WEST VIRGINIA ASSOCIATION *for* JUSTICE

October 11, 2022

Edythe Nash Gaiser, Clerk of the Court
Supreme Court of Appeals of West Virginia
Building 1, Room E317
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305

Dear Ms. Gaiser,

On behalf of the West Virginia Association for Justice and its president, Scott Windom, please accept our comments on the proposed rules of civil procedure. We thank the Court for this opportunity to submit comments and have provided one copy for each Justice and one for the Clerk's office.

If the Court, members of the rules committee, or you have questions regarding our comments, please feel free to contact me at (304)343-2900 or matt@thewvlawfirm.com.

Sincerely,

Matthew Stonestreet, Chair
WVAJ Committee on the Proposed Rules

Preamble

The West Virginia Association for Justice ("WVAJ"), a body that primarily provides legal representation to consumers and ordinary West Virginia working people, after a thorough review of the *Proposed Amendments to the West Virginia Rules of Civil Procedure*, believes that our current Rules of Civil Procedure provide fair and understandable Rules to govern civil actions in our Circuit Courts. Importantly, there is a significant body of case law interpreting these Rules which enhances their understanding and application. In sum, the West Virginia Association for Justice does not believe that an overhaul of our current Rules of Civil Procedure is necessary and, as proposed, these changes very well may be counter-productive resulting in increased costs of litigation to our citizens who can least afford it.

Critically, Rule changes are offered with no analysis of the cost burden the proposals will impose on court budgets, court staff workloads, and litigants. The proposed Rule changes are essentially a copy-and-paste approach to federalize the West Virginia Rules of Civil Procedure. Virtually every single Rule comment states that it "…is changed to be consistent with the corresponding federal rule."[1] The West Virginia Court System does not operate under an equal budget provided to the United States District Courts or with an equal court staffing census, but our West Virginia Circuit Courts must maintain a civil case filing load more than twelve times the load in West Virginia's federal system. In that regard, the 2021 statistics for the West Virginia Court System reflect 21,322 civil case filings. The civil case filing statistics for March 2019 to March 2020 reflect a total filing number for Northern and Southern West Virginia Districts combined of 1,762. Thus, West Virginia state courts are operating on lower budgets, with less staff, while being tasked with incomparable caseloads. An exploration of the cost burden the proposals will bring is beyond necessary.

Similarly, it is necessary to examine the cost burden placed on litigants. Like the disparity in budget to case ratio, which exists between the federal and state court systems, there is a large disparity in case values between the federal and state court systems. West Virginia Circuit Courts maintain jurisdiction, with limited exceptions, over all civil cases in which more than $7,500 is at issue. The United States District Courts have a jurisdictional threshold of $75,000. Applying procedural Rules which impose high costs on litigants disputing a claim worth $8,000, in essence prices them out of litigation and their ability to achieve due process. A copy and paste approach to Rule revision does not work when court budgets, court staffing and jurisdictional thresholds are not the same. Copying federal rules that are applied in complex litigation, or litigation that can only occur in a small well-defined subset of federal cases,[2] is not an efficient and just way to handle state court disputes.

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[1] *See generally, Proposed Amendments to the West Virginia Rules of Civil Procedure.*

[2] Historically, the narrowing of discovery and proportionality amendments to the federal rules arose from a need in securities litigation and intellectual property litigation, which cannot even be litigated in state courts. Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and*

The WVAJ further observes the proposed Rule changes are offered as a solution where no problems to solve were first identified. It is necessary to first identify specific problems with the existing West Virginia Rules so changes are targeted to best solve those problems. Adopting a solution that resolves no defined problem creates many obstacles and unintended consequences interfering with efficient state court litigation. The federalization of West Virginia's Rules will impede the flexibility and authority circuit courts need to manage their dockets. The proposed changes include procedural time burdens which inflexibly slow down case progression of some types of cases where the court and litigants could reach expeditious resolution. The procedural time burdens will also inappropriately speed up the progression of cases where the court and/or litigants need more time. In short, the rules impose more and inflexible procedures where no failure of procedure has been identified or exists.

There is also no exploration of any identified problems that the committee seeks to address. Without any identification of problems that warrant wide-ranging transubstantive changes to our West Virginia Rules, the proposed amendments repeatedly state the purpose is "...to be consistent with the corresponding federal rule."[3] No rationale is offered for why non-transubstantive problems in federal cases (discovery issues in securities cases or intellectual property cases) would lead to changes in the West Virginia Rules of Civil Procedure. If federal rules are to be copy-and-pasted, at least the impact and reason for those changes should be explored and analyzed.

Copy-and-pasting rules causes other serious – and functional – problems as well. For instance, the proposed amendments to Rule 23(h) require an affidavit to be submitted pursuant to Rule 54(d)(2) in order to obtain attorney fees in a class case. Rule 54(d)(2) does not exist in either the current rules or the proposed amendments. This would effectively create a process that is functionally impossible to comply with and is clearly an error. Copy-and-paste problems are found in other provisions throughout proposed amendments.[4]

Of particular concern is narrowing the scope of discovery, as the proposed amendments seek to accomplish. This is inconsistent with the practical experience of attorneys in West Virginia and attorneys practicing nationwide. The uniform experience of WVAJ membership is that obstructionism is commonplace in the discovery process, which is consistent with nationwide attorney surveys showing that 89% of defendants' attorneys and 93% of plaintiffs' attorneys reported that "just the right amount" of information or even "too little" information had been provided in discovery.[5] Further

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Trials on the Merits: Reflections on the Deformation of Federal Procedure, 88 N.Y.U. L. Rev. 286 (2013). This makes copy-and-pasting recent changes made to federal rules even more dubious.

[3] *See* FN 1.

[4] *See* other specific errors listed *infra*.

[5] Emery G. Lee III & Thomas E. Willging, Federal Judicial Center National, Case-Based Civil Rules Survey: Preliminary Report to the Judicial Conference Advisory Committee on Civil Rules (2009).

narrowing the scope of discovery and creating brand new objections to withhold evidence will not aid the process. Instead, it will increase litigation expense and harm self-represented litigants and those without resources to commit to an already overwrought motion practice.

The proposed amendments outright reverse longstanding decisions of the West Virginia Supreme Court of Appeals ("WVSCA").[6] Certainly, radical change should not sweep through the justice system without an analysis of the benefits and costs of implementation. Reversing WVSCA decisions and impacting new policy goes far beyond the historical purpose of our state's rules of civil procedure. The presumption of the rules since adoption is that the justice system should depend less on the capacity of parties to state positions on paper, and more on the evidence merits of a position.[7]

At least in part, the stated goal of the proposed revisions is "modernizing" West Virginia's Rules of Civil Procedure. This is an odd choice of words, as "modernization"

This survey was conducted in regard to rules prior to adoption of the 2013 proposed amendments, which included narrowing discovery and new "proportionality" objections.

[6] Narrowing the scope of discovery and the addition of new objections drastically reverses longstanding decisions governing discovery: *State ex rel. Massachusetts Mut. Life Ins. Co. v. Sanders*, 2012, 724 S.E.2d 353, 228 W.Va. 749 (Finding that the scope of discovery includes all information "...reasonably calculated to lead to the discovery of admissible evidence."); *see also State ex rel. Shroades v. Henry*, 187 W.Va. 723, 725, 421 S.E.2d 264, 266 (1992), and Syl. Pt. 1 of *Evans v. Mut. Mining*, 199 W. Va. 526, 485 S.E.2d 695 (which provides "Civil discovery is governed by the *West Virginia Rules of Civil Procedure*, Rules 26 through 37. "The Rules of Civil Procedure generally provide for broad discovery to ferret out evidence which is in some degree relevant to the contested issue. (footnote omitted)." *Policarpio v. Kaufman*, 183 W. Va. 258, 261, 395 S.E.2d 502, 505 (1990). Discovery disputes that must be resolved by the circuit court are addressed to the circuit court's sound discretion, and the circuit court's order will not be disturbed upon appeal unless there has been an abuse of that discretion."). Abrogation of current Rule 56(f) reverses many decisions encouraging resolution of cases on their merits with full discovery and favoring fairness over process: *Harbaugh v. Coffinbarger*, 2000, 543 S.E.2d 338, 209 W.Va. 57; (Reasoning that "[o]pponent of summary judgment motion requesting continuance for further discovery need not follow exact letter of summary judgment rule in order to obtain it."); *see also Payne's Hardware & Bldg. Supply, Inc.* v. *Apple Valley Trading Co. of West Virginia*, 490 S.E.2d 772, 200 W.Va. 685 (1997); *Powderidge Unit Owners Ass'n v. Highland Properties*, Ltd., 474 S.E.2d 872, 196 W.Va. 692 (1996); *Williams v. Precision Coil, Inc.*, 459 S.E.2d 329, 194 W.Va. 52 (1995). Proposed Rule 15 no longer permits amendment by right: *Emps. Fire Ins. Co. v. Biser*, 161 W. Va. 493, 493, 242 S.E.2d 708, 709 (1978) (A trial court should permit a party to amend his pleading once as a matter of course at any time before a responsive pleading is served and, unless the amendment will prejudice the opposing party by not affording him an opportunity to meet the issue, the refusal to permit such amendment will constitute reversible error).

