. The charges commonly include process server fees, fees fixed by law or assessed by Courts and other agencies, court reporters' fees, long distance telephone calls, messenger and other delivery fees, postage, parking and other travel expenses (including mileage at the rate allowed by the IRS), fax, photocopy and other reproduction, and other similar actual charges.

(B) **Out-of-Town Travel.** If applicable, you agree to pay transportation, meals, lodging and all other costs of any reasonable necessary out-of-town travel by our personnel. You will also be charged the hourly rates for the time legal personnel spend traveling. Because the above-referenced matter is pending in the Circuit Court of Putnam County, West Virginia, there may be a significant amount of travel; however, we will attempt to minimize travel time and expense.

(C) **Experts, Consultants and Investigators.** To aid in the preparation or presentation of your case, it may become necessary to hire expert witnesses, consultants or investigators. We will not hire such persons unless you agree to pay for their fees and charges; we will select any expert witnesses, consultants or investigators to be hired.

6. BILLING STATEMENTS

We will send you monthly, itemized statements for fees and charges incurred in this matter. Payment of the balance owed in each monthly statement will be due no later than thirty (30) days of its date.

7. DISCHARGE AND WITHDRAWAL

You may discharge us at any time. We may withdraw with your consent or for good cause. "Good cause" includes your breach of this Agreement, your refusal to cooperate with us or to follow our advice on a material matter or any fact or circumstance that would render our continuing representation either unlawful or unethical.

We look forward to the privilege of working with you. If you wish us to begin our representation, you must sign and return this letter to my attention at our office in the enclosed self-addressed stamped envelope (an extra copy of the letter has been provided for your records).

Sincerely,

Acceptance by

Date:

Re:

Dear

I am following up on our telephone conversations of last week regarding your request that I and my firm provide advice and assistance to you and your firm in connection with the above-captioned transaction. Under the West Virginia Rules of Professional Conduct, it is suggested that we express to you in writing the basis of the arrangement that will be applicable to our handling of this matter, and the purpose of this letter is to set forth our mutual understanding of the basis upon which we have agreed to undertake such services.

You are hiring us to serve as local counsel only, to provide advice and assistance to your firm, as lead counsel, in your representation of your client, in the above-captioned transaction, and our advice and assistance will be limited to matters of West Virginia law.

The charges for our services will be based upon our regular hourly rates in effect at the time the services are rendered. My rate currently is per hour. I anticipate that other attorneys in the firm will also work on this matter, and their time will be billed on the basis of their regular hourly rates in effect at the time. Unless otherwise specified, any additional services requested to be provided by our firm beyond the scope of the above matter also will be billed to you in accordance with our hourly rates in effect at the time those services are rendered.

Bills will be submitted to you on a monthly basis. It is our understanding that all bills rendered to you by us will be paid within thirty days of the date on which such bills are submitted. We will promptly respond to any questions you may have concerning any item on a bill submitted to you.

You should be aware that you will be billed charges for various expenses that we incur, including, without limitation, express mailings and postage, telecopy, long distance telephone, and photocopying. Our firm policy dictates that certain expenses in excess of Five Hundred Dollars ($500.00) and which are payable to a third party will be forwarded to you for direct payment.

You understand and agree that, unless otherwise agreed to in writing, the file materials maintained by our firm may be destroyed five years after the conclusion of this matter.

If this letter is consistent with your understanding of our fee arrangement, please sign a copy of this letter where indicated and return it to me for our files.

We appreciate the opportunity to be of service to you in this matter and look forward to working with you.

If you have any questions concerning this letter, please do not hesitate to let me know.

Yours truly,

Accepted and agreed to effective the
17th day of

By:

RE: Engagement for Legal Services

Dear Mr. and Mrs.

It is our standard procedure to confirm with a new client the scope of the services we will provide and the terms by which we will bill fees and expenses.

Scope

The scope of our representation will generally entail providing advice, assistance, drafting and executing documents relating to your estate planning needs.

Fees

Our bills for professional services are based on hourly billing rates. A different billing rate is applicable to each attorney depending upon that attorney's experience and area of expertise. The hourly billing rate for this engagement will be ___ ır time spent by me. ___ hourly billing rate for this engagement will be ___. Our fees are computed in increments of one-tenth of an hour (6 minutes). These fee rates will not be changed without notice to you, unless there is a general rate increase with respect to all clients.

Our professional fees will reflect a number of factors, including time spent on your matter(s) (e.g., office and telephone conferences with you, telephone and office conferences between us and others on your behalf, attending meetings, hearings and court appearances on your behalf), and preparation of correspondence and documents in connection with your affairs). We do not charge for attorney administrative time or for time spent in maintaining a general, current knowledge of the law. You will receive a computer-generated invoice showing a description of the services performed and itemizing charges for your work. These invoices contain information protected by the attorney-client privilege. The privilege could be deemed to have been waived if someone other than the client sees the privileged material. Accordingly, we recommend that you keep all of your invoices in a segregated file marked "Attorney-Client Privileged Materials" and keep the file in a secure place.

Conflicts

Relative to conflict matters, we have performed a formal conflicts check within our office. As you understand, we represent numerous clients on numerous matters. Based upon our initial conversations, we have found no apparent conflicts relative to representation of your interests versus those of other clients we currently represent. However, couples can have different, and sometimes conflicting, interests and objectives regarding their estate planning. For example, they may have different views on how property should pass after the death of one or both of them. In some situations, we may recommend that holdings be restructured to take advantage of available tax benefits, which may involve gifts from one to the other. Some of these actions can affect the division of property in the event of divorce. These are just a few of the general examples. Each couple's situation is unique.

If you each had a separate lawyer, you would each have an "advocate" for your position and would receive totally independent advice. Information given to your own lawyer is confidential and cannot be obtained by your spouse without your consent.

That is not the case when one firm advises both of you. We cannot be an advocate for only one of you. Information that either of you gives us relating to your planning cannot be kept from the other. We will have to immediately tell the other anything which one of you tells us that relates to the estate planning of either of you, since not to reveal

such information to the other would be a violation of the attorney-client relationship. If you ask us to continue to serve you jointly, our effort will be to assist in developing a coordinated overall plan and to encourage the resolution of differing interests in an equitable manner and in your mutual interests.

After considering these factors, each of you must decide whether you want us to represent you jointly in connection with your estate planning and related manners. If you do, please review the statement that follows and sign and date it as indicated. If either of you wishes to have the advice of separate counsel, you are completely free to do so. If you decide to obtain separate counsel from the beginning of your estate planning process, we would be happy to represent either of you.

Termination

You may terminate our services at any time. Termination of our representation does not, however, relieve you from the responsibility to pay fees and expenses already incurred. By the same token, if our monthly invoices are not paid in accordance with this agreement, we reserve the right to withdraw from this work.

The goal of each of us at is to provide the highest quality legal services on a prompt and timely basis. I trust you will find that we are not only available and responsive, but will spare no effort to meet your needs and deadlines. Accordingly, let me encourage you to contact me, or any other person working on your matters, at any time. My phone number is When I am not immediately available, you may leave a detailed message on our "voice mail" system or, if you prefer, you may transfer the call to my secretary,

We hope this explanation of the structure of our relationship will be helpful to you and invite you to discuss any matter with us at any time or to inquire at any time about your fees or costs incurred. We will strive to keep you fully informed during the course of this engagement and anticipate that you likewise will keep us informed of pertinent developments. If this understanding of the terms of our engagement is acceptable, please sign and return one copy of this letter. The other copy of the letter is yours to keep.

We are delighted at this opportunity to work with you and look forward to a mutually satisfactory relationship. Please feel free to contact me if you have any questions concerning this letter.

Very truly yours,

We have reviewed the foregoing letter. Each of us realizes that there are areas where our interests and objectives may differ and areas of potential or actual conflict of interest between us in connection with our estate planning and related matters. We understand that either of us may retain separate, independent counsel in connection with these matters at any time. After careful consideration, each of us requests that . represent us jointly in connection with our estate planning and related matters and each of us consents to that dual representation. Each of us also understands and agrees that communications and information receives from either of us relating to these matters will be shared with the other.

AGREED as of this _____ day of _____,

_____

_____

May 25, 2013

RE: Engagement for Legal Services

Dear

It is our standard procedure to confirm with a new client the scope of the services we will provide and the terms by which we will bill fees and expenses.

