

*founded 1886*

## President's Corner



John F. McCuskey  
 President

I am pleased to report that The West Virginia Bar Association continues to be healthy and vibrant. Your Board members are each very generous in donating their time to guide and promote our organization and Pryce Haynes, our Executive Director, brings tremendous energy and creativity to accomplishing our goals. Our active membership currently stands at 1191 which includes 322 members of the Young Lawyers Division and 56 members of our Real Estate Division. Our Senior Division and our newest addition, the Legal Nurse Consultant Section, have both been very successful in promoting interest and new members for the Association. I want to take this opportunity to thank all of our Board, Division and Section Leaders, and Past Presidents who, over the past ten years, have worked to resurrect our 118-year-old Association and help it again become a vital voice for, and part of, West Virginia's legal community.

Often I am asked by new members, and sometimes by veteran members, to state the goals of the West Virginia Bar Association. The answer is not complicated: to advance the reputation of our profession by sponsoring activities and programs which educate both the public and our own membership and which promote civility and social interaction between lawyers of all ages and types of practices. Hopefully, the numerous Bench/Bar receptions held throughout West Virginia, the excellent CLE seminars sponsored by the Real Estate Division, the two recent Judicial Forums offering the Bar and the public the opportunity to weigh the merits of the candidates for the Supreme Court of Appeals of West Virginia, and last year's tremendously successful joint annual meeting with the Virginia Bar Association were all in furtherance of our goal.

This year's 118<sup>th</sup> Annual Meeting, to convene at the Homestead in Hot Springs, Virginia on September 16, 2004 promises to be a great event. With gasoline and travel prices on the increase, this really is an outstanding opportunity for a nearby family vacation combined with a relaxing atmosphere and an exceptional program. Charlotte Lane, a past President of our Association, and now a Commissioner of the United States International Trade Commission, will keynote the weekend events.

In the excitement over the future of our organization, it is important to remember and recognize the contribution made by our past leaders. Three of West Virginia's most eminent lawyers and past Presidents of our Association died in the past few months. Charles F. Bagley, Hays Webb, and James Hornor Davis III all were leaders in their communities, outstanding lawyers, and great ambassadors for our profession. They will be sorely missed not only by their families but by the many members of the legal community whose lives they touched in such positive ways.

*Don't miss these important forms  
 included inside this issue:*

- Annual Meeting Registration & Reservation Forms
- Award of Merit Form
- History Project Update from Phil Hill
- Legal Briefs

## Colson Hall: How it Came to Be

Pryce Haynes

Executive Director, The West Virginia Bar Association

Recently, the WVU College of Law celebrated its Quasiquicentennial. Founded in 1878, just 8 years prior to the founding of The WVBA, the College of Law was initially referred to as the Department of Law. In the minutes of The WVBA's 34<sup>th</sup> Annual Meeting held in Elkins in 1918, B. Randolph Bias from Williamson commented upon the deplorable situation of the Law School when he was in attendance in 1910, "the conditions for learning law were certainly very, very meager and poor ... sometimes right in the middle of a lecture or while we were trying to chase down some law point in the library, somebody on the third floor in the School of Music would break out in song or, still worse, would begin pounding the ivories ... ." The Law School, to which Bias referred, was then housed in four small rooms (one of which was used for its library) on the second floor of a campus building sandwiched between the Cooking School on the first floor and Music School on the third floor. H. C. Jones, then Dean of the Law School and a member of the Executive Council, added, "Our Law School is in a very critical condition, and we are going to be subjected to criticism of a very severe character from former students and from students who come to the University after the war is over, if the condition is not remedied."

In 1916, Judge Joseph M. Sanders, from Bluefield and a member of the Executive Council in 1918, proposed a resolution for the construction of a building at WVU specifically to house the College of Law, which was acted upon and adopted at The WVBA's Annual Meeting at The Greenbrier in 1917. At the 1918 Annual Meeting, Wells Goodykoontz, from Williamson, president of The WVBA, presented on behalf of Col. George S. Wallace, chairman of the Special Committee on Law School Appropriation, the committee's recommendation "that the special committee on law school appropriation be continued and that it be requested to use its best endeavor to procure from the next legislature an appropriation of at least \$150,000 for the erection of a suitable building for the separate use of the College of Law."

At the 1918 meeting, the concerns of the Law School drew considerable attention and discussion. With the country's resources in great demand for the WWI effort, costs of construction were 50% to 100% more than typical due to high costs of labor and materials. The members of The WVBA realized that getting the legislature to appropriate sufficient funds for the construction of this building would be difficult, at best, given these circumstances and the post war demands on the state treasury. At the urging of Senator Fred L. Fox, from Grafton, The WVBA aggressively amalgamated the membership of The WVBA in its pursuit of convincing legislators across the state of the grave necessity to allocate state funds for the construction of the College of Law building.



Through the relentless efforts of The WVBA and its membership, the legislature did allocate the funds requested and in 1923 the building, now known as Colson Hall, was dedicated and put into service. From 1923 to 1979, this building served as our state College of Law building and is beautifully depicted on the WVU College of Law's gold plated page marker memento celebrating its quasiquicentennial.

Since its beginnings, the WVU College of Law has grown from its humble beginnings. According to Dean H. C. Jones, in June of 1917, there were only five students in attendance (57 students withdrew to join the military), 12,000 volumes in its library and only 4 classrooms. Today, the attendance is 443, Colson Hall, although still being used by the University for undergraduate purposes, the College of Law now occupies the Law Building built in 1974 with 4 classrooms, 4 seminar rooms, a court room and library containing over 300,000 volumes and equivalents.