[7] Arthur Miller offers a more uncomfortable rationale for the copied federal rule changes favoring process over substance: That it is merely a continuation of efforts to protect resource rich institutions by constraining the justice system from doling out consequences. Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. Rev. 286 (2013).

is a term associated with increasing efficiency and production while reducing cost via the use of innovative technology or ideas. The proposed modifications to West Virginia's Rules of Civil Procedure are the antithesis of modernization. The modifications increase cost, decrease efficiency by placing unnecessary time and workload burdens and, perhaps most importantly, are a simple retread of an inapposite framework meant for a wholly different system.

Finally, one must recognize the goal of implementing the proposed amendments "to be consistent with the corresponding federal rule" will set West Virginia on a costly path to maintain procedural change at the same pace as the federal system. The federal rules of civil procedure are reviewed yearly and revised in some manner nearly every year. The change process includes opening each change up for comment and often testimony in congressional hearing. Once a decision is made to federalize the state court rules, West Virginia is setting upon a costly and continues rules review and revision process.

Because the proposed changes are unnecessary and premature, and the presumptions underlying these proposed amendments impede the longstanding goal of merits-based outcomes and make preference for process and paper, WVAJ cannot support the proposed changes. Evidence, juries, and justice must not be washed out by process. If the task were to simply copy the federal rules, it is accomplished. If the task is to seek just[8] resolutions of disputes (the stated point of the rules in the first place) it is not accomplished.

Comments to Proposed Rules, by Order of Significance

Proposed Rule 26

Rule 26 is the cornerstone rule for conducting discovery in West Virginia state courts. Discovery is vital to the fair and effective presentation of a civil case and, most notably, to its just resolution. Understanding the vitally important role discovery plays in the just resolution of civil disputes, then it must be accepted that restrictions and limitations on discovery must be undertaken with great caution, studied research, fair examination of views expressed, and empirical data. However, the proposed amendments seek to

[8] "They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." W. Va. Rule of Civil Procedure 1.

impose cumbersome requirements and limitations on the discovery process by replacing our current Rule 26 with Federal Rule 26 with a few problematic caveats and drafting errors referencing non-existent rules. This wholesale replacement of our Rule 26 will create many problems in our state court civil justice system including, but not limited to:

- Narrowing the scope of discovery and limiting litigant access to evidence;
- Increasing costs for the court system and all litigants;
- Making the discovery process more cumbersome;
- Increasing discovery disputes and the need for judicial intervention which increases the work load on court system staff; and
- Denying access to justice to many West Virginia citizens, self-insured defendants, and small businesses.

If the proposed amendments to Rule 26 are adopted, long established rules and case law precedent for conducting discovery in our West Virginia state courts becomes irrelevant; and state court procedure essentially becomes federalized. Our current Rule 26 is working. It is well understood by West Virginia lawyers and West Virginia Circuit Court Judges. As the proverbial saying goes: "If it is not broken, don't fix it." Federalization of Rule 26 fails to consider the crucial differences between our state's civil justice system and the federal system which make the wholesale adoption of the Rule 26 untenable. For example:

- The Federal rules are generally focused on complex and high-stakes litigation, especially in the area of discovery.

- The case load of a West Virginia Circuit Court Judge and a Federal District Court Judge is remarkably different. West Virginia Circuit Courts manage approximately 21,322 annual civil case filings while the United States District Courts in West Virginia manage approximately 1,762 annual civil case filings.

- The types of cases pending before a West Virginia Circuit Court Judge and a Federal District Judge are remarkably different. Notably, State Court civil cases typically involve less money and are intended to provide a means for ordinary West Virginia citizens and businesses to obtain access to the courts to resolve civil disputes. West Virginia Circuit Court maintains a $7,500 jurisdictional threshold while the United States District Courts maintain a $75,000 threshold.

- Federal Courts have more resources and are better equipped to handle Rule 26 discovery disputes occurring with more frequency

> under Federal Rule 26. For example, Federal Courts utilize a Magistrate Judge to litigate discovery disputes. State Courts do not maintain a magistrate judge system available to handle the discovery dispute load created by a federalized Rule 26. Our state courts are not equipped to handle the wave of discovery disputes that will arise from the proposed 26(b)(2)(C)(iii) language which embraces a "proportionality" objection.

The proposed changes to Rule 26 impose cumbersome and costly requirements that make many ordinary civil cases economically unfeasible to pursue. Particularly problematic are the proposed amendments regarding expert witnesses, as set forth in proposed Rules 26(a)(2) and 26(e)(2), which include the requirement that expert witness disclosures must be accompanied by written reports, prepared and signed by each expert, containing detailed information and documents.[9] Importantly, the additional cost of obtaining written reports from expert witnesses and providing all the information and documents required under proposed Rule 26(a)(2) will, in and of itself, be prohibitive in many cases, and result in a denial of justice to many West Virginia citizens and businesses. There is no doubt that the proposed changes to Rule 26 related to expert witnesses will add unnecessary costs and burdens and have a devasting effect on many ordinary civil state court claims. It is the experience of our membership that litigating cases in federal court is significantly more expensive and burdensome than litigating cases in West Virginia state court. There is no reason to replace our existing rules with rules that increase costs and impose unnecessary burdens on parties, lawyers and circuit court judges. For this reason alone, the changes to Rule 26 requiring written reports for all testifying experts should be aborted.

The proposed West Virginia rule would also force experts to produce and disclose an "expert report" containing a detailed set of disclosures early in the litigation. Currently, such information is available through interrogatories at the appropriate point in the litigation process. By forcing such a report to be generated and distributed early in the litigation, this is not only expected to drive up costs significantly for plaintiffs—unnecessarily taking away from their final recovery—it also increases the risks of taking

[9] For instance, proposed Rule 26(a)(2)(B)(iii) requires "any exhibits that will be used to summarize or support them" [the expert's opinion], must be provided with the report. This early-stage litigation cost imposed on litigants impedes not enhances settlement resolution of claims. Revised Rule 26 expert reports will be required relatively early in the proceedings prior to any expert depositions and before discovery is usually completed. This imposes an unnecessary additional cost to litigants with non-complex lower value cases, for example the thousands of car wreck claims filed in state courts. Also, most such exhibits such as a video or chart are not prepared until closer to trial after all discovery has been completed. As long as all the data is disclosed in discovery such "summarizing" exhibits should not be required prematurely. The trial court is best positioned to exercise Court authority to control the pace and extent of expert and exhibit production requirements. The proposed one size fits all revisions proposed fails to consider the discovery needs of each case are not the same.

on a plaintiff for the attorney as it increases the costs they will (likely) pay if the claim is unsuccessful.[10] As such, it is unsurprising to find that 38 states and the District of Columbia spare plaintiffs the extraordinary burden of producing an expert report. Even among the 12 states that require an expert report, there is variation – for example, some jurisdictions only require the lawyer, not the expert, to produce a narrative summary of the expert's qualifications and substance of their testimony. Most other states take the approach taken in the current version of the West Virginia rules and allow discovery through the normal course of interrogatories and depositions. This is a balanced approach that minimizes unnecessary costs that would impede a citizen's access to justice. The bottom line is that our current Rule 26(b)(4) expert disclosure process is working and should remain unchanged.

The proposed amendments to Rule 26 will create significantly more discovery disputes. The rise in discovery disputes, which will increase costs and cause delay, runs afoul of the express purpose of the West Virginia Rules of Civil Procedure which, as set forth in Rule 1, states that our Rules "*shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.*" For example, according to the committee's comments, proposed Rule 26(b)(2)(C)(iii) (incorrectly identified as "Section(b)(3)(C)(iii)" in the committee's comments)[11] adds a "proportionality" objection as a further basis for opposing discovery. This will create significantly more problems in discovery that will cause delay, increase costs and impede the truth finding process. If adopted, a plaintiff's discovery requests will be frequently (if not customarily) met with the boilerplate defense objection that is all too often seen in Federal Court: "*Objection. The discovery sought is not proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' resources, the importance of the discovery in resolving the issues and the burden and expense of the proposed discovery outweighs its likely benefit.*" In turn, more motions to compel will be filed, which will result in the need for greater judicial intervention and more court hearings (and referrals to discovery commissioners with additional fees and costs to the paid by the litigants) on discovery disputes.

