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Hon. Edythe Nash Gaiser, Clerk
WV Supreme Court of Appeals
1900 Kanawha Boulevard East
Building 3, Suite 317
Charleston, WV 25305

Re: *Proposed Changes to*
West Virginia Rules of Civil Procedure

Dear Ms. Gaiser:

I am writing to comment on the proposed changes to the *West Virginia Rules of Civil Procedure*. By way of background, I have been a practicing lawyer in West Virginia for over 45 years, litigating cases in a number of Circuit Courts and in the Federal Courts for the Southern and Northern Districts. I have practiced in a 3-lawyer firm and now as a solo practitioner.

As a general comment, it seems as if the members of the committee proposing the changes are obsessed with making the West Virginia Rules as identical as possible to the *Federal Rules of Civil Procedure*. While many of the non-substantive changes do no harm, the committee states no reason for them, other than apparent discomfort with the fact that the West Virginia and Federal Rules are different. This is hardly a reason justifying wholesale changes. I believe few members of the Bar are aware of exactly what is being proposed.

The Court's focus in evaluating these proposed changes should be whether or not they are in the best interests of, first, West Virginia litigants, and second, West Virginia lawyers, especially those practicing in small firms or as solo practitioners, who, I believe, are the majority of the members of the Bar who are in private practice. Many of the substantive changes appear to be calculated to benefit lawyers in large firms, to increase the difficulty of litigation for small firm and solo practitioners, and to increase the expense of litigation for their clients. This is not surprising given that the majority of the members of the committee are members of large firms, with large staffs, in the larger cities in this state. As far as I can tell, no member of the committee is from a small town or rural county, and none is a solo practitioner.

There is one particular substantive change that I strongly oppose and urge the Court to reject, regardless of any decision on the others. This is the change to Rule 26 to adopt the Federal Rules' "disclosure" requirements. In my experience, this requirement leads to the production of a large amount of unnecessary documents, increasing the cost of litigation, especially in small- to medium-size business litigation. Disclosure is time-consuming for

lawyers, especially those with small staffs, and it is burdensome in terms of time and expense to such litigants. This is even more costly regarding experts, who would be required to prepare expensive reports by proposed Rule 26(a)(2)(B). All of this encourages parties with more resources to try to out-spend their opponents into submission.

The exception in Rule 26 (a)(1)(B)(v), which excludes from the disclosure requirements cases with an "agreed" amount in controversy of less than $25,000 is illusory. It allows the party with more to gain by imposing the onerous disclosure requirement on the other party to simply not agree to the $25,000 value, thus forcing the disclosure burden on the other party.

I do endorse the change in proposed Rule 6(c)(1) of having three rounds of briefing of motions, contrary to the two rounds, initial and reply memoranda, now allowed by the West Virginia Rules. Under the current West Virginia Rules, the proponent of a motion does not get the final word. This can lead, and has led in my experience, to counsel opposing a motion being less than honest and forthright in so responding. The addition of reply by the proponent of the motion should help to curtail bad behavior on the part of counsel opposing any motion.

I am not aware of any outcry among the members of the Bar to make the West Virginia Rules more like the Federal Rules. In fact, over the years I have heard a number of lawyers say they avoided litigating cases in Federal Court precisely because of the excessive amount of filings and useless paperwork required there compared to that in the West Virginia Circuit Courts. West Virginia litigants are not happy about the additional expense incurred thereby either.

The Court should evaluate the proposed Rules in light of this timeless maxim: "If it ain't broke, don't fix it." Thank you for the opportunity to comment.

Yours truly,

James D. Kauffelt

JDK/mmw