Scope

The scope of our representation will generally entail providing advice, assistance and representation relating to the administration of the Estate of This engagement will include advice and assistance beginning with our initial meeting on even though this agreement is executed subsequent to such date.

Fees

Our bills for professional services are based on hourly billing rates. A different billing rate is applicable to each attorney depending upon that attorney's experience and area of expertise. The hourly billing rate for this engagement will be . for time spent by me. Our fees are computed in increments of one-tenth of an hour (6 minutes). These fee rates will not be changed without notice to you, unless there is a general rate increase with respect to all clients.

Our professional fees will reflect a number of factors, including time spent on your matter(s) (e.g., office and telephone conferences with you, telephone and office conferences between us and others on your behalf, attending meetings, hearings and court appearances on your behalf), and preparation of correspondence and documents in connection with your affairs). We do not charge for attorney administrative time or for time spent in

maintaining a general, current knowledge of the law. You will receive a computer-generated invoice showing a description of the services performed and itemizing charges for your work. These invoices contain information protected by the attorney-client privilege. The privilege could be deemed to have been waived if someone other than the client sees the privileged material. Accordingly, we recommend that you keep all of your invoices in a segregated file marked "Attorney-Client Privileged Materials" and keep the file in a secure place.

Conflicts

Relative to conflict matters, we have performed a formal conflicts check within our office. As you understand, we represent numerous clients on numerous matters. Based upon our initial conversations, we have found no apparent conflicts relative to representation of your interests.

Termination

You may terminate our services at any time. Termination of our representation does not, however, relieve you from the responsibility to pay fees and expenses already incurred. By the same token, if our monthly invoices are not paid in accordance with this agreement, we reserve the right to withdraw from this work. You understand and agree that, unless otherwise agreed to in writing, the file materials maintained by may be destroyed five years after the conclusion of this matter.

The goal of each of us at is to provide the highest quality legal services on a prompt and timely basis. I trust you will find that we are not only available and responsive, but will spare no effort to meet your needs and deadlines. Accordingly, let me encourage you to contact me, or any other person working on your matters, at any time. My phone number is When I am not immediately available, you may leave a detailed message on our "voice mail" system or, if you prefer, you may transfer the call to my secretary,

We hope this explanation of the structure of our relationship will be helpful to you and invite you to discuss any matter with us at any time or to inquire at any time about your fees or costs incurred. We will strive to keep you fully informed during the course of

this engagement and anticipate that you likewise will keep us informed of pertinent developments. If this understanding of the terms of our engagement is acceptable, please sign and return one copy of this letter. The other copy of the letter is yours to keep.

We are delighted at this opportunity to work with you and look forward to a mutually satisfactory relationship.

Very truly yours,

AGREED as of this _____ day of

Re: Engagement for Legal Services

Dear

I am pleased to confirm your retention of myself and the law firm of to represent you in connection with matters related to claim against This letter will serve as an engagement letter with respect to our representation. It is our standard procedure to confirm with clients the scope of the services we will provide and the terms by which we will bill fees and expenses.

Scope

The scope of our representation will generally entail providing advice, assistance and representation regarding your claim adverse to

Fees

In the event that we recover any amount on your behalf through settlement or a jury verdict, our fee in this matter will be the greater of (1) one-third (33 1/3%) of the amount recovered or (2) our actual fees incurred and awarded by the Court under the West Virginia Human rights Act. Actual fees are determined based upon our billable hourly rates multiplied by the number of hours spent on the case. Should we have to participate in any appeal of your case, then our fees will be forty percent (40%) of the amount recovered.

Expenses

Please note that any expenses are separate from attorney fees. Upon recovery through settlement or a jury verdict, expenses which our firm has incurred on your behalf will be due and payable from the amount recovered in full. Expenses include such items as computerized legal research (LEXIS and Westlaw services), telephone charges, delivery and fax charges,

Conflicts

Relative to conflict matters, we have performed a formal conflicts check within our office. As you understand, we represent numerous clients on numerous matters. Based upon our initial conversations, we have found no apparent conflicts relative to representation of your interests. However, if we become aware of a conflict, we will discuss it with you. We specifically reserve the right to withdraw from representation if we feel that we cannot properly represent your interests. Likewise, should we at any time during the representation, even after the conflicts check, determine that representations of your interests would conflict with our previous representation, or previous relationship with other clients relative to your matter, we do reserve the right, after discussion with you, and at our sole discretion, to withdraw from representation of your interests. In addition, because we do represent many other clients in West Virginia, we cannot institute litigation against these clients. If representation of your interests would require such action, we reserve the right to either withdraw from your representation and/or, after consultation with you, refer that particular litigation matter out to other counsel to handle.

We also reserve the right to continue to represent or to undertake to represent existing or new clients in any matter that is not substantially related to our work on your matter, even if the interests of such clients in other matters are indirectly adverse to you. We agree that the prospective consent to conflicting representation reflected in this paragraph shall not apply in any instance where as a result of our representation of you we have obtained sensitive, proprietary, or otherwise confidential information that if known to any other client of ours, could be used in any matter by said client to the material disadvantage of you. However, by signing this document, you acknowledge and consent to the above limits in representing your interests.

Termination of Representation

You may terminate our representation at any time. This firm also retains the right to terminate representation of you in the event that you reject a settlement offer which has been made and which we have advised you is fair and reasonable when evaluating the merits of your case

In either event, termination of our representation does not relieve you from the responsibility to pay fees and expenses already incurred. Upon termination or representation, you agree to reimburse this firm in full for all expenses advanced on your behalf. In addition, should you proceed with this matter after our representation terminates, you agree that this firm will have a lien on any recovery for attorneys fees incurred to date. Such lien will be equal to a pro-rata share of the amount recovered. Such lien shall be equal to: (the number of hours incurred by this firm divided by the total number of hours of all attorneys representing you in the case) multiplied by the greater of (1) one-third (33 1/3%) of the amount recovered or (2) our actual fees incurred and awarded by the Court under the West Virginia Human rights Act.

Retainer

We are not requesting a retainer in this matter.

The goal of each of us at is to provide the highest quality legal services on a prompt and timely basis. I trust you will find that we are not only available and responsive, but will spare no effort to meet your needs and deadlines. Accordingly, let me encourage you to contact me or at any time. My phone number is . If I am not immediately available, you may leave a detailed message on our "voice mail" system or, if you prefer, you may transfer the call to my secretary,

We hope the explanation provided in this letter will be helpful to you and invite you to discuss any matter with us at any time or to inquire at any time about your fees or costs incurred. We will strive to keep you fully informed about your case and anticipate that you likewise will keep us informed of pertinent developments. If this understanding of the terms of our engagement is acceptable, please sign and return one copy of this letter. The other copy of the letter is yours to keep.

I look forward to the opportunity to work with you and to a mutually satisfactory relationship.

Very truly yours,

AGREED as of this _____ day of

_____

May 15, 2013

CONFIDENTIAL ATTORNEY-CLIENT PRIVILEGED COMMUNICATION

Via email and regular mail

Re:

Engagement Letter -- Revised

Dear Mr. Stout:

This letter will serve to confirm your retention of this firm to represent you in connection with . Additionally, under the West Virginia Rules of Professional Conduct, we are required to express to you in writing the basis for our fee agreement that will be applicable to this matter.

Scope of Engagement

The scope of our engagement will be to represent you .

Attorney Fees and Costs

The charges for our services will be based upon our regular hourly rates. I will be the primary attorney involved in your matter. However, other attorneys may, from time to time be involved in this matter and they will be billed at their regularly hourly rate. At this point in addition to myself, we anticipate nay have some involvement in the matter. Our regular hourly rates are:

a.
b.
c.

If other attorneys in the firm work on this matter, their time will be billed on the basis of their regular hourly rate. Unless otherwise specified, any additional services requested to be provided by our firm beyond the scope of the above matters will also be billed to the Company in accordance with our hourly rates in effect at the time those services are rendered.

Time will be billed in tenth of an hour (.1) increments. Bills will be submitted to you on a monthly basis and are due within thirty (30) days. We will promptly respond to any questions the Company may have concerning any item on a bill submitted.

You will be billed for disbursements and expenses that we incur on your behalf, including, without limitation, express mailings and postage, legal research, telecopy charges, long distance telephone costs and photocopying charges. Reimbursable expenses are set forth in more detail in the *Schedule of Reimbursable Expenses*" that is attached to this letter.

