WEST VIRGINIA

CIRCUIT CLERK PROCEDURAL MANUAL

© West Virginia Supreme Court of Appeals
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PURPOSE OF THE MANUAL

The purpose of this manual is to establish general procedures or policies and practices that should be common to all offices of the clerks of the circuit court. Article 8, Section 3 or the West Virginia Constitution establishes the West Virginia Supreme Court, and in particular the Chief Justice, as the administrative authority for the judicial system in West Virginia. Within a judicial circuit, the chief judge or circuit judge in a single-judge circuit is the administrative authority for the circuit. (W. Va. Const. Art. 8, § 6). As an officer within the judicial system, the circuit clerk is subject to the administrative hierarchy established by Article 8 of the West Virginia Constitution. (*Rutledge v. Workman*, 332 S.E.2d 831 (W. Va. 1985)). The adoption and promulgation of this manual is one of the vehicles by which the Court fulfills its administrative responsibility to manage the West Virginia judicial system.

Uniformity in procedures across courts is essential to the smooth functioning of the West Virginia judicial system. It facilitates communication among court personnel and ensures access to the courts for attorneys, litigants and the general public. The uniform procedures established by this manual will enhance both the justice and efficiency of the West Virginia court system.

LIST OF RULE ABBREVIATIONS

ARMC	Administrative Rules for the Magistrate Courts
RAP	Rules of Appellate Procedure
RCP	Rules of Civil Procedure
RCANP	Rules of Procedure for Child Abuse and Neglect Proceedings
R. Cr. P.	Rules of Criminal Procedure
RDVCP	Rules of Practice and Procedure for Domestic Violence Civil Proceedings
RFCP	Rules of Practice and Procedure for Family Court
RJDP	Rules of Judicial Disciplinary Procedure
RJP	Rules of Juvenile Procedure
RMGP	Rules of Practice and Procedure for Minor Guardianship Proceedings
RPAA	Rules of Procedure for Administrative Appeals
RPHCP	Rules Governing Post-Conviction Habeas Corpus Proceedings in West Virginia
TCR	Trial Court Rules

Chapter 1

OVERVIEW OF WEST VIRGINIA COURT SYSTEM

Contents

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The present Constitution of West Virginia was ratified in 1872. The entire Judicial Article was rewritten and adopted by the voters in 1880. Until 1974, the Judicial Article remained basically unchanged, except for a minor amendment in 1902, which increased the number of justices on the Supreme Court from four to five and permitted judicial salaries to be set by law.

In November 1974, the voters adopted the current version of Article 8 of the West Virginia Constitution governing the judiciary -- the Judicial Reorganization Amendment. Section 1 of this constitutional amendment states: "The judicial power of the State shall be vested solely in a supreme court of appeals and in the circuit courts, and in such intermediate appellate courts and magistrate courts as shall be hereafter established by the Legislature, and in the justices, judges and magistrates of such courts." This article permitted the continued existence of municipal courts with legislative approval, but limited their jurisdiction to hearing cases involving municipal ordinance violations. In November 2000, the Unified Family Court Amendment was ratified. As a result of these two constitutional

amendments, West Virginia's judicial system presently consists of the following courts: Supreme Court, circuit courts, family courts, magistrate courts, and municipal courts. There are some specialized courts, which include the Mass Litigation Panel and the Business Court Division. In addition, there are treatment courts, such as adult drug courts, juvenile drug courts and mental health treatment courts.

1.1 COURT STRUCTURE

1.1.1 Appellate Courts

The Supreme Court of Appeals, consisting of five justices elected to 12-year terms, is the court of last resort in the West Virginia judicial system. In addition to original jurisdiction over extraordinary writs, the Supreme Court has appellate jurisdiction over all matters decided in the circuit courts and in direct appeals from the family courts. It also has appellate jurisdiction over circuit court decisions when the circuit court acts as an intermediate appellate court. These types of appeals include family court appeals, magistrate court appeals, municipal court appeals and administrative agency appeals.

1.1.2 Trial Courts

The State has one court of general jurisdiction, circuit court, and three courts of limited jurisdiction: family, magistrate and municipal courts.

Circuit courts have jurisdiction of all civil cases at law exceeding $2,500. However, this jurisdictional limit does not apply to cases involving real estate installment sales contracts. In addition, circuit courts have jurisdiction over all civil cases in equity; proceedings in habeas corpus, mandamus, quo warranto, prohibition and certiorari; and all felonies and misdemeanors. It has concurrent jurisdiction with the family court over divorce, annulment or separate maintenance, provided that the case does not involve issues relating to the care and support of minor children. Additionally, it has concurrent jurisdiction with the family court over name changes, domestic violence cases and minor guardianship cases. If a minor guardianship case is based upon allegations of abuse and neglect, the circuit court is required to address the case. The circuit court does not have jurisdiction over probate matters because jurisdiction for those cases is vested in county commissions.

The circuit court has appellate jurisdiction over limited-jurisdiction courts. Appeals from magistrate and municipal courts are heard by trial *de novo* or on the record, depending on whether a jury trial was held in the lower court. In family court appeals, the circuit court

reviews the family court record. In administrative agency appeals, the circuit court reviews the record of the proceeding before the administrative agency.

The State is divided into 31 judicial circuits, each composed of one to four counties. Each county has a courthouse where one or more circuit judges preside. The number of judges in each circuit range from one circuit with seven judges to nine circuits with one judge. There are 70 total circuit judges in West Virginia. Beginning in 2017, there will be 74 total circuit judges.

As one of the courts of limited jurisdiction, the family court has jurisdiction over cases involving divorce, annulment, separate maintenance, child support, paternity, allocation of custodial responsibility and grandparent visitation. However, when an abuse or neglect proceeding is pending involving any child which is the subject of a grandparent visitation motion or petition, such motion or petition must be filed and heard in the circuit court. (W. Va. Code §§ 48-10-101(c) and 102(d)). The family court also has jurisdiction over final domestic violence hearings, child support enforcement actions, and civil contempt wherein the order sought to be enforced is a family court order. It has concurrent jurisdiction with the circuit court over name changes and minor guardianship proceedings. If a minor guardianship case is based upon allegations of abuse and neglect, the circuit court is required to address the case.

Presently, there are 45 family court judges who serve 27 family court circuits. Beginning in 2017, there will be 47 family court judges. The geographical area of family court circuits is, in many cases, different from the judicial circuits for circuit courts. The number of family court judges per circuit varies from one to five.

Magistrate courts have jurisdiction over all misdemeanors, and magistrates conduct arraignments and preliminary hearings in felony cases. Magistrate courts also have jurisdiction to conduct some juvenile proceedings; and to conduct emergency protective proceedings in domestic violence cases. Circuit courts may appoint a magistrate in a county to accept mental hygiene petitions and conduct probable cause hearings when a circuit court judge or mental hygiene commissioner is not available. Circuit courts may also designate a magistrate to serve as a juvenile referee. (Rule 3, RJP). In this capacity, a magistrate may conduct detention hearings and other duties as assigned by the court, but may not conduct hearings on the merits of any juvenile case.

The civil jurisdiction of magistrate courts generally extends to matters wherein the amount in controversy or the value of property sought is $10,000 or less. There is a magistrate court in each of the State's 55 counties. (See W. Va. Code § 50-2-1). The number of magistrates per county varies from two to ten. If deemed necessary, the chief judge of the circuit court may appoint a chief magistrate. Magistrates are subject to the administrative authority of the chief circuit judge and the Supreme Court.

The jurisdiction of the municipal courts is constitutionally limited to hearing cases involving municipal ordinance violations. Administrative matters relating to the municipal courts are locally determined by the governing body of the municipality.

1.2 JUDICIARY

1.2.1 Qualifications, Selection and Term

Beginning in the primary elections in 2016, all West Virginia judicial officials will be elected in nonpartisan elections. Supreme Court justices serve 12-year terms. Circuit court and family court judges serve eight-year terms. Magistrates serve four-year terms. The procedures for the appointment or election of municipal court judges are determined locally.

Supreme Court justices must be attorneys with at least ten years legal experience. Circuit court judges and family court judges must be attorneys in good standing with the bar and must have a minimum of five years legal experience. The legislature and courts are constitutionally prohibited from requiring magistrates to be attorneys. However, magistrates must attend and complete a course of instruction in rudimentary principles of law prior to assuming office. While serving as magistrates, they must also attend annual continuing education classes as prescribed by the Supreme Court. Similar to magistrates, a municipal court judge is not required to be a lawyer. However, a municipal court judge who is not a lawyer must attend and complete a course of instruction in rudimentary principles of law as soon as a class is offered.

1.2.2 Quasi-Judicial Officers

Circuit court judges may receive assistance from specially appointed quasi-judicial officers, such as mental hygiene commissioners. West Virginia Code § 27-5-1 requires the circuit court of each county to appoint at least one mental hygiene commissioner, an attorney who presides over involuntary hospitalization hearings. A mental hygiene

commissioner can issue summons, subpoenas, and make findings of fact and conclusions of law. These findings and conclusions are not binding on the circuit court, which enters the final order in these cases. Mental hygiene commissioners may also be appointed to make findings of fact in adult guardianship and conservatorship cases. (W. Va. Code § 44A-2-9(a)). The circuit court enters the final order in these cases as well.

Circuit courts may also appoint attorneys to serve as commissioners, such as discovery commissioners. See *State ex rel. Hamrick v. Stucky*, 640 S.E.2d 243 (W. Va. 2006). Another example involves the appointment of a special commissioner in cases involving the sale of real estate.

1.3 ADMINISTRATION AND PROCEDURE

1.3.1 State Judicial Administration

Article 8, Section 3 of the West Virginia Constitution designates the chief justice as the administrative head of all the courts. The administrative director, whose position is authorized by the Constitution, is appointed by and serves at the will and pleasure of the Supreme Court. Under the provisions of West Virginia Code § 51-1-17, the administrative director has charge of all administrative matters relating to circuit and magistrate clerks' offices, oversees the management of dockets in the various courts, and secures information concerning any necessary assistance for courts. The administrative director is also responsible for the compilation of statistical data, issuance of necessary reports, and the preparation of the judicial budget. Finally, the duties of the administrative director include the purchase, transfer and distribution of equipment and supplies, and any other duties as assigned by the Supreme Court.

1.3.2 Local Court Administration

Local administrative authority for the courts reposes in the circuit court, by and through the circuit judge in a single judge circuit or in the chief judge of a multi-judge circuit, as established by Article 8, Section 6 of the West Virginia Constitution. The designation of a chief judge in multi-judge circuits is governed by local court policy or practice.

As the administrative head of the magistrate courts within the circuit, the judge or chief judge appoints the magistrate court clerk and may designate one of the magistrates as chief magistrate if it is deemed necessary. In counties with only two magistrates, the judge or chief judge may by rule, in lieu of appointing a magistrate clerk, require that

the circuit clerk perform the duties of the magistrate clerk. If so, the circuit clerk is entitled to additional salary of $2,500. (W. Va. Code § 50-1-8(a)).

In general, a family court judge is responsible for the supervision and administration of the family court. In multi-judge family court circuits, the family court judges should adopt local policies and procedures by agreement. If family court judges cannot agree, the chief circuit judge or judges will have the authority to adopt local policies and procedures. When two or more chief circuit judges (covering different counties of a family court circuit) cannot agree on local policies and procedures, the Supreme Court may decide any differences. (W. Va. Code § 51-2A-7(b)). This statutory subsection, therefore, indicates that family court judges are subject to the administrative authority of chief circuit court judges. Additionally, as established by Article 8, Sections 3 and 16 of the West Virginia Constitution, family courts are ultimately subject to the administrative authority of the West Virginia Supreme Court.

1.4 THE OFFICE OF CIRCUIT CLERK: DUTIES AND RESPONSIBILITIES

The office of the clerk of the circuit court is established by Article 8, Section 9 of the West Virginia Constitution. Circuit clerks are elected for a term of six years and their duties, responsibilities, compensation and the procedure for their removal from office are set by various statutes and court rules.

The circuit clerk is an officer within the judicial system and plays a pivotal role in that system. While the clerk is an independently elected official with autonomy to establish any procedures or policies necessary to carry out statutory responsibilities, cooperation and communication with all the entities and agencies that comprise the justice system is essential. The clerk should adopt policies and procedures that ensure cooperation with other officers and agencies in the justice system so that cases are efficiently processed.

The West Virginia Constitution establishes a hierarchy of administrative control that gives overall authority for the entire judicial system to the Supreme Court of Appeals, by and through its chief justice and administrative director. Thereafter, local administrative authority reposes in the circuit court, by and through the judge or chief judge of each circuit. This hierarchy controls the office of circuit clerk with regard to the clerk's judicial functions.

Rule of Civil Procedure 77 provides general guidance concerning a clerk's duties and also allows for review of the clerk's actions by the court. The first provision of Rule 77, which states that the courts "shall always be deemed open," is to permit the court, or the clerk, to deal with emergencies after

business hours. However, the clerk's office is only required to be open during business hours on all days except Sundays and legal holidays. (Rule 77(c), RCP).

The clerk of court is authorized to issue mesne (during the progress of a case) process to effect provisional remedies to ensure the satisfaction of a judgment which might ultimately be obtained; issue final process to enforce and execute judgments; appoint a guardian ad litem when required (Rule 17(c), RCP); and, respond to other requests that do not require a court order. However, any action of the clerk may be suspended, modified or rescinded by the court for cause shown. (Rule 77(c), RCP).

The circuit clerk is responsible for all papers filed in the office. (W. Va. Code § 51-4-3). This means the clerk is the registrar, recorder and custodian of all pleadings, documents and funds pertaining to cases filed in the circuit and family courts. Circuit clerks are required to maintain records in such form as the Supreme Court of Appeals requires. (See Chapters 2 and 3). (Rule 79, RCP; Rule 5(a), RFCP; Rule 55, R. Cr. P.).

The circuit clerk is also responsible for the administration and management of the petit and grand jury systems in the county. Under the direction of the circuit court, the clerk creates the master list of prospective jurors; randomly selects panels for attendance; qualifies and summons the jurors; participates in jury orientation; and monitors attendance and mileage for reimbursement purposes. (See Chapter 9). The circuit clerk is also required to provide jury panels for both magistrate and municipal courts.

In addition to the roles as official recordkeeper and jury administrator of the court, the circuit clerk is also the fee officer. The circuit clerk is authorized by statute to collect various fees, fines, and costs associated with cases, and hold and disburse other types of payments and deposits, such as bonds and restitution. With the exception of the portion of fees and costs that are sent directly to the State under various statutory provisions, all such monies are either deposited into the county treasury for subsequent disbursement to the appropriate county or state agency or, as in the case of bonds or restitution, disbursed directly to the appropriate individual. As provided in West Virginia Code § 59-1-11(f), the clerk is not required to handle or accept for disbursement any fees, costs or accounts that are not payable into the county treasury unless ordered by the court or mandated by the law pertaining to such fees, costs or accounts. (See Chapters 5 and 6).

In addition, when authorized by order of the court, parties to any action in which a money judgment or disposition of a sum of money or other deliverable is sought may deposit with the court all or any part of such sum or item. (Rules 67 and 68(b), RCP). For instance, deposits are routinely made in condemnation cases. The circuit clerk receives and is accountable for all

money and property which the court orders to be deposited in the circuit court. Under the provisions of Rule of Civil Procedure 67, such money is deposited and withdrawn in accordance with applicable statutes and orders of the court entered in specific cases. The money must be deposited in a federally insured interest-bearing account or invested in an interest-bearing instrument approved by the court. West Virginia Code § 51-6-1 also provides for the appointment of a general court receiver, an agent of the court who is, in essence, the custodian of funds or other property subject to a legal dispute. Any funds deposited with the general receiver must be properly managed until the legal action is resolved, and the rightful ownership or control of the property is determined.

As a recordkeeper and a fee officer, the clerk's duties are ministerial; that is, the duties are prescribed by statute, order, rule, or other directive and are absolute, certain, and required. The clerk has no discretion as to the performance of these duties; he or she must execute them. The clerk may exercise reasonable administrative judgment, however, as to the most efficient and effective way to perform or accomplish the ministerial duties.

The multiple functions and responsibilities of the clerk's office require that the clerk periodically report various statistics, accountings, and other information to other governmental agencies. In addition to reports on caseload and trial activity in the courts submitted to the Administrative Office, the circuit clerk is the provider of certain vital statistics to the Department of Health and Human Resources, and financial data to the Offices of the State Auditor and the State Treasurer. (See Chapter 6).

According to West Virginia Code § 6-2-10, every circuit court clerk must be bonded in an amount not less than $10,000 but not more than $50,000. The bond and security for the bond must be approved by the circuit court. The bond of the circuit clerk is filed in the office of the county clerk; the bond of the county clerk is filed in the office of the circuit clerk. (W. Va. Code § 6-2-12).

The circuit clerk is also authorized by West Virginia Code § 6-3-1 to appoint deputy clerks subject to the review of the court. Deputy clerks take the same oath of office as the clerk and perform all official acts and duties in the name of the circuit clerk. This means that actions by a deputy clerk have the same force and effect as if the circuit clerk actually performed the task. Any defaults or misfeasance by a deputy may constitute a breach of the bond of the circuit clerk. According to West Virginia Code § 6-2-19, the circuit clerk may require deputies to be bonded separately if they handle state funds or property.

A notarial act may be performed by a circuit clerk or deputy clerk. (W. Va. Code § 39-4-10(a)(2)). No commission as a notary public is required for any

notarial act done by a clerk or deputy within the scope of the duties of the clerk's office. The signature and title of the clerk or deputy clerk conclusively establish the authority to perform the notarial act. (W. Va. Code § 39-4-10(c)). A "notarial act" can be performed with respect to either a tangible or electronic record, and includes taking an acknowledgment, administering an oath or affirmation, taking a verification on oath or affirmation, witnessing or attesting a signature, certifying or attesting a copy, and noting a protest of a negotiable instrument. (W. Va. Code § 39-4-2(5)). (See also W. Va. Code § 51-4-5 (authority of clerk or deputy to administer oath)).

Chapter 2

CASE NUMBER ASSIGNMENT

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2.1 GENERAL PROVISIONS

The Supreme Court has adopted a uniform case numbering system for cases filed in the circuit courts and family courts. Adherence to this uniform case numbering system has been required since January 1, 1996, pursuant to an Administrative Order of the Supreme Court. (See Appendix A). The uniform case numbering system, as set forth in this section, is not subject to local variation, and supervising judges are responsible for ensuring compliance. Each case number identifies the year of filing, the case type and the sequential number of that case within a given calendar year. It is important that careful control and consistency be exercised over the assignment of case numbers because the case number uniquely identifies a case while it is pending, when a case is reopened, or when a final order is modified.

The case numbering system is closely related to the statistical reporting procedures for the Circuit and Family Court Caseload Reports. (See Chapter 7). However, it should be noted that the case categories designated for the uniform case numbering system and case categories for the statistical reports are not identical in all respects. Although the case categories for case numbering and statistical reporting are not completely identical, the statistical reporting procedures are based on the assumption that certain types of actions are uniformly designated in all courts and that the case categories provide accurate information about the numbers of these various types of case. Therefore, accurate case numbering will increase the accuracy of statistical reporting.

The general system for assigning case numbers is as follows:

a. Last two digits of the year of filing; followed by

b. The alphabetical code indicating the type of case; followed by

c. The next unassigned sequential number for that case type and year.

d. In multi-judge counties, an alphabetic or numeric designation of the assigned judge or division may be added after the assigned sequential number.

For example, case number 16-C-140 would be the 140th general civil case filed during 2016. In a multi-judge circuit using a numeric designation of the assigned judge, Case No. 16-F-30-2 would be the 30th felony case filed in the court in 2016, which was then assigned to Division 2. If a multi-judge circuit uses alphabetic designations and, for example, the family court circuit has two judges – Smith and Jones – Case No. 16-D-207-J would be the 207th domestic relations case filed in 2016, which was then assigned to Judge Jones.

Different types of **civil cases** are designated by the codes listed below:

C -- General Civil

This type of case number includes, but is not limited to, torts, contract cases, extraordinary writs, condemnation cases, removals from magistrate court, post-conviction habeas corpus proceedings, foreign judgment actions, and appeals from county commissions (unless the county commission is acting in its capacity as the board of equalization and review).

D -- Domestic Relations

This type of case number includes, but is not limited to, divorces, paternity suits, annulments, separate maintenance actions, grandparent visitation petitions, UIFSA cases, family court name-change petitions, and child support petitions. (*Note*: Appeals from family court to circuit court retain the same D designation and number.)

DV -- Domestic Violence

When a domestic violence petition is set for hearing in family court, the circuit clerk assigns a new DV number. The prior magistrate court number should not be used.

CIG -- Circuit Infant Guardianship

Minor guardianship cases filed in circuit court.

FIG -- Family Infant Guardianship

Minor guardianship cases filed in family court.

CIGR -- Circuit Infant Guardianship – Removed

Minor guardianship cases originally filed in family court and removed to circuit court.

DV-AP -- Appeals of Denial of Emergency Protective Order

This type of case number is assigned when the magistrate court denies a petition for an emergency protective order, and a petitioner appeals the denial to family court.

A -- Adoption

This case designation is used for all adoptions, including step-parent adoptions and recognition of foreign adoptions.

MH -- Mental Hygiene

This case designation is used for involuntary commitment proceedings.

MH(Vol) -- Transport Requests, Voluntary Hospitalization of Minors

This case designation is used for transport requests for the voluntary hospitalization of minors.

G -- Guardianship/Conservatorship

This designation is for adult guardianship or conservatorship cases, including cases that are transferred to West Virginia and foreign guardianship and protective (guardianship) orders that are registered in West Virginia.

AA -- Administrative Appeals

This designation is for appeals to circuit court from administrative agency decisions, such as DMV driver's license revocations, Board of Review unemployment compensation decisions, and Education/State Employee Grievance Board decisions. An appeal from an administrative agency is assigned an "AA" number whether the party is appealing pursuant to the Administrative Procedures Act or the party has filed a petition for a writ of certiorari. It also includes appeals from a county commission when it acts as the board of equalization and review for tax assessments.

C-AP -- Civil Appeal from Magistrate Court

This designation includes appeals from magistrate court civil cases, but does not include appeals from magistrate court to family court in domestic violence cases.

S-AP -- Personal Safety Order Appeal from Magistrate Court

This designation is for appeals from magistrate court personal safety order cases. Consistent with other types of magistrate court appeals, the circuit clerk is to assign an appeal number with the "S-AP" designation (16-S-AP-001, 16-S-AP-002, etc.).

P -- Miscellaneous Proceedings

This designation includes miscellaneous civil proceedings that do not involve a money judgment, generally require only one hearing, and usually are presented by petition rather than complaint. Examples are minor settlement proceedings when

no civil action is pending, circuit court name-change petitions, expungements, or the issuance of a subpoena to obtain discovery from a West Virginia resident in a case pending in a foreign jurisdiction.

JA -- Juvenile Abuse and Neglect Proceedings

The designation is for civil child abuse/neglect cases; and review of voluntary placement agreements.

JAA – Juvenile Abuse and Neglect Administrative Proceedings

This designation is for proceedings instituted by circuit court administrative order directing the Department of Health and Human Resources (DHHR) to investigate and report on suspected child abuse and neglect.

JAM – Juvenile Abuse and Neglect Mandamus Proceedings

This designation is for cases instituted by circuit court relating to determinations whether DHHR has a mandatory duty to file an abuse/neglect petition.

JD -- Juvenile Delinquency Proceedings

For cases involving juvenile delinquency offenses.

JS -- Juvenile Status Offenses Proceedings

For cases involving juvenile status offenses.

Different types of **criminal cases** are designated by the codes listed below:

B -- Bound Over

This designation is for felony charges after probable cause has been found by the magistrate court, but before an indictment has been returned or an information has been filed.

M -- Misdemeanor

F -- Felony

M-AP -- Misdemeanor Appeal

This type of case number includes appeals from magistrate or municipal court criminal cases.

P -- Miscellaneous Proceedings -- *(Note: Some counties assign these miscellaneous criminal matters a "P-CR" number.)* **All counties are to use either a "P" or "P-CR" case number assignment for miscellaneous proceedings until the new case management system is implemented in the county.**

A "P" case number should be assigned to fugitive-from-justice cases. "P" case numbers should also be given to petitions that are ancillary to criminal proceedings bound over from magistrate court, including: psychiatric evaluation; bond reduction issues; petitions for probation or other alternative sentences; home confinement as a condition of bail; revocation of home confinement; extradition (fugitive-from-justice warrant or detainer); search warrants/ wiretaps; applications for outside witnesses; applications for ex parte orders; in re grand jury investigations/proceedings. Administrative actions within inactive (bound over) criminal cases which **do not** require a hearing **do not** merit the assignment of a separate "P" case number and should not be counted statistically, these include: appointment of counsel; funeral furlough order; payment vouchers; reassignment of counsel; dismissal of bound-over case.

In both civil and criminal matters, case numbers are assigned when the case-initiating document is filed. The case number is entered on the original pleading and all copies. It is very important that careful control be exerted over the assignment of case numbers so that no two cases are given the same case numbers and that no case number is skipped. New case numbers are **not** assigned to cases that are reopened or appealed cases remanded from the Supreme Court. However, new case numbers are assigned when a case is transferred from a circuit court in one county to another circuit court in a different county.

Depending on the volume of case filings, control over case number assignment is primarily accomplished by two alternative methods. First, the clerk may use case management software to assign numbers as new case information is entered into the database. Alternatively, the clerk may manually enter each case number in an instituting book or case register as it is assigned.

2.2 CRIMINAL CASE NUMBERING - ADDITIONAL PROVISIONS

Felony charges are assigned a case number in the form **16-B-###** at the time they are bound over from magistrate court. A **"B"** case number should be assigned for *every* felony case bound over from magistrate court. Although local practices may vary, each county should have a consistent system for assigning bound over case numbers and identifying whether certain offenses could be assigned the same bound over number. For example, the clerk could maintain related charges under the same bound over number based upon the date of the offense, based upon the magistrate case numbers that appear on a bond order or based upon the receipt of the documents from magistrate court at the same time. In some counties, an administrative order governs local practices for the assignment of numbers for criminal cases that have been bound over to circuit court.

Prior to indictment or information, the circuit clerk should maintain all records pertaining to these cases in file folders maintained in the **16-B-###** case number sequence. **"B"** cases are assigned to a judge, but are **not** counted as new case filings or pending cases for statistical reports.

The **"F"** and **"M"** case number designations should not be assigned or used prior to indictment or the filing of an information. The exception to this rule is that a misdemeanor transfer (from magistrate court or another circuit court) will be assigned an **"M"** number. This would occur, for example, when misdemeanor charges are transferred to circuit court to be combined with felony charges against the same defendant and a plea agreement is worked out on all charges. In all other cases, a case file will not receive a misdemeanor or felony number if the case is never presented to the grand jury or if the grand jury returns a "no true bill."

Upon indictment or the filing of an information, an **"F"** or **"M"** case number replaces the **"B"** number, and a separate number should be assigned for *every* indictment or information filed against an individual. For example, if two indictments or informations are filed against one individual, two case numbers would be assigned. However, if a *multiple-count* indictment is issued against an individual, only one case number would be assigned. If the multiple-count indictment involves both felonies and misdemeanors, an **"F"** number should be assigned. If one indictment or information is filed against two individuals, two case numbers would be assigned. Two indictments or informations against two individuals would be assigned four case numbers. Three indictments or informations against two individuals would be assigned six case numbers, and so on.

The clerk may request that the prosecutor forward a copy of the magistrate court case history sheet with an indictment or information for each criminal

charge. This practice will help the clerk identify matching bound-over case files with the correct indictment or information.

Under circumstances involving more than one indictment or information and more than one individual, the case numbers should be assigned in sequence, by indictment or information and then by individuals within the indictment or information. For example, if two indictments are filed against two individuals, the numerical sequence would be as follows:

- Indictment 1, Defendant A - - assigned Case No. 1
- Indictment 1, Defendant B - - assigned Case No. 2
- Indictment 2, Defendant A - - assigned Case No. 3
- Indictment 2, Defendant B - - assigned Case No. 4

The basic forms of felony and misdemeanor case numbers are: **16-F-###** and **16-M-###**. Every criminal case number should be placed in a separate case file. In multi-judge circuits, an alphabetic or numeric designation of the assigned judge or division may be added, for example, Case No. 16-F-###-2 would indicate that the case was assigned to Division Two.

2.3 JUVENILE CASE NUMBERING - ADDITIONAL PROVISIONS

The basic forms for delinquency, status offense, and abuse and neglect case numbers are: **16-JD-###**, **16-JS-###**, and **16-JA-###**. In multi-judge counties, alphabetic or numeric designations of the assigned judge or division may also be included in the case numbers.

2.3.1 Delinquency and Status Offense Cases

There are two types of petitions for juvenile offenders: delinquency or status offense petitions. When a juvenile petition is filed, a case number, either **"JD"** or **"JS,"** is assigned for each petition filed against a juvenile. Juvenile delinquency cases involve acts which would be a crime under state law or municipal ordinance if committed by an adult. (W. Va. Code § 49-1-202). Status offenses by juveniles involve any of the following types of charges: a) incorrigibility (habitual and continual refusal to respond to lawful supervision by a parent, guardian or legal custodian); b) runaway; c) truancy; or d) underage drinking. (W. Va. Code § 49-1-202).

Each juvenile *petition*, whether **"JD"** or **"JS,"** is assigned a separate case number. A petition, however, may charge a juvenile with a single offense or with multiple offenses arising out of a single incident. For example, a juvenile petition alleging two offenses arising out of the same incident, assault and burglary, would be assigned one case number. The two different offenses are charged within the same

petition as different counts. For case numbering in delinquency and status offense cases, it is presumed that multiple charges against a juvenile will be consolidated in a single petition only when the charged offenses arise out of one incident. If two or more charges against a juvenile involve different incidents, the petitioner should normally file separate petitions.

Any time a juvenile petition is filed, whether **"JD"** or **"JS"** (or both), the clerk is required to promptly notify the local office of the Department of Health and Human Resources. (W. Va. Code § 49-4-704(e)). If practicable, the clerk should also notify the chief probation officer for the county when a juvenile petition is filed. (W. Va. Code § 49-4-719). The form, *Notice of Filing of Juvenile Petition*, approved by the Supreme Court Administrative Office for this notification, serves this purpose, although a copy of the juvenile petition should be attached in order to provide the DHHR adequate information regarding the charged offense. The form also should be provided to the juvenile probation office.

It is fairly common for a juvenile to have subsequent petitions filed against him or her. For example, a status offense petition may be originally filed against a juvenile. While a status offense case is pending, a second juvenile petition may be filed, typically a delinquency petition. The second petition should be assigned a new case number in the following form: 16-JD-###. By court order, the judge may later consolidate both the status offense and delinquency cases.

Although it is highly unlikely, a single petition could be filed against two different juveniles. If this situation occurs, the clerk assigns a different case number for each juvenile. If two juveniles are charged in the same petition, separate case files should be set up for each juvenile. This procedure protects the confidentiality of each juvenile and any information related to the juvenile.

2.3.2 Child Abuse and Neglect Cases

Upon the filing of a child abuse and neglect petition, a **"JA"** case number must be assigned for each child named in the petition. Even if multiple children from the same family or household are included on one petition, **each** child is to be given a separate **"JA"** number. For example, if one petition names three siblings, three case numbers would be assigned. For case-management purposes, the clerk should list all of the related case numbers on the original petition, make a copy of the original petition for each child named, and establish separate files for each child/case number.

Similar to abuse and neglect petitions, petitions for judicial review of voluntary placement agreements should also be assigned **"JA"** case numbers. (W. Va. Code § 49-4-116). If there is more than one child involved, each child is assigned a **"JA"** number.

2.3.3 Pre-Petition Proceedings Relating to Child Abuse and Neglect

Allegations and information regarding possible child abuse and neglect sometimes arise in other types of cases properly before the family courts. Only circuit courts have jurisdiction to handle abuse and neglect cases, and several rule changes adopted in April 2006 are designed to get the abuse and neglect matters promptly investigated by the Child Protective Services (CPS) Office of the Department of Health and Human Resources and then addressed in the appropriate court. (For further details on these proceedings, beyond the case-number procedures discussed below, see Section 11.12).

2.3.3.1 Administrative Proceedings Arising from Domestic Relations or Domestic Violence Cases

Upon receiving a copy of a referral letter to CPS from family court regarding suspected abuse and neglect, the circuit court is required to promptly issue an administrative order directing CPS to investigate and submit a report to the circuit court. (Rule 3a, RCANP). Once the clerk receives the *Administrative Order Directing Investigation and Report*, a **"JAA"** number should be assigned and placed on the order (along with the family court case number from the case from which the written referral to CPS originated). Unlike **"JA"** numbers assigned for each child in an abuse/neglect petition or petition for review of a voluntary placement, only one **"JAA"** number is assigned for an administrative order, even if more than one child is named therein. These administrative proceedings will typically be short-lived cases, concluded by CPS either filing its investigative report with the circuit court or by filing an abuse/neglect petition. If CPS files an abuse/neglect petition in response to an administrative order, in this new **"JA"** case separate **"JA"** numbers still need to be assigned for each child named in the petition.

2.3.3.2 Mandamus Proceedings Following the Filing of an Investigative Report

Another possible outcome for an administrative case would be when CPS files an investigative report finding no necessity to file an abuse/neglect petition; however, the circuit court concludes, in view of the information then before the court, that it appears CPS has a statutory obligation to file an abuse/neglect petition. (Rule 3a(b), RCANP). In this instance, the circuit court will issue a *Mandamus Show Cause Order* which, by its terms, closes the **"JAA"** case and opens a new mandamus proceeding. The clerk should assign a new **"JAM"** number for the mandamus case and note the new number on the show cause order (along with the closed **"JAA"** case number).

2.3.3.3 Removal of Family Court Infant Guardianship Cases to Circuit Court

Under West Virginia Code § 44-10-3, a petition seeking appointment of a guardian for a minor may be filed and heard in either family court or circuit court. (See Section 14.1 for a discussion of minor guardianship proceedings generally). If a minor guardianship petition is filed in family court and the judge learns that the basis of the petition, in whole or in part, is child abuse or neglect allegations, the family court must remove the case to circuit court. (Rule 47a(a), RFCP).

When the circuit clerk receives the removal order, a new case number should be assigned, replacing the **"FIG"** number assigned when the petition was originally filed in family court. Rather than a **"CIG"** number typically assigned to circuit court infant guardianship cases, the case should be assigned a **"CIGR"** number to designate it as a removed case for case management and statistical purposes.

2.4 CASE NUMBERING - ADDITIONAL CATEGORIES

2.4.1 Domestic Violence Cases

There are two types of case numbers for domestic violence protective order proceedings. The first type of case number, **16-DV-###**, is assigned when the magistrate court grants a protective order and the case is transferred to the family court for a final hearing. The second type of case number, **16-DV-AP-###**, is assigned when a magistrate

court denies a petition for protective order and a petitioner **appeals** to family court.

If, at a later date, a new case involving the same individuals is brought to family court, a new **"DV"** case number is assigned. The new case is not combined with the previous case. In family court circuits with more than one judge, an alphabetic or numeric designation of the assigned judge or division may be added: **16-DV-###-2**.

2.4.2 Mental Hygiene Cases

When a mental hygiene petition is filed, a mental health case number **"MH"** shall be assigned. If, at a later date, a new petition is filed regarding an individual with a previous petition, a new **"MH"** case number is to be assigned. The new petition should not be combined with the case number assigned to any previous petition.

2.4.3 Transport Requests for the Voluntary Hospitalization of Minors

When a parent or guardian files an affidavit requesting transport for the voluntary hospitalization of a minor, the clerk assigns a case number in the following format: **16-MH(Vol)-###**.

2.4.4 Modification Petitions in Family Court Cases

As noted previously, family court cases are assigned a number in the following form: **16-D-##**. Because a family court retains jurisdiction of some issues, such as spousal and child support or allocation of custodial responsibility even after a final order is entered, it is fairly common for parties to seek the modification of a prior family court order. When a modification petition is filed, the clerk does not assign a new case number. Rather, the modification petition retains the original case number. Additionally, a modification petition and any related pleadings should be filed and maintained in the original case file.

