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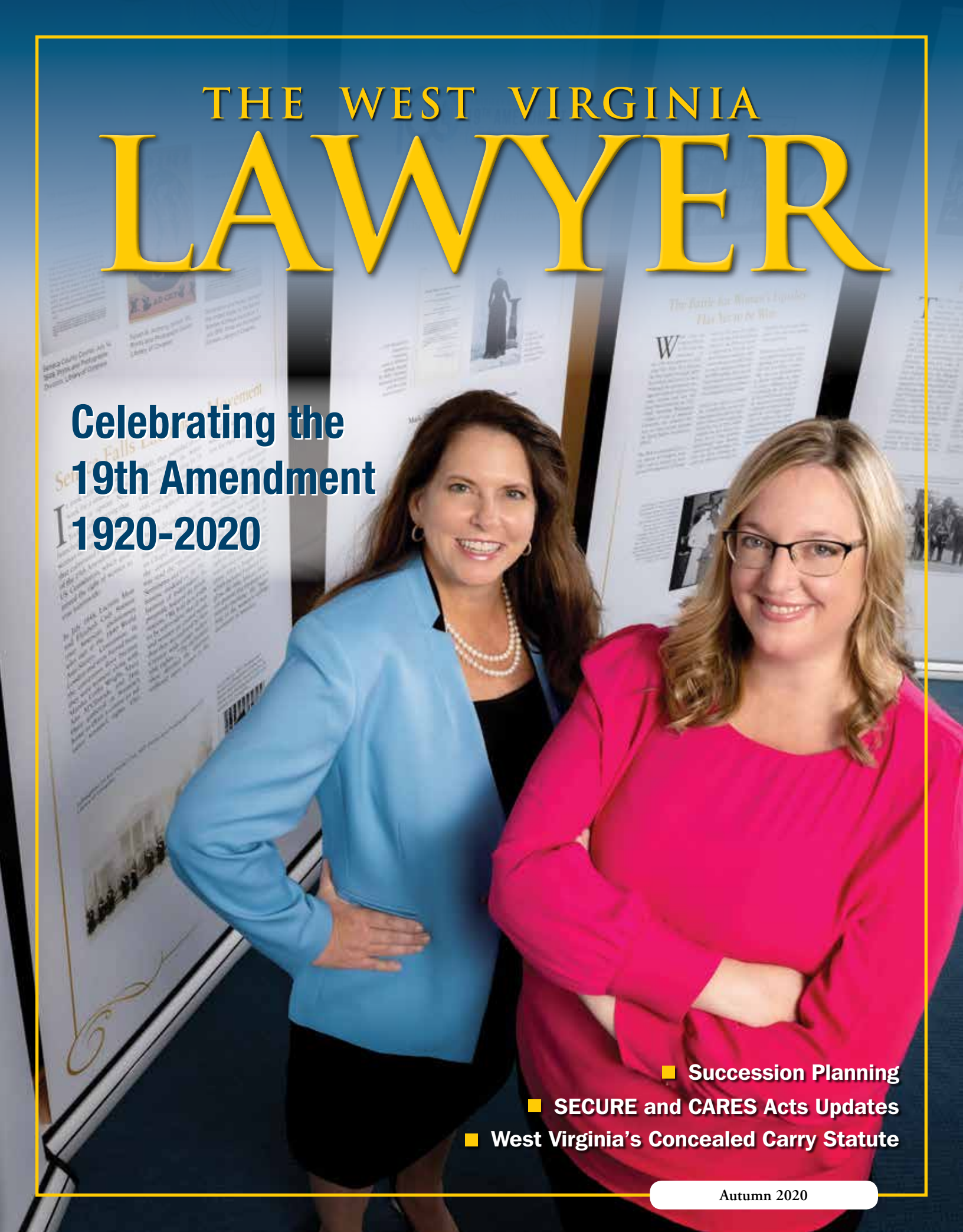

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On the Cover: Attorneys Lee Murray Hall and Jami Cooper are co-chairs of the WVSB's new Women in the Profession Committee. Photo by Rick Lee.

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THE WEST VIRGINIA
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The West Virginia Lawyer is published quarterly for all members of The West Virginia State Bar. *The West Virginia Lawyer* helps lawyers stay current and share in-depth information on the latest legal developments, issues and trends with their colleagues in West Virginia and beyond. The West Virginia State Bar publishes practical, substantive and procedural articles on West Virginia law and articles on legal theory, philosophy and jurisprudence. The editorial policy of The West Virginia State Bar is under the supervision of the publication's Board of Editors. All submissions to *The West Virginia Lawyer* are subject to approval by the Board of Editors. Articles are judged on importance of topic, accuracy, clarity, timeliness and quality of writing. The Board of Editors reserves the right to require rewriting or editing as a condition of publication. The editor reserves the right to edit all material. *The West Virginia Lawyer* retains ownership of all published material, including contributed articles. No compensation is paid for submissions or contributions.

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PRESIDENT'S PAGE

Monica Nassif Haddad
President
The West Virginia State Bar

CONNECTIONS

One of our basic desires as humans is the desire to feel as though we are a part of something greater than ourselves — to feel as though we have contributed and given back. We can all make a difference in our world, our State, our communities and, yes, even our State Bar. I became involved in the West Virginia State Bar (WVSB) leadership so that I could be part of building stronger connections among our attorneys. We are living in challenging and turbulent times, and it is more important than ever that we open up a dialogue and truly listen to and connect with each other.

My goal to promote The State Bar as a conduit for professional connections and inclusivity was largely premised upon improving State Bar programming and publicity resulting in increased participation by The Bar and the Bench physically at regional and annual meetings. The pandemic, through its social-distancing requirements, created an obvious impediment to this goal for increased physical attendance at these Bar events.

Always looking for silver linings, I did not have to look far. As with much of our social interactions today, the video (and Zoom) platform created greater connections between our members than could have been imagined in the pre-COVID era. When the coronavirus struck, the Annual Meeting was canceled, the courthouses were closed and our professional and personal lives took on new, unfamiliar routines. We should all be proud that our State Bar was able to quickly provide our members with a series of 10 COVID-19 webinars in a two-month period. Through the Zoom platform, almost 1,000 of our attorneys joined our Supreme Court for a panel presentation; and an astounding average of 650 attorneys appeared for the COVID-19 Zoom webinars. Never before have we been able to connect so many of our own in one setting.

The need for better connections within our Bar and the public is especially timely given the historical significance of 2020 beyond the coronavirus. The civil unrest which arose from the killing of several black men in police custody has again brought to necessary light the public's skepticism in the fairness of our policing and the entire justice system. Communities look to lawyers for answers and leadership. As an administrative arm of the West Virginia Supreme Court (and as a mandatory Bar), The West Virginia State Bar is prohibited from taking a stance on certain political/ideological issues beyond the regulation of our profession and the improvement in the quality of services. However, The State Bar is called to educate upon and act to eliminate barriers to accessing justice. It also can play a necessary part in exposing racism and social

injustice when and where it occurs. As such, The State Bar issued a Statement on Social Justice calling for our attorneys to advance these objectives.

In furtherance of these objectives, The State Bar, along with the Minority Lawyers Committee, has begun a Social Justice Webinar and Article Series titled "Culturally Courageous Conversations" to educate and inform our Bar on equality of access to justice, racism, equal and effective legal rights and social justice as a professional duty. Past State Bar President Meshea Poore presented our first lecture in this webinar series on implicit bias and its impact on the practice of law. The Zoom video platform connected over 500 members of our Bar who tuned in for Meshea's presentation. The Bar will host additional webinars in our "Culturally Courageous Conversations" series throughout the year.

To further the discussion of social justice, racism, diversity and inclusion, and also as part of our "Culturally Courageous Conversations" series, The West Virginia Lawyer contains a four-part series titled "Diversity, Equity and Inclusion." In this series, the Minority Lawyers Committee, which has been in existence since 1983, will offer our members an opportunity to learn from the experiences of our West Virginia minority lawyers. (See pages 44-46.) I am hopeful that with these initial measures, we can all recognize that we not only can make a difference, but that we must make a difference.

To further my goal of inclusivity within The Bar, I have started a new State Bar committee, Women in the Profession (WIP), to address issues unique to women lawyers. Those issues include equal opportunity, job advancement, family/societal expectations, sexism in the workplace and connectivity. (See pages 18-25.)

For the first time, more than half of our incoming law students at the WVU College of Law are women. Accordingly, the creation of a Bar committee to assist female attorneys, young and old, in navigating a historically predominantly male profession is critical for a more inclusive environment in The Bar.

And last, inclusivity and connection within our Bar is also vital for those attorneys separated by geography. In West Virginia's 55 counties, 15 counties have less than 10 practicing attorneys. In an effort to connect our rural members with The State Bar and with our public, The State Bar created and funded the WVSB Rural Practice Scholarship under the leadership of former State Bar President Dean Rohrig. This scholarship is awarded annually to two incoming WVU College of Law students committed to practice law in one of the 15 designated rural counties in West Virginia. This year, the law school graduated our first two Rural Practice Scholarship recipients: Nathan Bennett, who will practice in Grant County, and Sarah Petitto, who will practice in Doddridge County. This scholarship program is critical for the success of legal practitioners in rural areas and vital to ensure access to justice. A special thanks to one of my favorite WVU College of Law professors, Charles DiSalvo, for his continued efforts in ensuring the success of this program.

Connecting with others, which includes an awareness of problems which are not simply our own, gives us a sense of inclusion, interaction, safety and community. Connecting our attorneys with one another is vital to a successful legal practice and ensures that our Bar produces and promotes competent attorneys, effective legal service and access to justice for all. WVL

DEAN'S COLUMN

John E. Taylor
Interim Dean and
Jackson Kelly Professor
West Virginia University
College of Law

REFLECTING ON THE DEATH OF GEORGE FLOYD

It's a privilege to lead the College of Law for the next year and to address The Bar through this column. I thank Greg Bowman for his service, and I wish him the best of luck at Roger Williams.

We are living through an extraordinary time. The College of Law, like most other institutions, faces difficult challenges in adapting to the COVID-19 pandemic and its economic consequences. Throughout the summer, we worked both to prepare to reopen safely for in-person instruction and to be ready to pivot to fully online education if necessary. In my next column, I will tell you how that worked out.

Today, however, I want to talk about another sobering and difficult set of challenges that we face at the College of Law. For the past two months, the brutal killing of George Floyd and the protests it has sparked have catalyzed a long-overdue public discussion of police violence against people of color and of systemic racism more generally. Even though our classes were all taught online and our building was mostly empty this summer, our law school community engaged in conversation about these issues — on Zoom, in social media, by phone and even occasionally through socially distanced in-person discussion. The legal profession is dedicated to the pursuit of justice, and this summer's events have made it crystal clear that we cannot pursue justice without combatting racism.

Our students all come to law school to pursue justice, though of course they disagree (as do we all) about what that means. They want to know what we will do as a college to address issues of racial injustice, and their questions do not have easy answers. What follows is a condensed version of a message I sent to our students on my first day as interim dean:

The law school faculty and staff take issues of racial justice seriously. We commit ourselves to working with students to identify meaningful collective and individual actions we must take in the coming academic year and beyond. Among these planned actions is the faculty's adoption of a comprehensive diversity, equity and inclusion plan based on a draft developed last year by a committee composed of faculty, staff and students. The plan will address issues of curriculum, hiring, student recruitment and programming, along with other issues identified as conversations continue.

These collective deliberations and actions are more important than anything I can say individually, but I do want to add a few words of my own. I'll admit to sometimes doubting my authority

to speak about racial injustice. Intellectually, I am no stranger to the problems of racism in policing and in the criminal justice system more generally, but I have not been personally victimized by these problems. I do not regularly see videos of people who look like me being killed or injured by police, and I have never been afraid that such things will happen to my family or me. I recognize that being free from such fears is among the remarkable privileges I enjoy, yet I have too often taken those privileges for granted. I doubt I fully understand the emotional weight borne by parents who watch the video of George Floyd's killing and think, "That could just as easily have been me or my spouse or my child."

I still have a lot to learn. Nevertheless, I will do what I can to encourage and participate in our community's efforts to fight against racism. In that spirit, I'd like to share four points that I hope might play a role in finding common ground for deliberation and action.

First, George Floyd's death is so unspeakably tragic and has been such a galvanizing moment in our history because it perfectly illustrates why many Black Americans doubt that their lives fully matter in our society. Obviously, police officers have very difficult and dangerous jobs, and there are situations where even the best-intentioned officers may make tragic errors under great pressure. Yet it is impossible to see how anyone could treat another human being as the officers treated George Floyd while fully appreciating his humanity. The officers' actions said, "Your life is worth less than ours," more clearly than any words could. And that message provides the context for understanding what it means to say, "Black lives matter."

Some hear these words as an objectionable claim that only Black lives matter or that Black lives matter more than other lives. I hear the words very differently. They are not the opening words in a conversation; they are a response. When words and actions seem to say that Black lives lack equal dignity and value, the response is that Black lives do matter just as much as other lives. And surely when understood in that context, the claim that "Black lives matter" is self-evidently true.

Second, it is far too late in the day to dismiss George Floyd's death as an isolated incident. It's not even an isolated incident for policing in the Twin Cities (Philando Castile), let alone for policing generally (Breonna Taylor, Freddie Gray, Michael Brown, Tamir Rice and more). Nor do the violent deaths of unarmed Black people occur solely at the hands of the police (Ahmaud Arbery, Trayvon Martin). We cannot see these deaths as nothing more than the misdeeds of a few individuals. We face systemic problems of racism in our society, and the death of George Floyd has concentrated our collective attention on these problems.

Third, peaceful protest and activism are vital if we are to meaningfully address racism and other societal ills. Police and other local authorities should respect the First Amendment rights of protestors while peaceably ensuring public safety. In contrast, excessive police force in containing demonstrations should be condemned, and lines between policing and military approaches to demonstrations need to be strictly maintained.

Fourth, while violence, destruction of property and looting by protestors should be condemned, we should not use the actions of a few to dismiss the protests and the problems of systemic racism to which they point. The protests are another sign of the fraying of our social contract, and that is something we all need to take very seriously.

I hope these four points might be common ground for many members of our community who hold differing views about many other things.

However broad or narrow our shared starting points may be, we need to look beyond Law School Hill to discuss and promote policy changes in policing, criminal justice and a host of other areas. Closer to home, we must try to figure out what additional steps we can take, both individually and collectively, to make the College of Law a welcoming community that respects the equal dignity of all people.

We will engage in this hard work. I do not have all the answers about how to lead this work, and I am sure I will make mistakes. I do, however, promise to listen to you and to work to build mutual understanding and respect to the best of my ability. WVL

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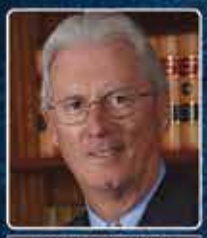

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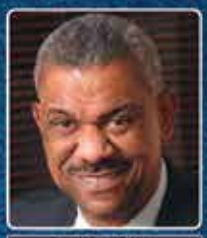

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RACIAL INEQUALITY AND INJUSTICE: A CALL TO ACTION

"Injustice anywhere is a threat to justice everywhere."
—Martin Luther King, Jr.