This firm will require a retainer in the amount of $5,000.00. One-half ($2,500.00) of this retainer is payable at the time of our retention. The remaining balance ($2,500.00) is payable sixty (60) days thereafter. For every month that you receive a statement from this firm, the fee and expenses will be deducted from said retainer until the retainer is depleted. If this matter is completed before the depletion of said retainer, you will be refunded the balance thereof. However, if additional work is required, you will be asked for an additional retainer.

Waiver of Future Conflicts

Recurring potential conflict problems have caused the firm to adopt the following conflicts policy for those clients whom we represent only occasionally or in a limited area of work. Our acceptance of such employment is conditioned upon you consenting in advance to our representation of others in other matters whose interest may conflict with your interests so long as we, in our employment by you, have not become privy to confidential information which would be relevant in our representation of others with adverse interests. Your execution and return of an original of this letter shall constitute your consent to this conflicts policy.

File Management of Documents Provided to our Firm from you during these Proceedings

If you have not asked for the return of any original documents that you may have provided to us during the proceedings of your case, these documents will be maintained in any archive file we establish. If you would like your file at the conclusion of the litigation, you may request, in writing, that you be provided your file. If you so choose, your file can be provided to you scanned on a CD. This firm will maintain a copy of your file for a minimum of five years upon the conclusion of the litigation.

Cooperation and Termination of Representation

It is crucial for our ability to effectively represent you that it and its agents, employees, mangers, members, and representatives be truthful with us, cooperate with us in the defense of this case, and keep of informed of any changes in your situation; including changes of address, telephone numbers and the like. This representation agreement is terminable by either party. In the event this firm terminates its representation of you, we will provide you notice of our intent and an opportunity to obtain substitute counsel prior to ending the representation.

Representation Agreement

Enclosed are two originals of this letter. If this agreement is acceptable to you, please sign the enclosed originals and return one to me and keep the other for your records. Please enclose the retainer with the executed engagement letter that is being returned to us. Your signature will signify your approval of the terms and conditions set forth in this letter and the signed copy will constitute our representation agreement. Until you return this signed letter, no work will be performed in your behalf.

We appreciate the opportunity to be of service to you in this matter and look forward to working with you.

Very Truly Yours,

enclosure

[REMAINDER OF PAGE LEFT BLANK]

Acceptance by

_____

_____
Date

xxxxxxxxxx

Xxxxxxxxx
xxxxxxxxx

Re: Insured: xxxxxxxx.
xxxxxx v xxxxxxxxx
Civil Action No. xxxxxxxxxxxx

CONSENT TO REPRESENTATION

Dear xxxxxxxxxx:

This firm has been retained by xxxxxxxx insurance company to defend you in the above-styled civil action.

I: Scope of Service:

Your insurance carrier, xxxxxxxx has retained to represent you in the above-captioned litigation filed against you by xxxxxxxx in the Circuit Court of xxxxxxxxCounty, West Virginia arising xxxxxxxx. Because your legal expenses in this matter are being paid by a third-party – an insurance carrier – the West Virginia Rules of Professional Responsibility require that we obtain your consent to the billing arrangement.

II: Communications with xxxxx insurance company.

You are our client in this matter, not xxxxx insurance company. However, as the insurance company is paying defenses costs and expenses and has the right to settle, if necessary, the claims asserted against you, it is necessary for us to keep the insurance company informed of the status of the litigation so that it may properly evaluate and make informed decisions relating to the case. Information we may communicate to the insurance company includes information relating to the facts of the case, information relating to the legal theories of the case, including strengths and weaknesses of any claims or defenses you may have, and information regarding the damages claimed by plaintiff, including medical bills and expenses incurred and information regarding other items of damages that plaintiff may seek to recover from you.

However, we represent you, not xxxxxxxxxxxxxxxxxxxxxxxx. Therefore, we cannot, and will not, communicate information to the insurance company that could potentially negatively impact you with regard to coverage under the insurance policy with xxxxxxxxxxxxxxxxxxxxxxxxxxxx.

By executing this consent, you consent and agree to our communications with your insurance company as set forth herein.

III: Coverage questions under your insurance policy

As mentioned in Section III, we cannot communicate information to your insurance company that may impact your coverage under that policy. It is our understanding that there is a question of whether you are covered under the xxxxxxxxxxxxxxxxxxxxxxxxxx insurance policy issued to xxxxxxxx. We cannot become involved in any disputes between you and xxxxxxxxxxxxxxx over coverage afforded to you under its policy.

If disputes arise between you and xxxxxxxxxxxxxxxxxx related to coverage, you will need to retain separate counsel to advise you in to any disputes between you and xxxxxxxxxxxxxxxxxxxx.

Additionally, if a determination is made by either xxxxxxxxxxxxxxx or a court of competent jurisdiction that there is no coverage available to you, you will be responsible for payment of legal fees for ongoing representation of you. In such a situation, this firm may seek leave of Court to withdrawal from its representation of you in this case if you are unwilling or unable to pay ongoing legal expenses related to this matter.

IV: Legal Fees and Billing Practices

Legal fees and expenses incurred in your representation will be billed to and paid by xxxxxxxxxxxxx Insurance Company, which is the insurance company for Shafer Equipment, pursuant to rates agreed to between it and

V: Communications with you and File Maintenance

We will provide you copies of all correspondence and pleadings that are filed on your behalf in this matter. You will want to keep these in a safe place and keep them separate from other files. It is crucial for our ability to effectively represent you that you be truthful with us, cooperate with us in the defense of this case, and keep us informed of any changes in your situation; including changes of address, telephone numbers and the like.

typically maintains files in electronic and paper form. It is our policy that, after the conclusion of the litigation, all our paper files will be scanned and stored in electronic format. All duplicates and extra copies of documents will be

culled from the file and shredded before scanning. Any original documents that you have provided to us that have not already been returned will be returned to you. If you would like your file, we will provide a copy of your file to you upon written request. Documents that will be provided to you include all material provided by you to us, all correspondence, pleading, motions, discovery filed, and depositions. If you would like a paper copy of your file, we must receive you request within 30 days after conclusion of the litigation days. Otherwise, we will provide you with an electronic copy of the file on disk. Our electronic file will be maintained for a period of 7 years after the conclusion of the litigation.

VI: Questions

If you have any questions related to any of the above matters, we are happy to discuss them with you further. You are also free to consult with counsel of your choice for additional advice relating to any of the foregoing.

Again, I look forward to the opportunity to work with you in this matter. If you have any further questions or concerns regarding this firm's retention, please do not hesitate to contact me.

Sincerely,

Consent and agreed to this ___ day of _____20_____

By:_____

RE: Engagement and Retainer Agreement for title search of

Dear

We are pleased that you have selected the law firm of to represent you in any matter in which you may need assistance. This letter, when returned signed by you to our office, will confirm the basis upon which the firm agrees to represent you in these matters and will constitute the written fee contract ("Agreement") with our firm.

We understand that the issue of legal fees and expenses is of importance to you as it is to us. Because of the complexity and uncertainty of many matters, it is not possible to inform you of each and every step that may be necessary or every expense that necessarily may be incurred in representing you. Consequently, it is impossible to accurately estimate the total amount of time necessary to complete an individual task. The outcome depends upon a number of factors, including but not limited to, the complexity of the issues involved, the amount of cooperation by other parties involved, the amount of documentation necessary to adequately fulfill the task, and any other circumstances or issues that may arise during the pendency of our representation. No results can be guaranteed in any case, and the amount of our fees will not be contingent upon the outcome. The best that we can provide is the general basis upon which fees and expenses will be charged.

1. **Scope of Representation.** This Agreement will not take effect and we will have no obligation to provide legal services until you return a signed copy of this Agreement.

You are hiring us as attorneys to represent you in locating the property known as the , determining ownership of said property, and determining whether drilling has commenced. We are undertaking this work as an independent law firm organized as a professional limited liability company as determined under the laws of the State of West Virginia and not as employees of you or of your company.

We will provide those legal services reasonably required in such representation, and we will take reasonable steps to keep you informed of progress and to respond to your inquiries. In the event litigation becomes necessary with respect to any matter, if necessary and at your request, we will represent you on any appeal without a separate and further agreement. Unless you and we make a different agreement in writing, this Agreement will govern all future service we perform for you. We hope you will understand that we can make no guarantee of a successful conclusion in any case.