It will prove difficult to exercise enlightened judicial discretion when that which is sought is as yet undiscovered. And how can this as yet unknown important or not so important

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[10] Furthermore, requiring plaintiff's expert to render opinions in an early report without the benefit of facts uncovered with full discovery is prejudicial, not only because it undercuts the foundation of those opinions, but because it undermines the credibility of the witness him/herself. This change arms defense counsel with a powerful built-in argument that plaintiff's expert pre-formed opinions and authored a report without considering "all the facts and circumstances" which defendant's (later-disclosed) expert considered. This amendment invites defendants to obstruct and delay discovery all the more in hopes of fanning that argument.

[11] There are several mistakes and inaccuracies with the committee's comments under the proposed Rules, including references to rules that only exist in the federal rules and, for whatever reason, are included in the proposed amendments) which create ambiguity and make the proposed amendments even more difficult to understand and evaluate.

information be reviewed fairly on appeal? And how is a party supposed to demonstrate the other parties' resources? Will the financial status of the parties now be fair game for a set of financial discovery requests—and will that need to be done at the outset of the case just to be in a position to deal with such "proportionality" objections? Discovery and evidentiary hearings will be requested to determinate a party's resources and the burden and expense to be incurred to respond to the discovery request. Other concerns with proposed Rule 26(b)(2)(C)(iii) include:

- This amendment will narrow the scope of discovery. Most of the language of Federal Rule 26(b)(1) proportionality is found in the proposed amendments under 26(b)(2)(C)(iii). However, the fact that the language for proportionality under the proposed amendments to the West Virginia Rule does not include as a component "*the parties' relative access to relevant information,*" which is in the federal counterpart, is a problematic omission (since institutional defendants will almost always have that access). As drafted, the new 26(b)(2)(C)(iii) (proportionality objection) is worse than the federal counterpart it claims to copy because it does not include, in weighing proportionality, the "*access*" factor.

- The comment on page 85 is misleading because the proposed "proportionality" basis does not include the "*access*" factor (see previous paragraph).

- The proposed change to 26(b)(2)(C)(iii) will have a disproportionate impact on civil claims where the parties have disparate resources such as the individual or small business plaintiff against a larger corporate defendant (or defendants). For instance, in a product liability cases, the plaintiff must obtain discovery from the defendant to prove defect. If the Plaintiff's discovery from the defendant is curtailed, her ability to recover at all is at risk. Even more problematic and potentially chilling on an individual's ability to bring a civil action is the potential for a discovery commissioner being appointed and the cost being split between the parties. While insurance companies can afford to pay a discovery commissioner's hourly rate; the average West Virginian who is hurt in a motor vehicle crash or small business seeking to enforce a breached contract cannot.

Also problematic, the proposed proportionality rule is a radical outlier that would only exist in West Virginia. There are four common state standards for discovery: proportionality (used in 15 states), burden/benefit (the old federal rule - used in 18 states), undue burden (the West Virginia rule - used in 7 states), and relevance (no limiting language beyond the relevance requirement - used in 8 states) (2 state have unique rules that don't fit neatly into these categories).[12] West Virginia's current rule is

[12] *See* attached "State Proportionality Spreadsheet."

not particularly common, but is also not an outlier—six other states use the same standard, including Virginia, Pennsylvania, and Tennessee.

The proposed rule change would shift West Virginia to a burden/benefit standard. This is an anomaly in that it includes a comment explicitly stating that proportionality should be considered when applying the rule. This would put the West Virginia rule in a gray area between a burden/benefit standard and a proportionality standard and makes the West Virginia rule an outlier. Adopting this kind of ambiguous and unique rule would be confusing and burdensome for West Virginia, and would have unpredictable, unforeseen consequences for its interpretation.

This is in contrast to Syl. Pt. 1 of *Evans v. Mut. Mining*, 199 W. Va. 526, 485 S.E.2d 695, which provides:

> Civil discovery is governed by the *West Virginia Rules of Civil Procedure*, Rules 26 through 37. "The Rules of Civil Procedure generally provide for broad discovery to ferret out evidence which is in some degree relevant to the contested issue. (footnote omitted)." *Policarpio v. Kaufman*, 183 W. Va. 258, 261, 395 S.E.2d 502, 505 (1990). Discovery disputes that must be resolved by the circuit court are addressed to the circuit court's sound discretion, and the circuit court's order will not be disturbed upon appeal unless there has been an abuse of that discretion.

Other issues with Rule 26(a) include:

- An initial disclosure requirement should help to expedite the identification of witnesses known by the parties at the inception of the case, but that should not delay the start of discovery or serve as a basis for reducing the number of written discovery requests. Litigants should continue to be able serve written discovery with the Complaint and Answers. There is no reason to delay the start of discovery as is done in federal court. This federal procedural delay takes five to six months from the date the Complaint is filed before any discovery begins.

- The proposed rule is problematic in that Part (E) says based on "information then reasonably available to" the filing party. It only requires name, and if known, address and telephone number. There should be mandatory language requiring the parties (e.g., employers) to provide the last known address and phone number of all witnesses so identified.

- Will the proposed language require pre-discovery privilege logs to be created? As drafted, it could. Such revisions are another example of front-loading litigation costs that impede, not enhance, case resolution through settlement.

- To clarify, proposed Rule 26(a)(2)(D)(i) requires contemporaneous disclosure by

plaintiff and defendant of expert witnesses?

- Proposed Rules 26(e)(1) and 37(a)(3)(A) address supplementation of 26(a) disclosures. A standard that is less stringent than the federal rules should be considered, or at least some additional comment or guidance regarding good faith conferral, regarding the duty to supplement Rule 26(a) disclosures. There is a concern about averting serial motions to compel for failure to supplement with every additional document or witness that comes out during discovery pursuant to Rule 37(a)(3)(A) which may be applied to failures to supplement Rule 26(a) disclosures.

Other issues with Rule 26(b) include:

- Proposed Rule 26(b)(1) - changes the "reasonably calculated to lead to the discovery of admissible evidence" standard to the "relevant" standard; however, federal courts are still applying "reasonably calculated" under this language. Is the intent to be identical to the federal standard or is the intent to narrow the scope of discovery to what would satisfy W. Va. R. Evid. 401-02? Comparing the committee's comments with the language of the proposed rule is confusing. What is clear is that long standing West Virginia precedent regarding the scope of discovery would be evaporated by this change.

- Proposed Rule 26(b)(2)(B) regarding electronically stored information will produce an enormous number of discovery disputes. The proposed rule states the parties need not provide discovery of electronically stored information from sources the party identifies as not reasonably accessible because of undue burden or cost. Instead of devoting litigation costs to obtaining and analyzing relevant evidence, the parties will be forced to spend money for experts opining as to the ease of access or burdensomeness of producing electronic data. Litigants will be forced to spend time and money retaining experts to opine on discovery disputes instead of the facts and circumstances determining liability.

- Regarding electronically stored information, will in-state corporate defendants move their file servers out of state to take advantage of this permitted objection?

- Proposed Rule 26(b)(4)(E)(i) requires the party seeking discovery to pay the expert "a reasonable fee for time spent in responding to discovery *under Rule 26(b)(5)(A) or (D).*" (emphasis added). However, proposed Rule 26(b)(5)(A) does not say anything about expert discovery (rather, it deals with what a party withholding discovery under a claim that the information is privileged or protected as trial-preparation material must do to make that claim); and there is no "Rule 26(b)(5)(D)" in the proposed Rules. This same ambiguity applies to Rule 26(b)(4)(E)(ii) as well. Consequently, under proposed Rule 26(b)(4)(E)(i), it is not clear what the requesting party has to pay for regarding expert discovery.

- Reduces Interrogatories from 40 to 25 on the basis that litigants will now have Initial Disclosures. Effective written discovery can reduce the need for oral depositions. Reducing the number of interrogatories is not favored by experienced litigators who know how to craft appropriate requests. It will increase costs by adding the need for more depositions. Under our current Rules, circuit court judges have the power to limit discovery if deemed excessive. There is no reason to reduce written discovery.

Accordingly, the WVAJ opposes the proposed amendments to Rule 26. Again, our long-established Rule 26, which is well understood by West Virginia lawyers and Circuit Court Judges, is working and should remain unchanged.

Proposed Rule 30

- A review of the proposed changes suggests that there are several areas which may, again, cause new disagreements among parties, increase motion practice, and require the Court to intervene. Under the old rules, the parties would stipulate as to how the deposition would be recorded. If the parties jointly elected to take the deposition via remote means such as Zoom/Microsoft Teams, that was by agreement. However, there was an express option to take depositions in person. There is now concern that the inclusion of a new provision under 30(b)(4) entitled "By Remote Means" becoming part of the rule itself, that will cause increased disagreements between the parties about in-person depositions. Now, there is a concern that by including it expressly in the rewritten rule, that a party may seek to invoke this rule to attempt to make all depositions remote. Scheduling depositions is already a difficult process in cases with multiple parties. While taking depositions by remote means may be convenient for one party, that is not the case for all witnesses. In cases where there are a significant number of documents/exhibits, depositions via Microsoft Teams/Zooms are difficult for the deponent to view exhibits and require suitable internet and technology access. This can be difficult in locations without good internet access, and will increase costs to the parties.

