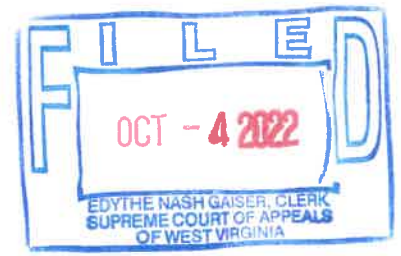




DEFENSE TRIAL COUNSEL
of WEST VIRGINIA
Voice of The Civil Defense Bar



October 4, 2022

VIA HAND DELIVERY

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

Re: Defense Trial Counsel of West Virginia's Comments to Proposed Revised
Rules of Civil Procedure

Dear Eydie:

This letter conveys comments from the Defense Trial Counsel of West Virginia ("DTCWV") on the proposed revisions West Virginia Rules of Civil Procedure ("Rules") recently published by the Supreme Court of Appeals of West Virginia.

The DTCWV has divided its proposed comments between substantive comments and suggestions and several, minor proposed corrections that were discovered during our review of the proposed amendments. The DTCWV thanks the Supreme Court of Appeals of West Virginia, the Clerk of Court and Committee charged with formulating the proposed amendments for all of their hard work leading to these proposed changes to the Rules of Civil Procedure.

COMMENTS IN RESPONSE TO PROPOSED AMENDMENTS

Rules 5(b)(1)(F), of the Proposed Amendments To The W. Va. R. Civ. P.¹

The proposed amendment to the language provides that "[s]ending it by other electronic means if the person consented in writing...." The DTCWV believes that this is one of the most significant proposed amendments, because attorneys will finally be able to serve documents on counsel for the other parties *by email*. The DTCWV membership sees no reason why attorneys should not be permitted to use email for service of virtually all documents upon counsel for the other party in a case. Every attorney has (or should have) an email address.

¹ See, Page 14. In effort to facilitate ease of reference for the comments submitted on behalf of the DTCWV, we have cited to the proposed Rule being addressed and also included the page number of the cited Rule in these footnotes.

The only issue that the DTCWV raises is that the proposed Rule 5(b)(1)(F) permits emails “if the person consented in writing.” In the West Virginia Federal District Courts, this is accomplished through their respective Local Rules and Administrative Procedures to Electronic Case Filing. L.R.Gen.P. 5.07 (c) of the Local Rules of the Northern District provides, in part, that “[p]arties may serve all other case documents [after the initial summons] electronically.” Section 9.3 of the Administrative Procedures for Electronic Case Filing in the Southern District provides “[r]egistration as a participant in ECF shall constitute consent to electronic service of all documents in accordance with Federal Rules of Civil and Criminal Procedure.” The required “consent in writing” could be accomplished in several ways: proposed Rule 5(b)(1)(F) could be further amended to provide that “the attorney’s appearance in any matter in a Circuit Court shall constitute consent to the electronic service of all documents in accordance with the West Virginia Rules of Civil Procedure, absent written service of a notice upon all counsel and/or parties as to why electronic service cannot be accomplished by the attorney or party;” Trial Court Rule 15 could be amended to include such a provision; or the required Civil Case Cover Sheet could be amended to include such a provision.

Rule 6(a)(6)(A) of the Proposed Amendments to The W. Va. R. Civ. P.²

All of the West Virginia legal holidays that are prescribed by W. Va. Code § 2-2-1 are included, with the exception of Lincoln’s Day, which is the day after Thanksgiving. Since it is a “day set aside by statute” the DTCWV suggests that it should be specifically named to avoid confusion and uncertainty. There is a catch-all in subsection (c) for any other legal holidays so designated by the West Virginia Legislature,” but the DTCWV respectfully suggests that Lincoln’s Day should “have its day” and be included in subsection (A).

Rule 6(d) of the Proposed Amendments To W. Va. R. Civ. P.³

The three days which are added for service by mail appears to create a possible conflict with motions, responses and replies. Under Rule 6(c)(1) motions are served at least 30 days before the hearing, and under (c)(3) response memoranda are due 21 days after service of the motion and replies are due 7 days from the date of service of the memorandum in response. Adding three days for responses and three days for replies exceeds 30 days, which may create an issue in the approximately 25 counties not currently on the CourtPLUS e-Filing System.