Without the efforts of The WVBA, Colson Hall may never have come to fruition!

A handwritten signature in black ink, appearing to read "Pryce Haynes".

## 2004 Real Estate Law Seminar

The Real Estate Lawyers Division will put on The West Virginia Bar Association 2004 Real Estate Law Seminar on Saturday, October 16, 2004 at Stonewall Resort. Six hours of continuing legal education will be offered on timely real estate subjects. Registration also includes lunch, a cocktail reception and dinner Saturday evening. Join us Sunday for a golf outing! For more information, please contact The West Virginia Bar Association at 800-944-9822 or 304-522-2652.

### Snapshots from the 2003 Real Estate Seminar



Sherry & Andy Miller, Dan Guida



John & Susie Fisher,  
Jim & Mickey St. Clair



Tammi Clark, Pat & Alison Deem

## WVBA seeks to appear in Supreme Court as Amicus Curiae

The West Virginia Bar Association, by its volunteer legal counsel, James W. St. Clair and Robert K. Tebay, III, both members of The Real Estate Division, has sought leave to file an Amicus Curiae Brief in the case of McMahon vs. Advanced Title Services, now pending in the West Virginia Supreme Court. The Court accepted this case from The Brooke County Circuit Court, which certified a series of questions asking whether a lay person not under the direct supervision or control of a licensed attorney is engaged in the unlawful practice of law when performing a title examination, reporting on the title, acting as a closing agent, preparing title insurance commitments and policies and recording documents.

## Upcoming Events

*Mark your calendars!*

### Kanawha County Blood Drive

July 26, 2004

Kanawha County Courthouse

### Raleigh County Legal Ease

Date TBA

### WVBA 118th Annual Meeting

September 16-18, 2004

The Homestead

### Real Estate Conference

October 16, 2004

Stonewall Resort

## Legal Assistant / Paralegal Section of The WVBA

Jane Lambert, CLA

Plans are underway to implement an active Legal Assistant/ Paralegal Section of The West Virginia Bar Association. Get on board today and participate in this exciting effort along with other enthusiastic legal assistants/paralegals in working toward the goals and purposes of promoting the legal assistant profession in a positive manner.

### Purposes:

The Legal Assistant/Paralegal Section (LAPS) is a professional group of legal assistants whose primary purposes and goals include:

- Establishing good fellowship among members and the legal community
- Promoting high standards of ethical and professional competence
- Furthering education among members of the legal profession
- Supporting and carrying out the programs, aims and goals of the West Virginia Bar Association

### Benefits include:

- Membership in a professional legal organization
- Networking opportunities with attorneys, judges, legal nurse consultants, and other legal assistants/paralegals
- Social events sponsored by the Young Lawyers Division of the WVBA
- Continuing education through seminars, workshops, and other educational offerings approved for CLAE credit
- *The Communiqué*, a quarterly newsletter distributed by the WVBA

### Membership requirements:

Membership is open to any legal assistant/paralegal qualifying under one of the requirements set forth below:

1. Any individual who has successfully completed the Certified Legal Assistant (CLA) Examination of NALA, or
2. Any individual who has graduated from an ABA approved program of study for legal assistants, or
3. Any individual who has graduated from a course of study for legal assistants which is institutionally accredited but not ABA approved, and which requires not less than the equivalent of 60 semester hours of classroom study, or

4. Any individual who has graduated from a course of study for legal assistants other than those set forth in 2 and 3 above, plus not less than six months of in-house training as a legal assistant, whose attorney-employer attests that such person is qualified as a legal assistant, or

5. Any individual who has received a baccalaureate degree in any field, plus not less than six months in-house training as a legal assistant whose attorney-employer attests that such person is qualified as a legal assistant, or

6. Any individual who has a minimum of three years of law related experience under the supervision of an attorney, including at least six months of in-house training as a legal assistant, whose attorney-employer attests that such person is qualified as a legal assistant, or

7. Any individual who has a minimum of two years of in-house training as a legal assistant, whose attorney-employer attests that such person is qualified as a legal assistant.

Click on The WVBA website to download a membership application in the LAP Section. If membership qualifications are met, you will receive a letter of welcome from the Executive Director of The WVBA and will be contacted by the LAP Section Membership Committee.

For more information contact Rhonda Swartz, CLA, at [rschwartz@kvinet.com](mailto:rschwartz@kvinet.com), or Jane Lambert, CLA, at [vjlambert@charter.net](mailto:vjlambert@charter.net)