- This leads to the second issue this rule change will cause, namely the technology requirements of (b)(4) that the "party taking a deposition by remote means is responsible for assuring that the witness has the appropriate technology to participate." Under the new rule, that cost is to be borne by the party taking the deposition. Obviously, a party taking the deposition needs to retain a court reporter, and other necessary personnel, and should pay for them. However, this is more complex when a party is refusing an in-person deposition, and insisting upon the deposition being taken by "remote means." If a deposition were to be taken in a rural county lacking strong cell phone signals and lacking suitable broadband internet access, the deposition will be difficult to take by "remote

means." Will this lead the deposition taker to need to file a Motion establishing good cause to take the deposition in person? One example from a recent case of a WVAJ member involves taking the depositions of railroad workers, whose attorney would only agree to make them available at shift change, remotely. Despite being told that they would have to be able to do the depositions remotely without issue, they inevitably appeared on their phones, without wi-fi access, using cell phone signals. Appearing remotely at a busy railyard impeded the ability to timely complete these depositions, as they could not view any exhibits on their phone, had their cellular signals drop out, and background noise impeded their ability to properly hear questions.

- Another example involves employees from a natural gas company at an in-person deposition. Upon starting each deposition, it was clear that the deponents had brought hundreds of pages of new documents with them to the deposition. This leads to the question of how will invoking the new "remote means" provision interplay with a deposition noticed with a subpoena duces tecum? If a remote deponent shows up with hundreds of pages of documents, how are they provided promptly to other Counsel? These documents would need to be scanned, emailed, and then printed off by counsel appearing remotely. All of this takes time, and assumes that the Court Reporter is in a suitable location with appropriate technology to do so.

- There are also other technology-based cost burdens with remote video depositions, including the possibility that video personnel may need to be brought in from outside the county, to ensure they are more well versed in the technology requirements associated with remote video depositions. It may also require the hiring of personnel solely to handle deposition exhibits in document intensive depositions.

- If this new provision will truly become part of the new rule, the cost to provide suitable technology should be shifted to the party insisting on the deposition being taken remotely. They should further bear the cost to ensure that there is suitable broadband access, suitable technology, a suitable screen for viewing exhibits, and that the depositions are available to the deponent at the deposition. Why should the cost to provide this technology be assessed against the party who does not want to take it remotely? However, the old rule has not caused problems in this regard, as the parties could stipulate to take the deposition remotely. In our view, the inclusion of "remote means" as an express option in the rule may invite further motion practice if a party refuses to make any witnesses available in person.

- There are also security concerns to consider. For instance, a Corporate Defendant has stringent security policies/protocols at their home office and insists on taking the deposition of their personnel by remote means. Under the new proposal, the Plaintiff would be required bear the costs to provide appropriate technology to

participate. Is the Plaintiff here now required to provide the technology per the Corporate Defendant's secure facility requirements? Will the Plaintiff be required to purchase a specific laptop/tablet that will pass Corporate Defendant's security and technology requirements? Why would this cost not be borne by the Corporate Defendant seeking to do the deposition remotely? Certainly, this example can also be extended to a Corporate Plaintiff, and can further extend to a situation where there is a Corporate Defendant and Corporate Plaintiff, both of whom have significant security distinctions in technology permitted at their home offices.

- While the date for a deposition is usually by agreement among the parties by counsel, a "reasonable notice" depends on the circumstances and reference to Rule 6 is informative. In the Advisory Committee's Preliminary draft of 1936, it was provided that parties must be given at least five (5)-days' notice, plus one (1) additional day for each three hundred (300) miles of travel from the place of holding court. Though Rule 30 substituted the more flexible approach, five (5) days will ordinarily be reasonable and a number of district Courts have adopted that figure by local rule. There are times when shorter notice will suffice." (citations omitted) Moore's Federal Practice, 2d 30.57[3] 1985.

- Lastly, if revisions to this rule are being made, why are there no specific rules on in-deposition objections. It would appear that if counsel is prone to complain about "object to form" versus speaking objections, there should have been defined rules as to what can, and cannot, be stated in terms of an objection.

Proposed Rules 6(b) and 6(c), and, Discussing Timing Generally

A review of the proposed changes to the timing of the setting and scheduling of hearings for motions are problematic, as the revisions are likely to again cause an increase in motion practice, as discussed herein.

First, as to subsection (b) "Extending Time," the current rule permits the parties to file agreed written stipulations altering time periods, which is regularly utilized to address the timing of Expert disclosures and extending discovery deadlines. Inevitably the parties encounter scheduling conflicts in multi-party cases, and permitting such revisions by Stipulation expressly avoids the use of judicial resources (which is appreciate by trial judges). The new proposal removes the Stipulation option of the current rule, which is not necessary, and will likely now require judicial attention to what was previously a matter addressed by the parties themselves.

As to Section (C), the proposed revisions are likely to cause delay and increased Motion practice. The current rules permitted hearing to be set 9 days out, and a response to be filed 4 days prior to the hearing if by mail (2 days if hand delivered). The new proposal provides that all motions must be set for hearing a minimum of at least 30 days after

service.

This revision is likely to cause delay and increased use of judicial resources, already stretched thin from criminal matters and abuse and neglect proceedings (matters that are not addressed in federal courts), as the new proposal requires multiple motions to each be scheduled 30 days from service, or for parties to set forth good cause to consolidate, which will require yet another motion. The current 9-day rule is more time efficient, and has historically permitted multiple motions to be consolidated or piggybacked into one solitary hearing - saving judicial resources. The proposed revision is contrary to principles of judicial economy.

In a multi-party case, often the scheduling of one hearing would serve to initiate other motions to be promptly served and scheduled for argument during that same hearing. The new revisions would require the parties to set separate hearings, or in the alternative, either (1) the Court will need to rule that the motions should be consolidated into one hearing, or (2) a party will need to file a motion setting forth good cause to consolidate the matters into one hearing. In either instance, the attempt to consolidate the matters is likely to require judicial resources to accomplish. Consolidating all pending discovery motions into one hearing is a preferable cost saving measure in terms of client costs and judicial economy.

These timeframes also impact proposed inclusion of Rule 53.1 relating to discovery commissioners, which would appear to also need to be set 30 days post-service. Such a Motion would be filed in response to a pending motion to compel, which would then require the Court or the parties to seek to consolidate, or set for hearing 30 days post-service.

Pushing discovery matters out 30 days from service will inevitably mean that compliance with an Order compelling disclosure will likewise occur at a much later date under the new proposal. For instance, under the new rule, a motion must be set 30 days after service. A hearing then occurs where the Judge rules that discovery is to be produced in 30 days, which is often typical. The new rules will now push receipt of these discovery materials out a minimum of 60 days.

Under our current Rule 53.1, discovery commissioners are discretionary for the Court to consider. Currently, many West Virginia circuit judges routinely choose to handle discovery matters on their own, but under the new proposed rule any party will be able to have a discovery commissioner appointed by simply making a request for the same. Making this an express option will only further delay receipt of discovery materials even longer, and increase costs to the parties that might otherwise be saved under our current rule. This should remain a discretionary function for the Court, rather than an express option of the parties. In the above instance, if a request for a discovery commissioner is made and granted, there will be a back-and-forth dialog related to objections to commissioners, and upon agreement, finally the selection of a discovery commissioner.

Presuming this can all occur within a 30-day time frame of the motion to compel, a discovery commissioner hearing will need to take place, followed by creation of a Recommended Decision by the commissioner, then submission to the Court to agree/disagree with the Recommended Decision. By the time all of the above occurs under Rule 53.1, the needed discovery materials may not be received for 75-90 days from the date of the initiating Motion to Compel.

The old rules did not impose such lengthy constraints. This leaves us with the questions of why the new proposal would be seeking to lengthen the discovery dispute into multiple motions and hearings over a solitary hearing. Simply put, these changes to the timing rules would appear to increase motion practice, and are likely to cause further delay and may impact other scheduling order deadlines.

Proposed Rule 23

- The new proposed provisions of Rule 23 require a petition for attorney fees to made pursuant to Rule 54(d)(2), which does not exist in the current rules or in the proposed amendments. This is an error that makes fee petition compliance an impossibility.

- The changes to Rule 23 make interlocutory certification appellate challenges a lower threshold than the current standard of filing an extraordinary writ, again encouraging an increase in litigation. Decreasing standards to challenge interlocutory circuit court orders will naturally result in more appellate litigation and delay.