² See, Page 19.

³ See, Page 21.

The DTCWV suggests that the appropriate approach for handling time frames for filing motions, responses and replies would be to mirror the time lines provided in Local Rules of Civil Procedure for the Northern District of West Virginia.⁴

⁴ Rule 7.02 of the Local Rules of Civil Procedure for the Federal District Court for the Northern District of West Virginia provides:

(a) **Motions and Supporting Memorandum**: All motions shall be concise, state the relief requested precisely, be filed timely, but not prematurely, and, except for nondispositive motions other than a motion for sanctions, be accompanied by a supporting memorandum of not more than twenty-five (25) pages, double-spaced, and shall be further accompanied by copies of depositions (or the pertinent portions thereof), admissions, documents, affidavits and other such materials upon which the motion relies. A judicial officer, for good cause shown on motion made to the Court, may allow a supporting memorandum to exceed twenty-five (25) pages. The proposed supporting memoranda must be attached to the motion during the e-filing process. A dispositive motion or a motion for sanctions that is unsupported by a memorandum may be denied without prejudice. The memorandum must be submitted on 8½ by 11-inch paper. Margins must be one inch on all four sides. Page numbers, but no text, may be placed in the margins. The memorandum must be in either Times New Roman, Courier New or Arial font. The font size must be twelve (12) point proportionally spaced type or eleven (11) point non-proportionally spaced type. Footnotes and indented quotations may be single-spaced and footnote text shall be no smaller than eleven (11) point proportionally spaced or ten (10) point non-proportionally spaced type. Parties may file a memorandum in support of a nondispositive motion, but are not required to do so. Motions for summary judgment shall include or be accompanied by a short and plain statement of uncontroverted facts.

(b) Memoranda in Response to Motions and Reply Memoranda:

(1) Memoranda in Response: Except for responses to motions for summary judgment, responses to motions shall be filed and served within fourteen (14) days from the date of service of the motion. Responses to motions for summary judgment shall be filed and served within twenty-one (21) days from the date of service of the motion. (i) Traditional Filing: When not filing electronically in CM/ECF, parties shall file the original and two (2) copies of the memoranda and other materials and serve paper copies on opposing counsel and unrepresented parties. (ii) Electronic Filing: When filing in CM/ECF, the filer must provide any non-CM/ECF filer with the document according to this Rule. CM/ECF filers need not, however, provide paper copies to other CM/ECF filers, as the document will be served electronically. (iii) Page Limitations: Responsive memoranda may not exceed twenty-five (25) pages and are subject to the restrictions set forth in LR Civ. P. 7.02(a) regarding paper size, font size and line spacing. A judicial officer, for good cause shown on motion made to the Court, may allow a memorandum in response to exceed twenty-five (25) pages. The proposed memoranda in response must be attached to the motion during the e-filing process.

Rule 26(b)(2)(C) of the Proposed Amendments To the W. Va. R. Civ. P.

The DTCWV comments on this addition to the Rules to express its approval of the proportionality analysis that a Court may take under the Rules on its own or upon motion of a party. See, Rule 26(b)(2)(C)(iii) of the Proposed Amendments To the W. Va. R. Civ. P. This will enhance fairness for all litigants appearing before West Virginia Courts. The DTCWV writes separately to further encourage the Court to adopt language similar to the current Federal Rule of Civil Procedure 26(b)(1) which expressly provides that:

Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and 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.

(2) Memoranda in Reply: Except for replies to responses to motions for summary judgment, replies shall be filed and served within seven (7) days from the date of service of the response to the motion. Replies to responses to motions for summary judgment shall be filed and served within fourteen (14) days from the date of service of the response to the motion. (i) Traditional Filing: When filing in paper and not filing in CM/ECF, parties shall file the original and two (2) copies of the reply memoranda and serve paper copies on opposing counsel and unrepresented parties. (ii) Electronic Filing: When filing in CM/ECF, the filer must provide any non-CM/ECF filer with the document according to these Rules. CM/ECF filers need not, however, provide paper copies to other CM/ECF filers, as the document will be served electronically. (iii) Page Limitations: Reply memoranda may not exceed fifteen (15) pages, subject to the restrictions set forth in LR Civ P 7.02(a) regarding paper size, font size and line spacing. A judicial officer, for good cause shown on motion made to the Court, may allow a reply memorandum to exceed fifteen (15) pages. The proposed reply memoranda must be attached to the motion during the e-filing process.