The recent tragedies, indeed, injustices involving George Floyd, Breonna Taylor and Ahmaud Arbery have reignited the flames of racial injustice in America. Since the days of our founding, America has struggled with racial inequality and injustice — from the displacement of Native Americans, to slavery, to segregation and the Jim Crow era, to Japanese internment camps. Unfortunately, these episodes have occupied more of our history than not. After all, slavery in America did not officially end until 1865, a mere 155 years ago.[1] It began around 1619.[2] Following the end of slavery, the Jim Crow era endured until the late 1960s.[3] In recent decades, the flames of racial inequality and injustice have been temporarily reduced to embers as society moved along, but they have never been fully extinguished.

In 2008, America elected its first Black president, and re-elected him in 2012. With that, many believed we had turned a corner. Make no mistake, electing Barack Obama moved us forward in many ways, but it did not cure our ills. Rather, even as President Obama was serving as the leader of the "free world," America endured other racially charged incidents, including the police killings of Michael Brown, Eric Garner, Alton Sterling and Philando Castile, among others.

The cold, hard truth, unfortunately, is that racial inequality and injustice in America is institutionalized and systemic throughout our government and other areas of our society. Much of the focus, and rightly so, has been on police brutality against Black men and women, but racial inequality and injustice runs much deeper. It is present in education, our healthcare system, social and government programs and jobs and economic opportunity. It is important to understand that for many Black Americans, their families have only been "free" to receive an education or generate income and wealth for 155 years, or about five generations, when most of the rest of our ancestors never had such restrictions placed on them. Today, the median Black American family owns less than 10% of the wealth that the median White American family owns. The enormity of these societal and economic deficits cast upon the Black community, inextricably

linked to their historical treatment in America, cannot be understated.

I am, however, uniquely unqualified to opine on these issues. I am a white male, who grew up in a community that was 100% white. I was not exposed to different races or cultures until I went to college. My only experiences with different races or cultures prior to that were what I saw on television (the internet was very new back then). More importantly, I was never introduced to the plight many Black Americans experience in their daily lives due to deeply rooted racial bias, discrimination or pure unabashed racism.

To be sure, I have never experienced discrimination or prejudice because of my skin color, whether it be in a job interview, in the application for a loan or a government program or in the retaining of my services as a lawyer. I have never experienced the fear of authority because of who I am or what I look like. I have no idea what it feels like to see a statue in the courthouse square of, or my school named after, a person who dedicated their life to, indeed risked their life, fighting for the enslavement of my ancestors.

Rather, I am blessed with the privilege of not having any of that weigh on my mind or heart, or shaping the way I live my day-to-day life. I likely will never be denied a job, client or loan because of my racial heritage. Nor will I ever have to explain to the children I hope to one day have that there are people and institutions who will treat them differently because of their skin color and that they must be constantly on guard because of it. That is the privilege I so unadornedly do not deserve, just because I happen to have been born white.

Because of this, I cannot begin to know the plight of Black Americans. And so, I have committed myself to listen — to listen to those who do not enjoy the same privilege that I do; to hear their grievances and concerns; and to do my best to empathize and understand. Beyond that, I have committed my personal and professional life, in the ways that I can, to help right the sins of our past and help pave the way to reaching the goals of racial equality and justice in America. These are the, not goals, but rights espoused in our Declaration of Independence — that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. These rights should and must be available and guaranteed to people of all colors and races.

The West Virginia State Bar issued a Statement on Social Justice; I encourage each of you to read it. It reminds us that, as lawyers, we swear an oath to support the Constitutions of the United States and the State of West Virginia. Ethically, we have a special responsibility for the quality of justice in our society. And as citizens, we are supposed to seek improvement of the law, access to the legal system, the administration of justice and the quality of legal service.

Inherent — some may say explicit — in our responsibility as lawyers is the promotion and fight for justice for all, including all races alike. I opened this article with a quote from the Rev. Dr. Martin Luther King Jr. to illustrate this principle. We cannot, for the good of our Nation, for the good of justice and for the good of our profession, allow injustices like those that occurred to Mr. Floyd, Ms. Taylor and Mr. Arbery to stand. We must go beyond that, however, and fight to cure the systemic and institutionalized racism that allows such things to occur in the first place. That is our duty and our responsibility as attorneys, counselors and officers of the Court. I challenge all of you to meet this duty and to continue the pursuit of equality and justice for all. WVL

Endnotes

1. https://www.history.com/topics/black-history/slavery#:~:text=The%2013th%20Amendment%2C%20adopted%20on,awaited%20during%20the%20Reconstruction%20period.
2. https://www.history.com/topics/early-20th-century-us/jim-crow-laws.
3. https://www.clevelandfed.org/newsroom-and-events/publications/economic-commentary/2019-economic-commentaries/ec-201903-what-is-behind-the-persistence-of-the-racial-wealth-gap.aspx.

Tim Armstead
Chief Justice
The West Virginia Supreme Court

ESTABLISHING AN OPEN AND EFFICIENT BUDGET PROCESS FOR OUR COURTS

During the past several months, our State's courts have directed our efforts and attention toward meeting the unprecedented challenges presented by the COVID crisis. While our focus has rightfully centered on efforts to ensure that the critical work of the judicial system has moved forward while protecting the health and safety of our citizens, it is important to note that July 1 marked a significant yet little-noted milestone.

On July 1, courts throughout our state began operating under the new Fiscal Year 2021 budget. This fact is significant because it marks the first time that the judicial system's budget has been subject to the oversight of the West Virginia Legislature, pursuant to the Judicial Budget Oversight Amendment adopted by the citizens of West Virginia in 2018.

Despite concerns expressed by some during the debate over the Amendment, the new process worked well during its first year in operation, thanks to a spirit of cooperation and mutual respect between the Judicial and Legislative Branches of government. The court system began developing its proposed budget several months before it was presented to the Governor and the Legislature in late 2019. Each of the court system's directors made presentations to the Justices of the Supreme Court outlining the needs in such areas as probation, technology, staffing and children and juvenile services. The Justices then worked with the Supreme Court's Director of Financial Management, Sue Racer-Troy, to set funding priorities and to ensure the taxpayers' hard-earned money is spent efficiently and in a fiscally conservative manner.

As envisioned by the Constitutional Amendment, the Legislature undertook a detailed analysis of the judiciary's proposed budget and asked several questions during the court's budget presentations in the House and Senate Finance Committees. In the end, the Legislature approved the West Virginia judicial system's Fiscal Year 2021 budget largely as it was submitted with only minor revisions.

The court system's budget request for Fiscal Year 2021, which began on July 1, 2020, was $4 million less than the court system's budget was five years ago. This is true even though this year's budget incorporates two back-to-back 5% pay raises for all court employees (not including elected judges) that were provided by the Court when the Legislature provided teachers and state employees commensurate pay raises in Fiscal Years 2019 and 2020.

Members of the Court and Court

staff engaged in many discussions relating to the budget as well as other proposed measures with legislators throughout the Legislative Session. While the entire budget for the state's judiciary constitutes approximately 11 line items and less than two pages of the State's overall budget bill, legislative leaders and finance committee members praised the Court for the detailed breakdown of proposed spending the Court provided as part of the Court's budget presentation.

Before the passage of the Judicial Budget Oversight Amendment, the Legislature had little input or control over the judiciary's budget and was not permitted to appropriate less than the amount the Supreme Court requested. Now, the Legislature has the same oversight of the Judicial Branch budget as it does over the Executive Branch budget — with one exception. The Legislature may not decrease the total general revenue appropriations to the judiciary, as compared to its prior year's budget, by more than 15% unless such reduction is approved by a two-thirds super majority of the Legislature.

Approximately 82% of the Judicial Branch's Fiscal Year 2021 $135,499,000 budget is made up of salaries and benefits for approximately 1,468 full-time judicial officers and employees throughout the state, including 75 Circuit Court Judges, 47 Family Court Judges, 158 Magistrates and probation officers and court staff in each of West Virginia's 55 counties. The budget also funds improvements in technology and equipment to modernize the court system, make our courts more accessible to our citizens and continue the phased-in implementation of the court system's e-filing initiative.

Last year, even before the Constitutional Amendment went into effect, the new Supreme Court worked closely with the Legislature to enact a streamlined budget for the recently completed Fiscal Year 2020. The Court not only reduced its Fiscal Year 2020 budget by more than $5 million, it worked with the Legislature last year to return to the general revenue fund an additional $10 million by expending funds remaining from previous fiscal years to fund ongoing expenses.

Both the Supreme Court and the Legislature recognize that it is our responsibility to work together to prevent wasteful spending, and the Court's Fiscal Year 2021 budget fulfills this responsibility. The court will continue to work cooperatively with the Legislature to fulfill our Constitutional responsibility to ensure that "every person, for any injury done to him, in his person, property or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial or delay."

The first year in which the Legislature had oversight of the court system's budget provided both the Judicial and Legislative Branches of our government the opportunity to build a strong partnership that will serve our court system well in the years to come. The people of our State expected no less of us when they adopted the Judicial Budget Oversight Amendment. Together, our court system and the Legislature have established a model and framework that I am confident will ensure that the critical work of our courts will be funded and appropriated in an open and efficient manner that respects our citizens' hard-earned tax dollars. WVL

MORE Than A Lawyer

Every day, attorneys throughout the state impact lives both within and outside the legal profession. West Virginia's lawyers are service members, volunteers, mentors, coaches, musicians and committed advocates. In all these roles and more, they make a difference in their respective communities. Our "MoreThanALawyer" campaign aims to highlight all the ways our attorneys serve the community. Each month, we share a MoreThanALawyer story on The West Virginia State Bar's Facebook and Twitter pages.

APRIL

April's MoreThanALawyer recognizes an Ohio County lawyer who immediately reacted to the needs of her community when faced with the COVID-19 pandemic. Teresa Toriseva and her firm, Toriseva Law, have helped not only our first responders, but also many who are in dire financial circumstances. Here is her story.

When the pandemic struck and supplies for first responders were difficult to be found, Teresa and her firm located and donated hundreds of N-95 masks — inspiring others to follow suit — leading to the donation of hundreds of additional masks.

"In the big picture, the masks we have distributed are a drop in the bucket," Teresa noted. "But, when you talk to the individuals who need these masks and their families, you see it's not so small."

In a continued showing of community support, Teresa donates food and makes deliveries to first responders; and in an effort to assist families and small businesses with the economic and financial hardships brought on by the pandemic, Teresa has taken to her social media platforms and her podcast to inform and educate the public on the CARES stimulus package. During these challenging times for so many, Teresa dedicates her online attention to answering as many questions as possible, many for people she will never meet.

Teresa Toriseva

"I am glad that I can help in this small way and hopefully give some answers and inject some calm into the lives of people in our community," Teresa said.

Teresa and her family live in

Wheeling. Thank you, Teresa, for being MoreThanALawyer during these uncertain and challenging times. Your community and your Bar are grateful!

MAY

May's MoreThanALawyer is in recognition of our West Virginia State Bar Young Lawyers Section for their compassion and generosity to essential employees during the pandemic in all corners of the State.

Young Lawyers Section serving during the pandemic

During these challenging times, our West Virginia young lawyers didn't hesitate to acknowledge the significant work of so many around the State in combating the coronavirus. They delivered hundreds of pizzas, doughnuts and sandwiches to nursing home attendants, COVID-19 testing tent employees, hospital employees, 911 telecommunicators, county courthouse staff, law enforcement, public health officials, grocery store frontline cashiers and Boys & Girls Clubs. They also assisted our West Virginia students and their families with donations of toiletries to our schools.

Thank you, West Virginia State Bar Young Lawyers Section and Chairperson Eric Hayhurst for all of the charitable work you do and especially for acknowledging our essential workers during this difficult time. The West Virginia State Bar is honored to have such a wonderful group of young lawyers!

JUNE

This month's MoreThanALawyer story comes from Point Pleasant-based attorney R.F. Stein Jr., who uses his vocal skills and love for all things farming to better his community, and especially his local 4-H 4-Mason County Extension Service.

R.F. is the Prosecuting Attorney for Mason County. He was nominated by Attorney Tanya Hunt Handley.

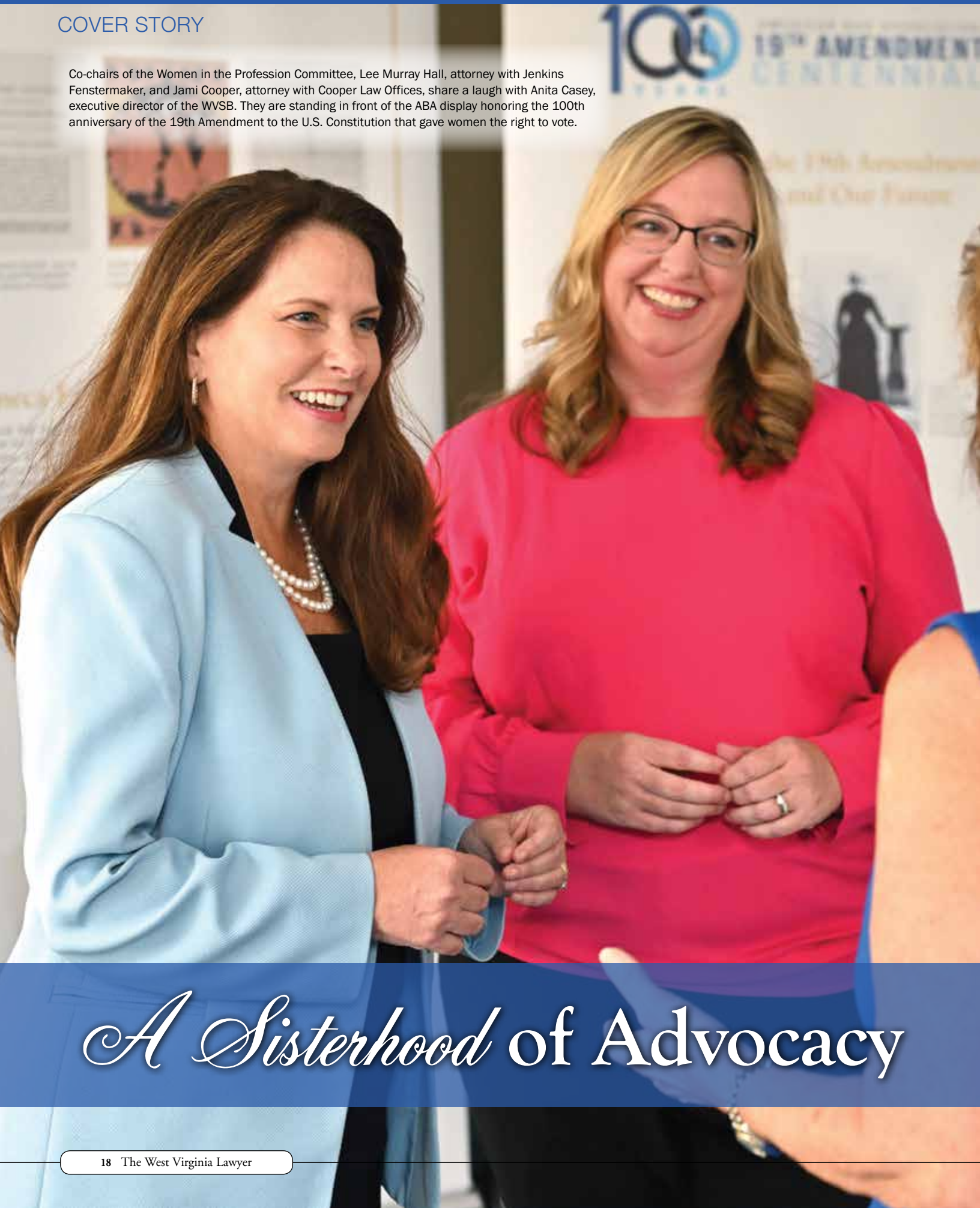
Like many in our great State, R.F. Stein Jr. learned the value of hard work when he began working on his grandfather's farm at age 12. His family then moved to a farm when he was 13, and his love for farming has grown ever since. He became an active member of 4-H when he was 16 and, now living on his own farm with his wife Aimee and their children Grayson, Addyson and Weston, continues to be active in 4-H and many other organizations. He is a lifelong supporter of the Mason County Fair and is a very active fair board member.