- Providing a new right to a direct appeal of certification also potentially places additional work on the Intermediate Court of Appeals, since currently the WVSCA maintains jurisdiction over matters of original jurisdiction including challenging class certification and it is unclear if the ICA will receive these appeals. If, like Rule 54(b) appeals, the IAC ultimately takes jurisdiction, these changes effectively guarantee multiple appellate challenges and guarantee delays in already challenging cases. This is simply another amendment in the rules that will result in more litigation, more expense, and more burden on behalf of the citizens of West Virginia.

Proposed Rule 53.1

- The fundamental problem with proposed new Rule 53.1 regarding discovery commissioners is that it will surely and significantly raise the cost of all civil litigation where the rule is utilized. While the intent with regard to 53.1(b) appears to be to reduce costs and increase efficiency, the practical effect will be quite the opposite and will only benefit parties who wish to drag out discovery disputes – those who would ligate for the sake of litigation. It is an additional burden that

few parties to litigation can easily absorb, and one that will certainly be exponentially more detrimental to any small or solo operation that could easily be overcome by cost-based litigation tactics.

- Rule 53.1(b) states that costs are assessed to the party "requesting the appointment of a discovery commissioner." However, the circuit court may also appoint a discovery commissioner as desired, and it is fairly anticipated that many, if not all, circuit court judges will want to use this function as a docket-clearing device. But the fundamental question remains: who has to pay for the commissioner?

- As written, the proposed Rule could easily be manipulated to abuse a smaller litigant. There is no equal justice under the law if the larger, more affluent party can simply manufacture a discovery dispute on a whim and force the smaller, less financially secure party to pay a discovery commissioner in order to get the discovery they should have been entitled to in the first place. If this practice takes hold, defendants can force the significant expense of a discovery commissioner as a cost of "doing business" in litigation. Defendants can refuse to produce documents or information, force a discovery dispute and then sit back while a Plaintiff must seek a discovery commissioner.

- There is no guidance as to when a commissioner gets appointed or who pays for a commissioner. At the very least, the court should limit the use of discovery commissioners to those disputes where a judge makes a finding that the dispute is uncommon and so unique as to require the use of a commissioner. Further, the Rules should dictate who pays and there should be an option for the Court to pay the commissioner (for the rare occasion when the court and the commissioner agree that all parties did act in good faith and the commissioner was truly needed). The desire to avoid frivolous disputes (and, indeed, cost reduction and preservation of judicial resources) would be best satisfied by only appointing a commissioner when absolutely necessary and requiring that the discovery commissioner fees be assessed to the losing party. This will serve to prevent the possibility of abuse.

- Additionally, there are concerns about the time impact of this rule. With the modifications to Rule 6 requiring that a hearing be held, at a minimum, 30 days from the date the motion is filed, any discovery dispute will necessarily take months, especially when one considers that the response to a motion to compel will inevitably be another motion from the opposing party to appoint a discovery commissioner. As this is a new motion, the hearing would have to be pushed 30 days from that and, realistically, the circuit court will not be inclined to rule on a motion to compel prior to ruling on a motion to appoint a discovery commissioner regarding that motion to compel. Allowing any party to seek the appointment of a discovery commissioner, and requiring all hearings be held 30 days after the motion is filed, has the practical effect of slowing litigation to a crawl solely

because one party doesn't want to comply with their duty to produce discovery. This practice rewards the bad actor.

- The effect is that the motion to compel hearing gets pushed for another 15–30 days. At that point, the circuit court may grant the discovery commissioner motion, which would move the motion to compel to the discovery commissioner, resulting in another delay of unknown length (possibly 30 days or more) waiting for the commissioner's availability. In sum, a motion to compel likely faces a 75–90 day resolution period at a minimum (not accounting for the fact that the discovery commissioner must then rule, issue their ruling to the circuit court, and potentially face objections). A minimum 3-month discovery dispute will likely undermine any schedule that exists, prolonging the litigation (which inevitably inures to the benefit of the defending party).

WVAJ believes that the proposed modifications to Rule 6 and the new Rule 53.1 cannot co-exist without unintended and significant consequences harming access to justice. As such, WVAJ opposes adoption.

Proposed Rule 33

- The major change in the Proposed Rule 33 is to limit interrogatories to 25 from the now 40 allowed. WVAJ believes that such a proposal is detrimental to the party that does not have access to needed information, especially when those facts are buried in written documents, electronic materials, including emails, text messages and other similar means of communication now used in society.

- Such a limit to 25 interrogatories will also increase the cost of litigation, as it will increase the use of depositions which are much more costly to a party. While the Proposed Rules also propose limiting depositions to 7 hours, a deposition may be the only avenue if interrogatories are limited to 25, and many parties in our Circuit Courts cannot afford multiple depositions.[13] Such changes force many litigants to forgo any additional discovery at all. Such changes will then provide an edge to those parties who are more financially substantial than his or her opponent, which most likely means large business entities will have the high ground rather than a level playing field. Such changes are believed to tilt the balance from the small business or individuals.

[13] Depositions include an appearance fee and a cost per transcribed page; such costs vary but not by much; appearance fees range in the $100.00 to $145.00 and per page charges of $4.00 each which amounts to any 7-hour deposition being over $1,000.00. Such does not include video recording.

- The Proposed Rule 33 is not necessary and will make discovery burdensome or out of reach to those litigants who need it most.

Proposed Rule 15

- Court no longer obligated to permit amendment by rule, instead granted discretion to deny. This change obviously favors process over merits, and abrogates long-standing case law in West Virginia that supports cases being determined based on the evidence, and not technicalities.

Proposed Rule 56

- First, Rule 56(a) very clearly eliminates the 30-day holding requirement prior to filing a motion for summary judgment. However, the reasoning for this change is not set forth. WVAJ suggests that the committee prepare a comment explaining the reasoning behind this decision.

- Second, the proposed Rule 56 is much more complex than its predecessor, dictating much of how the circuit court reacts to various situations that have arisen under Rule 56 motions. While clarity is appreciated, West Virginia has an extensive body of precedent on summary judgment motions which have given rise to an established practice. As with the revisions to Rule 56(a), it is unclear why there is a need to expand the rule in an effort to account for multiple variable situations, particularly when those revisions will deviate from the practice in West Virginia for decades.

- Third, abrogation of current Rule 56(f) reverses many decisions encouraging resolution of cases on their merits with full discovery and favoring fairness over process: *Harbaugh v. Coffinbarger*, 543 S.E.2d 338, 209 W.Va. 57 (2000); (Reasoning that "[o]pponent of summary judgment motion requesting continuance for further discovery need not follow exact letter of summary judgment rule in order to obtain it."); *see also Payne's Hardware & Bldg. Supply, Inc.* v. *Apple Valley Trading Co. of West Virginia*, 490 S.E.2d 772, 200 W.Va. 685 (1997); *Powderidge Unit Owners Ass'n v. Highland Properties, Ltd.*, 474 S.E.2d 872, 196 W.Va. 692 (1996); *Williams v. Precision Coil, Inc.*, 459 S.E.2d 329, 194 W.Va. 52 (1995).

- WVAJ respectfully suggests that these modifications are not necessary to correct any ongoing problem in practice.

Proposed Rule 4

- We are concerned that the proposed rule did not adopt the waiver provision of Federal Rule 4(d). The proposed rule should adopt the waiver provisions of

Federal Rule 4(d) that charge defendants with the costs of service if they refuse to accept a summons without good cause. This provision from Federal Rule 4(d) enables litigants to save a good deal of time and money by following the waiver of service provisions that disincentivize inefficient or bad faith refusals to accept service. Fair waiver provisions in Rule 4 can be a significant aid in averting superfluous costs of litigation and enhancing access to the courts.

- Proposed Rule 4(c)(2)(E). There has been a concern with the Clerk being the only person who can issue service of summons and complaint by certified mail. Even when specifically requested, the Clerk will often send certified mail restricted delivery to addressee only or not as directed. The rule should permit the attorney to send as well.

- Proposed Rule 4(d)(4)(B). The rule should permit service by the West Virginia Secretary of State for domestic public corporations.

- Subpart 4(h) seems contradictory. Why mandate proof of service affidavits if it would not impact their validity?
- Proposed Rule 4(d)(2) should read "Upon a person confined in a penitentiary or jail . . ."

Proposed Rule 5

- Proposed Rule 5(a)(1)(E) appears to truncate prematurely where the word "similar" does not modify any other word.

- Proposed Rule 5(b)(2)(B)(i). The proposed rule should require that papers be provided to someone, rather than just leaving a copy somewhere "conspicuous."

- Proposed Rule 5(b)(2)(F). Service by Email should entail both a required opt-in and an ability to opt-out. How many times do you not get an email with attachments, because the attachments are too large? What if it's sent to spam? If we allow this, the rule should require a "read receipt" to be tendered in order to confirm it was read, or follow up to ensure it was received. Most litigants already send a copy electronically via email and hard copy in mail.