(3) Surreply and Surrebuttal: Except by leave of court, parties shall not file surreply or surrebuttal memoranda. The proposed surreply or surrebuttal must be attached to the motion during the e-filing process. (4) Time Limits; Judicial Officer Discretion: The judicial officer to whom the motion is addressed may modify the times for serving memoranda. (5) Courtesy Copy: When electronically filing a memorandum, the filing party must file a courtesy copy of the memorandum with the Court if the memorandum, together with documents in support thereof, is twenty-five (25) pages or more, or where any administrative record is seventy-five (75) pages or more in length. Courtesy copies should be delivered to the Clerk's Office at the appropriate courthouse. Courtesy copies should not be delivered directly to chambers.

Fed. R. Civ. P. 26(b)(1). The DTCWV believes that the reference to the proportionality of discovery should be expressly stated in the contemplated version of new Rule 26(b)(1) of the West Virginia Rules of Civil Procedure, subject to any later amendments with the Federal Rules.

Rule 26(b)(5) of the Proposed Amendments To The W. Va. R. Civ. P.⁵

“Claiming Privilege for Protecting Trial-Preparation Materials.” The proposed amendment will mean that the requirement of privilege logs for claiming attorney client privilege or work-product protection will appear in a Rule of Civil Procedure. Currently the privilege log requirement stems only from Supreme Court decisions, such as *State ex rel. Nationwide Mut. v. Kaufman*, 213 W.Va. 624, 658 S.E.2d 728 (W.Va. 2008) and *State ex rel. Westfield Insurance Co. v. Madden*, 216 W.Va. 16, 602 S.E.2d 459 (2004). The DTCWV believes this to be a significant change in the requirements of the Rules of Civil Procedure. Because of its significance, it may be beneficial to reference the change within the Committee Comments. This would prevent confusion amongst practitioners at the time of the implementation of the proposed amendments.

Rule 37 of the Proposed Amendments To The W. Va. R. Civ. P. ⁶

The DTCWV suggests that the proposed, mandatory language of Rule 37 of the Rules be amended to permit Judges to have the discretion concerning the award of attorney fees in discovery disputes. The previous language contained the mandatory requirement that the Court *shall* order the payment of reasonable expenses, including attorney’s fees. Discovery disputes are often driven by case specific, nuanced issues that defy absolute mandates. The proposed amendment to Rule 37 uses the word *must*. The DTCWV suggests that it should be changed to *may* in order to afford this additional discretion to the Court. This change would involve Rule 37(a)(5)(A) and (B), (b)(2)(C), (c)(2), and (d)(3). Also, proposed Rule 37(f) uses the word “required,” which should be “require,” and the DTCWV suggests that this should be amended to “may require.”

Rule 54(d) of the Proposed Amendments To The W. Va. R. Civ. P.⁷

The DTCWV suggests that the proposed edit eliminating the attorney-fee recovery provision in the proposed Rule 54(d) not be adopted. Fees are excluded from the proposed Amendment to Rule 54, but they appear in Federal Rule 54(d). Attorney’s fees can be recovered in civil actions in West Virginia. For example, W.Va. Code § 46(A)-5-104 provides for attorney’s fees in actions under the West Virginia Consumer Credit and Protection Act, as does W. Va. Code § 21-5-12(b) of the West Virginia Wage Payment and Collection Act. Also, “Pitrolo hearings” are required to determine the attorney’s fees incurred by an insured where the insurer is found to

⁵ See, Page 86.

⁶ See, Pages 122-127.

⁷ See, Page 155.

have had a duty to defend its insured (which it denied) under its policy in a declaratory judgment action. *Aetna Cas. & Sur. Co. v. Pitrolo*, 176 W.Va. 190, 342 S.E.2d 156 (1986). Since there are clear instances where attorney’s fees can be recovered, the DTCWV suggest that the provisions in Federal Rule 54(d)(2)(A) (B) and (C) should be incorporated into the proposed Amendment to the Rules of Civil Procedure in an effort to avoid confusion on this issue.

