

## **HOT TOPICS FOR GOVERNMENT LAWYERS**

Building 7, Training Center, Capitol Room  
State Capitol Complex, Charleston  
8:30 a.m. - 4:30 p.m.  
June 6, 2014

- 8:30 a.m. - 9:00 a.m. SEMINAR REGISTRATION
- 9:00 a.m. - 9:10 a.m. WELCOME AND INTRODUCTORY REMARKS  
Martha Hill, Chair, Government Lawyers Committee
- 9:10 a.m. - 10:00 a.m. RECENT WV SUPREME COURT DEVELOPMENTS  
Rory L. Perry, Clerk, West Virginia Supreme Court of Appeals
- 10:00 a.m. - 10:50 a.m. 2013 TERM: UNITED STATES SUPREME COURT CASES OF INTEREST TO THE GOVERNMENT LAWYER  
Elbert Lin, Solicitor General, Office of the West Virginia Attorney General
- 10:50 a.m. - 11:00 a.m. BREAK
- 11:00 a.m. - 11:50 a.m. OVERVIEW OF *wvOASIS* IMPLEMENTATION  
Lisa Comer, Enterprise Readiness Lead, *wvOASIS*
- 11:50 a.m. - 1:00 p.m. LUNCH (On Your Own)
- 1:00 p.m. - 1:50 p.m. ETHICS AND LAW OFFICE TECHNOLOGY PANEL:  
BRING YOUR OWN DISASTER?  
Sallie Milam, West Virginia's Chief Privacy Officer,  
WV Health Care Authority  
Rachael Fletcher Cipoletti, Chief Lawyer Disciplinary Counsel,  
Office of Disciplinary Counsel  
Jim Weathersbee, Information Security Audit, Compliance and  
Privacy Officer, West Virginia Office of Technology
- 1:50 p.m. - 2:40 p.m. GOVERNMENT PROCUREMENT AND CONTRACTS  
Jimmy Meadows, Counsel, Purchasing Division  
Tracy Webb, Deputy Attorney General
- 2:40 p.m. - 2:50 p.m. BREAK
- 2:50 p.m. - 3:40 p.m. PUBLIC LIABILITY FOR OFFICIAL MISCONDUCT  
Robert A. Fisher, Deputy Director and Claim Manager  
Charles S. Mazingo, Jr., Assistant Claim Manager  
West Virginia Board of Risk & Insurance Management
- 3:40 p.m. - 4:30 p.m. COURTESY AND CIVILITY IN THE PRACTICE OF LAW  
Scott E. Johnson, Senior Assistant Attorney General

7.0 Total MCLE Credits, including 2.0 in Ethics/Law Office Management

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# RECENT SUPREME COURT DEVELOPMENTS

*Eleven Quick Tips for a Better Appellate Practice*

*Review of Changes to Court Rules and Rules Governing Lawyers*

Presented by Rory L. Perry II

Clerk of Court, Supreme Court of Appeals of West Virginia

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## HOT TOPICS FOR GOVERNMENT LAWYERS SEMINAR

Friday, June 6, 2014

State Capitol Complex, Building 7

*Sponsored by: West Virginia State Bar Government Lawyers Committee*

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### ELEVEN QUICK TIPS FOR A BETTER APPELLATE PRACTICE

- 1. Begin with the end in mind.** If you are involved in litigation that may later result in an appeal, be careful to make sure that all relevant evidentiary material is actually presented to the lower court and *in the record*. For example, depositions that are not incorporated in a dispositive motion are not typically considered part of the record on appeal. The Court has denied motions to supplement the record by lawyers who realize too late that critical deposition testimony was never presented to the circuit court.
- 2. Preserve your errors.** The Supreme Court will not consider arguments that have not been articulated to the lower court. Complying with this basic tenet of appellate procedure is not always easy. In the heat of protracted and disputed litigation, it is difficult sometimes to imagine what might be important to a future appellate court. In this regard, it might be helpful to remember that unlike a lawyer who has lived through months or years of litigation, the Supreme Court is a stranger to the case. Make every effort to preserve errors by making cogent arguments to the lower court. If you do choose to file a post-judgment motion under R. Civ. P. 59, you should articulate in that motion all errors that you intend to raise on appeal.
- 3. Understand finality.** With very few exceptions (qualified immunity, denial of arbitration, R. Civ. P. 54(b) orders, among others), the Supreme Court only has jurisdiction in appeals from *final* judgments. Interlocutory appeals are not favored by the law. If you have a case where the order you seek to appeal is not final, and

the case is not subject to one of the exceptions, your notice of appeal should contain a supplemental answer that clearly articulates why the order should be subject to appeal. Review of cases involving the collateral order doctrine will be helpful in this regard.

- 4. Last-minute writs and motions are disfavored.** In other words, your emergency is not always the Court's emergency. "The mere fact that a litigation deadline is approaching is not a sufficient basis for requesting expedited relief." R.A.P. 29(c). Indeed, many lawyers do not seem to be aware that Rule 29(c) requires any request for expedited relief to be accompanied by a *separate* motion that specifically explains why expedited relief is necessary. Quite often the Court will receive routine procedural motions only to have lawyers call within a day or two to inquire if the motion will be granted, apparently unaware that the opposing party has ten days to respond. Although there is not a firm deadline to file an extraordinary writ, you should not wait until two weeks prior to trial unless the circumstances are dire and unavoidable. Typically, the Court asks for a response to writ petitions within three weeks and schedules them for conference within a month or so. If this schedule is compressed without substantial good cause, it is more likely that a petitioner will be unsuccessful.
- 5. All the deadlines are important.** Most lawyers seem to be aware of the two most common critical deadlines in the appellate process: thirty days to file the notice of appeal and four months to perfect the appeal. These deadlines, and the deadlines for the transcript and the remaining briefs, are easy to track because they are clearly set forth in the scheduling order that the Court issues in every appeal. However, there are several other milestones that are important but often overlooked that are set out below. (Please note, R.A.P. 39(a) provides that if a deadline is less than *seven* days, business days are used. Otherwise, all deadlines are calculated using regular calendar days.)

Respond to a Motion: 10 days after filing

Respond to a Motion for Expedited Relief: 2 days after filing

Motion to Disqualify: 30 days after discovering grounds

Notice to Parties of Amicus Filing: 5 days prior to parties' due date

Amicus Brief: Due same day as party the brief supports

Waiver of Argument: 10 days after order setting case for argument

48-hour rule: Unless requested, no filings less than 48 hours before argument

Effective date of Opinion or Memo Decision: 30 days after release, generally

Petition for Rehearing: 30 days from release of opinion or memo decision

**6. Brief briefs are often better briefs.** *“It is perfectly okay to write garbage—as long as you edit brilliantly.”* - C. J. Cherryh

*“Not that the story need be long, but it will take a long while to make it short.”*  
- Henry David Thoreau

*“Lawyers somehow can’t give up the extra space, so they fill the brief unnecessarily, not realizing that eye fatigue and even annoyance will be the response they get for writing an overlong brief.”* - Justice Ruth Bader Ginsburg

There is a good reason why the Court changed the 50-page limit for briefs in the old rules to the 40-page limit in the new rules: to try to force lawyers to write better briefs. In my opinion, the two most important components of a successful appeal are to frame the assignments of error with care and to write an excellent brief. Avoid dramatic rhetorical flourishes. Long narrative expositions of egregious facts are not only unnecessary but can also be counterproductive. Everyone at the Court reads hundreds upon hundreds of briefs in the course of a year, and they can tell when you have recycled something from another case or have dictated without carefully editing. Make your arguments clear. Get to the point. Cite the correct and most current law. Tie your arguments carefully to the assignments of error. In most cases, you only get one chance to write a good brief, so make it count. Editing is important. If possible, read your brief out loud. Better yet, have someone who is completely unfamiliar with the case read your brief and pay attention to their suggestions.

**7. If your case is argued, everything in your brief can be found in a Google search.**

Lawyers who represent clients in cases with sensitive facts should take care to write briefs in such a fashion that personal identifiers and sensitive facts are minimized or not included. Often the sensitive facts and personal identifiers are included out of habit are not at all necessary to the issues under consideration by an appellate court. (*e.g.* Is the exact date of a marriage, or divorce, or birth, really needed?) Read Rule 40 for guidance. The Clerk’s Office has been contacted multiple times by clients who are upset due to the fact that their personal information is readily available in a web search because their lawyer didn’t carefully follow Rule 40. Although there is a remedy, *see* Rule 40(g), there is no “undo” button for the Internet.

**8. Use all of the required components of briefs to your advantage.** The Rules of Appellate Procedure require a brief to contain specific sections, and there is an understandable tendency for counsel to pay careful attention to the major components (the assignments of error, the statement of the case, and the argument) and ignore the minor components. Two of the minor components are very important tools that lawyers can use to persuade the Court (and its law clerks): the *Summary of Argument* and the *Statement Regarding Oral Argument and Decision*. Rule 10(c)(5) states very plainly what is required in the summary of argument: “The summary of argument should be a concise, accurate, and clear condensation of the argument made in the body of the brief, and need not contain extensive citation to legal authorities. The summary may not be a mere repetition of the headings under which the argument is arranged.” The summary of argument is your elevator pitch about the most important aspects of your argument and if done well, can be very useful to the Court. Many briefs simply reiterate the assignments of error, or fail to approach the summary as a true abridgment of the argument, both of which result in a brief with a diminished chance to persuade. Additionally, the statement regarding oral argument and decision is an opportunity for counsel to give the Court direct input on the mechanics of the decisional process, including whether counsel believes that Rule 20 argument is needed. Such an opportunity should never be wasted by using equivocal language that leaves the Court with no real idea about what your position is. One final note of caution: if you file a summary response (which acts as an initial waiver of argument), or file a brief claiming that argument is not necessary, and the Court later issues an order that sets the case for argument, the Court’s order overrides your decision. In such a circumstance, the only way to waive oral argument—and avoid a rule to show cause in contempt—is to file a timely waiver of argument under R.A.P 19(f) or 20(f). Needless to say, a decision to waive argument in these circumstances should be very carefully considered.

**9. Don’t dodge or be contentious at argument; concede and clarify instead.** Lawyers who face tough questions at oral argument do their position a disservice by dodging tough questions or by arguing with a Justice. Difficult questions signal two things: that the Court has carefully considered the case and that the Court is giving counsel an opportunity to persuade. Don’t ignore that opportunity. (Indeed, in some instances Justices will ask tough questions *because they agree with your position and they want you to persuade one of their colleagues* on the bench who might disagree.) The best answer to a tough yes-or-no question is to give a short, direct, yes-or-no answer first—even if it’s adverse to your position—and then follow-up to clarify. All too often lawyers take the opposite route and launch into a rambling and defensive clarification first, only to be interrupted by an indignant

Justice who says: “I asked you a simple yes-or-no question, why don’t you just answer?” Once that happens, not only have you lost a good opportunity to persuade, but you might lose your footing for the remainder of your argument.

10. **Be very well prepared to answer The Golden Question.** If a case is set for oral argument under Rule 20, that is generally a signal that the Court believes the case will result in an opinion with at least one new syllabus point. Even in cases set for argument under Rule 19, there are instances when the case will result in an opinion that makes new law. If you believe your case falls into this category, particularly if the case presents an issue of first impression, then you should be prepared to answer what I refer to as “The Golden Question” at oral argument: “If you were writing a syllabus point, what would it say?” Such a question presents a rare invitation that should be approached with care. Write the syllabus point as part of your preparation. Be careful not to overreach, because syllabus points have to be crafted to become part of *everyone’s* common law, not just to benefit your client.
11. **Update the law before you argue.** At least a dozen times a year, a lawyer will be called out at oral argument for not being familiar with a case that the Court thinks is important to the issue. Such lack of preparation undermines a lawyer’s effectiveness as an advocate and should be avoided at all costs.

## **CHANGES TO COURT RULES AND THE RULES GOVERNING LAWYERS**

1. **Code of Judicial Conduct.** In June 2013 a revised Code of Judicial Conduct was placed for a period of public comment. Numerous substantive comments were received, and the comment period is now closed. The Court is in the process of a second review in light of the comments received. The proposed revisions clarify and modernize aspects of the Code and adopt many of the suggestions in the American Bar Association Model Code of Judicial Conduct. It is anticipated that the Code will be promulgated later this year.
2. **Rules of Evidence.** In 2012 the Court appointed a select committee to undertake a comprehensive review of the Rules of Evidence. After the committee concluded its work, a comprehensive revision was submitted for public comment, which concluded in December 16, 2013. The proposed revisions follow the style revisions of the Federal Rules of Evidence and adopt many of the federal rules except in those instances where West Virginia law differs. It is anticipated that the Rules of Evidence will be promulgated in June.

**3. Rules of Professional Conduct.** On April 14, 2014 the Court approved a sixty-day period of public comment on a proposed set of revisions to the Rules of Professional Conduct. The comment period concludes June 13, 2014. The proposed revisions are substantial and extensive, and lawyers are encouraged to review the changes carefully and submit comments. The proposed revisions are intended to update the rules in conformity with West Virginia law, and are largely patterned after the American Bar Association Model Rules of Professional Conduct, including many of the revisions of the Ethics 2000 Commission and the amendments related to technology and other matters that were adopted at the ABA annual meeting in 2013. The revisions introduce new terms, such as “informed consent”, “confirmed in writing”, and “screened.” All of the changes are too numerous to mention, but a small sample of the highlights are listed below.

- Expands competence to include keeping abreast of the benefits and risks associated with relevant technology
- Permits limited representation, including ghostwriting
- Duty of diligence may require sole practitioners to create a succession plan
- Expanded guidance on communication with clients, including the concept of informed consent, confirmed in writing
- Clarifies instances in which a lawyer may reveal information relative to representation of a client, such as seeking ethics advice or conducting conflict checks
- Eliminates former rule prohibiting fee sharing, allows referral fees if client agrees to the referral
- Requires reasonable and appropriate precautions by using available technical, physical, and administrative safeguards to prevent unauthorized access to information about the representation of a client
- Rewrites rule on concurrent conflicts of interest, providing greater detail and clarity, greater protection for clients, and informed consent
- Adds a prohibition that prevents a lawyer from soliciting any substantial gift from a client
- Clarifies that most of the specific conflict types are imputed to the firm
- Provides clarification for mass tort and aggregate settlements, including a mechanism for allocation agreements
- Makes clear that the duty to protect confidentiality extends to former clients
- Eliminates imputation of conflicts arising from a lawyer’s own personal interests

- Does not propose adopting the controversial 2009 Model Rule that permits screening outside of the narrow confines of situations involving government lawyers (Rule 1.11) and law clerks, etc. (Rule 1.12)
- And many other changes . . .

The proposed set of revisions includes two ancillary matters. The proposed amendments to Rule 8 of the Rules for Admission—governing admission *pro hac vice*—add a \$350 annual fee, and permit the presiding judge to waive the requirement of personal appearance by local counsel at proceedings not conducted in front of the tribunal. The new proposed State Bar Administrative Rule 10 governs client trust accounts and the IOLTA program. The new rule restates and reorganizes the administrative requirements for handling trust accounts in accordance with US Supreme Court precedent. It also has new provisions related to overdraft reporting and how to handle unclaimed funds in trust accounts.