2. **Basis for legal fees.** Our fees will be based upon hourly rates applied to the time devoted to your proceeding. The current hourly rate for
Rates for other attorneys will vary, depending on the attorney's level of experience and expertise. The hourly rates applied will be the established rates of the attorneys and/or paralegals (legal assistant) who perform the services during the particular period involved. Each professional (attorney or paralegal) will maintain a daily record of time expended on your matter. All time charges are recorded in minimum units of one-tenth (.10) of an hour.

In order to provide efficient legal services, unless I am instructed to the contrary, the firm practice is to utilize, to the extent appropriate, para-professionals "under lawyer supervision" who possess experience and expertise required to perform the work in a professionally competent manner. As a consequence, has been successful in providing clients with high quality legal services performed on a timely basis at an average hourly cost which is reasonable and appropriate. has a wide variety of experience and backgrounds available in the firm's attorney and paralegal staff. It may be necessary from time-to-time to consult with other attorneys in the firm on matters such as, but not limited to, tax issues, property rights, evidentiary matters, contracts and other business agreements and presently unforeseeable legal issues. The firm reserves the right to assign the responsibility for your proceeding to other attorneys and paralegals to best utilize our firm's professional experience and background resources to provide you with the best possible representation.

The time charged will include, but is not limited to, conferences with you, the time we spend on telephone calls and e-mails relating to your matter, including calls and e-mails with you, waiting time in Court and elsewhere, court appearances, drafting and reviewing documents and correspondence, interoffice conferences for issues attendant to proceedings, legal research, and travel as may be needed.

Although the firm does not currently anticipate an increase in the hourly rates charged for our services, hourly rates may be increased from time-to-time by the firm.

3. **Costs and Expenses.** Your responsibility, as our client, will be to pay on a current basis all out-of-pocket costs and expenses incurred in your behalf. These costs and expenses will include, but are not limited to

(A) **General Expenses.** We will charge you for various items in performing legal services under this Agreement. You agree to pay those charges in

addition to the hourly fees. The charges commonly include process server fees, fees fixed by law or assessed by Courts and other agencies, court reporters' fees, long distance telephone calls, messenger and other delivery fees, postage, parking and other travel expenses (including mileage at the rate allowed by the IRS), fax, photocopy and other reproduction, and other similar actual charges.

(B) **Out-of-Town Travel.** If applicable, you agree to pay transportation, meals, lodging, and all other costs of any reasonable, necessary out-of-town travel by our personnel. You will also be charged the hourly rates for the time legal personnel spend traveling.

(C) **Experts, Consultants, and Investigators.** To aid in the preparation or presentation of your needs, it may become necessary to hire expert witnesses, consultants, or investigators. We will not hire such persons unless you agree to pay for their fees and charges; we will select any expert witnesses, consultants, or investigators to be hired.

4. **Billing Practices.** Statements for fees and expenses are generally prepared and mailed during the month following the month in which services are rendered or expenses are incurred. You are expected to pay your monthly invoices as you receive the statement. Unless I am advised otherwise, the statement will be mailed to the address you have provided to us. Your cash advance of **$500.00** will be applied to the final invoice generated as a result of our representation of you unless we have a specific understanding for any other application of the cash advance. Any additional cash advance will be applied against current invoice balances. The cash advance **is not** a flat fee, nor is the cash advance a guarantee that your legal costs will be limited to this amount.

5. **Discharge and Withdrawal.** You may discharge us at any time. We may withdraw with your consent or for good cause. "Good cause" includes your breach of this Agreement, your refusal to cooperate with us or to follow our advice on a material matter, or any fact or circumstance that would render our continuing representation either unlawful or unethical.

6. **Waiver of Future Conflicts.** Recurring, potential conflict problems have caused the firm to adopt the following conflicts policy for those clients whom we represent only occasionally or in a limited area of work. Our acceptance of such employment is conditioned upon you consenting in advance to our representation of others in other matters whose interest may conflict with your interests so long as we, in our employment by you, have not become privy to confidential information which would be relevant in our representation of others with adverse interests. Your execution and return of an original of this letter shall constitute your consent to this conflicts policy.

Once again, the firm is pleased to have the opportunity to represent you. Any expressions on our part concerning the outcome of your legal matters are expressions based on

our best professional judgment, but are not guarantees. Such opinions are necessarily limited by our knowledge of the facts and are based on the state of the law at the time the opinions are expressed.

Once you have reviewed this representation letter, execute the same and return the original with your cash advance to my office. Until this letter is signed by you and your cash advance payment is returned, no work will be performed in your behalf.

Very truly yours,

Date of client's signature

STANDARD PROVISIONS FOR REPRESENTATION AND BILLING

(1) The hourly rates agreed upon for this matter are set forth in the representation letter specific to your matter. In the event a matter exceeds two years duration, we reserve the right to renegotiate the hourly rates.

(2) Invoices will be submitted to you upon a monthly basis unless otherwise agreed in writing. Payment is due within 30 days of the submission of an invoice.

(3) Any requirement for the payment of a retainer will be included in the representation letter specific to your matter.

(4) Time in billed in minimum increments of 1/10th of an hour.

(5) Unless otherwise agreed, time entries will reflect the date of the activity, the identity of the partner, associate, or paralegal performing the service, the amount of time expended on the activity, the dollar value of the time and a brief description of the activity. Our computer system allows for some flexibility in the format of our invoices. Special arrangements may be made to include ABA billing codes.

(6) The time for which a client will be billed will include, but not be limited to, the following:

(a) telephone conferences, correspondence and office conferences with clients, opposing counsel, potential and actual witnesses, experts, investigators, court officials, and with Kay Casto & Chaney PLLC personnel working on the case;

(b) legal research and brief writing;

(c) preparation of exhibits, pleadings, motions, and orders;

(d) reviewing and summarizing documents and depositions;

(e) preparation of status reports, budgets, specialized billing formats, and audit letter responses;

(f) preparing for and attending court hearings, trials, and depositions;

(g) waiting time in court and elsewhere and for travel time related to the client=s matter;

(h) factual investigation;

(i) reading discovery responses and correspondence received from other parties involved in a matter; and

(j) drafting contracts, releases, and other documents related to a matter.

(7) Expense entries will reflect the date of the expense, the nature of the expense, and the amount of the expense.

(8) It is expected that the attorney who is primarily responsible for your case will employ the services of other partners, associates, and paralegals employed by in the preparation of your case.

(9) Pursuant to the Code of Professional Ethics governing West Virginia lawyers, invoices will not be disclosed to third-party legal audit firms without the express written consent of the client.

(10) A client has the right to terminate our services at any time. Such termination shall not relieve the client of the obligation to pay for all fees and expenses incurred prior to the termination and for our time and expenses related to the termination of the representation.

(11) Normally, we will withdraw from the representation of a client in a matter only with the client's consent. However, we reserve the right to withdraw from a client's representation for good cause. Good cause would include, but not be limited to, recognition of an irresolvable representational conflict; a client's failure to pay for our services and expenses in the manner agreed; the occurrence of an event which would render our continuing representation illegal or unethical; and the failure of a client to cooperate in the preparation of the case or to follow our advice on a material matter. If we elect to withdraw from a representation, the client will take all steps necessary to complete our withdrawal including the execution of documents for substitution of counsel. In the event our representation is terminated by the client shall have the continuing obligation to pay for all fees and expenses incurred prior to the termination and for our time and expenses related to the termination.

(12) In the event a client requests return of file materials, will be entitled to reimbursement of all copying charges at a rate of $0.20 per page necessary to allow to maintain a complete copy of the file.

(13) Unless otherwise agreed, the client agrees that the file materials maintained by may be destroyed five years after the conclusion of a matter.

SCHEDULE OF REIMBURSABLE EXPENSES

' will be entitled to reimbursement for monies expended in the preparation of your matter or case. These include, but are not limited to, the following expenses:

(1) Automobile mileage for trips outside the county in which office handling your case is located at the IRS-approved rate (currently 56.5 Cents per mile). Parking and tolls will be charged at cost.

(2) Airfares will be charged at our cost based on Coach Class fares. Ground transportation such as taxis/rental cars will be charged at cost. Prior approval for flights will be obtained from the client. Private charter flights are also a reimbursable expense if the charter is approved in advance by the client.

