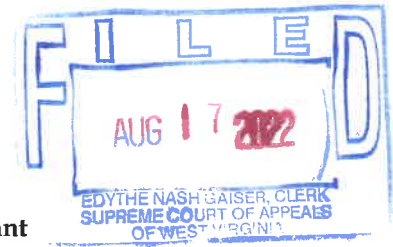


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Independent Adjuster
Company Adjuster
Public Adjuster

August 15, 2022

Honorable Edythe Nash Gaiser, Clerk
Supreme Court of Appeals of West Virginia
Building One - Room E-317
1900 Kanawha Blvd., East
Charleston, WV 25305

RE: Proposed Amendments to the West Virginia Rules of Civil Procedure

Dear Ms. Nash Gaiser:

Attached please find comments to certain of the proposed amendments to the West Virginia Rules of Civil Procedure for your consideration. My compliments, and gratitude, to both you and each member of the Committee for this fine work.

Thanking you for the opportunity to comment, I remain

Respectfully yours,

A handwritten signature in blue ink, appearing to read "VJ King".

Vincent J. King

c: Honorable Joseph K. Reeder c/o U.S. Mail: 12093 Winfield Rd., Winfield, WV 25213
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SCANNED

Rule 22 Interpleader

This rule allows a person or entity facing dual exposure to require rival claimants to interplead their respective claims. That's appropriate where, for example, a life insurance policy names the insured's "wife" as beneficiary but, in fact, at the time of his death the decedent is survived by his first wife, to whom he was married at the time of policy inception, and his second wife to whom he was married at the time of death. The carrier should only have to pay the face amount once despite the ambiguity and the potential of rival claims. Allowing the respective wives to bring separate claims would risk inconsistent results and double exposure.

But the rule does not require that the claims be related. So, for example, a liability carrier issuing a policy with an Annual Aggregate Liability Limit could complain that two or more wholly unrelated losses might combine to exceed the aggregate limit, and could thus force the claimants to likewise interplead. Particularly given that the rule further allows the insurer to simultaneously contest any liability whatsoever, that seems particularly unfair. At a minimum, it should have to concede the single limit for all claims combined and pay that amount into the interpleader court clerk without contest.

The concerns raised with respect to this rule are not triggered by the proposed change. They each existed before draft changes but, if we are now amending, I am hopeful they could simultaneously be addressed.

* * *

Rule 26 Duty to Disclose: General Provisions Governing Discovery

- I do considerable consulting and rendering of opinions on insurance coverage and extracontractual issues. Often, I perceive issues to be matters of law for the Court but, because expert disclosures are due before summary judgment rulings, retaining counsel will ask me to render an opinion "just in case". I recommend that Rule 26(a)(2)(D) be further amended to provide for automatic withdrawal of opinions on issues ultimately determined by the Court, or provide for additional supplementation within a certain time-frame following such rulings.
- I am often cross examined with prior testimony. Thus, reading of depositions and preparation of errata is essential. That sometimes leads to dispute as to who should bear that expense. I recommend that Rule 26(b)(4)(E) be further amended to specifically address the expense of reading the transcript and preparation of errata with respect to expert depositions. Whatever general rule is decided could certainly include a proviso "unless otherwise agreed". Alternatively, this suggestion could be inserted within Rule 30(e).
- Protective Orders have become rote with little attention given to the impact on persons other than the scribes. Typically, expert witnesses are implicated. The S.D.W.Va uses a problematic form often borrowed for use in other cases. It provides

for not only the return of protected documents but also any notes prepared therefrom. Expert witnesses need to be able to retain the original copy of his or her own notes in case of subsequent suit with respect to opinions rendered or payment thereof. Likewise, as mentioned above, experts are sometimes cross examined with depositions given in other cases and need to be able to refresh their recollection as to the basis for an opinion previously rendered. I recommend that Rule 26(c) be further amended to add a new subsection (4) addressing the return of protected documents and exempting an expert's own notes.

* * *

Rule 30 Depositions By Oral Examination

Although reading and preparation of deposition errata is routinely permitted, I sometimes see dispositive motions quoting testimony as initially transcribed without reference to errata duly submitted. I recommend that the Notice of Filing requirement contained within proposed Rule 30(f)(4) further specify that, if a deposition is filed, the errata must be included.

* * *

Rule 45 Subpoena

The proposed amendments to Rule 45 appropriately include modern-day electronically stored information. Many subpoena recipients, however, do not have IT staff. The amendment should specifically address the time and expense, and burden with respect to, producing ESI.