**4. State Bar By-Laws and Administrative Rules.** In May 2012 the Court appointed a select committee to revise the By-Laws and Rules and Regulations of the West Virginia State Bar. The committee’s work is ongoing, and some of the Committee’s work depends upon the final content of the amendments to the Rules of Professional Conduct and ancillary matters. The committee helped to develop the proposed State Bar Administrative Rule 10 that was released for comment along with the Rules of Professional Conduct. That rule governs client trust accounts and the IOLTA program, and includes new provisions related to overdraft reporting and unclaimed trust account funds.

**5. Rules of Civil Procedure.** In April 2013 the Court appointed a select committee to undertake a comprehensive review of the Rules of Civil Procedure, including whether any of the recent changes to the corresponding federal rules should be adopted. The Committee’s work is ongoing and a proposed draft is expected to be available for public comment later in 2014.





## **October Term 2013**

# **United States Supreme Court Cases of Interest to the Government Lawyer**

**Elbert Lin**

**Solicitor General**

**Office of the West Virginia  
Attorney General**

# The (Not So) Fine Print

- Attorney General joined multi-state *amici curiae* briefs in many of these cases.
- Does not represent the views of the Attorney General, the Office of the Attorney General, or the State of West Virginia.
- No warranties or guarantees.

THE ILLUSTRATED LONDON NEWS

£100 REWARD  
HAS BEEN OFFERED BY THE  
**CARBOLIC SMOKE BALL CO.**  
To any person who contracts Infectious Coughs, Colds, Catarrhs, Asthma, Bronchitis, Sore Throat, Hoarseness, Loss of Voice, Whooping Cough, Whooping Croup, or any disease caused by taking Cold, after having used the Carbolic Smoke Ball according to the printed directions.

They demand Carbolic Smoke Balls, even when all these ailments are cured, but only those persons who have used the Carbolic Smoke Balls, and who can testify to the fact, will receive the above-mentioned reward.

**THE CARBOLIC SMOKE BALL CO., Ltd.,**  
NOW OFFERS  
**£200 REWARD**  
to the person who purchases a Carbolic Smoke Ball and afterwards contracts any of the following diseases, viz—

INFLUENZA	CATARRH	THROAT DEAFNESS	DIPHTHERIA
COUGHS	ASTHMA	LOSS OF VOICE	CROUP
COLD IN THE HEAD	BRONCHITIS	LARYNGITIS	WHOOPING COUGH
COLD ON THE CHEST	SORE THROAT	SNORING	NEURALGIA
	HOARSENESS	SORE EYES	HEADACHE

or any disease caused by taking cold while using the Carbolic Smoke Ball. This offer is made to those who have purchased a Carbolic Smoke Ball since July 1, 1893, and is subject to conditions to be obtained on application to the Company, which must be signed and stamped with the Company in London by the applicant before commencing the treatment specified in the conditions. This offer will terminate on July 31, 1895.

As all the diseases mentioned above arise from one cause, they are destined to pass by the remedy which cures the cause, viz—

THE CARBOLIC SMOKE BALL. — It is used in several months, making it the cheapest remedy in the world.

THE CARBOLIC SMOKE BALL will be supplied and returned, post free, the next day, on receipt of Money in Postal Notes or B.N.

**CARBOLIC SMOKE BALL CO., LTD.,**  
27, PRINCES STREET, MANOVER SQUARE, LONDON, W.

PARIS DEPOT—14, Rue de la Paix. AMSTERDAM DEPOT—106, Beelders, Nieuw York. GARRARDE DEPOT—71 & 73, Fleet Street, London, E.C.



# By the Numbers\*

- 70

- Argued cases

- 25

- Undecided

- 96%

- Highest agreement rate (Scalia/Thomas and Kagan/Ginsburg)

- 72%

- Lowest agreement rate (Alito/Sotomayor)

- 0-8

- Ninth Circuit's success rate so far, with three cases to go

**\*according to SCOTUSBlog, as of May 28, 2014**

# The Baker's Dozen

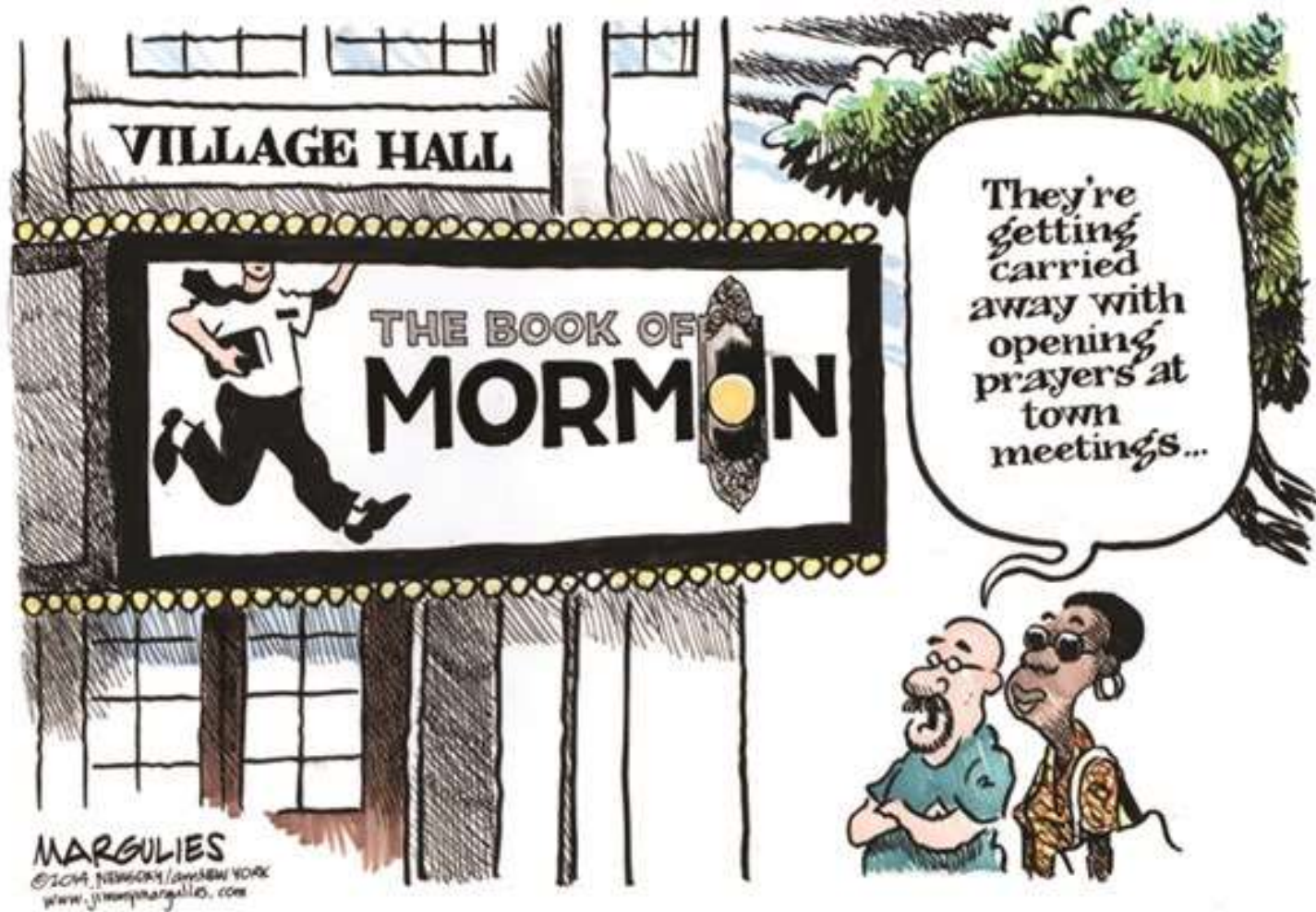
- **First Amendment:**

- *Town of Greece v. Galloway* (prayer before government meetings)
- *Harris v. Quinn* (public employee unions)
- *Lane v. Franks* (public employee speech)
- *McCullen v. Coakley* (protest buffer zones)
- *McCutcheon v. FEC* (campaign contributions)
- *Susan B. Anthony List v. Driehaus* (false statements in political ads)

- **The Others:**

- Affirmative action, car chases, anonymous tips, cell phone searches (smart phones and not-so-smart phones), flat-screen TVs, and ...
- A love triangle.

# The First Amendment



# ***Town of Greece v. Galloway***

## **(prayer before government meetings)**

- What can be said in prayers offered before a government meeting?
- Facts
  - Town of Greece, New York invited a member of the local clergy to deliver an invocation of prayer before its monthly town meetings.
  - Town did not have a formal policy, but most prayers were predominantly Christian in nature, due in part to the fact that most congregations in the town are Christian.
  - Respondents are citizens who attend the town meetings, and they sought to limit the town to “non-sectarian” prayers – those not identifiable with any one religion.
  - The Second Circuit found the practice to violate the Establishment Clause.

# ***Town of Greece v. Galloway***

## **(prayer before government meetings)**

- Opinion
  - In a 5-4 decision by Justice Kennedy, the Court upheld the practice, relying in large part on tradition and the Court's previous decision in *Marsh v. Chambers*, which in 1983 had upheld the Nebraska Legislature's practice of opening its sessions with a prayer.
  - The Court also emphasized that the rule requested by respondents would force legislatures and courts "to act as supervisors and censors of religious speech."
  - "Absent a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose, a challenge based solely on the content of a prayer will not likely establish a constitutional violation."
  - "The analysis would be different if town board members directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person's acquiescence in the prayer opportunity."

# ***Harris v. Quinn***

## **(public employee unions)**

- Can public employees who do not want to be in unions be required to pay union dues?
- Facts
  - Governor of Illinois signed an executive order requiring certain healthcare workers to be treated as public employees who must be represented exclusively by a union for collective bargaining with the State and must pay some of the union's costs.
  - Eight individuals sued, arguing that the executive order violates their First Amendment right to free association.
  - The Seventh Circuit ruled against the challengers, concluding that the case was controlled by the Supreme Court's 1977 decision in *Abood v. Detroit Board of Education*.



# ***Harris v. Quinn***

## **(public employee unions)**

- Issues

- In *Abood*, the Supreme Court upheld against a First Amendment challenge the maintaining of an agency-shop arrangement in a public workplace. The Court found that even non-union employees may be assessed a service charge equal to union dues, as a condition of employment.
- Petitioners are asking the Court to overturn *Abood*. At oral argument, some Justices seemed inclined to do so, but not a majority.

- Implications

- Overturning *Abood* would cause a fundamental change to the way public employee unions work.
- But the Court need not go that far. There are narrow grounds on which to decide the case—in particular, that the State was wrong to conclude that these types of healthcare workers need unionization or that these types of healthcare workers are public employees at all.

# ***Lane v. Franks***

## **(public employee speech)**

- Is subpoenaed testimony by a public employee protected by the First Amendment?
- Facts
  - Edward Lane—then an employee of Central Alabama Community College—discovered that a state representative was defrauding the college.
  - He was later subpoenaed to testify at the former state representative's criminal trial, but was fired from his job after doing so.
  - Lane sued the former president of the College, Steven Franks, for damages.
  - In a split with several other circuits, the Eleventh Circuit ruled against Lane, concluding that his testimony was not protected speech under the First Amendment because it touched on acts performed as part of his official duties.

# ***Lane v. Franks***

## **(public employee speech)**

- Issues
  - The Supreme Court has held—most recently in 2006 in *Garcetti v. Ceballos*—that public employees may not bring First Amendment free-speech claims for retaliation when they are terminated for speech made in performance of their official duties.
  - Nearly everyone in this case—including the State of Alabama—has argued that the Eleventh Circuit drastically overstated the scope of *Garcetti*.
- Implications
  - The Court has a chance to clarify what it means for speech to made in performance of a public employee’s official duties.
  - It seems unlikely that the Court will adopt a bright-line rule protecting all testimony. Rather, the Court will probably adopt a nuanced rule that protects certain testimony in certain circumstances.

# *McCullen v. Coakley*

## (protest buffer zones)

- Can a State prohibit anti-abortion protestors from coming within a certain distance of an abortion clinic?
- Facts
  - Massachusetts law creates a 35-foot “buffer zone” around abortion clinics, within which protestors may not enter.
  - The law applies only to abortion clinics and not all medical facilities, and it creates an exception for employees acting within the scope of their employment.
  - The First Circuit upheld the law against an as-applied challenge brought by several protestors.



# *McCullen v. Coakley*

## (protest buffer zones)

- Issues
  - In 2000, the Supreme Court upheld a protest buffer zone in *Hill v. Colorado*, a 6 to 3 decision.
  - Petitioners argue that this statute differs from the one at issue in *Hill*. They contend that the other statute was ostensibly content-neutral, but that this one discriminates specifically against a particular viewpoint because it applies only to abortion clinics and exempts clinic employees from the restriction.
  - Petitioners also argue that *Hill* should be overturned if it cannot be distinguished.
- Implications
  - Because the membership of the Court has changed significantly since 2000, the Court may overturn *Hill v. Colorado*, which could fundamentally change a State's ability to impose protest buffer zones. Petitioners were supported by groups from across the political spectrum.
  - A more narrow decision is also possible based on this particular statute. At oral argument, Justice Kagan suggested that 35-feet may be too big a zone.

# *McCutcheon v. FEC*

## (campaign contributions)

- Can the law put an aggregate periodic limit on campaign contributions?
- Facts
  - In 2002, Congress passed the Bipartisan Campaign Reform Act, which established two sets of limits of campaign contributions.
    - The *base limit* restricts how much money a contributor may give to individual candidates, political parties, and PACs.
    - The *aggregate limit* restricts how much money an individual may donate in a two-year election cycle.
  - Petitioner challenged the aggregate limit, and the three-judge district court upheld the law.

# ***McCutcheon v. FEC***

## **(campaign contributions)**

- Opinion
  - In a four-Justice plurality opinion by Chief Justice Roberts, the Court struck down the law. (Justice Thomas concurred separately in the judgment.)
  - The Court reiterated that only one interest justifies campaign finance restrictions: preventing *quid pro quo* corruption or the appearance of it.
  - The Court determined that the only possible justification for the aggregate limit was to prevent circumvention of the base limit – which could be achieved by funneling money to a candidate through other groups.
  - But the Court concluded that there are other laws in place that make it difficult or impossible to do that.
  - The Court chose not to address its longstanding distinction—articulated first in *Buckley v. Valeo*—between contributions and expenditures.

# ***SBA List v. Driehaus***

## **(false statements in political ads)**

- How certain an injury is required for a pre-enforcement challenge to a speech-restricting law?
- Facts
  - SBA List, a pro-life group, sought to put up a billboard attacking U.S. Representative Steve Driehaus's vote supporting the Affordable Care Act as supportive of "taxpayer funded abortion."
  - The Ohio Elections Commission found probable cause that the message was false and prohibited SBA List from putting up the billboard, relying on an Ohio law that bans knowingly false statements during political campaigns.
  - SBA List challenged the law's constitutionality, and the Sixth Circuit found that SBA List lacked standing.