(3) During trips outside the county in which the ...ice handling your case is located, the cost of meals plus a reasonable gratuity for service personnel will also be charged at cost. Working meals with clients and witnesses will also be considered a reimbursable expense.

(4) Copying will be charged at $0.10 cents per page. Large copying projects may, at our discretion, be given to private copying firms and will be charged at cost.

(5) Long distance telephone calls are charged at our cost.

(6) Lexus/Nexis or WestLaw charges for legal and fact research done on-line are charged at our cost.

(7) In the event your matter requires the review and processing of electronically stored information ("ESI") either maintained by you or by others, expenses incurred associated with the retention of consultants or use of specialized ESI processing and review services will be charged at our cost.

(8) Court reporting, filing, service of process, and witness fees are charged at our cost.

(9) Expenses for investigative work, photography, and specially prepared exhibits will be charged at cost. Prior approval will be obtained from the client before an investigator is retained.

(10) Expert witness fees and expenses will be charged at our cost. Prior approval will be obtained from the client before an expert witness is retained.

(11) Any testing performed in the preparation of your case will be charged at our cost. Prior approval will be obtained from the client before testing will be undertaken.

(12) Expenses incurred for specialized services such as accident investigation, medical and vocational consultants, forensic accountants and economists data recovery experts, property surveys and mapping, property appraisers and videographers are charged

at our cost. Prior approval will be obtained from the client before specialized services are contracted for by the firm.

(13) Document delivery will be charged based on actual postage, FedEx, or UPS charges or based on $25.00 per hour for hand delivery.

XXXXXXXCLIENTXXXXXXXXXXXX

SETTLEMENT SHEET

XXXXXXXCASENAMEXXXXXXXX

Settlement Received	$XXXXXXXXX.XX
Contingency Fee to Attorney (xx %)	- XXXXXX.XX
Payment to XXXXXXXXX for Medical Bills	- XXXX.XX
Payment to XXXXXXXXX for Med Pay Subrogation	- XXXX.XX
Payment to LAW FIRM for Expenses Paid During Litigation	- XXXX.XX
PAYMENT TO CLIENT	XXXXXXXX.XX

I have reviewed the above figures and agree with their calculation and amounts. I have this day received a check from LAW FIRM in the amount of $ XXXXXXX.XX which is the full and final amount to be received by me in the settlement of my lawsuit against XXXXXXXXXXX for the accident that occurred on DATE in COUNTY, West Virginia.

_____
Client Signature
Client SSN: _____
Date: _____

Witness: _____
Date: _____

{Date}

_____
_____
_____

Re:

Dear _____:

This letter is to confirm that my representation of you in the above referenced matter has concluded now that [*the matter has been resolved/judgment has been entered/settlement finalized/transaction completed, etc.*]. I want to take this opportunity to thank you for allowing me the opportunity to represent you. It has been a pleasure and I hope you will allow me the privilege of representing you again in the future should the need ever arise.

In the meantime, I have enclosed your original documents as I no longer need to keep them and I thought you would want them for your records. It is my practice to destroy files [*number of*] years after I close them. If you would like me to return your file to you [*number of*] years from now instead of destroying it, please send me a note to that effect within the next thirty days so that we can segregate your file from all my other files and accommodate your request. You will need to be responsible for keeping me informed as to how to reach you should your contact information ever change.

[Insert here any follow-up required of the client. For example, if you have incorporated a new business, here is where you would clarify who will do what in the future relative to state regulatory and local, state and federal tax filings. Another example would be in estate planning where you should remind clients that they should bring the plan back to you or to another attorney every three years or so to make sure it still comports with their wishes and the then current estate tax laws.]

Best regards,

_____

Enclosure(s)

Sample Closing Letters

{Date}

_____
_____
_____

Re:

Dear _____:

This is to confirm that all work necessary to our representation of you in this matter has been completed and we will take no further action on your behalf in regard to this matter. We wish to take this opportunity to thank you for allowing us to represent you. It has been our pleasure and we look forward to working with you in the future should the need ever arise. While our work is complete, you will need to [*outline everything the client must yet do as well as the consequences for failing to follow through*].

We are returning your original [*records, documents*] related to your case and we are closing our file. As we discussed during our initial interview with you, your file will be kept for a period of [*number of*] years. The file will then be destroyed unless you request that we store it longer or return it to you at that time. If you wish us to store the file for a longer period or return it to you when our normal retention period expires, you must give us written notice of that desire within five days after you receive this letter. Please note that you will need to be responsible for keeping us informed as to how to reach you should your contact information ever change.

We take pride in the level of service that we provide and thus we hope this matter has been concluded to your satisfaction. We would appreciate your filling out the enclosed evaluation questionnaire as the information you provide will help us continue to improve our services.

Again, thank you for allowing us to represent you in this matter. If we can be of further assistance on this or any other matter, please don't hesitate to let us know.

Sincerely,

_____

Enclosure(s) List

GHOSTWRITING

2010 – 01

Opinion Vacated by The Lawyer Disciplinary Board January 31, 2015

Due to Comment 9, Rule 1.2 and

Comment 3, Rule 3.3

of the New Rules of Professional Conduct

LEGAL ETHICS OPINIONS
issued by the
LAWYER DISCIPLINARY BOARD

Legal Ethics Inquiries [L.E.I.]
and
Legal Ethics Opinions [L.E.O.]
[Formally changed to Legal Ethics Opinions in 2006]

CHRONOLOGICAL INDEX
1976 through present

[L.E.O.] Opinion No.:

2010-01 THIS OPINION WAS VACATED BY THE LAWYER DISCIPLINARY BOARD ON JANUARY 30, 2015

Opinion required disclosure of attorney's representation for preparation of any pleading or other document (with exception of court forms) to be filed with a court or tribunal, or with a state or federal agency once the case becomes contested. Disclosure was not required when document is not intended to be filed with a tribunal or when providing aid in filling out forms adopted by and/or used by tribunals or federal or state agencies. This was changed by comment 9 to Rule 1.2 and comment 3 to Rule 3.3 which both specifically allow ghostwriting without disclosure of attorney's representation.

2009-01 THIS OPINION WAS VACATED BY THE LAWYER DISCIPLINARY BOARD ON JANUARY 30, 2015

Opinion put burden on an attorney to take reasonable steps to protect metadata in transmitted documents and burden on a lawyer receiving inadvertently provided metadata to consult with the sender and abide by the sender's instructions before reviewing such. This was changed by comment 2 and 3 to Rule 4.4. Those comments indicate that a lawyer who "knows or reasonably should know" the documents where inadvertently sent electronically is required to promptly notify the sender so they may take protective measures. Whether the lawyer is required to take additional steps is a matter of law because there is a question of whether the privileged status of the document has been waived. Further, Rule 4.4 does nto address the legal duties of lawyers who receive information that they "know or reasonably should know" may have been inappropriately obtained. The determination of whether to voluntarily return or delete the unread information is a matter of professional judgment of the lawyer.

2008 NO OPINIONS ISSUED

[L.E.I.] Opinion No.:

L.E.O. 2010-01

GHOSTWRITING OR UNDISCLOSED REPRESENTATION: WHAT IS PERMISSIBLE AND WHAT IS NOT PERMISSIBLE

INTRODUCTION

The Lawyer Disciplinary Board has received a request to determine whether an attorney can ghostwrite letters as a service to *pro se* litigants. The question arose when an attorney drafted letters without disclosing authorship of the document.[1] The Lawyer Disciplinary Board, in this L.E.O., offers its advice as to the propriety of ghostwriting as undisclosed representation for clients after an analysis of the Rules of Professional Conduct.

Ghostwriting is authoring a legal document for another who appears to be and is presumed to be the actual author. It can include preparing pleadings and other documents filed with the Court or tribunal, or preparing letters or other documents on behalf of the client. Other jurisdictions have arrived at different conclusions for the permissibility of ghostwriting: some allowing it without disclosure when dealing with *pro se* litigants[2], and some finding that help provided by an attorney to any person should be disclosed[3].

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[1] Actually, the issue presented to the Board was whether the attorney must disclose authorship of letters written for persons the attorney characterized as "non-clients." However, the Board believes this characterization is not accurate. When a lawyer agrees to perform some legal service and thereafter undertakes such performance, an attorney client relationship exists. See State ex rel. DeFrances v. Bedell, 191 W.Va. 513, 446 S.E.2nd 906 (1994).