Because a family court case retains the original case number when the modification petition is filed, a case now assigned to family court, may have a different designation than 16-D-###. For example, a divorce case may have a general civil designation, such as 16-C-###. A new domestic relations number, 16-D-###, should **not** be assigned.

2.4.5 Treatment Court Cases

All treatment court cases, other than true diversion cases, originate with a regular criminal case number and therefore a regular case file. Once the criminal case is formally diverted to the treatment court, the original case is statistically closed. But that statistically closed does not mean there is no further action on the case. It means it is no longer on that judge's caseload. The order officially diverting the case to treatment court serves as the trigger to statistically close the original criminal case.

The filing of the referral establishes the new case, and the clerk's office will assign a case number to the treatment court case. The case numbers of the underlying criminal cases are NOT changed or affected; a new treatment court case file and number is created separate from the underlying criminal case file. Circuit clerks are the official keepers of the court records, and therefore should maintain the official court files as well as assign numbers for these cases.

Numbers will be assigned as follows by the circuit clerks.

a. The first letter after the traditional year number will always be "T," which denotes that the case is a treatment court.

b. The second letter will be "A" for an adult court. The circuit clerks have requested to not implement a separate number for juvenile drug courts at this time. However, if this is ever implemented; the second letter for a juvenile treatment court would be "J."

c. The third letter in that field will be "D" for drug court, "R" for re-entry court or "M" for mental health court. The circuit clerks have requested to not implement a separate number for mental health courts at this time. Juvenile and mental health records are already confidential records. However, if this is ever implemented; the third letter for a mental health court would be "M."

The number format stays exactly the same as other circuit court numbers: two digit year, three letter category, sequential number. For example for the year 2016, the first adult drug court case number would be "16-TAD-001." The first adult re-entry number would be "16-TAR-001." The first adult mental health court number would be "16-TAM-001."

2.4.6 Personal Safety Order Appeals

Petitions for personal safety order proceedings originate in magistrate court, but an aggrieved party may appeal to circuit court in the following circumstances. If the magistrate does not issue a temporary personal safety order, the petitioner may appeal the denial to circuit court. If a magistrate issues a temporary personal order and conducts a final hearing, either party, the petitioner or respondent, may appeal to circuit court. Consistent with other types of magistrate court appeals, the circuit clerk assigns an appeal number with the "S-AP" designation (16-S-AP-001, 16-S-AP-002).

Chapter 3

GENERAL RECORDKEEPING

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3.1 FILING OF DOCUMENTS

To file a document, a person must present the document to the circuit clerk. Upon receipt of the document, the clerk should immediately note the filing date on the document. (Rule 5(e), RCP; *Winston v. Wood*, 437 S.E.2d 767 (W. Va. 1993)). The date that a document is received by the clerk is the filing date. (Syl. Pt. 2, *Johnson v. Nedeff*, 452 S.E.2d 63 (W. Va. 1994)). A party may also file documents by facsimile, and the date that a complete facsimile is transmitted to the clerk's office is the date of filing. (See Section 3.9, Filing and Service by Facsimile Transmission).

The accurate notation of the filing date on pleadings is extremely important because many types of documents must be filed within time frames established by law. For example, most personal injury cases must be filed within two years of the date of injury, unless an exception established by law applies. A personal injury case filed outside of the two-year time frame could be subject to dismissal.

A judge may also accept documents for filing, including case-initiating documents, and the judge should note the date of filing on the document. (Rule 5(e), RCP). The judge must then forward the documents to the clerk for filing. The date that a judge notes on the document is considered the filing date; it is **not** the date that the clerk receives the documents from the judge. The judge's notation of the date will constitute the filing date, even if the party has not submitted a necessary fee or document, such as a civil case information sheet.

In the absence of instructions from the court to the contrary, the clerk must accept documents for filing, provided any applicable fee has been paid or a fee waiver has been approved. The document must also be properly prepared. A document is properly prepared if it is legible, is on 8 1/2" x 11" paper, and is bound if it is more than one page. (Rule 10.01, TCR). Exhibits may be larger than the standard size of 8 1/2" x 11." The document should list the name of the court, case style, the case number if it has been assigned, the name of the presiding judge (if assigned) and a brief descriptive title of the document. (Rule 6.01(b), TCR).

The clerk must file all pleadings in a case that are submitted by a party to the case. Additionally, the clerk accepts motions to intervene for filing, subject to the court's directions, even though potential intervenors are not parties to a case. The power to make any decision as to the propriety of any pleading submitted, or as to the right of a person to file such pleading, is vested in the court, not the clerk.

3.1.1 Case Initiation for Civil and Family Court Cases

The documents required to initiate a case are dependent upon the type of case that is filed. In general, a civil or family court case may be initiated by the filing of a complaint or a petition.

In a civil or family court case, a party must also submit a completed civil case information statement (CCIS) with a complaint or petition. (Rule 3, RCP; Rule 9(a), RFCP; Syl. Pt. 3, *Cable v. Hatfield*, 505 S.E.2d 701 (W. Va. 1998)). A CCIS must also be submitted with all newly filed counterclaims, cross-claims and third-party claims in civil suits. (Rule 8(a), RCP). In both general civil cases and family court cases, a party must file a CCIS with an answer. (Rule 12(a), RCP; Rule 9(b), RFCP). If a CCIS must be filed with a specific type of document, the clerk **cannot** accept the document for filing if a CCIS is not presented.

In specific types of family court cases, a party may be required to file an application for services from the bureau of child support enforcement when the case is initiated. (Rule 9, RFCP). If a case **may** involve child or spousal support, allocation of custodial responsibility, visitation, or paternity, a party must file this application when filing a complaint or an answer. (See Section 12.9.2). When a divorce petition is filed, the petitioner must also file a bureau of vital statistics form. (See Section 12.9.2).

Especially in family court cases, questions arise as to whether a party may file a modification petition or whether a new case must be filed. For example, suppose a party has obtained a *final* order in a separate maintenance case and later decides to obtain a divorce. He or she would have to file a new divorce case because he or she is not seeking to modify the separate maintenance order, but rather is seeking relief that would not be available by simply modifying the final order. In contrast, suppose a party seeks to modify a spousal support obligation. He or she would not have to file a new case because he or she is seeking to modify or change the terms of an order that has already been entered.

When a case is filed, the clerk must issue a summons. A summons is process that informs a defendant in a civil case that an action has been filed against him or her and that he or she must appear or answer the complaint by a specific date. Either an attorney or the clerk may prepare the summons, and the clerk must sign and seal the summons.

Prior to the adoption of Rule 71B of the Rules of Civil Procedure, a clerk did not issue a summons in petitions for extraordinary writs, such as a petition for a writ of mandamus or prohibition. A summons was not issued because the Rules of Civil Procedure did not apply to cases involving extraordinary writs. Since the adoption of Rule 71B, the West Virginia Rules of Civil Procedure now govern applications for extraordinary writs. Therefore, the clerk should issue a summons in cases involving petitions for extraordinary writs. (See Syl. Pt. 2, *Cable v. Hatfield*, 505 S.E.2d 701 (W. Va. 1998)).

If a plaintiff seeks only a preliminary injunction, the clerk does not issue a summons to the defendant to provide notice that the plaintiff is seeking this specific relief. However, a party often seeks a preliminary injunction as only part of the requested relief in a general civil case. Typically, a party will seek a permanent injunction and damages. When a party requests a preliminary injunction **and** other relief, the clerk does not issue a summons for the preliminary injunction, but must issue a summons for the underlying complaint in the civil case. For example, a plaintiff could file a cause of action because of a defendant's trespass to real property. As part of the requested relief, the plaintiff could seek both an injunction and damages as relief. In this situation, the clerk would be required to issue a summons for the underlying civil case, but not for the preliminary injunction.

In civil cases, a summons, as well as the complaint, must be served upon any defendant. When there are multiple defendants in a case, a summons or copy shall be issued for each defendant. (Rule 4(b), RCP).

The summons must meet the following requirements: a) it must be issued in the name of the State of West Virginia; b) it must be signed, sealed and dated by the clerk; c) it must contain the name of the court, the name of the parties, and the name and address of counsel for the plaintiff, or if the plaintiff is unrepresented, the name and address of the plaintiff; d) it must state the time within which the defendant must answer; and e) it must state that a default judgment will be entered if the defendant fails to appear. (Rule 4(a), RCP).

3.1.2 Service

A party is responsible for indicating the party who must be served and the requested method of service on the CCIS. (Rule 4(c)(1), RCP). If a party opts for personal service, the party is responsible for forwarding the summons and complaint to a private process server or the sheriff. In some counties, private process servers or deputies may come to the clerk's office to obtain documents that must be served.

A party may choose service by first class mail or certified mail. (Rule 4(c)(3)(B), RCP). When a party chooses service by first class mail, the clerk must send the summons and complaint and two copies of a Notice and Acknowledgement of Service by First Class Mail. (Rule 4(d)(1)(E), RCP). When service by certified mail is requested, the clerk must send a copy of the summons and complaint to the party by certified mail, return receipt requested, with delivery restricted to the addressee. (Rule 4(d)(1)(D), RCP). When received, the return receipt must be filed in the case folder.

If allowed by statute, a party may request that service be made on the Secretary of State who will serve as the designated agent for service of process. (Rule 4(c)(3)(C), RCP). The following types of entities or individuals may be served through the Secretary of State: a) limited liability companies, including foreign limited liability companies (W. Va. Code § 31B-1-111); b) corporations, including foreign corporations (W. Va. Code §§ 31D-5-504, 31D-15-1510); c) nonprofit corporations (W. Va. Code § 31E-5-504); d) certain nonresidents (W. Va. Code §§ 46A-2-137, 56-3-31 and -33); and e) limited partnerships (W. Va. Code § 47-9-4).

In addition, a non-resident may be served through the Secretary of State with any domestic violence protective order. (W. Va. Code § 48-27-311). Further, a non-resident or a resident who has left the state may be served through the Secretary of State with domestic violence petitions, domestic violence contempt petitions, personal safety petitions and any case-initiating order in domestic violence or personal safety order proceedings. (W. Va. Code § 56-3-33a). Fees for service in these types of cases may not be collected in advance.

If a party requests service through the Secretary of State, a form, Request for Legal Process to be served by the West Virginia Secretary of State, must be completed, and must be forwarded to the Secretary of State. Generally, the original and two copies of the summons and two copies of the complaint must also be sent. (Appendix B). However, in class actions suits involving corporations in which all defendants are to be served with the same process, notice or demand, service may be made by filing with the Secretary of State the original process, notice or demand and one copy for each named defendant. (W. Va. Code § 31D-5-504). The clerk collects the fee for service and a fee for mailing the documents to the Secretary of State.

Statutes that govern the various entities noted above have authorized the Secretary of State to receive notification through electronic means (i.e. e-mail) from the postal service concerning service or the lack thereof, such as the signature of the defendant, the refusal to accept

service of process, or an incorrect address. In turn, the Secretary of State will transmit the notification to the clerk's office through electronic means (i.e. e-mail). (See W. Va. Code §§ 31B-1-11; 31D-5-504; 31D-5-1510; 31E-5-504; 46A-2-137; 47-9-4 and 56-3-31 and -33). Each week, the Secretary of State will send an e-mail to the clerk's office concerning the status of service for cases in the county in which service on the Secretary of State is pending.

The Secretary of State returns the original summons and complaint to the clerk's office once it has been processed by the Secretary of State. At a later date, the e-mail concerning service will be transmitted when it is received from the postal service. (Prior to the implementation of these procedures, the Secretary of State held the complaint and summons until it received notice (i.e. the "green card") from the postal service.)

A party may request to serve either an unknown or named defendant by publication, provided certain requirements have been met. To serve by publication, a plaintiff must file an affidavit that indicates that the defendant falls into **one** of the categories listed below.

a. The defendant is a foreign corporation and there is no appointed or statutorily established attorney-in-fact that may be served. (Rule 4(e)(1)(A), RCP).

b. The defendant is a nonresident and there is no appointed or statutorily established attorney-in-fact that may be served. (Rule 4(e)(1)(B), RCP).

c. Despite diligent efforts, the plaintiff cannot locate the defendant. (Rule 4(e)(1)(C), RCP).

d. That the summons and complaint have been forwarded to the sheriff at least twice for service and service has not been completed. (Rule 4(e)(1)(D), RCP).

e. That there are persons who are unknown by the plaintiff and are named as defendants according to the general description of the plaintiffs. (Rule 4(e)(1)(E), RCP).

When a party files the required affidavit, the clerk must enter an order providing for service of the defendants by publication. The order must list the following information: a) the style of the case and the relief requested; b) the name and address of the plaintiff or counsel for the plaintiff; c) that the defendant may obtain a copy of the complaint from the clerk; and d) the defendant must appear and defend by the date

specified in the order, providing that the defendant is allowed at least 30 days to respond; and e) default may be entered if the defendant fails to appear and defend. After receiving the order from the clerk, the party is required to arrange for the publication of this order. If a person has an approved fee waiver, the clerk will be responsible for submitting the invoice and payment order to the Administrative Office. (See Section 5.5).

A defendant, served through the Secretary of State or other agent statutorily designated to accept service of process, has 30 days to appear and defend. (Rule 12(a), RCP). A defendant served by publication also has 30 days to respond to a complaint. (Rules 4(e) and 12(a), RCP). A nonresident defendant who is personally served has 30 days to answer. (Rules 4(f) and 12(a), RCP). In all other circumstances, a defendant must respond to a complaint within 20 days by filing a notice of bona fide defense, an answer or a motion to dismiss. (Rule 12(a), RCP).

3.1.3 Checklist for Case Initiation in Civil and Family Court Cases

When a clerk receives documents that initiate a civil or family court case, he or she should follow the procedures set forth below.

a. When a complaint is filed, the clerk should verify that the party has submitted a completed CCIS and the applicable filing fee.

b. If a CCIS indicates that a party or witness is disabled and requires an accommodation, it is best practice for the clerk to highlight this information on the CCIS.

c. In all cases, a copy of the CCIS is forwarded to the assigned judge.

d. In family court cases, the clerk should verify that an application for child support enforcement services or a bureau of vital statistics form, if required, has been submitted.

e. The clerk should review the case-initiating documents for appropriate format (*i.e.* the style of the case), required signatures, and an adequate number of copies.

f. The clerk should collect the applicable filing fee and any fees for service unless a fee waiver has been approved

or there is an established procedure for delayed payment of the filing fee. (See Section 5.2).

g. The clerk must date stamp the original pleading. If requested, a copy may also be date-stamped, but the document should indicate that it is a copy.

h. The clerk must assign a case number, initiate a docket and prepare a case file. The clerk may also prepare a list for the taxation of costs. (See Sections 2.1, 3.4, and 3.6).

i. The summons may be prepared either by the clerk or by a party. The clerk must sign and seal the summons.

j. The clerk should perform any applicable clerk duties related to service, such as mailing a complaint by certified mail. (See Section 3.1.2 Service).

k. The clerk must note the issuance of a summons and a return of service (once completed) on the docket.

l. When received, the clerk must file the return of service in the court file.

m. Local practice determines whether the clerk will notify a party of completion of service. The clerk may notify the plaintiff of completion of service by either mailing a copy of the summons showing the method and date of service or may mail a post card listing this information.

3.1.4 Case Initiation and Service in Criminal Cases

Both felony and misdemeanor cases are typically initiated in magistrate court by the filing of a complaint. (Rule 3, R. Cr. P.). After a magistrate reviews a complaint and finds probable cause, an arrest warrant or summons will be issued by the magistrate court. A preliminary hearing may then be conducted in magistrate court. If probable cause is found, the case will be bound over to circuit court. (Rule 5.1, R. Cr. P.; see Section 11.1).

A criminal case may be initiated in circuit court by the filing of an indictment or information. (Rule 7, R. Cr. P.). If the charged criminal offense is punishable by life imprisonment, the case must be initiated by an indictment. Cases involving other types of felony offenses may be initiated by the filing of an information, provided that the defendant

waives his or her right to indictment. If a case involves only misdemeanor offenses, the case may be initiated by the filing of an information.

When an indictment or information is filed, the prosecutor may request from the court issuance of an arrest warrant or a summons. (Rule 9(a), R. Cr. P.). The clerk must file a return of service for a summons in the court file.

3.1.5 Case Initiation in Juvenile Cases

When a juvenile petition is filed, the clerk is required to promptly notify the local office of the Department of Health and Human Resources. (W. Va. Code § 49-4-704(e)). If practicable, the clerk should also notify the chief probation officer for the county when a juvenile petition is filed. (W. Va. Code § 49-4-719). The form, *Notice of Filing of Juvenile Petition*, approved by the Supreme Court Administrative Office for this notification, serves this purpose, although a copy of the juvenile petition should be attached in order to provide the DHHR or probation office adequate information regarding the charged offense.

3.1.6 Subsequently Filed Documents in all Cases

Once a case is filed, the parties may submit subsequent pleadings or documents for filing. The type of pleadings or documents will depend on the type of case and the stage of the proceedings. Subsequent pleadings may include answers, motions, and cross-claims. Although pleadings may be presented to the judge for filing which are later presented to the clerk, parties typically file pleadings with the clerk. (Rule 5(e), RCP).

A party must serve all subsequent pleadings or other filed documents upon all other parties to the case. (Rule 5(a), RCP; Rule 49, R. Cr. P.). Any document served on an opposing party must be filed with the court within a reasonable time after service. A certificate of service must be attached to the pleading or other type of document, and it must show the date and method of service.

When subsequent pleadings are presented to the clerk for filing, the clerk should follow the procedures set forth below.

a. The clerk must verify that the document is an original and review the document for appropriate format, required signatures, and a certificate of service.

b. The clerk must verify that the correct case number is included.

c. If a fee is required, the clerk should verify that fee has been submitted. Subsequent pleadings that result in a fee include but are not limited to counterclaims, cross claims, third party complaints and motions to intervene in circuit court. (See Chapter 5).

d. The clerk must date stamp the document, unless the document is a proposed order.

e. The clerk must record the filing of the document on the docket.

f. The clerk must place the document in the case file.

3.1.7 Removal of Filed Documents

Once a document has been filed with the court, it may not be removed from the file unless the court orders the removal of the document. (Rule 10.02(a), TCR). Occasionally, a litigant will file exhibits, such as a marriage certificate or photographs, and will ask the clerk to return them. The clerk should not return filed documents or exhibits unless authorized to do so by court order.

3.2 FILING OF DISCOVERY

3.2.1 Civil Cases

As established by Rule 5(d)(2) of the West Virginia Rules of Civil Procedure, parties are not required to file discovery requests or response. Rather, parties are only required to file certificates of service for discovery. The court may, however, require the parties to file discovery requests and responses.

3.2.2 Criminal Cases

Trial Court Rule 32.09 provides, by default, that discovery does not have to be filed in a criminal case unless the judicial officer orders otherwise. According to Trial Court Rule 32.09, the attorney who discloses the evidence is responsible for filing a certificate of service that includes the name and the case number; that includes specific references to the type of materials disclosed as required by Trial Court Rules 32.01 through 32.09, and that indicates the number of pages of material that were disclosed with regard to each rule. This procedure

would limit the filing of discovery unless documents were filed as a proposed exhibit or admitted into evidence either at a hearing or at trial.

3.3 DATE STAMPING

All papers, except a proposed order, filed with the clerk must be date-stamped to provide a record of the filing date. The date of filing must be recorded on the docket and other records. Since the date of filing can be important to subsequent proceedings in a case, this information must be posted clearly on all filed documents. This procedure may be accomplished by using an electric date stamp machine or a hand stamp. The clerk should date stamp the document in a location where the stamp will not cover any of the typed or written material in the document. If the clerk uses a hand stamp, the clerk must fill in the date and the clerk's initials in ink.

3.4 CASE FILES

The case file folder is the central repository for all documents filed in a court case. Case files must be maintained so they are readily accessible, but they must be secure and subject to controlled removal from the clerk's office.

3.4.1 File Folders

Case files should be of standard size since only letter size (8 1/2" x 11") documents are to be filed in the court. Documents that are filed must be bound on the top left corner, not at the top. Likewise, the clerk must bind the filed papers in the case folder on the left side. (Rule 10.01, TCR).

Folders may be color-coded according to the type of case, or they may be standard manila color and color-coded with tabs. Local practice determines the colors used for different types of cases.

The case file should display the style of the case and the case number. In multi-judge courts, the name of the judge or the division number should also be apparent. When a new case is filed, the clerk should follow the procedures set forth below.

a. The clerk must select a new case file folder and must affix a label that notes the case number, the style of the case and the assigned judge.

b. The clerk must affix the case-initiating document, such as a complaint, on the left side of the folder, not on the top. (Rule 10.01, TCR).

c. Depending on local practice, the clerk may attach a duplicate of the docket sheet to the inside front cover or the outside of the file folder to note all subsequent filings.

d. The clerk must file the case folder in numerical order according to the applicable type of case.

3.4.2 Maintenance of Case Files

When documents are filed after case initiation, the clerk should follow the procedures set forth below.

a. When a document is filed, the clerk should verify that it lists the correct case style and number.

b. The clerk should place documents in the case file as soon as possible.

c. The clerk should insert the document in the folder according to filing date. Documents may be filed in chronological or reverse-chronological order. Reverse-chronological order is preferred since the items that are most frequently reviewed are the items most recently filed.

d. Although local practice may vary, the clerk should number each document on the docket sheet so that the file can be easily reconstructed if it is lost or destroyed.

e. When documents, such as exhibits or psychological reports, are not placed in the ordinary sequence or location of documents, the clerk should note the location of the documents on the docket sheet. For example, the clerk should note that sealed documents have been placed in an envelope in the case file.

f. When a file folder is filled, the clerk should place the same case number on a second folder and designate it as "# 2 of 2" and place it behind the first folder which should be marked "# 1 of 2."

3.4.3 File Control

Each circuit clerk should determine the most efficient method for a local office. Factors to consider are the number of cases, the location and arrangement of filing equipment, and the general storage capacity of an office.

Typically, case files are maintained in order by case number and year. Some courts, however, separate pending case files and disposed case files because maintaining active and disposed case files together uses up office space unnecessarily. To address this problem, clerks may wait until most of an annual series of cases have been closed, typically 90% - 98% of cases filed in a specific year, to move the closed cases to secondary storage. This practice saves office space and allows quick access to active case files.

Access to files is discussed in detail in Chapter 4. Each circuit clerk should establish general policies with regard to the retrieval and removal of files. These policies may specify who may retrieve or remove files from the clerk's office. For example, in some counties a judicial secretary may retrieve files for a judge, but in other counties a deputy clerk would be required to do this.

Although the circuit clerk may establish specific local practices, he or she should follow the guidelines set forth below.

a. Requests to see files should be specific and should include the name of the case or the case number.

b. Access should only be allowed if the file is subject to public access or the person is authorized to access a closed file. (See Section 4.8).

c. The clerk should review any requests to do general research to determine reasonable limitations on the inspection of files.

d. Case files should be viewed by attorneys or the public in the clerk's office.

e. Unless files are removed by a judge or judicial staff, files should only be removed from the clerk's office pursuant to a court order. (Rule 10.02(b), TCR).

f. When a case file is checked out, the clerk should maintain a record that lists the case number, the date

the file was removed, the person's name, address, telephone number and extension.

g. The clerk should regularly review the record of removed files to locate files that are not promptly returned.

3.5 CASE MANAGEMENT SOFTWARE

All 55 counties have computerized case management software in their circuit clerk's office. As of 2005, approximately 39 of the 55 counties in West Virginia maintain computerized records using the Supreme Court Circuit Court Management System. On October 11, 2001, the Supreme Court entered an administrative order that requires circuit clerks to maintain computerized court records once appropriate software has been purchased and installed. (Administrative Order: Standardized Circuit and Family Court Case Management Software, Appendix A). To implement this order, the appropriate software must be maintained, and its use is mandatory for all magistrate, circuit and family court staff. This uniform software is designed to enable circuit clerks to comply with all legislatively mandated reporting requirements and will enable all West Virginia courts to communicate more efficiently with each other.

3.6 DOCKETS

A docket is a master reference guide to all aspects of a case. A docket can be used to recreate a new case file should the original be lost, stolen, or destroyed. Therefore, it is essential to maintain dockets with the use of computers and appropriate software. Maintaining a court's docket with a computer is more efficient and accurate than dockets that are maintained by hand. Computerized records also facilitate responses to routine inquires. For example, a clerk who, at a party's request, must determine whether an answer has been filed can simply locate the record on the computer.

The clerk should maintain docket sheets for all cases. All pleadings and filed documents are indexed or noted on the docket sheet for a case.

When a case is filed, the clerk must set up computerized docket sheets with the following information: date of filing, type of case, case number, style of the case, names of the parties, attorney names, and the amount and purpose of all fees paid. As the case progresses, the clerk must index all filed documents, all process issued, returns of service, all orders, verdicts, or judgments in chronological order on the docket sheet. The date entered on the docket sheet should be the date of filing of the document itself, **not** the date it is signed or the date the docket entry is made.

Entries should be brief, but should list the nature of each paper filed, any process issued, the nature of each order or judgment, and any returns indicating execution of process. Clerks often use the descriptive title on the document to make a docket entry. For example, an order titled "Order Granting Motion for Summary Judgment" could be noted on the docket sheet in the same way. Entry of orders may also include reference to the volume and page number of the order book.

3.7 INDEXES

For the same reasons that dockets should be maintained by a computer, indexes should also be maintained on a computer. At a minimum, indexes should contain the following information: the case number, the names of the parties, the filing date, the style of case, the final order date, the date of any modification of the final order, and the order book volume and page reference for the final order and any modification order.

Clerks must maintain and provide for the public a "name" index of all defendants in criminal cases and every party to a civil case. The method to do so is a matter of local practice. In some counties, a public computer terminal is available. In some counties, the clerk may post a list of pending criminal and civil cases during a particular term.

Of course, **indexes to confidential cases** should be maintained separately and stored where access is limited to authorized personnel. (See Section 4.8). The following types of indexes are confidential and not subject to public inspection: adoption, guardianship or conservatorship, child abuse and neglect, juvenile, personal safety order cases and mental health. Additionally, if an entire file (of any type) has been sealed by court order, the file should not be listed on an index that is subject to public access. If a criminal case has been expunged, the defendant's name should not be listed on any index that is subject to public access.

When indexing cases, the clerk should follow the basic conventions set forth below. If a county has a particular local practice, all personnel must follow it to ensure proper recordkeeping.

a. The names of all parties should be indexed. This practice facilitates access to a file because any party's name can be used to access a case's docket.

b. Names of firms, corporations, and institutions are indexed exactly as written, except that articles (a, an, and the) are not indexed.

c. Names beginning with numerals are indexed as if the numeral were written out. For example, 10th Street Corporation should be indexed as if it were Tenth Street Corporation.

d. Matters that are styled "In re," "In the matter of," or "State of West Virginia ex rel" are indexed by the name of the party for whom the action is brought. For example, *State of West Virginia ex rel. Richards v. Pauley* would be indexed under "Richards" and "Pauley."

e. Surnames beginning with de, De, des, Des, Mc, Mac, and O' are indexed alphabetically as they are spelled, among other surnames beginning with the same letters. The following example indicates the application of this rule: Mabry, MacConnell, Madison, McKinley, Oldham, O'Leary, and Olesen.

f. "Doing business as" (or d/b/a) should be indexed under the business name, and the party's personal name should also appear on the index entry. For example, John Smith d/b/a Ace Plumbing would be indexed as Ace Plumbing (John Smith). In some counties, both the entity's name and the person's name are indexed. For example, John Smith would have index entries: Ace Plumbing (John Smith) and John Smith (Ace Plumbing).

3.8 ORDERS

In general, courts speak through their orders. (*Stephens v. W. Va. College of Graduate Studies*, 506 S.E.2d 336 (W. Va. 1998)). By order, a judge may authorize, direct or prohibit certain actions of a party. For this reason, the proper entry and handling of the court's orders is one of the most important duties of the circuit clerk.

3.8.1 Order Books

The clerk must maintain order books that correspond to different types of cases. A clerk should maintain the following types of order books: civil, family court, criminal, mental health, juvenile, child abuse and neglect, guardianship/conservatorship, and miscellaneous proceedings. A clerk should also maintain an order book for administrative orders. The clerk may also maintain a separate order book for expunged cases. Other order books may be maintained according to local practice.

The maintenance of orders may also be subject to other local practices. Within a local office, all personnel, however, must follow the standard practice of the particular office.

Although local practice for maintaining order books may vary, orders that are confidential must not be placed in an order book that is subject to public access. The following types of order books are confidential, and are **not** subject to public access: adoption, guardianship/conservatorship, child abuse and neglect, juvenile and mental health. Additionally, if an order in any other type of case has been sealed, the order should only be placed in an order book in a manner that would preclude public access. For example, a general civil order that is sealed could be placed in the civil order book secured within a sealed manila envelope. Similarly, orders in expunged criminal cases should not be maintained in an order book subject to public access.

With regard to **general civil cases only**, Rule 79 of the Rules of Civil Procedure requires a clerk to maintain the following types of orders in order books: final judgment orders, appealable orders, or orders that affect a title or a lien upon personal or real property. A clerk is also required to maintain in order books any order or type of order that a judge requires. Therefore, procedural orders in civil cases, such as scheduling orders and temporary orders, do not have to be maintained in an order book, unless the judge directs the clerk to do so. The clerk, however, must maintain all orders in the case file and must note the entry of an order on the docket sheet of each case. If the clerk has questions about whether a specific order should be included in an order book, he or she should ask the presiding judge. Some general principles about the entry of orders follow. First, a clerk must record or enter all final judgments without regard to whether costs have been paid. (Rule 58, RCP; *Humphrey v. Mauzy*, 181 S.E.2d 329 (W. Va. 1971)). Secondly, a judgment is "not final and effective until entered by the clerk in the civil docket as provided in Rule 58 and Rule 79(a) of the Rules of Civil Procedure." (Syl. Pt. 4, *State v. Mason*, 205 S.E.2d 819 (W. Va. 1974)). Therefore, the **entry** of an order is extremely important because it is the date that establishes subsequent deadlines, such as the date for filing post-judgment motions or appeals.

3.8.2 Format of Orders

The caption of a properly prepared order will list the following information: a) the name of the court; b) the case number; c) the name of the assigned judge; d) the style of the case; and e) a heading that describes the court's action. (Rule 11.01, TCR). An order should

indicate the date of the proceeding and should be double-spaced. (Rule 11.02, TCR).

Any directives to the clerk must be listed clearly and distinctly in the final paragraph of the order. (Rule 11.02, TCR). Typical directives to a clerk include requiring the clerk to send a copy of the order to counsel of record or to strike the case from the active docket of the court. When the clerk completes the directives, he or she should note the date of completion in the margin of the order. (Rule 11.02, TCR). Although local practice may vary, it is typical for a deputy clerk to initial the date of the completion of the task.

3.8.3 Procedure for Entering an Order

When a signed order is presented to the clerk, he or she should follow the procedures set forth below.

a. The clerk should verify that the order is the original and that it has been signed by the judge.

b. The clerk should date stamp the order.

c. The clerk places a copy of the order in the appropriate order book and assigns page numbers. The book and page number should be recorded on the order book index.

d. The clerk files the original order in the case file.

e. On the docket sheet, the clerk records the date the order was entered and the volume and page number of the order book on the docket sheet for the case.

f. If the clerk is required to certify or attest the order, he or she should do so. The certification or attestation should be on the page of the order that bears the judge's signature.

g. The clerk should note any mailing or distribution of copies of the order in the margin of the original order. (Rule 11.02, TCR).

h. If an order disposes of all or part of a case, the clerk must perform any additional required tasks. (See Section 3.11).

i. The clerk should disburse any funds, if required by an order.

3.9 FILING AND SERVICE BY FACSIMILE TRANSMISSION

3.9.1 Applicable Rules

Rule 12 of the Trial Court Rules governs the filing and service of documents by facsimile. Additionally, Rule 5 of the Rules of Civil Procedure expressly recognizes that documents may be served and filed by facsimile.

3.9.2 Maintenance of Facsimile Machine

All circuit clerks must have a facsimile machine available to conduct court business during regular hours of operation. The chief judge may also require the clerk to have a facsimile machine available after regular business hours. (Rule 12.03(a), TCR).

3.9.3 Requirements for Filing by Facsimile

Similar to filing by mail or in person, all documents filed by facsimile must be standard sized, 8 1/2" x 11." (Rule 12.03(b), TCR). A party must obtain prior approval from the court to file a larger document by facsimile. (Rule 12.03(d), TCR). A party may not file a document by facsimile that exceeds 20 pages without first obtaining approval from the clerk or the court. (Rule 12.03(c), TCR).

When a party files by facsimile, he or she must also provide the following information to the clerk: a) the name of the sender; b) the address, telephone number and facsimile number of the sender; c) identification of the documents by case style and number; d) the number of pages that are transmitted; and e) any instructions. Typically, this information would be included on the cover sheet for the facsimile transmission. (Rule 12.03(e), TCR).

When a document is filed by facsimile, the original document must be retained by the person or entity filing it. (Rule 12.03(k), TCR). It is not necessary to file the original unless the court or the clerk requires the sender to do so. (Rule 12.03(j), TCR). If the clerk must make additional copies of a facsimile to process a document, the party filing it may be charged for the cost of the copies. (Rule 12.03(l), TCR).

3.9.4 Facsimile Filing Prohibited for Certain Types of Documents

Certain types of documents **may not** be filed by facsimile. A petition or a complaint in a civil case **may not** be filed by facsimile. Additionally, a mental hygiene application **may not** be filed by facsimile. (Rule 12.04(a), TCR). Although domestic violence petitions are filed with the magistrate court clerk, the circuit clerk should note that this one particular type of petition may be filed by facsimile. (Rule 12.05(a), TCR). In criminal cases, a complaint or a search warrant **may not** be filed by facsimile. (Rule 12.06(a), TCR). All other types of documents in civil and criminal cases may be filed by facsimile, provided that all other lawful filing requirements have been met.

3.9.5 Receipt of Documents

Trial Court Rule 12.03(h) provides that a document has been filed when the clerk's office **receives** the entire document without regard to the clerk's regular hours of operation. Therefore, a completed facsimile transmission that is received after hours is considered to be filed on the date of **receipt**, not on the following business day. For example, a document that is received by the clerk's facsimile machine at 7:00 p.m. on December 13, 2015, would be considered to be filed on December 13, 2015, **not** December 14, 2015. When noting the date of filing on the document, the clerk should refer to the date that the facsimile transmission was received. For this reason, the clerk should ensure that the facsimile machine properly records the receipt date and time of all transmissions.

3.9.6 Transmission Errors

To file a document by facsimile, the complete document must be received by the clerk's office. If there is an error in the transmission of a facsimile, the clerk should **not** accept the document for filing and should **not** date stamp the document until a complete, corrected document has been filed. (Rule 12.03(m), TCR). For example, if a party files an answer by facsimile but omits the completed CCIS, the document would not be considered filed until the CCIS is filed. As another example, if a party files a document, and only part of it is transmitted, then the document is not considered to be filed.

If the clerk is aware of a possible transmission error, the clerk has the duty to notify the sender as soon as possible. Although the clerk should notify the sender of an error, the sender bears the risk of using a facsimile machine for filing. (Rule 12.03(n), TCR). When a party inquires whether a transmission has been received, the clerk has the

duty to inform him or her of the status of the transmission. (Rule 12.03(g), TCR).

When a clerk has not accepted a document for filing because of a transmission error or other deficiency, a party may file a written motion with the court seeking to have the filing accepted *nunc pro tunc* or retroactively. (Rule 12.03(o), TCR). It is the court's responsibility, not the clerk's, to consider any arguments with regard to a transmission error and to order any adjustments to the filing date.

3.9.7 Payment of Fees

When a person files a document that requires the payment of an applicable fee, such as a writ of execution, he or she must deliver a copy of the facsimile cover sheet and the fee not later than seven days after the filing by fax. (Rule 12.03(i)(1), TCR). The clerk may decline to process the document until the fee has been paid. (Rule 12.03(i)(2), TCR). For example, a clerk could wait to forward a writ of execution to the sheriff until the applicable fee has been paid.

