LEGAL AID OF WEST VIRGINIA

Seeking Justice, Changing Lives

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September 27, 2022

Edythe Nash Gaiser, Clerk of Court
Supreme Court of Appeals of West Virginia
State Capitol Rm E-317
1900 Kanawha Blvd. East
Charleston WV 25305

Re: *Comments on the proposed amendments to the West Virginia Rules of Civil Procedure*

These comments are submitted on behalf of Legal Aid of West Virginia. Legal Aid of West Virginia is a non-profit law firm serving indigent and vulnerable West Virginians. In addition to traditional legal services where we represent litigants in civil litigation each year, Legal Aid of West Virginia also provides other services geared to help people understand their rights such as clinics, general legal information, advice specific to clients that we lack capacity to represent and various other assistance for self-represented litigants.

The proposed amendments would impact Legal Aid of West Virginia's traditional legal services as well as self-represented litigants often assisted by LAWV. These comments are intended to encompass and present issues that would affect Legal Aid of West Virginia as well as indigent, marginalized or otherwise vulnerable West Virginians.

GENERAL COMMENT REGARDING DEADLINES

The proposed amendments adjust several deadlines for filing. Some proposed deadlines are longer, some are shorter and some merely clarify the deadline calculation. Generally speaking, the shorter the deadline, the more difficult it may be for indigent, marginalized or vulnerable West Virginians to access the courts. Many West Virginians live in rural areas and do not have access to reliable transportation. Many West Virginians lack reliable internet service and phone access. The simple act of getting transportation to a courthouse may create a substantial burden on some litigants. While technology has improved and these adjustments would be virtually unnoticeable to lawyers or law firms, the persons who are unrepresented may be denied access to the Courts based on shortened deadlines.

COMMENTS ON PROPOSED CHANGES TO SPECIFIC RULES
RULE 5: SERVICE AND FILING PLEADINGS AND OTHER PAPERS

Proposed Rule 5(d)(4) "[t]he clerk must not refuse to file a paper solely because it is not in the form prescribed by these rules" would benefit indigent West Virginians who are self-represented and may be

unable to understand the intricacies of filing requirements. This requirement ensures access to our courts and appropriately puts the onus on the Judge to determine if and how a case should proceed.

RULE 5.1: PRIVACY PROTECTIONS FOR FILINGS MADE WITH COURTS

This provision has support from LAWV. Sealing sensitive records would seem to be in order and would protect litigants who have mental health issues, substance use disorder or other disability that should not be available for public inspection.

RULE 6: COMPUTING AND EXTENDING TIME; TIME FOR MOTION PAPERS

This proposed amendment could be detrimental to pro se litigants. The inclusion of weekends and holidays in the computation of time is particularly impactful to non-attorneys and those that may need to retain counsel on short notice. Pro se litigants are unable to access the courts for documents, information or form pleadings during weekends and holidays. Unlike attorneys who may have access to efiling, pro se litigants are unable to file pleadings on a weekend or a holiday.

Persons who might wish to obtain counsel are also prejudiced by shortened deadlines that include weekends and holidays, as most attorneys are unreachable during these times. These issues are compounded by the fact that most pro se litigants receive notice via the mail (rather than instantaneous notice through efiling). The additional delay associated with mailing documents makes an already short deadline even shorter.

Rule 16. PRETRIAL CONFERENCES: SCHEDULING MANAGEMENT

Rule 16 (f) Sanctions (2) Imposing Fees and Costs appears to make it mandatory that if a party or its attorney fails to appear for pretrial conference, is not prepared to participate, shows bad faith, or fails to obey a pretrial order, the court must order the party, its attorney, or both to pay reasonable expenses, including attorneys' fees, incurred because of noncompliance, unless substantial justification for non-compliance or circumstances render it unjust. The "must" was previously a "may."

LAWV believes it best that this discretion be left to the trial court and not, as is proposed, create a rebuttable presumption in favor of sanctions. Pro se parties sometimes struggle with understanding their obligations as well as their rights in a court setting. Under the language as drafted, the pro se party could fail, for example, to disclose witnesses as ordered in a pre-trial order. As this amendment is written, this would be cause for sanctions unless there is justification for non-compliance. This would force the pro se party into a situation where they are already nervous, fail to understand the process and are further intimidated.