R.F. Stein with his wife and three children

R.F. learned from being at cattle auctions at a young age that the monetary value of an item could be driven up by the use of one's vocal chords — as an auctioneer! While a student at the WVU College of Law, R.F. volunteered as an auctioneer for the Public Interest Advocates and the West Virginia Fund for Law in the Public Interest. Since that time, he has continued to use his auctioneering skills at charity auctions for numerous organizations, including the Mason County Fair, the Mason County Community Foundation, the American Cancer Society, 4-H, the Mason County Chamber of Commerce, the Loyal Order of Moose and the Point Pleasant Rotary Club. R.F. has donated countless hours conducting auctions over the years in large part to raise money for 4-H endeavors.

"My work with 4-H as an adult is a direct result of my participation in that program as a teenager and young adult," R.F. said. "4-H is a tremendous organization that teaches responsibility, hard work and accountability." In addition to volunteering hundreds of hours for 4-H, the fair and auctioneering for charities, R.F. also coaches youth league basketball, baseball and softball teams.

It's fair to say that R.F.'s charitable service and auctioneering skills have had a positive impact on his community. Thanks, R.F., for being MoreThanALawyer! WVL



Co-chairs of the Women in the Profession Committee, Lee Murray Hall, attorney with Jenkins Fenstermaker, and Jami Cooper, attorney with Cooper Law Offices, share a laugh with Anita Casey, executive director of the WVSB. They are standing in front of the ABA display honoring the 100th anniversary of the 19th Amendment to the U.S. Constitution that gave women the right to vote.

A Sisterhood of Advocacy

A History of Women's Involvement in West Virginia's Legal Landscape[1]

The Honorable Ruth Bader Ginsberg, second female justice appointed to the United States Supreme Court, once said, "My mother told me to be a lady. And for her, that meant be your own person, be independent."[2]

2020 is a year to celebrate the woman as her own person, independent and strong, as it marks 100 years since the ratification of the 19th Amendment to the Constitution. It is further quite fitting that 2020 is the inaugural year of the Women in the Profession (WIP) Committee of The West Virginia State Bar. Shirley Chisholm, first African-American woman elected to the U.S. Congress, righteously stated, "[t]remendous amounts of talent are being lost to our society just because that talent wears a skirt."[3] Sadly, that sentiment rang true for far too long, particularly in the practice of law. With the rich history of women attorneys in West Virginia, the future for women in the bar is progressing. This Committee provides a space where women in law practice can share experiences, network and uplift each other through its subcommittees and activities with the goal of ensuring that the future for women in the practice of law remains bright.

Between the late 1800s through 1920, women in West Virginia used their bravery, wit, intelligence and grit to advocate for women's independence. By 1920, women had won the right to vote with the ratification of the 19th Amendment to the United States Constitution; but only 1,171 women were enrolled in the nation's 129 law schools (seven of which were still refusing to admit women), and women struggled to achieve their professional goals due to hurdles that prevented them from practicing law.[4] The women of West Virginia who took up the causes were a tour de force in advocacy and offer a powerful, if intimidating, reminder of the efforts that it took to make our current law practices possible.

By Nicole A. Cofer, Jami Cooper, Liz Stryker, Kala Sowers, Tanya Hunt Handley and Lee Murray Hall

The EARLY WEST VIRGINIA UNIVERSITY COLLEGE of LAW GRADUATES: "A MOST REMARKABLE AMOUNT of COURAGE and DARING"

The West Virginia University College of Law was one of the first institutions to admit and graduate women.[5] Agnes Jane Westbrook Morrison, the first woman to graduate from the West Virginia University College of Law, earned her degree in 1895.[6] Morrison was admitted to practice law in West Virginia in 1896 and practiced law with her fellow law graduate and husband, Charles Sumner Morrison, in Wheeling, West Virginia.[7] Mrs. Morrison was so active in civic and religious organizations that she became known as the "Mother of Clubs."[8]

Two other early graduates of the College of Law, Leila Jesse Frazier and Lillian Ruth Wiles (both of the Class of 1899), were also advocates for women's issues.[9] These women had barriers to overcome — and the grit and determination to overcome them. In one newspaper account of Ms. Frazier's trip to Morgantown for law school, it is said that she set off from Virginia, leaving her husband in Martinsburg, and rode "man fashion" on horseback across the mountains, "carrying a brace of revolvers" and "armed with a most remarkable amount of courage and daring."[10] At the time, West Virginia did not have the statutory prohibitions against women in the practice of law that many other states had, but judicial opinions across the country largely concluded that the practice of law was not a fit profession "for the female character."[11]

GEORGIA McINTIRE-WEAVER and the CROSS EXAMINATION that INSPIRED an INDICTMENT

Georgia McIntire-Weaver had already distinguished herself as an advocate when she came to West Virginia in 1913. A former dressmaker and stenographer, she graduated with honors from the Atlanta School of Law in 1911 and immediately applied to take the Georgia bar exam. Georgia, however, refused to allow women to sit for the bar exam. After an unsuccessful effort to lobby the Georgia Legislature for statutory reform, Mrs. McIntire-Weaver returned to her home state of West Virginia, which did not restrict her ability to obtain a license to practice law on the basis of her gender. She was the first woman to take and pass the West Virginia bar examination.[12] *Good Housekeeping* magazine used Mrs. McIntire-Weaver's efforts to practice her chosen career as an example of the challenges a reader's daughter may face in choosing law as a career.[13] According to that article, entitled "Your Daughter's Career: If She Wants to Be a Lawyer:"

> [Mrs. McIntire-Weaver] felt that so many years of preparation, so much hardship and hoping and self-denying must not go to waste. So, she moved to Berkeley Springs, West Virginia. There she hung out a shingle, inscribed, "G. McIntire-Weaver, Attorney at Law." And now, as a duly recognized practising [*sic*] lawyer from a neighboring state, she can double back into Georgia any time she pleases, and the Georgia courts are forced to extend to her all those privileges of a practitioner which the state denies to its own daughters.[14]

Less than a year later, in 1914, after successfully defending clients against a claim brought by a prominent Morgan County farmer, the farmer broke into her office and became abusive. Armed with the law (literally), Mrs. McIntire-Weaver flung a copy of Hogg's *Pleadings and Forms* at the farmer, along with a vase of roses, and "put the intruder out without assistance."[15]

Mrs. McIntire-Weaver's law practice flourished, despite — or perhaps because of — her willingness to advance unpopular causes against well-funded and politically powerful opponents. When John Gross wanted to pursue a claim against Vernon Johnson, then "speaker of the West Virginia house of delegates, and a prominent and wealthy insurance man and bank official," for contributing to the delinquency of Gross's 15-year-old daughter, he looked to Mrs. McIntire-Weaver, a well-known woman lawyer, who successfully pursued his claim.[16]

By all accounts, Mrs. McIntire-Weaver was a zealous advocate. However, her career reached some notoriety in that regard in 1918 when she was indicted for her cross-examination of a witness. She was charged with "intimidation" for her "attempt … to browbeat a mere male witness in the trial."[17] One account characterized the witness as a "defenseless" male witness, on whom "she turned loose a flood of oratory of such a character as to upset the magistrate's judicial dignity."[18] Another account described that, during the trial, Mrs. McIntire-Weaver "took occasion to give the court and the witness a large and scorching piece of her mind."[19]

Not willing to back down from the inequality she perceived, and continuing to use the legal processes astutely, Mrs. McIntire-Weaver sought **and obtained**

The Women in the Profession's formation committee, comprised of women in various stations, levels of experience, geographic regions and diverse backgrounds, gathers virtually for a planning meeting.

an injunction in the Circuit Court of Morgan County against the deputy sheriff, the sheriff and the mayor for three years of "injurious acts of disparaging her and causing her to incur enmity in the court of her professional duty."[20] She then brought a civil claim for money damages ($10,000) for slander, but ultimately lost as the jury returned a verdict for the defendants.[21]

Outside of her practice of law, Mrs. McIntire-Weaver was a vocal proponent of the women's suffrage movement. It would certainly have been something to behold to be an attendee at the West Virginia State Suffrage meeting in Huntington in 1915 where Mrs. McIntire-Weaver spoke, joined by the first woman licensed as a physician in the State of West Virginia, Dr. Harriet B. Jones, and the first woman ordained as a minister in the State of West Virginia, Rev. Helen Hill.[22] They were called upon to share their experiences and to voice their support for the suffrage movement by the leader of the West Virginia suffrage movement, Lenna Lowe Yost.

LENNA LOWE YOST and HER "SMALL MINORITY of WOMEN AGITATORS"

Though she was not a lawyer, an article about women trailblazers in the law would not be complete without a discussion of Lenna Lowe Yost's important work on the issue of women's suffrage. Mrs. Yost was married to a lawyer and politician, Ellis Asby Yost. The Yost couple joined forces in their involvement in the temperance movement, leading Mrs. Yost to serve as a champion for women's suffrage in West Virginia. Unable to vote herself because of her gender, Mrs. Yost was a keen strategist and worked to lobby lawmakers to pass actions that she believed essential for the State's progress, including suffrage.

Mrs. Yost worked diligently on the cause of women's suffrage from the late 1800s until West Virginia ratified the 19th Amendment on March 20, 1920.[23] Mrs. Yost was elected President of the West Virginia Equal Suffrage Association in advance of the 1916 West Virginia suffrage referendum — the popular vote that followed the West Virginia Legislature's passage of a women's amendment to the State's Constitution. As part of her strategic efforts, Mrs. Yost wrote speeches, commissioned posters, made personal appeals and organized "flying squadrons" of speakers throughout the state to educate and recruit voters.

As the 1916 general election drew near, however, the anti-suffrage movement grew stronger and more outspoken. The Clarksburg *Daily Telegram* published a political advertisement on Nov. 2, 1916, arguing for the anti-suffragists. The article noted that the authors "opposed the suffrage for women because we feel we have more influence without it" and that "suffrage involves office-holding, which is inconsistent with the duties of most women (as wives and mothers)."[24] It also noted that, without the vote, women "can exert an influence in the community proportionate to her character and ability."[25] The authors argued, "The influence of women standing apart from the ballot is immeasurable. Men look to her then (knowing that she has no selfish, political interests to further) as the embodiment of all that is truest and noblest."[26] In a Nov. 5, 1916, editorial in the Huntington *Herald-Dispatch*, Judge C.B. Bill wrote, **"God forbid that the destruction of our homes be made possible by an innovation proposed to be brought by a small minority of women agitators."**[27] The West Virginia suffrage amendment was overwhelmingly defeated, at least in part by the liquor industry, which had concluded that suffrage posed the primary threat to legal liquor sales. In fact, the West Virginia defeat was the largest defeat of suffrage in any State at that time. The all-male electorate voted it down on a more than 2-to-1 margin.[28]

Agnes Jane Westbrook Morrison, **the first woman to graduate from the West Virginia University College of Law, earned her degree in 1895.**

Mrs. Yost's efforts, like many suffragists at the time, then turned to the federal system. In 1919, Congress passed the 19th Amendment to the United States Constitution, which would, if ratified by three-fourths (36) of the states, give women the right to vote. As the suffragists neared the magic number, each state became a critical battleground. Mrs. Yost once again led the battle for women's suffrage in West Virginia. Her skill was her understanding of the contributions that each group could bring to the cause, and her ability to navigate the different ideologies and parties. The West Virginia vote, which was accomplished by a special session, was "one of the most dramatic sessions ever witnessed in either House."[29] The vote, which occurred on March 10, 1920, made West Virginia the 34th state to ratify the 19th Amendment.[30] The praise for Mrs. Yost and her tenacity, organization, political acumen and determination was overwhelming.

Mrs. Yost's impressive mind for strategic politics and her good work in obtaining ratification of the 19th Amendment in West Virginia ultimately led to her appointment as the first woman to chair a major political party's state convention with her chairmanship of the West Virginia Republican Convention.[31] She was also the first Republican National Convention Committeewoman.[32] Throughout her life, Mrs. Yost continued to work in positions that allowed her talents in political strategy to shine.[33] As was written in the *Herald-Dispatch*, "there is not an issue affected the welfare of West Virginians in which her leadership has failed her constituency."[34] Perhaps the best description appeared in a 1934 *Washington Post* article: "Among these Leaders is Lenna Lowe Yost (Mrs. Ellis A. Yost), who is generally conceded, has more contacts and a wider acquaintance with men and women of national prominence than any other person in the country."[35]

1920-2020: The SHATTERS of CEILINGS

The women who worked so tirelessly to give women the right to vote and the opportunity to practice law were joined in the 100 years that followed the ratification of the 19th Amendment by additional women who continued to carry the torch for equality in the legal field.

Following the death of her husband, E. Howard Harper, a lawyer and a member of the West Virginia House of Delegates, Minnie Buckingham Harper became the first African-American woman in the country to serve in a state legislative body with her appointment on Jan. 10, 1928, by Gov. Howard Gore. Mrs. Harper, who lived in Keystone, McDowell County, finished her husband's term but chose not to run for election at the term's conclusion.[36]

Service of women in judicial roles in the state came later,

when, in 1959, Elizabeth V. Hallanan became the first woman Juvenile Court judge and the first woman in West Virginia to preside in a court of record.[37]

In 1971, Callie Tsapis was the first woman elected to a West Virginia circuit judgeship following four years of service in the West Virginia Legislature.[38] She was one of three women in the West Virginia University College of Law's Class of 1948 and graduated at the top of her class.[39] Margaret Workman was the first woman to sit on the Supreme Court of Appeals of West Virginia and the first woman to hold statewide office; she was elected to the Court in 1988.[40] Kanawha Circuit Judge Joanna Tabit described Justice Workman's impact on the profession:

> Trailblazer, shatterer of glass ceilings, an inspiration to all lawyers — no one in West Virginia has done more for women in our profession than Justice Margaret Workman. I had the privilege of meeting her when I was a college student, after she had just become a Circuit Court Judge. She inspired me to apply to law school, and I can unequivocally say that but for her encouragement and mentorship, I would not be a lawyer. She was and remains an incredible inspiration to me and countless others.