# ***SBA List v. Driehaus***

## **(false statements in political ads)**

- Issues
  - The Sixth Circuit found that the threat of enforcement was not sufficiently imminent because the Ohio Elections Commission lacked prosecutorial power.
  - Petitioner—and many *amici*—contend that prosecution under a *speech-restricting* law need not be certain and successful before the law may be challenged.
- Implications
  - Court could clarify the standard for a pre-enforcement challenge to a speech-restricting law.
  - The actual constitutionality of the law is not at issue, but the Court may take the opportunity to weigh in—especially in light of last year’s decision in *Alvarez* (the Truth in Valor Act case).
  - An interesting historical point: the Ohio Attorney General took adverse positions in two briefs in this case.

# *The Others*



And now here's  
something we  
hope you'll  
**REALLY** like!!

# ***Schuette v. BAMN***

## **(affirmative action)**

- Is it unconstitutional to ban affirmative action?
- Facts
  - After *Grutter*, Michigan voters amended their constitution to ban “preferential treatment to any individual or group on the basis of race” in an effort to ban affirmative action in the admissions process for state universities.
  - Relying on the Supreme Court’s decision in *Washington v. Seattle School District No. 1*—a 1982 school busing decision—the Sixth Circuit concluded that the constitutional amendment violated Equal Protection.

# *Schuette v. BAMN*

## (affirmative action)

- Opinion
  - In a three-Justice plurality decision by Justice Kennedy, the Court upheld the amendment. (Justices Scalia, Thomas, and Breyer concurred separately in the judgment.)
  - The Sixth Circuit had relied on broad language in *Seattle*, stating that where a government policy “inures primarily to the benefit of the minority” and “minorities ... consider” the policy to be “in their interest,” then any state action that “place[s] effective decision making authority over” that policy “at a different level of government” must be reviewed under strict scrutiny.
  - The Court rejected that broad reading, concluding that *Seattle* was a case where a political restriction was designed to be used, or was likely to be used, to encourage infliction of injury by reason of race.
  - “Our constitutional system embraces, too, the right of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times and the course of a nation that must strive always to make freedom ever greater and more secure.”

# ***Plumhoff v. Rickard***

## **(qualified immunity and car chases)**

- When is a denial of qualified immunity appealable? And what constitutes excessive force when stopping a high-speed car chase?
- Facts
  - At the end of an extensive police chase, police officers shot at the drivers of a vehicle attempting to flee a total of fifteen times at close range, resulting in the death of both individuals in the car.
  - In a § 1983 lawsuit, the officers moved for judgment on the basis of qualified immunity.
  - After a confused ruling on jurisdiction, the Sixth Circuit found that the officers had violated the Fourth Amendment by using excessive force.

# ***Plumhoff v. Rickard***

## **(qualified immunity and car chases)**

- Opinion
  - In a unanimous opinion by Justice Alito, the Court found that the police officers were entitled to qualified immunity.
  - Significantly, the Court reaffirmed the basic principles about the appealability of a denial of qualified immunity: such a denial is usually appealable under the collateral order doctrine unless the district court denied summary judgment on the basis of evidence sufficiency (rather than on legal grounds).
  - On the merits, the Court found that there was no violation of the Fourth Amendment, given the facts and circumstances.

# ***Navarette v. California***

## **(anonymous tip of drunk driving)**

- Can a police officer pull a car over based solely on an anonymous tip?
- Facts
  - Police received a phone call reporting the location, make, model, and license plate number of a truck that had allegedly run her off the road.
  - After identifying the vehicle, the police officer followed the truck for five minutes but identified no suspicious behavior. Nevertheless, the officer executed a traffic stop and found 30 lbs of marijuana in the truck bed.
  - Treating the phone call as an anonymous tip, the California state courts denied Petitioner's motion to suppress.

# ***Navarette v. California***

## **(anonymous tip of drunk driving)**

- Opinion
  - In a 5-4 decision by Justice Thomas (over a dissent by Justice Scalia), the Court upheld the officer's traffic stop.
  - The Court recognized that anonymous tips alone are seldom enough to provide reasonable suspicion for a traffic stop, but concluded that the anonymous tip in this "close case" included sufficient indicia of reliability.
  - The Court relied on the detail in the call, the fact that 911 calls are recorded, and that the location of the truck closely matched what the caller reported.



# ***Riley / Wurie***

## **(cellphone searches)**

- Can the police search an individual's cellphone without a warrant?
- Facts
  - Riley was pulled over for having expired license plate tags. After finding two loaded guns, the police seized Riley's smartphone without a warrant and discovered a photo that officers later used to charge him with participating in a drive-by shooting.
  - Wurie was arrested for dealing drugs. Following a warrantless search of his cellphone log, investigators used Wurie's home phone number to locate Wurie's house, where they discovered more illegal substances and a gun.



# ***Riley / Wurie***

## **(cellphone searches)**

- Issues
  - “Incident to an arrest,” officers are currently permitted to conduct a warrantless search of the individual’s effects.
  - Several different positions have been advanced:
    - always permit cellphone searches incident to arrest, just as is the case for wallets and other personal items found on persons;
    - carve out a blanket exception for cellphones, given the amount of information they contain; or
    - create some sort of nuanced test based, perhaps, on the nature of the crime for which the individual has been arrested.
  - The cases differ in that one involves a smartphone and the other involves a not-so-smart flip phone.

# ***Mississippi ex rel. Hood v. AU Optronics*** **(CAFA and flat screen TVs)**

- Is a State's *parens patriae* action on behalf of its citizens a "mass action" of 100 persons or more for purposes of the Class Action Fairness Act?
- Facts
  - Mississippi sued a group of LCD manufacturers, claiming they harmed Mississippi residents by engaging in a conspiracy to fix prices.
  - The LCD manufacturers sought to remove the case to federal court under CAFA, asserting that the suit was a "mass action" involving more than 100 "real parties in interest."
  - The Fifth Circuit permitted removal.

# ***Mississippi ex rel. Hood v. AU Optronics*** **(CAFA and flat screen TVs)**

- Opinion
  - In a unanimous opinion by Justice Sotomayor, the Court found that the case could not be removed to federal court.
  - Under the statute, there must be 100 or more actual persons for a suit to constitute a “mass action.”
  - The test is not whether there are 100 or more real parties in interest.

# ***The Love Triangle***



# ***Bond v. United States***

## **(treaty power and states' rights)**

- Can the federal government enact laws pursuant to Congress's treaty power that infringe on traditional state prerogatives?
- Facts
  - Carol Anne Bond learned that her husband had impregnated one of her best friends.
  - Seeking revenge, Bond stole an arsenic-based substance from her employer (a chemical company) and spread it on her friend's mailbox, doorknob, and car handle.
  - After "her friend" received a minor chemical burn from touching her mailbox, the U.S. Postal Service investigated.
  - Bond was charged under a federal statute criminalizing violations of an international treaty, the Chemical Weapons Convention, to which the United States is a signatory.

# ***Bond v. United States***

## **(treaty power and states' rights)**

- Issues
  - Case presents fundamental questions of state / federal power.
  - In 1920, the Supreme Court decided in *Missouri v. Holland* that Congress has sweeping power to enact federal legislation to implement international treaties.
  - The statute at issue reaches mere possession of fairly innocuous chemicals.
- Implications
  - Court could overturn *Missouri v. Holland*.
  - Poised to be an historic decision on scope of treaty power.

# Looking Ahead ... to OT 2014

- ***North Carolina Dental Board v. FTC:***
  - Scope of the state action exemption to the federal antitrust laws.
  - Is it necessary for Boards staffed by market professionals to be “actively supervised”?
  - Attorney General’s Office led ten States in an *amici* brief that helped obtain certiorari, and we filed a brief last week on the merits on behalf of a number of States.
- **Other issues:**
  - Whether age discrimination claims can be asserted outside the Age Discrimination Employment Act. (*Madigan v. Levin* – dismissed this Term as improvidently granted)
  - Whether disparate impact claims are cognizable under the Fair Housing Act (as opposed to “intentional discrimination”). (Issue has been granted and settled twice in the past two Terms)



***Questions?***

***It is okay not to  
have any.***



**2014 Government Lawyers Committee of W.V.  
Continuing Legal Education Seminar**

**W OASIS**

Our Advanced Solution with Integrated Systems

**June 6, 2014  
Building 7, State Capitol Complex**

# Agenda

- Project Overview
- Status Update of Phases
- myOASIS
- Deployment Readiness
- Q&A

# Systems in Production

## Phase A: Budget Development

- Fixed reporting problems associated with expenditure schedules
- Finalized testing and development of interface between budget development and financial system

## Phase B: Agile Asset components including Transportation Asset Inventory (some roadway / traffic assets), Safety Management, Utility Relocation, Right of Way, Maintenance QA Program Pilot

- Completed and in production

# Status Update: Phase C

- Phase C
  - End User Training (EUT) Registration & Delivery – Present through July 21<sup>st</sup>
  - Only Agency Training Coordinators enroll participants
  - Employees who have not been mapped to a role will not receive training
  - Employees who self-enroll will be unenrolled
  - Go Live July 8, 2014

# Training Sites

## Phase C: Core Financials

- End User Training (EUT) will be delivered to:
  - Approximately 3,400 local registered employees
  - Across 424 scheduled sessions (44 post go-live)
  - By CGI and 34 State trainers at WVSU facilities
  - Over 30 work - day period
  - As well as Ferrell Hall training sessions to regional training centers across the state via WebEx

### Region 1

- Morgantown – WVU (2)
- Fairmont – Fairmont State University (2)
- Glenville – Corrections Academy (1)

### Region 2

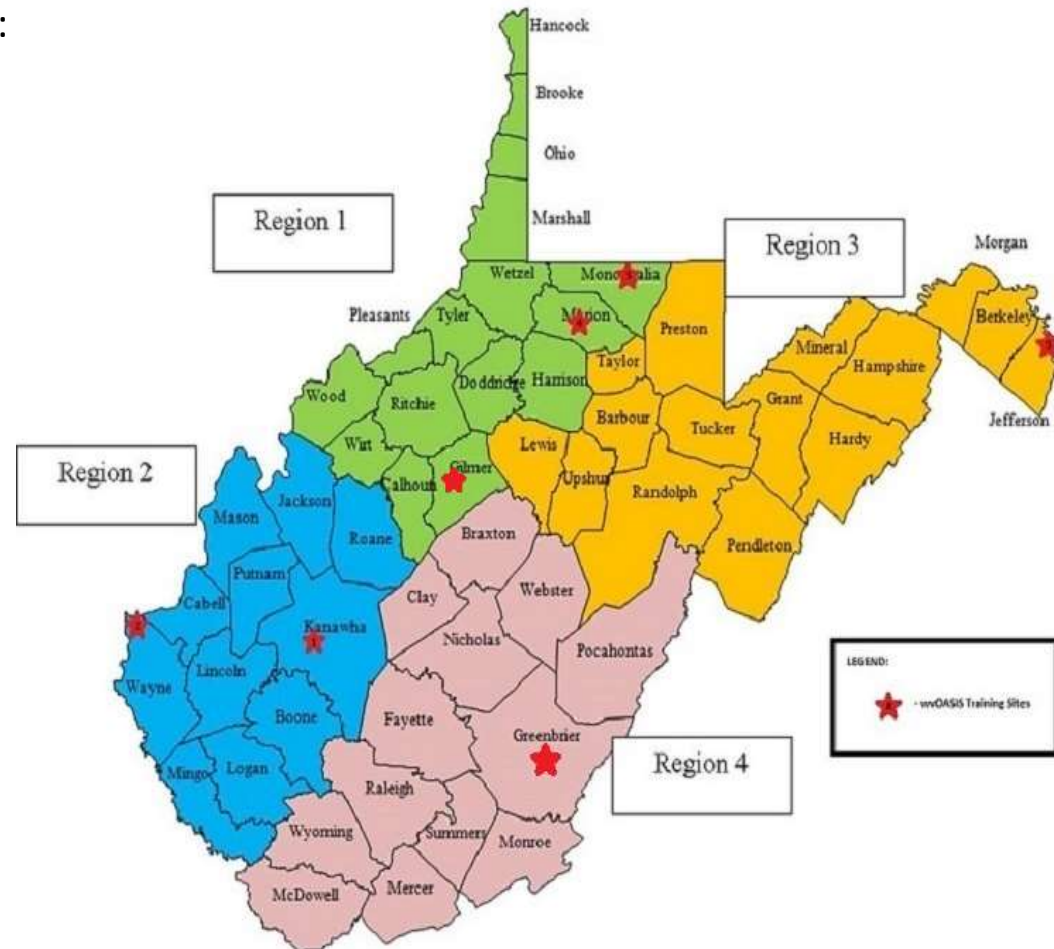
- Huntington – Marshall University (2)

### Region 3

- Shepherdstown – Shepherd University (2)

### Region 4

- Lewisburg – WV School of Osteopathic Medicine (2)



# Status Update: Phase D

- Phase D 2014 Key Dates
  - Integration Testing – May - June
  - User Acceptance Testing (UAT) Training – July
  - UAT Testing – July – Oct.
  - Payroll Parallel Test1 – May – July
  - Payroll Parallel Test 2 – Aug – Oct.
  - End User Training (EUT) – Oct. – Dec.
  - **Go Live January 2015**

# Phase E

For Phase E, DOT is in the process of revising the State resources plan in line with the revised phase E deployment schedule

## **Phase E.1: Statewide Travel, Federal Reciprocity (as of May 13)**

- System test began April 7 and runs through June 27:
  - On target for January 2015 go-live

## **Phase E.2: Core financials (Transportation), CPMS (Transportation and DOA), v7 Agile (TOM, TAI, Safety Management, Utility Relocation, Right of Way, Fleet, Facilities, Real Estate**

- System test scripts to be completed May 23
- System test to begin June 2 for CPMS and FHWA
- System test for v7 Agile components to begin October 13

## **Phase E.3: v7 Agile Signs & Signals**

- System / integration test combined and starts March 16, 2015
- **Go Live July, 2015**



# What is myOASIS?

myOASIS is part of a secure website hosted by the West Virginia State Auditor's Office.

The myOASIS site provides access to information such as:

- End User Training Videos
- Outreach Session Materials
  - Session videos
  - Presentation materials
  - Instruction guides for data collection
- Access to wvOASIS Applications

# myApps V2:Your portal to myOASIS

- myApps V2 is version 2 of the myApps application
- myApps V2 is the only way to access myOASIS and the wvOASIS applications
- To access myOASIS you are required to obtain a myApps account
- **NOTE:** Employees can self-register for a myApps account by visiting [www.wvsao.gov](http://www.wvsao.gov) and clicking myApps. This account can also be used to access myApps V2, which is the entry point to myOASIS



### PHASE A: BUDGET DEVELOPMENT IS NOW LIVE!

We are happy to report that Phase A, Budget Development of the wOASIS Project is now live and ready for West Virginia state employees to use! This new budgeting program for all branches of state government will allow for the planning of fiscal year 2021 budgets.

For the Budget Development System Training Manual and access to wOASIS Chart of Account Extensions, please visit <http://www.budget.wv.gov/stateagency/forms/408>

The detailed guidelines for the preparation and submission of the FY 2021 Appropriation Request may be accessed through <http://www.budget.wv.gov/stateagency/forms/448>

The wOASIS Project team and all of the state agencies are to be commended on their hard work and efforts to ensure a smooth implementation.

