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The Public And the State Bar

Charles C. Wise Jr.
West Virginia State Bar

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CHARLES C. WISE, JR.**

THE world is on the move, and we, as lawyers, must keep pace. In a measure, we should chart the direction of travel.

While the proper administration of justice is an important concern of every citizen, does not the public have every reasonable right to expect literally everything from the bench and bar in leading the way to improvement in the broad field of administration of justice? Not only must we conduct the matters our clients have entrusted to us with honesty and competency, but we must also constantly consider ways and means of fulfilling our public trust more efficiently. To do this, we should ascertain what the public thinks about us.

That the lawyer must give serious consideration to public opinion is at once obvious. No court, no lawyer, law or bar group can exist in a vacuum set apart from laymen; we are wholly dependent upon the public for our professional employment and our livelihood. And today the need to analyze fairly and objectively what the public thinks of lawyers and the law is more important than ever before. This century has seen tremendous inroads made upon the practice of law, not only by competitive businesses and professions, but also by the development and extension of far flung extra-legal tribunals for the settlement of controversies. Lawyers have long been critical of bureaus, administrative agencies and arbitration panels, and it is believed that litigants and the public generally are likewise convinced that such tribunals do not render as good a brand of justice as courts are capable of providing.

Why, then, have we witnessed the twilight of the courts and the ever-increasing expansion of extra-legal means of settling controversies? Some believe that one cause for this situation is the poor public relations of lawyers and bar groups with the public; and that improving public relations may ameliorate our difficulties. Others, with sound reasons, believe that the bar now enjoys the best public relations it has ever had in the long history of the profession. There are more lawyers doing more business and handling more important matters now than ever before, and there is a bare

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** President of the West Virginia State Bar, 1949-50; member of the Kanawha County bar.

minimum of defalcation on the part of the practitioner to bring disrepute upon the profession as a whole.

Is it not reasonable, then, to suggest that the answer to the problem goes much deeper than mere matters of public relations, however important that subject may be? Most West Virginia attorneys are cognizant of the survey conducted among laymen in Iowa a few years ago, which disclosed that *long delays* and *high fees* constituted by far the major criticisms of our courts and of the legal profession.[1] We, of course, can show that lawyers' office and other costs have sky-rocketed, and we can rationalize in our minds the delays (some justifiable) which all must admit do exist in disposing of legal matters. At the same time, there is more than a little truth in the public's appraisal of bench and bar, and we must meet these criticisms straightforwardly. In the final analysis, what the public thinks of us must not only be recognized, but will control the future of the profession. If it be true that the public does not prefer administrative tribunals and arbitration proceedings, but by experience businesses and individuals have found that they can resolve their difficulties by such methods, however somewhat imperfectly, a great deal more expeditiously and at far less cost than in a court of law, certainly we should do our part to stem this tide which endangers both the caliber of service to the public and our profession.

Doubless some of you were startled to see in the August, 1950, American Bar Association Journal a table which lists West Virginia forty-third among the forty-eight states on the basis of acceptance of the minimum standards of judicial administration, and these are minimum standards, mind you, worked out and approved by the American Bar Association more than ten years ago. Of even more startling import, our state ranks forty-seventh among all the states of the union respecting *evidence* and is fourth from the bottom respecting *trial practice.* These minimum standards cover nine general subjects,[2] and if it were not for the fact that West Virginia's legislature has recognized the inherent rule-making power of the courts respecting items of practice and procedure,[3] has provided an administrative assistant to the supreme court,[4] and, if our Supreme Court of Appeals had not provided by rule for pre-trial

[1] See *The U. S. Bar,* 39 FORTUNE 90 (May 1949).
[2] Porter, *Minimum Standards of Judicial Administration,* 36 A.B.A.J. 614 (1950).
[3] W. VA. CODE c. 51, art. 1, § 4 (Michie, 1949).
[4] W. VA. CODE c. 51, art. 1, § 15 (Michie, 1949).

conferences,[5] it might very well be that West Virginia would be found at the bottom of the list instead of ranking forty-third. As it is, our state in twenty-nine particulars received the lowest rating. It is not unfair, then, to state that our working rules are defective, even by standards set by fellow lawyers.

Respect for the court and for the legal profession is dependent upon what the public thinks about these working methods of our courts and the bar. If we are honest in an appraisal of our system, we must admit, however reluctantly, that many anachronisms exist in our practice which are no longer found in any place where the Anglo-Saxon system of law prevails. While comparisons are difficult, it can be said with considerable truth that West Virginia retains many of the artificial technicalities of the common law which were abolished in some of the states of the union a century ago and in England, the mother of our common law system, more than seventy-five years ago. It may be further said with a fair degree of accuracy that West Virginia retains more of the characteristics of the common law, both in substance and in practice and procedure, as it obtained in England three centuries ago, than any other state of the English-speaking world.