Rule 12.03(i)(2) refers to a court withholding "the entry of judgment pending the receipt of fees." This provision, therefore, indicates that required fees must be paid before a document can be issued or processed, unless a party has an approved fee waiver. However, orders that have been signed by a judge should be entered without regard to whether court costs have been paid. (See Rule 58, RCP; *Humphrey v. Mauzy*, 181 S.E.2d 329 (W. Va. 1971)).

If a party does not pay a required fee within seven days, the filing of the document may be voidable. (Rule 12.03(i)(3), TCR). This rule, however, does not specify who may seek to have the filing of a document voided. In practice, an opposing party would typically seek to void a filing date. For example, if a party filed a writ of execution to preserve the enforceability of a judgment but did not pay the filing fee within the seven-day period, the opposing party could request that the court void the filing of the writ of execution. The court, not the clerk, has the authority to determine whether the filing of a document should be voided.

3.9.8 Fee for Transmission by the Clerk

In addition to receiving faxes, a clerk may also send faxes related to court business. (Rule 12.03(p), TCR). The clerk may collect a fee to send a fax. The clerk may not, however, collect this fee from a judicial officer or a judicial employee.

3.9.9 Service by Facsimile

A party may serve any document by facsimile in a civil case except for the service of an original complaint, petition or summons. (Rule 12.04(b), TCR; Rule 5(a) and (b), RCP). In a criminal case, a party may also serve documents by facsimile. (Rule 12.06(b), TCR; Rule 49, R. Cr. P.). In both civil and criminal cases, service has been completed when the faxed document has been received. (Rules 12.04(b) and 12.06(c), TCR).

3.9.10 Commitment to or Release from Custody

Note: A facsimile machine may be used to transmit documents relating to a criminal defendant's commitment to or release from custody, provided that the following procedures are used. (Rule 12.06(d) and (e), TCR).

If a criminal bond is posted after a defendant has been committed to a correctional facility, the order setting bail and the release order must be faxed to the correctional facility. In turn, the release order must be completed and faxed to the court. The court that issued the release order must contact the correctional facility upon receipt of the completed release order. The correctional facility shall not release the defendant until it receives confirmation from the court of the receipt of the completed release order. (Rule 12.04(d), TCR). Confirmation of the completed release order may be transmitted by fax.

When a criminal defendant is committed to a correctional facility, the court or clerk may use a facsimile machine to provide notice to the correctional facility. To do so, the court faxes the commitment order to the correctional facility, which may verify receipt by return fax. When the defendant has been placed in the custody of the facility, it must return the completed commitment order to the court. (Rule 12.06(e)(1) - (4), TCR).

A defendant may be committed to a correctional facility by a court which lacks venue to preside over the offense. When this situation occurs, the order setting bail and the commitment order should be transmitted by fax, if at all possible, to the court which will conduct the preliminary hearing or trial. (Rule 12.06(d)(4), TCR).

3.10 CLOSED CASES

In general, circuit clerks are required to monitor when a final order has been entered in a case and the case can be considered "closed." (Rule 16.01, TCR). As a means of tracking case activity, the clerk is required to submit monthly summaries of disposition activity and other information to the Supreme Court Administrative Office and to provide a copy to the subject judge. (See Sections 7.2 and 7.3). One purpose for these reports is to facilitate the courts' compliance with time standards set forth in Trial Court Rule 16. Additionally, the reports are used to monitor workloads and case management in family and circuit courts; to allocate resources and prepare the judicial budget; and to respond to inquiries from other agencies of the federal and state governments as well as nationally based judicial research organizations.

As set forth in Trial Court Rule 16.03, a final judgment is "a final order, decree or other document that terminates or otherwise disposes of the case." (Rule 16.03(e), TCR). Various provisions of Trial Court Rule 16 set forth time standards that generally prescribe the time by which final judgments should be entered based upon the type of case.

Although Trial Court Rule 16 provides time standards and includes guidance concerning final judgments for various types of cases, it does not provide express guidance for the closure of domestic violence protective order cases. Consequently, clerks have used different standards to report when a domestic violence case is "closed" or "final."

Because Trial Court Rule 16 generally indicates that cases are closed when final orders are entered by the trial court, domestic violence proceedings should be treated in a similar manner. In domestic violence proceedings, a case, therefore, should be considered closed after the family court judge conducts a final hearing and prepares an order. One outcome after the final hearing may be the denial of a protective order when the magistrate court has either denied or granted an emergency protective order. A second outcome may be the issuance of a protective order for 90 or 180 days.

It is relatively common that a litigant will request some type of relief or modification of the protective order after the final hearing. For example, a litigant may request the termination or modification of a protective order. Additionally, a litigant may request the extension of a 90-day protective order or file a contempt petition. Although these subsequent proceedings may arise after the final hearing, domestic violence protective order cases should still be considered "final" or "closed" for statistical purposes once the family court has conducted a final hearing and prepared an order.

3.11 SPECIAL PROCEDURES FOR RECORDKEEPING AND DISPOSITION OF A CASE

In various types of cases, the clerk has special tasks or procedures for the maintenance of records and communication with State agencies. Most of these arise upon the disposition of a case. Generally, the tasks associated with the close of a case are limited to the entry and notice of the final order; the assessment of costs (See Sections 5.2, 5.9 and 5.10; Rule 54, RCP; W. Va. Code § 62-5-7); striking a case from the active docket of the court, and the completion of any other directives to the clerk contained in the final order. If the clerk is holding funds, such as a bond, the funds must be disbursed according to the terms of the final order. In certain cases, however, the clerk must perform some duties that are mandated by statute for the particular type of case. This section summarizes these special procedures by case type.

3.11.1 Divorces and Annulments

The clerk must submit a monthly report to the Division of Vital Statistics of all divorces and annulments granted the previous month. (W. Va. Code § 16-5-34; see Section 12.9.2; Appendix B). The form must list the following information: a) the names and ages of the parties to the case; b) the date and place of the terminated marriage; c) the names of the parties' minor children; and d) the date of the final decree or order.

3.11.2 Certificate of Name Change in Divorce

When a party to a divorce requests a name change, the court is required to issue a one-page certificate of divorce. The purpose for the certificate is to provide official proof of a name change for different purposes, such as obtaining a new driver's license. The certificate must include: a) the style of the divorce case; b) the name on the birth certificate of the party requesting the name change; c) the party's date of birth; d) the party's social security number; e) the effective date of the name change; and f) the party's new name. The clerk must certify the certificate, but the certificate is **not** considered an order and should **not** be maintained in the domestic relations order book. (W. Va. Code § 48-5-613).

3.11.3 Paternity

When a judgment determining paternity has been entered, the clerk must forward a certified form to the Division of Vital Statistics that provides necessary information to amend the birth certificate. (W. Va. Code § 16-5-17). This form is due the tenth day of the month following the entry of an order. (Appendix B).

3.11.4 Modification of Child Support Obligations

When an order is issued that modifies a child support obligation, the clerk is required to send a copy of the order to the BCSE no later than five days after the entry of the order. (W. Va. Code §§ 48-11-105; 48-14-106).

3.11.5 Adoption

a) *Adoption Granted*: By the tenth day of the following month, the clerk must submit a certified certificate of adoption to the Division of Vital Statistics. (W. Va. Code §§ 16-5-16(a); 48-22-702). This form must include social security numbers for the adoptive parents and the birth parents. (Appendix B).

b) *Adoption Order Amended or Vacated*: If an adoption order is amended or vacated, the clerk must prepare a certificate which identifies the original adoption certificate and the facts amended by the subsequent order, so that the birth certificate can be amended. (W. Va. Code § 16-5-16(c)). These certificates should be forwarded to the Division of Vital Statistics by the tenth day of following month after the entry of the order.

3.11.6 Juvenile Case Files: Marking Juvenile Records Confidential

The clerk must mark juvenile files as confidential when a juvenile turns 19, or one year after juvenile or personal jurisdiction has expired in the case. The records should be marked confidential at the **later** of these two dates. (W. Va. Code § 49-5-104(a); see also Section 4.9.10). Once a file has been marked as confidential, it may only be accessed by a court order. The only other way to access a juvenile file that has been marked confidential is upon the presentation of a federal subpoena. (W. Va. Code § 49-5-103(d)(7)).

If a juvenile case has been transferred to the court's criminal jurisdiction, the records should only be marked confidential in the following two situations. First, the records may be marked confidential if the juvenile is either acquitted or is found guilty of an offense other than the charged offense which provided the basis for the transfer. Secondly, the records should be sealed if the criminal charges are dismissed. (W. Va. Code § 49-5-104(b)). In these circumstances, the records are marked confidential when the juvenile is acquitted, found guilty of a lesser included offense or the charges are dismissed.

3.11.7 Suspension of Juvenile Driver's Licenses

In any delinquency case, a court may enter an order that prevents the issuance of a junior probationary operator's license to a juvenile who is fifteen or younger. When a juvenile is aged sixteen through eighteen years, the court may order that the juvenile is not eligible to operate a motor vehicle. (W. Va. Code § 49-4-714). Similarly, for second and third offenses of underage consumption, the court must suspend a juvenile's operator license for specified periods of time. (W. Va. Code § 49-4-713(b)). If the court orders a license suspension under either code section, the clerk should provide a copy of such an order to the DMV. Since this type of penalty would only be ordered in some juvenile cases, the order should clearly direct the clerk to send it to the DMV. (See also Section 4.9).

3.11.8 Magistrate Court Appeals

The clerk should forward a copy of the final order issued by the circuit court to the magistrate court clerk.

3.11.9 Motor Vehicle Violations

*Note 1: This section does not apply to violations of motor vehicle laws that govern standing or parking. It also does **not** apply to DUI convictions, which are covered in the next section.*

*Note 2: The procedure described below is **not** used when the circuit court orders the suspension of a juvenile operator's license for underage consumption or other delinquency offenses. For a discussion of the procedures for disclosures to DMV in juvenile cases, see Chapters 3 and 4.*

The clerk must transmit a certified abstract of a judgment of conviction of a motor vehicle law to the Division of Motor Vehicles within 72 hours of the conviction. The clerk must provide the following information: a) the entry of the plea or a judgment by the court; b) the amount of the fine; c) the amount of the costs; d) the sentence; and e) the date of conviction. The clerk should provide this information on the pink abstract copy of the uniform traffic citation or on the abstract form designated by the DMV. (Appendix B). The clerk should mail either form to:

Division of Motor Vehicles
Capitol Complex
Bldg. 3, Room 124
Charleston, WV 25317

3.11.10 DUI Convictions

*Note: The procedure described below is **not** used when the circuit court orders the suspension of a juvenile operator's license for underage consumption or other delinquency offenses. For a discussion of the procedures for disclosures to DMV in juvenile cases, see Chapters 3 and 4.*

If a person pleads guilty or is found guilty after a trial, the circuit clerk must forward an abstract of the DUI conviction to the DMV within 30 days after the judgment, unless a notice of intent to appeal has been filed. (W. Va. Code § 17C-5A-1a(b)). A conviction of guilt is one basis for the suspension or revocation of an operator's license. (W. Va. Code § 17C-5A-1a(a)).

The clerk should not send an abstract of conviction if the person entered a no contest plea (*nolo contendre* plea) or if the person was acquitted. It is not necessary to inform the DMV of a no contest plea or a not guilty verdict because neither of these results, standing alone, determines the outcome of the license revocation proceedings. It is possible for driver's license to be suspended even if a person is found not guilty. (W. Va. Code § 17C-5A-1a(e)).

For guilty convictions, the clerk should send the abstract of the DUI conviction to:

Division of Motor Vehicles
Capitol Complex
Bldg. 3, Room 138
Charleston, WV 25317

3.11.11 Criminal Convictions -- Criminal Identification Bureau

West Virginia Code § 15-2-24(g) requires a clerk to report the disposition of all criminal cases to the Criminal Identification Bureau, (CIB), by a completed Criminal Disposition Report (CDR). The CDR form should be submitted to the CIB on a monthly basis.

3.11.12 Criminal Convictions -- WV Division of Corrections

If a person is convicted of a felony and sentenced to the custody of the Commissioner of the West Virginia Division of Corrections (DOC), the clerk must transmit a certified commitment order and a copy of the final order in the case. West Virginia Code § 62-7-10 establishes the form for commitment orders. The mailing address is:

West Virginia Division of Corrections
112 California Avenue
Bldg. 4, Room 300
Charleston, WV 25305

The clerk must also fax and mail a certified copy of the commitment order and the final order to the regional jail housing the defendant. This practice notifies the Regional Jail Authority of the date on which the DOC, as opposed to the county, is liable for the incarceration costs for the defendant.

3.11.13 Criminal Convictions -- Regional Jail

If a person is committed to the custody of a regional jail, the clerk should transmit a certified commitment order and a copy of the final order to the administrator of the regional jail. (See also Section 3.9.10, Commitment to or Release from Custody).

3.11.14 Probation Violations

West Virginia Code § 62-12-10(b) establishes limited periods of incarceration for felony probationers who are found to have violated the terms of their probation. For a first offense, a probationer may be incarcerated for up to 60 days. For a second offense, a probationer may be incarcerated for up to 120 days. If a court orders the incarceration of a felony probationer for these limited periods, the circuit clerk is required to provide the order of confinement to the Division of Corrections (DOC) within five days. The reason for the requirement is that the DOC will be responsible for the cost of incarcerating felony probationers for these limited periods. The order should direct the clerk to transmit a copy of the order to the DOC.

3.11.15 Drug Court Sanction: Incarceration

A judge of a drug court may order the temporary incarceration of a drug court participant who has an underlying felony conviction in a regional jail as a sanction. (W. Va. Code §§ 62-15-6a and -6b). The period of incarceration cannot exceed 30 days. If the judge finds that the offender would otherwise be committed to the Division of Corrections (DOC) to serve his or her sentence, the DOC will pay for the cost of incarceration. To facilitate this process, the clerk must transmit copies of these types of orders within five days of entry. These orders may be mailed or may be faxed to the DOC:

West Virginia Division of Corrections
Attn: Diann Skiles/Records
1409 Greenbrier Street
Charleston, WV 25311
Fax No.: 304-558-8430

The fax coversheet or order should indicate that it is a "Temporary Order." The order itself should direct the clerk to transmit the order to the DOC.

3.11.16 HIV Test Results -- Custodial Agencies

A person who is charged with or convicted of the following offenses is subject to mandatory HIV testing: a) sexual abuse; b) sexual assault; c) incest; or d) prostitution. (W. Va. Code § 16-3C-2(f)(2), (6)).[1] By definition, a juvenile who has been adjudicated delinquent for one of these offenses is considered to have been "convicted" for the purposes of mandatory HIV testing. (W. Va. Code § 16-3C-1(d)). Although the HIV testing statutes do not expressly provide that juveniles who are charged with or convicted of these sexual offenses are subject to court-ordered HIV testing, the corresponding legislative rule indicates that juveniles are subject to the same HIV testing as an adult who is charged with or convicted of these sexual offenses. (W. Va. C.S.R. Title 64, Series 64, Section 4.3).

When a person is subject to mandatory, court-ordered testing, the test results will be filed with the court. (W. Va. C.S.R. Title 64, Series 64, Section 4.3.b.2). This section of the legislative rule states:

> 4.3.b.2. As soon as practical, test results shall be provided to the magistrate court clerk in the county where the defendant or juvenile respondent is charged. If the criminal matter or juvenile delinquency proceeding is then pending before the circuit court, the magistrate clerk shall immediately forward the test results to the circuit clerk. The clerk shall also promptly provide a copy of the test results to: 1) the prosecuting attorney, who shall inform the victim, or parent or legal guardian of the victim; and 2) counsel for the defendant or juvenile respondent.

Therefore, when a circuit clerk receives HIV test results, copies should be immediately provided to the prosecuting attorney and defense

[1] The statute also lists "sexual molestation" but there is no such offense in West Virginia.

counsel, unless there is clear indication that the results were already provided to these persons by the magistrate clerk.

Because HIV test results are closed and confidential, clerks should routinely seal HIV test results in both adult and juvenile cases. (W. Va. Code § 16-3C-2(f)(6)). Even though juvenile case files are already closed by statute, there are a number of exceptions permitting access to juvenile records. (See W. Va. Code §§ 49-5-101 and -103). Access to HIV test records is specifically limited and requires a court order meeting certain statutory requirements. (W. Va. Code § 16-3C-3(a)(11)).

If a defendant is placed in the custody of the Division of Corrections or the Regional Jail Authority or if a juvenile is placed in the custody of the Division of Juvenile Services; or other custodial placement, the court is required to transmit HIV test results to the custodial agency. (W. Va. C.S.R. Title 64, Series 64, Section 4.3e). The test results should be placed in a sealed envelope that is marked "Confidential for the Records Supervisor."

3.11.17 Pretrial Risk Assessments

When a person is arrested and incarcerated in a regional jail, the Regional Jail Authority (RJA) is required to conduct a pretrial risk assessment within three days of the placement. (W. Va. Code § 31-20-5g(a)). According to the statute, the RJA will provide the risk assessment to the magistrate or circuit clerk who, in turn, must provide it to the presiding magistrate or judge.

The statute establishes that the pretrial risk assessments are confidential. (W. Va. Code § 31-20-5g(a)). The only persons who may have access to pretrial risk assessments are the presiding judge, court personnel, the prosecuting attorney, defense counsel and the defendant. When pretrial risk assessments are maintained in the court file, they should be sealed.

3.11.18 Notice of Appointment of Guardianship or Conservatorship

Within ten days following the entry of an order that appoints a guardian or conservator, the circuit clerk is required to send a notice of appointment to the county clerk. (W. Va. Code § 44A-2-13(d)). The statute indicates that the notice shall be recorded with the records of deeds and powers of attorney in the county clerk's office. The notices will be recorded with the powers of attorney. The notice

should list the name of the protected person, the case name and number and the names of the guardian or conservator.

3.11.19 Suits Adjudicating Title to Real Property

If a civil case involves the partition of real property, the recovery of real property or otherwise affects the title to real property, the circuit clerk is required to transmit a copy of the order, judgment or decree to the county clerk where the land is located. (W. Va. Code § 51-4-7). The statute was last amended in 1875, and it requires the circuit clerk to forward a description of the real property and any report to the county clerk. In most cases, the legal description of the real property would be included in the final order, and it would not be necessary for the clerk to forward another document including the description of the property. The order should direct the circuit clerk as to any specific documents that should be forwarded to the county clerk with the order. In turn, the county clerk will record the order in the deed book and index it under the names of the former and newly adjudged owner. Similar to other final orders that affect title to real property, a final condemnation order must also be forwarded to the county clerk for recordation. (W. Va. Code § 54-4-20).

3.11.20 Report of FOIA Requests to Secretary of State

Beginning January 1, 2016, each public body, including a circuit clerk, that receives a Freedom of Information Act request will have to report specified information to the Secretary of State. For each request received, the public body must report the following information: a) the nature of the request; b) the time-frame necessary to comply with the request; and c) the amount charged for providing the information. Although the statute does not require the name of the person who made the FOIA request, it is anticipated that this information will be included in the database. The public body does **not**, however, provide the records themselves to the Secretary of State. In turn, the Secretary of State will maintain a publicly available database of this information. (W. Va. Code § 29B-1-3a). The Secretary of State has the duty to prepare rules, procedures, and forms for the submission of this information to the office. For a discussion of exemptions to the Freedom of Information Act, see Section 4.5.

3.12 SEX OFFENDER REGISTRY, CHILD ABUSE AND NEGLECT REGISTRY AND MENTAL HEALTH REGISTRY

The specific duties of the circuit clerk to report information for each of these registries is discussed below.

3.12.1 Sex Offender Registration

West Virginia Code § 15-12-2 requires a person who is convicted of certain sexual crimes to register as a sexual offender with the Sex Offender Registry maintained by the West Virginia State Police when granted probation, parole or release from incarceration. West Virginia Code § 15-12-2(g) requires a person, at the time of conviction (or a finding of not guilty by reason of mental illness, mental retardation or addiction), to sign in court a statement that acknowledges this requirement. This statute directs that the court is to provide a copy of this statement to the Registry. The statute also requires the court, within 72 hours of entry of the commitment or sentencing order, to transmit to the Registry all information required for registration by a registrant, as well as the following non-identify information regarding the victim or victims: sex; age; and relationship between victim(s) and perpetrator. (W. Va. Code § 15-12-2(e)(2)). Copies of forms sent to the Registry should also be maintained in the criminal case file, noting when they were sent.

Additionally, if the circuit court makes a separate determination that the convicted person is a sexually violent predator, the clerk is required to send a copy of the order making that determination to the Registry. (W. Va. Code § 15-12-2a(g)). The following information must be provided with the order: name of offender; date of birth; social security number; crime(s) for which offender convicted; date of conviction; and sentence imposed. (*Regulations and Procedures Pertaining to the West Virginia Sex Offender Registration Act*, at § 81-14-9.6). This regulation requires the order and accompanying information to be sent to the Registry by certified or registered mail. The mailing address is:

Sex Offender Registry
Criminal Records
West Virginia State Police
725 Jefferson Road
South Charleston, WV 25309

3.12.2 Child Abuse and Neglect Registration

Under the Child Protection Act of 2006, any person convicted (or found not guilty by reason of mental illness, mental retardation or addiction) of a child abuse or neglect criminal offense under West Virginia Code §§ 61-8D-2 through -4a, or similar law from another jurisdiction, must register with the Child Abuse and Neglect Registry maintained by the West Virginia State Police. In relation to this Registry, at the time any person is convicted (or found not guilty by reason of mental illness, mental retardation or addiction) of one of these criminal offenses, the person must be informed about the requirement to register, and sign in open court a notification statement acknowledging an understanding of the registration requirements. A copy of this signed statement must be provided by the court to the Registry. (W. Va. Code § 15-13-2(h)). Additionally, when a person is convicted of a child abuse or neglect criminal offense, the circuit clerk must, within 30 days, forward to the Registry the information required by the State Police relating to the person who must register. (W. Va. Code § 15-13-2(c)). The superintendent of the State Police must provide the forms to circuit clerks for the submission of the information needed to administer the Child Abuse and Neglect Registry. (W. Va. Code § 15-13-2(j)). Copies of completed forms sent to the Registry (indicating when sent) should be kept in the criminal case file.

3.12.3 Mental Health Registration

The State Mental Health Registry Act authorizes the dissemination of certain mental health information for the establishment of a central database designed to aid in the enforcement of federal and state laws prohibiting persons with mental illness from possessing firearms. (W. Va. Code §§ 61-7A-1, *et seq.*). The State Mental Health Registry is to be maintained by the Supreme Court Administrative Office or the State Police. (W. Va. Code § 61-7A-3(a)). The applicable statutory subsection, West Virginia Code § 61-7A-3(c), requires circuit clerks and the DHHR to provide information to the Supreme Court Administrative Office and the State Police. However, the Division of Mental Hygiene and Treatment Court Services of the Supreme Court Administrative Office has developed and implemented an electronic method for the collection of this information and submission of the data by the mental hygiene commissioners, circuit court judges, and magistrates to the State Mental Health Registry which, in turn, provides the data to the FBI National Instant Criminal Background Check System (NICS). An explanation of the duties with regard to the collection and submission of this information to the Administrative Office appears in Section 3.12.3.3.

Under the statute, every circuit clerk is required "as soon as practicable after the effective date of this article," to begin providing to the Registry the names and other required identifying information of those persons covered by the Act. (W. Va. Code § 61-7A-3(c)). The express language of the Act does not indicate that it should be retroactively applied. Federal officials, however, have indicated that the West Virginia statute and other similar state statutes should be retroactively applied to comply with federal requirements. As the Administrative Office initially developed the Mental Health Registry, it started collecting names of individuals and identifying information on a prospective basis from newly filed cases. The Division of Mental Hygiene Services has obtained federal grant funds to collect information retrospectively. With the grant funds, the Division utilizes contracted court abstractors to conduct a review of past case files to identify individuals who should be included in the Mental Health Registry. This has relieved circuit clerks of any duty, at this point, to conduct a review of prior case files for the Mental Health Registry.

The Act covers those persons "adjudicated to be mentally defective or who have been committed to a mental health institution." (W. Va. Code § 61-7A-3(a)). An explanation of this statutory language follows.

3.12.3.1 Adjudicated as a Mental Defective

Those persons under the Act's definition of "adjudicated as a mental defective" include criminal defendants determined to be incompetent to stand trial due to mental illness or insanity, or found not guilty by reason of mental illness or insanity. (W. Va. Code, Chap. 27, Article 6A - Competency and Criminal Responsibility of Persons Charged or Convicted of a Crime). (W. Va. Code § 61-7A-2(1)). Currently, circuit court judges and their staff are submitting this data to the Registry. Therefore, clerks have not been required to set up a process to review criminal orders on an ongoing basis to identify those persons who fit this category of "adjudicated mental defective" that need to be reported for the Registry.

Additionally, under the Act definition a person is considered to be "adjudicated as a mental defective" if he or she has been "determined to be unable to handle his or her own affairs due to mental illness or insanity." (W. Va. Code § 61-7A-2(1)). This language, in some respects, is similar to the definition of "protected persons" under the Guardianship and Conservatorship Act codified in Chapter 44A. The definition of a "protected person" is multi-faceted, but can include any adult who has been found by a court, because of mental impairment,

lacking the capacity "to manage property or financial affairs . . . without the assistance or protection of a conservator." (W. Va. Code § 44A-1-4(13)). To implement the Registry Act, mental hygiene commissioners who conduct adult guardianship and conservatorship proceedings are required to determine whether the "mental impairment" or reason that a person is subject to an adult guardianship or conservatorship arises from mental illness or insanity. If the mental hygiene commissioner makes such a finding, then the person would be properly included in the Mental Health Registry and would be precluded from possessing firearms. It should be noted, however, that **not** all "protected persons" would be automatically included in the Mental Health Registry. It also bears repeating that mental hygiene commissioners will be responsible for making this determination.

3.12.3.2 Committed to a Mental Health Institution

The statutory definition of "committed to a mental institution" in the Mental Health Registry Act is limited to those persons who have been "involuntarily committed for treatment pursuant to chapter twenty-seven of this code." (W. Va. Code § 61-7A-2(2)). Individuals can be involuntarily committed to a mental institution based upon either mental illness or addiction. The definition in the Registry Act, however, includes only persons who are involuntarily committed after a probable cause hearing (W. Va. Code § 27-5-2) or after a final commitment proceeding because of mental illness. (W. Va. Code § 27-5-4). The Registry Act was amended in 2016 (Senate Bill 338) to clarify that it does not include persons involuntarily committed based solely on drug or alcohol addiction, which is separately defined under Chapter 27. (W. Va. Code §§ 27-1-11 and 27-1A-11(b)). Also excluded are children under 14 years of age who are involuntarily committed for treatment of mental illness. (W. Va. Code § 61-7A-2(2)).

Under this definition in the Mental Health Registry Act, linking its meaning to Chapter 27 procedures, persons subject to a statutorily designated voluntary treatment agreement on an outpatient basis following either a probable cause or final commitment hearing would also be subject to the reporting requirements. Under the applicable provision (W. Va. Code § 27-5-2(h)), *after* a judicial finding that due to mental illness or addiction the individual is likely to cause harm to self or others, a voluntary treatment agreement can be approved by the court in some circumstances where outpatient treatment appears to

be a viable option. Notwithstanding the "voluntary" terminology in this circumstance, this option remains as an involuntary commitment for treatment and, therefore, is subject to the Mental Health Registry Act reporting requirements if it is for mental health treatment.

The definition of "committed to a mental institution" under the Registry Act would also cover any juvenile over 14 years of age adjudicated as delinquent who has a disposition under West Virginia Code § 49-4-714(b)(6). A circuit court proceeding with a disposition in a juvenile delinquency case under this code provision can, after conducting a hearing pursuant to the Chapter 27 final commitment hearing procedures, commit the juvenile to a mental health facility for treatment of mental illness. In these circumstances involving a disposition pursuant to West Virginia Code § 49-4-714(b)(6), the juvenile "[h]as been involuntarily committed as provided in chapter twenty-seven . . .." (W. Va. Code § 61-7A-4(a)). Therefore, juveniles who are over 14 years of age and are subject to a commitment under West Virginia Code § 49-4-714(b)(6) for treatment of mental illness would be included in the Mental Health Registry. Like adults, juveniles involuntarily committed based solely on drug or alcohol addiction would not be subject to the Registry Act reporting requirements. (See Section 3.12.3.2 above). Additionally, under juvenile law some youth charged with delinquency offenses will have a court determination of incompetency to stand trial or, upon trial, a finding of not guilty due to mental illness or insanity. (W. Va. Code § 27-6A-9). In these instances, the juveniles (if over age 14) fall within the Registry Act definition of "adjudicated as a mental defective" and are subject to inclusion in the Registry. (W. Va. Code § 61-7A-2(1)).

3.12.3.3 Summary of Reporting Duties and Procedures

The following identifying information should be included for each person reported to the Mental Health Registry: a) name; b) date of birth; c) date of commitment or adjudication; and d) address at the time of commitment or adjudication. (W. Va. Code § 61-7A-3(d)).

Mental hygiene commissioners, circuit court judges, and magistrates are required to provide this information to the Registry for the following persons:

a. Adults who have been involuntarily committed (or subject to a voluntary treatment agreement) because of mental illness (not addiction) after a probable cause or final commitment hearing pursuant to Chapter 27 of the West Virginia Code;

b. Adults who have been found to be "protected persons" because of mental illness or insanity and are, therefore, subject to an adult guardianship or conservatorship pursuant to Chapter 44A of the West Virginia Code;

c. Adults charged with felony or misdemeanor crimes who are found incompetent to stand trial due to mental illness or insanity;

d. Adults charged with felony or misdemeanor crimes who are found not guilty by reason of mental illness or insanity at trial;

e. Juveniles over 14 years of age who are adjudicated delinquent and are committed to a mental health facility pursuant to West Virginia Code § 49-4-714(b)(6); and

f. Juveniles over 14 years of age charged with delinquency offenses who are determined by the court to be incompetent to stand trial or, upon trial, are found not guilty due to mental illness or insanity.

Under the current protocol and system, mental hygiene commissioners, circuit court judges, and magistrates submit the necessary information to the Registry. Nevertheless, the Registry Act places ultimate responsibility for reporting this information with the circuit clerks. Therefore, if there is any instance where it appears that there has been an omission in reporting information, circuit clerks should provide this information to the Central State Mental Health Registry database at the Administrative Office. The data manager for the Registry is Lou Weisberg, lou.weisberg@courtswv.gov. The West Virginia State Mental Health Registry Users Guide provides detailed instructions on the submission of this information.

3.12.4 Removal From Mental Health Registry

West Virginia Code § 61-7A-5 establishes a procedure in which a person whose right to possess a firearm had been lost because he or

she had been adjudicated as mentally defective or had been involuntarily committed to a mental institution may petition the circuit court to restore his or her right to possess a firearm. (For an explanation of this proceeding, see Section 11.14). When a court grants such a petition, the circuit court or clerk must provide a certified copy of the order that restores the right to possess a firearm to the data manager of the Registry. The person's name will be removed from the Mental Health Registry and the Registry staff is required to inform the FBI (or other federal entity operating the NICS) of the court action. (See Section 11.14 for more details).

3.13 ISSUANCE OF PROCESS

Note: This section does not address procedures for the issuance of a summons. Procedures for issuance of a summons are addressed in Section 3.1.

Proper and timely communication of planned events in a case is crucial to the functioning of the judicial system. While the attorneys in a case have the responsibility to provide notices of hearing and other events in a case, any process issued by the clerk is essential to the orderly and systematic management of cases.

3.13.1 Subpoenas

A subpoena is a document that commands an individual to appear and testify at a hearing, trial or deposition. A subpoena *duces tecum* requires the production of documents, books or other tangible items. A subpoena may be served within the State of West Virginia. (For service of subpoenas outside of West Virginia, see Sections 10.2.5 and 10.2.7).

3.13.1.1 Subpoenas in Civil and Family Court Cases

A subpoena issued in a civil or family court case must substantially conform to Form 33, Civil Case Subpoena, set forth in the Appendix of Forms to the Rules of Civil Procedure.

Independent of the circuit clerk, an attorney, as an officer of the court, may issue and sign a subpoena. (Rule 45(a)(3), RCP). Because attorneys have the authority to issue subpoenas, clerks will rarely issue subpoenas in civil or family court cases. If a person asks a clerk to issue a blank subpoena, the clerk should provide a blank, signed subpoena form. (Rule 45(a)(3), RCP).

3.13.1.2 Administrative Agency Subpoenas

The circuit clerk may be asked to issue a summons or subpoena, including a subpoena *duces tecum*, for an administrative agency hearing or other administrative agency proceeding. The clerk may do so, provided that the subpoena compels the witness to appear in the county where the clerk's office is located. (W. Va. Code § 57-5-1).

In some instances, specific statutes governing particular administrative agencies allow an agency to issue subpoenas. A subpoena issued by an administrative agency is subject to review by the circuit court. (W. Va. Code § 29A-5-1(b); *State ex rel. Hoover v. Berger*, 483 S.E.2d 12 (W. Va. 1997)).

3.13.1.3 Subpoenas in Criminal and Juvenile Cases

When a party requests a subpoena from the clerk, the clerk should provide a form that bears the name of the court, the case style, and the clerk's seal and signature. The clerk should not be filling out the substance of a subpoena. That is the responsibility of the party or counsel requesting it. If it is a juvenile case, the case style should name the state as the petitioner and have the first name and initial of the last name of the juvenile. Also in a juvenile case, if a subpoena seeks the appearance and testimony of a witness who is a minor, the subpoena must specifically name a parent or custodian, directing that the minor be brought at the time and place specified to give testimony. (Rule 17(a), R. Cr. P.; Rule 22, RJP). Alternatively, in either a criminal or juvenile case a party may request a blank subpoena. If so, the clerk should issue the subpoena signed and sealed, but otherwise in blank. Special procedures apply to the issuance of subpoenas for non-resident witnesses in criminal and juvenile cases. (Section 10.2.7).

In a pending criminal investigation, the clerk may be directed by the court to issue a subpoena. For example, a court order may direct the issuance of a subpoena for telephone records. The clerk should follow the directives of the court with regard to any provisions that should be included in the subpoena.

3.13.1.4 Investigative Subpoenas in Aid of Criminal Investigations Involving Certain Crimes Against Minors

West Virginia Code § 62-1G-2 provides a process whereby a magistrate or circuit judge may issue an investigative subpoena directed to an electronic communications service or remote computing service provider. A law enforcement agency having reasonable suspicion that electronic communications, as defined in the statute, have been used in the commission of certain offenses (sexual offenses, stalking, or kidnapping) against a minor may apply for the issuance of a subpoena to obtain certain information from, for example, an internet service provider. The application for a subpoena may be transmitted to either a magistrate or circuit court by any means permitted by rules promulgated by the Supreme Court (i.e. fax, mail, or hand delivery). The application should be directed by the law enforcement agency to a magistrate or circuit judge, who are the only court officers that can issue and sign such a subpoena. Circuit clerks cannot sign these investigative subpoenas. And there is no requirement that the application or subpoena be filed with the clerk, and likewise no court fee associated with the procedure. In other words, the statute regarding these investigative subpoenas places no duties or responsibilities on circuit clerks. If a law enforcement agency does submit an application for one of these investigative subpoenas to a circuit clerk, the clerk should promptly deliver it to an available circuit judge or direct the law enforcement agency to do so.

3.13.2 Miscellaneous Process

When directed by the court, the circuit clerk has the responsibility to issue and sign a capias or a summons to appear before a court. Additionally, the circuit clerk is frequently responsible for sending notices of hearings in different types of cases. When the clerk issues a notice or other similar document, the clerk should include a copy of the notice in the court file and should note it on the docket.

3.14 COPIES

West Virginia Code § 59-1-11 allows the clerk to collect a fee for copies, if requested by attorneys or the public. (See Chapter 5 - Cost Schedules). This statute does not provide for the collection of additional fees for certified or attested copies.

3.14.1 Regular Copies

Each office should establish local procedures for copying documents and returning documents to their original locations.

3.14.2 Certified Copies

A certified copy bears an official notation that the copy is a true copy of the original. A clerk has the following duties associated with certifying copies of documents:

a. Verify that the document which is copied is an original document;

b. Copy the document and verify that all pages were copied;

c. Stamp the document as certified and sign the document;

d. Place the clerk's seal on the document; and

e. The clerk should collect any applicable fee for the copy and issue a receipt.

