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Carl M. Selinger  
*West Virginia University College of Law*

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# West Virginia Law Review

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## THE WEST VIRGINIA LAW INSTITUTE: UNITING THE LEGAL COMMUNITY TO MODERNIZE STATE LAW

CARL M. SELINGER\*

[T]he American Law Institute is national. It does not and cannot concern state problems . . . . The West Virginia Bar Association, in conjunction with the College of Law of West Virginia University, has started a plan of joint research work on state legal problems which has the advantage of joining the active political force of the Association and the more scholarly work of the law faculty. It aims to utilize the services of the faculty of the law school in much the same way as the work of the reporters of the American Law Institute is utilized by the American Bar Association.

From "Bar and Law School Unite for Research in West Virginia," by Dean Thurman W. Arnold, *West Virginia University College of Law* (1929).<sup>1</sup>

While members of the College of Law's faculty have continued over the sixty years since Dean Arnold's article in the *American Bar Association Journal* to make important individual contributions to the modernization of West Virginia law and legal institutions,<sup>2</sup> there

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\* Dean and Professor of Law, West Virginia University College of Law.

1. 15 A.B.A.J. 67-68.

2. Some recent examples are DiSalvo, *The Key-Man System for Composing Jury Lists in West Virginia — The Story of Abuse, The Case for Reform*, 87 W. VA. L. REV. 219 (1984); Fisher, *Forfeited and Delinquent Lands — The Unresolved Constitutional Issue*, 89 W. VA. L. REV. 961 (1987); Lewin, *Comparative Negligence in West Virginia: Beyond Bradley to Pure Comparative Fault*, 89 W. VA. L. REV. 1039 (1987); Van Tol, *Crisis in Higher Education Governance: One State's Struggle for Excellence*, 91 W. VA. L. REV. 1 (1988); Wells, *Involuntary Dissolution as a Remedy for Freeze-outs of Minority Shareholders: Two West Virginia Statutes*, 88 W. VA. L. REV. 47 (1985). See also, F. CLECKLEY, *HANDBOOK ON EVIDENCE FOR WEST VIRGINIA LAWYERS* (2d ed. 1986); D. OLSON, *MODERN CIVIL PRACTICE IN WEST VIRGINIA* (1984).

is no evidence that efforts to institutionalize research collaboration between the law school and the bar survived much beyond Arnold's departure for Yale, initially as a visiting professor, in 1930.<sup>3</sup>

Today, collaboration has finally been institutionalized. On January 11, 1989, in the Senate Judiciary Committee Room of the State Capitol, the governing Council of the new West Virginia Law Institute convened for the first time. Established by the West Virginia Legislature in 1988, the Institute has been designated "an official advisory law revision and law reform agency of the state,"<sup>4</sup> and the legislation provides that its offices are to be located at the College of Law, in Morgantown.<sup>5</sup>

The West Virginia Institute is modeled on successful state institutes in Alabama and Louisiana, as well as on the American Law Institute. Its principal purpose is to "consider needed improvements in both substantive and procedural law and to make recommendations concerning the same to the Legislature."<sup>6</sup> The creation of the West Virginia Institute can be viewed as a recognition of the fact that in an era of keen, if not ferocious, competition between states to develop and market their economic resources and to attract and retain business enterprises, the modernization of a state's laws, as they relate directly to the economy and as they impact on the overall quality of life in the state, is absolutely essential.

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3. Dean Arnold also proposed in 1929 the establishment in West Virginia of a Judicial Council, which would draft state court rules, collect judicial statistics, exercise administrative control over the courts, and recommend needed legislation or executive action; and the faculty of the College of Law was to be the "research department" of the Council. Arnold, *Judicial Councils*, 35 W. VA. L. REV. 193, 209-10 (1929). Such a Council, with the law faculty serving as its "bureau of research," was established by the Legislature in 1933. (Act of March 23, 1934, ch. 71 W. Va. Acts 191 (most recent version codified at W. VA. CODE § 56-11-1 *et seq.* (1966)), amended and reenacted by Act of March 8, 1947, ch. 122 W. Va. Acts 442, partly repealed by Act of March 11, 1953, ch. 142 W. Va. Acts 416, amended by Act of February 20, 1957, ch. 98 W. Va. Acts 537, repealed by Act of February 25, 1986, ch. 153 W. Va. Acts 1045). However, in 1947, the legislation was amended to permit the Council to hire its own researchers "if the faculty of the College of Law . . . shall be unable to render adequate and proper service," and a position of Executive Secretary was created (Act of March 8, 1947, ch. 122 W. Va. Acts 442); in 1953, the Executive Secretary position was eliminated (Act of March 11, 1953, ch. 142 W. Va. Acts 416); and, in 1986, the legislation was repealed in its entirety. (Act of February 25, 1986, ch. 153 W. Va. Acts 1045).