## Legal Assistants of West Virginia, Inc. (LAWV)

*An Affiliate of National Association of Legal Assistants*

### ANNOUNCE A NAME CHANGE

\*\*\*\*\*

**Effective January 10, 2004,  
by majority vote of the membership,  
the official name is:**

\*\*\*\*\*

## ASSOCIATION OF WEST VIRGINIA PARALEGALS, INC.

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## Bench and Bar Reception



Glenn Robinson



Charles Bellomy, Chris Pence, Matt Nelson,  
Eric Calvert and Scott Caudill



Gary Joe Triplett



John McCuskey and  
David Shuman



Steve Crislip, Bill Dobbs and Dan McDonald



Justice Warren McGraw  
and Ed Cook



Walton "Tony"  
Shepherd

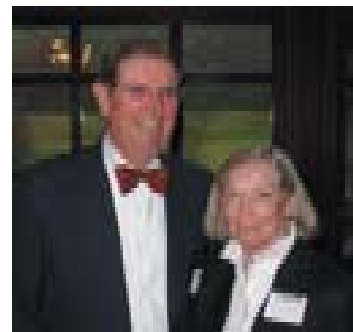
## Clarksburg Forum



Dean John W. Fisher, Brent Benjamin



David Straface, Ralph Bean,  
Jo Marie Pitrolo, John Angotti



James "Jay" West and Nina West



Stuart R. Waters, Mandi DeMoss,  
Thomas G. Steele



Alison Williams, Gary Jack



Dean John W. Fisher, Judge Jim Rowe

## LNC Section News

Karen J. Huff, BSN RN LNCC  
LNC Section President

### WEBSITE

Our web site was officially launched in April. The address is [www.wvbarassociation.org/lncsection](http://www.wvbarassociation.org/lncsection). Thanks to everyone for their help, including Sherry Phillips and Tonja Parsons from our web site committee, and also our Board of Directors. A very special thank you is also extended to Pryce Haynes for his support of this project.

### WVBA ANNUAL MEETING

The Education Committee recruited several speakers for the 2004 Annual Meeting. Topics include nursing home litigation, pain management in the legal arena, and a special presentation by a medical illustrator. Sessions are eligible for nursing continuing education and attorney CLE credit. Also, the LNC Section will have a special luncheon meeting Saturday September 18th. A lecture will follow by Lynda Kopishke titled "Forensics: The New Frontier."

### EXECUTIVE COUNCIL MEETINGS

In January I attended the WVBA Executive Council meeting as the representative from the LNC Section. It was an honor to be invited, and time was allotted on the agenda for an LNC Section report. The Executive Committee expressed

their sincere appreciation of all the great work our group is doing.

### PUBLICATIONS

The Marketing Committee is coordinating a new "medical" column written by LNCs for The Communique. We hope to educate attorneys about medical topics, and raise awareness of the LNC Section within the WVBA.

### STRATEGIC PLANNING

The Board of Directors has been busy drafting a Strategic Plan. Included are key concepts from AALNC, along with goals unique to our status as bar association members. The final version should be available soon.

### OTHER NEWS

In April I gave a presentation about joining The West Virginia Bar Association to AALNC leaders at the national conference in Chicago. By sharing our success story, we hope to help AALNC promote the creation of LNC Sections in other areas of the country.



## Remembrance

**J. Oakley Seibert**

D.O.B.: 06-02-46  
D.O.D.: 11-10-03  
Martinsburg

**John J. McOwen**

D.O.B.: 07-21-24  
D.O.D.: 12-25-03  
Huntington

**Henry Riffe**

D.O.B.: 10-01-31  
D.O.D.: 01-12-04  
Ronceverte

**Fred H. Caplan**

D.O.B.: 12-03-14  
D.O.D.: 03-04-04

**Charles H. Haden II**

D.O.B.: 04-16-37  
D.O.D.: 03-20-04  
Charleston

**Charles R. Payne**

D.O.B.:  
D.O.D.: 11-10-03  
Winfield

**E. Garland Ray**

D.O.B.: 01-11-13  
D.O.D.: 12-26-03  
Huntington

**James W. Reed, Sr.**

D.O.B.: 1928  
D.O.D.: 02-15-04  
Charleston

**James Horner Davis III**

D.O.B.: 10-09-28  
D.O.D.: 03-04-04  
Charleston

**Larry L. Harless**

D.O.B.: 04-18-41  
D.O.D.: 04-01-04  
Ripley

**C. Judson Pearson**

D.O.B.:  
D.O.D.: 11-22-03  
Charleston

**Charles F. Bagley, Jr.**

D.O.B.: 09-21-19  
D.O.D.: 12-28-03  
Huntington

**Marshall G. Walls**

D.O.B.: 03-02-40  
D.O.D.: 02-20-04  
Welch

**Claude R. Hill**

D.O.B.: 05-26-29  
D.O.D.: 03-04-04  
Fayetteville

**Joseph M. Handlan**

D.O.B.: 07-14-14  
D.O.D.: 04-01-04  
Parkersburg

**Andrew L. Blair**

D.O.B.: 12-05-15  
D.O.D.: 12-15-03  
Charleston

**William N. Matthews**

D.O.B.: 02-01-17  
D.O.D.: 01-11-04  
Huntington

**Harper Grimm, Sr.**

D.O.B.: 08-17-07  
D.O.D.: 03-01-04  
Charleston

**B. Hays Webb II**

D.O.B.: 10-02-20  
D.O.D.: 03-18-04  
Charleston

## Medicare Set Asides: Sleeping Giant?

Mary Kay Apple, BSN RN CCM CLCP  
Legal Nurse Consultant Section

### Are your settlements compliant with 42 CFR 411, the Medicare Secondary Payer Program?



The Medicare Secondary payer program was developed in 1980 to preserve Medicare. In the past, Medicare has been mistakenly paying medical expenses that should have been paid by another primary payer. Currently, the Centers for Medicare & Medicaid Services (CMS, formerly HCFA) is undertaking a comprehensive effort to collect money owed to Medicare for past overpayments and to prevent the shifting of future medical expenses from the **primary plan** to Medicare. If a primary payer attempts to shift payment of medical expenses to Medicare, CMS can make a claim against the primary payer for reimbursement (up to twice the amount specified, plus interest).

A **primary plan** is statutorily defined as a group plan, a worker's compensation plan, automobile or liability insurance plan (including self-insured plans), or no-fault insurance plan.