Should you have questions, please [Contact Us](#).

### wOASIS END USER TRAINING SESSIONS

Click the link below to register for wOASIS End User training and workshops.

[Register for End User Training & Workshops](#)

To access the new myOASIS Applications click on the link below and sign in.

**myApps v2**

#### MYOASIS HELPDESK

Phone (204) 340-4250  
Toll Free (877) 666-8822  
Mon-Fri (7am to 5pm)

[helpdesk@wvOASIS.gov](mailto:helpdesk@wvOASIS.gov)



Click on myApps V2 from [www.wvOASIS.gov](http://www.wvOASIS.gov) or the myApps page of [www.wvsao.gov](http://www.wvsao.gov)

West Virginia State Auditor's Office  
GLEN B. GAINER III, STATE AUDITOR

Name  Sign In

**State Employees & Retirees**  
If you are a new State Employee, Retiree or former VISTA User and need to create a new account, W-2s and retiree 1099 information click Sign Up! below to create a new account.

**myApps**

Click the logo below to access the new myOASIS Applications.

**myApps v2**

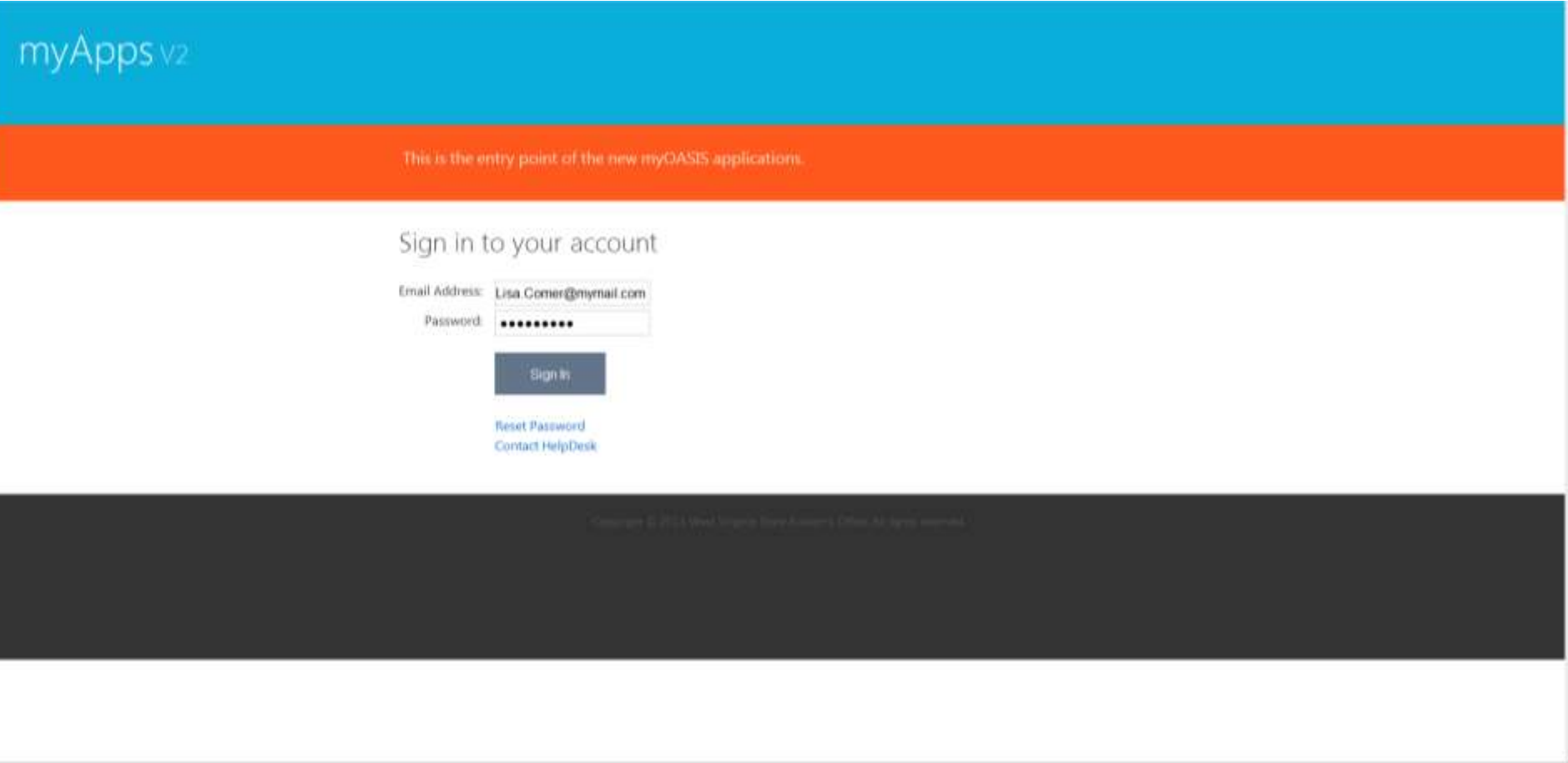
Reset Password?  
New to myApps? Sign Up!

If you need assistance, please contact our HelpDesk at 204-340-4250 or 304-340-4254  
Our Helpdesk is available Monday - Friday from 8:30am to 4:00pm

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[Terms of Use](#) | [Privacy Statement](#)



- Log in to your myApps V2 account



- Select **Enterprise Readiness**

myApps v2

LISA  
myProfile  
Logout



### myOASIS

Pop-up blockers may prevent you from accessing portions of this site.

 Employee	 Forms	 Enterprise Readiness	 Feedback	 Budget Development
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Can't find what you're looking for?

 VISA	 myApps
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- Select **Outreach Sessions** to view functional overviews
- Select **Training** to view available End User Training materials
- Select **Data Collection** to submit Deployment Readiness worksheets

myApps v2 > myOASIS

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Logout



## Enterprise Readiness



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Outreach Sessions

### Outreach Sessions

Please choose a Section and Sub-Section from the dropdowns below.

- Budget Development
- Enterprise Readiness
- Financial
- General Overview
- HRM/Payroll
- Procurement
- Transportation
- Treasury

- Accounts Payable
- Asset Management
- Financial Overview
- Grant/Project Management



Select a Topic

Select a Functional Area

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- Select the video or document you wish to view

myApps v2 > myOASIS





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myApps Enterprise Readiness

### Outreach Sessions

Please choose a Section and Sub-Section from the dropdowns below:

Financial Grant/Project Management

Description	Event Name	Event Date
 wOASIS Grant Accounting - State Auditor's Conference 2013 - VIDEO		
 wOASIS Projects and Grants Instruction Manual October 3, 2013		
 wOASIS Projects and Grants Meeting - October 3, 2013		
 wOASIS Projects and Grants Meeting Powerpoint - October 3, 2013		

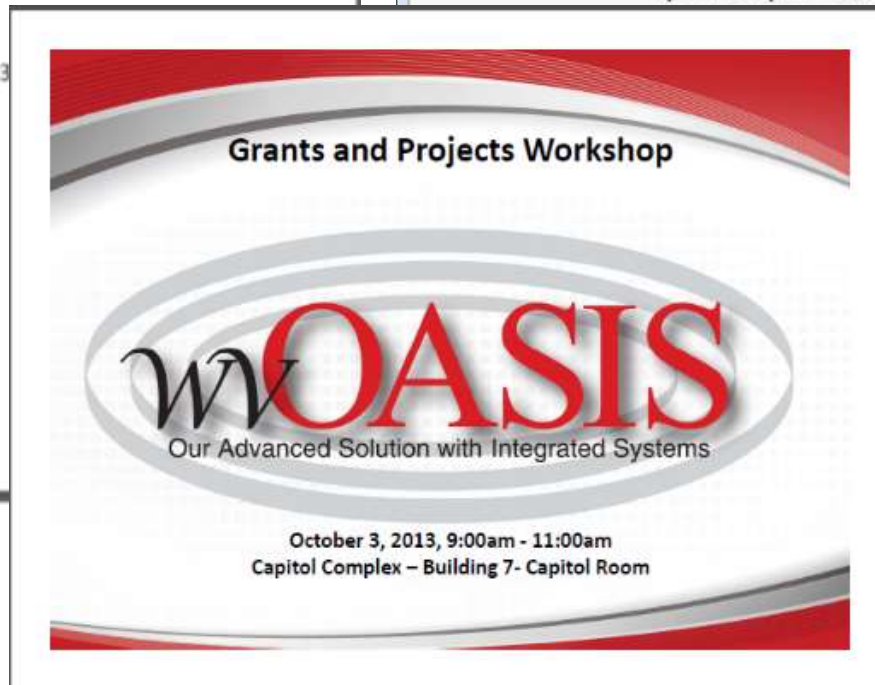
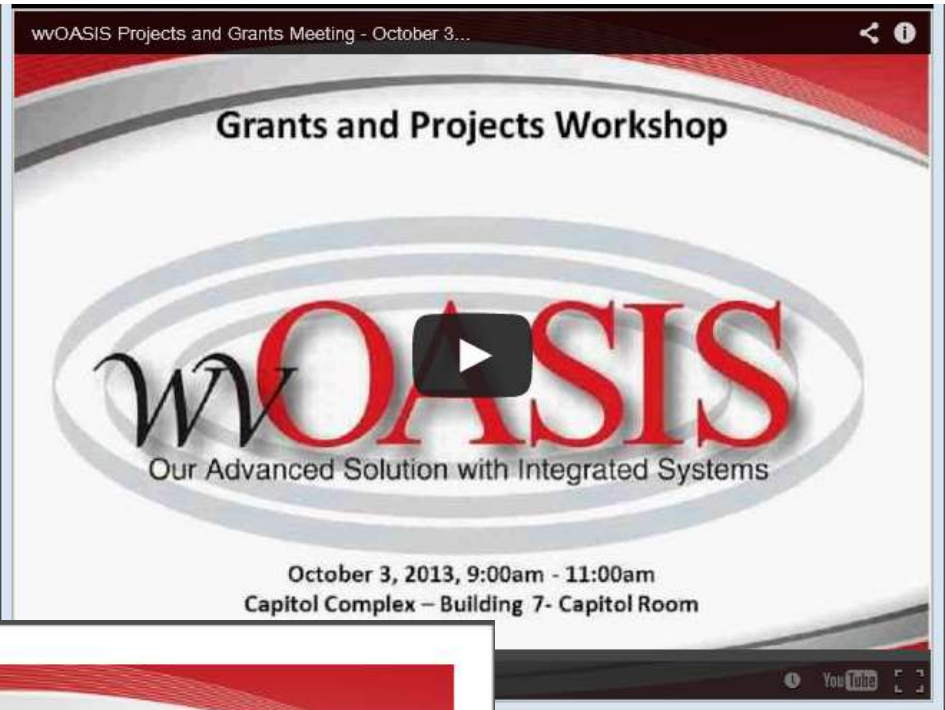
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**Grants and Projects  
Budget Structures and Table  
Instruction Manual**

October 01, 2013



# Deployment Readiness

## Key Activities

- Communication
  - Outreach sessions for affected User Community
  - Newsletter, wvOASIS website, myOASIS
- Data Collection
  - Timely submission of requested data to project team; e.g. Security identification and roles mapped to function
  - Notification to project team of critical changes (e.g.; changes to end user roles)
- Dashboard Readiness Reports
  - Weekly dashboard reports (June 2<sup>nd</sup>) to Cabinet, Constitutional Officers, Agency Heads and the Change Leadership Team
    - Reports on data collection, agency training registration and attendance status



### What's Happening Now?

#### Phase C End User Training

wvOASIS Phase C End User Training (EUT) Registration will begin on Monday May 5, 2014 in CourseMill.

EUT for Phase C is scheduled for May 27<sup>th</sup> thru July 20<sup>th</sup> in Ferrell Hall at WV State University.

To continue the preparation for EUT, we are partnering with the Division of Personnel to conduct the first part of Phase C Train-the-Trainer (TTT). This training is only for Instructors who will be conducting training during end user training.

Many of our trainers have been involved in User Acceptance Testing Training (UAT), which in combination with TTT will help prepare them in the delivery of training to end users.

wvOASIS Phase C Go-Live will be in July 8, 2014.

#### More about Phase C End User Training...

The following courses will be offered during Phase C End-User Training:

1. Getting Started
2. Financials for Managers
3. Budget Control
4. General Accounting
5. Accounts Payable
6. Central Auditor Processing
7. Accounts Receivable Cash Receipts
8. Accounts Receivable Billing Collections
9. Procurement - Requisitions
10. Procurement - Receiving
11. Procurement - Solicitations Basics
12. Procurement - Solicitations Advanced
13. Procurement - Evaluation & Awards
14. Purchasing Card (P-Card\_ Reconciliation)
15. Vendor and Customer
16. Cost Allocation
17. Grants Accounting
18. Asset Management
19. Investment Accounting
20. Inventory Management
21. Inventory Requisitions & Return
22. Master Agreements
23. CAFR Configuration & Maintenance

The Phase C End User Training schedule is posted to myOASIS/Enterprise Readiness/Outreach Sessions/Enterprise Readiness/ Training Coordinators

- Announcements
- Upcoming meetings/events
- Overview of past events
- Training dates, locations
- Recent decisions by project team, steering committee and ERP Board
- Newsletter posts first of each month to [www.wvOASIS.gov](http://www.wvOASIS.gov)

# Questions?

## Contact Us!

For Deployment Readiness Questions E-mail: [EnterpriseReadiness@wvOASIS.gov](mailto:EnterpriseReadiness@wvOASIS.gov)

For Training Questions E-mail: [Training@wvOASIS.gov](mailto:Training@wvOASIS.gov)

Website: [wvOASIS.gov](http://wvOASIS.gov)



# ETHICS AND LAW OFFICE TECHNOLOGY PANEL: BRING YOUR OWN DISASTER?

*Hot* Topics for Government Lawyers  
June 6, 2014

Sallie Milam, West Virginia's Chief Privacy Officer,  
WV Health Care Authority

Jim Weathersbee, Information Security Audit, Compliance and  
Privacy Officer, West Virginia Office of Technology

Rachael Fletcher Cipoletti, Chief Lawyer Disciplinary Counsel,  
Office of Disciplinary Counsel

# This is a *HOT* Topic!

- First 30 minutes  $\Rightarrow$  Presentation
- Last 20 minutes  $\Rightarrow$  Discussion

# Recent BYOD Stats

- BYOD is happening now – whether you know it or not
- 68 percent of surveyed employees bring their own devices to work
- Less than 1 / 3 of the companies that these employees work for have a BYOD policy in place
- 93% of these same employees who were surveyed stated that they would not participate in a BYOD program if their employer would have access to their personal information

Source: Legal Hold Pro Signature Paper. Legal Hold and Data Preservation 2014

# Why does this matter to me?

- As a member of the workforce and an attorney, you may want to fully understand the ups and downs of BYOD, including your ethical obligations, before you make the decision to bring your own device to the workplace
- Lawyers are high priority targets for cyber attacks
- Your client may be evaluating BYOD implementation and would benefit from your informed advice
- Even if your client is not actively evaluating BYOD, the client's employees are most assuredly using their own devices in the workplace, with and without the employer's knowledge



# Policy Considerations to Explore

- Eligibility.
  - Consider including:
    - Employees who travel extensively
    - Employees who work from home
    - Employees who are on call or who must be always available
  - Evaluate excluding:
    - Executives or managers
    - Employees requiring regular access to sensitive data
    - Rank and file under NLRA
    - Non-exempt employees, temps, independent contractors

# More Policy Considerations

- Device types
  - IT needs to determine and specify required technology
    - Minimum specs
    - Laptops too?
  - Employees should purchase their devices on their own and not through the employer – keep ownership clear
  - Be clear about what the employer will purchase for support as to peripherals, like printers, keyboards, etc.