3.14.3 Attested Copies

An attested copy requires a sworn statement that the document is a true copy of the original. Unlike a certified copy, an attested copy is not required to bear the clerk's seal.

3.14.4 Responses to FOIA Requests

When a clerk provides public records in response to a FOIA request, he or she may collect reasonable fees for reproducing records. The clerk, however, may not charge a search or retrieval fee or charge a fee based on the man-hour costs for reproducing the records. (W. Va. Code § 29B-1-3(e)).

3.14.5 Authenticated Records

The procedure for the authentication of court records is a method of establishing the authenticity of court records maintained by another jurisdiction. (Rule 44, RCP; Rule 27, R. Cr. P.). It may also be referred to as the exemplification of the record. The procedure for

authenticating records allows court records to be used in other jurisdictions without further verification or testimony by a clerk.

To authenticate a record, the clerk first must attest a copy of the original document. Secondly, a certificate signed by a circuit judge must state that the clerk is the legal custodian of the original document. Third, the clerk must certify that the signature of the judge is genuine and that the signatory is, in fact, the judge. (See Authentication Form, Appendix B).

Occasionally, documents must be authenticated for submission to a foreign government. (Rule 44(a)(2), RCP). If the foreign government is a signatory to the Hague Convention of 1961 for authenticating documents for use in foreign countries, the procedure for authentication is referred to as *apostille*. To authenticate a document by *apostille,* the clerk certifies the record. In turn, the Secretary of State certifies or authenticates the record once the clerk has done so.

If the parties are not signatories to a treaty such as the Hague Convention noted above, the clerk and circuit judge should follow the procedure for authenticating a record for use in another jurisdiction of the United States. (Rule 44(a)(2), RCP). Subsequently, a final certification may be provided by an appropriate diplomatic official, such as a secretary of an embassy.

3.15 MULTI-JURISDICTIONAL LAW ENFORCEMENT AGREEMENTS

West Virginia Code § 15-10-4 allows law-enforcement agencies to enter into multi-jurisdictional agreements to assist each other and to cooperate with each other to investigate criminal activity. This code section envisions cooperation between federal, state, county, municipal and campus law enforcement agencies, as well as the Hatfield-McCoy regional recreational authority.

A multi-jurisdictional agreement is not effective unless the agreement is in writing and it has been filed in the office of the circuit clerk in the county in which the law enforcement agency operates. (W. Va. Code § 15-10-4(d)). This type of agreement would normally be subject to public access. However, this type of agreement may be sealed pursuant to a court order. When such an agreement is sealed, it can only be disclosed pursuant to a court order.

When a multi-jurisdictional agreement is filed in the clerk's office, it is best practice to file the agreement in a bound book and to maintain an index. The book can be stored with the other order books. This practice ensures that the multi-jurisdictional agreements will be properly filed. It further ensures

that the public would have access to such an agreement, unless the agreement has been sealed.

3.16 EXHIBITS

Records or items known as exhibits may be introduced as evidence in court proceedings. As established by policy of the Supreme Court, the circuit clerk is responsible for assisting a judge by marking, labeling and accepting exhibits during court proceedings. The clerk should provide the labels that identify exhibits. The clerk should label exhibits numerically by the party introducing the exhibit; *e.g*. State's Exhibit 1 or Defendant's Exhibit 1. During a proceeding, the clerk should keep an evidence or exhibit log that lists each exhibit number, a brief description, and indicates whether the exhibit was introduced into evidence.

The circuit clerk is also responsible for storing exhibits, and retrieving them if necessary. However, the clerk should only store exhibits that have been admitted during trial as evidence (or lodged but not admitted based upon a court ruling). Exhibits must be carefully controlled and monitored until they are returned to the owner or are destroyed, sold or otherwise disposed of pursuant to a court order. (W. Va. Code § 57-5-11; see also Section 3.17 - Record Retention Schedule). When preparing a transcript, a court reporter may check out an exhibit from storage. However, it must be returned to the clerk.

The location of an exhibit must be noted on the docket sheet. If an exhibit can be stored in a case file, the clerk should place the exhibit in a marked envelope and note it on the docket sheet. Often, exhibits cannot be stored in a case file because of their size or the need for secure storage. In this case, exhibits should be stored in a secure room, especially if the exhibit is contraband, valuables or money. When an exhibit is not stored in a case file, the storage location must be noted on the docket sheet or in some manner in the court file.

3.17 RECORD RETENTION SCHEDULE

West Virginia Code § 51-4-3 provides that all papers and records filed in a circuit clerk's office are to be preserved in accordance with time periods established by a record retention schedule promulgated by the Supreme Court. This statute also provides for the destruction of any records not required to be permanently preserved under the court-adopted record retention schedule. Another statute, West Virginia Code § 57-1-7c, requires notice by the circuit clerk to the state archivist prior to disposing of any court records that no longer need to be retained. A summary of record retention, storage, and disposal procedures is contained in the following sections.

Refer to the Record Retention Schedule promulgated by the Supreme Court for detailed guidance.

3.17.1 Maintaining Court Records

The Supreme Court's Record Retention Schedule sets out six categories of records in circuit clerk's offices, with various sub-categories of documents in each of the categories. (See Record Retention Schedule, Appendix A). The category breakdown (with the number of sub-categories in parentheses) is as follows:

Administrative	(11)
Civil	(38)
Criminal	(11)
Financial	(13)
Juvenile	(2)
Personnel	(4)

Order books and indexes are the principal groups in the various categories that must be maintained as permanent records. Other major sub-categories of permanent records include adoption case files and paternity case files where paternity was established. Other sub-categories of records have widely varying retention timeframes -- ranging from relatively short periods (e.g., 30 days after expiration of appeal period) to 75 years (e.g., felony case files). Although not set out in the Record Retention Schedule, all records relating to selection and service of jurors are to be preserved by the clerk for at least four years after the panel was selected, or longer if ordered by the circuit court. (W. Va. Code § 52-1-16).

The specific timeframes for each particular type of record are detailed in the Record Retention Schedule. Permanent retention and storage involves preserving the original paper documents using low-acid record boxes and a document medium meeting archival standards. An alternate method of permanent retention that greatly reduces storage space (and makes record retrieval easier) is to convert the documents to microfilm, microcards, optical disk, or other electronic storage system. Photographic microfilm and microcards are the statutorily preferred alternative storage media to meet archival standards for preserving permanent records. (W. Va. Code § 57-1-7c). However, conversion of paper records to an electronic storage medium is also a recognized method of permanent preservation of court records. (W. Va. Code § 51-4-3). Consultation and guidance should be obtained from the Supreme Court Administrative Office if there is any question regarding whether permanent court records are being maintained and stored properly.

If lack of storage space is a problem, subject to local court and AO approval, converting other types of paper records to microphotographic film or electronic storage media is a possible solution. For records that must be maintained for an extended period of years under the retention schedule, it may be more cost-efficient to convert those files to microfilm or electronic disk and dispose of the paper records.

3.17.2 Court Reporter Notes and Recordings

Although not always considered as circuit clerk office records, court reporter notes and recordings are court records covered under the civil and criminal categories of the record retention schedule. It is best practice for the circuit clerk to file and store court reporter notes and recordings, including those of a substitute court reporter. When storing recordings of grand jury proceedings, the clerk must maintain these records under seal. (Rule 6(e), R. Cr. P.).

In some counties, the court reporter's records are stored by the court reporter, not the circuit clerk. In either situation, the court reporter's notes and recordings must be stored in the courthouse. When the court reporter's notes and recordings are stored, they should be labeled with the date on which they may be destroyed. However, once a transcript of a court proceeding is prepared and certified, the notes and recordings may be destroyed or returned to the court reporter at any time. Reusable tapes and other electronic media may be erased for further use. Court reporter records must be maintained as follows: a) felonies -- 75 years after disposition; b) misdemeanors -- 10 years; and c) civil cases -- 10 years.

3.17.3 Disposal of Records

Circuit clerks may dispose of any permanent paper records that have been properly converted and stored in an alternate archival medium, such as microfilm. All other court records kept beyond their applicable holding periods under the record retention schedule are also subject to disposal in an appropriate manner. The first step, as required by West Virginia Code § 57-1-7c and the Supreme Court's retention schedule, is to provide written notification of the planned destruction of court records to the State Director of Archives and History. It is not necessary to notify the Archives Director regarding the intended destruction and disposal of the following categories of records; a) any confidential case files as listed in the retention schedule; b) any case file (or portion thereof) sealed or designated confidential by court order; c) financial records described in the retention schedule; and d) personnel records of the clerk's office.

Before disposing of court records, clerks shall submit, under appropriate cover letter, an unsigned "Records Disposal Report" (See Appendix B) listing the types and time periods of the records, and noting any that may be perceived as historically significant. The list should be mailed to:

Archives and History Section
Division of Culture and History
The Cultural Center
1900 Kanawha Blvd., E.
Charleston, WV 25305-0300

If the Archives Director does not reply within 30 days with a request to review the records, the clerk may submit a signed and dated Records Disposal Report and proceed with the disposal. All records, confidential or otherwise, should be disposed of in accordance with the destruction of records guidelines set forth in the retention schedule.

3.18 CHANGE OF VENUE/REMOVAL OF CASES

3.18.1 Change of Venue -- Criminal Cases

A change of venue may be ordered in a criminal case if a court finds that the defendant cannot receive a fair trial in the county where he or she was indicted. (W. Va. Code § 62-3-13; Rule 21, R. Cr. P.). When a change of venue is granted, the clerk should provide a certified copy of the record to the clerk where the trial will be conducted. If the original presiding judge decides to try the case in the new venue, the judge must obtain an administrative order of approval and special assignment from the Chief Justice of the Supreme Court. When a change of venue has been ordered, the clerk must prepare an index and mail all pleadings, documents, evidence and any bond to the clerk of the court where venue was transferred. When a clerk receives a transferred case, the clerk should handle the case as new filing and should assign a new case number.

3.18.2 Removal or Transfer to Another West Virginia County

A civil case may be removed or transferred to another county upon the motion of any party for good cause shown. (W. Va. Code § 56-9-1). Additionally, Rule 42(b) of the Rules of Civil Procedure establishes a procedure for the transfer of cases when two or more related actions are pending before different courts. The court where the first case was filed has the discretion to transfer all other pending cases to its

jurisdiction. Additionally, a circuit court handling a child abuse and neglect case may, by order, transfer any other proceeding (except criminal and juvenile delinquency proceedings) pending before another circuit court, family court, or magistrate court, which arises out of the same facts alleged in the abuse and neglect petition or involves the question whether such abuse and neglect occurred, to that circuit court hearing the abuse and neglect case. Upon such transfer, the court also may consolidate the cases. (Rule 4, RCANP). Consolidation is discussed in Section 3.19. Finally, juvenile cases may be transferred (or removed) pursuant to West Virginia Code § 56-9-1. (W. Va. Code § 49-4-704(a)(1)).

When a case is removed or transferred to another county, the clerk must index all pleadings, documents and evidence, and must note the removal order and status of the case on the docket sheet. The original case documents, a statement of the costs incurred, a list of the evidence, any bond, and a certified copy of the removal order should be sent by certified mail to the circuit clerk of the county where the proceeding was removed. (W. Va. Code § 56-9-3). It is best practice to include an acknowledgment of the receipt of the file.

When a clerk receives a case transferred from another county, the clerk should treat the removal order as a case-initiating document and handle the case as a new filing. (W. Va. Code § 56-9-3). The clerk who receives the file should assign a new case number and process the case as any other new filing, except that no filing fee would be collected.

3.18.3 Removal to Federal Court

A party who removes a state court case to federal district court is required to obtain a certified copy of the state court case file, or portions of it, for filing with the federal district court. After a notice of removal has been filed in the state court case and copies of the file have been provided to party removing the case, the circuit clerk closes the pending state court case. After a case has been removed to federal court, it is sometimes returned or remanded back to state court. When this occurs, the clerk files any documents received from the federal court case file in the original state court case file.

3.18.4 Transfer of Post-Conviction Habeas Corpus Cases

A post-conviction habeas corpus petition may be transferred to the county where the petitioner is incarcerated or to the county where the petitioner was convicted and sentenced. (Rule 4(a), RPHCP). If a petition is transferred, the clerk should forward two copies of the case

file and any filing fee that had been collected to the county where the case is transferred.

3.19 CONSOLIDATION OF CASES

Civil cases pending before a circuit court or within a circuit may be consolidated if the cases involve a common question of law or fact. (Rule 42(a), RCP; Rule 4, RCANP). When cases are consolidated, the clerk must cross-reference the index, the docket and case file folders. A clerk must follow the procedures set forth below to consolidate case files.

a. The clerk should write on each case file folder: "Consolidated with" and specify the other case numbers.

b. The clerk must note the case numbers of the cases that were consolidated on the docket sheet and index for each case.

c. The clerk must file the original consolidation order in the case file with the lowest case number and place a copy of the order in the other case file(s), unless the consolidation order indicates otherwise.

d. Documents filed after consolidation should be filed in the case file with the lowest number, unless otherwise ordered by the court.

e. The clerk must note the consolidation of the cases on the docket sheets of all the cases and should reference the case number where subsequent pleadings will be filed.

f. The clerk must make subsequent entries on the docket sheet of the case file where subsequent documents are filed.

g. The clerk should leave each case file in its present numerical sequence on the file shelf.

3.20 CASE MONITORING

Although parties will provide input concerning case management, the circuit court is the entity that controls the pace of litigation. Although the assigned judge has this responsibility, the circuit clerk plays a significant role in assisting a judge with this responsibility. The clerk's responsibility is especially crucial with regard to inactive cases. Therefore, the clerk should establish a system to monitor case status for the different procedural stages noted below.

3.20.1 Dismissal for Lack of Service

Rule 4(k) of the Rules of Civil Procedure allows for the dismissal without prejudice of a civil case or an individual defendant when the summons and complaint are not served within 120 days of filing. To extend the time for service pursuant to this rule, the plaintiff must demonstrate to the court good cause for lack of service.

The circuit clerk should develop a procedure to monitor the status of service in civil cases so that the court can be notified of cases or particular defendants that may be subject to dismissal. It is best practice for the clerk to monitor the status of service through the use of software. The clerk may also develop an alternate method to monitor service. One manual method to monitor service involves the use of postcards that are used to notify the plaintiff of the completion of service. The clerk should complete the postcards at the time a case is filed and place them in order of the case numbers in a card-file box. As service is completed in particular cases, the clerk should mail any cards to the plaintiff. If the plaintiff is handling service through a private process server, index cards can be used instead of postcards. When the returns of service are provided to the clerk, the matching index cards can be removed from the card-file box. The clerk should periodically review the remaining postcards and index cards, and provide a list of those cases that exceed the 120-day limit for service to the presiding judge. (Rule 16.13(a), TCR). This procedure should be performed on a monthly basis.

3.20.2 Rule 41(b) Dismissals

Rule 41(b) of the Rules of Civil Procedure allows for the dismissal of civil cases if there has been no activity for a period of one year, or where the plaintiff is delinquent in the payment of accrued court costs. It is the responsibility of the circuit clerk to monitor cases for dismissal pursuant to this rule. It is best practice for the clerk to present a list of cases that may be dismissed under this rule to the judge during each term of court. (Rule 16.13(a), TCR). Although a case may be dismissed for lack of activity, notice of the pending dismissal must be given to all parties before dismissal. (Rule 41(b), RCP). Local practice will determine whether the clerk is responsible for providing notice, by publication or otherwise, of the pending dismissal.

3.20.3 Dismissal of Felony Charges Bound Over to Circuit Court

A felony charge that has been bound over may be dismissed without prejudice if an indictment or information is not filed or it is not presented to the grand jury for more than one year after the case is

bound over from magistrate court. (Rule 48, R. Cr. P.). The clerk must establish a system to monitor cases subject to dismissal under this rule. The clerk should list the cases on a form order that directs the clerk to return any bail and should present the order to the court. The clerk should present this order to the judge for his or her signature. Although no notice to the prosecutor is required, the proposed order may be provided to the prosecutor before any cases are dismissed. (See also Section 11.1).

3.20.4 Family Court Appeals

West Virginia Code § 51-2A-14(e) imposes a duty on circuit judges to rule on family court appeals within 60 days after the final appellate pleading may be filed. (See also Rule 33(a), RFCP). If a circuit judge does not do so or does not enter an order stating just cause for the delay in the entry of the order, the circuit clerk must provide the parties with written notice that unless the parties both file an objection within 14 days, the appeal will be transferred to the West Virginia Supreme Court. The clerk, therefore, must monitor family court appeals and should alert the presiding circuit judge two or three weeks before the 60-day period expires. If the judge does not issue a ruling as required, the clerk must provide a notice to the parties.

3.21 COMPUTATION OF TIME

The guidelines set forth below govern the computation of time in all court cases. (W. Va. Code § 2-2-1; Rule 6(a), RCP; Rule 45(a), R. Cr. P.). Although clerks must have a working knowledge of the computation of time, a clerk should not advise litigants about the date by which documents must be filed or certain tasks must be performed. Advising a litigant in this matter would be providing legal advice.

a. The day of the event or act (or default from) from which the period of time begins to run is not included.

b. The last day of the period is included unless it is a Saturday, Sunday or a legal holiday, in which case the period runs until the end of the next day that is not a Saturday, Sunday or legal holiday.

c. If the period of time allowed is less than 11 days, intermediate Saturdays, Sundays and legal holidays are not included. If the period of time is more than 11 days, intermediate Saturdays, Sundays and legal holidays are included.

d. The beginning or ending of a term of court has no effect on the computation of time periods.

e. Legal holidays include New Year's Day, Martin Luther King Day, Lincoln's Birthday, Washington's Birthday, Memorial Day, West Virginia Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, Christmas Day, any national or state election day and any county election day in the particular county holding a county-wide election, and any other day or part of a day declared as a legal holiday by the governor or the legislature of West Virginia. No legal holiday is created if the Governor simply recommends that state employees be given all or part of a day off without taking annual leave. (*Capitol City Lodge No. 74 v. City of Charleston*, 375 S.E.2d 791 (W. Va. 1988)).

f. If a legal holiday falls on a Sunday, the observance will be moved to the following Monday.

g. If service of a notice or other paper is by mail, the prescribed period within which a party has a right or is required to do some act or take some proceedings is extended by three days. (Rule 6(e), RCP).

Chapter 4

ACCESS TO COURT RECORDS

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West Virginia Code § 51-4-2 provides that the public has the right to inspect and obtain copies of records and papers maintained by every court unless access is expressly limited. Additionally, the Freedom of Information Act (FOIA) grants the public the right to inspect and copy government agency records unless the records are exempted from disclosure. (W. Va. Code §§ 29B-1-1, *et seq*.). These two statutes impose a duty on circuit clerks to allow access to court files by the public unless a court order, statute or rule provides that specified files, or parts of files, are not subject to disclosure.

When case files are subject to public access, the clerk has a duty to provide copies of documents upon request. (W. Va. Code §§ 29B-1-3(1); 51-4-2). Although the clerk has a duty to provide copies, the clerk may collect allowable fees for copies as established by statute. (W. Va. Code § 59-1-11(b)(1); See Cost Schedules). However, as with other fees and costs, charges for copies are waived for persons with approved fee waivers and for persons entitled to court-appointed counsel.

The FOIA provisions regarding public access, specifically West Virginia Code § 29B-1-3(3), require circuit clerks, as custodians of public records, to establish "reasonable opportunities for inspection and examination of records" during business hours. The inspection of records includes documents that exist in "magnetic, electronic or computer form." (W. Va. Code § 29B-1-3(3)).

Although circuit clerks have the general duty to allow the public to inspect court files, circuit clerks may establish "reasonable rules and regulations necessary for the protection of records . . .." (W. Va. Code § 29B-1-3(3)). Therefore, circuit clerks should maintain reasonable control over the method in which materials may be reviewed. With specific regard to court personnel such as judicial staff, the circuit clerk should use the sign-out procedure before any file is removed from the clerk's office. For persons other than court staff, the clerk must provide a suitable area where the public and attorneys may review case files or other records.

Because circuit clerks may make reasonable rules and regulations with regard to access to public records, circuit clerks may respond to unreasonable requests for copies by limiting the request, extending the time period in which copies are provided, or making other arrangements to access records. The FOIA access provisions would not require circuit clerks to extract and summarize information from various public records in order to accommodate the specific terms of a request. The clerk's only obligation would be to make the records available so the person making the request could review and extract the information sought. (See Section 4.5). Additionally, circuit clerks are not required to read file contents over the telephone. However, circuit clerks should accommodate callers who request information (on open files) such as time and date of a scheduled proceeding,

the charges in a criminal case or the type of complaint in a civil case. (Supreme Court Administrative Conference Minutes, 9/25/89).

4.1 ACCESS BY THE GENERAL PUBLIC

As a general rule, the public should not have direct access to case files. The request to inspect case files or public records should be specific and may be made orally or in writing to a member of the clerk's staff who will locate and retrieve the file or record. Records should be reviewed in a designated area of the clerk's office where the file inspection may be supervised.

Requests to do general research should be reviewed by the clerk to determine the type of controls, limits and monitoring which will be imposed. However, a clerk should not refuse access to records because the request to review files is general. Rather, "[u]nless a statute provides for confidentiality, court records *shall* be open to public inspection." (Syl. Pt. 2, in relevant part, *Richardson v. Town of Kimball*, 340 S.E.2d 582 (W. Va. 1986) (emphasis in original)). Therefore, a clerk has the duty to allow inspection, including a general inspection of court files, unless the files are confidential as established by statute, rule or court order.

Although the clerk has a duty to allow a general inspection, a clerk may place reasonable limits on the methods by which records are inspected. For example, suppose a person requested dispositions of misdemeanor convictions that were appealed to circuit court for the last ten years. Since some of the files would be fairly old, assume that some of the files are in a remote storage facility, and it would require time to obtain the files. In this case, reasonable limits may include requiring the person who requested access to actually copy the documents (instead of a deputy clerk); or requiring the inspection only during a set portion (e.g. 8:30 a.m. to noon) of normal business hours if staff assistance is needed for the inspection and such assistance will impede completion of the office's daily workload. Another reasonable limit could be restricting the number of case files that a person inspects at one time.

4.2 ACCESS BY ATTORNEYS

As a general rule, attorneys should not have direct access to court files. Similar to members of the general public, attorneys should make their requests to review files to a member of the clerk's staff. Attorneys should review files in the clerk's office.

4.3 REMOVAL OF FILES FROM CIRCUIT CLERK OFFICE

No case files or any filed documents should be removed from the clerk's office except by judges or other court personnel, or in compliance with a written order of the court. Such a court order should identify the case file or document to be removed, the person authorized to take possession and the time period for the removal.

A clerk must not allow case files or any filed document to be taken out of the county unless an order of the court permits transfer of files or documents within the counties of a circuit or to another circuit when a visiting or special judge is presiding. (W. Va. Code § 51-4-4). Although West Virginia Code § 51-4-4 limits the removal of court files from a county, this code section expressly states that it does not operate to prevent a judge from taking court files or documents to another county when necessary to perform his or her official duties. When a judge takes a file to another county, the clerk, as required by West Virginia Code § 51-4-4, should maintain a record of the location of the file. Each office's standard sign-out procedure should be an adequate method for tracking files that a judge takes to another county.

4.4 REMOVAL OF DOCUMENTS FROM A CASE FILE

If a document or exhibit has been filed in a case, it shall not be removed from a file unless a court orders the removal. (Rule 10.02, TCR). Occasionally, a litigant will file exhibits, such as a marriage certificate or photographs, and will ask the clerk to return them. The clerk should not return filed documents or exhibits unless authorized to do so by a court order.

4.5 FREEDOM OF INFORMATION ACT

Circuit clerks and the records they maintain are subject to the West Virginia Freedom of Information Act, West Virginia Code §§ 29B-1-1, *et seq.* Under FOIA, the public has the broad right to inspect and copy records, subject to reasonable limitations, unless the file is exempt from disclosure. Rule 10.04 of the Trial Court Rules reiterates the general provisions of FOIA concerning access to court records. Similar to FOIA, Trial Court Rule 10.04 provides that court records are open to public inspection unless a specific statute or court order limits access to a file.

According to FOIA, a circuit clerk has the duty to allow persons to inspect and copy records during normal business hours. (W. Va. Code § 29B-1-3(c)). This same subsection requires a clerk to have "reasonable facilities" in which a person may inspect or may request copies of records. A clerk, however, may charge for copies of the documents. If records are in electronic or magnetic form, the clerk should provide records in this same form, if requested.

Typically, a FOIA request will be in writing. However, West Virginia Code §§ 29B-1-1, *et seq.* does not require FOIA requests to be written. Further, there are no state regulations that require FOIA requests to be written when they are directed to circuit clerks. For this reason, a clerk should not deny a FOIA request simply because it is not written. If a person makes an oral FOIA request, it is best practice for the clerk to write out the FOIA request and request that the person sign the document. This practice will create a record of the request, and the circuit clerk's response to it.

Although a request may be oral, a FOIA request must be reasonably specific so that the clerk may respond to it. (W. Va. Code § 29B-1-3(d)). A clerk may ask a person to clarify a FOIA request, if it is vague.

The clerk is required to respond to a FOIA request within a **maximum** of five days, not including weekends and legal holidays. (W. Va. Code § 29B-1-3(d)). Similarly, Trial Court Rule 10.04 imposes a duty on circuit clerks to promptly respond to FOIA requests.

Under FOIA, a clerk has three different options to respond to a FOIA request. First, a clerk may provide copies of the requested information, subject to allowable charges. (W. Va. Code § 29B-1-3(d)(1)). Secondly, a clerk may inform the person of a date and time at which the records may be inspected or copied. (W. Va. Code § 29B-1-3(d)(2)). Third, a clerk may deny the request, but must do so in writing and must provide the reasons for the denial. (W. Va. Code § 29B-1-3(d)(3)). A written denial must inform the person that the custodian has no further duties to provide records. The denial must also inform the person seeking the records that he or she may seek injunctive or declaratory relief from the circuit court in which the records are located.

As noted previously, a circuit clerk is a custodian of a public record. If a clerk, including a deputy clerk, is found by a court to have *willfully* violated the provisions of the West Virginia Freedom of Information Act, West Virginia Code §§ 29B-1-1, *et seq.*, he or she is guilty of a misdemeanor. (W. Va. Code § 29B-1-6). Upon conviction, a clerk can be fined in the minimum amount of $200 to a maximum amount of $1,000. A clerk may also be incarcerated for a maximum amount of 20 days.

Although FOIA requires a clerk to allow a person to inspect and copy records that already exist, it "does not require the creation of a public record." (*Affiliated Construction Trades Foundation v. Regional Jail and Correctional Facility Authority*, 490 S.E.2d 708 (W. Va. 1997)). Therefore, if a person requests information from a clerk and the information is not maintained in a particular document or set of documents by a clerk, the clerk has no duty to create a record that would be responsive to the request. However, the clerk

should allow a person to inspect available records if the records would allow a person to gather information that would be responsive to the request.

For example, suppose a person requests a list of the disposition of misdemeanor convictions that were appealed to circuit court for the last ten years. Since the clerk does not maintain a record that lists misdemeanor appeals and the corresponding circuit court disposition, the clerk has no duty to compile this information. However, the clerk should allow a person to review all misdemeanor appeal files, subject to reasonable limitations.

4.5.1 Exemptions to the Freedom of Information Act

The West Virginia Freedom of Information Act provides that records maintained by a public body are presumptively open to the public. (W. Va. Code § 29B-1-4(a)). However, a circuit clerk has no duty to grant access to public records if a statute exempts the records from disclosure. (W. Va. Code § 29B-1-4(a)(5); Rule 10.04, TCR). Under this exception to FOIA, case files that are statutorily exempt from public access, such as adoption, juvenile, or family court files, cannot be inspected or copied by the public. (For a detailed list of confidential cases and records, see Section 4.8).

A second type of general record exempt from disclosure is information of a personal nature that would result in an unreasonable invasion of privacy if disclosed. (W. Va. Code § 29B-1-4(a)(2)). It is fairly typical for court files to contain this type of information. However, the circuit clerk **should not try** to make a judgment call with regard to personal information in an open court file because documents in a court file are presumptively subject to public inspection. (W. Va. Code § 51-4-2). Rather, it is the duty of the parties to request, and the duty of the presiding judge to decide, to close or seal specific information in a file. (Rule 10.03, TCR). If a judge limits access to a court file or specific parts of it, then the circuit clerk may not allow anyone to review the documents. If documents have **not** been sealed by court order, the clerk must allow public inspection of any filed document, provided that the file is not exempt from disclosure by statute or rule. (Section 4.6).

FOIA further exempts from disclosure two other types of records that will sometimes end up in a case file: a) trade secrets; and b) certain law-enforcement records. (W. Va. Code § 29B-1-4(a)(1) and (4)). As with personal information, the clerk is not required to determine whether documents in open case files should be exempt from disclosure because they constitute trade secrets or law enforcement records. Rather, the clerk has the duty to allow inspection of files and documents unless the file or parts of it have been sealed by court order.

The following statutory exemptions to FOIA would rarely be applicable to records maintained by circuit clerks. However, the following list summarizes the remaining FOIA exemptions for informational purposes. First, test questions and related information for licensing, employment or academic examinations are exempt from disclosure. Secondly, records that describe historical, prehistoric, archeological, paleontological and battlefield sites are exempt from disclosure. Third, certain financial reports maintained by regulatory agencies are exempt from disclosure. Fourth, a public body's internal memoranda or letters received or prepared by it are exempt from disclosure. Fifth, information that relates to a terrorist investigation or that could be used to perpetrate a terrorist act are exempt from disclosure. Sixth, customer proprietary network information of other telecommunication carriers, equipment manufacturers and individual customers are exempt from disclosure. See 47 U.S.C. § 222. Seventh, records maintained by the Division of Corrections and the Regional Jail and Correctional Facility Authority relating to their facilities or policy directives relating to the safe management of inmates are not subject to disclosure. Finally, information related to an individual concealed weapon permit application is exempt from disclosure, but aggregate non-identifying information may be disclosed. (See W. Va. Code § 29B-1-4(a)).

4.5.2 FOIA Requests and Petitions for Writs of Habeas Corpus

Prisoners may not use FOIA to obtain records for the purposes of prosecuting a petition for a writ of habeas corpus. (*State ex rel. Wyant v. Brotherton*, 589 S.E.2d 812 (W. Va. 2003)). Rather, a prisoner must use the procedures set forth in the Rules Governing Post-Conviction Habeas Corpus Proceedings in West Virginia. If a prisoner makes such a FOIA request, the circuit clerk should forward the request to the circuit court for further disposition, and send a response to the requesting prisoner indicating such forwarding of the request.

4.5.3 Report of FOIA Requests to Secretary of State

Beginning January 1, 2016, every public body, including a circuit clerk, that receives a Freedom of Information Act request will have to report specified information to the Secretary of State for inclusion in a database. For each request received, the public body must report the following information: a) the nature of the request; b) the time-frame necessary to comply with the request; and c) the amount charged for providing the information. It is anticipated that the Secretary of State will also include the name of the person making the request in the database. The public body does **not**, however, provide the records

themselves to the Secretary of State. In turn, the Secretary of State will maintain a publicly available database of this information. (W. Va. Code § 29B-1-3a). The Secretary of State has the duty to develop rules, procedures, and forms for the submission of this information to the office, and it is anticipated that the database will be in operation before January 1, 2016.

4.6 PROCEDURES FOR LIMITATION OF ACCESS TO SPECIFIC COURT FILES

4.6.1 Circuit Court

A circuit court has the discretion to seal or limit access to specific court files or portions of a file. (Rule 10.03, TCR; Rule 26(f), RCP). Typically, it is a party who requests that a court seal specific documents in a file or seal the entire file. A court, however, may order the sealing of a file *sua sponte*.

To request this relief, a party must file a motion. To obtain this relief *ex parte*, a party must file a motion and supporting affidavit. In its discretion, the court may limit access to the file and should specify the type of limitation, the time period for the limitation, and the reason for the limitation in an order. Typically, an order will direct the clerk to seal specific records. However, a court has the discretion to order an alternate method for limiting access under Trial Court Rule 10.03. The clerk must follow the specific directives in an order with regard to limiting access to a file or portions of it. **As required by Trial Court Rule 11.02, any directives to the clerk, including directives concerning sealing or other limitations on access to a file, or portions of it, must be clearly and distinctly listed in the last substantive paragraph of the order.**

4.6.2 Family Court

A family court file, including pleadings, recordings, evidence or documents, is not subject to public access and may only be inspected by attorneys of record, parties, their designees as established in writing, and a person who has standing to modify or enforce an order. (W. Va. Code § 48-1-303(b); Rule 6(a), RFCP). In addition, a court, by order, may allow other persons to access a family court case file if he or she shows good cause. (Rule 6(b), RFCP). To obtain this relief, a person must file a written motion.

When sensitive information is disclosed during a family court case, a family court has the discretion to seal portions of a family court file, including any pleading, recording, evidence or document that contains this type of information. (W. Va. Code § 48-1-303(c); Rule 6(a),

RFCP). If the court seals a file, or portions of it, no one, not even involved attorneys and litigants themselves, may inspect the closed or sealed material without a court order. The court may close portions of the file either *sua sponte* or at the request of a party. **Any directives to the clerk concerning sealing or other limitations on access to a file, or portions of it, should be clearly and distinctly listed in the last substantive paragraph of the order.**

4.6.3 Maintenance of Sealed Records

To seal a case file or documents, the clerk should place the records in an envelope that is then physically sealed so that any unauthorized inspection would be visibly apparent. The clerk should note the case number on the envelope and place the envelope in the original file folder. If an order must be sealed or otherwise limited to public access, it should be placed in an envelope and then stored in the case file. The clerk should note the applicable page references to the order book.

When any document, including an order, has been sealed, the clerk should note the presence of the sealed documents on the docket sheet. The reference should be general enough so that the contents of the sealed documents are not inadvertently disclosed.

It is best practice for the clerk to maintain a list of persons who inspect sealed documents in a specific file. One way to maintain this record is to note on the envelope the following information: the name of the person allowed to inspect the records, the date of the inspection and the specific court order that authorized the inspection.

4.7 ACCESS TO CONFIDENTIAL FILES BY FEDERAL AND STATE OFFICIALS

4.7.1 Federal Officials

Upon the presentation of a federal subpoena, a federal official, such as a prosecutor or agency investigator, is entitled access to closed files, sealed documents or files, or expunged records.[1] When a federal official presents a subpoena, the clerk should allow the federal official to have access to the file at the time and place described in the subpoena. If a federal official is entitled to inspect a file, he or she may also obtain copies of the documents. The reason that access

[1] For the purposes of this discussion, the term "federal official" should be considered to include counsel representing any defendant in a federal criminal case. Federal civil matters are discussed in the next section.

should be allowed, despite West Virginia law that precludes access, is that federal judicial power is supreme to or overrides state law that limits access to a particular type of file or to specific records in a file. The Supremacy Clause of the United States Constitution is the legal authority for this conclusion. *See E.E.O.C. v. Illinois Dep't. of Employment Security*, 995 F.2d 106 (7th Cir. 1993); *In re Grand Jury Subpoena*, 198 F. Supp. 2d 1113 (D. Alaska 2002). Several federal district courts have held that a state official who allows access to confidential files pursuant to a federal grand jury subpoena could not be prosecuted under a state statute that criminalizes the disclosure of certain types of documents or records. *See, e.g. In re Grand Jury Subpoena for New York State - Sales Tax Records*, 382 F. Supp. 1205 (W.D.N.Y. 1974); *In re Grand Jury Matter*, 762 F. Supp. 333 (S.D.Fla. 1991); *In re Grand Jury Subpoena*, 198 F. Supp. 2d 1113 (D. Alaska 2002).

The only circumstances that could otherwise preclude access to a state court confidential file is when the federal subpoena is successfully challenged by motion in federal court. If there is a **federal** common law or statutory privilege similar to the state confidentiality provision, the federal court could quash or modify the subpoena. *Branzburg v. Hayes*, 408 U.S. 665, 92 S. Ct. 2646 (1972); *In re Grand Jury Proceedings*, 563 F.2d 577 (3rd Cir. 1977).