Legal Aid of West Virginia would prefer that these sanctions remain in the sound discretion of the trial court and not be written in a manner that encourages sanctions.

RULE 23. CLASS ACTIONS

Rule 23(i) "residual funds" would amend the provisions that previously provided that one-half of all residual funds would be allocated to Legal Aid of West Virginia. Clearly this provision would have a detrimental effect on LAWV as a firm. Legal Aid of West Virginia will comment separately, through our Executive Director, on the economic impact of this decision. Legal Aid of West Virginia is a non-profit firm that provides representation to indigent, marginalized and vulnerable West Virginians. While we receive funding from state and federal grant programs, much of this funding is allocated to provide specific services to specific client communities, such as recipients of certain governmental programs, victims of domestic violence, or our veterans community. Because these residual funds are not specifically allocated to serve a specific client community or service, we are able to utilize these funds to adapt services to specific areas, to fill in gaps when there are funding uncertainties and to respond immediately to emerging issues. Furthermore, as a recipient of funds from Legal Services Corporation, we are generally prohibited from taking "fee generating cases" except in limited cases. This provision is outlined in 45 CFR 1609.3. LAWV would propose that Rule 23(i) would remain unamended.

RULE 26 – DUTY TO DISCLOSE

The duty to disclose would be an intimidating and difficult to understand duty for a pro se party. While Rule 25(a)(1)(B) excludes most cases that would impact the clientele of Legal Aid of West Virginia, there are certain circumstances that are not mentioned.

Legal Aid of West Virginia would propose modifying the language to Rule 26(1)(B)(v) to note any case where the amount in controversy is less than $25,000 as it may be difficult to have a pro se client make such an acknowledgement as required under this rule.

Further, we would propose including additional exceptions such as: 26(1)(B)(ix) *Proceedings where one or more parties are not represented by counsel* and 26(1)(B)(x) *Other proceedings wherein the Circuit Court deems these requirements should be waived.* This would permit Circuit Judges to note certain factors that may be applicable in an initial hearing and make a finding and ruling as to the applicability of these mandatory initial disclosures.

RULE 33. INTERROGATORIES TO PARTIES

The proposed amendments to Rule 33 would limit the number of interrogatories to the parties at 25 instead of the previous limit of 40. As a non-profit law firm without a substantial discovery budget, interrogatories are frequently used by advocates to gather information in a cost-effective manner. Legal Aid of West Virginia would propose leaving the number at 40. While the Rule does provide for additional leeway and intervention of the Court, this additional action would not be necessary if the interrogatories remained at 40.

RULE 45. SUBPOENA

Rule 45(a)(4) requires notice to the "other" party prior to being served. This requirement is limited to certain cases wherein documents, electronic information, or inspection of a premises. In these situations, this notice is required to be sent in advance of the service of the subpoena. Legal Aid would propose that this includes language that would require notice for any subpoena to all parties. Thus, we would propose including *"in the event that the subpoena seeks testimony at a trial, attendance at a deposition, or anything not previously contemplated by this section, then notice of the subpoena shall be sent simultaneously with the service of the same."*

RULE 53.1 DISCOVERY COMMISSIONERS

Rule 53.1 provides for a new section for Discovery Commissioners. Nonetheless, the proposed rule makes it clear that commissioners have limited authority to do anything without the trial court acting. Commissioners will add costs to the litigation process (for example, the rule requires a written report from the discovery commissioner). In many cases commissioners will also increase the duration of litigation.

Of particular concern is that the cost of discovery commissioners can be assessed to the parties without regard to a litigant's ability to pay. While the comments suggest commissioners should only be appointed in "complex matters" the section reads "In complex cases or *for other good cause.*" In practice, this allows a Circuit Court to appoint a commissioner in almost any case. Within our advocacy at Legal Aid of West Virginia, we are aware of at least one situation where the Circuit Court appoints a discovery commissioner in most, if not all civil cases.

Commissioners may be a necessity in truly complex cases, but when appointed in small-to-moderate amount in controversy cases they increase the cost and duration of litigation. In the worst-case scenario, the costs of litigation (including the cost of a discovery commissioner) can meet or exceed the amount sought in the lawsuit itself.