### What is a Medicare Set-aside (MSA)?

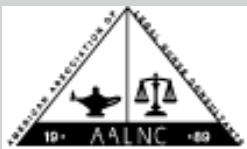
A Medicare Set-Aside is the amount of settlement dollars that must be set aside at the time of settlement, for injury related medical expenses of the type typically covered by Medicare.

### When is a Medicare Set-aside needed?

1. In all cases when the individual is a Medicare beneficiary at the time of settlement, and future medical expenses are anticipated; or
2. If the individual is not a Medicare beneficiary at the time of settlement, but there is reasonable expectation of Medicare enrollment within 30 months of the settlement date, and the settlement exceeds \$250,000.

### Websites

For additional information on Medicare Set Asides, please visit The Centers for Medicare & Medicaid Services at [www.cms.hhs.gov/manuals/105\\_msp/msp105c01.pdf](http://www.cms.hhs.gov/manuals/105_msp/msp105c01.pdf).



### 2004 AALNC National Conference

Karen Huff, President of the LNC Section of The WVBA, was invited to speak at the 2004 annual conference of the American Association of Legal Nurse Consultants (AALNC) in Chicago. In addition to her presentation about joining The WVBA, Karen presented a lecture entitled, "The Role of the LNC in Toxic Tort Litigation" which was part of the presentation "Disease Clusters, Causation & Common Sense" by Dr. Alan Ducatman from WVU.

*Karen is a legal nurse consultant in the Charleston office of Steptoe & Johnson, PLLC.*

### Legal Nurse Consultants: Earn Nursing CEs at The WVBA Annual Meeting!

Attend The WVBA 118th Annual Meeting  
September 16-18 at The Homestead  
and receive up to **6.2 Nursing CEs!**  
Check out the enclosed registration  
information for more details.

**Don't miss this great opportunity!**

## It pays to be a member of The WVBA!

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**Laura Wareheim**

*Assistant Vice-President and Manager*

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**John F. McCuskey** (1999)  
President  
Ph: 304-345-1400  
Jmccuskey@shumanlaw.com

**Charles M. Love III** (1998)  
President Elect  
Ph: 304-347-1104  
Clove@bowlesrice.com

**Richard A. Pill** (2000)  
Ph: 304-263-4971  
Pillrpill@stargate.net

**Robert M. Steptoe, Jr.** (2001)  
Ph: 304-624-8142  
Steptoerm@Steptoe-johnson.com

**J. Mark Adkins**  
President, Young Lawyers Division  
Ph: 304-347-1768  
madkins@bowlesrice.com

**Ronda Harvey** (2002)  
Ph: 304-347-1701  
rharvey@bowlesrice.com

**Elisabeth H. Rose** (2003)  
Ph: 304-363-4260  
crose@rosepaddenpetty.com

**Andrew H. Miller**  
Real Estate Lawyers Division  
Ph: 304-529-2591  
fmmt@ezwv.com

**Philip B. Hill**  
Senior Lawyers Division  
Ph: 304-264-4209  
phill@bowlesrice.com

**Pryce M. Haynes, II**  
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**JEFFREY J. DOWNEY**  
TEL: 202.736.2782

Mr. Downey, an attorney with Robins, Kaplan, Miller & Ciresi L.L.P., is experienced in handling complex nursing home malpractice cases involving patient abuse, bed/pressure sores, serious fractures/falls, unexplained injuries, malnutrition, billing fraud, over medication and other mis-treatment. Mr. Downey is a plaintiff's trial attorney with experience in both defending and prosecuting malpractice cases and welcomes both referrals and associations. He is admitted in the bars of West Virginia, Virginia and D.C.

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## Jackson Kelly open Pittsburgh office

The Chief Executive Officer of Jackson Kelly PLLC, A.L. Emch, has announced that the Firm will soon open its eleventh law office, with R. Henry “Hank” Moore joining the Firm to oversee the new Pittsburgh, Pennsylvania operation.

The headquarters of Jackson Kelly is in Charleston, WV, with six additional offices located in Morgantown, Fairmont, Martinsburg, New Martinsville, Parkersburg, and Wheeling. Lawyers are also resident in Lexington, KY; Denver, CO; and Washington, DC. The emergence of a Pittsburgh, PA office is seen as a logical next step in the expansion of the Firm’s energy and natural resources practice areas.

Emch explained that the presence in Pennsylvania offers an additional anchor for the Firm’s nationwide occupational safety and health practice which handles a broad range of litigation, compliance assistance, and rulemaking and policy advice in industries regulated under state and federal occupational safety and health statutes and regulations, including matters before the Occupational Safety and Health Administration (OSHA), the Mine Safety and Health Administration (MSHA), the Department of Transportation (DOT), and the Bureau of Alcohol Tobacco and Firearms (BATF),

“We have many clients who are located in and/or have significant interests in Pennsylvania. It is an energy state and we are a law firm that has always represented energy clients—most notably those in the extraction industries, such as coal, sand and gravel, and metals — through the whole spectrum of their legal needs. We also represent related businesses such as cement manufacturers and asphalt industries. Pittsburgh, Pennsylvania is a natural location for us and will enhance our ability to serve our clients throughout the East and the rest of the U.S.,” Emch said.

Concurrent with the occupational safety and health specialties, Jackson Kelly - Pittsburgh will cross into the areas of labor and employment, business and commercial, and environmental law. R. Henry “Hank” Moore has joined the Firm as a Member and will be the Senior Attorney in the Pittsburgh office.