Similarly, a federal official may present a federal court order that allows access to a file that is otherwise deemed confidential or closed pursuant to state law. Upon presentation of a federal court order, the federal official would be authorized to review the file for the same reasons that a federal subpoena would entitle an official to review the file.

When a federal official presents a subpoena or order to obtain access to a confidential file, the clerk should file the original subpoena or court order in the case file and should note the type of access that was allowed. Maintaining the subpoena or order in a case file creates a record of the access and should protect a circuit clerk against any civil or criminal liability for the disclosure of confidential records.

If a federal official requests access to a confidential file but does not provide a subpoena or court order, the clerk should **not** allow the access to the file. The clerk may, however, indicate that access to the file would be allowed upon the presentation of an appropriate subpoena or a court order.

4.7.2 Federal Civil Subpoenas

A subpoena issued in a **federal civil case** could also be presented to a circuit clerk as a means to access a file established as confidential or closed by state law. An attorney or a party, including a *pro se* party, as well as a federal official, could present a subpoena as a means to access information or records in a confidential file. Like the cases cited above that address subpoenas issued by a federal agency or in relation to a federal criminal case, case law establishes that a subpoena issued in a federal civil case would generally override state law confidentiality provisions based upon the federal supremacy clause.

As discussed in the preceding section, the only situation where access could be precluded is when a motion is brought in federal court, and the court issues an order quashing or limiting the subpoena based upon a privilege or confidentiality protection under **federal** common law or statute. *Pearson v. Miller*, 211 F.3d 57 (3rd Cir. 2000); *Lawrence v. Van Aken*, 2004 WL 228989 (W.D.Mich. 2004). Upon a request or motion by a person with a privacy interest in the subject records, a federal court may limit disclosures, may provide for confidentiality of records by entering a protective order, or may utilize other procedural steps such as an *in camera* review before ordering the release of records. For these reasons, a clerk, when presented with a subpoena in a federal civil case, should provide notice to any interested parties, *i.e*. the parties to a confidential case. The notice should advise the interested parties that the subpoena has been served, and that notice is being provided to them so that they can take any legal action that they wish with regard to the subpoena. The notice should inform the interested parties of the date and time listed in the subpoena for compliance with it, and should inform the interested parties that the records will be released unless legal action is pursued and the clerk is provided any resulting order quashing or limiting the subpoena.

It is best practice for the clerk to maintain a copy of the subpoena and notice provided to the parties in the case file. If the clerk ultimately allows access pursuant to a subpoena, the clerk should note on the subpoena the type of access that was allowed.

4.7.3 Access to Juvenile Files by Federal Subpoena

West Virginia Code § 49-5-103(d)(7) provides for the disclosure of juvenile records when a federal subpoena is presented. Under this code section, a federal official, such as prosecutor or agency investigator, may obtain access to and copies of juvenile case files.

As stated earlier, the Supremacy Clause of the federal constitution would require disclosure pursuant to a federal subpoena, even in the absence of this state statute. (See Section 4.7.1).

Given the broad language in this code section, a subpoena issued in a federal **civil** case would also appear to statutorily grant access to juvenile case files. However, it is best practice for a clerk, when presented with a subpoena in a **federal civil** case, to provide notice to interested parties. Typically, the interested parties would be the juvenile respondent and any parent or other custodian named in the juvenile case. The notice should inform the interested parties that the subpoena has been served, list the date and time for compliance (i.e. access to file under subpoena), and should inform them that they may take any legal action they wish with regard to the subpoena. The notice should also inform the interested parties that the records will be released unless legal action is pursued and the clerk is provided any resulting order quashing or limiting the subpoena.

Both the subpoena and notice to interested parties should be maintained in the case file. If the clerk provides access to a file, it is best practice for the clerk to note on the subpoena the type of access that was allowed.

4.7.4 State Officials

A **state official,** whether from West Virginia or another state, may only access a confidential or closed file in the manner governed by the West Virginia law. (See Section 4.8). The presentation of a subpoena by a state official does not grant a state official the right to inspect or copy a closed file except in specific circumstances addressed by a statute or rule.

Civil domestic violence cases are one type of statutorily closed case file that may be accessed by subpoena, and then -- only in limited circumstances. (W. Va. Code § 48-27-312). To access a domestic violence case file, the subpoena must be issued in a **state** or **federal criminal** case or in another West Virginia civil domestic violence proceeding. A subpoena issued in any other type of case should not be honored. (See Section 4.8.3).

Additionally, West Virginia Code § 49-5-101(c) provides for the disclosure of records of child abuse and neglect to specified government officials or agencies. West Virginia Code § 49-5-101(c) allows the listed government officials or agencies to "request" access, but does not specify the type of request that is required. A state official identified by West Virginia Code § 49-5-101(c) who presents

either a subpoena or some type of written request should be allowed access to child abuse and neglect records, most likely a child abuse and neglect case file, maintained by a circuit clerk. (See Section 4.8.5). As in other circumstances of granting access to a closed file, a record of the subpoena or written request, and the type of access permitted, should be maintained in the file.

Further, Rule 2.2 of the Rules of Judicial Disciplinary Procedure (RJDP) allows for the issuance of a subpoena by the Chairperson of the Judicial Investigation Commission (JIC) or by the Supreme Court Clerk. Rule 2.2 does not address whether this type of subpoena allows access to confidential files as established by state law. However, it is likely that this type of subpoena, if challenged, would be enforced by a court order because of the importance of maintaining the integrity of the judiciary. (*In the Matter of Gorby*, 339 S.E.2d 702 (W. Va. 1985)). Additionally, it is likely that this type of subpoena would be enforced because investigative files maintained by the JIC are also confidential. (Rule 2.4, RJDP; see also *In re Application of the United States for an Order Authorizing the Judiciary Commission of Louisiana to Release Certain Records to Grand Jury*, 936 F. Supp. 357 (E.D. La. 1996)). For these reasons, the clerk should normally allow access to confidential files when this type of subpoena is presented.

If the clerk has questions or concerns about compliance with this type of subpoena, the clerk should consult the chief judge or the judge who presided over the specific case file. The clerk could also request that the judge authorize, in advance of granting access, that notice be provided to any interested parties, i.e. the parties to the case. The clerk could further request that the judge enter an order governing the release of the records.

4.8 CONFIDENTIAL AND SEALED COURT RECORDS

*Note: A chart at the end of Chapter 4 summarizes each type of case file or record that is not subject to public access. This first chart does **not** address juvenile case files. Two other charts, also appearing at the end of Chapter 4, summarize access to juvenile case files. These charts are summaries only, and more detailed information should be obtained by reference to the sections below and the specific statutes and rules cited therein.*

4.8.1 Overview

As noted previously, certain court files and records are not open to public inspection and are generally referred to as confidential files. In some cases, confidential cases are physically sealed in an envelope

to prevent unauthorized inspection. Specific statutory provisions, such as statutes governing adoption proceedings or adult guardianship cases, govern whether records are confidential, whether the records are physically sealed, and whether there are any other limitations regarding access to a file.

As a general rule, a person who is entitled to review confidential files is also entitled to obtain copies of any filed documents. However, if a court order is the authority for allowing access, the clerk should follow the directives of the order with regard to copies.

In general, confidential case files should be stored in a locked file cabinet or in an area where access is restricted. The clerk should control the office staff and court personnel authorized to access confidential files. As with sealed files, the clerk should maintain a record in each case file of people who inspect a confidential file. It is not necessary, however, for a clerk to include court personnel who perform necessary clerical duties, such as placing pleadings and orders in a confidential file.

The following sections discuss specific types of confidential files, the kind of access allowed, and specific statutes and rules governing access. However, access in juvenile status offense and delinquency case files is discussed in a separate section because access to juvenile files is complex. (See Section 4.9).

4.8.2 Family Court Files

In family court cases, all orders and indexes are public records. (W. Va. Code § 48-1-303(b); Rule 6(a), RFCP). Since orders are public records, a person who is not a party to the case may review the orders or obtain copies of the orders, provided that he or she pays for the copies. It is not necessary to obtain a release from a party in order to inspect or obtain copies of orders.

In contrast, case files, including pleadings, recordings, exhibits or other documents, are **not** public records. A person may only inspect or copy a family court case file if the person is: a party; a person designated by a party in writing to access the file, counsel of record, including a guardian ad litem; or anyone with standing to modify or enforce an order (e.g., BCSE). Any written authorization or designation by a party to allow access to a case file should indicate that the person is allowed to review the court records, should specify whether copies may be made and whether there are any other limitations with regard to the review of the file. The clerk should be certain that the signed authorization is valid. Ordinarily, a notarized

signature would be sufficient. There is a court-approved form for this authorization -- SCA-FC-315 Appointment of Designee for Access to Court File.

Additionally, a court may allow another person access to a family court case file if the court finds that the interests of justice require such an inspection. (Rule 6(c), RFCP). The court order that allows such access should specify which documents may be examined or copied and any other limitations on the inspection.

In some cases, specific records in a family court case file are sealed. If so, no one may review the sealed documents without a court order.

Unless the persons who are the subject of confidential records waive confidentiality in writing, confidential *domestic relations* case records may not be obtained by state court subpoena; but only by court order in compliance with statutory and case law requirements. (Rule 6(d), RFCP). These records may, however, be obtained by federal court subpoena. (See Sections 4.7.1 and 4.7.2). (Subpoenas for *domestic violence* records are discussed in Section 4.8.3).

West Virginia Code § 48-1-303(e) requires a circuit clerk to maintain a written log of all people who examine family court files, except a circuit or family court judge or court personnel who are performing their official duties. The log must contain signatures of persons who inspect these records and the time and date of any inspection.

4.8.2.1 Identifying Information

Normally, a family court file lists a party's name and contact information. However, a party may file an affidavit indicating that disclosure of this information would be potentially harmful to the party or to a minor child. (Rule 10(b), RFCP). After this type of affidavit is filed, a court shall prevent the disclosure of this information to anyone except court personnel. Alternatively, the court could direct the clerk to seal the contact information, including the civil case information sheet, within a file.

When contact information may not be disclosed, an opposing party may not be able to serve pleadings. Rule 10(b) does not expressly require a clerk to serve documents to prevent disclosure of contact information. In this situation, however, the clerk should follow the procedure established by Rule 11(f), RDVCP. If an opposing party files a pleading and cannot serve it because identifying information may not be disclosed, the

clerk should serve the pleading or document, subject to allowable charges. A person who requests indirect service should submit two copies of the documents and should complete a form that describes the pleading, lists the type of service requested, and indicates that applicable service fees have been paid or waived.

4.8.3 Domestic Violence Protective Order Proceedings

As a general premise, domestic violence protective order case files are subject to the same confidentiality rules as family court files. (Rule 6, RDVCP). The orders and indexes are a matter of public record, but the case files, including pleadings, recordings, exhibits or other documents, are not subject to public inspection. The following persons are allowed access to domestic violence case files: a party; a party's designee as established in writing by the party; counsel of record, including a guardian ad litem; and anyone with standing to modify or enforce an order (e.g., family member who filed on behalf of minor or incapacitated victim).

Domestic violence protective order case files are subject to a subpoena in both federal and state **criminal** cases. (W. Va. Code § 48-27-312; Rule 6(b), RDVCP). Therefore, a circuit clerk should allow access or provide copies of documents from a protective order case file upon the presentation of a subpoena issued in any **criminal** case. Additionally, protective order case files are subject to a subpoena in another West Virginia domestic violence protective order case. (W. Va. Code § 48-27-312). This statutory provision allows a party in a West Virginia domestic violence case to subpoena records from a second protective order case file. When a subpoena is submitted to the clerk to obtain access to a protective order case file, the clerk should maintain the subpoena in the case file.

If a subpoena is issued in a state civil case other than a West Virginia protective order case, the clerk should refuse the requested access because West Virginia Code § 48-27-312 does not allow access by subpoena in state civil cases other than another West Virginia protective order proceeding. Rather, a person in another state civil case who seeks access to a domestic violence case file must obtain a court order to allow inspection or copying. (W. Va. Code § 48-27-312(a)). If a federal subpoena is issued in a federal **civil** case, the clerk should follow the procedure set forth in Section 4.7.2.

4.8.3.1 Identifying Information

The CCIS for a domestic violence case has a checkbox to permit a petitioner to request that the court withhold his or her contact information. When a petitioner requests the withholding of this information, the magistrate court clerk is required to seal the civil case information sheet and any other document with this information. (Rule 8(e), RDVCP). As a matter of practice, however, the circuit clerk needs information from the CCIS to process the domestic violence case file. It is fairly typical for the magistrate court clerk to forward the file to the circuit clerk without sealing the CCIS. Once the circuit clerk processes the case file, he or she then seals the CCIS. This procedure is acceptable so long as court personnel ensure that contact information is not disclosed to anyone other than court personnel.

If a respondent files a pleading and cannot serve it because identifying information has been sealed, the clerk must serve the pleading, subject to allowable charges. (Rule11(f), RDVCP). A person who requests indirect service should submit two copies of the documents and should complete a form that describes the pleading, lists the type of service requested, and indicates that applicable service fees have been paid or waived.

4.8.4 Access to Minor Guardianship Files

Effective June 14, 2006, case indexes and court orders in minor guardianship cases are not confidential, but all other records are confidential. This confidentiality provision applies uniformly to minor guardianship cases in both circuit and family courts. Because the statute expressly identified "all other records" as confidential, the pleadings, exhibits, transcripts, or any other filed documents are not subject to public access. (W. Va. Code § 44-10-3(l)). Since orders and indexes are public records but the case files are not, the confidentiality of all (circuit and family court) minor guardianship cases should be maintained in the same manner as family court domestic relations cases.

West Virginia Code § 44-10-3(l) allows access to minor guardianship records by a party, counsel of record or the presiding judicial officer only. In addition, another family court or circuit court that is presiding over another case involving the minor may review the minor guardianship file. Rule 7(b) of the Minor Guardianship Rules is similar to subsection (l), but does not refer to other family or circuit judges

who are presiding over another case involving the minor as persons who are allowed to access a minor guardianship file. This statutory provision supplements, as opposed to conflicts with the provisions of Rule 7(b). Therefore, family court or circuit court judges who are presiding over a different case involving a minor may properly review a minor guardianship case file. Anyone else must obtain a court order before he or she can review or copy a minor guardianship file.

The June 14, 2006 amendment to West Virginia Code § 44-10-3 that established the confidentiality of records (except orders and indexes) in minor guardianship cases was silent as to whether the confidentiality provision has any retroactive application. It is a general rule of construction that: "A statute is presumed to be prospective in its operation unless expressly made retrospective." (W. Va. Code § 2-2-10(bb)). But even with that rule of construction taken into consideration, it is reasonable to conclude that the confidentiality provision of West Virginia Code § 44-10-3 can be applied to all minor guardianship files, including cases initiated and closed before June 14, 2006. First of all, this statutory amendment did not change the confidentiality requirements for minor guardianship cases in family court. By rule, everything in the family court minor guardianship case files, except orders, was confidential even before this statutory amendment. (Rule 6, RFCP). Secondly, existing (pre-June 14, 2006) circuit court minor guardianship case files can simply now be treated as closed files, much the same way most clerk's offices treat old domestic relations case files that pre-dated the confidentiality rules applying to those types of cases. Applying the new confidentiality provision to prior circuit court minor guardianship case files is simply a current (nonretroactive) application of the law to files as they now exist in the circuit clerk offices. There should not be many circuit court minor guardianship cases that pre-date the 2006 confidentiality provision, since the change-over from county commission to court jurisdiction for these cases only occurred on June 6, 2004.

4.8.5 Child Abuse and Neglect Case Files

Child abuse and neglect case files, orders, and indexes are all closed to public inspection. (W. Va. Code § 49-5-101). However, with the exception regarding "recorded interviews" discussed in the next paragraph, the following persons may inspect and copy documents in the case file:

a. A child;

b. A parent whose rights have not been terminated;

c. Counsel of record, including a guardian ad litem;

d. Anyone authorized by written consent of a child;

e. Anyone authorized by written consent of a person who may act on a child's behalf; and

f. Anyone granted access by a court order, such as a representative of CASA. (W. Va. Code § 49-5-101(b)).

West Virginia Code § 49-5-101 generally applies to all types of child abuse and neglect records and is, therefore, applicable to all agencies with these records, including circuit clerks. The limited access and disclosure provisions of this statute do not apply to any "recorded interview" of a child as defined in West Virginia Code § 62-6B-2(6). (See W. Va. Code § 49-5-101(i)). Any access to these confidential recorded interviews of children, and any written documentation related to such recorded interviews, is exclusively controlled by the provisions of West Virginia Code § 62-6B-6. Under the specific language of that statute, if any recorded child interview (and written documentation related to the interview) is filed with the court, the clerk should only permit access or release copies of such recording pursuant to the terms of an order of the presiding judge.

West Virginia Code § 49-5-101(c) specifically addresses disclosure to governmental officials or agencies. It is not typical that these government officials or agencies would seek information from a circuit court case file. However, the following officials or agencies are lawfully authorized to access child abuse and neglect records:

a. Federal, state or local government entities, including law-enforcement agencies and prosecuting attorneys;

b. The child fatality review team;

c. Child abuse citizen review panels;

d. Multidisciplinary investigative and treatment teams;

e. A grand jury, circuit court, or family court if the court or grand jury finds that the information is necessary to decide an issue before it. (W. Va. Code § 49-5-101(c)).

West Virginia Code § 49-5-101(c) indicates that the above-listed agencies may access the records "upon request," but does not specify the type of request that is required. It is best practice to require the

agency or official requesting the records to present some type of written request (or subpoena if available) because this creates a record of the governmental official or agency that was granted access to the file and the specific type of access that was allowed. However, as discussed above, "recorded interviews" of children should only be accessed pursuant to court order.

A family court or circuit court judge may want to inspect a case file, even though he or she is not presiding in that case, because the file may contain information that is potentially relevant in another case before that judge. West Virginia Code § 49-5-101(c) expressly authorizes circuit or family courts to access records in a child abuse or neglect case if necessary to decide an issue in another matter before that court. Therefore, a family or circuit court judge may review abuse and neglect case files even if he or she is not presiding in a particular case. (See also Rule 6a(b), RCANP).

4.8.6 Adoption Case Files

West Virginia Code § 48-22-702(a) requires the clerk to maintain a separate index for adoption cases. The index is not open to public inspection and must be stored in a locked or sealed container. The clerk must also maintain a separate order book for adoption cases that is not open for public inspection. The order book must be stored in a secure container.

The circuit clerk has the additional duty to maintain the confidentiality of the identities of adoptive parents, biological parents, and the identity of the adopted child. (W. Va. Code § 48-22-702). Therefore, the clerk must not disclose the names of any of these people without a court order. When faced with an inquiry, the clerk should indicate that all adoption records are sealed and that no information may be disclosed without a court order. Even when the adoptive parents and the biological parents know each other's identities, the clerk still has a duty to maintain the confidentiality of all adoption information.

All records of an adoption proceeding are to be maintained in a sealed file. (W. Va. Code § 48-22-702(a)). Unlike other confidential files, even the parties are not allowed to inspect an adoption case file. Records in a file or the file itself cannot be accessed **except** by the procedures set forth below.

4.8.6.1 Nonidentifying Information

The circuit clerk is required to maintain nonidentifying information in a specific adoption case file for a period of 99

years. (W. Va. Code § 48-23-601(c)). Nonidentifying information is written information that includes a health, genetic and social history of a child and the child's birth family. It must, however, exclude information that would identify the birth parents or their family. (W. Va. Code § 48-23-601(a)).

An adult adoptee or adoptive parents may file a written, notarized request for nonidentifying information from an adoption file with the clerk. (W. Va. Code § 48-22-702(a)). This statute allows for the disclosure of nonidentifying information upon the submission of the request to the clerk and upon payment for the copies. Although local practice may vary, it is fairly typical for circuit judges to informally review these requests and approve the clerk's disclosure of nonidentifying information.

Either during or after an adoption, a birth parent may present nonidentifying information for filing. If this information is filed, the clerk should notify the court, which has the responsibility to provide this information to the adoptive parents or an adult adoptee. (W. Va. Code § 48-22-702(a)).

4.8.6.2 Petition for Identifying Information

An adult adoptee or parents of an adopted child may file a petition to obtain identifying information about the adoptee or his or her birth parents. (W. Va. Code § 48-22-702(b)). If the court orders the release of identifying information, the clerk should follow the specific directives of the order when providing information or allowing access to a specific case file.

4.8.7 Standby Guardianship Case Files

West Virginia Code §§ 44A-5-1, *et seq.* established a procedure for the appointment of a standby guardian for minors when it is anticipated that a parent will die or become so debilitated that he or she can no longer parent a minor child. An order of appointment of a standby guardian allows the standby guardian to assume his or her duties when a triggering event, as defined by the order of appointment, occurs. Similar to a family court case file, the pleadings, exhibits or documents are confidential and are not open to public inspection. (W. Va. Code § 44A-5-9). A party, a party's designee, or counsel of record may, however, inspect or obtain copies of the file. Although the file itself is closed, there is no authority that establishes the orders or indexes as confidential. Therefore, the orders and indexes are subject to public inspection.

4.8.8 Special Guardianships for Medical Treatment of Minors

West Virginia Code §§ 49-4-301(g)-(i) establishes a procedure for the appointment of a special guardian to consent to medical treatment of a minor. A court may appoint this type of guardian when there is a substantial possibility that a minor will suffer a serious physical or emotional condition, and the physical or emotional condition is the result of the parent's failure or refusal to obtain medical treatment for the minor. Although this statute does not identify this type of case file as confidential, West Virginia Code § 49-5-101(a) provides for the confidentiality for "all records and information concerning a child or juvenile" maintained by a court unless Chapter 49 of the West Virginia Code or a court order indicates otherwise. Chapter 49 does not expressly authorize the public inspection of this type of file, index or order. Therefore, this type of court file is confidential. Similarly, the orders are confidential. The case file should not be listed on an index that is subject to public access.

4.8.9 Emancipation

West Virginia Code § 49-4-115 establishes a procedure in which a minor may petition a court for emancipation. This statute does not establish this type of file as confidential. However, West Virginia Code § 49-5-101(a) provides for the confidentiality for "all records and information concerning a child or juvenile" maintained by a court unless Chapter 49 of the West Virginia Code or a court order indicates otherwise. Chapter 49 does not expressly authorize the public inspection of this type of file, index and order. Therefore, this type of court file and any orders are confidential. The case file should not be listed on an index that is subject to public access.

4.8.10 Waiver of Physician's Pre-Abortion Notification of Parent or Legal Guardian

West Virginia Code §§ 16-2F-1, *et seq.* establishes a procedure whereby a court may enter an order which allows a physician to perform an abortion on a minor without providing notice to a minor's parent or legal guardian. As established by West Virginia Code § 16-2F-4(e), the entire court file, the indexes and any orders entered in such a proceeding are confidential. At the conclusion of these proceedings, the entire court file must be sealed. Additionally, the clerk is required to maintain a separate order book which must be sealed. To fulfill this requirement, the clerk may maintain the order book in a locked container or file. The court file or orders cannot be accessed except by court order for good cause shown.

4.8.11 Personal Safety Order Proceedings

The Personal Safety Act (W. Va. Code §§ 53-8-1, *et seq.*) establishes a procedure for obtaining a personal safety order for a person who has been subject to a sexual offense, stalking or repeated threats of bodily injury by another person who is not a family or household member. Although these cases originate in magistrate court, an aggrieved party may appeal to circuit court. All documents contained in the court file, including all orders, findings, pleadings, recordings, exhibits and transcripts, and all documents forwarded from magistrate court, are confidential and not available for public inspection. The file, however, is available for inspection and copying by the parties, attorneys of record, guardians *ad litem*, law enforcement, and persons authorized by a party in writing. (W. Va. Code § 53-8-2(a)). In the latter situation, the clerk should require the written authorization to be notarized to assure its validity. (W. Va. Code § 53-8-9(b)). Appeal hearings, like the court files, are closed to the general public, except that persons whom the court determines to have a legitimate interest in the proceedings may attend. (W. Va. Code § 53-8-2(b)(1)).

A person (e.g. non-party) without access to a court file may file a written motion in the case seeking access. Upon a showing of good cause, the court may enter an order permitting the person to examine documents in the file and may also authorize him or her to obtain copies of the documents. (W. Va. Code § 53-8-2(c)). Any order permitting such access is required to specify the particular documents that may be examined and, if authorized, copies; as well as the arrangements under which the examination and copying may take place. Therefore, before permitting access, the clerk should carefully review the order to ascertain whether it gives access to the entire file or only specified documents, whether copies may be made, and any other arrangements or limitations imposed by the court.

Records in the court file of a personal safety order case may not be obtained by the presentation of a subpoena.[2] If both the petitioner and respondent waive their right to confidentiality, court records specified in both written waivers may be obtained by subpoena. Alternatively, the relevant statutory provision provides that a person seeking to subpoena documents from one of these court files may do so "only by court order and upon full compliance with statutory and case law requirements." (W. Va. Code § 53-8-2(d)). This "full

[2] This discussion about the requirements for a subpoena to be in compliance with state law relates only to **state** court subpoenas. A subpoena issued by a federal court would not be subject to these state law requirements. See Chapter 4, Section 4.7.

compliance" language presumably refers to providing, at the least, notice to the parties and an opportunity to be heard by the court prior to release of confidential records. In any event, if a subpoena is served upon a clerk seeking records from one of these confidential files, and there are neither written waivers of confidentiality signed by both parties or a court order authorizing release of the records, the clerk first notifies the person who had the subpoena issued and inform them of the deficiency. If the person declines to rectify the deficiency and insists that the clerk should comply with the bare subpoena, the clerk should immediately inform the circuit court judge who is hearing (or heard) the case appeal. If that judge is not available, the clerk should inform the chief circuit judge.

4.8.12 Personal Safety Order Proceedings: Sealed Records

If sensitive information has been disclosed in a hearing, pleading, or other document, the court may order the information sealed in the court file. (W. Va. Code § 53-8-2(a)). Additionally, either party to a personal safety order case may file a written request with the clerk seeking to seal all court records relating to the case. (W. Va. Code § 53-8-17(b)). A request for sealing all court records under this latter provision may not be filed until two years after the entry of the final order, or the denial or dismissal of the petition. (W. Va. Code § 53-8-17(c)). Such a request for sealing should only be filed in circuit court when there has been an appeal from magistrate court. The request would be filed within the existing appeal file, and no filing fee is collected. When a request for sealing is filed, the clerk should inform the court that handled the case. The court will need to schedule a hearing, with notice to the parties. Following the hearing the court may order the sealing of the court records (including any index or docket entries) if good cause is found, and no personal safety orders are still in effect or no criminal charges against the respondent are pending. (W. Va. Code § 53-8-17(d)). If the court orders the sealing of the case records, within 60 days of the entry of the order each custodian of court records must advise the court and parties in writing of compliance with the order. (W. Va. Code § 53-8-17(f)).[3]

Under this statute, "court records" are defined as the official record of the court "that the clerk of a court or other court personnel keeps." (W. Va. Code § 53-8-17(a)(2)). However, there is some ambiguity created elsewhere in the statute since "sealing" is defined to also include records maintained by any law enforcement agency. (W. Va.

[3] Regarding records held by the clerk, sealing means "removing to a separate secure area to which persons who do not have a legitimate reason for access are denied access." (W. Va. Code § 53-8-17(a)(4)(A)).

Code § 53-8-17(a)(4)(C)).[4] Any order to seal should therefore be carefully reviewed by the clerk to see if it should be forwarded to any law enforcement agencies.

Other ambiguities in the statute are found in subsection (e), which regulates who may get access to sealed records, and how such access is obtained. (W. Va. Code § 53-8-17(e)). Subsection (e)(1) states that the following persons can, "for a legitimate reason," access a sealed record:

A) A law-enforcement officer;
B) An attorney who represents or has represented the petitioner or the respondent in a proceeding;
C) A prosecuting attorney; or
D) An employee of the Department of Health and Human Resources. (W. Va. Code § 53-8-17(e)(1)).

Any other person (apparently even a party not represented by an attorney) must subpoena the records or file a motion and demonstrate to the court why access to the sealed file should be granted. (W. Va. Code § 53-8-17(e)(2)).

Subsection (e) creates a number of uncertainties for clerks who must control access to sealed files. Sealing a court file is generally understood to mean that no person is entitled to access without a court order. Yet, subsection (e)(1) appears to authorize certain persons access as long as they provide the clerk with a "legitimate reason." Even more perplexing, under this provision a DHHR employee would have access to a sealed file, but before it was sealed would have to file a motion and obtain a court order to examine a confidential (but unsealed) file. (See W. Va. Code § 53-8-2). There are other inconsistencies and ambiguities in the provisions relating to access to sealed files. Accordingly, whenever *anyone* seeks access to a sealed court file in a personal safety order case, the clerk should first obtain guidance from the court as to whether a court order is required. If an order is deemed unnecessary in a particular instance, the clerk should obtain written approval from the court that can be placed in the file.

[4] "Sealing" is also defined to require removal of any electronic information about a proceeding on any *public* website maintained by the magistrate court, circuit court, or Supreme Court of Appeals. (W. Va. Code § 53-8-17(a)(4)(B)). However, the confidentiality provisions of Section 53-8-2 already preclude the possibility that any court website would have any case information posted on a public-accessible site.

4.8.13 Mental Hygiene Case Files

Mental hygiene case files, orders and indexes are not open to public inspection. (W. Va. Code § 27-5-4(c)(3)). However, there are specific instances in which access to a mental health case file is allowed. A respondent, a person designated by a respondent, or respondent's counsel may inspect the case file. Also, a circuit court may grant others access to a file by court order. (W. Va. Code § 27-5-4(c)(3)). Additionally, the sheriff may inspect the file if the respondent has applied for a concealed weapons permit. (See Section 4.11). Further, federal officials who present a subpoena or order may inspect a mental health case file. (Section 4.7).

In addition to access by the persons noted above, West Virginia Code § 27-5-4(c)(3) indicates that a legal representative of a respondent may inspect a file or authorize another individual to inspect the file. Presumably, the term "legal representative" includes a respondent's attorney. However, it would also include a person that has been designated by a court, such as a guardian. It also would include a person designated by a respondent, such as a person authorized by an executed durable power of attorney. It is best practice to require any legal representative, such as a guardian, to produce documentation that establishes the individual as a legal representative of the respondent.

An exception to confidentiality regarding certain information in mental hygiene case files relates to the State Mental Health Registry established pursuant to West Virginia Code §§ 61-7A-1, *et seq.* This act creating the State Mental Health Registry authorizes and requires circuit clerks to supply the West Virginia Supreme Court Administrative Office or State Police with the name and certain other identifying information of all persons over fourteen years of age involuntarily committed for treatment in mental hygiene proceedings (as well as other persons adjudicated as a "mental defective" as defined in that act). Although the statute assigns this duty to circuit clerks, the Division of Mental Hygiene and Treatment Court Services of the Supreme Court Administrative Office has developed a procedure in which mental hygiene commissioners, circuit court judges, and magistrates are primarily responsible for this reporting requirement. For a detailed discussion of who is subject to the registry and what information is to be provided, see Section 3.12.3.

Files relating to proceedings under West Virginia Code § 27-4-1 regarding transport requests for voluntary hospitalization of minors are also to be maintained as confidential files. See Section 13.15 for

further discussion of these proceedings and who is entitled to have access to these files.

4.8.14 Guardianship or Conservatorship Files

Guardianship and conservatorship files are confidential and are not open to public access either while the case is pending or after it is closed. (W. Va. Code § 44A-2-5). Similarly, orders and indexes are closed. However, the protected person and his or her attorney may inspect or copy the file. No other party, including the petitioner, appointed guardian or conservator, or relative of the protected person can access the file without a court order. Another party may file a written petition requesting that he or she be allowed to inspect or copy the file. The court or mental hygiene commissioner has the authority to allow a party to the case to inspect or copy the file if the party has shown good cause. (W. Va. Code § 44A-2-5).

Although the files are closed, a sheriff may inspect the file if the protected person has applied for a concealed weapons permit. (See Section 4.11). Further, circuit clerks are required to provide a notice of appointment to the county clerk when a guardian or conservator is appointed so that the information can be recorded with records of deeds or powers of attorney. The notice includes the name of the protected person, the case name and number and the names of any guardian or conservator. (W. Va. Code § 44A-2-13(d)).

4.8.15 Adult Abuse or Neglect Records

The West Virginia Department of Health and Human Resources, through its adult protective services division, has the duty to investigate and address reports of abuse or neglect of incapacitated adults or adult-care facility residents. These records are, however, confidential. Either a circuit court or the West Virginia Supreme Court may subpoena these records in connection with any court proceeding, but should enter an order that places appropriate limits on their use. (W. Va. Code § 9-6-8(b)). When these records are filed in a circuit court case file, the clerk should follow the directives of any court order regarding access to these records.

4.8.16 Access to Petit Juror Qualification Forms

While preparing for jury selection and during a trial, counsel of record (or a *pro se* party) may review names of qualified petit jurors who have been selected for a jury panel and their completed questionnaires. (W. Va. Code § 52-1-5a(e)). It can be inferred that an oral request by counsel of record (or a *pro se* party) to the clerk is

sufficient for these persons to review this information. Once the trial has ended, access to the questionnaires may only be allowed by a written court order. Other persons who want to review completed questionnaires would have to obtain a court order.

The 2014 amendments to West Virginia Code § 52-1-5a(e) and -9 seem to suggest that names of jurors would be subject to the same limitations on inspection as qualification forms. However, the relevant statute, West Virginia Code § 52-1-5a, does not expressly refer to names of jurors. In addition, the Supreme Court has not yet provided any guidance on this issue. Since this issue has not been decided definitively, the clerk should consult with the court if he or she has any question about whether the names of jurors could be disclosed to persons other than counsel of record (or a *pro se* party).

4.8.17 Grand Juror Qualification Forms

Completed juror questionnaire forms for prospective or active grand jurors are considered confidential. (W. Va. Code § 52-2-16). The clerk may only release the forms with the written permission, i.e. a written order, of the circuit court.

4.8.18 Grand Jury Records

As a general rule, grand jury proceedings are closed, and matters considered by a grand jury are confidential. (Rule 6(e)(2), R. Cr. P.). To preserve the secrecy of grand jury proceedings, the clerk should automatically seal grand jury records. Specifically, the clerk has a duty to maintain grand jury records, orders and subpoenas under seal to prevent disclosure of grand jury proceedings. (Rule 6(e)(6), R. Cr. P.). Additionally, a court reporter's recording notes or transcripts should be sealed when they are filed with the court. (Rule 6(e)(1), R. Cr. P.). Because Rule 6(e)(6) does not establish a non-discretionary period during which these records must be sealed, the clerk should not disclose the records of grand jury proceedings unless ordered by the court.

The circuit court has the discretion to allow disclosure of grand jury proceedings in some circumstances. (Rule 6(e)(3), R. Cr. P.; W. Va. Code § 52-2-15(c)(2)(A)-(B)). The clerk may, therefore, disclose grand jury records pursuant to the terms of a court order.

Once an indictment has been returned, a court has the discretion to order the clerk to seal an indictment until the defendant is in custody or he or she has been released pending trial. (Rule 6(e)(4), R. Cr. P.).

The clerk should follow the directives of any court order with regard to sealing indictments.

To prevent disclosure of grand jury proceedings, the Legislature has established a misdemeanor penalty for certain persons who disclose matters occurring before a grand jury. The penalties are a fine of not more than $1,000 or a thirty day jail sentence. The statute specially identifies grand jurors, interpreters, stenographers, operators of recording devices, typists and attorneys for the state as subject to this code section. The statute also refers to official personnel that are necessary to assist the attorney for the state. (W. Va. Code § 52-2-15(c)(1)(B)). It is important, therefore, to scrupulously maintain the secrecy of grand jury proceedings.

Occasionally, attorneys file motions with attached grand jury records in a criminal case file. The clerk should alert attorneys when this situation arises and should be careful to prevent the inadvertent disclosure of grand jury records. However, it is an attorney's responsibility to request, and the duty of the presiding judge to decide, to close or seal specific information in a file. (Rule 10.03, TCR).

4.8.19 Pretrial Risk Assessments

When a person is arrested and incarcerated in a regional jail, the Regional Jail Authority (RJA) is required to conduct a pretrial risk assessment within three days of the placement. (W. Va. Code § 31-20-5g(a)). According to the statute, the RJA will provide the risk assessment to the magistrate or circuit clerk who, in turn, must provide it to the presiding magistrate or judge.