4. W. VA. CODE § 4-12-1 (Repl. Vol. 1987).

5. *Id.*

6. W. VA. CODE § 4-12-2(a) (Repl. Vol. 1987).

The problem, of course, is that in this regard, as in others, the saying that "the rich get richer" is apt to apply. Some states have well-paid full-time legislatures, legislative committees and executive agencies with large legal staffs, and major private foundations either carrying on by themselves or otherwise supporting significant law revision and law reform efforts. West Virginia does not have these resources. During short legislative sessions, lawmakers are unavoidably preoccupied with major current controversies. The Office of Legislative Services has performed valiantly but is simply not equipped to take on large-scale projects. And an unsystematic reliance on bar committees is not well calculated to develop a body of expertise in terms of research techniques and drafting and codification skills.

Moreover, there has often been no effective counterweight of objective professional analysis to balance the drafting and lobbying resources of economic and political special interests. Indeed, when segments of the bar or the judiciary have supported legislation, they have tended to be viewed simply as additional (and not very strong) special interests. For decades, pieces of proposed legislation that could be characterized as "lawyers' bills" have stood little chance of passage. By contrast, all of the completed law revisions (with explanatory commentaries) proposed by the Alabama Institute have been enacted.<sup>7</sup> The enactments include an Eminent Domain Code, a Probate Code, a Banking Code, a Criminal Code, an Administrative Procedure Act, a Business Corporation Act, a Limited Partnership Act, and a Professional Corporation Act.<sup>8</sup>

No state funds have been appropriated for the West Virginia Law Institute.<sup>9</sup> But "seed money" support is being sought from private sources to enable it to employ a small staff, which will begin to develop expertise in research, drafting, and codification. Law professors and lawyers who specialize in the areas of the law in question will be retained as project Reporters, and the work of the

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7. ALABAMA LAW INSTITUTE, REPORT TO THE ALABAMA LEGISLATURE AND INSTITUTE MEMBERSHIP 1985-86 (1986).

8. *Id.* at 15-18.

9. W. VA. CODE § 4-12-4 (Repl. Vol. 1987).

Reporters will be reviewed in detail and at frequent intervals by relatively small but expert project advisory committees of lawyers, judges, and other knowledgeable citizens.

Because the advisory committees will be drawn from all elements of the bar and public that may be interested in a particular subject, and because the work of the committees will be reviewed in turn by the Institute's broad-based Council and the membership as a whole, the final drafts of law revisions will already embody resolutions of pre-existing conflicts. Thus, the legal profession will be able to speak with a single objective voice.

By statute, the governing Council, which elects the Institute's officers and decides on projects to be undertaken, includes representatives of the Legislature, the Supreme Court of Appeals, the Circuit Courts, the Board of Governors of the State Bar, and the College of Law, as well as the Attorney General, the Legal Counsel to the Governor and the Director of Legislative Services. The Institute's By-Laws, which were adopted by the Council on January 11, provide for a full membership consisting of all members of the Council; all state judges, law faculty, and lawyer-legislators; and up to seventy-five additional lawyers, to be chosen by the Council.<sup>10</sup>

Valuable by-products of the Law Institute framework will include recognition, through invitations to participate in the work of the Institute, of excellence in all fields of law practice and improved communication on important issues between key elements of the West Virginia legal system.

The location of the West Virginia Law Institute at the College of Law in Morgantown will symbolize its independence and professional objectivity, as well as provide it with access to the state's most comprehensive collection of research materials in law and related academic disciplines, and will allow it to draw upon the specialized knowledge of West Virginia University faculty and the research assistance of students.

On January 11, the Council elected Wade T. Watson, Esq., of Bluefield, as President of the Institute for 1989-90, and the writer

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10. W. VA. CODE § 4-12-3 (Repl. Vol. 1987).

as Secretary; it elected Larry L. Skeen, Esq., of Ripley, as the third member of the Executive Committee. After considering several possible initial law revision and law reform projects, the Council authorized the Executive Committee to proceed, to the extent limited resources will allow, to implement a project proposed by Professor John W. Fisher II, of the College of Law, to study and propose changes in West Virginia's intestate succession and spouse's forced share laws.<sup>11</sup> A Reporter and a project advisory committee are to be appointed for this project.

The Executive Committee will also appoint a Nominating Committee to recommend lawyer members for the Institute and a Planning Committee to recommend future projects, which necessarily will be very limited in number until some funding is obtained for an administrative staff. These Committees will report back to the Council at its next meeting, which will be held in Huntington, in April, in conjunction with the annual convention of the State Bar.

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11. See Fisher, *Spousal Property Rights—'Til Death Do They Part*, 90 W. VA. L. REV. 1169 (1988).