# More Policy Considerations

- Keep work and personal separate
  - Ensure that there is a policy or technology solution that effectively segregates work and personal data on the personal device
  - Emails for work should never be sent from personal email
  - Work data on personal devices needs to comport with an organization's data collection, use, disclosure, retention and destruction policies, as well as be available for eDiscovery
  - Dust off Acceptable Use policies to ensure that they apply equally to the BYOD program

# More Policy Considerations

- Evaluate cost sharing
  - Where allowable, ensure that subsidy is consistent with the appropriate length of a typical refresh cycle and renewed at regular intervals
  - Where a subsidy is provided, advise employees that it will be treated as income to them
  - Make clear who pays for network access
- Device support and maintenance – how much will IT do?
- Document retention and preservation

# More Policy Considerations

- Employer's liability for employee actions with device
- Address ownership of any intellectual property on employee's personal device
- Privacy
  - Be clear that all work data belongs to the employer
  - Be clear that the employer may monitor the device with respect to its data – no expectation of privacy with respect to employer data
  - If employer data will reside on the device, include a provision to allow for a remote wipe of the entire device and that the employee assumes the risk
  - Ensure that IT staff have procedures to avoid accessing personal information on the device
- Security: need policy + technology

# Implementation Considerations

- Review other existing policies for overlap or conflict
- Hard to achieve compliance
- Consider starting with a pilot
- Good communication re roles and responsibilities for employees generally, as well as IT
- Thorough training
- Ongoing guidance
- Departing employees who participate in BYOD could be a big risk
  - Consider having employee sign a confidentiality agreement that survives employee's separation from the organization

Sources: "The ABA Cybersecurity Handbook", Rhodes and Polley; "Legal Hold and Data Preservation 2014", Legal Hold Pro Signature Paper; "Six BYOD/PC Security Best Practices", Moka5; "Practical Law: Bring Your Own Device to Work (BYOD) Policy", Thomson Reuters; and, "Best Practices to Make BYOD Simple and Secure", Citrix.

# Security

Benefits

Risks

Threats

Tools

# Benefits of BYOD

- **Reduce Technology Costs**
- **Improve User Enhancement = More Productivity**
- **Retain Happy Employees**



# BYOD Risks

- **Security**
  - Loss of Device
  - Security settings, antivirus, and anti-malware protection are not standard.
  - Application control
  - Data Backup
- **Multiple platforms**
- **Compliance issues**

# BYOD Threats

- **Spear Phishing**
- **Malicious Apps**
- **Nonchalant employees**
- **Documents that only reside on Mobile device**

# Tools

- Policies
- Mobile Device Management (MDM)
  - Desktop virtualization
  - Containerization
- Network Access Controls (NAC)

# Summary

- BYOD is a reality.
- Be prepared for it and get it right the first time.
- Understand your legal requirements and address them upfront
- Help your client make the right decisions

What are the ethical implications associated with BYOD?

---

# Rule 1.1-- Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

# Are you a luddite?

Newly amended [Comment 8 to Model Rule 1.1](#) provides additional guidance by explaining that:

“To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.” (emphasis added).

**By Order entered April 14, 2014, the Supreme Court of Appeals of WV released proposed changes to the RPC and included this technology comment.**



# Rule 1.4 Communication.

- (a). A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable request for information.
- (b). A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

# Things to think about with communication

Security of unencrypted emails.

The dreaded inadvertent reply all and blind copy.

Do you know enough about the technology to explain the same to your client?

## **ABA Formal Opinion 11-459**

Duty to Protect the confidentiality of e-mail communications with one's client

## **ABA Formal Opinion 11-460**

Duty when Lawyer receives copies of a third party's email communications with counsel

# Rule 1.6 Confidentiality

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

- (1) to prevent the client from committing a criminal act; or
- (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer representation of the client.

# Rule 1.6 Confidentiality.

Distinguished from attorney-client privilege which applies in judicial and other proceedings where a lawyer may be called as a witness or otherwise required to produce evidence concerning a client.

Rule 1.6 applies in situations other than those where evidence is sought from the lawyer through compulsion of law.

Rule 1.6 applies not merely to matters communicated in confidence, but to ALL information relating to the representation, whatever its source.

# How to avoid BYOD with ODC

- Be knowledgeable.
- Be knowledgeable.
- Be vigilant.
- Be compliant.
- But, if disaster occurs... DO NOT HIDE IT.
- Report and take immediate remedial measures.



STATE OF WEST VIRGINIA  
OFFICE OF THE ATTORNEY GENERAL  
CHARLESTON, WEST VIRGINIA 25305

**Information To Be Provided With Requests For Approval Of  
Hearing Examiners and Administrative Law Judges**

Please submit the following with a completed and signed WV-48A:

1. Resume, including WV State Bar Number, and detailed statement of work.
2. Completed Purchasing Affidavit, if the contract amount is in excess of \$5,000.00. (<http://www.state.wv.us/admin/purchase/vrepAffidavit.pdf?vm=r>)
3. Employment History Disclosure Statement.  
(<http://www.state.wv.us/admin/purchase/vrc/employhistory.pdf>)
4. Business Registration with the Secretary of State if a corporation or limited liability company. See W. Va. Code §31B-1-101.  
(<http://apps.sos.wv.gov/business/corporations/index.aspx>)
5. Office of the Insurance Commission Defaulted Accounts/Employer Violator System. The EVS lists employers in default with the Insurance Commission. Please provide a printout of the search showing that your vendor is not on this list.  
(<http://apps.wvinsurance.gov/defaulted/Default.aspx>)
6. Bureau of Employment Programs-Unemployment Compensation/Workers Compensation Defaulted Employers Account Search. This search is for employers who are in default with unemployment or workers' compensation premiums. Please provide a printout of the search showing your vendor is not on this list.  
([http://www.wvcommerce.org/business/workforcewv/unemployment\\_compensation/employers/default\\_accounts/default.aspx](http://www.wvcommerce.org/business/workforcewv/unemployment_compensation/employers/default_accounts/default.aspx))
7. Workers Compensation (Old Fund) Defaulted Employers Account Search. This search is for employers in default on workers compensation premiums under the old state run workers compensation system. Please provide a printout of the search showing that your vendor is not on this list.  
(<https://icomp.wvinsurance.gov/Login/EmpViolator.asp?code=C&submit=Y&type=OWN>)
8. Federal Statement for Award Management Debarment Printout. This search should show no results. ([www.sam.gov](http://www.sam.gov))

\*If you find a result listing your vendor is in default or debarred for items 5 through 8, please contact the vendor to resolve the issue. This Office cannot approve a WV-48A with any vendor in default under any of these searches.



STATE OF WEST VIRGINIA  
OFFICE OF THE ATTORNEY GENERAL  
CHARLESTON, WEST VIRGINIA 25305

**Information To Be Provided With Request For  
Approval Of Contract For Outside Counsel**

Agencies seeking to obtain approval of WV-48A's for outside counsel services must first have one of the three approval letters listed in number 1 below.

If your agency already has an appointment letter of your counsel as a Special Assistant Attorney General that has not expired, submit the WV-48A, SAAG letter and all checklist items listed below for approval.

If your agency does not have a specific appointment letter for the current matter for which you need outside counsel representation, you must first contact Richie Heath at [rrh@wvago.gov](mailto:rrh@wvago.gov) and request that an RFP be issued.

The third option is to request an exception to the bidding process if your situation meets the criteria for a waiver. Exceptions are specifically laid out in the Attorney General's Outside Counsel Policy online at

[http://www.wvago.gov/pdf/Outside%20Counsel%20Policy%20\(Final%20-%20July%202016,%202013\).pdf](http://www.wvago.gov/pdf/Outside%20Counsel%20Policy%20(Final%20-%20July%202016,%202013).pdf).

This process can take 2-3 weeks so anticipate your needs as far in advance as possible. Developing an RFP takes the agency's cooperation and the length of the process can be shortened considerably if you have a written scope of work prepared to provide the Attorney General staff along with the request.

After obtaining approval, submit the WV-48A form to Tracy L. Webb, Deputy Attorney General, along with all checklist items listed below. If all information requested is provided, and the WV-48A is completed properly, approval as to form will take only a few days.

**CHECKLIST**

1. Special Assistant Attorney General Appointment (SAAG) Letter showing that the scope of work listed on the WV-48A has been approved;

Or

Outside Counsel Written Determination from the RFP process approving the scope of the work listed on the WV-48A;



Or

Outside Counsel Written Determination Letter approving exception to the Attorney General's Outside Counsel Bidding Policy and approving the scope of the work listed on the WV-48A.

2. Resume, including WV State Bar Number.
3. Completed Purchasing Affidavit, if the contract amount is in excess of \$5,000.00. (<http://www.state.wv.us/admin/purchase/vre/pAffidavit.pdf?vm—r>)
4. Employment History Disclosure Statement. (<http://www.state.wv.us/admin/purchase/vrc/employhistory.pdf>)
5. Business Registration with the Secretary of State if a corporation or limited liability company. (<http://apps.sos.wv.gov/business/corporations/index.aspx>)
6. Office of the Insurance Commission Defaulted Accounts/Employer Violator System. The EVS lists employers in default with the Insurance Commission. Please provide a printout of the search showing that your vendor is not on this list. (<http://apps.wvinsurance.gov/defaulted/Default.aspx>)
7. Bureau of Employment Programs-Unemployment Compensation/Workers Compensation Defaulted Employers Account Search. This search is for employers who are in default with unemployment or workers' compensation premiums. Please provide a printout of the search showing your vendor is not on this list. ([http://www.wvcommerce.org/business/workforcewv/unemlnoyment\\_compensation/ernployers/defaultaccounts/default.aspx](http://www.wvcommerce.org/business/workforcewv/unemlnoyment_compensation/ernployers/defaultaccounts/default.aspx))
8. Workers Compensation (Old Fund) Defaulted Employers Account Search. This search is for employers in default on workers compensation premiums under the old state run workers compensation system. Please provide a printout of the search showing that your vendor is not on this list. (<https://icomp.wvinsurance.gov/Login/EmpViolator.asp?code=C&submit--Y&type---OWN>)
9. Federal Statement for Award Management Debarment Printout. This search should show no results. ([www.sam.gov](http://www.sam.gov))

\*If you find a result listing your vendors as in default or debarred for items 6 through 9, please contact the vendor to resolve the issue. This Office cannot approve a WV-48A with any vendor in default under any of these searches.

*HOT* TOPICS FOR  
GOVERNMENT LAWYERS

GOVERNMENT PROCUREMENT  
AND CONTRACTS

FRIDAY, JUNE 6, 2014

Tracy L. Webb, Deputy Attorney General

# WV Attorney General Contracts and Bonds Section

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# Attorney General's Role in the Procurement Process

- Executive Branch Agencies

  - **West Virginia Code § 5A-3-13**

    - Contracts shall be approved as to form by the Attorney General. A contract that requires more than six months for its fulfillment shall be filed with the state auditor.

- Higher Education

  - **West Virginia Code § 18B-5-4 (m)**

    - Contracts entered into pursuant to this sectional shall be signed by the applicable governing board or the council or commission in the name of the state and shall be approved as to form by the Attorney General.

# Delegated Authority

All purchasing contracts must be approved as to form by the Attorney General's office per West Virginia Code § 5A-3-13, regardless of dollar amount, but it has been longstanding policy not to exercise that authority in certain limited circumstances. Currently, this office adheres to the following policies:

# Delegated Authority (cont...)

1. Agency delegated purchases under \$25,000.00 do not need AG approval as long as the approved Purchasing forms (which have been pre-approved by this office) are used.
2. As for exempt purchases under Section 9 of Purchasing's Procedures Handbook, contracts of any dollar amount are not exempt from AG approval as stated above. However, this office has continued the practice of previous AG's and not required submission of those purchases for review and approval as to form. Again, as long as purchasing guidelines and forms are used. There are two exceptions.
  - a. Attorneys and Law Firms. Hiring an attorney or law firm must be pre-approved according to the AG's bidding policy, and then approved as to form by the Contracts and Bonds Section once that process is complete (See attached forms).
  - b. An exempt purchase OF ANY DOLLAR AMOUNT where a Vendor requests the agency to sign its Terms and Conditions AND where the Vendor refuses to sign or requests changes to the WV-96 or WV-96A. In this case the Vendor Terms and Conditions and the requested changes must be sent to the Contracts and Bonds Section for approval.

# Compliance with the Constitution and Statutes of the State of West Virginia

- Article VI, § 35- Immunity

## **State Not to Be Made Defendant in Any Court**

The State of West Virginia shall never be made defendant in any court of law or equity, except the State of West Virginia, including any subdivision thereof, or any municipality therein, or any officer, agent, or employee thereof, may be made defendant in any garnishment or attachment proceeding, as garnishee or suggestee.

# Compliance with the Constitution and Statutes of the State of West Virginia (cont...)

- Article X § 4

## **Limitation on Contracting of State Debt**

No debt shall be contracted by this State, except to meet casual deficits in the revenue, to redeem a previous liability of the State, to suppress insurrection, repel invasion or defend the State in time of war; but the payment of any liability other than that for the ordinary expenses of the State, shall be equally distributed over a period of at least twenty years.



# Compliance with the Constitution and Statutes of the State of West Virginia (cont...)

- Article X § 6

## **Credit of state not to be granted in certain cases**

The Credit of the state shall not be granted to, or in aid of any county, city, township, corporation or person; nor shall the state ever assume, or become responsible for the debts or liabilities of any county, city, township, corporation or person. The investment of state or public funds shall be subject to procedures and guidelines heretofore or hereafter established by the Legislature for the prudent investment of such funds.

# Compliance with the Constitution and Statutes of the State of West Virginia (cont...)

- \* West Virginia Code § 12-3-14

**Expenditures for institutions to be confined to appropriations for fiscal year; exceptions**

It shall be unlawful for the superintendent, manager, any officer, or any person or persons, board or body, acting or assuming to act for and on behalf of any institution, kept or maintained in whole or in part by this State, to expend for any fiscal year any greater sum for the maintenance or on account of such institution than shall have been appropriated by the legislature therefor for such year except as provided in section thirteen, article one, chapter twenty five of this Code.

# Compliance with the Constitution and Statutes of the State of West Virginia (cont...)

- West Virginia Code § 12-3-15

**Expenditures for institutions in excess of appropriations; unauthorized debts; use in part payment of appropriation for whole payment**

It shall be unlawful for any such officer, board, body or person to expend for the erection, improvement or repair of any building or structure, or for the purchase of any real estate or other property, or upon any contract or undertaking whatsoever to be performed in whole or in part by the State, any sum exceeding that which shall have been appropriated or authorized therefor by the legislature, nor shall they incur any debt or obligation on any such account not expressly authorized by the legislature, nor use in part payment only upon the purchase or construction of any land or structure any sum which shall have been appropriated or authorized by the legislature in full payment for such object.