The statute establishes that the pretrial risk assessments are confidential. (W. Va. Code § 31-20-5g(a)). The only persons who may have access to pretrial risk assessments are the presiding judge, court personnel, the prosecuting attorney, defense counsel and the defendant. The statute does not indicate where pretrial risk assessments will be maintained. It is likely that further guidance on this issue will be developed by the Supreme Court. If pretrial risk assessments are maintained in the case file, they should be sealed.

4.8.20 Presentence Reports

In general, probation officers prepare presentence reports before sentencing unless a criminal defendant waives this right or a judge finds that the report is unnecessary. (Rule 32(a), R. Cr. P.). Presentence reports often contain medical and psychological information about a defendant, as well as extensive personal

information about a defendant. (W. Va. Code § 62-12-7; Rule 32(b)(4), R. Cr. P.). Trial Court Rules 43 and 44 establish procedures for the disclosure of the report to the defendant and by court order. Although West Virginia Code § 62-12-7 and the rules noted above do not expressly address the methods for maintaining presentence reports in court files, circuit courts, in general, have limited access to them. In some counties, presentence reports are filed with the circuit clerk and are routinely sealed. In some counties, presentence reports are disclosed to the defendant as required, but are not filed with the circuit clerk. Therefore, circuit clerks should follow the directives of the circuit court with regard to the filing and handling of presentence reports.

4.8.21 HIV Test Results

A person who is charged with or convicted of the following offenses is subject to mandatory HIV testing: a) sexual abuse; b) sexual assault; c) incest; or d) prostitution. (W. Va. Code § 16-3C-2(f)(2), (6)).[5] By definition, a juvenile who has been adjudicated delinquent for one of these offenses is considered to have been "convicted" for the purposes of mandatory HIV testing. (W. Va. Code § 16-3C-1(d)). Although the HIV testing statutes do not expressly provide that juveniles who are charged with or convicted of these sexual offenses are subject to court-ordered HIV testing, the corresponding legislative rule indicates that juveniles are subject to the same HIV testing as an adult who is charged with or convicted of these sexual offenses. (W. Va. C.S.R. Title 64, Series 64, Section 4.3).

When a person is subject to mandatory, court-ordered testing, the test results will be filed with the court. (W. Va. C.S.R. Title 64, Series 64, Section 4.3.b.2). This section of the legislative rule states:

> 4.3.b.2. As soon as practical, test results shall be provided to the magistrate court clerk in the county where the defendant or juvenile respondent is charged. If the criminal matter or juvenile delinquency proceeding is then pending before the circuit court, the magistrate clerk shall immediately forward the test results to the circuit clerk. The clerk shall also promptly provide a copy of the test results to: 1) the prosecuting attorney, who shall inform the victim, or parent or legal guardian of the victim; and 2) counsel for the defendant or juvenile respondent.

[5] The statute also lists "sexual molestation" but there is no such offense in West Virginia.

Therefore, when a circuit clerk receives HIV test results, copies should be immediately provided to the prosecuting attorney and defense counsel, unless there is clear indication that the results were already provided to these persons by the magistrate clerk.

Because HIV test results are closed and confidential, clerks should routinely seal HIV test results in both adult and juvenile cases. (W. Va. Code § 16-3C-2(f)(6)). Even though juvenile case files are already closed by statute, there are a number of exceptions permitting access to juvenile records. (See W. Va. Code §§ 49-5-101 and 49-5-103). Access to HIV test records is specifically limited and requires a court order meeting certain statutory requirements. (W. Va. Code § 16-3C-3(a)(11)).

If a defendant is placed in the custody of the Division of Corrections or the Regional Jail Authority or if a juvenile is placed in the custody of the Division of Juvenile Services; or other custodial placement, the court is required to transmit HIV test results to the custodial agency. (W. Va. C.S.R. Title 64, Series 64, Section 4.3e). The test results should be placed in a sealed envelope that is marked "Confidential for the Records Supervisor."

4.8.22 DHHR Administrative Agency Appeals Involving Minors

The DHHR has an established grievance procedure for cases involving the receipt of public assistance and for providers of Medicaid services. (W. Va. Code § 9-2-13). A party aggrieved by a final decision of the Board of Review or the Bureau of Medical Services may appeal to circuit court. If the case involves a minor, the clerk must maintain the file as a confidential, closed or sealed file. (W. Va. Code § 9-2-13(f); see Section 15.5.4). The clerk must automatically maintain the file in this manner because the applicable statute provides that this type of file must be "sealed" by operation of law. (See Section 15.5).

4.8.23 Proceedings to Regain Firearm Rights

Persons previously adjudicated to be mentally defective or having a prior involuntary commitment to a mental institution are prohibited from possessing a firearm. (W. Va. Code § 61-7-7(a)(4)). Further, such persons must be listed on the State Mental Health Registry and the National Instant Criminal Background Check System (NICS) maintained by the FBI to prevent the unlawful purchase of firearms. (W. Va. Code §§ 61-7A-1, *et seq.*). West Virginia Code § 61-7A-5 establishes a procedure whereby such persons may petition the circuit court seeking to regain the right to possess firearms and removal from

the State Mental Health Registry and the NICS Database. A petitioner must show, by clear and convincing evidence, that he or she is competent and capable of exercising responsibilities concomitant with possessing firearms, will not likely be a danger to public safety, and that granting the relief will not be contrary to public interest. (W. Va. Code § 61-7A-5(e)). Due to the nature of the proof to be produced by the petitioner and considered by the court, much of the contents of the court file is deemed confidential. Specifically, the petition, required certificate of mental health examination by a psychologist or psychiatrist, mental health and substance abuse treatment records, and any other documents containing substance abuse or mental health information are confidential and not accessible by the public. Access to these documents is limited to the prosecuting attorney and assistant prosecutors representing the state in the proceedings, the petitioner and his or her counsel and any person authorized by the petitioner (or his or her legal representative) or by order of the court. (W. Va. Code § 61-7A-5(h)). Although this statutory provision specifies only certain documents and information as confidential, in practical effect, all of the file will likely be confidential. For example, at first glance it would appear that court orders in the file would be open to the public. But most orders addressing any substantive aspect of the case will likely contain "substance abuse or mental health information of the petitioner," bringing it with the confidentiality protection of the statute. Therefore, clerks and deputy clerks should be very cautious in granting public access to any documents in the file. If there is any doubt, consult the judge assigned to the case before allowing public access to these records.

4.9 JUVENILE CASES

In both juvenile status offense and delinquency proceedings, case files, indexes and orders are confidential records and are not subject to public inspection. (W. Va. Code §§ 49-5-103(b); 49-5-101(a); Rule 49, RJP). However, West Virginia Code § 49-5-101(b) expressly allows certain specified individuals to have access to records concerning a juvenile that are maintained by a court. (This statute applies to records maintained by the Division of Juvenile Services, the Department of Health and Human Resources, child agencies or facilities, courts and law enforcement agencies. However, this discussion applies only to juvenile court records maintained by circuit clerks). These individuals include the following: a) the juvenile; b) a parent whose parental rights have not been terminated; c) the attorney for the juvenile or the parent; or d) someone who acts with the written consent of the juvenile or someone who is authorized to act on the juvenile's behalf. The statute allows these individuals to have access to the court files of a juvenile even if another provision of the West Virginia Code does not permit access. (W. Va. Code § 49-5-101(b)).

It should be noted that West Virginia Code § 49-5-103(c)(5) establishes a procedure in which certain individuals, including a juvenile, his or her parents or legal guardians may be allowed access to a juvenile file by petitioning the court and obtaining a court order. Given the wording of West Virginia Code § 49-5-101(b), which allows access "notwithstanding any code provisions to the contrary," it is not necessary for a juvenile, his or her attorney or his or her parents to obtain a court order before they are allowed to review the juvenile's court file. However, once the applicable time periods have passed, access is only allowed by court order. (W. Va. Code § 49-5-104). (See Section 4.9.10 for an explanation of procedures for access to post-jurisdiction closed juvenile records).

In addition to the provisions of West Virginia Code § 49-5-101(b), Rule 49 of the Rules of Juvenile Procedure expressly allows a family court and staff to have access to all circuit court orders and indexes in all juvenile proceedings. The reason for allowing this type of access is to ensure that a family court in a domestic relations or minor guardianship case does not issue an order that contravenes an order issued by a circuit court in a juvenile case.

4.9.1 Petition for Access to Juvenile Records

West Virginia Code § 49-5-103(c)(5) establishes a procedure through which certain persons may seek access to juvenile records by filing a written petition. The petition would be filed in the existing case and is not subject to a filing fee. By written order, a court may allow the following individuals or courts access to juvenile records:

a. Another juvenile court in which the juvenile is a respondent;

b. Another court that has criminal jurisdiction over the juvenile and requests the records for a presentence report or disposition proceeding;

c. A juvenile, his or her parents or legal guardians, or counsel for the juvenile;

d. A public institution or facility where the juvenile has been placed if the records are needed for transfer, parole or discharge; or

e. A person conducting research. (W. Va. Code § 49-5-103(c)(5)).

As discussed at the beginning of Section 4.9, a juvenile, his or her parents, and his or her counsel may inspect a case file, provided it has not been closed pursuant to West Virginia Code § 49-5-104.

Therefore, the juvenile, his or her parents, or his or her counsel are not required to file a written petition to review a juvenile case file and obtain a court order before they are allowed access to it.

When a circuit court judge enters an order that allows a person access to juvenile records pursuant to West Virginia Code § 49-5-103(c)(5), the circuit clerk should follow the directives of the order with regard to any limitations on access to the case file.

4.9.2 Automatic Disclosures to School Officials

In specific circumstances enumerated by West Virginia Code § 49-5-103(c), certain juvenile records are to be automatically disclosed to school officials by a person designated by the circuit court. (W. Va. Code § 49-5-103(c)(2); Rule 49, RJP). Typically, a probation officer is the court official designated by the circuit court to automatically disclose juvenile records to school officials. Automatic disclosures occur if the juvenile has been charged with the following types of offenses and the case has progressed to one of the stages: a) an offense of violence against another person; b) an offense involving possession of a dangerous or deadly weapon; or c) an offense involving possession or delivery of a controlled substance. (W. Va. Code § 49-5-103(c))(1)(A)). To be subject to automatic disclosure, the case must have progressed to one of the following stages: a) probable cause has been found by a judicial official; b) a judicial official has placed the juvenile on probation for the offense; c) a preadjudicatory community supervision period has been granted; or d) the court has ordered a disposition of the case, and the disposition is not a dismissal. (W. Va. Code § 49-5-103(c)(1)(B)).

4.9.3 Access to Juvenile Records by Federal Subpoena

West Virginia Code § 49-5-103(d)(7) provides for the disclosure of juvenile records when a subpoena from a federal court or federal agency is presented. Under this code section, a federal official, such as federal prosecutor or agency investigator, may obtain access to and copies of juvenile case files.

Given the broad language in this code section, a subpoena issued in a federal **civil** case would appear to also permit access to juvenile case files. However, it is best practice for a clerk, when presented with a subpoena in a **federal civil** case, to provide notice to interested parties, i.e. the juvenile and any adult respondent. The notice should inform the interested parties that the subpoena has been served, should list the date and time for compliance, and should inform them that they may take any legal action they wish with regard to the

subpoena. The notice should also inform the interested parties that the records will be released unless legal action is pursued and the clerk is provided any resulting court order quashing or limiting the subpoena.

Both the subpoena and notice to interested parties should be maintained in the case file. If the clerk provides access to a file, it is best practice for the clerk to note on the subpoena the type of access that was allowed.

4.9.4 Disclosure to Court of Claims

West Virginia Code § 14-2A-16(f) provides that the court of claims or a court of claims investigator may have access to records of juvenile proceedings that are related to compensation of crime victims. When a circuit clerk receives this type of request, he or she should forward it to the presiding circuit judge. The judge should determine which documents may be disclosed to the court of claims or its investigator. The clerk should follow the directives of the court when disclosing documents to the court of claims or its investigator.

4.9.5 Disclosure to Probation Officers

West Virginia Code § 49-5-103(d)(6) provides for the disclosure of juvenile records from court files to probation officers by request. The statute does not specify that the request be in writing; but best practice would be to require a written request that the clerk could place in the file. This situation will not arise very often, if ever, because the West Virginia Supreme Court now maintains a statewide electronic database for juvenile records. By the same statute, as amended in 2015, all probation officers can access juvenile records in the database.

The statutory subsection does not expressly authorize a probation officer to request access to records maintained in another circuit. A clerk should not, therefore, allow a probation officer from one circuit to access juvenile records maintained by another circuit, unless a judge **in the circuit where the files are maintained** authorizes the access, either by order or by approval of a written request. Again, this situation will not arise very often, if ever, since there is now a statewide database for juvenile records. Typically, probation officers would obtain juvenile records maintained by another circuit through the use of this database.

4.9.6 Disclosure of Juvenile Orders to DMV

According to West Virginia Code § 49-4-715, the court may enter an order that prevents the issuance of junior probationary operator's license when the juvenile has been adjudicated delinquent of any offense and he or she is age fifteen years or younger. When a juvenile is age sixteen through eighteen years and has been adjudicated delinquent of any offense, the court may order that the juvenile is not eligible to operate a motor vehicle. These penalties may be imposed in addition to other penalties in a disposition order.

West Virginia Code § 49-4-713, imposes graduated sanctions for juvenile alcohol consumption that include the suspension of a juvenile's driver's license. For a first offense, a license suspension may not be imposed. If a juvenile is adjudicated a second time for underage consumption, the court shall order that a juvenile's operator license must be suspended for a term of not less than five nor more than ninety days. For a third offense, the juvenile's license shall be suspended until he or she reaches age eighteen.

Although both West Virginia Code §§ 49-4-713 and -715 provide for the suspension of a juvenile's driver's license, neither statute establishes a procedure for disclosure of these types of court orders to the Division of Motor Vehicles (DMV). Additionally, the DMV has not established a procedure for this type of disclosure and has not revised the abstract of conviction form used for DUI convictions to include the suspension of a juvenile's driver's license.

If the court orders the license suspension of a juvenile under either of the code sections discussed above, the clerk should provide a copy of such an order to the DMV. Since juvenile orders are confidential and this type of penalty would not be ordered in all adjudication or disposition orders, the order should clearly direct the clerk to send any order entered pursuant to West Virginia Code §§ 49-4-713 or -715 to the DMV.

4.9.7 Disclosure of Certain Delinquency Dispositions to State Mental Health Registry

Under the State Mental Health Registry Act (W. Va. Code §§ 61-7A-1, *et seq.*), any juvenile over fourteen years of age who is involuntarily committed to a mental institution must be included in the mental health registry. Also, under juvenile law some youth charged as delinquents will have a court disposition either involving a court determination of incompetency to stand trial or not guilty due to mental illness or insanity, or a commitment to a mental health facility for

treatment of mental illness, or both. (W. Va. Code §§ 27-6A-9 and 49-4-714(b)(6)). In those cases, the required information must be submitted for inclusion in the mental health registry. (See Section 3.12.3 for further details.)

4.9.8 Access to Juvenile Records Determined by Charged Offense

Although juvenile case files are generally closed, there are several exceptions to this general rule that depend upon the specific circumstances of the case, involving whether the case has been transferred to the criminal jurisdiction of the court and the nature of the charged offense. Two charts appearing at the end of Chapter 4 summarize the type of access allowed in juvenile case files based upon the transfer of the juvenile to the criminal jurisdiction of the court or based upon the nature of the charged offense.

4.9.9 HIV Test Results in Juvenile Case Files

Juvenile respondents are subject to mandatory HIV testing when they are charged or adjudicated of the following offenses: a) sexual abuse; b) sexual assault; c) incest; or d) prostitution. (See W. Va. Code §§ 16-3C-1(d) and -2(f)(2); W. Va. C.S.R. Title 64, Series 64, Section 4.3). When HIV test results are filed in a juvenile case, the clerk should routinely seal the results. For a complete explanation of this issue, see Sections 3.11.16 and 4.8.21.

4.9.10 Marking Juvenile Records Confidential

Juvenile records must be marked as confidential at the **later** of the following dates:

1. On the juvenile's 19th birthday; or
2. One year after personal or juvenile jurisdiction of the court is terminated.

(W. Va. Code § 49-5-104(a); Rule 50, RJP).[6]

To comply with this recently amended provision, the files must be physically marked as confidential, and the files must be kept in a

[6] Rule 50 of the West Virginia Rules of Juvenile Procedure, which was promulgated before the most recent version of West Virginia Code § 49-5-104(a), requires the physical sealing of a juvenile file. Rule 1 of the West Virginia Rules of Juvenile Procedure provides that the Juvenile Rules apply if there is a conflict between a juvenile rule, a statute and any other rules. In practical terms, Rule 50 and West Virginia Code § 49-5-104(a) do not conflict because the maintenance of files that have been marked confidential under West Virginia Code § 49-5-104 is the substantial equivalent of physically sealing a file.

secure location. The juvenile's name cannot be apparent on the outside of the file. The name of the juvenile and case file itself may only be accessed by a court order. (W. Va. Code § 49-5-104(c)).[7] Once the juvenile case is marked confidential, the offense is considered to have never occurred. (W. Va. Code § 49-5-104(d); Rule 50(c), RJP).

Prior to 2013 the applicable statute required "sealing" juvenile files one year after jurisdiction terminated. Apparently, the Legislature intended to simplify the task for clerks by changing the obligation to "marking as confidential" -- in contrast to than "marking as sealed" under the earlier version of the statute. In the context of this statute, this language change seems to be a distinction without a difference. Moreover, this change in wording will likely cause confusion. Juvenile files are to be treated as confidential from the time these cases are initiated. (W. Va. Code § 49-5-101(a)). The language change in West Virginia Code § 49-5-104 to have these files "marked as confidential" one year after jurisdiction terminates is obviously confusing since these files are **already** confidential. The problems resulting from this language change in West Virginia Code § 49-5-104 arise from the fact that other (unchanged) portions of that statute still treat the files as sealed, whereby **nobody** has access except by court order. Thus, clerks are left with a confusing situation where parties, counsel and certain other persons have access to these confidential files under West Virginia Code 49-5-101, but once the files are similarly marked as confidential under West Virginia Code § 49-5-104, a different set of conditions apply. Therefore, it is strongly recommended that clerks set up an office protocol to clearly mark and store separately those files when they reach that second "confidential" stage under West Virginia Code § 49-5-104.

The following two examples illustrate when juvenile case files should be marked for confidential treatment under West Virginia Code § 49-5-104. For example, suppose a juvenile is adjudicated of a delinquency offense when he is 17, and the court dismisses the case three years later when the juvenile is 20. In this case, the clerk should mark the records confidential one year after the dismissal of the case, not when the juvenile turns 19. As a second example, suppose a juvenile is adjudicated delinquent at age 15, and the case is dismissed approximately one year later. In this case, the records should be marked confidential when the juvenile turns 19 because it is the later of the two dates.

[7] The only other way to access a juvenile file that has been marked confidential is upon the presentation of a federal subpoena. (W. Va. Code § 49-5-103(d)(7)).

As noted above, the termination of juvenile jurisdiction is one of the two events that determine when juvenile files should be marked confidential. Juvenile jurisdiction in a delinquency case (16-JD-###) terminates when the juvenile turns 21. (W. Va. Code § 49-4-701(f)(1)). In a status offense case (16-JS-###) based upon **truancy**, juvenile jurisdiction terminates when the first of one of the following occurs: a) the juvenile turns 21; b) completes high school; or c) completes a high school equivalent, such as a GED, or other court-approved education plan. A court may also voluntarily relinquish jurisdiction. (W. Va. Code § 49-4-701(f)(2)). Jurisdiction in other status offenses cases, such as refusing to respond to lawful supervision by parents, guardians or legal custodians or leaving the care of parents, guardians or custodians without consent or good cause, would terminate when the juvenile turns 18. (See W. Va. Code §§ 49-1-202).

If a juvenile case is transferred to the criminal jurisdiction of the court, the records of the juvenile proceeding are subject to public inspection under the circumstances provided in West Virginia Code § 49-5-103(c)(1)-(4). However, such records should be marked confidential if the juvenile is acquitted or found guilty of an offense other than the offense that was the basis of the transfer to criminal jurisdiction. For example, suppose a juvenile is charged with first-degree murder, the case is transferred to the court's criminal jurisdiction, and the juvenile is ultimately convicted of manslaughter. In this example, the case should be marked confidential because the juvenile was convicted of an offense other than first-degree murder, the offense that served as the basis for the transfer to adult status. The records also should be marked confidential if the charges for an offense that served as the basis for the transfer are later dismissed. (W. Va. Code § 49-5-104(b)).

As noted previously, a juvenile's case may be transferred to the court's criminal jurisdiction if he or she is at least 14 and is charged with the following offenses: treason, first or second-degree murder, robbery involving a firearm or a deadly weapon, kidnapping, first-degree arson, or sexual assault in the first-degree. If a juvenile is convicted of any of these offenses under the court's criminal jurisdiction, the records of the proceedings may **not** be marked and kept as confidential at any point. (W. Va. Code § 49-5-104(e)).

In some cases, a juvenile's records may be subject to public access while the case is pending even though the case has not been transferred to the court's criminal jurisdiction. For a complete list of these offenses and other statutory requirements, see the following chart titled "Chart 4.9B Juvenile Records Subject to Public Inspection

Even if Case is Not Transferred to Criminal Jurisdiction." These files should be marked confidential at the appropriate times noted above even though the records were subject to public access while pending because they are **juvenile proceedings**, and West Virginia Code § 49-5-104 does not exclude these files from the procedures for confidential treatment one year after jurisdiction has terminated.

4.10 CRIMINAL RECORDS CHECKS

Requests for criminal record checks should be referred to the Criminal Identification Bureau of the West Virginia State Police in Charleston: 304-746-2180. Requests for criminal records check may also be referred to the National Instant Criminal Background System (NICS): 877-444-NICS. This ensures the accuracy of the information.

If a circuit clerk conducts criminal records checks, he or she should only do so if a written request specifies the name, social security number, or other identifying information of the adult individual for whom the information is sought. All information provided by the clerk should be accompanied by a disclaimer that indicates that the records reviewed include only **circuit court** records within the **specified county** or **circuit** and that the clerk is not responsible for any misinformation provided as a result of insufficient or inaccurate identifying information provided by the requesting party or contained in the original court documents.

4.11 CONCEALED WEAPON PERMIT INVESTIGATIONS

When a person applies for a license to carry a concealed deadly weapon, the applicant authorizes the county sheriff to conduct an investigation related to the information contained in the permit application. (W. Va. Code § 61-7-4(a)(11)). By authorizing the sheriff to conduct this type of investigation, the applicant has designated or allowed the sheriff to access closed court files, specifically mental hygiene or guardianship and conservatorship files. To obtain a concealed weapon permit, the applicant must not have been adjudicated as mentally incompetent. (W. Va. Code § 61-7-4(a)(9)). Additionally, an applicant must not be addicted to alcohol or controlled substances. (W. Va. Code § 61-7-4(a)(4)). Further, an applicant must be both physically and mentally competent to carry a firearm. Information relevant to these three requirements may be contained in mental hygiene or guardianship and conservatorship files. As noted above, by authorizing the sheriff to conduct the required investigation, the sheriff has been designated by the applicant to review information in either a mental hygiene or guardianship and conservatorship file. Typically, the clerk will review the indexes and let a member of the sheriff's staff know whether the applicant's name appears on one of these indexes. The sheriff's office would then be entitled access to review any such files and obtain copies.

4.12 EXPUNGEMENTS

This section addresses maintenance of and access to expunged criminal records. For a complete discussion of expungement procedures, see Section 11.6 Expungements. This section also does not address the procedure for marking juvenile records as "confidential."

There are three general circumstances when expungement of criminal records may occur in circuit court and affect the maintenance of and access to such records. First, when a person receives a full and unconditional pardon from the governor, that person may file a petition with the circuit court in the county where the conviction occurred pursuant to West Virginia Code § 5-1-16a. To be eligible for expungement under this code provision, the pardon must have been granted at least one year earlier and any sentence for the conviction discharged at least five years prior. Second, West Virginia Code § 61-11-25 provides a procedure for the expungement of criminal records if the criminal charges have been dismissed or the person has been acquitted. A person may file a motion for expungement 60 days after the entry of the acquittal or dismissal order. A third circumstance, pursuant to West Virginia Code § 61-22-26, involves persons convicted of a qualifying misdemeanor offense or offenses arising from the same occurrence committed when the person was between 18 and 26 years of age. No person is eligible for this type of expungement until one year after the conviction; but if any sentence of incarceration or probation was imposed, the eligibility period begins one year after completion of the sentence or probation. (W. Va. Code § 61-11-26).

Under any of these three types of proceedings, when a motion or petition for expungement is filed and pending, the criminal and expungement files remain open for public inspection. If the motion for expungement is granted, the clerk should then seal both the case file for the expungement petition and the criminal file. Any reference to the criminal and expungement cases in index books should be redacted and electronic data accessible by the public regarding the cases should be deleted. Expungement orders, including any order that enforces the expungement procedure, should be filed with other orders of expungement in a locked or secure location. When an expungement petition is granted, in addition to the sealing of all court records, the court order will direct every agency with records relating to the arrest, charge, or other matters arising out of the arrest or conviction to expunge their records and certify to the court that the required expungement has been completed. The clerk should seal these certifications within the expungement case file as well.

If any inquiry is made concerning the expunged records, the clerk must reply that no records exist. (W. Va. Code §§ 61-11-25(e) and 61-11-26(l)). If criminal records have been expunged, the records may be accessed only in

the following circumstances. West Virginia Code §§ 61-11-25(f) and 61-11-26(m) allow a person whose record has been expunged, or a prosecuting attorney who indicates the records are necessary for a criminal investigation, to obtain a court order to allow the inspection of the records. Additionally, a federal official, upon the presentation of a federal subpoena, would be entitled to review expunged records. (See Section 4.7).

West Virginia Code § 60A-4-407 allows for the expungement of criminal records for misdemeanor possession of a controlled substance and possession of salvia divinorum, a psychoactive plant. (W. Va. Code § 60A-4-413(b)). In addition, West Virginia Code § 17C-5-2b allows for the expungement of first offense DUI when a person successfully completes the motor vehicle alcohol test and lock program. However, DMV records are not eligible for expungement. (W. Va. Code §§ 17C-5-2b(H)(1); 61-11-25(a)). Finally, criminal records related to the underage purchase or consumption of alcohol may be subject to expungement. (W. Va. Code § 60-6-26).

Typically, these proceedings are handled in magistrate court because the offenses are misdemeanors. Additionally, the statutory provisions indicate that the court handling the criminal case, most often the magistrate court, has the authority to expunge the criminal records. However, the circuit clerk should follow the sealing procedure noted above if the circuit clerk has records that are to be expunged for these offenses.

Chart 4.8 **Confidential Files – Generally**

Type of Case or Document	**Specific Records within a Case File**	**Confidential**	**Sealed**	**Persons Allowed to Access**	**Legal Authority** *All statutory citations refer to the West Virginia Code*
Family Court (See Section 4.8.2)	All pleadings, recordings, exhibits, and filed documents, but **not** orders or indexes	Yes	Not unless specifically ordered	Party, party's designee as established in writing, counsel of record, anyone with standing to modify or enforce an order, or by court order	§ 48-1-303 Rule 6, RFCP
Domestic Violence Protective Order Proceedings (See Section 4.8.3)	All pleadings, exhibits, recordings, and filed documents, but **not** orders or indexes	Yes	Not unless specifically ordered	Party, party's designees as established in writing, counsel of record, by court order, or by subpoena issued in a **criminal** case or in another WV protective order proceeding	§ 48-27-312 Rule 6, RFCP Rule 6, RDVCP
Minor Guardianship (See Section 4.8.4)	All records including pleadings, exhibits, and filed documents, but **not** orders or indexes	Yes	Not unless specifically ordered	Party, counsel of record, presiding judicial officer, or by court order	§ 44-10-3(e)

Chart 4.8 (cont.) **Confidential Files – Generally**

Type of Case or Document	**Specific Records within a Case File**	**Confidential**	**Sealed**	**Persons Allowed to Access**	**Legal Authority** *All statutory citations refer to the West Virginia Code*
Child Abuse and Neglect (See Section 4.8.5)	Entire case file, orders and indexes	Yes	Not unless specifically ordered	Child, parent whose rights have not been terminated, counsel of record, by court order. Disclosures allowed by § 49-5-101(c). Exception: Recorded interviews, by court order only (§ 62-6B-6).	§ 49-5-101(a)-(c)
Adoption Case Records (See Section 4.8.6)	Entire file, orders and indexes	Yes	Yes	Only by court order; except nonidentifying information may be provided to adult adoptee or adoptive parents upon submission of a duly acknowledged request.	§ 48-28-7(a)
Standby Guardianships (See Section 4.8.7)	All pleadings, exhibits or other filed documents, but **not** orders or indexes	Yes	Not unless specifically ordered	Party, party's designees or counsel or record	§ 44A-5-9
Special Guardianships for Medical Treatment of Minors (See Section 4.8.8)	Entire case file, orders and indexes	Yes	Not unless specifically ordered	Child, parent whose rights have not been terminated, counsel of record, by court order. Disclosures allowed by § 49-5-101(c)	§ 49-5-101(a)-(c)

Chart 4.8 (cont.) **Confidential Files – Generally**

Type of Case or Document	**Specific Records within a Case File**	**Confidential**	**Sealed**	**Persons Allowed to Access**	**Legal Authority** *All statutory citations refer to the West Virginia Code*
Emancipation (See Section 4.8.9)	Entire case file, orders and indexes	Yes	Not unless specifically ordered	Child, parent whose rights have not been terminated, counsel of record, by court order. Disclosures allowed by § 49-5-101(c)	§ 49-5-101(a)-(c)
Waiver of Physician's Pre-Abortion Notification of Parent or Legal Guardian (See Section 4.8.10)	Entire case file, orders and indexes	Yes	Yes	Only by court order	§ 16-2F-4(e)
Personal Safety Order Proceedings (See Section 4.8.11 and 4.8.12)	Entire case file, orders and indexes	Yes	Not unless specifically ordered	Parties, attorneys of record, guardians *ad litem*, law enforcement, designees authorized in writing, persons authorized by court order	§ 53-8-2 (access generally) § 53-8-17 (sealed files)
Mental Hygiene (See Section 4.8.13)	Entire case file, orders and indexes	Yes (except the Mental Health Registry information as described in Section 4.8.10)	Not unless specifically ordered	Respondent, respondent's designee, counsel of record, respondent's legal representative, sheriff in concealed weapon permit investigations	§ 27-5-4(c)(3) § 61-7-4(a)

Chart 4.8 (cont.) **Confidential Files – Generally**

Type of Case or Document	**Specific Records within a Case File**	**Confidential**	**Sealed**	**Persons Allowed to Access**	**Legal Authority** *All statutory citations refer to the West Virginia Code*
Requests for Transport of Minor for Voluntary Hospitalization (See Section 4.8.13)	Entire case file	Yes	Not unless specifically ordered	Minor; parent or guardian; counsel for minor, parent or guardian; person with written consent of minor, parent or guardian	§ 27-3-1 § 27-5-4(c) § 49-5-101(a)-(b)
Guardianship or Conservatorship (See Section 4.8.14)	Entire file, orders and indexes	Yes (except the notice of appointment provided to the county clerk)	Not unless specifically ordered	Protected person and his or her counsel; other parties by order of the court or mental hygiene commissioner; sheriff in concealed weapon permit investigations	§ 44A-2-5 § 44A-2-13(d) § 61-7-4(a)(4)
DHHR Records of Adult Abuse and Neglect (See Section 4.8.15)	Adult Protective Services Records	Yes	Not unless specifically ordered	As directed by court order	§ 9-6-8(b)
Petit Juror Qualification Forms (See Section 4.8.16)	Petit Juror Qualification Forms	No	No	Counsel of record (and pro se party) before and during a jury trial; as directed by court order	§ 52-1-5a

Chart 4.8 (cont.) **Confidential Files – Generally**

Type of Case or Document	**Specific Records within a Case File**	**Confidential**	**Sealed**	**Persons Allowed to Access**	**Legal Authority** *All statutory citations refer to the West Virginia Code*
Grand Juror Qualification Forms (See Section 4.8.17)	Grand Juror Qualification Forms	Yes	No	As directed by court order	§ 52-2-16
Grand Jury Records (See Section 4.8.18)	All records, including transcripts, records, subpoenas, and orders	Yes	Yes	Only by court order	Rule 6(e), R. Cr. P.
Pretrial Risk Assessments (See Section 4.8.19)	Post-arrest assessment report	Yes	As directed by court order	Court personnel, prosecuting attorney, defense counsel, and defendant	§ 31-20-5g(a)
Presentence Reports in Criminal Cases (See Section 4.8.20)	Presentence Reports	As directed by court order	As directed by court order	As directed by court order	§ 62-12-7 Rule 32, R. Cr. P. Rules 43 and 44, TCR
HIV Test Results in Sex Offense Cases (See Sections 4.8.21 and 4.9.9)	HIV Test Results for Defendants and Juvenile Respondents	Yes	Yes	As directed by court order	§ 16-3C-2(f)(6)
DHHR Board of Review or Bureau of Medical Services Administrative Agency Appeal Involving Minors (See Section 4.8.22)	All pleadings, orders and indexes if the case involves a minor	Yes	Yes	Any party or as directed by court order	§ 9-2-13(f)

Chart 4.8 (cont.) **Confidential Files – Generally**

Type of Case or Document	**Specific Records within a Case File**	**Confidential**	**Sealed**	**Persons Allowed to Access**	**Legal Authority** *All statutory citations refer to the West Virginia Code*
Proceedings to Regain Right to Possess Firearms (See Section 4.8.23)	Petition, certificate of mental health exam, treatment records, documents containing substance abuse or mental health information	Yes	No	Prosecuting attorney, asst. prosecuting attorney, petitioner, petitioner's counsel, persons authorized by petitioner, and by court order	§ 61-7A-5

Chart 4.9 - A

Juvenile Records Subject to Public Access When Case is Transferred to Criminal Jurisdiction

Age of Juvenile	**Reason for Transfer**	**Requirement of Prior Adjudication**	**Time at which Juvenile File is Subject to Public Access**	**Legal Authority** *All statutory citations refer to the West Virginia Code*
At least 14	Request by Juvenile	N/A	Upon entry of order of transfer to criminal jurisdiction	§ 49-5-103(d)(1) § 49-4-710(c)
At least 14	Juvenile charged with treason, murder, robbery with a deadly weapon, kidnapping, first degree arson, or first degree sexual assault	N/A	Upon entry of order of transfer to criminal jurisdiction	§ 49-5-103(d)(1) § 49-4-710(d)(1)
At least 14	Juvenile charged with a felony offense of violence against a person	Juvenile previously adjudicated for a felony offense of violence against a person	Upon entry of order of transfer to criminal jurisdiction	§ 49-5-103(d)(1) § 49-4-710(d)(2)
At least 14	Juvenile charged with a felony offense	Juvenile has two prior adjudications for felony offenses	Upon entry of order of transfer to criminal jurisdiction	§ 49-5-103(d)(1) § 49-4-710(d)(3)

Chart 4.9 - A (cont.) **Juvenile Records Subject to Public Access When Case is Transferred to Criminal Jurisdiction**

Age of Juvenile	**Reason for Transfer**	**Requirement of Prior Adjudication**	**Time at which Juvenile File is Subject to Public Access**[1]	**Legal Authority** *All statutory citations refer to the West Virginia Code*
Under 14	Juvenile charged with treason, murder, robbery with a deadly weapon, kidnapping, first degree arson, or first degree sexual assault	N/A	a. Time period for filing an appeal of the transfer order expires; or b. Appeal denied.	§ 49-5-103(d)(2) § 49-4-710(d)(1) and (e)
Under 14	Juvenile charged with a felony offense of violence against a person	Juvenile previously adjudicated for a felony offense of violence against a person	a. Time period for filing an appeal of the transfer order expires; or b. Appeal denied.	§ 49-5-103(d)(2) § 49-4-710(d)(2) and (f)
Under 14	Juvenile charged with a felony offense	Juvenile has two prior adjudications for felony offense	a. Time period for filing an appeal of the transfer order expires; or b. Appeal denied.	§ 49-5-103(d)(2) § 49-4-710(d)(3) and (f)
At least 14	Juvenile charged with a felony offense of violence against a person	N/A	a. Time period for filing an appeal of the transfer order expires; or b. Appeal denied.	§ 49-5-103(d)(2) § 49-4-710(g)(1)

[1] West Virginia Code § 49-5-103(d) states that the is juvenile file subject to public access when the time period for filing an appeal of the transfer order expires; an appeal is refused or an appeal is denied. On December 1, 2010, the West Virginia Rules of Appellate Procedure went into effect. Under these rules, all appeals are addressed by the Supreme Court. Before December 1, 2010, the West Virginia Supreme Court had the option of refusing to hear an appeal.