“Hank Moore is among the very best occupational safety and health lawyers in the country. His addition makes Jackson Kelly’s capabilities in this area second to none and enables us to represent our clients in this critical field more efficiently throughout the nation,” Emch stated.

Moore has advised, counseled and litigated issues covering this area of the law on behalf of clients in various industries since 1978. These include clients in coal mining, metal and nonmetal

mining, stone, sand and gravel operations, construction, heavy industry such as steel production and foundries, airlines and other service industries.

He represented clients in nationwide litigation arising from allegations of tampering with respirable coal mine dust samples. He has also represented individual corporate managers, officers and businesses that were targets of civil and criminal investigations under the Federal Mine Safety and Health Act and the Occupational Safety and Health Act.

Moore has engaged in litigation before various tribunals including the Occupational Safety and Health Review Commission and its administrative law judges; the Federal Mine Safety and Health Review Commission and its administrative law judges; the United States Courts of Appeals; the Pennsylvania Environmental Hearing Board; and the Pennsylvania Commonwealth Court.

He is a 1976 graduate of the Dickinson School of Law and a 1972 graduate of Dartmouth College. Moore is admitted to practice before the Pennsylvania Supreme Court and is a member of the Bar of the United States District Court for the Western District of Pennsylvania and for the United States Courts of Appeals for the Third, Fourth, Sixth, Seventh, Ninth and District of Columbia Circuits.

Jackson Kelly - Pittsburgh is located at Three Gateway Center, 401 Liberty Avenue, Suite 1340, Pittsburgh, PA - 15222. For more information, contact the Firm’s website at [www.jacksonkelly.com](http://www.jacksonkelly.com).

### Tinney elected Fellow of the American Bar Foundation

John Tinney, one of the founders of the Tinney Law Firm and its senior member, has been elected a fellow of the American Bar Foundation. Membership in the fellowship is limited to one-third of one percent of the lawyers in America. Tinney’s election by his peers recognizes his professional, public and private dedication to the welfare of his community and the traditions of the legal profession.

*Save the Date!*

118<sup>th</sup> Annual Meeting  
*of the*  
West Virginia Bar Association



The Homestead Resort  
*Hot Springs, Virginia*  
September 16 - 18, 2004

*Be there!*

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# Legal Briefs

A Publication of The West Virginia Bar Association

## Defending the Negligent Credentialing Claim

May 2004

Paul K. Reese, Esquire  
Karen J. Huff, BSN RN LNCC

*This article provides basic information on negligent credentialing claims and an overview of the role of the LNC when working with an attorney on a negligent credentialing claim.*

In the mid-1980's, in a rural area of the United States, an otherwise healthy 2½ year old toddler first presented to a medical provider complaining of rectal bleeding following a bowel movement. The family's pediatrician was out of town, so they consulted with another local doctor who happened to be a member of their church. After examination, the doctor performed a sigmoidoscopy. In addition, without the parent's permission, the physician performed a biopsy. In doing so, he perforated the child's colon. Peritonitis developed. Follow-up care was seriously criticized, and the child died an agonizing death shortly thereafter. Not only was the operating physician sued, but the clinic/hospital where he performed the surgery was named as a defendant, on a theory of negligent credentialing. Evidence was presented at trial that before the defendant physician came to practice at the clinic he was primarily a family practitioner. Further, before this sigmoidoscopy, the physician had never been granted surgical privileges at any other medical institution. At trial, the hospital was found 18% negligent; the doctor 82%. The total verdict was ten million dollars. On appeal, the verdict against the clinic was upheld on the basis that the hospital had a duty to investigate the background and experience of the co-defendant physician before granting surgical privileges, a classic case of what has become known as "negligent credentialing" (*Roberts v. Stevens Clinic Hospital, Inc., No. 345 S.E. 2d 791 [W.Va.]*).

### Historical Background

Although the *Stevens* case was West Virginia's first reported case regarding negligent credentialing, the theory of liability for negligent credentialing appeared in other jurisdictions more than 20 years earlier (*Darling v. Charleston Community Hospital, No. 33 Ill.2d 326, 2111 N.E.2d 253*). In the following 38 years since *Darling*, numerous jurisdictions have recognized a direct claim of liability against a hospital for failure to adequately and properly scrutinize a physician's application for privileges, staff membership, re-privileging and specific procedure privileging. It should come as no surprise that this cause of action has extended to managed care (*McClellan v. Health Maintenance Organization of Pennsylvania, No. 413 Pa. Super. 128, 604 A.2d 1053*).

### Elements of a Negligent Credentialing Claim

It is fairly well-recognized that the elements of a negligent credentialing claim include:

1. Hospital has a duty to plaintiff to exercise reasonable care in selecting (or supervising) staff physicians;

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# Defending the Negligent Credentialing Claim



*Paul K. Reese is a defense attorney with over 23 years of litigation experience. As a member of Steptoe & Johnson PLLC in Charleston West Virginia, his practice primarily involves medical malpractice as well as general litigation. He regularly defends hospitals, physicians, nurses, physician assistants, nurse midwives and other health care providers in medical negligence and wrongful death actions. He also represents hospitals in negligent credentialing claims.*

*Karen J. Huff has an extensive background in critical care and nursing management with over 25 years of nursing experience. As an in-house LNC at Steptoe & Johnson in Charleston West Virginia, her primary focus is medical malpractice defense. She is a founding member and first president of the LNC Section of the West Virginia Bar Association, and a founding member and first president of the Southern West Virginia Chapter of AALNC.*

2. Physician who treated plaintiff was incompetent or unfit and therefore should not have been appointed to the medical staff (or should have been subject to supervision);
3. Hospital failed to exercise reasonable care in appointing physician to its medical staff (or in failing to supervise);
4. Physician was negligent in treating the plaintiff;
5. Negligent treatment resulted in injury; and,
6. Hospital's negligence in appointing physician to its staff (or in failing to supervise) was the proximate cause of the injury (8 Cause of Action 427, 3).