Rule 56(a) of the Proposed Amendments To the W. Va. R. Civ. P.⁸

The DTCWV suggests that the words “is sought” should be added at the end of the sentence so as to conform to its Federal counterpart.

Rule 59(f) of the Proposed Amendments to the W. Va. R. Civ. P.⁹

The proposed Amendment to Rule 59(f) of the West Virginia Rules of Civil Procedure appears in the proposed Amendments as mis-lettered (g) which is lined through, and (f) as “abrogated”. The DTCWV believes the current Rule 59(f) should be retained. Principally, motions for a new trial give the Circuit Court a chance to correct serious errors by setting aside the verdict and granting a new trial, and current Rule 59(f) also warns counsel of the failure to file a motion for a new trial. Additionally, Rule 59(f) allows for development of issues first raised before the trial court, which provides the appellate courts with a further factual record from which to conduct meaningful appellate review.

The last sentence in the third paragraph of the Committee Comment on Rule 59 provides that “[t]he Committee believes that it is more efficient to allow a party to seek appellate review immediately after judgment is rendered, if it so chooses.” Wright Miller Kane provides in § 2818 that “[t]he settled rule in Federal Courts...is that a party may assert on appeal any question that has been raised in the trial court. The parties are not required to make a motion for a new trial challenging the supposed errors as a prerequisite to appeal.” But contrast that with Rule 50 requirements: “[t]he party against whom the verdict was rendered must comply strictly with all of the procedural requirements of Rule 50 in order to obtain appellate review of a claim that he or she is entitled to judgment as a matter of law. If the party moved only for a new trial, neither the trial nor the appellate court may order a judgment as a matter of law....” Wright Miller Kane § 2540. Unquestionably a Rule 50 motion is required to preserve the right to challenge the sufficiency of the evidence supporting the verdict, which also extends to other claims of error that turn on alleged evidentiary shortcomings. There is a risk of permitting the Committee Comment to be included without comment as it could be interpreted to bring into conflict Rules 50 and 59.

⁸ See, Page 158.

⁹ See, Page 162.

Rule 62(b) of the Proposed Amendments to the W. Va. R. Civ. P.¹⁰

Pursuant to Federal Rule of Civil Procedure 62(b), an interlocutory or final judgment in an action for an injunction is not automatically stayed unless the court otherwise orders, and Rule 62(d) otherwise provides for actions which can be taken with respect to injunctions while an appeal is pending. The DTCWV respectfully suggests that the proposed Rule 62 needs to say something about whether or not injunctions can be stayed pending appeal. This addition will avoid confusion on the issue and provide for unanimity among practitioners in West Virginia state courts.

Also, the Committee Comment on Rule 62, in the fourth paragraph, appears to be missing a word. It provides that “language in Rule 62(b) is consistent with the current federal rule extension of the automatic stay obviates the need for the discretionary stay.” The DTCWV would also suggest that the Committee Comment be amended to reflect that fact that the automatic stay is only for 30 days, after which the judgment becomes enforceable even though there may be pending post-trial motions—and the discretionary stay is provided in Rule 62(h).

Rule 69(b) of the Proposed Amendments to the W. Va. R. Civ. P.¹¹

This provision for “obtaining discovery” is identical to its Federal counterpart, in that the judgment creditor “may obtain discovery...as provided in these rules.” The DTCWV suggests that it may be beneficial, for clarity purposes, to add at the end of that sentence “in addition to that provided by statute.” The West Virginia Code provides for proceeding in aid of execution in Chapter 38, and the “debtor’s examination” is provided in W.Va. Code § 38-5-1 through § 38-5-5. The discovery provisions in Rule 69(b) are in addition to those provided in Chapter 38 of the West Virginia Code and it might be helpful to explicitly clarify this fact.

Rule 85 of the Proposed Amendments to the W. Va. R. Civ. P.¹²

It is common for many parties appearing before West Virginia Courts to abbreviate the Rules of Civil Procedure when citing to them. Because the abbreviation is common, the DTCWV suggests that the Rules be cited as simply “WVRCP.”

¹⁰ See, Page 165.

¹¹ See, Page 173.

¹² See, Page 187.