In the federal system, West Virginia's "first women" began their work to continue chipping away at the glass ceiling in 1983. Judge Hallanan became the first woman appointed to a federal judgeship in West Virginia when she was appointed by President Ronald Reagan in 1983.[41] During her confirmation hearing on Nov. 9, 1983, Senator Jennings Randolph had this to say about Judge Hallanan:

> The nominee's experience, her performance, her commitment in private and public life have permitted me to say very strongly that her career has been one of efficiency and fairness and productivity. Her service to the State and the communities within West Virginia is noteworthy as are her broad range of activities in civic and community affairs.[42]

Women continue to struggle with attrition in the practice, in equality in firm and bar leadership and in joining the ranks of elected public officials.

During the course of that hearing, then-Senator Joe Biden, recognizing the historical significance of her appointment, stated, "I want to compliment the President on choosing you. I think it is good for several reasons, one of which is that you are, from everything that I have read, prepared by my staff, that you are very qualified, but also, there will come a day when this will not matter, but the day has not arrived yet, that you are a woman."[43]

In 1992, Irene Keeley became the first woman to serve as a federal district judge in the Northern District of West Virginia, a position that she has held for the past 28 years.[44] She served as Chief Judge of the Northern District of West Virginia from 2001 to 2008 and served for two years as President of the Federal Judges Association.

Judge Irene Berger, who had served as a Kanawha County Circuit Judge since 1994, was unanimously confirmed as the first African-American federal district court judge in West Virginia's history on Oct. 27, 2009.[45] More recently, Judge Stephanie Thacker shattered the Fourth Circuit's ceiling. Judge Thacker — nominated by President Barack Obama in 2011 and confirmed by the Senate in 2012 — is the first West Virginia woman to serve as a judge on the Fourth Circuit Court of Appeals.[46]

Female lawyers and judges are now considered fairly normal. However, women continue to struggle with attrition in the practice, in equality in firm and bar leadership and in joining the ranks of elected public officials. Thus, the efforts of women to attain equality in legal processes that started with the suffrage movement are ongoing. As Alice Paul, suffrage activist and founder of the National Women's Party, said after ratification of the 19th Amendment, "It is incredible to me that any woman should consider the fight for full equality won. It is just beginning."[47]

2020 and BEYOND: WOMEN in the PROFESSION COMMITTEE

In the strong spirit of our predecessors in law, State Bar President Monica Haddad formed the Women in the Profession Committee of The State Bar, noting an unmet need in our State for women lawyers to come together. Borrowing inspiration from the work of women in law over the course of the last 100 years, the WIP's steering committee is energetic and ready to work. State Bar President Monica Haddad said that her inspiration for forming the WIP lies in her experiences as a working lawyer and mother and in hearing stories from women lawyers during her mediations:

> Women were telling me these stories about instances of discrimination, or harassment, or difficult professional decisions they had to make because of their gender, and I heard these stories pretty often. As I heard these women's stories, I started to see the need for this Committee. Just knowing that there is support and other women have struggled in similar ways is valuable, and the idea that this Committee can serve as a source of inspiration and empowerment is really exciting for me, and for a lot of women who practice law.

Chaired by Jami Cooper (Bridgeport) and Lee Hall (Huntington), the WIP's formation committee, comprising women in various stations, levels of experience, geographic regions and diverse backgrounds, has met to form the Committee's structure.[48] Although the challenges presented by COVID-19 prevented the members of the formation project from meeting in person, members have participated in videoconferences to meet one another, to brainstorm and to provide insight on the mission, the goals and the purpose of this endeavor. Fueled by the enthusiasm and excitement of the formation committee's members — a group of impressive women from across the State — the WIP has made great strides in establishing the structure of an organization that will serve The State Bar as a whole by establishing programs and activities consistent with its mission, which is "to inspire, encourage, support and empower current and future generations of women in the legal profession."

"There seems to be a need for women practicing law to come together, to share experiences, to educate and support each other and their colleagues and to try to contribute to the practice in some positive way that will, hopefully, benefit the younger generations of women lawyers and the practice as a whole," said WIP Co-Chair Jami Cooper.

In the spirit of Alice Paul's warning that the work that the suffragists began 100 years ago is not over, the WIP's mission aims to continue the forward progress of women's participation in law in West Virginia, which started more than 100 years ago with our sisters-in-advocacy who worked tirelessly for the cause of women's suffrage, understanding what those women knew — a strong sisterhood is invaluable to improving the station of its members.[49] WVL

Endnotes

1. By Nicole Cofer, Esq., Jami Cooper, Esq., Lee Hall, Esq., Tanya Hunt Handley, Esq., Kala Sowers, Esq., and Elizabeth Stryker, Esq.
2. *See* Morning Edition: Ruth Bader Ginsburg and Malvina Harlan: Justice Revives Memoir of Former Supreme Court Wife (NPR radio broadcast May 2-3, 2002), at http://www.npr.org/templates/story/story.php?storyId=1142685.

3.Cong. Record, Vol. 160, Part 2, 113th Cong., 2d Session (2014), Congressional Black Caucus: When Women Succeed, America Succeeds, at 2383.

4. Richard L. Abel, American Lawyers 90 (1989).
5. Teree E. Foster & Sandra M. Fallon, *West Virginia's Pioneer Women Lawyers*, 97 W. Va. L. Rev. 705 (1995).
6. *Id.* at 706.
7. *Id.*
8. *Id.*
9. *Id.* at 706-07.
10. *Id.*
11. *Id.*
12. Mrs. McIntire-Weaver was not the first woman to practice law in West Virginia, but was the first to pass the West Virginia bar examination. The women who came before her in practice were beneficiaries of the then-existing diploma privilege.
13. Rose Young, *Your Daughter's Career: If She Wants to be a Lawyer*, Good Housekeeping, 1915 at 470.
14. *Id.*
15. Marion Weston Cottle, *Women in the Legal Profession*, Women Lawyers' Journal, November 1914 at 86.
16. *Politician Sue on Ugly Charge*, The Bluefield Daily Telegraph, Dec. 14, 1915, at 11.
17. *Woman Lawyer Under Indictment on Charge of Browbeating Witness*, The Wheeling Intelligencer, April 4, 1918, at 1.
18. Gerald Swick, *A Wooden Leg, a Glass Eye and a Woman Lawyer*, West Virginia Histories, Volume 1, at 87-89.
19. *Woman Lawyer Under Indictment on Charge of Browbeating Witness*, The Wheeling Intelligencer, April 4, 1918, at 1.
20. *Woman Lawyer Gets Injunction*, Shepherdstown Register, Feb. 23, 1922, at 7.
21. *Items of Interest*, Shepherdstown Register, April 20, 1922, at 4.
22. *Fifteen Delegates for Suffrage Meet: Program for State Convention has been Announced at Headquarters*, The West Virginian (Fairmont, West Virginia), November 8, 1915, at 1 (noting that during the convention, "[s]everal brief addresses will be given by the pioneer professional women of the state of West Virginia").

23. The suffrage effort began in West Virginia in the late 1800s with the formation of the West Virginia Equal Suffrage Association in Grafton in 1895. *See* Ida H. Harper, *The History of Woman Suffrage, Vol. 6 (1900-1920)*, National American Woman Suffrage Association, 1922, at 687.
24. *(Political Advertisement) Why the Majority of Women do not Want the Ballot*, Clarksburg Daily Telegram, Nov. 2, 1916, at 10.
25. *Id.*
26. *Id.*
27. *Against Woman Suffrage*, The Huntington Herald-Dispatch, Nov. 5, 1916.
28. *Id.*
29. *Senator Bloch Casts Deciding Vote After Exciting Home Trip*, The Clarksburg Exponent, March 1920.
30. While, by the 1920s, women had attained the right to vote, were entering law school in increasing numbers, were practicing law and were participating in the legislative process, it was not until 1956 that women in West Virginia were permitted to serve on juries. *See* Robert M. Bastress, *The West Virginia State Constitution*, Oxford University Press (2011), at 127. Despite its rather progressive actions in some respects, West Virginia lagged far behind the nation in this regard, being the last state to permit women to serve on its juries. *See West Virginia Blue Book* (1957), 680-687. It was Elizabeth Simpson Drewry, the first black woman elected to the West Virginia Legislature, who proposed the initiative. *See id*.
31. Anne Wallace Effland, *Lenna Lowe Yost, 1878-1972. Missing Chapters*. Women Commission & the Humanities Foundation of West Virginia, 1983.
32. *See Former Federal Radio Boss Dies*, Raleigh Register, Jan. 8, 1962, at 1.
33. Mr. Yost had an equally impressive career. He was elected Mayor of Fairview in Marion County at the age of 23 and served in the State Legislature thereafter. In his role as Delegate, he was instrumental in enactment of a Prohibition law in West Virginia in 1913 (known as the "Yost Bill"). *See* George W. Atkinson, *Bench and Bar of West Virginia*, Virginian Law Book Company, 1919, at 498. Mr. Yost served as U.S. Attorney in Huntington before his appointment to the position as chairman of the Federal Communications Commission. Mr. Yost was the brother of West Virginia University football star, Fielding "Hurry Up" Yost, who later became a football coach and athletic director at the University of Michigan. *See Former Federal Radio Boss Dies*, Raleigh Register, Jan. 8, 1962, at 1.
34. *Carry On*, The Huntington Herald-Dispatch, May 25, 1932.
35. Thurston, Karina G., *Lenna Lowe Yost, temperance, and the ratification of the woman suffrage amendment by West Virginia*, 2009, Graduate Theses, Dissertations, and Problem Reports, at 695, at https://researchrepository.wvu.edu/etd/695, citing *The Washington Post*, 1934, Lenna Lowe Yost Papers, Box 1, West Virginia and Regional History Collection, West Virginia University, Morgantown, WV.
36. *Chronology of Women in the West Virginia Legislature 1922-2020*, West Virginia Legislature's Office of Reference & Information, Joint Committee on Government & Finance, 2019.
37. West Virginia House of Delegates Res. 39, 2005 (adopted April 8, 2005).
38. Foster, et al., at 713.
39. *Tsapis will be inducted to HOF*, Weirton Daily Times, July 10, 2016, at https://www.weirtondailytimes.com/news/local-news/2016/07/tsapis-will-be-inducted-to-hof/.
40. *Id.* at 716; Associated Press, *West Virginia Supreme Court to Have Female Majority*, West Virginia Public Broadcasting, https://www.wvpublic.org/post/west-virginia-supreme-court-have-female-majority#stream/0 (last accessed July 6, 2020).
41. *Confirmation Hearings on Federal Appointments, Confirmation Hearing on Elizabeth V. Hallanan before the Committee on the Judiciary*, 98th Congress (1983).
42. *Id.* at 84.
43. *Id.* at 87
44. Foster, et al. at 716.
45. Congressional Rec., 111th Cong., 1st Sess., 2011, at S10791.
46. Congressional Rec., 112th Cong., 2d Sess., 2012, at 4712, 4751.
47. Alice Paul, American Suffragette, 1920.
48. In addition to co-chairs Jami Cooper (Cooper Law Offices, PLLC, Bridgeport) and Lee Hall (Jenkins Fenstermaker, PLLC, Huntington), the following have served on WIP's formation project: State Bar President Monica Haddad, Esq. (Morgantown); Tammie Alexander, Esq. (Steptoe & Johnson, PLLC, Morgantown); Iris Aloi, Esq. (Herrington & Sutcliffe, LLP, Wheeling); Lindsay Brennan, Esq. (Law Offices of Chanin W. Krivonyak, Charleston); Nicole Cofer, Esq. (Kanawha County Prosecuting Attorney's Office, Charleston); Hon. Bridget Cohee (Circuit Judge, 23rd Judicial Circuit, Martinsburg); Michele Eby, Esq. (Chief Deputy Clerk, U.S. District Court, Clarksburg); Tanya Handley, Esq. (Handley Law Offices, PLLC, Point Pleasant); Heather Heiskell Jones, Esq. (Spilman, Thomas & Battle, PLLC, Charleston); Jane Harkins, Esq. (The Harkins Law Firm, Beckley); Teresa McCune, Esq. (Chief Public Defender, 13th Circuit, Williamson); Kameron Miller, Esq. (Littler Mendleson, PC, Charleston); Julie Moore, Esq. (Bowles Rice LLP, Morgantown); Shawn Morgan, Esq. (Steptoe & Johnson PLLC, Bridgeport); Ashley Hardesty Odell, Esq. (Bowles Rice LLP, Morgantown); Stephanie Ojeda, Esq. (Clerk for the Hon. Thomas Kleeh, Clarksburg); Chelsea Prince, Esq. (Bowles Rice LLP, Morgantown); Jill Rice, Esq. (Dinsmore & Shohl, LLP, Morgantown); Debra Scudiere, Esq. (Morgantown); Esha Sharma, Esq. (Clerk for the Hon. Susan Tucker, Morgantown); Shannon Smith, Esq. (Kay Casto & Chaney, PLLC, Morgantown); Kala Sowers, Esq. (Colombo Law, Morgantown); Liz Styker, Esq. (Clerk for the Hon. Irene Keeley, Clarksburg); and Hon. Joanna Tabit (Circuit Judge, 13th Judicial Circuit, Charleston).
49. Any lawyer or judge who is interested can join The State Bar's Women in the Profession Committee.

Nicole A. Cofer is the Immediate Past Chairperson of the WVSB Young Lawyers Committee, chair of the Minority Lawyers Committee and serves at the West Virginia Traffic Safety Resource Prosecutor.

Jami Cooper practices at Cooper Law Offices, PLLC, in Bridgeport, with her husband, Dan.

Liz Stryker serves as a law clerk to the Honorable Irene M. Keeley of the U.S. District Court for the Northern District of West Virginia.

Kala Sowers is an attorney with Colombo Law in Morgantown, West Virginia. She is a West Virginia Super Lawyers Rising Star, a member of the National Trial Lawyers Top 40 Under 40.

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PHOTO COURTESY OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA.
PHOTO BY JEFF GENTNER.

Tucker County Courthouse

Once busy with timbering and mining, the county's chief employer today is tourism.

Between 1890 and 1893, two tiny West Virginia towns, Parsons and St. George, clashed in a dispute that became known as the "Tucker County Courthouse War."

Each of the two towns coveted the title of county seat. St. George initially gained that honor, but Parsons won a subsequent election. Claiming there had been voting irregularities in the election, St. George refused to turn over the courthouse records.

On the night of Aug. 1, 1893, an armed mob of 200 Parsons men took matters into their own hands. They broke into the St. George courthouse and made off with the county records and the bell that hung in the courthouse tower, carrying them to Parsons. In a subsequent action, the court reaffirmed that Parsons was the rightful county seat. The "war" was over, with no casualties other than St. George's wounded pride.