Proposed Rule 6(a)(6)

- Rule 6(a)(6) lists several holidays, then also states that it includes "any other legal holiday so designated by the West Virginia Legislature." The implication here is that the listed holidays are designated as such by the legislature. This may potentially lead to confusion for practitioners having to constantly monitoring holidays designated by the legislature.

Proposed Rule 12

- Notably, there is an extension to all defendants of 30-day response window.

- Also, waiver under 12(h) can be remedied by amendment as a matter of course.

Proposed Rule 32

- The proposed Rule 32 which is a copy of the Federal Rule is rejected by the Committee as being not necessary in West Virginia; such is suggested because current WVRCP 32 has worked well in our Circuit Courts and there is no need for a wholesale revamping of this current Rule which is familiar to both practitioners and trial judges; there have been only three WV Supreme Court cases regarding Rule 32 noted in Westlaw under that Rule; there have however been other cases in our State's jurisprudence regarding Rule 32; in *Carper v. Kanawha Banking & Trust Co.*, 207 S.E.2d 897 (WV 1974), where our Supreme Court noted that WVRCP 32 was "identical" to the then current Federal Rule; merely because the Federal RCP have been modified that Rule does not equate that WV's RCP must be changed.

- Provisions 5(A) and (B) in the proposed Rule 32 were rejected as it is believed such are unnecessary and will only result in delays and motion to compel; if such is a problem and cannot be resolved, then a motion for a protective order is available to any party and such has worked well in our State; our Committee saw no reason to burden the Rule in this manner

Proposed Rule 34

- This language was general to our rule, but is now only specific to Electronically stored information:

  "A party who produces documents for inspections shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request."

  Why would we remove this requirement to apply to all discovery responses, and only apply now to ESI? Organizing and labeling is a critical component to understanding what was produced for each specific discovery request.

- Discovery of Electronic information (ESI) - Problem is as follows: the option to produce in original format or to produce in a "reasonably usable format or form." Critical distinction relates to Metadata. Metadata contains information about (a) the date a document is created, (b) who authored the document, (c) who is the document custodian, and (d) the date a document was modified. The metadata is only contained in the original format of the document. If you print it to a PDF, you

strip out the metadata. Perhaps the best compromise: If a Party requests the document to be produced with original Metadata, the responding party shall produce it as such. Alternatively, the responding party shall produce the document/form in a reasonably usable format/form and separately provide the Metadata as requested.

Proposed Rule 36

- It appears two versions are both included; I'm assuming the first recitation is the one being deleted consistent with the rest of the document.

- 36(b) - phrasing of the rule suggests that an admission by Defendant A is "conclusively established" against Defendant B. If a fact that impacts Defendant B, but can fairly be admitted by Defendant A, is admitted, does it bind Defendant B?

Proposed Rule 45

- Error/typo under 45(b)(2); seems like "Service in the United States" should read "Service in West Virginia." Likely a copy-and-paste error from the federal rules.

- Objection under 45(d)(2)(B) suggests that time for responding to subpoenas must exceed 14 days, as 14 days is the allotted time for objection.

Proposed Rule 54

- The proposed edits to Rule 54 are not clear with regard to attorney's fees. By removing the portion of the rule setting forth pursuit of attorney's fees post-judgment, the proposed rules can be interpreted as barring collection of attorneys' fees and costs. It could also be interpreted as doing away with the motions practice requirement associated with attorneys' fees and costs. It is unclear whether this was the committee's intent; therefore, WVAJ suggests the addition of a comment explaining the thinking behind this revision. Also, non-existent provisions of this Rule are cited and incorporated in Rule 23 as discussed *supra*.

Proposed Rule 59

- The subsection lettering is incorrect.

Closing and General Comments

The concept of open access to courts without unnecessary cost or delay is a principle so fundamental to the values upon which West Virginia was created that it was included within our Constitution. *See*, W.Va. Const. Art. 3, §17 ("The courts of this State shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial or delay"). It is a principle reiterated throughout our jurisprudence and is the cornerstone upon which the current *West Virginia Rules of Civil Procedure* are built. *See, e.g., State ex rel. Dunlap v. Berger*, 211 W.Va. 549, 560, 567 S.E.2d 265, 276 (2002) (discussing founders' motivation for W.Va. Const. Art. 3, §17); W. Va. R. Civ. P. 1 (rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.").

The current *West Virginia Rules of Civil Procedure*, as interpreted and applied by the West Virginia Supreme Court of Appeals and West Virginia trial courts, have served litigants well and promoted the constitutional directive of administering justice without sale, denial or delay during the nearly twenty-five years since their implementation. Wide-spread problems or issues which would be corrected by the nearly wholesale adoption of the *Federal Rules of Civil Procedure* have not been identified. Although none have been identified, if issues exist with the application or implementation of specific rules, the more prudent course of action would be to enact amendments narrowly tailored to address those specific, identified problems as opposed to the nearly wholesale adoption of the *Federal Rules of Civil Procedure*.

Instead of streamlining the litigation process, the nearly wholesale adoption of the *Federal Rules of Civil Procedure* will undo years of jurisprudence and render meaningless the many years of practical experience earned by both our circuit court judges and the members of the West Virginia bar who regularly practice in our courts. West Virginia

trial court judges and the lawyers who regularly practice before them understand our current rules. A significant percentage, if not the majority, of West Virginia licensed attorneys do not practice in Federal Court. The same would likely hold true for our West Virginia trial court judges prior to assuming the bench. The nearly wholesale adoption of the *Federal Rules of Civil Procedure* will require both the bench and the bar of West Virginia to unlearn years of experience and precedent while simultaneously learning a whole new set of rules of civil procedure and interpreting precedent. Questions which remain open include: Are we to now disregard prior West Virginia precedent interpreting the civil litigation process in favor of federal decisions interpreting the corresponding federal rules? Does federal precedent remain persuasive or is it now controlling? What happens in situations where federal law is different than established West Virginia precedent? The general jurisdiction of federal courts is significantly different that of our trial courts; how then, does application of rules specifically tailored to address the unique types of cases presented in federal courts translate to our courts of general jurisdiction? Why are we seeking to narrow discovery, as indicated in the proposed rules' commentary, where, throughout our history, broad discovery designed to ensure cases are decided on their merits, rather than through motion practice and gamesmanship, has been the standard?[14]

Adoption of the proposed rules will significantly delay resolution of disputes and disproportionately increase costs to the detriment of ordinary West Virginia citizens and small businesses, the very people and entities who are guaranteed access to our courts without sale, denial or delay. Discovery disputes created by obstructionist behavior of entities with disproportional resources already significantly delay the litigation process. With the adoption of the proposed rules, we are promoting obstructionist behavior by adding new objections, such as proportionality, which are directly contrary to our long-established commitment to broad discovery designed to ensure cases are decided on their merits. For example, West Virginia citizens and small businesses who bring claims against national or multinational entities already deal with endless relevancy and other objections creating discovery disputes which delay litigation. With the adoption of the proposed rules, West Virginia citizens and small businesses will almost certainly be faced with unending proportionality objections where the value of the case, which, for the most part, can be anything in excess of $7,500 will, more often than not, be relatively insignificant to the defendant in comparison to claimed costs of defending against the claim.

New, additional, proportionality objections coupled with the new rules governing motion practice will serve only to increase costs and further delay the ultimate resolution of the litigation. Unlike federal courts, which have magistrate judges charged with overseeing discovery motion practice, our trial courts do not have the similar resources. Expansion of the use of discovery commissioners to deal with the attendant expansion of

[14] Although the proposed forms are discussed in the request for public comment, they have not been provided. WVAJ is concerned, particularly in regard to medical releases or form protective orders, that the proposed rules impacted the development of these forms.

discovery disputes and motion practice will only increase costs to litigants, as will the new expert report requirements under proposed Rule 26(b)(4). Treating physicians, whose time should be focused on patient care, will now be required to author reports if they have an opinion as to the cause of an injury or medical condition or as to the scope of necessary future care. This is *in addition* to sitting for a deposition as they already are required to do. Will investigating officers be permitted by their employer to author reports beyond a Traffic Crash Report to provide opinions on the cause of an accident or incident? Many experts have a fee for conference and then a separate increased fee for authoring a signed report. These additional costs will be unfairly borne by plaintiffs whose potential recovery is often already limited by available insurance proceeds. By contrast, for defendants, these increased costs are borne either by insurance companies or, for the self-insured, included within ordinary operating cost budgeting.

The cost of litigation already deters may individuals and small businesses from pursuing legitimate claims. If the intent of the proposed revised *Rules of Civil Procedure* is to deter litigation, then the intent will be fulfilled by their adoption. If, however, the intent is to remain true to the constitutional guarantee of open access to the courts of this State to obtain remedy by due course of law without sale, denial or delay, then it is respectfully urged that the proposed revised *Rules of Civil Procedure* be rejected in favor of the selective amendment of any current rule which our trial court judges and the attorneys who regularly practice before them have identified as causing undue problems or delay.