[2] See ABA Formal Comm. on Ethics & Prof'l Responsibility, Formal Op. 07-446 (2007); Ariz. Comm. on the Rules of Prof'l Conduct, Formal Op. No. 2005-06 (2005); Los Angeles County Bar Ass'n Prof'l Responsibility & Ethics Comm., Formal Op. No. 502 (1999); and Utah State Bar Ethics Advisory Op. Comm., Op. No. 74 (1981).

[3] See N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 613 (1990); Ky. Bar Ass'n Ethics Op. E-343 (1991); and Del. State Bar Ass'n Comm. on Prof'l Ethics, Op. 1994-2 (1994).

Ghostwriting is just one form of undisclosed representation. Other forms may include advising the client, reviewing documents, or "coaching" the client prior to or at hearings, depositions, meetings or negotiations. This L.E.O. addresses only undisclosed authorship of documents.

The ABA notes that undisclosed legal assistance may be a form of "unbundling" of legal services and that a lawyer is generally allowed to accomplish such "unbundling" and, therefore, limit the scope of his or her representation of a client under Model Rule of Professional Conduct 1.2(c). See ABA Formal Op. 07-446.

DISCUSSION

1. Rules of the West Virginia Rules of Professional Conduct that are applicable to ghostwriting and/or undisclosed representation.

Rule 1.2(c) of the West Virginia Rules of Professional Conduct is the same as the Model Rule. This rule provides "[a] lawyer may limit the objectives of the representation if the client consents after consultation." Nevertheless, while this rule may allow undisclosed representation, other rules also need to be considered. These include Rule 3.3, which deals with candor to the tribunal; Rule 3.4, which deals with fairness to opposing party and counsel; and Rule 8.4(c), which deals with misconduct "involving dishonesty, fraud, deceit or misrepresentation."

2. Issues with ghostwriting.

One significant concern is that preparing documents on behalf of a client that are filed with the court or other tribunal without disclosing the attorney's authorship constitutes misrepresentation, fraud, or lack of candor with the tribunal as well as with the opposing party. Ghostwritten documents can also possibly affect how the tribunal will view and treat certain litigants, particularly *pro se* parties. By not disclosing an attorney's assistance in a case, a *pro se* party may receive an unfair advantage from the tribunal due to the tendency to treat *pro se* litigants with more leniency than attorneys. Further, if a tribunal determines that the pleading was frivolous, it will have to expend time establishing attorney involvement, and, if unsuccessful, will be unable to sanction the attorney responsible.

3. When disclosure is required.

Balancing the interests to unbundle and provide undisclosed services against the concerns of fairness, honesty and candor, the Board reasons that disclosure of the attorney's representation is required for preparation of any pleading or other document (with the exception of forms as discussed below) to be filed with a court or tribunal, or with a state or federal agency once the case becomes contested. This disclosure must include the attorney bar number and other necessary contact information. The attorney may also state his or her representation is limited and describe the limitation.

4. When disclosure is not required.

Attorneys routinely provide legal advice and counsel to clients and write letters or documents on their behalf without disclosing their representation. In this regard, attorneys who write letters or other documents on behalf of an individual do not have to disclose their identities if the letter or document is not intended to be filed with a tribunal, or authorship is not otherwise required by law.

The Board also finds that aiding clients in the preparation or filling out of forms adopted by and/or used by tribunals or federal or state agencies does not require attorney disclosure. The attorney is not preparing the pleading or document for the tribunal in the traditional sense of forming and positing legal arguments and theories based upon factual information from the client. Rather the form, itself, instructs and directs the legal argument and theory by the factual questions asked of the client. While the attorney may provide legal advice to aid in the filling out of the form, the attorney is not preparing the pleading.

5. Procedures that should be followed when an attorney limits his or her services to a client.

When an attorney provides legal services to a client whether in limited form or not, the Rules of Professional Conduct will apply and care is required. For instance, a conflict check is necessary, even on such "unbundled" legal services.

An attorney client relationship exists with any representation, whether undisclosed or disclosed, whether limited or traditional, and the same ethical obligations are owed to all clients.

Rule 1.2(c) of the West Virginia Rules of Professional Conduct permits a lawyer to limit the objectives of representation "if the client consents after consultation." Thus, the client must be informed and give consent to the undisclosed representation or limited representation in a written representation contract. The client should also be informed of what the attorney will be doing, but more importantly, what the attorney will not be doing on his or her behalf. The written agreement should explicitly clarify the scope of representation in order to protect both the client and attorney. Of course, the consideration or fee for services provided should be specified in the written agreement.

The written representation contract should also state that the client has reviewed the contract and understands its implications. That is, at a minimum, the contract should state: that the client understands the limitation of the representation and of the work the attorney will provide; that the attorney has explained and the client understands the disadvantages, if any, of having limited representation; that there may possibly be other issues present in the matter which will not be reviewed or investigated by the attorney; and that if there are other issues or claims the client would like reviewed or investigated, the client should seek another attorney's assistance.

When an attorney notes his or her limited representation on a pleading or other document, it is important to insure that the tribunal and other parties understand the attorney's limited role. One way to accomplish this may be to state the nature of the limited representation in any court document filed while staying within the bounds of confidentiality. In any event, the attorney will be subject to all rules of procedure, including the Trial Court Rules, and whether the Court accepts an attorney's limited representation in a matter will be a matter of judicial discretion.

CONCLUSION

While the Board finds that ghostwriting as a form of undisclosed representation is permissible under the Rules of Professional Conduct, the attorney must disclose his or her identity when preparing pleadings and other documents filed with a tribunal. The Board also finds that when attorneys limit their representation of clients, they should follow certain procedures to ensure that the client is fully aware of and consents to the specific limitations and their possible ramifications.

APPROVED by the Lawyer Disciplinary Board on the 29th day of October, 2010, and **ENTERED** this 8th day of November, 2010.

David A. Jividen, Chairperson
Lawyer Disciplinary Board

RULE 1.2 SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

COMMENT

Allocation of Authority between Client and Lawyer

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3). A lawyer must comply with Rule 1.16(c) and Trial Court Rule 4.03 when in litigation.

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty

to abide by the client's decisions is to be guided by reference to Rule 1.14.

Independence from Client's Views or Activities

[5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

Agreements Limiting Scope of Representation

[6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

[8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See e.g., Rules 1.1, 1.8 and 5.6.

Ghostwriting

[9] Ghostwriting is a form of limited representation. A lawyer may provide legal assistance to litigants appearing before courts and other tribunals *pro se* and help them prepare written submissions without disclosing, or ensuring the disclosure to others, of such assistance. Undertaking to provide limited legal help does not alter any other aspect of the lawyer's professional responsibilities to the client. See Rule 3.3, comment 3.

Criminal, Fraudulent and Prohibited Transactions

[10] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[11] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to

disaffirm any opinion, document, affirmation or the like. See Rule 4.1.

[12] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[13] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

[14] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).

RULE 3.3 CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

COMMENT

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(m) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

Representations by a Lawyer

[3] In accord with Rule 1.2(c), a lawyer may provide legal assistance to litigants appearing before courts or other tribunals *pro se*, including help in the preparation of written submissions, without disclosing such assistance or ensuring the disclosure to others. See Rule 1.2, comment 9.

[4] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement

in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).

Legal Argument

[5] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the laws, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

Offering Evidence

[6] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[7] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

[8] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements. See also Comment [10].

[9] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[10] Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [8].

Remedial Measures

[11] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the

opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done — making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

[12] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Preserving Integrity of Adjudicative Process

[13] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct relating to the proceeding.

Duration of Obligation

[14] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

***Ex Parte* Proceedings**

[15] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in an *ex parte* proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an *ex parte* proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

Withdrawal

[16] Normally, a lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no

longer competently represent the client. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.

METADATA

2009 – 01

Opinion Vacated by The Lawyer Disciplinary Board January 31, 2015

Due to Comments 2 & 3, Rule 4.4

of the New Rules of Professional Conduct

LEGAL ETHICS OPINIONS
issued by the
LAWYER DISCIPLINARY BOARD

Legal Ethics Inquiries [L.E.I.]
and
Legal Ethics Opinions [L.E.O.]
[Formally changed to Legal Ethics Opinions in 2006]

CHRONOLOGICAL INDEX
1976 through present

[L.E.O.] Opinion No.:

[L.E.I.] Opinion No.:

From the West Virginia. Lawyer Magazine:

L.E.O. 2009-01

WHAT IS METADATA AND WHY SHOULD LAWYERS BE CAUTIOUS?