The Virginia General Assembly formed Tucker County from Randolph County in 1856. In 1871, after the new county had broken away from Virginia, the West Virginia Legislature added a small portion of Barbour County to it. The county is named for Virginia jurist Henry St. George Tucker.

When the Parsons men who broke into the St. George courthouse returned home, they established a temporary courthouse in a nearly completed store on Main Street. The county government continued to operate out of the store until 1900 when the current courthouse was built.

By James E. Casto

PHOTO BY MARY TERRIBERRY

Blackwater Falls is a 57-foot cascade of water tinted by the tannic acid of fallen hemlock and red spruce needles. Visitors can enjoy the scenic views year-round by taking the steps to the falls or by using viewing platforms.

With the construction of the courthouse, the town of St. George never regained its former prominence. The flickering hope that the county seat might once again come to St. George was lost forever.

The courthouse, located at First and Walnut streets, was designed by architect Frank P. Milburn, a prolific designer of courthouses and other public buildings in West Virginia and across the southern United States.

More or less Victorian in design, the courthouse is flanked by a red brick jail and jailor's residence, built in similar style. The main entrance of the courthouse is flanked by two towers. The largest of the towers is four stories tall and capped with a steeply pitched roof. Each side of the tower has a clock face. The courthouse and jail were added to the National Register of Historic Places in 1984.

The historic jail is no longer used to confine inmates. Since 2005, the Tygart Valley Regional Jail in Belington in Randolph County has also served Tucker County.

In 2013, a four-story courthouse annex, designed by ZMM Architects of Charleston, was built adjacent to the courthouse. It sits on the same lot as the courthouse, with the original jailor's residence between the two. The annex is starkly modern in design, but its red bricks blend well with the courthouse brickwork.

Tucker County's rugged terrain and impenetrable thickets of mountain laurel impeded the county's settlement. In 1746, when a survey party hacked its way into the wilderness, one member of the group, Thomas Lewis, claimed the "dismal appearance of the place" was "sufficen [*sic*] to strike terror in any human." Even as late as 1853, Philip Pendleton Kennedy called the region "as perfect a wilderness as our continent contained." Little wonder that the 1860 census counted only 1,428 residents in the county.

All that changed in the 1880s when industrialist Henry Gassaway Davis built his West Virginia Central and Pittsburgh Railroad, which joined the Baltimore & Ohio's main line in Mineral County. The coming of the railroad provided the missing ingredient — transportation — that was needed to open up Tucker County's timber and coal resources.

The timber and coal boom naturally increased the county's population. In 1910, it stood at 18,675. But there it peaked, when the boom proved short-lived. The clear-cutting that claimed nearly all the county's old-growth forest came to a halt

PHOTO BY RAUN KERCHER

Dolly Sods is located on top of the Allegheny Plateau of West Virginia, and has over 26 miles of hiking trails. The name is derived from an 18th century German family named Dahles, who settled nearby and allowed their sheep to graze in the open mountaintop meadows (sods).

PHOTO BY JON BILOUS

Bear Rocks Preserve is a 477-acre area owned and maintained by The Nature Conservancy. It is adjacent to the Dolly Sods Wilderness, part of the Monongahela National Forest. Bear Rocks overlooks the South Branch Potomac River and visibility can extend eastward to the Shenandoah National Park in Virginia.

in the mid-1920s. Coal mining continued but steadily declined, ultimately playing out in the 1950s. By 2012, the county's population fell to an estimated 6,995.

With three state parks and a good share of the West Virginia ski industry, Tucker County's leading employer today is tourism.

Though mostly known as a skiing destination, Canaan Valley Resort State Park is a four-season resort park. Hiking and biking are exceptionally popular, and its trails double as cross-country skiing routes in winter. Its 18-hole golf course is among the top warm weather attractions in the Canaan Valley. More than 150 guest rooms at Canaan Valley Lodge and 23 cabins and cottages accommodate overnight guests year-round.

Photographs of the spectacular falls have won worldwide fame for Blackwater Falls State Park, though more than 2,000 acres of forest await visitors who trek beyond its well-traveled boardwalk to the falls. Hiking, biking, horseback riding and cross-country skiing trails wander the park and intertwine with those of the adjacent Monongahela National Forest. Guests are accommodated in 26 cabins and the 54-room Blackwater Lodge.

Although it's only four acres in size, Fairfax State Park attracts its share of visitors. It celebrates the Fairfax Stone, a boundary stone marking the source of the North Branch of the Potomac River. The original stone was placed in 1746. Over the years, there have been six Fairfax Stones, each one replacing the last owing to weathering or vandalism. The present six-ton stone was dedicated in 1957.

The county is also home to the Dolly Sods Wilderness. Part of the Monongahela National Forest, its distinctive landscape is characterized by stunted trees, wind-carved boulders, heath barrens, grassy meadows created in the last century by logging and fires and sphagnum bogs that are much older.

Tucker County attracts thousands of visitors each year, and an increasing number of visitors decide to buy or build vacation homes in the county. WVL

James E. Casto is the retired associate editor of the Huntington *Herald-Dispatch* and the author of a number of books on local and regional history.

Retirement Planning Update After the SECURE and CARES Acts

By J.E. White

Under current law, retirement assets provide taxpayers with three tremendous benefits: (1) protection from the claims of creditors; (2) the amount of earnings contributed to the plan are not subject to income tax; and (3) the earnings realized inside the plan grow tax-free.

In the past few months, two new laws have been enacted that meaningfully impact planning with retirement assets.[1] The Setting Every Community Up for Retirement Enhancement Act of 2019 (herein, "SECURE"), signed into law on Dec. 20, 2019, made significant changes with respect to estate planning for retirement assets. Then, on March 27, 2020, the Coronavirus Aid, Relief and Economic Security Act (herein, "CARES") was signed into law by President Trump.

WHAT HAS CHANGED?

The SECURE and CARES Acts are voluminous and contain numerous law changes. This article addresses some highlights of these acts, specifically:

- the loss of the stretch IRA for many beneficiaries;
- the change in the required beginning date from 70.5 to 72;
- the waiver of certain required minimum distributions for 2020;
- the elimination of the maximum age to make contributions to an IRA;
- the limitation on the qualified charitable deduction exclusion;
- the allowance of certain coronavirus-related distributions; and
- permitting qualified plans to be established after year end.

Death of the Stretch

For many years, the preferred estate plan for owners of retirement assets has been the stretch IRA. If a taxpayer made his or her retirement assets payable to a designated beneficiary[2] (including a see-through trust), then the assets could be paid over the life expectancy of the designated beneficiary. For example, a parent could make a child the beneficiary of his or her retirement plan assets, and the assets could be dribbled out to the child over his or her life expectancy. This provided a great benefit, as the plan continued in its tax-deferred status for many years. SECURE shortened the post-death distribution period for designated beneficiaries to 10 years after the death of the decedent.[3]

SECURE killed the stretch IRA for most beneficiaries. The "stretch" is now only available for individuals who qualify as "eligible designated beneficiaries" under any of the following five categories:

(1) surviving spouse;
(2) minor child of the participant;
(3) disabled beneficiary;
(4) chronically ill individual; and
(5) an individual who is less than 10 years younger than the decedent.

Thus, under SECURE, there are three possible payout scenarios for beneficiaries other than a surviving spouse:

(1) 10 years for a designated beneficiary;
(2) five years for a beneficiary who is not a designated beneficiary; or
(3) a stretch payout over the life expectancy of an eligible designated beneficiary.

While eligible designated beneficiaries can still enjoy the benefits of the stretch, there are a few caveats. When a minor child reaches the age of majority, the new 10-year rule takes over. Additionally, upon the death of any eligible designated beneficiary, the new 10-year payout rules apply.

Required Beginning Date Now 72

SECURE increased the age for taxpayers to begin mandatory distributions from their retirement assets (the "required beginning date") from 70.5 to 72. Thus, the required beginning date is now generally April 1 of the year following the later of the calendar year in which the taxpayer reaches age 72.[4]

Waiver of Certain Required Minimum Distributions for 2020

CARES added §401(a)(9)(I) to the Internal Revenue Code which provides a temporary waiver of required minimum distributions for 2020. IRS Notice 2020-51 clarified that this provision applies to both your own IRA and an inherited IRA.

Elimination of Maximum Age to Contribute to IRA

Since 1974, taxpayers have not been able to make a deductible contribution to a traditional IRA in or after the year in which the taxpayer attained age 70.5. SECURE repealed this age cap by providing that any taxpayer

with earned income can contribute to a traditional IRA regardless of age.

Qualified Charitable Distributions Exclusion Is Limited

Once a taxpayer attains 70.5, he or she can make Qualified Charitable Distributions (herein, "QCDs"), which are excluded from tax but still count towards their yearly required minimum distribution. The annual limit on QCDs is $100,000. Since SECURE eliminated the cap on deductible IRA contributions after 70.5, the possibility existed that taxpayers could make tax-deductible IRA contributions and income-excludable QCDs with the same money. To close this loophole, SECURE modified the QCD rules by reducing a taxpayer's permitted exclusion by the amount of the taxpayer's after age 70.5 deductible IRA contributions.

Coronavirus-Related Distributions

CARES enacted special tax treatment for certain coronavirus-related distributions (herein, "CRD"). A CRD is a distribution to a qualified individual from an eligible retirement plan taken after Jan. 1, 2020, and prior to Dec. 31, 2020.[5] The aggregate amount of distributions to be treated as CRDs shall not exceed $100,000.

The 10% penalty on distributions taken prior to age 59.5 does not apply to a CRD, and any income related to CRDs can be ratably spread over a three-year period. A CRD can also be rolled back within three years (rather than the usual 60 days) to an eligible retirement plan. This purported rollover of the CRD is to be treated as a plan-to-plan transfer. This is a valuable provision since the taxpayer can utilize the CRD in a time of great need and then put it back into a plan or IRA and continue to defer any income tax on the CRD.

Qualified Plans Can Now Be Established After Year-End

Prior to SECURE, qualified plans had to be established by the end of the taxable year. SECURE permits employers to establish qualified plans by the employer's tax filing deadline, including extensions, of the tax return for the prior year.[6]

WHAT HAS NOT CHANGED

Planning for a Surviving Spouse

SECURE did not significantly change planning for spouses. A surviving spouse can still be the named beneficiary of retirement assets and has the option to roll over the inherited benefits to his or her own IRA. Similar to prior law, a surviving spouse may elect to defer distributions until the account owner would have attained his or her required beginning date (now 72).

If, however, a trust is warranted, a properly structured conduit trust for a surviving spouse remains useful as it is still entitled to the surviving spouse's minimum distribution benefits. The conduit trust would not have to begin taking required minimum distributions until the end of the year in which the deceased taxpayer would have attained 72. As noted above, the applicable distribution period is the spouse's life expectancy, recalculated annually. The new 10-year rule does not apply.

Rules for Non-Designated Beneficiaries Have Not Changed

SECURE did not change the rules for non-designated beneficiaries, such as estates, charities and non-"see-through" trusts. Payouts to those beneficiaries continue to be required either: (1) within five years, if the plan participant died prior to his or her required beginning date; or (2) in annual installments over the taxpayer's remaining life expectancy, if he or she died after his or her required beginning date.

Distributions From Plans Are Taxable Income

As before, the distribution of retirement assets is income to the beneficiary. For example, when monies are distributed from an IRA, the beneficiary must take that amount into his or her income for the tax year of the distribution. This type of income is generally referred to as income in respect of a decedent (except for Roth IRA distributions). Also, retirement assets are not entitled to a basis step-up upon death.

WHAT TO DO

Consult Advisors

Taxpayers should revisit their estate planning post CARES and SECURE to determine whether the plan still works. With the availability of the stretch severely restricted, planning on how to pass retirement assets warrants considerable thought. Different plans and considerations are required for the various types of beneficiaries.

At a minimum, taxpayers should: (1) review and possibly revise their beneficiary designation forms; (2) review and revise wills and trusts where retirement assets have been designated to pass into trusts; and (3) educate themselves on CARES and SECURE changes in order to make informed decisions.

Consider an Accumulation Trust

For many taxpayers who want to utilize a trust, an accumulation trust may become the go-to planning

technique for downstream beneficiaries. As set forth below, an accumulation trust may be able to provide substantial creditor protection to the beneficiaries as the funds can remain in trust indefinitely. Also, since the stretch is essentially dead and the 10-year payout is now required, the class of individual beneficiaries in an accumulation trust is now unlimited.

For taxpayers wanting to direct retirement assets through trusts, there are generally two types of trusts that qualify as "see-through" trusts: conduit trusts and accumulation trusts.

A conduit trust requires that all amounts distributed from the plan to the trustee be paid immediately to the designated beneficiary. There cannot be any accumulation of assets in the trust, and no proceeds from the plan can be distributed to any other beneficiary during the beneficiary's lifetime. A problem with a conduit trust under SECURE is that the plan proceeds must be completely distributed to the designated beneficiary within 10 years of the taxpayer's death, unless the beneficiary is an eligible designated beneficiary. This can be troublesome if a beneficiary is not financially responsible and/or has creditors.

An accumulation trust can have multiple individuals as beneficiaries, and the distributions from the plan can be accumulated in the trust. Under SECURE, the distributions from the plan still must be completed within the 10-year period. Since the trustee does not have to distribute amounts received from the plan, the trust will be required to pay income tax on amounts that are not distributed. With trusts attaining the highest income tax rate at $12,950, this could be a severe tax hit. However, nothing prohibits a trustee from making distributions to beneficiaries and issuing K-ls to the recipients, pursuant to the trust terms. In that sense, an accumulation trust can essentially operate as a conduit trust with the advantage of being able to benefit numerous individuals that may have differing needs, may be in different tax brackets and may have differing abilities to handle money responsibly.

Roth Conversions

If a taxpayer will likely have a taxable estate or if they are in lower income tax brackets relative to their beneficiaries, he or she may consider a Roth conversion. Of course, the conversion from a traditional IRA to a Roth IRA will cause tax to become due immediately. This, however, will decrease the size of the taxable estate and could eliminate any need for a conduit or accumulation trust. There are many factors to analyze with any potential Roth conversion, including, but not limited to, the taxpayer's income in the year of potential conversion, the time value of money, rate of income tax, a guess as to what the tax laws will be in the future, whether a taxpayer may move to an income tax-free state, timing of income tax and rate of estate tax.

Use a Charitable Remainder Trust

For taxpayers who have strong philanthropic and charitable desires, a charitable remainder trust (herein "CRT") can be considered. If a CRT is used, the plan proceeds must be distributed to the CRT within five years (as the CRT does not qualify as a designated beneficiary). However, a CRT is not subject to income taxation, so the plan proceeds can be distributed and invested inside the CRT tax free. The CRT can then make the required annuity or unitrust payments to the individual beneficiaries of the CRT (for example, the taxpayer's children) over a 20-year period or, in some cases, their lifetime. Those distributions are taxable, but can be spread out over time to the beneficiaries. A CRT is thus able to somewhat mimic the stretch IRA. Advantages of a CRT are that: (1) there is an estate tax charitable deduction for the value of the remaining interest passing to the charity; (2) it provides asset protection; and (3) taxable distributions can be made over the beneficiary's lifetime.