# Compliance with the Constitution and Statutes of the State of West Virginia (cont...)

\* West Virginia Code § 12-3-17

**Liabilities incurred by state boards, commissions, officers or employees which cannot be paid out of current appropriations**

Except as provided in this section, it shall be unlawful for any state board, commission, officer or employee; (1) To incur any liability during any fiscal year which cannot be paid out of the then current appropriation for such year or out of funds received from an emergency appropriation; or (2) to authorize or to pay any account or bill incurred during any fiscal year out of the appropriation for the following year: Provided, That nothing contained herein shall prohibit entering into a contract or lease for buildings, land and space, the cost of which exceeds the current year's appropriation, even though the amount is not available during the then current year, if the aggregate cost does not exceed the amount then authorized by the Legislature. Nothing contained herein shall repeal the provisions of the general law relating to the expiration of appropriations for buildings and land.

Any member of a state board or commission or any officer or employee violating any provision of this section shall be personally liable for any debt unlawfully incurred or for any payment unlawfully made.

# Based Upon These Constitutional Provisions & Statutes the State Cannot:

- Consent to laws of another state. Contracts must be governed by the laws of the State of West Virginia or be silent on governing law.
- Be obligated to hold harmless or indemnify any party
- Consent to the jurisdiction of any Court or consent to binding arbitration. All contract claims against the State are to be sent to the Court of Claims. W.Va § 14-2-1 et. seq. may consent to non-binding mediation.

# Based Upon These Constitutional Provisions & Statutes the State Cannot: (cont...)

- Waive remedies at law. The State cannot agree to provisions which require consent to specific remedies upon default or provide for payment of liquidated damages, including early termination charges or late payment interest charges or fees (Prompt Payment Act repealed 2010)
- Waive any legal rights, claims or defenses
- Agree to alter a statute of limitations

# Based Upon These Constitutional Provisions & Statutes the State Cannot: (cont...)

- Agree to limit the Vendor's liability such that the state is without a remedy for injuries to persons or damages to property caused by the Vendor. Limitations on direct damages require a risk assessment by the agency. The State can agree to limitations on special, indirect or consequential damages.
- Bind funds beyond the current fiscal year of a multi-year contract, non-appropriation clause must be included. May agree to language requiring "best efforts" to obtain funding, but may not agree to language requiring pursuit of "all available review or appeals."

# Based Upon These Constitutional Provisions & Statutes the State Cannot: (cont...)

- Agree to acceleration clauses in multi-year contracts. Payment upon default for current fiscal year funds is acceptable.
- Payment in advance, except for subscriptions and software updates. Payment must be in arrears, “net 30” is acceptable.
- Waive Right to notice before repossession or agree to pay attorneys fees unless ordered by a court of competent jurisdiction.



# Other Terms:

- The State is exempt from taxes. Can agree to provide tax exempt certificate.
- Purchasing Division Contracts must include a provision for cancellation upon thirty (30) days' notice to the Vendor. W. Va Code § 5A-3-4 (a) (11).
- Pricing or Contract terms cannot be kept confidential per West Virginia Freedom of Information Act. W.Va Code § 29B-1-1 et. seq. Trade secrets require special handling.
- The State has insurance through BRIM and can provide a certificate of property insurance upon request. Do not agree to provisions that require the State to purchase insurance to cover the Vendor's property.
- Contracts cannot endorse a vendor's products or permit Agency's name or personnel to be used in product advertisements. W. Va Code § 6B-2-5, Ethics Advisory Opinion 2012-31.

# Be Aware of Provisions That:

- Prohibit State from purchasing or renting similar equipment during the contract period in the event of termination.
- Require payment for leased equipment even though it may have been destroyed, lost or rendered unusable.
- Prohibit assignment. May agree to written notice.

# General Requirements Contracts

- Solicitation (Bid), RFP, EOI
  - RFP's require completed Score Sheets and written recommendation for award
- Sole Source or Emergency, justification required and approved by Purchasing
- Vendor original signed bid
- Purchase Order
  - Incorporate Purchasing Division or Agency Delegated Terms and Conditions
  - Amount and term
  - Current Legal Name of Vendor
  - Authorized signatures
- Construction Contracts
  - Bonds-separately checked and approved
  - Contractor's License
  - Drug Free Workplace Affidavit
- Insurance
  - Type and Limits
  - Certificate Holder- Agency or Purchasing Division
  - Notification of Cancellation- 30 days

# General Requirements Contracts (cont...)

- Purchasing Affidavit- All contracts over \$5,000.00
- Certification of Non-conflict of Interest form
- Other certifications/licenses as per contract terms
- Secretary of State Registration or Proof of Exemption
- Federal System for Award Management (S.A.M.) Debarment Printout
- OIC Defaulted Accounts/Employer Violator System (EVS) Search (Showing NO Results)
- UC/WC Defaulted Accounts Search (Showing NO Results)
- Workers Compensation Defaulted Employers Account Search (Old Fund)

# Special Considerations

- Vendor Terms & Conditions- Must include WV-96 or WV-96A (for software). Any requested modification to WV-96 or WV-96A, regardless of dollar amount, must be approved by Attorney General's Office.

# Special Consideration (cont...)

- West Virginia Code § 5G-1-1 et seq.- Procurement of Architect-Engineer Services
  - A-E Services- Use Form AIA B101-2007 with Supplementary Conditions for the State of West Virginia (projects over \$250,000.00)
  - Construction Contracts with A-E Services under 5G- use Forms AIA A101-2007 and A201-2007 or A107-2007, as amended by the Supplementary Conditions for the State of West Virginia
- A Note On Exempt Agencies

# Change Orders

- Agency Request with signature
- Vendor Request or Acknowledgment with signature
- Original Contract and any prior change orders must be attached
- If renewal, written verification by agency and vendor

# Bonds

- 39 types of bonds
  - Notary Public Surety Bond effective 7/1/14
  - Appraisal Management Companies Surety Bond effective 7/1/14
- Forms provided/Approved by Attorney General's Office
- Must be in the full amount of contract or amount required by statute.
- Verify that signatures and acknowledgements are completed. A Power of attorney must accompany surety signature establishing authority to sign on behalf of the surety company. The date on the Power of Attorney must be effective on the bearing date of the bond.
- Raised (embossed) seals are required on the bond and power of attorney.



# Higher Education

## **West Virginia Code § 18B-5-4 (C)**

- When a state institution of higher education submits a contract, agreement or other document to the Attorney General for approval as to form as required by this chapter the following conditions apply:
  - “Form” means compliance with the Constitution and statutes of the State of West Virginia;
  - The Attorney General does not have the authority to reject a contract, agreement or other document based on the substantive provisions in the contract, agreement or document or any extrinsic matter as long as it complies with the Constitution and statutes of this state;

# Higher Education (cont...)

- Within fifteen days of receipt, the Attorney General shall notify the appropriate state institution of higher education in writing that the contract, agreement or other document is approved or disapproved as to form. If the contract, agreement or other document is disapproved as to form, the notice of disapproval shall identify each defect that supports the disapproval; and
- If the state institution elects to challenge the disapproval by filing a writ of mandamus or other action and prevails, then the Attorney General shall pay reasonable attorney fees and costs incurred.

# Higher Education

## The Pre-Approved Forms

- Purchasing forms contained in the Higher Education Purchasing Manual.
- The WV-96 Agreement Addendum (9/11) version), and the WV-96A Agreement Addendum for Software (12/12) version), which are required to be used with Vendor terms and conditions.
- AIA Documents A107-2007, A101/201-2007, A701-1997 and B101-2007 with AG-approved Supplementary Conditions for the State of West Virginia.
- State of West Virginia Performance Bond, Labor and Material Payment Bond, and roofing Maintenance Bond forms and acknowledgments.

# Higher Education

## The Pre-Approved Forms

### (cont...)

- Certificate of Insurance on Accord© or similar forms.
- West Virginia Higher Education Construction Purchase Order Terms and Conditions for Projects of \$25,000 or Less (6/12 version).
- Higher Education standard Equipment Lease-Purchase Agreement and Master Lease-Purchase Agreement terms and conditions (6/12 version).
- Higher Education standard Contract for Lease (2/11 version) and real Property Lease Purchase Agreement terms and conditions (10/11 version).

# Higher Education Approval Required

- Contracts with lawyers or law firms for legal services of any type, regardless of dollar amount. Proposed Policy for Outside Counsel on website.\*\*\*
- Vendor provided terms and conditions if Vendor will not sign WV-96 or WV-96A.
- Contracts or change orders to contracts which propose material changes to terms and conditions or standardized forms previously approved by the Attorney General. Any change proposed by a Vendor to a standard form should be approved.
- Lease-purchase agreements for capital improvements, including equipment, which total more than \$100,000 over the life of the agreement.
- Leases or other instruments for grounds, buildings, office or other space which exceeds \$100,000 annually in rental payments.

# Other Approvals Required

- Leases
- Tower Leases
- Deeds, Rights of Way, Easements
  - Board of Public Works
- Concession Contracts
- Timber Sales
- Intergovernmental Agreements

**PURCHASING DIVISION  
PUBLIC PROCUREMENT**

# BASIC PURPOSE & POWERS

- Ensure competitive bidding when possible
- Contract on behalf of State
- Examine and approve terms of every contract
- Assure all opportunity to bid (No favoritism)

*See W. Va. Code § 5A-3-3*



# WHY?

## Purchasing is where the money is . . .

- **Wally Barron** – Convicted of jury tampering while on trial for the Investright Scandal. Vendors told to pay Florida company for “assistance” in obtaining public contracts.
- **State v. Fahlgren Martin, Inc., 190 W. Va. 306 (1993)** – Director of the Lottery convicted of mail fraud and subversion of the bidding process for advertising contract. Directed Lottery employees to falsify bid results and make certain that they recommend vendor as the most “responsible” bidder.

# BIDDING

- Commodities and Services – W. Va. Code 5A-3
- Construction – W. Va. Code 5-22
- A/E Services – W. Va. Code 5G
- Design Build – W. Va. Code 5-22A

# COMMODITIES & SERVICES

- Request for Quotation (RFQ)
  - Award to lowest responsible bidder meeting specifications
  - Completely objective evaluation
  - Gold Standard for Public Procurement

*W. Va. Code § 5A-3-11(e)*

# COMMODITIES AND SERVICES

- Request for Proposal
  - Award to highest scoring bidder
  - Subjective evaluation component – Technical
  - Objective evaluation component – Cost
  - Limited by policy to projects over \$250,000

*W. Va. Code § 5A-3-10b(d)*

# COMMODITIES AND SERVICES

- Sole Source
  - Used when only one vendor can provide.
  - Requires written documentation from agency
  - Publication to ensure no other vendors

W. Va. Code § 5A-3-10c

# COMMODITIES AND SERVICES

- Non-Competitive, Exempt Purchase
  - Used for items director deems unbiddable
  - List created & modified annually
  - List found in Section 9 of Purchasing Handbook
  - AG approval still required

W. Va. CSR § 148-1-4.1

# COMMODITIES AND SERVICES

- Correctional Industries & Sheltered Workshop
  - State law mandates purchases from Correctional Industries and sheltered workshops if goods/services made/performed by those entities

W. Va. Code § 5A-3-10(e)

# CONSTRUCTION

- Construction
  - Project over \$25,000 must be bid
  - Award to lowest qualified responsible bidder
  - Bonds required
  - List of subs required by law (2012 addition)
  - Emergency repairs exempted

W. Va. Code § 5-22-1



# ARCHITECTS AND ENGINEERS

- Expression of Interest (EOI)
  - Must be used to procure architect and engineering services
  - Completely subjective process
  - Under \$250,000 agency seeks competition
  - \$250,000 or more, public advertising and evaluation process with Purchasing Division

W. Va. Code § 5G-1-1 et seq.

# AGENCY DELEGATED PURCHASES

- Bidding Limits at Agency Level (except EOI)

\$2,500 or less – no bids required

\$2,500.01 to \$5,000 – three verbal bids

\$5,000.01 to \$25,000 – three written bids

W. Va. Code § 5A-3-11 and Procedures Handbook

# EXEMPTED AGENCIES

- Agencies Exempt from Purchasing

35 agencies known to be exempt from Purchasing Division and/or bidding requirements of W. Va. Code § 5A-3

<http://www.state.wv.us/admin/purchase/PurchasingExemptions/default.html>

# PROCUREMENT OFFICER

- Each spending unit designates a Procurement Officer to:
  - Communicate with Purchasing Division
  - Ensure compliance with rules
  - Oversee purchasing generally
  - Receive training
- W. Va. CSR § 148-1-3.2

# CHANGES TO PURCHASING LAW

# Definition Changes

(W. Va. Code § 5A-1-1)

- Definition of “Spending Unit” clarified
- **Old:** “Spending unit” means a department, agency or institution of the State Government for which an appropriation is requested, or to which an appropriation is made by the Legislature.
- **New:** “Spending Unit” means a department, bureau, department, division, office, board[,] commission, authority, agency or institution of the state government for which an appropriation is requested of the governor, or to which an appropriation is made by the Legislature, unless a specific exemption from this chapter is provided in this code.

# Definition Changes

(W. Va. Code § 5A-1-1)

- Definition for “Grant” Added
- “Grant” means the furnishing of assistance, financial or otherwise, to any person or entity to support a program authorized by law.

# Definition Changes

(W. Va. Code § 5A-1-1)

- Definition for “Public Funds” Added
- “Public Funds” means funds of any character, including federal moneys, belonging to or in the custody of any state spending unit.



# Competitive Bid/Statewide Mandate

(W. Va. Code § 5A-1-10)

- All spending units must “whenever possible” base purchases on a competitive bid process and utilize statewide contracts
  - Provision is outside of 5A-3 so it applies to exempt agencies also.

# Cease and Desist

(W. Va. Code § 5A-1-10)

- Secretary of Admin. – given cease and desist authority over all spending units
  - Provision is outside of 5A-3 so it applies to exempt agencies also.
  - Must have credible evidence of violation
  - Penalty imposed

# Cease and Desist

(W. Va. Code § 5A-3-3(a)(11))

- Purchasing Director – given cease and desist authority
  - Provision in 5A-3 so does not apply to exempt agencies.
  - Must have “credible evidence” of violation
  - Penalty is imposed

# Reverse Auction

(W. Va. Code § 5A-3-10d)

- The new code section authorizes the Director to conduct reverse auctions for commodities only (not services).