With gratitude for the invitation to comment,

The West Virginia Association for Justice

State	Rule	Text	Standard	Court Discretion	Non-Paywalled Link	Notes
Alabama	26(b)(1)	"proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit."	Proportionality	May act on own initiative after providing notice - 26(b)(2)(B)	https://judicial.alabama.gov/docs/library/rules/CV26.pdf	Mirrors existing federal rule
Alaska	26(b)(2)(A)	"the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues."	Burden/Benefit	May act on own initiative after providing notice - 26(b)(2)(A)	https://courts.alaska.gov/rules/docs/civ.pdf	Mirrors pre-2015 federal rule Excludes parties' access to information
Arizona	26(b)(1)	"proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit."	Proportionality	Must act on own initiative after determination - 26(b)(2)(C)(iii)	https://govt.westlaw.com/azrules/Browse/Home/Arizona/ArizonaCourtRules/ArizonaStatutesCourtRules?guid=N93E3A75086BD11E6B9D68CD8AD30786D&transitionType=CategoryPageItem&contextData=(sc.Default)&bhcp=1	Mirrors existing federal rule
Arkansas	26(b)(1)	"relevant to the issues in the pending actions... appears reasonably calculated to lead to the discovery of admissible evidence."	Relevance	N/A	https://casetext.com/rule/arkansas-court-rules/arkansas-rules-of-civil-procedure/rule-26-general-provisions-governing-discovery	Limiting language, if present, is outside of Rule 26
California	CA CIV PRO § 2017.020(a)	"the burden expense, or intrusiveness of that discovery clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence."	Burden/Benefit	Must act after determination, unclear if able to act on own initiative - 2017.020(a)	https://codes.findlaw.com/ca/code-of-civil-procedure/ccp-sect-2017-020/	Burden/Benefit analysis requires burden to *clearly* outweigh benefit No determining factors listed

Colorado	26(b)(1)	"proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit."	Proportionality	N/A	https://casetext.com/rule/colorado-court-rules/colorado-rules-of-civil-procedure/chapter-4-disclosure-and-discovery/rule-26-general-provisions-governing-discovery-duty-of-disclosure	Mirrors existing federal rule
Connecticut	13-2	"if the disclosure sought would be of assistance in the prosecution or defense of the action and if it can be provided by the disclosing party or person with substantially greater facility than it could otherwise be obtained by the party seeking disclosure"	Comparative Burden	N/A	https://www.jud.ct.gov/publications/PracticeBook/PB.pdf	
Delaware	26(b)(1)	"proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit."	Proportionality	May act on own initiative after providing notice - 26(b)(1)	https://courts.delaware.gov/rules/pdf/superior_civil_rules_2016.pdf	Mirrors existing federal rule
Florida	26(d)(2) - electronic discovery only	"the burden or expense of the discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues."	Burden/Benefit	N/A	https://www-media.floridabar.org/uploads/2022/08/Civil-Procedure-Rules-Updated-8-2022.pdf	Electronic discovery only Excludes parties' access to information
Georgia	GA ST § 9-11-26(b)(1)	"relevant to the subject matter involved in the pending action... appears reasonably calculated to lead to the discovery of admissible evidence."	Relevance	N/A	https://law.justia.com/codes/georgia/2020/title-9/chapter-11/article-5/section-9-11-26/#:~:text=Parties%20may%20obtain%20discovery%20by,and%20mental%20examinations%3B%20and%20requests	Limiting language, if present, is outside of Rule 26

Hawaii	26(b)(2)(iii)	"the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues."	Burden/Benefit	May act on own initiative after providing notice - 26(b)(2)(iii)	https://www.courts.state.hi.us/docs/court_rules/rules/hrcp.pdf	Mirrors pre-2015 federal rule Excludes parties' access to information
Idaho	26(b)(1)(C)(iii)	"the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues."	Burden/Benefit	Must act on own initiative after determination - 26(b)(2)(C)	https://isc.idaho.gov/ircp26-new	Mirrors pre-2015 federal rule Excludes parties' access to information
Illinois	201(c)(3)	"whether the likely burden or expense of the proposed discovery, including electronically stored information, outweighs the likely benefit, taking into account the amount in controversy, the resources of the parties, the importance of the issues in the litigation, and the importance of the requested discovery in resolving the issues."	Burden/Benefit	May act on own initiative after determination - 201(c)(3)	https://casetext.com/rule/illinois-court-rules/illinois-supreme-court-rules/article-ii-rules-on-civil-proceedings-in-the-trial-court/part-e-discovery-requests-for-admission-and-pretrial-procedure/rule-201-general-discovery-provisions	Excludes needs of the case and parties' access to information
Indiana	26(B)(1)	"the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues."	Burden/Benefit	May act on own initiative after providing notice - 26(B)(1)	https://www.in.gov/courts/rules/trial_proc/index.html#_Toc77587480	Mirrors pre-2015 federal rule Excludes parties' access to information
Iowa	1.503(8)(c)	"The burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues."	Burden/Benefit	Must act on own initiative after determination - 1.503(8)	https://www.legis.iowa.gov/docs/ACO/CourtRulesChapter/1.pdf	Mirrors pre-2015 federal rule Excludes parties' access to information

Kansas	60-226(b)(1)	"proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues and whether the burden or expense of the proposed discovery outweighs its likely benefit."	Proportionality	Must act on own initiative after determination - 60-226(b)(2)	https://www.ksrevisor.org/statutes/chapters/ch60/060_002_0026.html	Mirrors existing federal rule
Kentucky	26.02(1)	"relevant to the subject matter involved in the pending action... appears reasonably calculated to lead to the discovery of admissible evidence."	Relevance	N/A	https://govt.westlaw.com/kyrules/Document/N85A3DA10A91B11DA8F5EE32367A250AE?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default)	Limiting language, if present, is outside of Rule 26
Louisiana	Art. 1422	"relevant to the subject matter involved in the pending action... appears reasonably calculated to lead to the discovery of admissible evidence."	Relevance	N/A	https://law.justia.com/codes/louisiana/2021/code-of-civil-procedure/article-1422/	Limiting language, if present, is outside of Rule 26
Maine	26(b)(1)	"relevant to the subject matter involved in the pending action... appears reasonably calculated to lead to the discovery of admissible evidence."	Relevance	N/A	https://www.courts.maine.gov/rules/text/MRCivPPlus/mr_civ_p_26_plus_2014-9-1.pdf	Limiting language, if present, is outside of Rule 26
Maryland	2-402(b)(1)	"the burden or cost of the proposed discovery outweighs its likely benefit, taking into account the complexity of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues."	Burden/Benefit	Must act on own initiative after determination - 2-402(b)(1)	https://govt.westlaw.com/mdc/Document/N5E7640909CEA11DB9BCF9DAC28345A2A?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default)	Mirrors pre-2015 federal rule Excludes parties' access to information Considers "complexity" of case rather than "needs" of case
Massachusetts	26(c)(3)	"whether the likely burden or expense of the proposed discovery outweighs the likely benefit of its receipt, taking into account the parties' relative access to the information, the amount in controversy, the resources of the parties, the importance of the issues, and the importance of the requested discovery in resolving the issues."	Burden/Benefit	May act on motion only - 26(c)	https://www.mass.gov/rules-of-civil-procedure/civil-procedure-rule-26-general-provisions-governing-discovery	Excludes needs of the case

Michigan	2.302(B)(1)	"proportional to the needs of the case, taking into account all pertinent factors, including whether the burden or expense of the proposed discovery outweighs its likely benefit, the complexity of the case, the importance of the issues at stake in the action, the amount in controversy, and the parties' resources and access to relevant information."	Proportionality	May act on motion only - 2.302(c)	https://www.courts.michigan.gov/siteassets/rules-instructions-administrative-orders/michigan-court-rules/court-rules-book-ch-2-responsive-html5.zip/index.html#t=Court_Rules_Book_Ch_2%2FCourt_Rules_Chapter_2%2FCourt_Rules_Chapter_2.htm%233415_Rule_Heading_1002841bc-44&rhtocid=_0_43	Mirrors existing federal rule Considers "complexity" of case rather than "needs" of case
Minnesota	26.02(b)	"proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit."	Proportionality	May act on own initiative after providing notice - 26.02(b)	https://www.revisor.mn.gov/court_rules/cp/id/26/#26.02	Mirrors existing federal rule
Mississippi	26(d)(2)	"the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving those issues."	Burden/Benefit	May act on motion only - 26(d)	https://courts.ms.gov/research/rules/msrulesofcourt/rules_of_civil_procedure.pdf	Mirrors pre-2015 federal rule Excludes parties' access to information
Missouri	56.01(b)(1)	"proportional to the needs of the case considering the totality of the circumstances, including but not limited to, the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expenses of the proposed discovery outweighs its likely benefit."	Proportionality	Must act on own initiative after determination - 56.01(b)(2)	https://www.courts.mo.gov/courts/ClerkHandbooksP2RulesOnly.nsf/c0c6ffa99df4993f86256ba50057dcb8/b83f5cbe4450f09686256ca60052134e?OpenDocument	Mirrors existing federal rule Includes "totality of the circumstances" language