To characterize common law pleading and practice as anachronistic and dilatory cannot be done lightly by a West Virginia lawyer, for it holds a tenacious grip upon our minds. Many of our ablest practitioners look upon common law pleading and our system of law, as did Blackstone, as the very epitome of logic and reason; and any suggestion of change thereof is to be beaten down with every force at the command of the profession.[6] In a sense, this attitude has characterized every effort to reform the law, and it is to be expected of a conservative, intelligent profession. Few of us would quarrel with those who believe the common law system to be the most logical ever devised by man and its mastery an art. But by the same token, a mathematical puzzle or a chess game is absolutely perfect from the standpoint of logic and reason, but a puzzle or game may not provide the most speedy and inexpensive settlement of disputes.[7] A lawsuit should not be a contest between attorneys with the victory going to the more experienced common

[5] Rule XV, RULES OF PRACTICE FOR TRIAL COURTS (1945).

[6] Wyckoff, *Our Changing Common Law,* 48 W. VA. L.Q. 25 (1941).

[7] These statements are not to be construed as an indictment of the common law system as a whole. That the great body of substantive law is the bulwark of our jurisprudence cannot be challenged or denied. But it is believed the efficacy of common law pleading and practice as distinguished from substance is another story.

law pleader. The object of every judicial inquiry is to arrive at the truth and the simplest and easiest way of ascertainment thereof should be the rule, rather than adherence to many artificial barriers which may not only becloud, but, in many instances, actually may prevent the attainment of a just solution to a case. Even the few practitioners who are masters of common law pleading and practice must realize that to every one of such experts there are nine other lawyers who have an inadequate grasp of its intricacies and technicalities which can be mastered only after years of study and practice. Trial by battle, trial by wager and other barbarisms are just as much a part of our common law heritage as its rules of pleading. The former have long been discarded; yet the ghosts of the latter are still with us.[8]

Once we lawyers are convinced that common law pleading and practice is no longer adequate or desirable for efficient handling of disputes, the further question remains of how and with what we can effect a change for the better. Basically, there are two alternatives: legislation and the rule-making power.

Experience has proved rather conclusively that legislation is not suitable for the revamping of procedural rules. The legislative codification of laws of practice and procedure has never proved altogether satisfactory either in this country or in England. Legislative reform is piecemeal, frequently drafted hastily and with the sole object in mind of remedying some manifest defect in a particular case. The so-called code states, such as New York, which have attempted voluminous and comprehensive legislative enactments are now bogged down by the fossilization of their codes. The rule-making power of the courts, on the other hand, it is believed, offers a more constructive means of modernizing practice and procedure. England was one of the first to recognize the feasibility of this power in dealing with reform in the law. Many states have enjoyed the same benefits, one of the most recent of which is Virginia, which on February 1, 1950, by twenty-two short rules promulgated by the supreme court of appeals of that commonwealth, occupying only eight printed pages, wiped out the vestiges of common law pleading and practice and provided simple but comprehensive practice and procedure for all actions at law.

The use of the rule-making power affords more flexibility, more opportunity for experimentation by trial and error, lends

[8] See Wyckoff, *supra* note 6, and Nesbitt, *The Proposed Changes in Federal Practice,* 43 W. VA. L.Q. 23 (1936), 110 (1937).

itself to easy amendment of any defective rule, and of significant importance, it places responsibility on bench and bar for improving the machinery of justice where it rightfully belongs, rather than in the legislature.

Believing that the rule-making power should be exercised in West Virginia, where should we look for guidance? It is respectfully suggested that the Federal Rules of Civil Procedure are admirably suited for use within this state. Most of us have had experience with the Federal Rules which were adopted in 1938, and thus have twelve years of intensive experience to recommend them. Since their inception, thirteen states have adopted the Federal Rules of Civil Procedure, in whole or in part, for their own civil practice, and vigorous campaigns for the adoption thereof are now being waged in nine other states. Recently, rules for criminal procedure have been adopted in the federal courts; one state, New Jersey, has adopted them, and three other states are seeking to put them into effect.[9]

Time will not permit us here to analyze and discuss in detail the advantages of the Federal Rules. This has been done by able students of the law.[10] There are, however, certain significant advantages which may be summarized. It is believed that we would achieve the following, among other benefits:

First: We would abolish all technical forms of action at law, such as covenant, debt, assumpsit, detinue, trespass, *etc.*, and substitute one form of action. Is there any of us who has not been puzzled at times (even after days of study) to determine just what form of action under our existing system of pleading should be brought?

Second: The distinctions between law and equity would be eliminated. It is doubtful if there is any lawyer in the state who has not been embarrassed by bringing a suit at law which the court holds should have been brought in equity or vice versa. We let the same judge act as chancellor and sit in actions at law, and it would seem no purpose is served by the present distinction.