CONCLUSION

The SECURE and CARES Acts made significant changes to planning for retirement assets, often the most complicated assets in a taxpayer's estate plan. Taxpayers should review their current planning to ensure it complies with their wishes and takes advantage of any new opportunities in the SECURE and CARES Acts. WVL

Endnotes

1. For this article, retirement assets referred to are Individual Retirement Accounts ("IRAs"), §401(k) plans, §403(b) plans and related qualified retirement plans.
2. The definition of designated beneficiary was not changed by SECURE.
3. The entire amount of retirement assets must be distributed by the end of the 10th calendar year following the calendar year of the death of the owner.
4. Applies to distributions required to be made after Dec. 31, 2019, to individuals who attain age 70.5 after such date.
5. The definition of a qualified individual is found in CARES section 2202(a)(4)(A)(ii).
6. Applies only to plans adopted for taxable years after Dec. 30, 2019.

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SUCCESSION PLANNING

Be proactive — for yourself, your family and your clients.

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Law practice succession planning is critical for protecting your clients, you, your heirs and others in the event you are unable to continue to practice law. In January 2020, annual reporting requirements for succession planning were promulgated as part of the West Virginia State Bar Administrative Rules. By July 1, 2021, all active sole practitioners will be required to disclose, as part of their Bar membership information, whether they have a designated successor, a succession plan and other critical information. Please review West Virginia State Bar Administrative Rule 14, Succession Planning: https://files.constantcontact.com/75edd16b001/23c3557a-73ba-46ab-b4c6-85e25b2f29f4.pdf

While the Law Practice Succession Committee is currently working toward full implementation of the Rule, it is important that succession planning begin sooner rather than later. To begin the process, helpful information is provided by the WV Lawyer Disciplinary Board. See *Establishing a Succession Plan: A Guide to Protecting Your Clients' Interests in the Event of Your Disability, Retirement or Death*, End of Practice Committee (March 1, 2016): http://www.wvodc.org/pdf/Establishing%20a%20succession%20plan.pdf.

In an effort to provide education on this important issue, the Law Practice Succession Committee is providing, with permission, the following article, which appeared in the *Virginia Lawyer* in December 2019.

— E. William Harvit,
Chair of Succession Planning Commitee

By Renu M. Brennan

Recently, our Bar has focused on the importance of lawyer wellness. In the face of incontrovertible data on lawyer suicide, substance abuse and depression, as well as cognitive decline as our profession ages, we have recognized the need to educate and be proactive to turn the tide toward better lawyer health.

Now, as noted in the executive director's column in June, the Committee on Lawyer Discipline (COLD) has turned its focus toward how to encourage lawyers to prepare for their law firms' future and to protect client interests in the event of a lawyer's impairment, disaster or death. COLD and ethics counsel are also reviewing resources available to lawyers to help them with succession planning.

This effort may seem unnecessary. After all, lawyers are hired to help others plan ahead. We don't need prodding to plan for ourselves and our clients should something happen to us. Moreover, comment 4 to Rule 1.3 on diligence provides that a lawyer should plan, in writing, for the lawyer's death, impairment, incapacity or disappearance, and should designate a responsible attorney capable of making (and who has agreed to make) arrangements for the protection of client interests.

Unfortunately, however, lawyers do not always plan ahead, and sometimes The Bar has to step in and seek the appointment of a receiver to do what the lawyer should have done: ensure that clients' interests are protected, including, at a minimum, the return of unearned advance fees and files. This process can be expensive and protracted[1]; it is also avoidable. The Virginia State Bar's website contains resources including the Ethics Department's *Planning Ahead: Protecting Your Client's Interests in the Event of Your Disability or Death*. As the materials emphasize, have a plan — find someone, preferably an attorney, to close your practice and draft written instructions to your successor, family and staff so they can quickly access your computer; notify clients; disburse files; disburse funds; pay liabilities and collect accounts receivable; notify your professional liability carrier, courts and opposing counsel; and close your office. Discuss the plan with those involved.

If there is no responsible party capable of properly discharging your responsibilities, then, upon an attorney's disability, impairment, absence or death, pursuant to Virginia Code § 54.1-3900.01, Bar counsel may, on an ex parte basis, petition the circuit court where the subject attorney resides or has an office for the appointment of a receiver. Bar counsel may also seek appointment of a receiver if a suspended or revoked attorney has not complied with his or her obligations to Part Six, Section IV, Paragraph 13-29 of the Rules of the Supreme Court of Virginia.[2] In either case, Bar counsel must show that no responsible party capable of properly discharging the attorney's responsibilities to clients is known to exist.[3] The Bar is required to use its best efforts to provide a copy of the petition, affidavits and notice of the hearing to the subject attorney and any known duly-appointed personal representative of the subject attorney, or the subject attorney's estate.[4]

Any receiver appointed is bound by the attorney-client privilege and confidentiality under the Virginia Rules of Professional Conduct.[5] Receivers are closely supervised by The Bar, and virtually everything must be approved by the court that appointed the receiver. Pursuant to statute, receivers must:

1. File an inventory of all clients with The Bar;
2. Notify all clients of his/her appointment and protect the clients' interests until clients have the opportunity to hire successor counsel;
3. Notify the attorney's personal representative and the commissioner of accounts that the receiver may have a claim against the estate for fees and costs of the receivership;
4. Identify and take control of all bank accounts over which the attorney had signatory authority in connection with the law practice;
5. Within four months of the appointment, and annually thereafter, submit for court approval an accounting of receipts and disbursements and account balances of all funds under the receiver's control;
6. Attempt to collect any accounts receivable related to the law practice;
7. Identify and attempt to recover any assets wrongfully

diverted, or assets acquired with funds wrongfully diverted, from the law practice;

8. Terminate the law practice;
9. Reduce to cash all assets of the practice and notify any personal representative and the commissioner of accounts of any proposed liquidations of assets;
10. Determine the nature and amount of all creditors' claims, including clients; and
11. Prepare and file with the court a report of such assets and claims proposing a distribution to such creditors, and the personal representative, if any, and the commissioner of accounts of the proposed distribution of receivership funds.[6]

Receiverships are a remedy of last resort. The process is often protracted and costly to The Bar and to the attorney's estate and loved ones. Receivers serve until released by court. Subject to court approval, a receiver is entitled to an award for reasonable fees, costs and expenses. The Bar must cover any shortfall to the extent The Bar has funds available and has a claim against the estate for the amount paid.[7]

As a self-regulating profession, it is in our collective interest to make sure that we protect client interests by planning ahead. We don't want our true legacy to be tarnished by putting off today what we may not be able to do tomorrow. WVL

> Unfortunately, **lawyers do not always plan** ahead, and sometimes **The Bar has to step in** and seek the appointment of a receiver to do what the lawyer should have done: **ensure that clients' interests are protected**.

Endnotes

1. Net payments from the Virginia State Bar for receivers for 30 attorneys over the last six years are as follows: FY 2014 – $118,658.45; FY 2015 – $100,169.43; FY 2016 – $33,340.44; FY 2017– $159,966.13; FY 2018 – $138,593.08; FY 2019 – ($32,922.64); FY 2020 – ($4,508.25). In FY 2019 and FY 2020, The Bar received reimbursements on three receiverships.
2. Paragraph 13-29 details the duties of suspended and revoked attorneys to notify clients, opposing counsel and judges of the suspension or revocation; to make appropriate arrangements for the disposition of cases in conformity with the clients' wishes; and to furnish proof to The Bar that notice and arrangements were made.
3. Va. Code § 54.1-3900.01.A.
4. Va. Code § 54.1-3900.01.A.
5. Va. Code § 54.1-3900.01.B.
6. Va. Code § 54.1-3900.01.C.
7. Va. Code § 54.1-3900.01.E.

Renu M. Brennan is assistant bar counsel at the Virginia State Bar and heads the Department of Professional Regulation which investigates and prosecutes lawyers in professional misconduct matters.

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A Geezer Lawyer's Letter to a 3L

My Dear Megan,

Congratulations on completion of your 2L year! The rest of your law school career will pass a lot faster than you might think it will. The tedium of your 3L year will quickly give way to terror of the bar exam. I predict you will pass. Your license will mean you can begin to learn how to make a living as a lawyer. Word has it that you choose to enter private practice, preferably as an associate in a law firm. Good.

Law school has done a good job of teaching you how to think. I doubt it has done a good job of teaching you how to build a law practice. I know my law school did not. Those hard lessons came later for me, with a painfully high tuition of experience. You are at the threshold of a long legal career, just as I am concluding one of 40+ years. It's time someone whispered the secret truths and showed you the secret handshake. Let me.

I want you to flourish in this difficult profession. With your burden of student loans to repay, so do you. Indulge me long enough to read my whole letter. I had to learn this … stuff … the hard way. Perhaps I can spare you from the costly tuition of experience. I promise (to try) to be brief. I consider these to be eternal truths. You may consider them one geezer's tedious opinions.

Here are eight hard lessons I learned in pursuit of a career in private practice, in no particular order:

1. Late nights and lots of billable hours *alone* are no path to partnership.

Dedicated diligence and hard work are usually rewarded with more hard work, period. As a new associate, you are mostly a cash machine for the firm. (Indeed, for the first few years of your career, you are probably a positive threat to your clients' cases.) Your firm's first job is to see you are worth your paycheck, not to foster your career. Yours is to *develop an expertise and a clientele*. Yes, you must accomplish both jobs at the same time. Yes, that means more stress. Welcome to the profession.

2. Find something different you can be good at, and then do it a lot.

It may not be something you particularly like, but you must become adept — and it cannot be for free. Try to choose something a bit different from what The Geezer who hired you is doing. (There's no reason to be viewed as a competitive threat.) Find some novel facet or seize on some aspect that no one else in the firm is doing. That does not mean trying criminal law in a residential real estate firm. It means learning condominium law or commercial leasing, for example. Whatever you choose, command it — and the sooner, the better.

An experienced attorney offers advice to a law student about ready to enter the profession.

3. Acquire your own clientele. It means at least as much to your career as technical competence.

Absolutely everyone already expects you to be technically competent. Even brilliance won't guarantee you will flourish. The coin with which you will purchase partnership (or independence) is your own book of business, not a history of being a faithful and efficient workhorse. Pursue a clientele of your own. I have seen associates with modest intellect offered a partner's office because they captured and kept repeat-business clients, while their more gifted but selfless contemporaries still toiled in their cubes. Cubes are dreadful. Even if partnership is denied, your own book of business will buy your next job.

4. Don't ever refer a client you are not ready to lose forever.

Remember we lawyers are competitive, by nature or training or both. Inside your own firm, your colleagues will be grateful for the work you found and handed off; they will also recognize the chance to claim your new client for their own. Make sure *you* remain your new clients' contact inside the firm. You want clients to view you as their lawyer, not the firm. Even if you must enlist a colleague's assistance, control access, take part in all conferences and ask your colleague to collaborate in *your* communication, not the opposite. The first client I ever originated was my own dentist, who wanted a will. I had never written a will, so I proudly introduced him to our probate and estates partner. That partner wrote *two* wills — and a trust, and powers of attorney — and I never saw the client again. Neither did the partner teach me how to write wills. It was a bitter lesson, and hard learned.

5. Good paralegals make good lawyers into better lawyers. Find one fast.

Do your best to find and keep the loyalty of a good paralegal. Overpay, if you can. No one else will ever reliably watch your back as well. As a newly minted young lawyer, I was assigned to a veteran paralegal. She was a person of a certain age, widely experienced, battle-weary and impatient with my naivete. By luck or by chance, I quickly recognized she knew more about practicing law in that firm than I would know for years

By Franklin Drake

to come. I made it my business to shut up and listen, even though her suggestions were usually salted instead of sugared. Until she retired, that paralegal made it her business to make me look good. God bless her sainted soul. Find her match, hang on and you will flourish. Alone, you will struggle.

6. Avoid the "Young Lawyer's Disease" — hubris.

Most larval lawyers know better than to spout and strut in front of a senior colleague or opponent. Yet when confronted with a paralegal or staffperson who bridles or questions a dumb decision or directive, some newbies wrap themselves in their law degrees and condescend. Don't be a snot. Pause and reflect. You might avert a mess. Remember your first weeks as a 1L, when you realized you were no longer the hot-shot undergraduate because *everybody else* had a Phi Beta Kappa key too? Embrace that humility again. Remember, after all, you probably are a positive threat to your own client's case. Better to avert a mess than to mop up a mess.

7. At all costs, keep your word — especially to other lawyers — or don't give it.

Your reputation for truth will be at least as valuable as your reputation as an accomplished attorney. For your entire career, your regard among your colleagues in the bar will be only "one lie deep." So it is with us all. Lawyers are not only competitive, but we are also unforgiving of deception. Make it your practice to remain scrupulously, tiresomely truthful. That does not mean disclosing confidences. It means recognizing the difference between what you *know* is true and what you have been told. Confuse the two in your dealings with the rest of us, and you will never escape the stain of a forked tongue.

8. Treat the lLs and 2Ls kindly next year. It will pay dividends later.

By my own 3L year, I was thoroughly weary of law school. The cold terror of the 1L students was a distasteful memory. The exhaustion of the 2Ls was just bitter satisfaction. To impatient 3Ls, they were all just hallway clutter underfoot, who snatched the best parking spaces and ate all the open-house cookies. We 3Ls tended to ignore them at best. Our eyes were on the horizon. I did not realize then that I would spend most of a long legal career practicing with, against or beside so many of them. Chances are you will see all three classes from your own law school for decades too. Treat them all kindly next year. It will make it easier to address some of those lLs someday as "Your Honor" — as I do now.

That's it. There's nothing left for me to offer from a lifetime in practice. Maybe I have helped you. Maybe I should just be satisfied that you respond to none of my remarks with, "Well, duh!" Good luck, kid. May you flourish.

Regards,
Your geezer friend
Franklin Drake, UNC Law '78,
a member of the West Virginia State Bar since 1986

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Scope Out Some Scope

Fastcase 7

Fastcase is a research benefit provided to members by The West Virginia State Bar. Log in at www.wvbar.org/members/fastcase/

Fastcase 7 not only has all of the great primary and secondary content that you enjoy in Fastcase 6, but it also has some materials that are only accessible in Fastcase 7. To switch to Fastcase 7, click on the toggle button in the upper right side of the screen in Fastcase to the left of "Welcome" and your name. *See Figure 1*.

Figure 1

Figure 2

Browse

The easiest way to view content in Fastcase 7 is to use Browse mode. Just click on the blue "Browse" button (*see Figure 2*) and you will see all libraries that have been tagged with "West Virginia & Federal" as the jurisdiction. *See Figure 3*.

Primary law is located on the left, and secondary content is located on the

By Erin Page, Esq.

right. Each library will have small icons located next to them, so you can see if they can be searched or browsed or if they need to be purchased. *See Figure 4*.