# Reverse Auction (W. Va. Code § 5A-3-10d)

- Director can only use reverse auction if he determines the process is:
  - Fair
  - Economical
  - In best interest of state

# Reverse Auction (W. Va. Code § 5A-3-10d)

- Director can only use reverse auction if the commodities to be purchased are/have:
  - Subject to low price volatility
  - Common and non-complex specifications
  - Vary little between suppliers
  - Sourced primarily on price
  - Require little collaboration from suppliers
  - Sold by large competitive supply base

# Master Contract; Direct Order

(W. Va. Code § 5A-3-10e)

- The new code section allows the director to utilize a secondary bidding process for commodities only (no services).
- Master Contract = Preapproval
- Direct Order = Secondary Bid Process

# Master Contract; Direct Order

(W. Va. Code § 5A-3-10e)

- Director can only use secondary bidding if he determines the process is:
  - Fair
  - Economical
  - In best interest of state



# Master Contract; Direct Order

(W. Va. Code § 5A-3-10e)

- Master Contract
  - Authorizes vendor to participate in secondary bid
  - Limited to one year
  - Must be advertised
  - Limited to “one type of commodity”

# Master Contract; Direct Order

(W. Va. Code § 5A-3-10e)

- Direct Order Process (Secondary Bidding)
  - Spending unit sends out request for a commodity to all preapproved vendors with a master contract
  - Vendor submitting lowest bid wins the order

# Master Contract; Direct Order

(W. Va. Code § 5A-3-10e)

- Direct Order Process (Secondary Bidding)
  - Request limited to \$50,000 for most commodities
  - Request limited to \$1,000,000 for info. tech.
  - Spending unit can request that Purchasing Division Director approve higher limits for a purchase

# Grants

(W. Va. Code § 5A-3-11(i)(3))

- **Bidding Mandate** – “If a grant **awarded to the state** requires the procurement of commodities or services that will directly benefit a spending unit, the procurement **is not exempt** from the competitive bidding requirements set forth in [Chapter 5A].”

# Grants

(W. Va. Code § 5A-3-11(i)(1))

- **Exemption** – “A grant **awarded by** the state is exempt . . . unless the grant is used to procure commodities or services that directly benefit a spending unit.”

# Grants

(W. Va. Code § 5A-3-11(i)(3))

- **Exemption** – “If a grant **awarded to the state** requires the state to transfer some or all of the grant . . . as a subgrant to accomplish a public purpose, and no contract for commodities or services directly benefiting a spending unit will result, . . . the subgrant is not subject to competitive bidding requirements of [5A].”

# Penalty Provisions

(W. Va. Code § 5A-3-17)

- **Old:** The **head of such spending unit** shall be personally liable for the costs of such purchase or contract, . . .
- **New:** The **spending officer of such spending unit, or any other individual charged with responsibility** for the purchase or contract shall be personally liable. . .

# Penalty Provisions

(W. Va. Code § 5A-3-31)

- **Old:** “It shall be unlawful for any person to corruptly combine, collude . . .

Any person who violates any provision of this section . . . shall be fined not exceeding **five thousand dollars.**”

- **New:** It shall be unlawful for any person to corruptly **act alone** or combine, collude . . . .

Any person who violates any provision of this section . . . shall be fined not exceeding **\$10,000.**



# Training

(W. Va. Code § 5A-3-60)

- New provision requires various officials attend two hour purchasing and p-card training annually
- Required Attendees
  - Executive Department Secretaries
  - Commissioners
  - Deputy/Assistant Commissioners
  - Directors
  - Deputy/Assistant Directors
  - Department Heads
  - Deputy/Assistant Department Head

# Training

(W. Va. Code § 5A-3-60)

- Officials must certify, in writing, the date, time, location, and manner in which training was taken.

# **Courtesy and Civility in the Practice of Law** *Or* **@\$#& You Shouldn't Write, Say, Do or Even THINK!**

**Scott E. Johnson\***



\*The opinions expressed herein are the moronic, imbecilic and, cretinous author's alone, as witless, fatuitous, blockish, and inexcusably inane as they are, and do not necessarily reflect those of the West Virginia State Bar, the Attorney General, or any other reputable lawyer who would have known better than to waste ink by putting such unadulterated drivel on paper.

When you think good lawyer, do you think  
or do you think?



Atticus Finch, Attorney at  
Law



John Rambo, Esquire



“In a case this term, *McCormick v. Allstate Insurance Company*, No. 22551 (W.Va. filed May 4, 1995), we entered an unpublished order which directed counsel to “refrain from the use of intemperate language in documents filed with this Court.” *Id.* In Rite Aid’s opening brief, it characterizes the emotional distress suffered by the Appellees to be nothing short of ‘whining.’ We do not countenance these types of *ad hominem* personal attacks. Accordingly, we caution counsel, and all members of the Bar who practice before this Court, that such inappropriate references will not be tolerated in the future.”

*Tanner v. Rite Aid*, 461 S.E.2d 149, 153-54 n.4 (W. Va.1995)

# Lock and Load!



**“For the respondent to suggest in its brief . . . these actions of the prosecutor below are somehow acceptable trial conduct and do not constitute plain error and did not deny the Petitioner his constitutional right to a fair trial is **offensive** and **reprehensible**.”**

(statement made in a brief about an Assistant Attorney General-2012, lost)

**“[T]he ALJ . . . engaged in a **willful** and **systematic misrepresentation of witness credibility**, in direct contravention to the testimony and evidence in a herculean effort to justify her **predetermined** conclusions.”**

(self-explanatory-2012, lost)

**“Petitioner has no one to blame but himself for his **stupidity** of behaving belligerently at trial.”**

(Statement in a brief by Assistant Attorney General about a criminal defendant-2013, won)

**“There are many reasons the above-statement is **preposterous**.”**

(Statement in a brief filed by a government lawyer-2006, won)



**“[The Petitioner] offered the rather ludicrous distinction . . . .”**

(Statement in a brief written by a law professor-2007, won)

**“Any unbiased judge with one college business course would have understood this intuitively obvious proposition at the first hearing, but literally years of litigation have been spent on this stupid proposition in the hopes that [Petitioner’s] lawyers would quit and [Petitioner] would be starved into submission.”**

(Statement in a brief written by a former Supreme Court of Appeals Justice-2004, won)

## **They said this . . . out loud?!?**

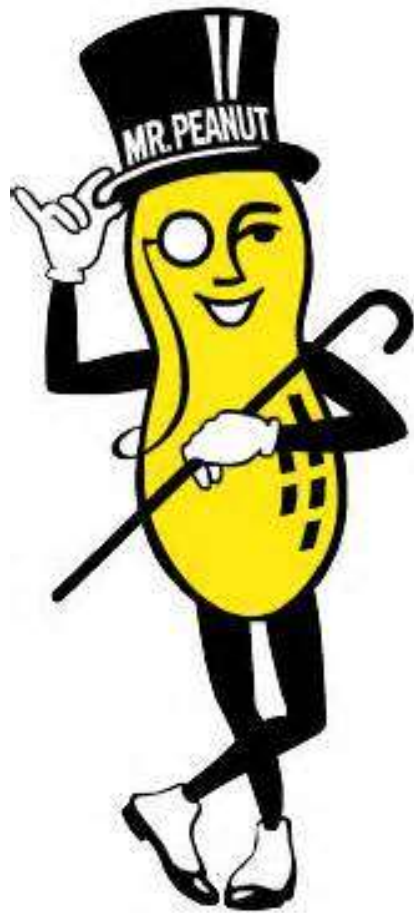
[Respondent's counsel] Judge, I'd like to put on the record this morning that after I gave that [motion for contempt] to [counsel], that he came in the hall, threatened me, pointed his finger in my face, and called me a **s-h-i-t head**, and I would also like on the record what he said to my client.

[Complainant's Counsel] Judge, she's being dishonest, flat out, undeniably dishonest. I didn't threaten her. I didn't call her what she said I called her. I called her a **chicken[sh\*t]**."



“An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.”

Comment, W. Va. R. P. Cond. 3.5



# Civility in a Nutshell

**Treat others as you would  
LIKE  
them to treat you!**



**The  
Golden  
Rule**



# **West Virginia Standards of Professional Conduct**



# Purpose of the Standards?

“to achieve the goals of **civility and professionalism**, both of which are hallmarks of a learned profession dedicated to public service.”

W. Va. Stnds. Prof. Cond., Preamble.

# The Standards are voluntary- Preamble (“voluntary adherence”)(?)



*But see* U.S. Dist. Ct. North. Dist. W. Va. Loc. R. Civ. P. 83.7 (requiring attorneys to abide by the West Virginia Supreme Court Rules of Professional Conduct *and* the Standards of Professional Conduct)

U.S. Dist. Ct. South. Dist. W. Va. Loc. R. 84.01 (same)





- **Violations not sanctionable(?)**

“[T]here exists no sanction for a violation of the Standards for Professional Conduct.”

*Finley v. Norfolk & West. Ry. Co.*, 540 S.E.2d 144, 153 n.\* (W. Va. 1999) (per curiam) (Workman, J., concurring).

*But see Clay v. Consol Coal Co.*, No. 5:12cv92, 2013 WL 5408064, at \*2 (N. D. W. Va. Sept. 25, 2013) (Stamp, J.).

Public reprimand for violating the Rules of Professional Conduct and the Standards of Professional Conduct

Attorney called plaintiff an “idiot” and questioned the Plaintiff about the Plaintiff’s genitals during deposition

**Stnd.I.A.1-** “treat all counsel, parties, and witnesses in a **civil and courteous manner, not only in court, but also in all other written and oral communications.** A lawyer should not, even when called upon by a client to do so, abuse or indulge in offensive conduct, disparaging personal remarks or acrimony to other counsel, parties or witnesses.”

**Stnd.I.A.3-**“should not, **absent good cause, attribute bad motives or improper conduct to other counsel or bring the profession into disrepute by unfounded accusations of impropriety.**”

**Stnd.I.C.3-** “should . . . act and speak **civilly to the court and all of its personnel** with an awareness that they, too, are an integral part of the judicial system.”

**Stnd.I.C.4-**“To the best of the lawyer’s abilities, **clients and witnesses should be prevented from creating disorder or disruption.**”

**Stnd.II.D.2-**“obligated to be **courteous, respectful and civil to parties, witnesses and other lawyers, to the court, and to the court’s staff.**”

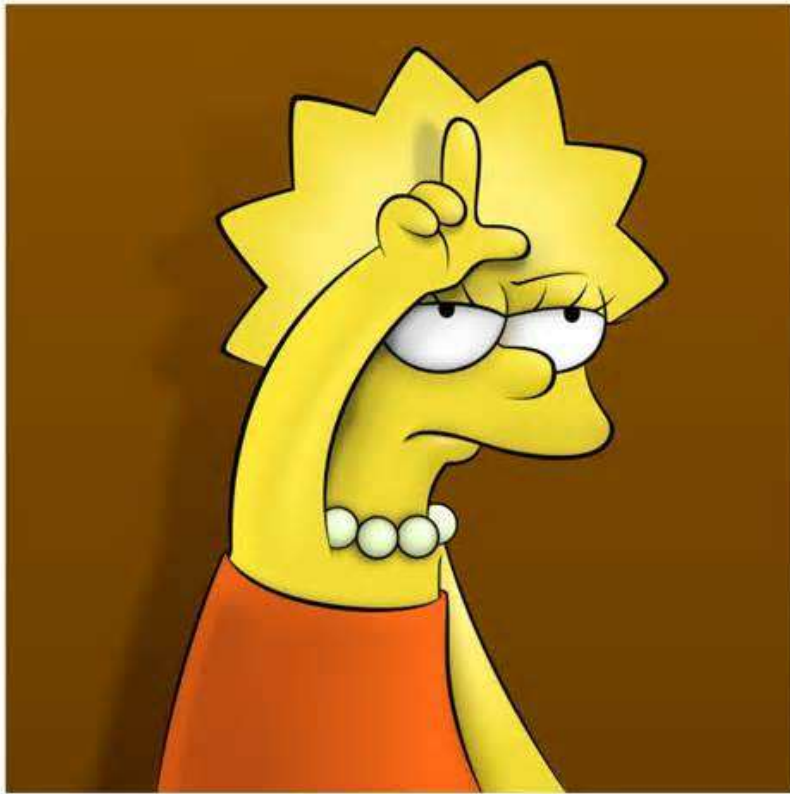
**Stnd.II.D.8-**“obligated to refrain from **abusive, hostile, demeaning or offensive conduct toward others even if a client requests it.**”

What can be the consequences of incivility?



“Courts around the country have entered the fray to find a way to enforce what are generally seen as non-binding suggestions on civility.”

Donald J. Winder & Jerald V. Hale, *Enforcing Civility in an Uncivilized World*, Utah Bar J., May 2009.



**Client Interests  
Compromised**

“Inappropriate references and ad hominem attacks do nothing to advance the litigation and come perilously close to exceeding the bounds of professional advocacy.”

*U.S. for Use & Benefit of Arrow Concrete Co. v. Ohio Farmers Ins. Co.*, 981 F. Supp. 443 n.2 (S.D. W. Va. 1997) (Haden, C.J.).

“Counsel is reminded that the lack of civility in his arguments does nothing to improve his representation of his client.”

*Wickline v. Pension Plan*, 2011 WL 1399078 (S. D. W. Va. Apr. 12, 2011) (Berger, J.).

“Referring to another party’s argument as

preposterous,

ludicrous,

absurd,

or anything similar

has the tendency to discredit rather than bolster legal arguments.”

*New Colt Holding Corp v.RJG*, 312 F.Supp.2d 195, 202 n.2 (D. Conn. 2004).



# **Incivility and lack of courtesy-**

\*Ticks off the Judge (and the Judge's secretary and law clerks)

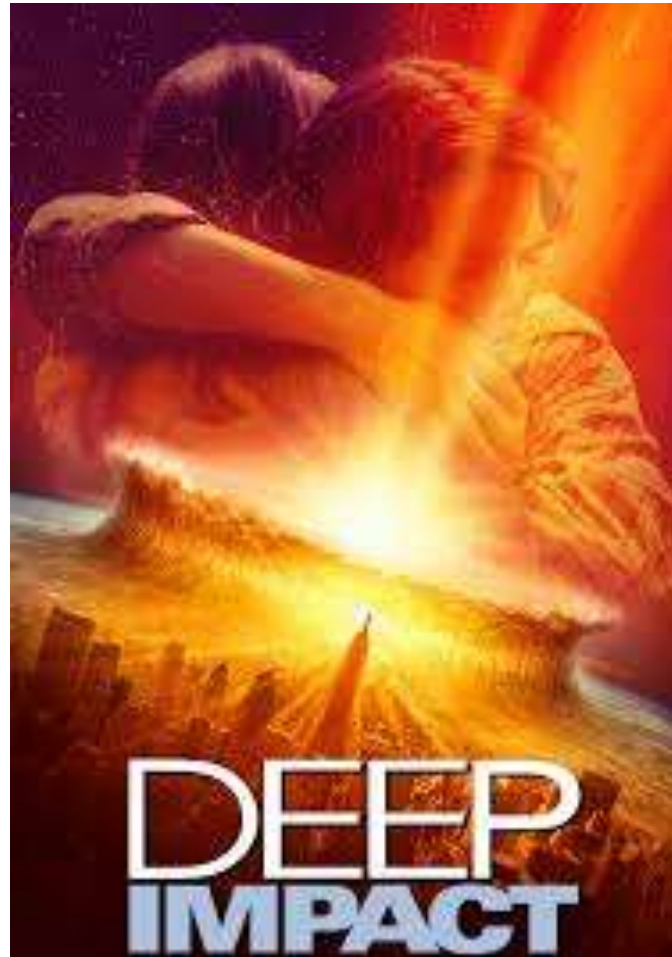
\*Ticks off opposing counsel

\*Ticks off the witnesses

\*Ticks off the jurors



# Impact on the Lawyer



“most lawyers are wise enough to know that their most precious asset is their professional reputation”

*Cooter & Gell v. Hartmarx Corp.* 496 U.S. 384, 413 (1990)  
(Stevens, J., concurring in part/dissenting in part)



“[W]e feel compelled to note that advocates, **including government lawyers**, do themselves a disservice when their briefs contain disrespectful or uncivil language directed against the district court, the reviewing court, opposing counsel, parties, or witnesses.”