An example of an allegation of negligent credentialing may appear in a complaint in any number of well-pled fashions. Please refer to excerpt below from a complaint drafted by the same attorney who prosecuted the *Stevens* case.

At all times relevant herein, [ ], a corporation, and [ ], a corporation, owned and/or were granted the privilege to operate a hospital and medical facility known as [ ] Hospital in [ ], which provided medical services and facilities to the general public, and advertised and warranted the same to the general public, including citizens of [ ] County, [ ], and included among such services and facilities so provided and advertised and warranted, were general hospital, surgical, medical, anesthesia, and [other] facilities.

As a direct and proximate result of the facts and allegations herein above stated, defendants [ ], a corporation, and [ ], a corporation, owed a duty to the citizens of the State of [ ], including plaintiff, to exercise due and proper care in the operation and supervisions of its medical care services and facilities, including hiring of employees, granting of medical staff privileges to physicians who practice at their facilities, and continued monitoring and supervision of care, treatment, and services provided to the public by its employees and medical staff.

At all times relevant herein, defendant [ ], a corporation, and [ ], a corporation, negligently failed in their duties to hire, supervise, and administer its medical staff and facilities at [ ], as the same relates to the hiring or granting of medical staff privileges to [ ], MD, and/or the supervision and continued monitoring of [ ], MD.

## The Credentialing Process

To defend a negligent credentialing claim, one must have a working understanding of the process of credentialing and the institutional issues that are typically the focus of that process. A recent article by John Hyde, PhD, *Physician Credentialing: Developing a Proactive Credentialing Process*, published in the January 2003 issue of the *Journal of Legal Nurse Consulting*, provides a good overview. Dr. Hyde discusses some of the standards often

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identified and accepted as suggested credentialing practice, as well as the internal hospital process of credentialing (Hyde, 2003). Understand and get to know the general, practical credentialing process that your client hospital conducts. Ascertain the elements of the credentialing process. Make sure you have collected and reviewed all state and national standards regarding credentialing which may apply to your institution, as well as any internal hospital bylaws and protocols applicable to the process. Dr. Hyde's article is a good outline of the process.

### The Credentialing File

In a case involving an allegation of negligent credentialing one can rest assured that among the first discovery tools employed by counsel will be formal request directed to the hospital for the co-defendant physician's "credentialing file" — the hospital's documented record of its credentialing process as it applies to the physician being sued. Two issues quickly come into play: (1) what are the accepted statutory or common law parameters regarding permissible disclosure of the contents of a credentialing file; and, (2) what can one, or should one expect to, find in a credentialing file?

### Peer Review Protection for Credentialing Documents

In West Virginia, like many other jurisdictions, there is a specific code provision which establishes "peer review" protection to the credentialing process and, by extension, to the documents produced in the credentialing process (West Virginia Code, 1980). By example, cases which have addressed the peer review protection statute in West Virginia have ruled that the hospital review committee is a "review organization" within the meaning of the statute, and therefore, subject to the privilege (*State ex rel Charles Town Gen. Hospital v. Sanders, No. 210 W.Va. 118, 556 S.E.2d 85*). Any similar statutes or case law in the relevant jurisdiction that address privileged protection of the credentialing process must be consulted. If the hospital has the peer review privilege, what protection does it provide?

In West Virginia, a recent case addressed the question of what particular documents or records contained in the credentialing file are discoverable. In that case, it was determined that no privilege attaches to documents or records considered by the review committee, which might be otherwise available from original sources (*State ex rel Scroades v. Henry, No. 187 W.Va. 723, 421 S.E.2d 264*). Just what those documents might be is subject to varying analysis and argument. For instance, in West Virginia, certain documents regarding a licensed physician are maintained by the Board of Medicine: licensing information; board certifications; diplomas or degrees; perhaps even school transcripts, all of which might arguably be secured from "independent" sources. Each jurisdiction must be addressed in terms of its particular law, but the issue of peer review or other privilege protection for the credentialing process and records must be considered.

### What's in the Credentialing File?

Depending upon the procedure in any given jurisdiction, if the privilege is asserted, it is possible that the court will require a "privilege log" of the contents of the credentialing file, so more particular argument regarding discovery might be framed. In West Virginia, this is a likely event, and may lead to an "*in camera*" confidential inspection of the credentialing file by the judge. While this is certainly no suggestion of what the typical credentialing file might contain, as an example of the types of documents and documentation one might see

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in a credentialing file, a redacted privilege log used in a recent case is instructive. In a rural hospital, where the hospital's credentialing and privileging was challenged, the following documents were contained in the defendant physician's file:

- Department Clinical Privilege Request Form
- Application for Medical Staff Reappointment & Clinical Privileges
- Correspondence between hospital department chairs and the physician
- Initial Application for Medical Staff Appointment & Clinical Privileges
- Extension of Medical Staff Appointment
- Privileges Approval
- Board of Trustees Meeting Minutes
- Temporary Staff Privileges
- State Board of Medicine Certification
- Verification of Licensure from the State Board of Medicine
- Request to Board of Medicine regarding license current and valid
- CV of the physician
- Certificates of Insurance
- Controlled Substance Registration Certificate
- Verification of undergraduate degree
- Verification of residency
- Verification of medical school degree
- References from medical school professors
- References from hospital CEO to another hospital
- Documentation that physician acted in accordance with the medical staff bylaws regarding medical records completion
- Letter from American Board of [appropriate medical board] regarding certification.