Third: Under the Federal Rules, instead of an intricate, prolix declaration, we would simply set forth a short and plain statement of the claim or claims of our client in *plain English.* For example, Form 9 appended to the Federal Rules, a complaint for negligence,

[9] From information furnished by the American Judicature Society, Ann Arbor, Michigan.

[10] Lugar, *Common Law Pleading Modified Versus the Federal Rules,* 52 W. VA. L. REV. 137 (1950), and the excellent bibliography found in notes thereto.

merely alleges that on a certain date in a public highway called Boylston Street in Boston, Massachusetts, defendant drove a motor vehicle against plaintiff who was then crossing the highway, as a result of which plaintiff was knocked down, had his leg broken, was otherwise injured, was prevented from transacting his business, suffered great pain of body and mind, incurred medical expenses of one thousand dollars, and concludes with a demand for judgment of ten thousand dollars. Do any of you think that our courts would hold a declaration in this state good, phrased so simply?[11] How many days has each of us wasted in preparing common law declarations, frequently with many counts, which perhaps tended more to confuse than clarify the issues?

Fourth: A multiplicity of technical pleadings under the common law would be obliterated. Demurrers, pleas in abatement, rejoinders, special pleas, rebutters, *etc.,* could no longer be used. Why should a lawyer have to struggle for half a day on a plea of the general issue, if there is one, in an action of covenant?

Fifth: Every lawyer would be as much at home in the federal courts as in the state courts from the procedural standpoint, and after all, if a client is entitled to the same relief, is there a very good excuse for giving him a more delayed and expensive type of justice in a state court than prevails in the United States court house, across the street?

Sixth: Under such rules it would be possible for a litigant to secure in the same action a determination of every justiciable claim that he has against the other in one suit, and, of course, if a third party has an interest in any part thereof, he could be joined and all matters disposed of in one proceeding.

Seventh: Under the Federal Rules there is great improvement in appellate procedure by reducing the allowable period of time for taking appeals from eight months to sixty days, and provision made for printing only so much of the record, as appendices to the briefs, as counsel consider necessary. In every other particular the federal appellate practice is simpler and cheaper than state practice and delays are greatly reduced.

Eighth: Those who are experienced in using the Federal Rules are agreed, in general, that they reduce the time required for the final determination of a suit by at least one-half as compared with

[11] It is ironical to note that this form is a verbatim copy of Chitty's common law form of action of trespass on the case and has been the statutory form for negligence in Massachusetts for years.

common law practice.[12] Thus, by reason of the simplicity and expediency of the actual litigation, the practitioner would not have to devote so much time to technical and artificial rules, and he could handle perhaps twice as many suits in the same time and with the same effort. And, since he could handle more work, he could charge less for each individual case.

The time is ripe for affirmative action on the part of the bench and bar to protect both the public and the profession by discarding our outmoded system and adopting better machinery for the administration of justice. The Judicial Council of this state, to its great credit, is aware of our need and has recently appointed a special subcommittee to consider the whole field of practice and procedure. The State Bar is cooperating fully in this great work. To achieve a truly satisfactory solution, however, requires the active interest and thoughtful contribution of every member of the profession. Since the citizens of West Virginia through the legislature have properly seen fit to entrust the Supreme Court of Appeals with the rule-making power, a corresponding responsibility of using such power wisely and well is thrust upon bench and bar. Whether you agree with the conclusions stated here is of little importance. The only point of vital significance is whether we shall heed the public demand and help provide the highest quality of justice with the least delay at the lowest cost of which we are capable.

Woodrow Wilson some years ago stated that "A bar association should be greater than the individual lawyer. It should embody not the individual ambition of the practitioner, but the point of view of society with regard to the profession." It is believed that no legal system can long survive or command public respect and confidence unless it meets the shrewd native sense of justice of the people of our land. Nor should it survive. The law is not a game of chance. It should be an effective method of resolving disputes. Of course, it will never be perfect because it is human, but striving for the goal is and must be the destiny of our profession.

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[12] Contrast the views of Wyckoff, *supra* note 6, who says: "Past time and events have shown that where justice should be done and wise conclusions reached, there should be calm deliberation—not haste . . . . We are now living, legislating, litigating, deciding in a hurry." See also, Holdsworth, *The Year Books*, 22 L.Q. REV. 360, 382 (1906), who says: "Its [the common law] weakness is caused largely by the very defects which are inherent in its virtues . . . . It can only advance step by step from precedent to precedent. It cannot disregard the logical consequences of its principles, though in practice their application may be inconvenient. It is loath to admit new principles, and will not do so unless compelled by such considerations as the loss of business consequent upon the competition of a rival court."