*United States v. Venable*, 666 F.3d 893, 904 n.4 (4<sup>th</sup> Cir. 2012)

the district court's "abrupt handling"

sarcastically referred to Appellant's previous counsel's "new-found appreciation for defendant's mental abilities"

criticized the district court's "oblique language" on an issue unrelated to the appeal

stated the district court opinion in another case as "a crabby and complaining reaction"

insinuated the district court's concerns "require [ ] a belief in the absurd that is similar in kind to embracing paranormal conspiracy theories"

accused Appellant of being a "charlatan" and "exploit[ing] his identity as an African-American"

“It appears that what [defendant] really intends to **communicate darkly** ... is **insinuation and innuendo** to the effect that [plaintiff’s law firm] in general and [its members] in particular **lack sufficient integrity** to not breach the confidences communicated between [defendant] and [lawyer] and to suggest otherwise is naive. **It is fair to add that the experience of the undersigned has been that people who throw such insinuation or innuendo at others sometimes have personal familiarity with it.**”

**The Court believes that the above statement crossed the line between zealous representation and unnecessary ad hominem personal attack and thus has no place in a litigant’s brief. The Court will not countenance such attacks.**

*Roberts & Schafer Co. v. San-Con.*, 898 F. Supp. 356 (S.D. W. Va. 1995) (Goodwin, J.).



*Lee v. American Eagle Airlines*, 93 F.Supp.2d 1322 (S.D.Fla.2000)

-incivility of plaintiff's lawyers factored into the lodestar amount for prevailing party in a fee shifting case based on the following representative conduct (reduced fee award by \$358,423.20)

\*On first day of trial, plaintiff's lawyer said "Lets kick some ass" in front of opposing counsel, judge, and jury

\*At the beginning of everyday of trial, plaintiff's lawyer told opposing counsel, "Let the pounding begin"

\*In front of defense counsel's client, plaintiff's lawyer would ask, "How are you going to feel when I take all of your client's money?"

\*When court ruled against objections, one plaintiffs' lawyer threw a pen, stated another time, "This is outrageous," both plaintiff's lawyers' rolled their eyes, and flayed their arms

\*When accused of calling a defense counsel a second rate loser, plaintiff's lawyer denied calling the lawyer a "second rate" loser because he "didn't rate losers."

\*accused judge of bias any time he ruled against Plaintiff's positions

\*lawyer's statements about certain occurrences were contradicted by court bailiff and opposing counsel

**SANCTIONS!**

**CALLING OUT THE **BIG** GUNS**







# Statutory Authority-28 U.S.C. §1927

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

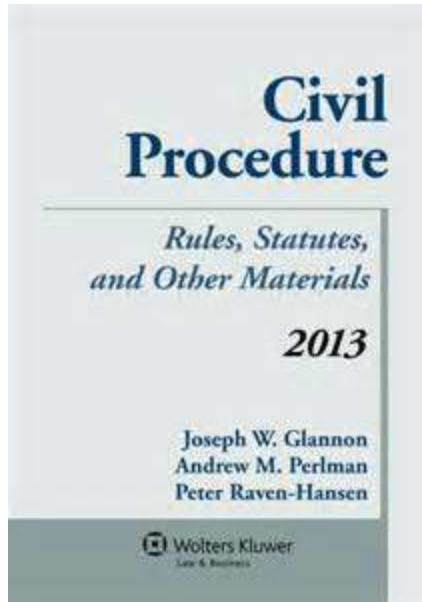
“You are being an obnoxious little twit. Keep your mouth shut.”

“You are a very rude and impertinent young man.”

“If you want to [] ask for sanctions [], go ahead. I would almost agree to make a contribution of cash to you if you would promise to use it to take a course in how to ask questions in a deposition.”

Plaintiff’s delayed the deposition by boasting about his performance in other non-related litigation during a lengthy, irrelevant, and self-serving diatribe.

*Unique Concepts v. Brown*, 115 F.R.D. 292, 293  
(S.D.N.Y.1987)



# **Civility Addressed Through the Rules of Civil Procedure**

**Rule 11**-court may sanction lawyer or client where a document, *inter alia*:

- a. has not been supported by a reasonable factual inquiry under the circumstances to establish factual contentions have evidentiary support or will likely have such support after discovery
- b. is presented to harass
- c. cause unnecessary delay
- d. increase the cost of litigation

**Rule 12**-court may strike, *inter alia*, scandalous language in a pleading.

Rule 11 and Rule 12 cover much the same ground. Fed. R. Civ. P. 11, 1983 adv. comm. note. (“Scandalous or indecent language is strong evidence that the pleading is filed for an improper motive. Such matter may be stricken under Rule 12(f) as well as dealt with under the more general language of amended Rule 11”).

“Filing otherwise legitimate documents that use abusive language toward opposing counsel could . . . violate [] rule [11] . . . .”

*Whitehead v. Food Max*, 332 F.3d 796, 805 (5<sup>th</sup> Cir. 2003)

# What is “scandalous” under Rule 12(f)?



A matter is scandalous “when it improperly casts a derogatory light on someone, usually a party to the action . . . . [it is] any *unnecessary* allegation which reflects cruelly upon the moral character of an individual, or states anything in repulsive language which detracts from the dignity of the court.”

Franklin D. Cleckley, et al., *Litigation Handbook on the West Virginia Rules of Civil Procedure* 408 n.1298 (2012) (emphasis added).

## Examples in Cleckley's Litigation Handbook:

- \*gratifying public spite

- \*promoting public scandal

- \*using court files as a reservoir of libelous statements for press consumption

Rule 11 and Rule 12(f) justified striking a motion containing the following language in *Pigford v. Veneman*, 215 F.R.D. 2,3 (D.D.C. 2003):

“Throughout this litigation, [USDA Lawyer] Michael Sitcov has persistently demonstrated the same racist attitude of U.S.D.A. workers who systematically destroyed the farms and lives of thousands of farmers, simply because they were black.”

“We believe Mr. Sitcov’s dishonesty or reckless [sic] disregard for the truth is inspired by his contempt for ‘lawyers of color’ who dare to challenge his unequal concern for black and white farmers.”



Following language struck under Rule 12(f):

“Counsel, in no way, wants this Court to conclude that it has been slighted or disrespected by his participation in a hearing before a judge in a sister Court, nor does he want to give the DOJ attorneys another ‘bullet’ by which they can attempt to discredit (kill) Counsel.”

*Hildebrandt v. Veneman*, 233 F.R.D. 183, 184  
(D.D.C.2005)





**Rule 30(d)(2)**-court may sanction where a person impedes, delays, or obstructs a deposition

**Rule 37**-if court compels discovery court must award attorneys fees and costs against the recalcitrant party or deponent or the attorney advising such conduct or both.

*GMAC Bank v. HTFC Corp.*, 248 F.R.D. 182 (E.D. Pa. 2008)

-Don't [frackin'] threaten me [hindend]

-Shut the [frack] up. Don't tell me what to do

-Go [frack] yourself, Bob

-I have a pair of [testicles] and you don't

-you're a piece of [feces] and a piece of [solid waste refuse]

-I'm the only person in your life that is [fracking] up your world and I enjoy it

-I swear my four-year-old knows more than you do

**Lawyer's inaction and failure to curb client was the functional equivalent of "advising" the witness's misconduct-joint sanction of \$22,322.**

*Paramount Communications v. QVC Network*, 637 A.2d 34 (Del. 1994)  
(conduct likely violated Rule 37 and Rule of Professional Conduct 3.5(c))

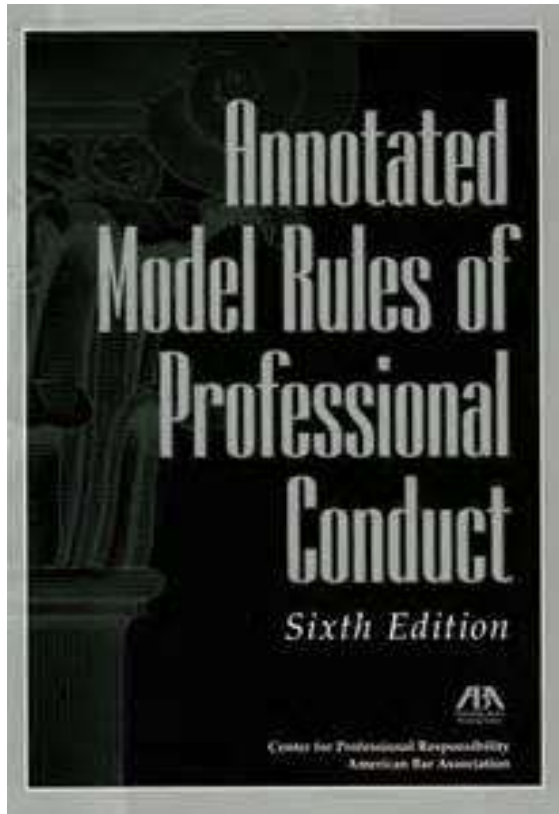
-Don't "Joe" me, [hindend].

-You could gag a maggot off a meat wagon.

-You have no concept of what you're doing.

-. . . Now look, I don't know what your intent in asking all these questions is, but, my God, I am not going to play boy lawyer.

-You fee makers think you can come here and sit in somebody's office, get your meter running, get your full day's fee by asking stupid questions.



# **Incivility Addressed the Rules of Professional Conduct**

*Lawyer Disciplinary Bd. v. Farber*, 488 S.E.2d 460, 466 (W. Va. 1997) (per curiam) (citing “*In the Matter of Vincenti*, 114 N.J. 275, 554 A.2d 470 (1989), indicating that discipline should be imposed for an attorney’s failure to act with common courtesy and civility.”)\*



\*Rule 3.2 [NJ courtesy rule] & 8.4(d) suspending attorney whose misconduct included challenging opposing counsel to a fight and who made profane and racist remarks about opposing counsel

**Rule 3.4(a)**-unlawfully obstruct another party's access to evidence

**Rule 3.5(c)**-not engage in conduct intended to disrupt a tribunal

**Rule 4.4**-cannot "use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person."

**Rule 8.4(a), (d)**- cannot violate or attempt to violate the RPC, or knowingly assist or induce another to do so, or do so through the acts of another; engage in conduct prejudicial to the administration of justice.

See ABA-Annotated Model Rules Prof. Cond. 8.4(d) (7<sup>th</sup> ed.) (8.4(d) covers "abusive or uncivil behavior toward opposing counsel, as well as parties and witnesses.")

***Kentucky Bar Assoc. v. Levit*, 351 S.W.3d 210, 213 (Ky. 2011)** (Rules 3.5(c) and 4.4(d)) (public reprimand)

-lawyer yelled and upbraided opposing counsel

-interrupted the trial court



-reduced his *own client* to tears





*Alexander v. Jesuits*, 175  
F.R.D 556 (D. Kan. 1997)  
(Rule 4.4 violation)

-Counsel (male) set an all day  
deposition of a 41 year old first time  
pregnant non-party witness with a full  
time job

-at 8:00 a.m. (contrary to district practice)

-Witness had to travel 60 miles leaving home at 6:30 a.m.

-Witness asked for deposition in her town, counsel refused  
*because—*

it was “*inconvenient*” for  
deposing counsel to travel



*In re Greenberg*, 9 So.3d 802 (La. 2009) (Rules 3.5 (d) and 8.4(d))

Greenberg calls another lawyer a...



Other lawyer, “Your mother is a...”



Greenburg then . . . .



*In re White*, 707 S.E.2d 411

(S.C. 2011) (4.4 and 8.4 violations)

No defense lawyer used language in a letter at client Church's request in zoning dispute between church and city



City manager “has no brains” and “questionable if he has a soul”

The “pagans at Atlantic Beach want to crucify Christ's body on Earth.”

“The Pagans of Atlantic Beach think they are above God and federal law.”

City council is insane and “pig headed”

Manager knows less about freedom of religion than a first grader



**INHERENT AUTHORITY**

**“Where an attorney’s misconduct so offends the integrity of the judicial system and a party’s right to a fair trial, the trial court has inherent authority to impose corrective sanctions.”**

*Clark v. Druckman*, 624 S.E.2d 427 (W. Va. 2005)

“We conclude that an attorney who submits documents to the district court that contain ad hominem attacks directed at opposing counsel is subject to sanction under the court’s inherent power to oversee attorneys practicing before it.”

*Thomas v. Tenneco*, 293 F.3d 1306, 1308 (11<sup>th</sup> Cir. 2002) (per curiam)

“a trial judge has the inherent authority to maintain decorum and to require civility of not only the parties to the case and their attorneys, but to witnesses as well.”

*People v. Davilla*, 603 N.E.2d 666, 674, (Ill. Ct. App. 1992)

***Gardner v. Waterman Steamship Corp.*, 2002 WL 31115252  
(E.D. La.)**

-Plaintiff requested a two week extension to file his response to a summary judgment motion because his wife was going to have surgery

-Defendant would not agree and court granted the motion to extend anyway

-In the Reply brief Defendant again argued over the extension

The Court cited to the Code of Professionalism and the ABA Guidelines for Litigation Conduct in entering the following orders to Defense Counsel



Start behaving with respect and consideration  
AND



Write a letter apologizing to the Court and Plaintiff's counsel!

*Johnson v. Johnson*, 948 S.W.2d 835 (Tex. App. 1997)

## Attorney Fined \$500 for filing frivolous appeal and Referred to Disciplinary Office

“The trial court’s pathetic determination to ‘take from the rich and give to the poor,’ regarding the entire Record of the matter of . . . separate property, is a classic example of disregard for the law and the facts, by a man incompetent to comprehend the case at hand.”

Counsel made similarly disparaging comments at oral argument even though it “pained” him to do so but he felt it necessary to do so to represent his client

# Contempt-

## The **Nuclear** Option



***Hirschfeld v. Superior Court, 908 P.2d 22, 30 (Ariz. Ct. App. 1995)***

Lawyer represented father in a custody dispute

judge continued the hearing leaving custody with pro-se mother overnight

Lawyer demanded of mother where she was hiding the child, and judge said mother did not have to answer and told lawyer to leave mother alone

Lawyer followed mother out of courtroom and again demanded to know where she hid the child

Mother tried to hide from lawyer after panic set in

Lawyer found mother and again demanded to know where the child was

Two deputies approached and the lawyer demanded mother be arrested for custodial interference

Lawyer's tone was abusive and harassing

Indirect criminal contempt

\$300.00 fine

and



Five nights in jail

If you practice law this



Al Pacino, as John Milton (Devil, a.k.a. Old Scratch), *The Devil's Advocate* (Warner Bros. 1997).

# The Answer to this question



*"Any chance of a plea bargain?"*

**IS NO!**