Given the issue of what might be privilege protected, and what might be discoverable from expert interaction, the question arises, what can, or do, you disclose to your credentialing expert? Consult your relevant jurisdiction, rules, procedures, and laws.

### THE ROLE OF THE LNC

When working with an attorney on a negligent credentialing claim, the legal nurse consultant (LNC) can expect to perform certain tasks. Whether the LNC is working for the plaintiff or defense, common duties include: 1) document retrieval and review, 2) performing research to obtain medical literature and standards, and 3) identifying, retaining, and conferring with experts.

#### Document Retrieval & Review

Critical documents to obtain when reviewing a negligent credentialing claim include hospital bylaws, the physician's credentialing file, and, if applicable, a copy of the contract between the physician and the hospital. A request to the state Board of Medicine (BOM) should also be considered. Procedures for obtaining documents from the BOM may vary, with some states having information accessible via the Internet. In West Virginia, documents in the physician's file are available for viewing at the state BOM office. If the physician is licensed as a DO, or Doctor of Osteopathy, then the Board of Osteopathy is the appropriate board to contact for records.

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Critical documents pertaining to the physician's credentialing and privileging process need to be reviewed. The initial credentialing process is done to investigate a physician's education, training, licensure and certification, but the process by which a physician is granted privileges can be more complicated. In the past hospitals simply granted a physician general hospital admitting privileges. Now privilege requests are specific to the physician's practice and training, with evidence of ongoing competency important in the re-privileging process (Zusman, 1990).

### **Medical Literature & Standards Research**

A favorite task of many LNCs is medical research. For a list of helpful Web sites containing credentialing information, please refer to the table on page 8. When searching for information about physician credentialing on the Internet, the LNC will find a wealth of information at the supersite [www.hcpro.com](http://www.hcpro.com). This Web site has links to many credentialing resources including the Greeley Company, a nationally recognized consulting firm. To access additional information about their consulting services for hospitals and legal professionals go to [www.greeley.com](http://www.greeley.com). The reader can review free on-line newsletters, obtain current seminar information, and review an extensive listing of books available for purchase on topics such as corporate compliance, credentialing, healthcare administration, long term care, medical records, and safety. To download sample credentialing policies, procedures, and forms go to [www.credentialinfo.com](http://www.credentialinfo.com). A recent review of the site revealed documents related to application for medical staff appointment, initial appointment policy, reappointment process, handling the impaired or dysfunctional physician, the disruptive physician, allied health professionals, and a fast track credentialing policy. A collection of policies and forms related to physician privileging is available, including the granting of temporary privileges, along with a section on dental, podiatric, and nurse practitioner privileges.

The information gathered during medical research can be very helpful to the attorney or LNC wanting to understand the credentialing process. However, such data may not reflect the community standards for credentialing, so a review of the Joint Commission on Accreditation of Health Care Organizations (JCAHO) credentialing standards is needed. The credentialing process has evolved greatly, and it is important to obtain standards or guidelines in effect at the time the alleged negligence occurred. The LNC working for the defense may be able to obtain the data needed from past surveys if the hospital keeps back issues of JCAHO manuals and records.

Additional information about JCAHO surveys is available via the Internet. Go to the JCAHO Web site at [www.jcaho.org](http://www.jcaho.org), and look for the shortcut on the home page to "Quality Check" performance reports for accredited organizations. When selecting this option, the reader will be taken to the next screen, which allows a search of all accredited organizations by geographical area. Such a search can be tailored to pull up all hospitals or long term care facilities in individual cities or counties. The next page lets the reader search for a specific health care facility, find out when the next survey is due, and obtain information about the results of previous surveys.

### **Identifying and Locating Experts**

Another task many LNCs find enjoyable is the process of identifying, locating, and conferring with medical experts. By interacting with experts in a variety of specialty fields,

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the LNC has the opportunity to advance his or her knowledge base while gathering the information needed to educate the attorney about the medical facts of the case.

In a credentialing case, hospital administrators or physicians with expertise in the credentialing process may be retained as experts. The LNC should look for someone with experience as a member of a hospital credentialing or executive committee. The American College of Physician Executives is a good resource for experts, and additional information can be found at their Web site, [www.acpe.org](http://www.acpe.org). JCAHO physician surveyors make excellent experts due to their understanding of the standards, and “hands on” experience evaluating hospitals with deficiencies in compliance. Such an expert could speak to whether the defendant hospital’s shortcomings in the credentialing process are similar to problems found in other hospitals, or actually fall below the standard of care.

As mentioned elsewhere in this article, it is important to carefully consider what documents to provide to the credentialing expert. If the LNC working for the defendant hospital inadvertently sends an expert peer review documents, the protection of these documents can be waived, making them accessible to the plaintiff’s attorney. Additionally, if the physician in question is not an employee of the hospital and has separate counsel, the defense attorney for the hospital will likely want to confer with counsel for the defendant physician regarding what information is disclosed during discovery to the plaintiff’s attorney and other parties.