Introduction

The Lawyer Disciplinary Board sees the need to raise awareness of metadata in electronic documents and emphasizes the need for attorneys to protect this kind of information.

All computer files have metadata (literally, the "data behind the data") associated or within them that provide information about the files. Whenever a document is created, opened, or saved in a program on a computer, the document stores information, such as the author's identity, the number of revisions made and comments and redlining. This metadata adds functionality to the editing, viewing, filing and retrieving capabilities of computer programs. In essence, metadata reveals information about electronic documents beyond the printable text and is used for a variety of legitimate purposes.

If legal professionals provide electronic versions of documents to other parties, metadata that is embedded in the document may be provided inadvertently. The information that is embedded is often of little or no interest, but in some instances it may reveal significant information. When this information is passed on to inappropriate parties, it can create adverse consequences for a legal professional or a client. In order to avoid these consequences, it is important to be familiar with the types of metadata contained in computer documents and to take steps to protect or remove it whenever necessary. Failure to do so could be viewed as a violation of the Rules of Professional Conduct. Additionally, searching for or viewing metadata in documents received from others after an attorney has taken steps to protect such could also be viewed as a violation of the Rules of Professional Conduct.

Discussion

The ABA has noted that the Rules of Professional Conduct do not contain any specific prohibition against a lawyer's reviewing and using embedded information in electronic documents, whether received from opposing counsel, an adverse party, or an agent of an adverse party. See ABA Formal Op. 06-442. However, metadata use may implicate other Rules of Professional Conduct.

Lawyers sending electronic documents have an obligation under Rule 1.1, which provides that a lawyer shall provide competent representation to a client, together with Rule 1.6, which obligates a lawyer not to reveal confidential information relating to the representation of a client, to take reasonable steps to maintain the confidentiality of documents in their possession. This includes taking care to avoid providing electronic documents that inadvertently contain accessible information that is either confidential or

privileged, and to employ reasonable means to remove such metadata before sending the document. Accordingly, lawyers must either acquire sufficient understanding of the software that they use or ensure that their office employs safeguards to minimize the risk of inadvertent disclosures. See N.Y. State Bar Ass'n Committee Op. 782; D.C. Bar Op. 341.

It is the duty of the lawyer sending electronic documents to protect sensitive metadata, and protecting metadata is not difficult. Sending documents in hard copy, creating an image of the document and sending only the image (scanning and creating a .pdf file, for example), or printing and faxing a document will prevent the transmission of embedded information. Software programs that remove metadata are also available. Lawyers must always exercise reasonable care not to disclose confidential information and ensure that the lawyer's firm and staff have the appropriate technology and systems in place to control the transmission of metadata.

Where a lawyer knows that privileged information was inadvertently sent, it could be a violation of Rule 8.4(c) for the receiving lawyer to review and use it without consulting with the sender. Therefore, if a lawyer has received electronic documents and has actual knowledge that metadata was inadvertently sent, the receiving lawyer should not review the metadata before consulting with the sending lawyer to determine whether the metadata includes work-product or confidences. See N.Y. State Bar Ass'n Committee OP. 749 (concluding that lawyers have an obligation under Rule 8.4(c) not to exploit an inadvertent or unauthorized transmission of client confidences).

In a discovery or subpoena context, however, a lawyer must be careful in situations where electronic documents constitute tangible evidence. Rule 3.4(a) prohibits altering, destroying or concealing material having potential evidentiary value. Therefore, in certain instances involving discovery responses or subpoena compliance, removal of metadata may be prohibited and must be produced when requested and not objected to. However, any metadata that is privileged can still be protected and exempt from discovery, upon proper assertion of a privilege.

In many situations, it may not be clear whether the disclosure was inadvertent. In order to avoid misunderstandings, it is always safer to notify the sender before searching electronic documents for metadata. If attorneys cannot agree on how to handle the matter, either lawyer may seek a ruling from a court or other tribunal on the issue.

Conclusion

The Board finds that there is a burden on an attorney to take reasonable steps to protect metadata in transmitted documents, and there is a burden on a lawyer receiving inadvertently provided metadata to consult with the sender and abide by the sender's instructions before reviewing such metadata.

David A. Jividen, Chairperson
Lawyer Disciplinary Board

Succession Plans

http://www.wvodc.org/pdf/successplan.pdf

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Establishing a Succession Plan:

A Guide to Protecting Your Clients' Interests in the Event of Your Disability, Retirement, or Death

Prepared by the West Virginia Lawyer Disciplinary Board
End of Practice Committee
October, 2013

Thinking about the What Ifs?[1]

The closure of a law practice can come as a result of many factors: retirement, merging firms, sudden illness, accidental death or even an appointment to the bench. While some of these events are difficult to think about and involve different parameters, some basic similarities, which you can control, do exist.

Although there is no specific requirement in the West Virginia Rules of Professional Conduct or the West Virginia Rules of Lawyer Disciplinary Procedure which indicate that a West Virginia licensed attorney must adopt a succession plan, your general duty to provide competent representation under Rule 1.1 of the Rules of Professional Conduct provides for an obligation to take appropriate steps to safeguard your clients' interests in all circumstances. See also, ABA Formal Op. 92-369. A failure to properly plan or prepare for both anticipated and unexpected departures from your practice may expose your clients to significant damages or prejudice and subject law partners and family members to financial and emotional stresses associated with the winding-up process.

Attorney professionalism is often equated with dedication to clients, service to others, competence in legal practice and a display of sound judgment. This is, by no means, an easy process and it will involve difficult questions. But by formulating a succession plan, you can fulfill your ethical obligations to your clients, your responsibilities to your profession, and ease your family's burden in stressful times.

The West Virginia Lawyer Disciplinary Board, based upon its experience in dealing with the unexpected closure of law practices, has prepared this guide to assist you in the process of formulating a succession plan for your practice so that the transfer of the obligations you owe to your clients can occur in a more orderly manner in the event of a crisis. While the WVLDB has attempted to contemplate a wide range of scenarios, it is nearly impossible to address every question and situation. For specific questions which are not addressed in this guide, please contact the Office of Disciplinary Counsel or the West Virginia Lawyers Assistance Program.

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[1]The West Virginia Lawyer Disciplinary Board gratefully acknowledges the work done by the Oregon State Bar Liability Fund, the Washington State Bar Association, and the North Carolina State Bar on succession plans. Their excellent work, and the work of many other State Bars, was consulted and utilized in the production of this guide.

It is noted that there are instances when the Office of Disciplinary Counsel initiates the closure of a law practice either due to disciplinary proceedings against a lawyer or through other notice to ODC. Currently, when a member of the West Virginia State Bar has disappeared, died or has abandoned his or her law office or has been suspended or disbarred and there is evidence that the lawyer has not complied with Rule 3.28 of the Rules of Lawyer Disciplinary Procedure (Duties of disbarred or suspended lawyers), and **no partner, executor, or other responsible party capable of conducting the lawyer's affairs is known to exist,** the Supreme Court of Appeals of West Virginia, upon written request by Disciplinary Counsel, may authorize the chief judge in the circuit in which the lawyer maintained his or her practice, to appoint a lawyer or lawyers to take such action as seems indicated to protect the interests of the lawyer and the lawyer's clients. See, Rule 29, Rules of Lawyer Disciplinary Procedure. A lawyer who is appointed in this matter is referred to as a "trustee" attorney. Nearly every jurisdiction has a method of appointing a trustee or supervising lawyer to protect the interest of a lawyer and the lawyer's clients in certain disciplinary proceedings.[2]

However, the purpose of this guide is to address those situations wherein an attorney is not otherwise involved in disciplinary proceedings. Moreover, this guide is intended for use by those lawyers who have no partners, associates, or employees. For it is often in the solo practice where the phone will go unanswered, mail will be unopened and deadlines will be missed for significant amounts of time after the death or disability of a lawyer. As these issues become more prevalent, states are recommending that attorneys implement succession plans to be in compliance with their Rules of Professional Conduct or taking this a step further and requiring the designation of a successor attorney or identification of the existence of a succession plan on attorney registration forms. But what is also indicative of the fact that attorney regulators around the country are concerned about these issues is that a majority of the jurisdictions now strongly recommend that attorneys have succession plans and offer informative materials on the subject for their members. West Virginia falls into this last category as we have no rule addressing succession planning. But you worked hard to build your practice and we can only strongly encourage [by this we really mean **implore**] you that the preparation and implementation of a succession plan for your law practice is the right thing to do.

