



October 13, 2022

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: DRI Center for Law and Public Policy's Comments to Proposed Revised
Rules of Civil Procedure

Dear Madam Clerk:

DRI is the world's largest international membership organization of lawyers involved in the defense of civil litigation. The history of DRI encompasses many years of effort by dedicated lawyers who see the need for a coordinated approach by defense lawyers to the challenges presented when defending parties in civil litigation. Many of DRI's West Virginia members are also members of Defense Trial Counsel of West Virginia (DTCWV), which has recently offered comments to you suggesting improvements to the Proposed Revisions to West Virginia's Rules of Civil Procedure.

The DRI Center for Law and Public Policy joins DTCWV and supports their suggestions. Of great importance is their comment encouraging the Court to include language similar to that in Federal Rule of Civil Procedure 26 (b)(1) to add language to allow to search for relevant evidence,

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.

The Committee Note of the Advisory Committee on the Federal Rules of Civil Procedure explained the purpose of adding this language to the portion of Civil Rule 26 addressing the Scope of Discovery:

The present amendment restores the proportionality factors to their original place in defining the scope of discovery. This change reinforces the Rule 26(g) obligation

of the parties to consider these factors in making discovery requests, responses, or objections.

Restoring the proportionality calculation to Rule 26(b)(1) does not change the existing responsibilities of the court and the parties to consider proportionality, and the change does not place on the party seeking discovery the burden of addressing all proportionality considerations.

Nor is the change intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional. The parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes.

The Proposed Revision, adding Rule 26(b)(2)(c), includes the factors the court must use to determine whether to limit the scope of extent of discovery. DRI believes the proper understating of those provisions will best be accomplished by including the DTCWV suggested proportionality provision to Rule 26(b)(1). That will ensure the proportionality factors are used to define the scope of discovery, consistent with the reasoning explained in the above quoted Committee Note accompanying the 2015 amendment to Federal Rule 26.

This addition to Rule 26 would be consistent the amendment to Civil Rule 1's expression of the purpose of the Civil Rules, contained in the Proposed Revisions:

They must be construed, administered, and employed by the court and parties to secure the just, speedy, and inexpensive determination of every action and proceeding.

The DRI Center for Law and Public Policy applauds the efforts to bring the West Virginia Civil Rules closer in their wording to the Federal Civil Rules. DRI members practice in both courts and when the rules are identical or quite similar it is easier for them to manage their cases in both systems. They also have a wealth of decisional law and practice aids from the Federal Courts that help them better understand how the rules will likely function in state court.

Very truly yours,

Kathleen M. Guilfoyle

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Chair, DRI Center for Law and Public Policy