### Conferring with Experts

To provide the reader with additional information about typical documents and hospital policies found in negligent credentialing claims, highlights from a recent conversation with an expert are described. Appointments to the medical staff are usually granted for 2 year periods, with the amount of time stipulated in the hospital bylaws. Some hospitals may chose to make the initial appointment for less than 2 years so that all reappointments are due at the same time. The LNC should look carefully for gaps in dates which may indicate the physician was practicing after his privileges expired. Secondly, if temporary privileges are granted, the bylaws should address the procedure for granting such privileges. Sometimes documentation is missing showing approval from the department head or medical staff. In this scenario, a copy of the Credentialing Committee or Medical Staff Committee meeting minutes may be substituted to prove the committee reviewed the forms and voted to approve the candidate.

Typically the hospital CEO will send a letter to the physician stating that the doctor has privileges, designate the privileges granted, and identify the date the appointment will expire. The credentialing application completed by the physician should include a check off list in which the physician identifies the specific privileges he is requesting. The credentialing committee will need to review educational records and/or continuing education certificates documenting that the physician has completed the necessary training. Some institutions may have a pre-printed form for each specialty or service. For a general surgeon, the application would include a form identifying the types of surgical procedures to be performed.

Additionally, the physician needs to demonstrate current competence in a particular procedure. On the application the physician documents the number of times he has performed each procedure for which he is requesting privileges. Problems can arise if a

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## Defending the Negligent Credentialing Claim

physician has received training but then does not perform a procedure for a prolonged period of time. In this scenario, he may no longer be considered competent to perform the procedure without additional training or experience. Upon re-application for privileges, the privilege may be suspended until competence is verified.

If the physician has been granted privileges more than once, any re-privileging documents should be obtained, as available during discovery. Such documents typically include an evaluation of the physician's competency. JCAHO expects data on drug errors, unplanned return trips to the OR, and patient complaints along with statistical information regarding the number of times these things happened. Also, evidence of continuing medical education is required in the physician's specialty area. An expert may recognize and opine that JCAHO standards are more "ideal" than what happens in everyday situations. Key elements of the credentialing process should be evident for a strong indication of careful privileging. Hospitals should not treat the re-application process as a rubber stamp.

### Special Considerations: Rural Hospitals and Evolving Medical Specialties

Rural hospitals often have difficulty attracting specialists, and for that reason may hire someone with less experience than a large city hospital. This circumstance raises a very real question of whether credentialing standards are different in rural areas and urban areas. Such a discussion is not meant to imply that it is okay for a rural hospital to hire an incompetent physician; however, the standard for credentialing may be less stringent than urban areas.

Rural hospitals clearly face the problem of fewer physicians on staff, making it difficult for existing staff to monitor new physician performance. This can be especially problematic if none of the staff physicians have experience in the new physician's specialty. In such cases, the hospital may want to consider retaining a physician from a peer review organization to evaluate and monitor the physician's competence.

Additionally, as medical practice and care evolves, hospitals may offer more and more services that employ medical specialists (and sub-specialists) relatively new to the geographic practice area. What if a hospital hires a specialist in an emerging specialty prior to the development of board certification? For instance, pain management is an example of a field that has evolved over the past decade. Board certification is now available, but many physicians began practicing in this field before board certification was even available. Many institutions now have pain management clinics and offer a wide spectrum of pain management services that were not readily available ten years ago. Pain management physicians often treat terminally ill cancer patients with severe pain; treatment can be rather extreme and carry risks unacceptable to patients that are not near the end of their life. For a pain management practitioner, in an area where there is no other like-practitioner, anesthesiologists, neurosurgeons, or other closely related fields may be the only source of reasonable oversight in the credentialing process. Flexibility is important, but reasonable oversight and a thorough credentialing process is imperative.

### Conclusion

Negligent credentialing claims are being pursued more frequently as a means of asserting an independent claim against a hospital. The informed LNC should be aware of the legal

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theory behind such cases, have an understanding of the credentialing and privileging process, be wary of potential pitfalls during the discovery process, and know how to provide the support needed for the attorney handling the claim. This article is intended as a general overview of what is involved in defending a negligent credentialing claim. The defense of each case will need to be individualized to include state-specific legislation and case law, along with client-specific hospital policies and procedures. ■

### HELPFUL WEB SITES FOR CREDENTIALING INFORMATION

[www.abms.org](http://www.abms.org) - American Board of Medical Specialties  
[www.accreditinfo.com](http://www.accreditinfo.com) - Accreditation Information  
[www.acep.org](http://www.acep.org) - American College of Physician Executives  
[www.ama-assn.org/aps/amahg.htm](http://www.ama-assn.org/aps/amahg.htm) - American Medical Association Doctor Finder  
[http://bhpr.hrsa.gov/dqa/](http://http://bhpr.hrsa.gov/dqa/) - Division of Practitioner Data Banks  
[www.certifacts.org](http://www.certifacts.org) - Primary source verification  
[www.credentialinfo.com](http://www.credentialinfo.com) - Credentialing information supersite  
[www.fsmb.org](http://www.fsmb.org) - Federation of State Medical Boards  
[www.guideline.gov](http://www.guideline.gov) - National Guideline Clearing House  
[www.hcpro.com](http://www.hcpro.com) - HC Pro  
[www.jcaho.org](http://www.jcaho.org) - Joint Commission on Accreditation of Healthcare Organizations  
[www.namss.org](http://www.namss.org) - National Association of Medical Staff Services  
[www.ncqa.org](http://www.ncqa.org) - National Committee for Quality Assurance  
[www.npdb.com](http://www.npdb.com) - The National Practitioner Data Bank  
[www.urac.org](http://www.urac.org) - Utilization Review Accreditation Commission

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