PROPOSED EDITS AND CORRECTIONS

The DTCWV offers the following suggestions related to proposed edits and corrections based upon the review and feedback of our members.

Rule 4(d)(4)(B)(i) of the Proposed Amendments To The W. Va. R. Civ. P.

The proposed revisions at Rule 4(d)(4)(B)(i), relating to service on Domestic Public Corporations that are cities, towns, or villages, replaces service on a member of the town “council” with service on “any member of its counsel or board of commissioners.” It would appear the original term was correct. The proposed change to the Rule text to refer to service on a member of a city or town “counsel” might create confusion about whether service can be made on legal counsel for a municipal government.

Rule 5(c)(1) and Committee Comment on Rule 5

On Rule 5(c)(1), a word appears to be missing, or alternatively, the Rule may read more clearly with the addition of a word. The text provides that “the court may, on motion or on its _____ order.” The word “own” was lined through. The DTCWV respectfully suggests that “own” be included for purposes of clarity.

Finally, it appears that the Committee Comment on Rule 5, in the second paragraph, needs to be corrected. “Substantively, Rule 5(b)(ii)(F) . . .” should be corrected to reflect reference to Rule 5(b)(1)(F).

Rule 26 of the Proposed Amendments To The W. Va. R. Civ. P.

The last sentence of the third paragraph on page 86 appears to incorrectly state “[d]iscovery regarding experts adopts the federal standards of requiring experts reports and depositions of disclosed experts under rule 26(b)(5).” This appears to be an inaccurate citation to the Rule number, which probably should be 26(b)(4)(A), addressing expert depositions.

Rule 33(a)(1) and Committee Comments of the Proposed Amendments To The W. Va. R. Civ. P.¹³

The DTCWV requests that additional language be added to the proposed Rule 33(a)(1). At the end of the text, it says “to the extent consistent with Rule 26(b)(1) through _____”. The Federal Rules of Civil Procedure provide “to the extent consistent with Rule 26(b)(1) and (2), where the blank space is currently placed. The DTCWV proposes that the proposed amendment adopt the language contained in the companion Federal Rule.

¹³ See, Pages 112-113.

In the Committee Comment on Rule 33, in the second paragraph, it is stated that the number of interrogatories specified by Rule 30(a) is reduced to 25....” It appears that where Rule 30(a) is noted, the Committee Comment should actually reference Rule 33(a).

Rule 36 of the Proposed Amendments To the W. Va. R. Civ. P.¹⁴

It appears that the original Rule 36 apparently was intended to be lined through, but instead it turned out to be underlined. This should be corrected.

Rule 51(b)(1) of the Proposed Amendments To the W. Va. R. Civ. P.¹⁵

Rule 51(b)(1). The amendment states: “must inform the parties of its proposed instructions and proposed action on the requests before instructing the jury and before final *jury*.” This sentence appears that it should state “before final *arguments*.”

Rule 56(a) of the Proposed Amendments To the W. Va. R. Civ. P.¹⁶

The DTCWV suggests that the words “is sought” should be added at the end of the sentence so as to conform to its Federal counterpart.

Rule 59 of the Proposed Amendments To the W. Va. R. Civ. P.¹⁷

It appears that the letters for the subdivisions in Rule 59 are out of order. The letters skip from (a) to (h) without explanation. The DTCWV respectfully suggests that the subparagraphs be re-lettered to accurately reflect the progression of paragraphs.

Rule 79(e) of the Proposed Amendments to the W. Va. R. Civ. P.¹⁸

The paragraph in the text which follows Rule 79(d) is not designated as (e), but it appears that it should be.

¹⁴ See, Pages 119-120.

¹⁵ See, Page 149.

¹⁶ See, Page 158.

¹⁷ See, Page 161.

¹⁸ See, Page 182.

Ms. Edythe Nash Gaiser, Clerk of Court
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We thank the Court and Clerk's Office for their effort to work towards a more efficient and clear set of Rules under which the membership of the Defense Trial Counsel of West Virginia practice. If there are any questions concerning the comments submitted on behalf of our membership, please do not hesitate to contact me.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Susan R. Snowden", is written over a horizontal line.

Susan R. Snowden, Esq.
President, Defense Trial Counsel of West Virginia