However, don't forget to take advantage of the two free secondary libraries. Jurispro is a database of expert witness biographical data, including name, contact information, education and specialties. Lexblog is a database of legal blogs written by leading practitioners and experts. Both databases are available only in Fastcase 7 and are a great resource for expanding your research. *See Figure 5*.

For more tips on searching Fastcase or for technical support, please contact our Research Attorneys via phone at 1-866-773-2782, option 2, via email at support@fastcase.com or via Live Chat using the Live Chat box at the bottom of the research platform. Stay tuned for more exciting updates by visiting fastcase.com/blog. Happy searching! WVL

Figure 3

Figure 4

Figure 5

Erin Page is senior law librarian and reference attorney with Fastcase. Erin is a graduate of the William and Mary Marshall Wythe School of Law, where she received honors in Legal Practice. She also received a BA in Classics from St John's College, Annapolis, and a Master's degree in Legal Library Science from Catholic University. Prior to working with Fastcase, Erin worked for eight years as an attorney with Convergent in Insurance Mediation and as company trainer/ CLE coordinator.

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Culturally Courageous Conversations

FIRST in a LIMITED SERIES

In his 1963 letter from the Birmingham jail, Martin Luther King Jr. wrote "[i]njustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly."

Culturally Courageous Conversations is a 2020 webinar and article series aimed at starting a healthy conversation amongst all members of our Bar on the issues of social injustice, racism and fairness under the law. With the support of the West Virginia State Bar President, the Minority Lawyers Committee will be highlighting a series of articles submitted by our African-American attorneys in the next four editions of *The West Virginia Lawyer*. As the chair of the Minority Lawyers Committee, I encourage our minority lawyers to submit articles for consideration to the committee. In the words of former First Lady Michelle Obama, "[. . .] no matter what you do, the point is to never be afraid to talk about these issues, particularly issues of race. Because even today, we still struggle to do that. Because this issue is so sensitive, is so complicated, so bound up with a painful history. [. . .] We need all of you to ask the hard questions and have the honest conversations, because that is the only way we will heal the wounds of the past and move forward to a better future."

Now is a time for this conversation; now is a time for action. We must all remember as practitioners of the law that history has its eyes on each of us, and in the words of Alexander Hamilton, "[t]he first duty of society is justice."

— **Nicole A. Cofer**, *Chairperson Minority Lawyers Committee*

By Brendan Doneghy

In June, The West Virginia Bar Blast included a statement titled "State Bar Statement on Social Justice." The long overdue statement turned out to be no statement at all, other than the implied statement that The Bar would not be taking a stand against racism. Indeed, it failed to even use the word "racism" or mention Black people. Instead of confronting the problem head on, the evasive article instead catered to the delicate sensitivities of those against progress.

A great civil rights leader once said, "There comes a time when silence is betrayal." That time is now. Dozens of cities and counties across the country, and at least three states, have declared racism to be a public health crisis. The American Medical Association declared institutional racism an urgent public health issue and vowed to eradicate racism and discrimination in health care. Quaker Oats acknowledged the racism of the Aunt Jemima brand and decided to retire it. NASCAR acknowledged the racism behind the confederate flag and banned it from its events. Mitt Romney, of all people, marched with the Black Lives Matter movement. All the while, our Bar didn't even use the word "racism."

Now is the time for us, as a Bar, to denounce racism and develop policies to eliminate its impact on Black people. When a state bar trails behind NASCAR on a matter of justice, there is a problem. *Res ipsa loquitur*.

In response to worldwide protests over Black people being murdered by the police, The West Virginia State Bar circulated a specious genuflection to social justice, citing the West Virginia Rules of Professional Conduct related to poverty. Where is the indication that Black people are being murdered by police because they don't have enough money? This has never been about poverty. It is about race. To focus on economics is to run from the truth.

Racism is real. Black people are being targeted and murdered. Black people continue to suffer and live in fear due to

racism. This is a problem. This is **the** problem. Acknowledge it.

I have been thrilled by the number of white people I have seen at the protests both in Charleston and across the country. Their presence is meaningful. Their presence is a statement that they see racism against Black people as a problem, and they are allies in the fight for a solution. They have made the decision not to remain silent in a country that continues to act as if Black lives don't matter. It's long been time for The Bar to make the same decision.

As Dietrich Bonhoeffer once said, "Silence in the face of evil is itself evil […] Not to speak is to speak. Not to act is to act." The Bar's apparent refusal to make an effort to understand the problem or take a stand against it is a statement that racism is not a concern of high priority. Tiptoeing around the sensitivities of people who do not wish to discuss racism is a statement that The Bar has placed a higher priority on the comfort of white people than on the lives of Black people. I hope we, as a bar, will do better.

To open its Statement, The Bar stated it was "deeply troubled by the death of George Floyd in Minnesota." George Floyd didn't have a heart attack or fall off a cliff. George Floyd was murdered by the police. It's on video. Let's call it what it was. There is a threat against Black lives, and it has to be addressed.

The statement continued with, "The unrest we are witnessing stems from a desperate yearning for equal justice among all people in this Nation, whose heritage is rooted in protest against injustice." This statement is saddening, grossly inaccurate and offensive.

If the contention about America's heritage is a reference to the American Revolution (and I can't imagine what else it could be), slavery was already well-established, and the slaughtering of the Natives was well underway. After the American Revolution, this Nation continued to murder the Natives and kidnap Black people from their countries and force them into lives of brutal and miserable servitude. This Nation's heritage is deeply rooted in injustice.

I invite readers to research "Jim Crow," "Separate But Equal" and "Redlining." America has become "this Nation" via some of the most unjust atrocities in the history of the world — atrocities that have obvious repercussions to this day. It takes a special kind of privilege to blissfully ignore these atrocities and spin this Nation's implementation and perpetuation of injustice in a positive light.

If The Bar fails to acknowledge the racism of the past, where it is defined and described for it, how can we expect it to acknowledge the racism of the present, which is often less obvious? For many white people, even today, anything less than hooded Klansmen burning crosses doesn't amount to racism.

White people, please try to wrap your head around this: animosity is not a required element of racism. Most white people don't hate Black people so much that they would eagerly join a lynch mob. You don't deserve to be praised for not hating Black people. You have to care enough to do something about it. Racism is a problem so substantial, so pervasive and so reprehensible that it isn't enough to not be a racist. The West Virginia State Bar must acknowledge this and take steps to be a part of the solution.

In Kanawha County, home to many of the most diverse cities in West Virginia, Black people walk into a courthouse and are met by a team of exclusively white security guards. There are seven circuit judges with seven secretaries and seven bailiffs. None of them are Black. There are five family court judges, with five case coordinators, five secretaries and five bailiffs. None of them are Black. Of over 30 circuit clerks, there is one who is often quietly referred to as "the Black one." This reality is a problem.

I write this article with the sad understanding that some of those people will view this opposition to racism as extreme, and they might be so uncomfortable with these truths that they will avoid me. Some clients might fire me; some judges might not appoint me to cases. Come what may. Racism feeds on silence, complicity and denial. It has to be actively opposed.

I am not sure exactly how The West Virginia State Bar can be a part of the solution. But the first step is recognizing that there is a problem, calling the problem what it is — racism — and acknowledging that the victims are Black people. With the publication of this article, I hope that we, The West Virginia State Bar, have taken the first step. WVL

Brendan Doneghy is a member of The West Virginia State Bar.

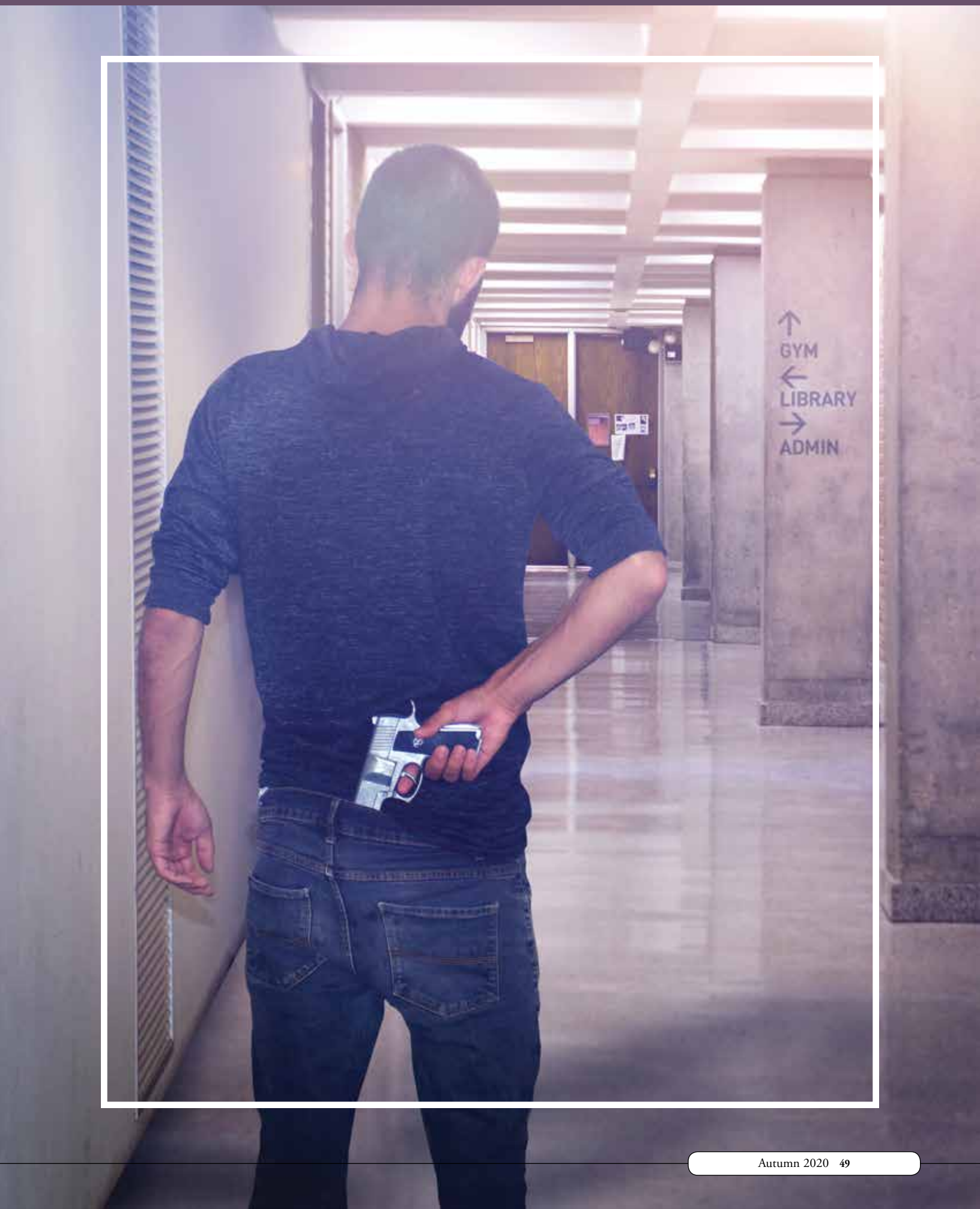
West Virginia's CONCEALED CARRY STATUTE

Is it really such a good idea?

If you have never read the West Virginia concealed carry statute, here is your chance: W.VA. Code 61-7-7(c) states

(c) Any person may carry a concealed deadly weapon without a license therefor who is: (1) At least twenty-one years of age; (2) A United States citizen or legal resident thereof; (3) Not prohibited from possessing a firearm under the provisions of this section; and (4) Not prohibited from possessing a firearm under the provisions of 18 U. S. C. §922(g) or (n).

By Robert E. Barratt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This law was introduced as W.VA. House Bill 4145 and passed in February 2016. It is my understanding the police unions were appropriately opposed to this legislation. There are few places concealed carry is not permitted; see W.VA. Code 61-7-11A (school buses, elementary schools, courthouses, the state capitol building). Also see W.VA. Code 8-12-5a, a statute that prohibits municipalities from controlling concealed gun carry in their jurisdiction. Since 2017 almost anyone can carry a concealed lethal weapon in the state for no particular reason. Things have gone downhill since this law was passed, statistically speaking, considering the health and safety of all those who reside in our state.

Statistics

West Virginia is No. 40 in state ranking population, with 1.77 million people in 2019, and is near the top (No. 5 out of 50) for poverty, with 17.9% of the population impoverished.[1] Please consider West Virginia is No. 5 in gun suicides and No. 13 in gun deaths, per capita. West Virginia is ranked No. 45 out of 50 in overall state safety, near the bottom of the pile. Part of that safety calculation comes from 290 offenses per 100,000 people in 2019, many of which are gun offenses.[2] In 2018 West Virginia had a 57.6% gun ownership rate.[3] Someone is killed by a firearm in West Virginia every 29 hours, for over 300 deaths a year. (Also keeping West Virginia low in the safety ranking are drug deaths.)[4] There were approximately 155 gun suicides in West Virginia last year, based on a calculation of population and per capita incidents.[5]

Cases & Legislation

District of Columbia v. Heller, 554 U.S. 570 (2008), was a landmark anti-gun control decision by the U.S. Supreme Court, ruling that the Second Amendment protects an individual's right to keep and bear arms, unconnected with service in a militia, for traditionally lawful purposes, such as self-defense within the home. District of Columbia's requirement that lawfully owned rifles and shotguns be kept "unloaded and disassembled or bound by a trigger lock" violated this guarantee.[6] The United States Supreme Court has not heard any cases directly dealing with the constitutionality of concealed carry; however, in a dissent in denying certiorari in *Peruta v. California*, 137 S. Ct. 1995, 198 L.Ed.2D 746 (2017), several of the justices appear pro-gun. The Supreme Court also recently vacated as moot a pistol carry case in *N.Y. State Rifle & Pistol Ass'n. v. City of New York*, No. 18-280 (2020).

West Virginia is ranked No. 45 out of 50 in overall state safety. … Someone is killed by a firearm in West Virginia every 29 hours.

Sweeping legislation to end the epidemic of gun violence and build safer communities by strengthening federal firearms laws and supporting gun violence research, intervention and prevention initiatives has recently been introduced in the United States House of Representatives with HR 5717, known as the Gun Violence Prevention and Community Safety Act of 2020. This ambitious gun control bill strengthens laws concerning background checks, proposes a waiting period for purchases and addresses gun storage, assault weapons, silencers and more. It is pending in Congress now.

Discussion

West Virginia has never been a more dangerous place to reside, probably since the Civil War or frontier days. W.VA. Code 61-7-7(c) permits regular citizens in the community to carry concealed firearms for no reason. I saw an elderly man not long ago in

a local big box store who appeared impoverished; his whole wardrobe appeared to have come from the charity store. He had an old, tattered jacket and shoes needing repair, and he used a walker. Despite that, on his belt under his jacket was a shiny, new, top-of-the-line 10mm semi-automatic pistol that cost at least $500. I cannot imagine he would need that firearm at the pharmacy counter or at the package store, but that handgun probably makes the clerks nervous.

