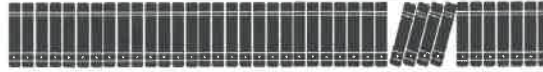
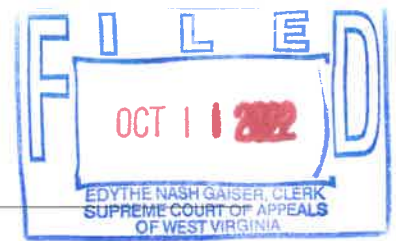


# Pepper & Nason



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October 10, 2022

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

Dear Ms. Gaiser:

I am writing on behalf of the Legal Aid of West Virginia (LAWV) Board as its President to comment on the Proposed Amendments to the West Virginia Rules of Civil Procedure. LAWV Board will be commenting as an organization on the impact of the proposed changes on access to justice for low-income West Virginians and the impact on LAMV as a law firm representing those citizens. You have received comments from our Legal Director and Executive Director. At our quarterly meeting of September 8, 2022, the Board passed a resolution authorizing this communication.

The Justices of the West Virginia Supreme Court of Appeals adopted an Amendment to Rule 23 in March, 2017. This Amendment changed the distribution rules for class action residuals. The current language is as follows:

Rule 23. Class Actions

(f) Residual funds. - When the claims process has been exhausted in class actions and residual funds remain, then fifty percent (50%) of the amount of the residual funds shall be disbursed to Legal Aid of West Virginia. The court may, after notice of counsel of record and a hearing, distribute the remaining fifty percent (50%) to one or more West Virginia non-profit organizations, schools within West Virginia universities or colleges, or foundations, which support programs that will benefit the class consistent with the objectives and purpose of the underlying cause of action upon which relief was based.

SCANNED

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The above-noted change, effective more than five years ago, has been a substantial benefit to LAWV over the time that it has been in place and its goal of providing legal services to impoverished and needy West Virginians. It means that every year, unrestricted funds become available to maintain or grow our services and the resources available for clients. We cannot budget for the cy pres revenue because it is unpredictable, but the fact that LAWV received an average of \$416,000 per year in cy pres funding over the last five years has been critical to providing legal services to eligible clients. These funds generally have specific limiting requirements as our other sources of funds may have, which means that they can cushion the impact when a grant expires or is not increased to meet inflation or can provide a bridge when we have a new grant on the horizon or a gap in funding. The cy pres funds have supported pilot projects and time-limited services and they have also helped us build a modest reserve so that we now meet non-profit best practice guidelines. Cy pres funds have enabled our program to streamline our intake process and provide more efficient delivery of services.

The proposed change to Rule 23(i) will be quite impactful. The proposed relevant language is as follows:

(i) Residual funds. When the claims process has been exhausted in class action and residual funds remain, the court may, after notice to counsel of record and a hearing, distribute the residual funds to Legal Aid of West Virginia, to one or more West Virginia nonprofit organizations, schools within West Virginia universities or colleges, or foundations, which support programs that will benefit the class consistent with the objects and purpose of the underlying cause of action upon which relief was based.

We strongly believe if LAWV is not designated as a residual fund recipient, the receipt of cy pres awards may be reduced or dry up. The 50% requirement in the current rule directs funds that are significant enough to support individual attorneys providing real assistance for real clients. Currently, LAWV receives only \$400,000 in West Virginia state general revenue funding. The rest is a mix of federal and state grants, private foundation and individual funding, or donations. Our program receives more than twenty-five sources of funding, creating a complex, yet still vulnerable annual budget. Cy pres funds matter in that budget and in the economic reality of inflation helps to keep the lights on and provide services to those who are least able to pay for legal services.

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As we look forward toward the future, of most immediate concern is that filing fee revenue from the last civil filing fee has dropped significantly from 2014 to 2021. With 9,600 fewer cases filed last year than in 2014, LAWV's important fee-based revenue is on a downward trend. Whether the decrease in civil case filings is a temporary impact of the pandemic remains to be determined, but we have been told by the Department of Homeland Security's Division of Justice and Community Services to anticipate a decrease of hundreds of thousands of dollars in 2023 of funds available to use from filing fees.

In addition, 2022 IOLTA formula payments are at historic lows; we do not know if this is temporary or a trend that will continue. Any increase in funds due to increased interest rates probably will not match cost increases. And finally, we believe the intermediate court, through the relocation of administrative appeals, may have an impact on filing fees that might have helped support Legal Aid. The added impact of the cy pres rule changes would be a "body blow" to our ability to maintain a healthy and responsive legal aid for our challenged target clients.

The Board is proud of our staff which now has 80 lawyers to serve those in need across West Virginia's 55 counties. However, for context, that pride is because West Virginia has not had 80 legal lawyers since 1980, the high mark of federal funding. The program has struggled over the last 42 years to maintain services. The Board recognizes that our program is West Virginia's "law firm of last resort," with more than 330,000 income-eligible clients and thousands more who need our help because they are domestic violence victims, grandparents raising their grandchildren as a result of the drug epidemic, veterans at risk of homelessness, children in need of special education advocacy, and elderly and disabled individuals living in care facilities. So, it is not surprising that our 80 lawyers mean that we are able to fully help less than one out of two people who seek our services.

The Board respectfully requests that the Court reject the proposed change to Rule 23(i), and instead maintain Rule 23 as it is currently written. We believe it is working and a fix is not required. The program, which currently receives 50% funding, represents needy West Virginians on a case-by-case model. If our services are reduced, needy individuals will have nowhere else to go.

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The Board believes that a healthy Legal Aid is a key component of a healthy justice system, and that civil justice is best persevered by access to courts with the assistance of an advocate.

Sincerely,



Andrew S. Nason  
LAWV Board President

ASN/pkw

pc: Ms. Adrienne Worth, LAWV Executive Director  
Mr. Clint Adams, LAWV Legal Director  
LAWV Board of Directors