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[2]American Bar Association, Center for Professional Responsibility, Standing Committee on Client Protection, State by State Caretaker Rules When Lawyer Disappears, Dies, or is Declared Incompetent, July 23, 2013.

Note: This guide refers to two categories of lawyers: (1) the lawyer whose disability, incapacity, retirement or death necessitates action is referred to as the "Affected Attorney;" (2) the lawyer called upon to respond to the disability, incapacity, retirement or death of another attorney is referred to as the "Assisting Attorney."

The West Virginia Lawyer Disciplinary Board and the Office of Disciplinary Counsel again gratefully acknowledge the work done by the Oregon State Bar Professional Liability Fund, the New York State Bar Association, the North Carolina State Bar, the Texas Bar and the Washington State Bar in this area. Most material in this guide has been suggested from materials produced by these forward-looking State Bars.

Thinking About and Implementing Your Succession Plan

Step 1: ☐ You must locate and designate one or more attorneys (Assisting Attorney[s]) to manage or close your practice in the event of your disability, incapacity, retirement or death.

Step 2: ☐ Consider if you want to have a simple or a detailed succession plan. Prepare the necessary documents to implement your succession plan. See Forms A and B.

Step 3: ☐ Prepare written instructions to your family, your designated Assisting Attorney, your nominated executor, and your office staff including, but not limited to, the following information:

- general information and instructions
- HIPAA authorizations to release medical information, if necessary
- specific and detailed information and authorization to close your law practice, i.e, computer passwords, locations of keys to office, filing cabinets and storage, bank account information – Do not forget to keep this information up to date! See Form E.
- think of this part as the preparation of "an advance directive"

Step 4: ☐ Discuss your succession plan with the appropriate people so they know what you have been planning.

You've found your Assisting Attorney, Now What? – The Big Issues

So, you've made it through the first big step. You have designated an assisting attorney to grapple with and close your practice should something happen to you. You now have to get down to business and draw up the paperwork.

But first . . . Did you discuss making the arrangement reciprocal with the other attorney? Maybe you could help that attorney out, too.

Scope of Duty

You and your assisting attorney need to clarify the scope of the assisting attorney's duty to you and your clients. Is the assisting attorney going to act as your attorney during the closure of your practice or not? Different duties accompany either role. If the assisting attorney is not going to act as your attorney, then the assisting attorney owes a fiduciary duty to your clients, not to you. However, we recommend that you not have the assisting attorney "represent" your clients. Rule 7.3 of the West Virginia Rules of Professional Conduct prohibit in-person or telephone contact with prospective clients with whom the lawyer has no family or prior professional relationship when a motive for doing so is the lawyer's pecuniary gain. The Lawyer Disciplinary Board suggests that focus of the assisting attorney's scope of duty should be to wind down and close the affected attorney's law practice, not the representation of the affected attorney's clients.

Trust Account/General Office Account/IOLTA Account

While the idea of providing access to your trust account and IOLTA account may make you cringe, your trust account must be addressed in your succession plan. But if you want the assisting attorney to handle your office's financial affairs, then access to your office's bank accounts is crucial. A written agreement with another attorney to provide access may not be sufficient and you may need to draw up a Power of Attorney. Questions to think about are what sort of Power of Attorney do you want to grant to the assisting attorney and how and when will the Power of Attorney be triggered. Will the Power of Attorney be triggered by a specific event, who will determine that the triggering event has occurred, what powers will be granted, and what will determine the duration. Some jurisdictions have suggested that you designate a third person to hold a power of attorney that is limited to your trust account. The third person would be instructed to release authority to the named

agent or attorney-in-fact (the assisting attorney) only upon your written instructions or upon a determination of disability, impairment or death. You should also contact your bank to see what documents they would require and to complete any necessary paperwork.

Remember . . . If you have not dealt with your bank accounts in your succession plan, it could be necessary to initiate a court proceeding to access your law office's bank accounts.

Client Notification

If you want to, you can provide client notification of your succession plan in your retainer agreement. Your client's signature on the retainer agreement or fee agreement can serve as written authorization for the assisting attorney to proceed on the client's behalf and allows for disclosure of the client's information to the assisting attorney in the event the assisting attorney is required to act due to your disability or death. See also Forms C and D.

Confidentiality and Conflicts

Clients must be given an opportunity to give their consent to have their confidential information shared or viewed by the assisting attorney. If called upon to implement the succession plan and prior to going through the affected attorney's client files for return or transfer, the assisting attorney should also conduct a conflicts check. See Forms C and D.

Office Organization

Now, it's time to get your office organized. Some general considerations: (1) does your office procedures manual include directions on how to access your client list and their contact information or do you even have an office procedures manual, if not, then draw one up; (2) are your client files up to date and well documented; (3) do you have written fee and/or retainer agreements for each client matter; (4) do you have a current list of clients, computer passwords and bank accounts with account numbers; (5) are your time and billing records current; (6) is your calendar current with all deadlines and follow-up dates; (7) are your open and closed client files clearly and currently designated and stored; and (8) have you considered what to do with your closed client files!!!!! ODC does not have any room for your closed client files. You need to deal with them and now is the time. ODC has enough closed client files from lawyers who are involved in a disciplinary proceeding.

More discussion about Client Files

The proper maintenance and handling of client files is an integral part of ethically maintaining your practice within the parameters of your duties under the Rules of Professional Conduct. Client files always pose a special problem for family members when a lawyer's practice must be closed. You do not want to overburden your family by having kept more than you need over the years. Don't leave this task for your family. Now is the time for you to examine your file retention policy, if you have one and if you do not, then come up with one, and take action about your closed client files. There are resources from the Office of Disciplinary Counsel to give you guidance about your closed client files. You can also contact your professional liability insurance carrier for input, as well. The Lawyer Disciplinary Board has published LEI 02-01, Retention and Destruction of Closed Client Files, which provides that you must keep client files for at least a minimum of five (5) years with certain exceptions, such as files pertaining to minors among others. However, you must remember that client files are also considered to be the property of your clients, not you. See, LEI 89-02 and LEI 92-02. Some original documents which you may have in your closed client files cannot be destroyed, such as deeds and wills and original materials provided to you by your clients. It is recommended that you should not retain these types of documents and materials. You can find additional information on ODC's website, www.wvodc.org, or you can contact ODC for informal advice.

Closing a Law Practice

Whether you are closing your own law practice or that of another attorney, be prepared for it is a lengthy process and a lot of hard work. But there are resources available. The Office of Disciplinary Counsel has prepared a work sheet containing Guidelines for Closing a Law Practice and a Handbook for Court Appointed Trustees with accompanying forms which are available on ODC's website, www.wvodc.org. Moreover, many other state bars, including Oregon, New York and Virginia have produced excellent materials on succession planning and closing a law practice. We encourage you to explore the internet. You may just find that there is more useful information out there to assist you in this endeavor.

The forms and worksheets provided here are for informational purposes and are not meant to cover every contingency the may come up when either closing your own practice or that of another lawyer. Please feel free to modify them to suit your law practice.

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Lawyer Assistance Program

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The Lawyer Assistance Program (LAP) is a service of the West Virginia State Bar which provides **confidential** assistance to West Virginia lawyers to help them identify and address problems with alcoholism, other drug addictions and mental health disorders.

Confidentiality

The LAP is entirely separate from the Office of Disciplinary Council of the State Bar. Information received by the LAP concerning any lawyer seeking help or to whom assistance is offered is confidential. The confidentiality provided is that of the attorney-client privilege. If you call as the spouse, child, or friend of the lawyer you suspect may have a chemical dependency and/or mental health problem, your communication is also treated as confidential.

In order to assure this high degree of trust and confidence, the Lawyer Assistance Program is, by rule of the State Bar, which has been approved by order of the West Virginia Supreme Court of Appeals, entirely separate from any ethics or disciplinary council of the State Bar.

Other Resources:

ABA	American Bar Association	www.americanbar.org/aba.html
WVSB	The West Virginia State Bar	www.wvbar.org
ALPS	Attorneys Liability Protection Society	www.alpsnet.com
MLM	Minnesota Lawyers Mutual Insurance	www.mlmins.com