The Second Amendment states, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." This awkwardly written clause has morphed into a political vote-getting football. The worry about other countries invading America passed long ago. The Second Amendment now seems to guarantee the right of citizens to shoot up nightclubs, bars and job sites; shoot their neighbors over dog or boundary disputes; enforce drug deals; and commit suicide with ease in their moment of despair. It seems no place is safe now in America: schools (Sandy Hook, Virginia Tech, Columbine, Stockton, Stoneman Douglas), workplaces (NAS Pensacola in Florida; Henry Pratt Co. in Aurora, Illinois; the Washington Navy Yard; the Inland Regional Center in San Bernardino, California; Excel Industries in Hesston, Kansas), concerts and gatherings (Las Vegas, the Gilroy Garlic Festival, Pulse nightclub in Orlando, the Power Ultra Lounge in Little Rock, the movie theater in Aurora, Colorado), and churches (the Pittsburgh synagogue, the Sutherland Springs church, the Charleston, South Carolina, church and more) are all unsafe.[7] My former law partner killed himself one night after being sued for a delinquent student loan balance. He purchased the pistol just days before that act. Homicides in the eastern panhandle of West Virginia, once a rarity, are now commonplace. The City of Chicago just had its pinnacle day of shootings: 18 murders in 24 hours on May 31, 2020. That number will probably be topped before this article reaches your desk.[8] What would the founding fathers who drafted the Constitution say if they understood someone went into an elementary school with a semi-automatic rifle and shot and killed 28 young children and teachers at their desks, as happened at Sandy Hook Elementary in Newtown, Connecticut?

Suggestions

While firearm sales may be good business for ammo vendors and funeral directors, W.VA. Code 61-7-7 should be repealed, however politically awkward. Background checks should be required for all gun purchases wherever they take place, and gun safety courses and refresher courses should be mandatory for those with concealed carry permits. Gun sales in our state should be limited to residents only. Gun buy-backs might be a good idea in Charleston, Huntington and other bigger cities. Municipalities and other jurisdictions should be able to determine themselves who may carry a firearm in their town. A waiting period for gun purchases may also help avoid snap decisions and further fatalities.

Wild, wonderful West Virginia should consider becoming a little less "wild" for the welfare and safety of its citizens. WVL

Endnotes

1. https://www.usatoday.com/story/news/nation/2018/02/21/states-most-and-least-gun-violence-see-where-your- state-stacks-up/359395002/.
2. https://lawcenter.giffords.org/wp-content/uploads/2019/02/Giffords-Law-Center-State-of-Gun-Violence-in-WEST-VIRGINIA.pdf.
3. Violence Policy Center, 2018 study.
4. America Health Ratings, United Health Foundation.
5. https://www.livestories.com/statistics/west-virginia/gun-firearm-violence-deaths-mortality, https://www.cbsnews.com/pictures/death-by-gun-top-20-states-with-highest-rates/9/.
6. https://www.supremecourt.gov/opinions/07pdf/07-290.pdf.
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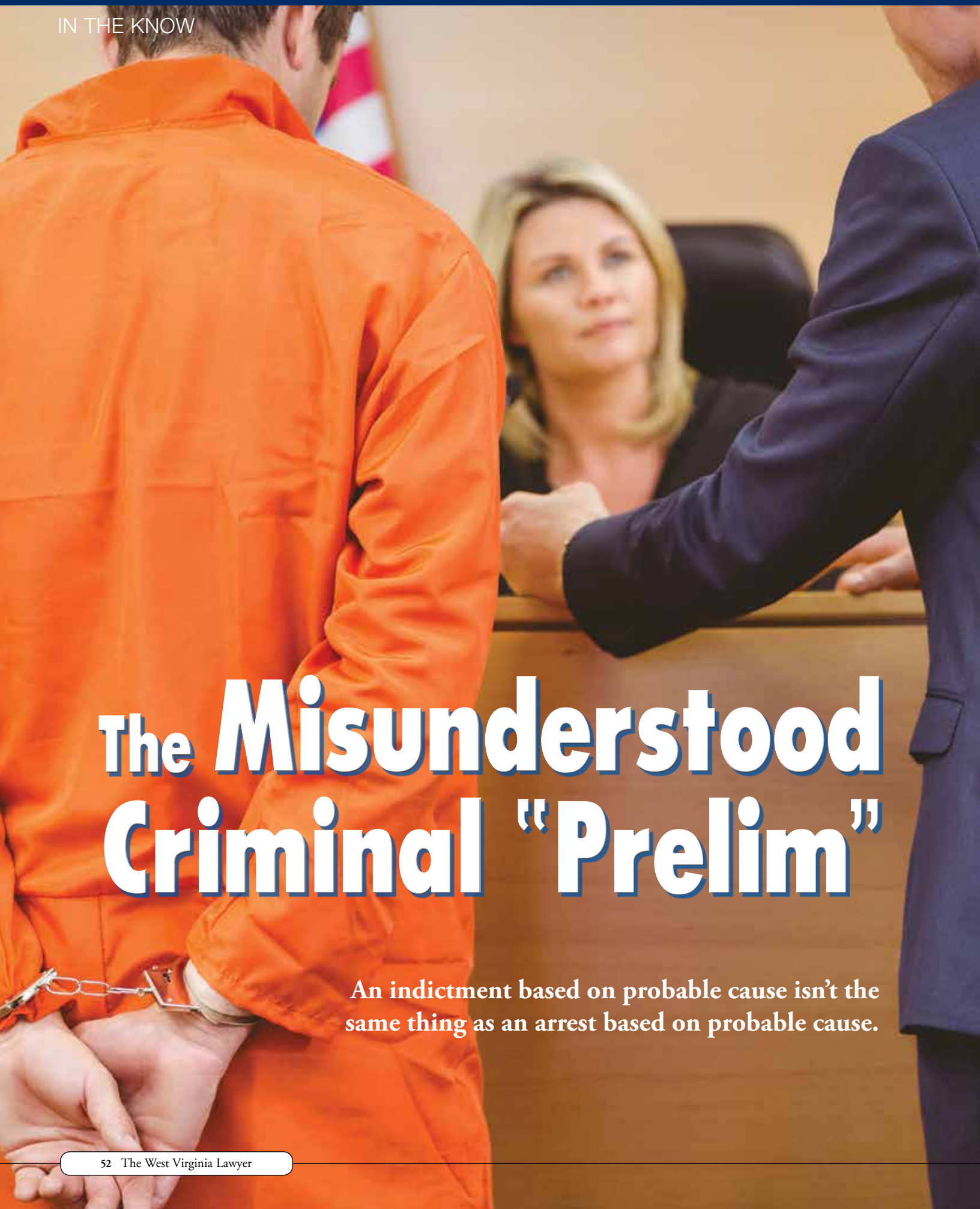
8. https://cdn.americanprogress.org/content/uploads/2019/11/18070714/WestVirginiaGunViolence-Factsheet.pdf

Robert E. Barrat practices law in Martinsburg, West Virginia. He can be reached at RobertEBarrat@gmail.com.



The Misunderstood Criminal "Prelim"

An indictment based on probable cause isn't the same thing as an arrest based on probable cause.

There is among members of the bench and bar in West Virginia a misapprehension of the fundamental purpose of a criminal preliminary examination. Such misapprehension has, in turn, led to an abandonment of the procedural rules girding the preliminary examination to such an extent as to render such hearings *ex parte* and altogether superfluous.

Although the preliminary examination dates back several centuries, in West Virginia it still closely resembles the past common-law procedure, *to-wit*:

> [a]t common law it was customary, if not obligatory, for an arrested person to be brought before a justice of the peace shortly after arrest. The justice of the peace would "examine" the prisoner and the witnesses to determine whether there was reason to believe the prisoner had committed a crime.[2]

Thus, the issue is not whether there *was* "probable cause" to arrest the accused, but whether there *is* probable cause to extend the accused's detention pending indictment. The potential indefinite deprivation of a person's liberty prior to indictment is a significant issue that should not be handled inconsiderately. Therefore, the preliminary examination is a procedural safeguard that fills the void between an arrest based on probable cause and later indictment based on probable cause where an indictment may take weeks, if not months, to secure. As the Supreme Court of the United States succinctly explains in *Gerstein v. Pugh*, "the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest."

Therefore, the fundamental purpose of a criminal preliminary examination is to undertake an exacting examination of the evidence set forth against the accused to ensure (1) that the charge holding the accused is indeed a felony and (2) that further detention of the accused is extended indefinitely only upon sufficient and credible evidence. To give effect to the forgoing the Court has taken two steps specifically. First, the Court regards the preliminary examination as a "critical stage" at which a defendant has a right to counsel.[3] Next, the Court promulgated Rule 5.1 of the Rules of Criminal Procedure ("Rule 5.1") to further expand on West Virginia Code § 62-1-8.[4]

Specifically, Rule 5.1(a) establishes a due process right to confront witnesses unless the state satisfies certain conditions to diminish that right. Preliminary examinations are adversarial. They were made such because cross-examination is "the greatest legal engine ever invented for the discovery of truth."[5] Rule 5.1(a) provides, with emphasis added:

> [i]f from the evidence it appears that there is probable cause to believe that an offense has been committed and that the defendant committed it, the magistrate shall forthwith hold him to answer in circuit court. Witnesses shall be examined and evidence introduced for the state under the rules of evidence prevailing in criminal trials generally except that hearsay evidence may be received, if there is a substantial basis for believing:
>
> (1) That the source of the hearsay is credible;
> (2) That there is a factual basis for the information furnished; *and*
> (3) That it would impose an unreasonable burden on one of the parties or on a witness to require that the primary source of the evidence be produced at the hearing.

By its explicit terms, Rule 5.1(a) prohibits hearsay evidence unless, and until, the state shows and the magistrate finds that the delineated conditions outlined in Rule 5.1(a) — the primary condition being the *credibility* of the declarant — are satisfied. Presently, magistrate courts are not holding prosecutors to the mandates of Rule 5.1(a).

A defendant's right to confront witnesses at the preliminary

By Nigel E. Jeffries[1]

examination stage is protected by constitutional due process. Even when confrontation rights are limited by rule or statute, due process is not eliminated — due process still applies in hearings lacking the full panoply of constitutional safeguards.[6]

Rule 5.1 was also promulgated to work in tandem with an accused's right to confront an adverse witness, and the Rule itself expressly provides that "*the defendant may cross-examine adverse witnesses …*" This language reinforces that inadmissible hearsay should not be perfunctorily and repeatedly admitted. Obviously, hearsay evidence cannot be cross-examined and routinely permitting such evidence deprives the accused from the express right to "cross-examine adverse witnesses" consistent with the Sixth Amendment's Confrontation Clause.[7] Magistrate courts are not only ignoring the express requirements of Rule 5.1 but also depriving the accused of the right to confront and cross-examine an adverse witness.

The solution to these current constitutional and due process challenges is elegant: adherence to Rule 5.1(a). Hearsay should be sparingly utilized and permitted only when each factor of Rule 5.1(a) is actually satisfied. Additionally, the right of the accused to confront and cross-examine an adverse witness must be preserved. Judicial integrity and due process require adherence to Rule 5.1. WVL

Endnotes

1. The author would like to acknowledge and thank Matthew Stonestreet, Esq. for his thoughtful and considerate contributions to this article.

2. *Gerstein v. Pugh*, 420 U.S. 103, 114–15 (1975).
3. *Spaulding v. Warden, West Virginia State Penitentiary*, 158 W. Va. 557, 212 S.E.2d 619 (1975).
4. The preliminary examination statute.
5. *California v. Green*, 399 U.S. 149, 158 (1970).
6. *See e.g., Louk v. Haynes*, 159 W.Va. 482, 223 S.E.2d 780 (1976).
7. *Pointer v. Texas*, 380 U.S. 400, 406 (1960) (holding that the Sixth Amendment's right of an accused to confront the witnesses against him is a fundamental right and is therefore made obligatory on the States by the Fourteenth Amendment).

Nigel E. Jeffries is a solo practitioner who specializes in criminal defense, habeas corpus and appellate litigation.

LEGAL NOTICES

DANIEL R. GRINDO
Law License Suspended

The Supreme Court of Appeals of West Virginia issued an Opinion which suspended Respondent Daniel R. Grindo's license to practice law in the State of West Virginia for a period of two years. It was further ordered that Respondent comply with the provisions of Rule 3.28 of the Rules of Lawyer Disciplinary Procedure regarding duties of a suspended lawyer; that he complete an additional six hours of Continuing Legal Education in the area of ethics; and that Respondent pay the costs of the disciplinary proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary procedure. Finally, it was ordered that should Respondent be reinstated to the practice of law following his suspension, that he be prohibited from engaging in work compensated through the West Virginia Public Defender Services.

DAVID A. KIRKPATRICK
Law License Suspended

On April 22, 2020, the Hearing Panel Subcommittee of the Lawyer Disciplinary Board, by its Chair Stephen M. Mathias, under Rule 3.10 of the Rules of Lawyer Disciplinary Procedure, filed its written recommended disposition in this matter, recommending that:

1) the respondent's law license be suspended for a period of six months;
2) upon suspension, the respondent must comply with the mandates of Rule 3.28 of the Rules of Lawyer Disciplinary Procedure;
3) the respondent be required to petition for reinstatement pursuant to Rule 3.32 of the Rules of Lawyer Disciplinary Procedure;
4) prior to applying for reinstatement the respondent must provide a copy of a Conciliation Agreement between himself and Public Defender Services reflecting that the restitution outlined in the written recommended disposition has been satisfied; and
5) the respondent be ordered to pay the costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

Thereafter, on May 18, 2020, the Office of Disciplinary Counsel, by Renée N. Frymyer, Lawyer Disciplinary Counsel, filed its consent to the recommendation. The respondent did not file a consent or an objection to the recommendation.

Upon consideration, the Court is of the opinion to and does concur with and approve the recommended disposition of the Hearing Panel Subcommittee of the Lawyer Disciplinary Board.

It is therefore ORDERED that:

1) The license to practice law in the State of West Virginia of the respondent, David A. Kirkpatrick, shall be, and it hereby is, suspended for a period of six months, effective immediately;
2) The respondent is hereby directed to comply with the mandates of Rule 3.28 of the Rules of Lawyer Disciplinary Procedure;

Continued on next page

NOTICES *continued*

3) The respondent is required to petition for reinstatement under Rule 3.32 of the Rules of Lawyer Disciplinary Procedure;
4) Prior to petitioning for reinstatement, the respondent must provide a copy of a Conciliation Agreement between himself and Public Defender Services stating that the restitution outlined in the written recommendation from the Hearing Panel Subcommittee has been satisfied;
5) The respondent shall pay the costs of these proceedings under Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

Service of a copy of this order upon Lee Murray Hall and Ronald H. Hatfield Jr., counsel for the respondent; the Office of Disciplinary Counsel; and the West Virginia State Bar shall constitute sufficient notice of the contents herein.

Justice Workman and Justice Hutchison do not concur with the entirety of the recommendation. They would suspend the respondent for three months, with automatic reinstatement.

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