Chart 4.9 - A (cont.) **Juvenile Records Subject to Public Access When Case is Transferred to Criminal Jurisdiction**

Age of Juvenile	**Reason for Transfer**	**Requirement of Prior Adjudication**	**Time at which Juvenile File is Subject to Public Access**[2]	**Legal Authority** *All statutory citations refer to the West Virginia Code*
At least 14	Juvenile charged with a felony offense	Juvenile previously adjudicated for a felony offense	a. Time period for filing an appeal of the transfer order expires; or b. Appeal denied.	§ 49-5-103(d)(2) § 49-4-710(g)(2)
At least 14	Juvenile used a firearm or other deadly weapon while committing a felony	N/A	a. Time period for filing an appeal of the transfer order expires; or b. Appeal denied.	§ 49-5-103(d)(2) § 49-4-710(g)(3)
N/A	Juvenile charged with a felony offense of manufacturing, delivering or possessing with intent to deliver a narcotic drug	N/A	a. Time period for filing an appeal of the transfer order expires; or b. Appeal denied.	§ 49-5-103(d)(2) § 49-4-710(g)(4)
N/A	Juvenile charged with second degree arson involving setting fire to a church or public building	N/A	a. Time period for filing an appeal of the transfer order expires; or b. Appeal denied.	§ 49-5-103(d)(2) § 49-4-710(g)(5)

[2] West Virginia Code § 49-5-103(d) states that the juvenile file is subject to public access when the time period for filing an appeal of the transfer order expires; an appeal is refused or an appeal is denied. On December 1, 2010, the West Virginia Rules of Appellate Procedure went into effect. Under these rules, all appeals are addressed by the Supreme Court. Before December 1, 2010, the West Virginia Supreme Court had the option of refusing to hear an appeal.

Chart 4.9 – B

Juvenile Records Subject to Public Inspection
Even When Case is Not Transferred to Criminal Jurisdiction

Age of Juvenile	**Charged Offense**	**Requirement of Prior Adjudication**	**Time at which public access is allowed**	**Legal Authority** *All statutory citations refer to the West Virginia Code*
At least 14	Felony offense of violence against a person	N/A	a. Pending trial if juvenile is released on bond; or b. Upon adjudication for charged offense	§ 49-5-103(d)(3) § 49-4-710(g)(1)
At least 14	Felony offense	Previously adjudicated delinquent for a felony offense	a. Pending trial if juvenile is released on bond; or b. Upon adjudication for charged offense.	§ 49-5-103(d)(3) § 49-4-710(g)(2)
At least 14	Juvenile used or presented a firearm while committing a felony	N/A	a. Pending trial if juvenile is released on bond; or b. Upon adjudication of charged offense.	§ 49-5-103(d)(3) § 49-4-710(g)(3)

Chart 4.9 – B (cont.) **Juvenile Records Subject to Public Inspection Even When Case is Not Transferred to Criminal Jurisdiction**

Age of Juvenile	**Charged Offense**	**Requirement of Prior Adjudication**	**Time at which public access is allowed**	**Legal Authority** *All statutory citations refer to the West Virginia Code*
At least 14	Manufacturing, delivering or possession with the intent to deliver a narcotic drug	N/A	a. Pending trial if juvenile is released on bond; or b. Upon adjudication or charged offense.	§ 49-5-103(d)(3) § 49-4-710(g)(4)
At least 14	Second degree arson of a church or public building	N/A	a. Pending trial if juvenile is released on bond; or b. Upon adjudication of charged offense.	§ 49-5-103(d)(3) § 49-4-710(g)(5)
Under 14	Murder or Sexual Assault in the First Degree	N/A	a. Pending trial if juvenile is released on bond; or b. Upon adjudication of charged offense.	§ 49-5-103(d)(4)

Chapter 5

FEES AND COSTS

Note: Filing fees and court costs are set out in detail in the four Cost Schedules: Civil Case Cost Schedule, Family Court Cost Schedule, Criminal Case Cost Schedule and Family and Circuit Court Cost Schedule for Suggestions and Suggestee Executions at the end of this chapter. These charts show the specific amounts of fees and costs for different proceedings or services.

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As the fee officer of the circuit court, the clerk is statutorily authorized to collect various fees, fines and costs associated with cases, and is statutorily authorized to hold and disburse other types of payments and deposits. Accounting procedures for circuit clerk offices are prescribed and audited by the State Tax Department, not the Supreme Court. This chapter summarizes the types and amount of fees and costs collected, general disbursement procedures and general guidance concerning accounts.

West Virginia Code § 59-1-37 provides that all money collected for fees and costs, whether cash or check, is to be deposited on the first available business day unless the total amount is less than $500.

5.1 CREDIT OR CHECK CARDS

West Virginia Code § 7-5-2a allows all county officers, including circuit clerks, who collect fines, fees or taxes to accept credit or check cards as a form of payment. Although the statute does not specifically denote court costs or filing fees, the reference to "other moneys" indicates that court costs or filing fees may be paid by credit or check card. The clerk may collect a fee to cover the cost of the transaction that is equal to the amount charged by the card service provider. The clerk must, however, disclose this fee in advance, and the disclosure should be in written form signed by the payor.

To implement this service, the clerk must obtain three bids for the services and use the lowest qualified bid. If another county office has, however, already obtained this type of service, the clerk may use this service without going through the bidding process.

5.2 ASSESSMENT OF FILING FEES

5.2.1 Filing Fees for Circuit Court

West Virginia Code § 59-1-11 establishes that fees for services in the circuit court shall be paid in advance. It further establishes the amount of filing fees for different types of cases, such as general civil cases, summary proceedings, or medical malpractice cases. It is critical for personnel who receive and process initial pleadings to categorize a case correctly and collect the appropriate filing fee and any other costs, such as service costs if service is to be handled by the clerk's office.

5.2.1.1 Case-Initiating Filing Fees

Unless an exception applies, all new civil cases require the payment of a filing fee when a circuit court case is initiated, even if it relates to a case that began in a lower court or agency forum. (Exceptions to this general rule are discussed in Section 5.4). Therefore, filing fees are assessed when a party appeals a civil judgment from magistrate court or removes a civil case from magistrate court. (W. Va. Code §§ 50-5-12; 50-4-8; 59-1-11(a)(1)). Filing fees are also assessed in administrative agency appeals, but state agencies may be subject to a delayed payment procedure. (See Section 5.4.14).

In most instances, initial filing fees for civil cases are governed by West Virginia Code § 59-1-11(a)(1). There are some exceptions, however, where a specific statute or subsection establishes a different filing fee for a particular type of case. For example, West Virginia Code § 44A-2-1(c) sets the filing fee for adult guardianship and conservatorship cases at a different amount than that for a general civil case. Similarly, a more specific subsection of West Virginia Code § 59-1-11, subsection (a)(2) rather than the more general subsection (a)(1), sets a higher fee for medical professional liability actions. Under the rules of statutory construction, a more specific statute and a more specific subsection of a statute controls if there is a conflict between the specific statute or subsection and the more general statute or subsection. (See Syl. Pt. 2, *UMWA v. Kingdon*, 325 S.E.2d 120 (W. Va. 1984); Syl. Pt. 2, *State ex rel. Myers v. Wood*, 175 S.E.2d 637 (W. Va. 1970)). In those instances, the clerk should assess the filing fee set by the more specific statute or subsection. The Cost Schedules for Circuit and Family Court set forth most, if not all,

of the specific filing fees that are **not** governed by West Virginia Code § 59-1-11(a)(1).

In general, once a filing fee has been assessed and collected to initiate a case, it will not be reassessed at a later date during a case. For example, a filing fee is not assessed when a plaintiff files an amended complaint. Secondly, filing fees are not assessed when a civil case is removed or transferred from one circuit court to another. (W. Va. Code § 56-9-1). Also, filing fees are not assessed when a motion for a new trial is granted, a case is remanded from the Supreme Court, or a stay is lifted after the conclusion of federal bankruptcy proceedings. Further, filing fees are not assessed for contempt or enforcement proceedings commenced within an existing case. However, additional filing fees are required when defendants or intervenors file certain pleadings. (See Section 5.2.1.3).

Filing fees apply to civil, not criminal cases. Therefore, a filing fee is not assessed for felony or misdemeanor cases. A filing fee is also not assessed for criminal appeals from magistrate or municipal court. Further, filing fees are not assessed in criminal petitions, such as petitions for bond reduction, home confinement, and other alternative sentencing cases. Even though an expungement petition in cases in which a defendant is found not guilty or charges are dismissed (not in exchange for a guilty plea) is considered a civil petition, filing fees or other costs are not assessed or collected. (See W. Va. Code § 61-11-25(g); Section 11.6). In contrast, a filing fee is assessed and collected in expungement petitions when a person was found guilty of a misdemeanor but he or she was between the ages of 18 through 26 or if a person received a pardon. (W. Va. Code §§ 5-1-16a; 61-11-26). Similarly, a filing fee is assessed for a post-conviction habeas corpus case, unless a petitioner has an approved fee waiver. (See Section 11.10).

5.2.1.2 Filing Fees for Medial Professional Liability Cases

As noted above, West Virginia Code § 59-1-11(a)(2) sets a different fee for a medical professional liability case. In 2015, the definitions of "health care," "health care facility," and "health care provider" were expanded. (See W. Va. Code § 55-7B-2(e)-(g)). Consequently, more cases will be subject to the requirements and limitations of this statute. It is important for a clerk who receives case-initiating documents to identify

whether a case is subject to the filing fee established by West Virginia Code § 59-1-11(a)(2).

5.2.1.3 Filing Fees for Defendants or Intervenors

Filing fees are also assessed and collected in civil cases when a party files a counterclaim, cross claim, third-party complaint or motion to intervene in circuit court, but not in family court. (W. Va. Code § 59-1-11(a)(6)). Although a party may be assessed this fee if he or she files one or more of these pleadings, only one filing fee may be assessed against a party. For example, a party who files both a counterclaim and third-party complaint would only be assessed one filing fee. In addition, a situation could arise in which a defendant files a claim, such as a counterclaim, that incurs a filing fee. During the course of discovery, that same party may determine that another claim, such as a cross claim or third party complaint, should be filed. Under the language of West Virginia Code § 59-1-11(a)(6), an additional filing fee would not be assessed. The statute states expressly that only one fee may be imposed "on any one party in any one civil action." (W. Va. Code § 59-1-11(a)(6)). This limiting language brings up another question -- whether multiple fees are to be assessed when two or more defendants or intervenors jointly file the same pleading. For example, a married couple or a business entity and employee sued together could file a joint answer and counterclaim. On one hand, the above-quoted "per party" limitation suggests that each defendant or intervenor joining a pleading may be assessed the filing fee. Adding to the ambiguity, however, the subsection states that the fee is "[f]or filing any pleading that includes a counterclaim, cross claim, third-party complaint or motion to intervene." This suggests only one fee per pleading, no matter how many parties are joined in it. One possible solution to this ambiguity is to apply, by analogy, the multiple plaintiff fee provision of Rule 3a of the Rules of Civil Procedure. (See Section 5.2.3). If the defendants or intervenors are related, as defined by that rule, then only one filing fee would be assessed for the joint pleading. Until the issue is resolved by legislative amendment, court rule, or case law, this may be the best resolution since it treats all parties the same. However, when the issue arises, the chief circuit judge should be consulted to provide direction since they have authority to enter administrative orders governing when separate filing fees are required when there is no statewide rule governing the matter. Syl. Pt. 3, *Cable v. Hatfield*, 505 S.E.2d 701 (W. Va. 1998). As also indicated in *Cable*, when a pleading and filing

fee are presented, the clerk should accept the same for filing and then present the presiding judge or chief judge with any question as to whether multiple fees should be assessed.

This additional filing fee for defendants or intervenors applies to all civil cases but does not apply to family court cases. For example, a defendant in a divorce case who files a counterclaim is not assessed a filing fee. In cases where circuit and family courts have concurrent jurisdiction, the court where a case is pending must be kept in mind. For instance, if a grandmother files a motion to intervene in a minor guardianship case pending in family court, no filing fee is assessed. But if the case is pending in circuit court (whether originally filed there or removed there) she would be assessed the filing fee. It should also be noted that a party who files a counterclaim, cross claim, third party complaint or motion to intervene in a medical professional liability case is assessed the same filing fee for one of these pleadings as is assessed for a general civil case, **not** the filing fee that a plaintiff must pay to initiate a medical professional liability action. (W. Va. Code § 59-1-11(a)(2)).

Another issue concerning the assessment of filing fees for defendants or intervenors arises when a more specific statute governs the filing fee for a particular type of case instead of West Virginia Code § 59-1-11(a). Under the rules of statutory construction, a more specific statute controls over a more general statute. See Syl. Pt. 2, *UMWA v. Kingdon*, 325 S.E.2d 120 (W. Va. 1984); Syl. Pt. 2, *State ex rel. Myers v. Wood*, 175 S.E.2d 637 (W. Va. 1970). For example, West Virginia Code § 44A-2-1(c) sets the filing fee for adult guardianships or conservatorships at a rate different than the filing fee for general civil cases. When this situation arises, the filing fee for a counterclaim, cross claim, third party complaint or motion to intervene under West Virginia Code § 59-1-11(a)(6) would not be assessed since it is not the applicable statute that sets a filing fee for the pleading.

5.2.2 Filing Fees for Family Court

As with circuit court filing fees, West Virginia Code § 59-1-11 establishes that fees for family court cases shall be paid in advance unless a person has an approved fee waiver. It further establishes the amount of filing fees for **specific** types of family court cases. The first type of family court case involves divorce, separate maintenance or annulment. The second type of family court case includes

miscellaneous family court cases, such as paternity or establishment of a parenting plan for unmarried parents. A litigant who files this type of case is subject to the same filing fee as a general civil case in circuit court. The third type of family court case consists of petitions for modification of final or temporary orders involving parenting plans, child support or spousal support. The fourth type of family court case includes expedited petitions for modification of child support. Unlike circuit court, filing fees are not assessed when a family court defendant or respondent files a counterclaim or when a new party files a motion to intervene in a family court case. (W. Va. Code § 59-1-11(a)(6)). In addition, a family court litigant would not be assessed a filing fee for a cross claim or third party complaint, but it is not likely that these pleadings would be filed in a family court case. Further, it should be noted that defendant/respondent filing fees are not assessed in enforcement proceedings that involve parenting plans, child support or spousal support.

5.2.3 Filing Fees for Multiple Plaintiffs

Rule 3(a) of the Rules of Civil Procedure provides the following in relation to the filing of a complaint involving multiple plaintiffs:

> For a complaint naming more than one individual plaintiff not related by marriage, a derivative or fiduciary relationship, each plaintiff shall be assigned a separate civil action number and be docketed as a separate civil action and be charged a separate fee by the clerk of the circuit court.

The terms "related by marriage," "derivative relationship," and "fiduciary relationship" are not defined for the purposes of this rule. Longstanding rules of statutory construction, however, can be similarly applied to court-promulgated rules. The rule of statutory construction most appropriate to Rule 3(a) states: "In the absence of any definition of the intended meaning of words or terms used in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used." Syl. Pt. 4, *Blue Stone Paving, Inc. v. Tax Commissioner*, 591 S.E.2d 242 (W. Va. 2003). In other words, these terms should be given their commonly defined meaning in the context of the apparent intent of Rule 3(a) to permit only legitimately "related" multiple plaintiffs to file under a single civil action number and pay a single filing fee.

"Related by marriage" is not literally confined to husband and wife. This term's commonly accepted meaning is much broader -- encompassing the blood relatives of each spouse which, by reason of the marriage, have a connection with the blood relatives of the other spouse. As summarized in one case: "'Related by marriage' is synonymous with 'related by affinity.' (See, e.g., Merriam-Webster's Collegiate Dictionary 1050 (11th ed. 2003) ('relative . . . a person connected with another by blood or affinity')). There are degrees of affinity. 'Direct affinity' is '[t]he relationship of a spouse to the other spouse's blood relatives,' such as 'a wife and her husband's brother.' Black's Law Dictionary 63 (8th ed. 2004). 'Collateral affinity' is '[t]he relationship of a spouse's relatives to the other spouse's blood relatives,' such as a 'wife's brother and her husband's sister.' (Black's Law Dictionary 63 (8th ed. 2004))." *Benjamin v. McKinnon*, 379 Ill. App. 3d 1013, 887 N.E.2d 14 (2008). The term "related by marriage" is, therefore, broad in its application.

The term "derivative relationship" is somewhat harder to define, but its intended meaning based upon the purpose and context of Rule 3(a) can be found based upon the commonly accepted definition: "Derivative: Coming from another; taken from something preceding; secondary; that which has not its origin in itself, but owes its existence to something foregoing. Anything obtained or deduced from another." (Black's Law Dictionary 530 (4th ed. 1968)). A "derivative relationship" could be, for example, between an unincorporated homeowners association and its members. If the individual members joined together in a complaint to enforce some common right of the association, this "derivative relationship" would permit those members to file under one civil action number and one filing fee. Another example would be a partition suit filed by a number of owners of a tract of commonly held property. Their "derivative relationship" arises from their standing as owners of the undivided tract of land. But "derivative" is not to be interpreted too literally to encompass distinct claims of individuals even if they arise from a common source. For example, if 100 employees each have asbestos-injury claims from working for the same employer, this does not involve a "derivative relationship." Each employee has distinct injuries and claims and even if they joined in a single complaint each would need a separate civil action number and filing fee.

The circumstances of a "fiduciary relationship" are more readily identified. Some relationships of trust and confidence may be considered as informal fiduciary relationships. But within the context of Rule 3(a), there is no indication that this term encompasses anything other than formal fiduciary relationships. The formal relationship is of a legally established nature. "A 'fiduciary

relationship' is a recognized legal relationship such as guardian and ward, trustee and beneficiary, principal and agent, or attorney and client." *Persson v. Smart Inventions, Inc.*, 125 Cal. App. 4th 1141, 23 Cal. Rptr. 3d 335 (2005). A common occurrence of multiple plaintiffs involving this type of relationship is when a trustee appointed under a trust agreement files an action along with beneficiaries of the trust to enforce some right arising from the trust. There would be only one civil action number and one filing fee in this circumstance.

Although Rule 3(a) authorizes the collection of multiple filing fees and the assignment of different civil action numbers unless the plaintiffs fall into one of the "related" categories discussed above, the West Virginia Supreme Court has established that this provision is "an administrative and record keeping provision." Syl. Pt. 3, in part, *State ex rel. J.C. v. Mazzone*, 759 S.E.2d 200 (W. Va. 2014). The purpose for the provision is to assess and track filing fees and to track documents associated with individual plaintiffs. The collection of multiple filing fees from plaintiffs and assignment of separate civil action numbers does not, however, indicate that the matters would be considered separate cases or separate civil actions.

Sometimes a clerk will be presented complaints involving multiple plaintiffs where it is unclear whether a relationship covered by Rule 3(a) exists. If the filer of the complaint presents it as qualifying for a single filing fee, the clerk is required to accept the complaint for filing if it is accompanied by a completed civil case information sheet, and the filing fee for one plaintiff is tendered. Syl. Pts. 4 & 5, *Cable v. Hatfield*, 505 S.E.2d 701 (W. Va. 1998). Once the complaint is filed, the clerk should present it to the assigned judge to determine whether additional filing fees should be assessed under Rule 3(a). Any time there is a question regarding the application of Rule 3(a), the assigned judge, not the clerk, has the judicial authority to review a complaint and determine whether any additional filing fees should be assessed.

5.2.4 Filing Fees for Defendants in Multiple Plaintiffs Cases

As discussed above, a defendant or an intervenor in a civil case in circuit court is assessed a filing fee when a counterclaim, cross claim, third party complaint or motion to intervene is filed. (W. Va. Code § 59-1-11(a)(6)). However, only one filing fee may be assessed against "any one party in any one civil action" for the filing of those specific pleadings. *Id.*

The language of subsection (a)(6) of West Virginia Code § 59-1-11 and the Supreme Court's decision in *State ex rel. J.C. v. Mazzone*, 759 S.E.2d 200 (W. Va. 2014), provide guidance concerning the

assessment of filing fees for defendants or intervenors when the case involves multiple plaintiffs. Under the language of subsection (a)(6) of West Virginia Code § 59-1-11, only one fee may be assessed and collected from "any **one party** in **one civil action**." (emphasis added). In *J.C.*, the Supreme Court held that the clerk's assignment of separate case numbers and assessment of additional filing fees under Rule 3(a) did not convert the two cases in that appeal involving multiple plaintiffs (19 families in one action and six plaintiff families in the other) into twenty-five civil actions or cases. Rather, the Supreme Court found that the multiple plaintiffs were properly joined in each of the originally filed two separate civil cases. The Supreme Court's conclusion was principally based on Rule 20(a) of the West Virginia Rules of Civil Procedure, a provision governing the permissive joinder of plaintiffs. The assignment of separate case numbers and the assessment of additional filing fees under Rule 3(a) as "an administrative fee and record keeping" measure in a case involving multiple plaintiffs does not, therefore, indicate that more than one civil action is pending. (*State ex rel. J.C. v. Mazzone, supra.*).

When a party files a counterclaim, cross claim, third party complaint or motion to intervene, the clerk assesses the filing fee based upon whether a matter involves one civil action. This is based on the specific language of subsection (a)(6) of West Virginia Code § 59-1-11. If one civil action is pending and a defendant or intervenor files one or more of the pleadings that result in a filing fee, he or she is assessed one filing fee without respect to whether multiple plaintiffs have incurred multiple filing fees for the initiation of the case. Filing fees for multiple plaintiffs is based upon the specific language of Rule 3a. If the clerk has any questions as to whether more than one case is pending, he or she should consult with the presiding judge.

If two or more defendants or intervenors are jointly filing a pleading, that presents a different circumstance (regardless whether there are multiple plaintiffs). See Section 5.2.1.3 for this issue.

5.2.5 Plaintiff Filing Fees for Cases Involving Multiple Defendants

Questions have arisen with regard to cases involving a single plaintiff against multiple defendants, typically in cases involving a single creditor against multiple debtor-defendants. The ultimate question is whether the multiple defendants should have been joined in a single case. One example involved a collection agency that purchased numerous delinquent credit card accounts and filed one civil case against many individual debtors. Presumably, such a plaintiff files a complaint in this manner to avoid multiple filing fees and reduce the

cost of debt collection. Whatever the motive, this type of filing presents potential administrative difficulties, such as tracking and enforcing judgments against individual defendants under a single case number. The conclusion that such a case has been improperly filed draws analogous support from *State ex rel. Frieson v. Isner*, 285 S.E.2d 641 (W. Va. 1981) which held that the joinder of multiple accounts in one complaint against a single debtor was improper.

The question of whether multiple defendants have been properly joined is a question of law for the court. (Rules 19, 20, 21, and 23, RCP). Therefore, the clerk should accept a complaint for filing that involves multiple defendants, provided that the plaintiff has paid the required filing fee and has submitted a completed CCIS. See Syl. Pts. 4 and 5, *Cable v. Hatfield*, 505 S.E.2d 701 (W. Va. 1998). Once the complaint is filed, the clerk should present it to the assigned judge. The judge has the authority to enter an order that dismisses or severs defendants who are not properly joined under the West Virginia Rules of Civil Procedure. (Rule 21, RCP). Such an order may also address whether additional filing fees should be assessed (if cases are severed) and other administrative matters.

5.2.6 Examples for the Assessment of Filing Fees

The following examples illustrate how clerks should assess filing fees for civil and family court cases under West Virginia Code § 59-1-11(a). For purposes of these examples, it is assumed that the filer does not qualify for a fee waiver.

A. A mother who is not married to the father of her minor child files a petition to establish a parenting plan and child support. What is the amount of the filing fee?

$200 because miscellaneous family court cases are assessed the same filing fee as general civil cases. (W. Va. Code § 59-1-11(a)(1)).

B. A husband files a petition for divorce based upon the grounds of irreconcilable differences and also seeks the establishment of a parenting plan. What is the amount of the filing fee?

$135, because this family court case involves a divorce. (W. Va. Code § 59-1-11(a)(3)).

C. The wife of the man in the immediately preceding example files a counterclaim to the divorce petition and alleges that she was subject to cruel and inhuman treatment. What is the amount of the filing fee for the counterclaim?

No filing fees are assessed because parties to family court cases are not assessed filing fees for counterclaims or motions to intervene. (W. Va. Code § 59-1-11(a)(6)).

D. A grandmother files a motion to intervene in a minor guardianship case pending in family court. What is the amount of her filing fee?

No filing fee is assessed for motions to intervene in family court. (W. Va. Code § 59-1-11(a)(6)).

E. A grandmother files a motion to intervene in a minor guardianship cases that was filed in or removed to circuit court. What is the amount of the filing fee?

$200. Parties who file motions to intervene in circuit court cases are assessed a $200 filing fee.

F. A defendant in a medical malpractice case files an answer, a counterclaim, a cross claim and a third party complaint. What is the amount of the filing fee?

$200. Even though medical malpractice plaintiffs are assessed a $400 filing fee, defendants or intervenors in medical malpractice cases are subject to the same filing fee for these specific pleadings as parties in other civil cases. (W. Va. Code § 59-1-11(a)(6)). Additionally, a party who files more than one claim that triggers a filing fee, such as both a counterclaim and a cross claim, is only assessed $200. (W. Va. Code § 59-1-11(a)(6)).

G. Twenty plaintiffs, none of whom meet any of the Rule 3(a) "related" tests, join in a complaint, pay 20 filing fees and are assigned 20 case numbers. One of the defendants files a counterclaim against 12 of the plaintiffs. What is the amount of the filing fee for the counterclaim?

$200. Under *State ex rel. J.C. v. Mazzone*, this matter would be considered one case or one civil action, even though the plaintiffs were assessed individual filing fees and assigned separate case numbers. According to West Virginia Code § 59-1-11(a)(6), only one filing fee for the specified pleadings filed by a defendant or intervenor may be assessed in one civil action.

H. A family member of the alleged protected person files a motion to intervene in an adult guardianship case. What is the amount of the filing fee for the motion to intervene?

No filing fee would be assessed because filing fees for adult guardianship cases are governed by Chapter 44A of the West Virginia Code, not West Virginia Code § 59-1-11(a)(1). Rather, West Virginia Code § 44A-2-1(c) sets case-initiating filing fees for guardianship/conservatorship cases, and no other provision of Chapter 44A sets a filing fee for a motion to intervene.

I. When a party in a civil case files a counterclaim, cross claim, third party complaint or motion to intervene, what fund will ultimately receive the filing fee or portions of the filing fee?

Unlike the plaintiff's filing fee in a civil case that is apportioned among various funds, the entire amount of the filing fee for a defendant's counterclaim, cross claim, or third party complaint or a party's motion to intervene is transmitted to the Fund for Civil Legal Services for Low Income Persons (LSF).

5.3 PROCEDURES FOR COLLECTION OF FILING FEES

The clerk has the following duties that are associated with the filing fees collected at the initiation of a case or when a party to a circuit court case (not family court case) files a counterclaim, cross claim, third-party complaint or motion to intervene.

a. The clerk must identify the type of filing fee that is required for specific types of documents, such as a civil complaint or cross claim.

b. The clerk must ensure that the amount remitted is correct. If an underpayment is received, the clerk may accept the case, inform the party of the amount due, and hold the documents for the balance. The clerk may also return the filing fee and documents and inform the party of the amount due. If an overpayment is received, the clerk may accept the case for filing and return the balance, or the clerk may return the payment and request the submission of the correct amount.

c. A judge may accept documents for filing and should note the date of filing on the document. (Rule 5(e), RCP). If a judge accepts a complaint or petition for filing, the clerk should file the case as of the date noted by the judge, even if a filing fee has not been collected. (See Section 3.1). When this situation arises, the clerk may collect the filing fee after the actual filing of the case.

d. The clerk must maintain adequate records of the receipt of all fees including filing fees. The receipt of the fee should be noted

in some manner in the individual case file. The clerk must also maintain a separate receipt for auditing purposes.

e. The clerk must provide a copy of the receipt to the person who pays the fee.

f. The clerk must endorse each check and deposit all checks daily, unless the total amount collected is less than $500. (W. Va. Code § 59-1-37).

5.4 SPECIAL PROCEDURES FOR THE ASSESSMENT OF FILING FEES

Although filing fees are typically assessed at the initiation of a civil or family court case, there are specific types of procedures or cases that are exceptions to this general rule. Each exception is set forth below.

5.4.1 Fee Waivers

If a party meets the financial guidelines established by the West Virginia Supreme Court, a party is not required to pay fees, costs or security. (W. Va. Code § 59-2-1; see Section 5.5). Therefore, a person with an approved fee waiver is not required to pay a filing fee. However, the clerk should generate a receipt for accounting purposes.

5.4.2 Wage Payment and Collection

The Commissioner of Labor is not required to pay a filing fee when he or she initiates a case to collect wages. These cases may involve an employer's failure to pay wages or a failure to pay minimum wage. (W. Va. Code §§ 21-5-12; 21-5C-8).

5.4.3 Suits Involving Delinquent Worker's Compensation Premiums

The Revenue Recovery Unit of the Worker's Compensation Division may file cases against employers who have not paid worker's compensation premiums. (W. Va. Code § 23-2-5a(a)). When this type of case is submitted to the clerk, he or she should accept the case for filing and should invoice Worker's Compensation for filing fees and other costs. If it is more efficient, the clerk may choose to consolidate invoices for multiple cases and bill the Revenue Recovery Unit on a monthly basis.

5.4.4 Delinquent Taxes

A sheriff is not required to pay fees or costs or post a bond when initiating and prosecuting a civil suit for delinquent property taxes. (W. Va. Code § 11A-2-2(b)). If a sheriff recovers fees and costs from the opposing party, the sheriff must remit these costs to the circuit clerk.

5.4.5 Cases Filed by a Sheriff

When a sheriff files a suit in his or her official capacity, he or she is not required to pay filing fees or other costs and is not required to post bond or security. (W. Va. Code § 7-5-24). If a sheriff, however, recovers fees or cost from the opposing party, the sheriff must remit these costs to the circuit clerk.

5.4.6 Mental Health Cases

No filing fee is collected in mental health cases. (W. Va. Code §§ 27-5-2; 59-1-11).

5.4.7 Waiver of Pre-Abortion Notification

No filing fee is to be assessed on petitions to waive pre-abortion notification of parents. (W. Va. Code § 16-2F-4(i); Section 11.4).

5.4.8 UIFSA Cases

A petitioner in a case involving the Uniform Interstate Family Support Act (UIFSA) may not be assessed a filing fee. (W. Va. Code § 48-16-313(a)). However, a child support obligor may be required to pay the filing fee if he or she does not prevail.

5.4.9 UCCJEA Cases

A petitioner in a case involving the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) may not be assessed a filing fee. However, a respondent who does not prevail may be assessed the filing fee as a cost. (W. Va. Code § 48-20-317).

5.4.10 Registry for Support Orders From Other States or Countries

A filing fee is not assessed when a party registers a foreign child support or custody order. (W. Va. Code § 48-16-313).

5.4.11 Fees Incurred by BCSE

The clerk invoices the Bureau for Child Support Enforcement (BCSE) for filing fees and other costs on a monthly basis. (W. Va. Code § 48-18-128(a); see Section 5.8). Therefore, a filing fee would not be collected when BCSE files a case. Rather, it is included on the monthly invoice.

5.4.12 Domestic Violence Protective Order Proceedings

Fees and cost in domestic violence protective order proceedings are governed by West Virginia Code § 48-27-308 and Rule 4 of the Rules of Domestic Violence Civil Proceedings. Therefore, fees and costs in these cases are not subject to the procedures for other types of cases.

In domestic violence protective order proceedings, fees and other costs, such as charges for service, are not assessed until the case is final. (W. Va. Code § 48-27-308; W. Va. Code § 56-3-33a(c)(2)(B)). (See detailed discussion in Sections 5.11.6 and 12.20.2). Therefore, fees are assessed by the circuit clerk either at the conclusion of family court proceedings, provided no appeal to circuit court is filed, or at the conclusion of circuit court proceedings, if an appeal is filed. (Rule 4, RDVCP). When a party appeals a denial of an emergency protective order by a magistrate to family court, fees and costs may be assessed at the conclusion of the family court proceedings.

5.4.13 Personal Safety Order Cases

Fees and costs in personal safety order cases are governed by West Virginia Code § 53-8-13, and they are **not** subject to the typical procedures for the assessment and collection for fees in civil cases, including the payment of filing fees when a petition is filed. Personal safety petitions are filed initially in magistrate court and only appear in circuit court when an aggrieved party files an appeal. (W. Va. Code §§ 53-8-4 and -9). Filing fees and other costs, such as service costs, are not assessed or collected until the case has been finalized, whether it becomes final in magistrate or in circuit court. (W. Va. Code § 53-8-13(f); W. Va. Code § 56-3-33a(c)(2)(B)). For a complete discussion for the assessment of fees and costs in these cases, see Section 5.10.4.6.

5.4.14 Filing Fees for State Agencies

When a state agency initiates an administrative agency appeal or other type of civil case, the state agency is liable for a filing fee. (W.

Va. Code § 59-1-15). To collect the filing fee, the clerk should provide the agency with an invoice to present to the Auditor. In turn, the Auditor will forward the payment to the circuit clerk.

Although the filing fee will not be tendered when a state agency files a civil case, it is best practice for the clerk to file the case when case-initiating documents are presented, not when the filing fee from the auditor is received. (*See W. Va. DHHR v. Hess*, 432 S.E.2d 27 (W. Va. 1993)). Under *Hess*, the clerk has a duty to accept a case for filing when documents are presented if the statute of limitations could expire before the fee is received. To ensure compliance with *Hess*, the clerk should simply accept a case for filing when the state agency presents the documents for filing.

5.4.15 Modification of Family Court Orders

West Virginia Code § 59-1-11 sets forth the fee for the modification of both **temporary** and **permanent** orders involving child custody, child visitation, child support or spousal support. Additionally, West Virginia Code § 59-1-11 establishes a fee for the **expedited modification** of a child support order. These filing fees are collected when the modification petition is filed. When a party seeks modification of a temporary order, the clerk must still assess and collect the filing fee for a modification petition, even though the case is still ongoing and the original filing fee has been paid.

5.4.16 Expungement Petition: Not Guilty, Charges Dismissed

A person who is found not guilty or a person against whom criminal charges were dismissed (not in exchange for a guilty plea) may file a civil petition for expungement of the records. (W. Va. Code § 61-11-25). In these cases, no filing fees or costs are assessed or collected. (W. Va. Code § 61-11-25(g)). However, filing fees are assessed and collected in cases in which a person seeks expungement after a pardon and when a person seeks expungement of misdemeanors that were committed when he or she was between the ages of 18 and 26. (W. Va. Code §§ 5-1-16a; 61-11-26).

5.4.17 Prisoner Litigation

An inmate who files a civil case that concerns the conditions of his or her confinement is liable for a filing fee subject to the delayed payment procedure set forth below. (W. Va. Code § 25-1A-3(a)). This procedure does not, however, apply to post-conviction habeas corpus cases or appeals of convictions. (W. Va. Code § 25-1A-1(a)). It also does not apply to cases that allege past, current or imminent

physical or sexual abuse. (W. Va. Code § 25-1A-2; Supreme Court Memorandum, 00-11).

When an inmate files a civil case concerning the conditions of confinement, the clerk must notify the warden or other designated representative of a correctional facility. In turn, the facility will deduct a portion of the inmate's account for the payment of a filing fee. (W. Va. Code § 25-1A-3(b)). The facility forwards these funds to the circuit clerk on a biannual basis. (W. Va. Code § 25-1A-3(c)).