LAWV proposes narrowing this proposed Rule to so that Discovery Commissioners only be appointed in truly complex cases. The rule could include factors that would assist the Circuit Court in deeming what would constitute a complex case, such as a minimum amount in controversy, the number of parties involved, or the novelty of the law or facts surrounding the case. Additionally, LAWV proposes the Rule allow for fees to be shifted or waived if a litigant can demonstrate an inability to pay through the filing of an affidavit of indigency.

RULE 77 – COURTS AND PROCEEDINGS

This rule reviews and puts in place provisions and protections relating to the filing of the Financial Affidavit for Waiver of Fees and Legal Aid of West Virginia supports these proposed amendments. We believe they assist in clarifying the roles and responsibilities of the clerk, the court, and the litigant.

RULE 81 – APPLICABILITY OF THE RULES

Frankly, LAWV would propose the removal of this section 81(b)(2)(C) and 81(b)(2)(D) all together as the West Virginia Code thoroughly discusses the grounds for divorce in West Virginia. Furthermore, basic legal principles regarding the need for evidence and burden of proof would address most, if not all, fault-based divorce. Further, while the Circuit Court has concurrent jurisdiction for divorce matters in limited situations (WV Code 51-2A-2(b)), the vast majority of these are sent to the Family Courts and provisions are provided to reference the appropriate Rules of Practice and Procedure for Family Court. Thus, the Rules of Civil Procedure could also reference the Family Court Rules in cases where the issues of divorce are addressed in the Circuit Court setting.

Nonetheless, as these rules are written, Legal Aid would make the following comments:

Rule 81(b)(2)(C) has a typographical error in the published edition noting that "A divorce or annulment action shallmust not be tried..."

Rule 81(b)(2)(D) confusingly proposes to amend the "shall" and must. As proposed, the provision would read "Unless specifically authorized by statute, no judgment of divorce, annulment or affirmance of marriage must be granted on the uncorroborated testimony of the parties or either of them." As originally drafted, this provision seems to be a limitation on the Court's authority noting that no divorce shall issue with uncorroborated testimony. By changing the shall to must, this seems to cause the limitation to go away. As proposed, it suggests that the court would have discretion? This sentence is further complicated by use of passive voice. If the intent is to restrict the court from issuing a divorce with uncorroborated evidence, LAWV would propose rewriting the section as follows: "*No Court shall issue a judgment of divorce, annulment or affirmance of marriage on the uncorroborated testimony of the parties unless specifically authorized by statute*."

Particularly relevant in considering this section is WV Code §48-5-201. Grounds for divorce; irreconcilable differences, which states:

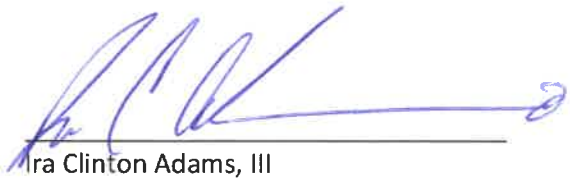
"The court may order a divorce if the complaint alleges that irreconcilable differences exist between the parties and an answer is filed admitting that allegation. A complaint alleging irreconcilable differences shall set forth the names of any dependent children of either or both of the parties. *A divorce on this ground does not require corroboration of the irreconcilable differences* or of the issues of jurisdiction or venue. The court may approve, modify, or reject any agreement of the parties and make orders

concerning spousal support, custodial responsibility, child support, visitation rights or property interests." *Emphasis added.*

Additionally relevant in considering this section is that the Circuit Court's jurisdiction in divorce is limited under 51-2A-2(b) to matters wherein the parties have no custodial, child or spousal support issues AND file a written settlement agreement signed by the parties. While it is possible that the parties could have a written settlement agreement and not agree to irreconcilable differences, this is unlikely and would be considered very uncommon to resolve all property issues and not agree to the entry of the divorce based on irreconcilable differences.

Thank you for allowing us the opportunity to comment on these proposed changes and we appreciate you taking the time to review and consider these issues through the lens of indigent, marginalized and otherwise vulnerable litigants. Should you have any questions regarding this submission, please do not hesitate to contact me as indicated below:

Respectfully submitted,



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