Montana	26(2)(C)(iii)	"the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues."	Burden/Benefit	Must act on own initiative after determination - 26(2)(C)	https://leg.mt.gov/bills/mca/title_0250/chapter_0200/part_0050/section_0260/0250-0200-0050-0260.html	Mirrors pre-2015 federal rule Excludes parties' access to information
Nebraska	6-326(b)(1)	"relevant to the subject matter involved in the pending action... appears reasonably calculated to lead to the discovery of admissible evidence."	Relevance	N/A	https://supremecourt.nebraska.gov/supreme-court-rules/chapter-6-trial-courts/article-3-nebraska-court-rules-discovery-civil-cases/%C2%A7-6-326-general-provisions-governing-discovery	Limiting language, if present, is outside of Rule 26
Nevada	26(b)(1)	"proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit."	Proportionality	N/A	https://www.leg.state.nv.us/courtrules/nrcp.html	Mirrors existing federal rule
New Hampshire	21(b)	"relevant to the subject matter involved in the pending action... appears reasonably calculated to lead to the discovery of admissible evidence."	Relevance	N/A	https://www.courts.nh.gov/rules-superior-court-state-new-hampshire	Limiting language, if present, is outside of Rule 26 21(d)(1)(B) includes a potential sanction for "employing discovery methods otherwise available which result in legal expense disproportionate to the matters at issue."
New Jersey	4:10-2(g)	"the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues."	Burden/Benefit	May act on own initiative after providing notice - 4:10-2(g)	https://www.njcourts.gov/attorneys/assets/rules/r4-10.pdf	Mirrors pre-2015 federal rule Excludes parties' access to information
New Mexico	1-026(B)(2)(c)	"the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation."	Burden/Benefit	N/A	https://casetext.com/rule/new-mexico-court-rules/new-mexico-rules-of-civil-procedure-for-the-district-courts/article-5-depositions-and-discovery/rule-1-026-general-provisions-governing-discovery	Excludes parties' access to information and the importance of discovery in resolving issues

New York	3101(a)	"There shall be full disclosure of all matter material and necessary..."	Material and Necessary	N/A	https://www.nysenate.gov/legislation/laws/CVP/3101	Limiting language, if present, is outside of Rule 26
North Carolina	26(b)(1a)	"the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation."	Undue Burden	May act on own initiative after providing notice - 26(b)(1a)	https://www.ncleg.gov/EnactedLegislation/Statutes/PDF/BySection/Chapter_1A/GS_1A-1,_Rule_26.pdf	Excludes parties' access to information and the importance of discovery in resolving issues
North Dakota	26(B)(i)	"the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues."	Burden/Benefit	Must act on own initiative after determination - 26(B)(i)	https://www.ndcourts.gov/legal-resources/rules/ndrcivp/26	Mirrors pre-2015 federal rule Excludes parties' access to information
Ohio	26(B)(1)	"proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit."	Proportionality	Must act on own initiative after determination - 26(B)(6)(b)(iii)	https://www.supremecourt.ohio.gov/LegalResources/Rules/civil/CivilProcedure.pdf	Mirrors existing federal rule
Oklahoma	OK ST T. 12 § 3226(B)(1)(a)	"proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit."	Proportionality	Must act on own initiative after determination - 3226(B)(2)(c)(3)	https://oksenate.gov/sites/default/files/2019-12/os12.pdf	Mirrors existing federal rule
Oregon	36(b)(1)	"relevant to the subject matter involved in the pending action... appears reasonably calculated to lead to the discovery of admissible evidence."	Relevance	N/A	https://www.oregonlegislature.gov/bills_laws/Pages/orcp.aspx	Limiting language, if present, is outside of Rule 26

Pennsylvania	4011(a), (e)	"would cause unreasonable annoyance, embarrassment, oppression, burden or expense to the deponent or any person or party... [or] would require the making of an unreasonable investigation by the deponent or any party or witness."	Undue Burden	N/A	http://www.pacodeandbulletin.gov/Display/pacode?file=/secure/pacode/data/231/chapter4000/s4011.html&d=reduce	
Rhode Island	26(b)(1)(c)	"The discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, the parties' resources, and the importance of the issues at stake in the litigation."	Undue Burden	May act on own initiative after providing notice - 26(b)(1)(c)	https://www.courts.ri.gov/efiling/PDF/Rules-Superior_Court_Rules_of_Civil_Procedure.pdf	Excludes parties' access to information and the importance of discovery in resolving issues
South Carolina	26(b)(6)(B)(iii) - electronic discovery only	"the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues."	Burden/Benefit	May act on own initiative after providing notice - 26(b)(6)(B)(iii)	https://www.sccourts.org/courtReg/displayRule.cfm?ruleID=26.0&subRuleID=&ruleType=CIV	Electronic discovery only Excludes parties' access to information
South Dakota	SD ST § 15-6-26(b)(1)(A)(iii)	"discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy limitations on the party's resources, and the importance of the issues at stake in the litigation."	Undue Burden	N/A	https://sdlegislature.gov/Statutes/Codified_Laws/2043529	Excludes parties' access to information and the importance of discovery in resolving issues
Tennessee	26.02(1)	"the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation."	Undue Burden	May act on its own initiative after providing notice - 26.02(1)	https://www.tncourts.gov/rules/rules-civil-procedure/2602	Excludes parties' access to information and the importance of discovery in resolving issues
Texas	192.4(b)	"the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues."	Burden/Benefit	May act on its own initiative after providing notice - 192.4	https://www.txcourts.gov/media/1453689/texas-rules-of-civil-procedure.pdf	Mirrors pre-2015 federal rule Excludes parties' access to information

Utah	26(b)(1), (3)	proportionality... Discovery and discovery requests are proportional if: (A) the discovery is reasonable, considering the needs of the case, the amount in controversy, the complexity of the case, the parties' resources, the importance of the issues, and the importance of the discovery in resolving the issues; (B) the likely benefits of the proposed discovery outweigh the burden or expense; (C) the discovery is consistent with the overall case management and will further the just, speedy, and inexpensive determination of the case; (D) the discovery is not unreasonably cumulative or duplicative; (E) the information cannot be obtained from another source that is more convenient, less burdensome, or less expensive; and	Proportionality	N/A	https://www.utcourts.gov/rules/view.php?type=urcp&rule=26	Excludes parties' access to information Burden placed on party seeking discovery
Vermont	26(b)(1)	"proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit."	Proportionality	Must act on own initiative after determination - 26(b)(2)(B)	https://casetext.com/rule/vermont-court-rules/vermont-rules-of-civil-procedure/v-depositions-and-discovery/rule-26-general-provisions-governing-discovery-effective-until-september-12-2022	Mirrors existing federal rule Rule changing on September 12 (limitation provisions will remain identical)
Virginia	4:1(b)(1)(C)	"the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation."	Undue Burden	May act on own initiative after providing notice - 4:1(b)(1)	https://www.vacourts.gov/courts/scv/rulesofcourt.pdf	Excludes parties' access to information and the importance of discovery in resolving issues
Washington	26(b)(1)(C)	"the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation."	Undue Burden	May act on own initiative after providing notice - 26(b)(1)	https://www.courts.wa.gov/court_rules/pdf/CR/SUP_CR_26_00_00.pdf	Excludes parties' access to information and the importance of discovery in resolving issues

West Virginia	26(b)(1)(C)	"The discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation."	Undue Burden	May act on own initiative after providing notice - 26(b)(1)	http://www.courtswv.gov/legal-community/court-rules/civil-procedure/V.html#rule26	Excludes factor regarding parties' access to information and regards the importance of discovery in resolving issues. Ongoing proposed rule changes. Only state with hybrid.
Wisconsin	WI ST 804.01(2)(a)	"proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit."	Proportionality	May act on motion only - 804.01(2)(am)	https://docs.legis.wisconsin.gov/statutes/statutes/804#:~:text=A%20party%20may%20depose%20any,such%20provisions%2C%20pursuant%20to%20subd.	Mirrors existing federal rule
Wyoming	26(b)(1)	"proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit."	Proportionality	Must act on own initiative after determination - 26(b)(2)(C)(iii)	https://www.courts.state.wy.us/wp-content/uploads/2017/05/WYOMING_RULES_OF_CIVIL_PROCEDURE.pdf	Mirrors existing federal rule