5.5 WAIVER OF FEES, COSTS OR SECURITY

A person who is financially unable to pay court costs associated with a **civil** or **family court** case may be approved to proceed without prepayment. (W. Va. Code § 59-2-1(a)). In addition to fee waivers in civil cases, the fee waiver process also applies to sex offenders who are required to undergo polygraphs or to be subject to electronic monitoring. (W. Va. Code §§ 62-11D-2(c) and -3(c); Financial Affidavit and Application). An offender may be subject to polygraph examinations or electronic monitoring while serving a period of probation, parole or supervised release.

To apply for a fee waiver, the person must file a form application and affidavit that lists specific financial information. The form elicits the individual applicant's annual income from all sources and also seeks information about dependents whether they are "household" members or not. These revisions indicate that an individual's income and number of dependents determines eligibility for a fee waiver, as opposed to the total income of the household.

To be approved for a fee waiver, a person must meet the financial guidelines established by the West Virginia Supreme Court. (Supreme Court Administrative Order, 2/10/15, Appendix A). According to this order, the financial guidelines are to be updated at the beginning of every year by the Supreme Court Administrative Office based upon 150 percent of the federal poverty guidelines (which are also revised each year). The guidelines are available at the website for the U.S. Department of Health and Human Services (http://www.hhs.gov). An administrative order entered on February 10, 2015 has set the financial guidelines from the date of the entry of the order until an order for 2016 is entered. (Supreme Court Administrative Order, 2/10/15, Appendix A).

Only a natural person is eligible for a fee waiver; corporations, associations and government agencies are not. Additionally, a fee waiver is distinct from the procedure for the appointment of counsel in criminal cases.

A fee waiver only applies to the party who received approval for it. It does not apply to other parties to a case unless they have individually qualified for

a fee waiver. Therefore, fees and costs may be assessed and collected from a party who is not entitled to a fee waiver, even though another party would not be assessed fees and costs. For example, the clerk does not collect a filing fee from a plaintiff who is entitled to a fee waiver. However, the clerk may later assess and collect this cost and others from a defendant, provided that the defendant was not the prevailing party and was not entitled to a fee waiver.

5.5.1 Fees, Costs or Security

A person who receives approval for a fee waiver may proceed without the payment of court costs, such as a filing fee or fees for service of process. The West Virginia Supreme Court has held that a litigant with an approved fee waiver may not be required to post an appeal bond, even if one would ordinarily be required. (*State ex rel. Bay v. Marshall*, 714 S.E.2d 331 (W. Va. 2011)). A person with an approved fee waiver is also entitled to receive copies of forms without charge, such as a *pro se* divorce packet or guardianship or conservatorship forms. Fees for parent education are also waived. A fee waiver does not, however, entitle a person to the appointment of free legal counsel for civil or family court cases.

5.5.2 Approved Forms

The Chief Justice has adopted a financial affidavit and application that must be completed when a person seeks a waiver of fees and costs. (Rule 77(e)(1), RCP). The Chief Justice is responsible for periodically reviewing and updating financial guidelines for determining the eligibility of persons for a fee waiver. (W. Va. Code § 59-2-1(b); Supreme Court Administrative Order, 2/10/15, Appendix A).

The application requires a person to provide specified financial information to the court and also requires a person to submit his or her most recent salary stub, W-2 form, or other documentation to verify income. The application should not be processed without the required financial documentation. The information requested in the application form is expressly required by West Virginia Code § 59-2-1(c).

While the form uses the simplest language possible consistent with the statute, it is inevitable that some applicants may need assistance to read, understand, or complete the form. Although the clerk may provide assistance, the clerk may not provide any legal advice. The clerk should also note that the applicant must swear that the information is truthful. The clerk must provide a copy of the completed affidavit to the applicant without cost at any time.

5.5.3 Filing of Affidavit

A person who seeks a waiver of costs is required to execute the affidavit portion of the application before the circuit clerk. (Rule 77(e), RCP). However, attorneys, especially legal aid attorneys, will often forward completed, notarized affidavits to the clerk so that the applicant does not have to appear at the courthouse. This practice is acceptable because the essential requirement of Rule 77(e) is the filing of a notarized affidavit, not the execution of an affidavit before the clerk.

Although an attorney may file a client's notarized affidavit, an attorney may not sign an affidavit on behalf of a party in a case. (See *Turk v. McKinney*, 52 S.E.2d 388 (W. Va. 1949) (disapproving practice of attorney giving testimony on behalf of client, by affidavit or otherwise)). It should be noted that a guardian or next friend of a minor may execute an affidavit on the minor's behalf. If the affiant is not present and the clerk denies an application, the clerk must notify the affiant as soon as possible so that the affiant can pay the required fees or request review from the court.

A person who has received approval for a fee waiver must update an application when his or her financial circumstances change or when the court requires the person to do so.

5.5.4 Review of Application by the Clerk

When an application for a fee waiver is filed, the circuit clerk has a duty to determine initially whether an applicant is eligible for a fee waiver. (Syl. Pt. 3, *State ex rel. DeBlasio v. Jackson*, 707 S.E.2d 33 (W. Va. 2011)). Applying sections A and C of the Financial Guidelines, the clerk must make the determination based upon the information in the affidavit and the supporting documents and must assume that the information is true. The clerk may not rely upon personal knowledge of the affiant or may not request additional information. (Syl. Pt. 2, *Mars v. Luff*, 186 S.E.2d 768 (W. Va. 1972); Syl. Pt. 2, *DeBlasio*, 707 S.E.2d 33). If a clerk believes that an applicant has knowingly provided incomplete or false financial information, the clerk should inform the presiding judge or prosecutor. If the information provided to the clerk is insufficient to make a determination, the clerk should deny the application. (See Syl. Pt. 2, *DeBlasio*, 707 S.E.2d 33).

If an applicant qualifies for a waiver of fees, the clerk processes the case as if any required fees have been paid. If the assigned judge later concludes that the affiant does not qualify for a fee waiver, he or

she may order the party to pay any past or future costs or may order any other appropriate remedy.

When the clerk denies an application, the clerk must notify the applicant immediately and inform him or her that the requested service or processing will not be performed until payment is made. When informing an applicant of the denial, the clerk should also inform the person that he or she may request that the circuit court review the denial. The Supreme Court has adopted a form motion for seeking this relief. If an applicant moves for review, the clerk must forward a copy of the motion and affidavit immediately to the judge because the judge is required to address the denial within seven days. (Rule 77(e)(2), RCP).

5.5.5 Maintenance of Fee Waiver Applications

The clerk may maintain the applications in the original case file or in a central file for all waiver applications. However, the applications must be readily available, especially those that have been denied, because they are subject to review by the presiding judge. Fee waiver applications in divorce and domestic violence cases are confidential and may not be disclosed to another party to the case. (Rule 77(e), RCP; Rule 5, RDVCP). These applications should be kept in a separate file not accessible by the parties.

5.5.6 Review by the Court

If the clerk denies an application, a party may move the court for review of the denial. When reviewing the application, the court should apply Sections B and C of the Financial Guidelines. In determining whether an application should be approved, the judge must consider the principle that a citizen has a right of access to the courts.

West Virginia Code § 59-2-1(e) prohibits involvement of any party, except the applicant, in any proceeding involving a fee waiver. Therefore, any hearing or other proceeding involving court review of a fee waiver application is *ex parte*. When a party seeks review from the court, the court has the following options: a) the court may review the application and supporting documentation provided to the clerk, and approve or deny the waiver; b) the court may instruct the person to provide additional information; or c) the court may schedule an *ex parte* hearing. The court must take any of these actions within seven days of receipt of the affidavit. (Rule 77(e)(2), RCP).

5.6 PUBLICATION COSTS -- APPROVED FEE WAIVERS

If a person has received approval for a waiver of fees pursuant to West Virginia Code § 59-2-1, publication costs for legal advertisements are paid by the Administrative Office. (*Johnson v. Stevens*, 265 S.E.2d 764 (W. Va. 1980)). When a newspaper publishes a legal notice on behalf of a party with an approved fee waiver, it must file an affidavit of publication with the circuit clerk. (W. Va. Code § 59-3-4). Once the affidavit of publication is filed, the clerk must provide the judge with an original invoice from the newspaper. If the invoice is correct, the judge may sign a payment order. Once the order is entered, the clerk should direct a certified copy of the order and the invoice to the Administrative Office. Upon the proper submission of these documents, the Administrative Office will issue a check to the newspaper designated in the order.

5.7 COURT-APPOINTED COUNSEL

West Virginia Code § 29-21-16(a) requires Public Defender Services to adopt a financial affidavit to be completed by persons who request the appointment of counsel. The Administrative Office provides this form to circuit clerks for distribution.

When a lawyer is appointed to a defendant, the clerk should provide the lawyer with a copy of the case file at no charge. This requirement applies in both felony and misdemeanor cases. If a copy of the file is provided to attorney, the clerk has no obligation to provide an additional, free copy of the file to the defendant.

5.8 BCSE INVOICING

Circuit clerks must bill the Bureau of Child Support Enforcement (BCSE) for all fees and costs on a monthly basis. (W. Va. Code § 48-18-128(a)). This provision covers filing fees, fees for issuing writs related to the enforcement of judgments, the cost of copies, the cost of duplicate recordings, and any other fee imposed by the court.

Each month, the clerk must prepare an original invoice and three copies and submit them to the local office of the BCSE for processing. A clerk should maintain a copy of the invoices. Although an invoice will usually reflect charges for numerous cases, only one invoice should be submitted for all services performed. The invoice should be on the clerk's office letterhead and be identified with a nine digit number composed of the County Federal FIPS Code Number followed by the date the invoice was submitted to the local BCSE office. A list of FIPS numbers and a sample invoice are included in Appendix B. Please note on the sample how the FIPS number of 077 and

the date of 11/17/05 are combined as one identifying number for the invoice of 077111705.

Finance and Administration will include the invoice number on the payment check so that it can be matched with the original invoice. The local BCSE will not return a copy of the invoice with the check to your office.

Local practice may vary with regard to maintaining BCSE receipts. Upon receipt of the check, the clerk may: a) place a separate receipt in each case file; b) post a copy of one master receipt to each case file; or c) maintain a separate file which documents all BCSE invoicing and payment. Whether receipts are posted to each case file or not, the clerk must note the receipt of payment on the docket sheet for each case.

5.9 SHERIFF FEES

West Virginia Code § 59-1-14 establishes the maximum amount that a county commission may charge for certain services of the sheriff. These services include the service of documents, such as an order, notice or summons. These services also include fees for levying an attachment on real estate or levying any other attachment. Further, these services include serving an attachment or other process in which the body is taken (*i.e* an arrest).

When this fee is collected, the clerk forwards $2.00 of the fee to the Deputy Sheriff Retirement Fund. The remainder of the fee is disbursed to the county general fund. (W. Va. Code § 59-1-14(d)).

It is fairly common for a party to request service of documents by the sheriff in another county. For example, a party may request a subpoena from the Preston County Circuit Clerk that must be served by the Monongalia County Sheriff because the person subject to the subpoena resides in Monongalia County. In this situation, the sheriff's department that actually performs the service will receive the fee, including the $2.00 that is directed to the West Virginia Deputy Sheriff Retirement Fund.

5.10 COSTS IN CIVIL CASES

Note: A complete listing of costs and statutory references is set forth in the Civil Case Cost Schedule.

5.10.1 Types of Costs

In civil cases, costs which are taxed by the clerk are fees or charges associated with the different procedural stages of a court case. These types of costs are referred to as "court costs." These types of costs

are established by statute, primarily West Virginia Code § 59-1-11, and are typically collected before filing or when a party requests a specific service or issuance of a document. There are also specific costs that are taxed at the conclusion of different types of proceedings, such as juror costs or the statutory attorney fee.

In a civil case, typical costs include the appropriate filing fee for the specific type of case or the filing of counterclaims, cross claims or motions to intervene. There is a filing fee for general civil cases, including summary proceedings or extraordinary remedies. If the case is a medical professional liability action, a different filing fee applies. (W. Va. Code § 59-1-11). Typical costs also include fees for the specific type of service of process requested by the party. Different methods of service are personal service, service by first class or certified mail, service on the Secretary of State or service by publication.

The clerk also collects a fee for issuing specific types of documents. These documents may include subpoenas, writs of execution, suggestions, suggestee executions, and abstracts of judgment. A clerk may also collect a fee for photocopies of court documents or forms, such as guardianship or conservatorship forms. With regard to postage for mailing documents, such as decrees, orders or records, the clerk may collect the actual cost of postage or express mail. If, however, the court orders the clerk to send the documents, the clerk may not collect for postage. Some specific types of costs and procedures for the assessment of costs are discussed below. Although some costs are discussed below, the Civil Case Cost Schedule lists all costs that may be assessed in a civil case.

5.10.2 Attorney Fees for the Benefit of the Domestic Violence Legal Services Fund

An award of attorney fees discussed in this section is **not** part of the assessment of fees or costs in a domestic violence protective order proceeding. Rather, it is a method to generate revenue for the Domestic Violence Legal Services Fund, a special revenue account of the Treasury that is used to provide legal services to domestic violence victims. (W. Va. Code § 48-26-603). Certain court costs, such as a portion of a filing fee or juror costs, are remitted to this fund.

West Virginia Code § 48-26-603(b) allows a court to order a nonprevailing party to pay reasonable attorney fees in any civil case, provided that the statutory requirements are met. First, the prevailing party must be entitled to attorney fees by statute or common law. Secondly, the prevailing party must inform the court that attorney fees

will not be requested. If both requirements are met, the court may order the losing party to remit a specified attorney fee award to this fund.

When a party is subject to such a court order, a party could pay the Treasurer directly. However, it would be more likely that a litigant would pay these funds to the clerk. When the clerk collects funds pursuant to a court order directing an attorney fee payment for the benefit of the Domestic Violence Legal Services Fund, they should be handled in the same manner as other funds collected for the benefit of this same fund.

5.10.3 Administrative Fee for Establishment of Bank Account

Subject to a court order in a specific case, the clerk may be required to deposit money into an interest-bearing account or other type of financial instrument, such as a certificate of deposit. When required to do so, the clerk collects a one-time administrative fee from the person depositing the funds with the court. (W. Va. Code § 59-1-11; Civil Court Cost Schedule) (See Chapter 6).

5.10.4 Assessment of Costs

At the conclusion of proceedings in circuit court, the clerk has an automatic duty to prepare a taxation of costs within 10 days after the entry of judgment. (Rule 54(d), RCP). The clerk should, therefore, prepare a taxation of costs within 10 days after a final order has been entered, including default judgment orders.

Rule 54(d) requires the clerk to provide the bill of costs to any party who is affected by it. However, it is best practice for the clerk to provide the bill of costs to all parties to a case.

A party may challenge the clerk's assessment of costs by filing a motion with the court. (Rule 54(d), RCP). This type of motion must be filed within 10 days after a party receives a bill of costs. The court, not the clerk, has the responsibility to review the assessment and determine whether any adjustments should be made.

5.10.4.1 Prevailing Parties

In a civil case, the prevailing party is awarded costs unless the court expressly orders costs to be assessed in a different manner. (W. Va. Code § 59-2-13; Rule 54(d), RCP). Therefore, a plaintiff or petitioner who prevails would ordinarily be entitled to obtain reimbursement for court costs, such as the

filing fee. If the defendant prevails and had not been subject to any fees, then the plaintiff would bear responsibility for the court costs. However, no reimbursement would be required because the plaintiff, who is lawfully assigned responsibility for the costs, has already paid the costs.

At the conclusion of a case, some fees must be paid to the clerk, not to the prevailing party. These costs include juror costs and the court reporter fee.

5.10.4.2 Fee Waivers and Costs

The clerk may not collect fees or costs from a party with an approved fee waiver. For accounting purposes, the clerk should prepare a bill of costs even if the clerk may not collect them. It should also be noted that a fee waiver is only applicable to the particular party, not to all parties to a case. Therefore, costs may be assessed and collected from a losing party even if the prevailing party has an approved fee waiver.

5.10.4.3 Costs in Settled Cases

When a civil case settles, a clerk typically does not assess costs, unless there are costs which are payable to the clerk, not to another party. Costs that would be payable to the clerk are juror costs and the court reporter fee. For a discussion of a special assessment levied in MPLA settlements, see Section 5.10.4.7.

When parties settle a case, they may, either by their inaction or their agreement, forego any right to seek reimbursement for costs. The parties may, however, settle a case, but have an outstanding dispute over costs. When this type of dispute occurs, the court, not the clerk, has the authority to allocate costs to a specific party or to order reimbursement for costs already collected. (Rule 54(d), RCP).

5.10.4.4 State Agencies and Assessment of Costs

If the State of West Virginia, a state agency or a state officer is party to a case, costs may not be assessed against the State unless a specific statute allows costs to be assessed. (Rule 54(d), RCP). For example, West Virginia Code § 29B-1-7 allows a prevailing party to recover court costs from a state agency that wrongfully denies access to records. Therefore, the clerk should assess costs against the state entity that did

not prevail in a Freedom of Information Act case. In cases involving the State as a party, the final order should indicate whether costs may be taxed in favor of the prevailing party.

5.10.4.5 Preparation of Record

When a circuit court case is removed to another court, the clerk may assess a fee for arranging papers, more commonly referred to as preparing the record. (W. Va. Code § 59-1-11). Because this fee may be assessed upon removal of a case to another court, the fee may be assessed when a case is removed to federal court or is transferred to another West Virginia circuit court. The basis for the assessment of this fee is the preparation of the file. It should only be assessed when the clerk prepares the record. When the record is **not** transmitted to another court, the clerk should not assess the fee because no service was performed. Therefore, the fee should not be assessed when a party files an appeal from family court to circuit court because the clerk has no duty to prepare the record.

5.10.4.6 Fees and Costs in Personal Safety Order Cases

Civil cases involving petitions for personal safety orders originate in magistrate court. (W. Va. Code § 53-8-4). However, an aggrieved party to such a case may appeal to circuit court, and the circuit clerk may, therefore, be required to assess and collect fees and costs in these cases. (W. Va. Code § 53-8-9).

Parties to a personal safety petition may be liable for the same types of fees and costs, such as magistrate and/or circuit court filing fees, costs for service of documents by law enforcement, service by the Secretary of State and any other types of fees or costs. (See W. Va. Code § 56-3-33a). If, however, a party has an approved fee waiver, fees and costs may not be collected from him or her. (W. Va. Code § 53-8-13(f)).

Unlike other civil cases, no filing fees or other costs may be assessed or collected until the case is considered final. (W. Va. Code § 53-8-13(a)). In this sense, the procedure for the assessment of costs is analogous to the procedure for assessing costs in a domestic violence case. A personal safety order case may be appealed to circuit court if a magistrate denies a petition at the initial hearing. A personal safety order case may also be appealed to circuit court after a

magistrate court conducts a final personal safety order hearing and either grants or denies the petition. (For a discussion of procedure in such a case, see 15.8.) The case would be considered final at the conclusion of circuit court proceedings, and fees and costs would be assessed and collected by the circuit clerk at that time. As noted previously, the fees and costs that would be assessed and collected would include the magistrate court filing fee, the circuit court filing fee, and fees for service of documents by law enforcement.

Another factor that affects the assessment and collection of fees and costs is that no fees may be assessed against a prevailing party. (W. Va. Code § 53-8-13(c)). This determination should be made at the conclusion of the proceedings, i.e., when the circuit court enters a final order. For example, assume a magistrate denied a petition for a personal safety order at a final hearing. Assume also that a circuit court granted a personal safety order on appeal. In this example, the respondent would be liable for costs because he or she was not the prevailing party when the case was finalized.

Yet another factor indicates whether fees and costs may be assessed against a party. Personal safety orders are subject to the Violence Against Women Act (VAWA). Fees and costs may, therefore, only be assessed against a **petitioner** if the court makes an affirmative finding that petitioner is **not** a victim of sexual assault, stalking or harassment.

Finally, costs may not be assessed or collected against a petitioner who moves the court for termination of a protective order. (W. Va. Code § 53-8-13(e)). This principle applies whether or not the court grants or denies the petition to terminate the personal safety order.

Given the above-stated rules, the following series of questions will help determine if the clerk should assess fees or costs against a party.

1. a. Has the circuit court entered a final order either granting or denying a personal safety order petition? Yes/No

   i. If the response is yes, then fees and costs should be assessed at this time.

   ii. If the response is no, the assessment of fees and costs should be delayed until the case is final.

2. a. Did the circuit court deny the petition for a personal safety order? Yes/No

b. If yes, did the circuit court affirmatively find that the petitioner was **not** a victim of sexual assault, stalking or harassment? Yes/No

i. If the response is yes, then fees and costs may be assessed against the petitioner.

ii. If the response is no, then fees and costs may not be assessed against the petitioner or against the respondent.

c. If fees and costs could be assessed against a petitioner, does the petitioner have an approved fee waiver? Yes/No

i. If the answer is yes, no fees and costs are collected.

ii. If the answer is no, the fees and costs should be assessed against the petitioner.

3. a. Did the circuit court grant the petition for a personal safety order? Yes/No

b. Does the respondent have an approved fee waiver? Yes/No

i. If yes, no fees are collected from the respondent (or the petitioner).

ii. If no, fees and costs are collected from the respondent.

5.10.4.7 Special Assessments on Claims Under the Medical Professional Liability Act

The West Virginia Patient Injury Compensation Fund (PICF) was established for the purpose of providing additional compensation to claimants under certain circumstances in medical malpractice actions for qualifying claims submitted to the fund prior to July 1, 2016. The PICF may be available for any portion of economic damages that is uncollectible as a result of limitations on economic damage awards for trauma care, or as a result of the operation of joint and several liability standards. (W. Va. Code § 29-12D-1). The PICF replaces the Medical Liability Fund (MLF) formerly established under the West Virginia Health Care Provider Professional Liability Insurance Availability Act. (W. Va. Code §§ 29-12B-1, *et seq.*). Effective July 1, 2016 all funds in the MLF will be transferred to the PICF. (W. Va. Code § 29-12B-10(d)). Also effective July 1, 2016, the Legislature enacted West Virginia Code § 29-12D-1a to establish additional funding sources for the PICF. Among those added funding sources are assessments on claims filed

under the Medical Professional Liability Act (MPLA) required under West Virginia Code § 29-1D-1a(c). From July 1, 2016 through June 30, 2020, an assessment shall be levied of one percent of the gross amount of any MPLA settlement or judgment in a qualifying claim (any claim for which a screening certificate of merit was required under the MPLA). For any judgment entered between the above-noted dates, the defendant or defendants must remit the assessment to the circuit clerk, who must then remit any such assessments quarterly to the Board of Risk and Insurance Management (BRIM) to be deposited in the PICF. (W. Va. Code § 29-12D-1a(c)(2)). For any settlement of a qualifying MPLA claim between the covered dates, if it is in a pending case, at the time the settled claim is dismissed by the court the assessment must be paid to the circuit clerk, who must remit such assessments quarterly to BRIM. If a qualifying claim is settled prior to the filing of an action, the plaintiff or his or her counsel is to remit the payment directly to BRIM. (W. Va. Code § 29-12D-1a(c)(3)).

5.11 COSTS IN FAMILY COURT CASES

Note: A completed listing of costs and their statutory references is set forth in the Family Court Case Cost Schedule.

5.11.1 Filing Fees

In family court cases, costs and the procedures for assessing them are similar to costs in civil cases. It should be noted, however, that there are different filing fees based upon the specific type of family court proceeding. West Virginia Code § 59-1-11 establishes a specific filing fee for cases involving divorce, separate maintenance or annulment. Miscellaneous family court cases are assessed the filing fee for a general civil case. (W. Va. Code § 59-1-11). These cases include child support actions, name changes and minor guardianship cases. Unlike civil cases, a party who files a counterclaim or motion to intervene in a family court case is **not** assessed a filing fee.

A different filing fee is collected for the **modification** of an order involving custodial responsibility, visitation, or child or spousal support. (W. Va. Code § 59-1-11(a)(4)). West Virginia Code § 59-1-11 establishes another filing fee for a petition for the **expedited modification of a child support obligation**. Filing fees for modification petitions are assessed for the modification of **temporary** and **permanent** orders, even when the case is still pending and the

original filing fee has been collected. (Supreme Court Memorandum, 03-11).

However, no filing fees are assessed if a party seeks the enforcement of an order. Enforcement proceedings include petitions for contempt and collection proceedings. Although a filing fee is not assessed, a party may be assessed other fees in enforcement proceedings, such as fees for service or issuance of documents, such as a suggestion.

With regard to postage for mailing documents, such as decrees, orders or records, the clerk may only collect the actual cost of postage or express mail. If, however, the court orders the clerk to send the documents, the clerk may not collect for postage.

The BCSE is authorized to enforce an assessment of costs against an obligor by income withholding. (W. Va. Code § 48-14-204). The clerk has the duty to assess costs according to the terms of a court order and provide the assessment to the parties, including the BCSE.

5.11.2 Mandatory Parent Education Fees

The clerk collects fees for parent education classes and remits these funds to the parent education fund. (W. Va. Code § 48-9-104(c)). A fee for parent education is not collected from a person with an approved fee waiver. Parent education is required in the following types of cases that involve minor children: divorce, separate maintenance, paternity, child support, or allocation of custodial responsibility. (Rule 37(b), RFCP).

It is permissible for a party to attend parent education in a county other than the county where the family court case is pending. When this situation occurs, the party pays the parent education fee to the circuit clerk where the class is conducted. The clerk collects the fee and does not assign another civil action number. The clerk who collects the fee simply remits the fee to the parent education fund. The party is responsible for filing a certificate of completion in the county where the case is pending.

5.11.3 Advanced Child-Focused Parent Education Fees

Rule 37a of the Rules of Practice and Procedure for Family Court establishes the procedures for participation in advanced child-focused parent education in certain designated regions. Six sessions are included in this course. (Rule 37a, RFCP). Unlike mandatory parent education, only certain parties attend these classes.

The circuit clerk collects a fee for advanced child-focused parent education. (See Family Court Cost Schedule). A party has the option of paying for each session individually. However, the fee for an individual session must be paid before the litigant participates in a particular session. (Rule 37a, RFCP). If a party has an approved fee waiver, no fee is collected. The family court may waive or reduce the fee even if a party does not have an approved fee waiver. Additionally, the court may require one party to pay the fees for both of the parties. Therefore, the clerk should review the terms of any court order that requires the party to participate in these classes.

5.11.4 Penalties for Parenting Plan Violations

West Virginia Code § 48-9-501(a)(5) allows the court to impose civil penalties for parenting plan violations. The court may impose maximum penalties of one hundred dollars ($100) for the first offense, five hundred dollars ($500) for the second offense, and one thousand ($1000) for the third or subsequent offense. When the clerk collects these penalties, the funds are remitted to the parent education fund.

5.11.5 Fees for Duplicate Recordings

The circuit clerk is responsible for collecting the fee and providing a receipt for a duplicate recording of a family court proceeding. (W. Va. Code § 51-2A-8; Rule 5(b), RFCP). The party then provides the receipt to the family court staff who, in turn, provides the copy of the recording to the party requesting it. If a duplicate recording is requested by the BCSE, the clerk may provide the BCSE representative a "Verification of Invoice" for presentation to the family court. When collected, these fees are remitted to:

WV Supreme Court of Appeals
Invoice Auditing
State Capitol Building, E-100
Charleston, WV 25305

5.11.6 Fees and Costs in Domestic Violence Protective Order Proceedings

Fees and costs in domestic violence protective order proceedings are not subject to the general procedures that apply to other types of cases. Rule 4 of the Rules of Domestic Violence Civil Proceedings is the primary authority governing the assessment of fees and costs in protective order proceedings. (See also W. Va. Code § 48-27-308; W. Va. Code § 56-3-33a(c)(2)(B)). As with other civil cases, a party may receive a waiver of fees and costs by completing the required financial

affidavit and application. If so, fees and costs may not be assessed against him or her.

Unlike other civil cases, no fees or costs may be assessed until the case is considered final. A domestic violence petition is considered final at the following different procedural stages. First, a case is final if the magistrate denies the petition for an emergency protective order, and no appeal to family court is filed. (Rule 4(a), RDVCP). Second, the case is final at the conclusion of family court proceedings, provided no appeal to circuit court is filed. If a party appeals to circuit court, the case is final at the conclusion of those proceedings. (Rule 4(b), RDVCP).

If a magistrate denies a petition for an emergency protective order, fees and costs may only be assessed against a petitioner if the court finds that the petitioner is not a victim of domestic violence, sexual assault or stalking. The magistrate court clerk will collect the fees unless the petitioner appeals the denial to family court. If an appeal is filed, no fees are assessed or collected until the appeal is resolved. (Rule 4(a), RDVCP).

Fees and costs may **not** be assessed against a petitioner if he or she fails to appear for the final hearing in circuit or family court. (Rule 4(b), RDVCP). Similarly, fees and costs may **not** be assessed against a petitioner who moves to terminate a protective order. (Rule 4(c), RDVCP).

If a family court (or circuit court exercising concurrent jurisdiction) does not issue a protective order after all evidence and testimony is presented at a final hearing, the court may assess fees and costs against the petitioner. (Rule 4(d), RDVCP). However, the court must find that the petitioner is not a victim of domestic violence, sexual assault or stalking. If a court assesses fees and costs against a petitioner, he or she is required to pay them within 10 days of the entry of the order assessing these costs. If the court grants a protective order, fees and costs shall be assessed against a respondent. (Rule 4(e), RDVCP). The respondent must may the fees and costs within 10 days.

Partial payments for fees and costs are applied in the following order: family court fund; magistrate court fund; court security fund; regional jail fund. (Rule 4(e), RDVCP). In addition to the assessment of costs for those above-mentioned funds, fees are assessed when a sheriff or other law enforcement agency serves orders or pleadings. (Rule 4(f), RDVCP). Similarly, fees for service of orders or pleadings are

assessed when a circuit clerk serves orders or pleadings by certified or first class mail. (Rules 4(f) and 11, RDVCP).

Pursuant to Rule 4(g) of the Rules of Domestic Violence Civil Proceedings, the court is required to compel parties to appear if any assessed costs are not paid within 10 days of the entry of the order. Since the language of the rule refers to a "party," this provision could be applied against either a petitioner or respondent, provided that fees and costs have been assessed by the court.

5.12 FEES FOR SUGGESTIONS AND SUGGESTEE EXECUTIONS

The Family and Circuit Court Cost Schedule for Suggestions and Suggestee Executions at the end of this chapter sets out the current fee amounts discussed in this section.

Note 1: The discussion below is an explanation of fees and costs for issuing and serving suggestions, suggestee executions and required notices. It is not intended to be a complete explanation of post-judgment proceedings.

Note 2: To protect against identity fraud and identify the judgment debtor, the judgment debtor's date of birth and last four digits of his or her social security number should be included on suggestions or suggestee executions. (W. Va. Code §§ 38-5-10; 38-5A-10; see also W. Va. Code § 38-5B-2). Before these statutes were amended, the judgment debtor's entire social security number was to be included on suggestions and suggestee executions.

5.12.1 Suggestions

A suggestion is issued to and served on the suggestee, a third party who is either in possession of the judgment debtor's property or who owes money to the judgment debtor. When a suggestion is issued, a judgment debtor is also entitled to notice of the suggestion and notice of personal property exemptions. (*Sauls v. Howell*, 309 S.E.2d 26 (W. Va. 1983); *Vanscoy v. Neal*, 322 S.E.2d 37 (W. Va. 1984)). Service of the notice to the debtor is by certified mail.

When a suggestion is issued, the clerk collects the fee established by West Virginia Code § 59-1-11(b)(3). This fee covers the cost of issuing the suggestion and the cost of service of the notice to the debtor. In addition, the suggestion must be served on the suggestee, the third party who possesses the property of the debtor or who owes money to the debtor. If service by certified or first class mail is selected, the fee established by Rule 4(d)(1) of the West Virginia Rules of Civil Procedure is collected. (W. Va. Code § 38-5-10(a)). If other methods of service (personal service or Secretary of State) are selected, the clerk collects the required fee based upon the method of service selected.

5.12.2 Suggestee Executions

A suggestee execution is a writ that compels an employer to withhold funds from the wages of a judgment debtor and provide the funds to the judgment creditor. It is commonly referred to as "wage attachment" or "garnishment of wages." Once a suggestee execution is issued, it is served on the employer. When a suggestee execution is issued, a judgment debtor is also entitled to notice of the suggestee execution and notice of exemptions.

When a clerk issues a suggestee execution, he or she collects the fee established by West Virginia Code § 59-1-11(b)(5). This fee covers the cost of issuing the suggestee execution and the cost of service of the notice on the debtor.

As noted previously, the suggestee execution must be served on the employer. The required method for service of the suggestee execution is based upon the type of employer, whether it is a private employer (W. Va. Code §§ 38-5A-1, *et seq.*), a federal governmental employer (W. Va. Code §§ 38-5A-1, *et seq.*), a state employer (W. Va. Code §§ 38-5B-1, *et seq.*) or an employer for a political subdivision, i.e. a county or a municipality (W. Va. Code §§ 38-5B-1, *et seq.*). A discussion of the requirements for service and corresponding fees is set forth below.

5.12.2.1 Private Employer - West Virginia Code §§ 38-5A-1, *et seq.*

In addition to the fee for issuing the suggestee execution and serving the notice to the debtor, the clerk collects the fee for serving the suggestee execution on the employer. (W. Va. Code § 38-5A-5). Initially, the suggestee execution must be served on the employer by certified mail, return receipt requested, restricted delivery. (W. Va. Code § 38-5A-5(a)). The clerk collects the fee established by Rule 4(d)(1) of the West Virginia Rules of Civil Procedure. If service by certified mail is not completed, a party may then request other methods of service established by Rule 4 of the West Virginia Rules of Civil Procedure. The clerk collects a fee based upon the method of service selected.

5.12.2.2 Federal Governmental Employer - West Virginia Code §§ 38-5A-1, *et seq.*

In addition to the fee for issuing the suggestee execution and serving the notice to the debtor, the clerk collects the fee for

serving the suggestee execution on the employer. (W. Va. Code § 38-5A-5). Initially, the suggestee execution must be served on the employer by certified mail, return receipt requested, restricted delivery. (W. Va. Code § 38-5A-5(a)). The clerk collects the fee established by Rule 4(d)(1) of the West Virginia Rules of Civil Procedure. If service by certified mail is not completed, a party may then request an alternative method service. However, service of a federal employer may only be by personal service or certified mail. (5 C.F.R. § 582.202). Other methods are not effective. Therefore, the only other option is personal service, and the clerk would collect the allowable fee for it.

5.12.2.3 State Governmental Employer - West Virginia Code §§ 38-5B-1, *et seq.*

When a debtor is employed by the State of West Virginia, the clerk collects the fee for issuance of the suggestee execution and for service of the notice of the debtor. (W. Va. Code § 59-1-11(b)(5)). A suggestee execution for a state employer must be served on the auditor, and the method of service is by first class mail. (W. Va. Code § 38-5B-5). The auditor may **not** be served by the Secretary of State. West Virginia Code § 38-5B-8 establishes a fee of one dollar ($1.00) when the auditor is served with a suggestee execution. The clerk collects this fee and forwards it to the auditor.

5.12.2.4 County or Municipal Governmental Employer - West Virginia Code §§ 38-5B-1, *et seq.*

As with all suggestee executions, the clerk collects a fee for the issuance of a suggestee execution and service of the notice to the debtor. (W. Va. Code § 59-1-11(b)(5)). Similar to a State Employer, the suggestee execution must be served on the auditor for the political subdivision or other appointed officer, and the method of service is by first class mail. (W. Va. Code § 38-5B-5). The auditor or other official for the political subdivision may **not** be served via the Secretary of State.

West Virginia Code § 38-5B-8 establishes a fee of one dollar ($1.00) when the auditor or other official is served with a suggestee execution. The clerk collects this fee and forwards it to the auditor or other official for the political subdivision.

5.13 BOND PROCESSING FEE

In criminal cases, West Virginia Code § 59-1-11 authorizes a circuit clerk to collect a bond processing fee when bond is posted, for deposit to the courthouse facilities improvement fund. This fee is collected when a bond must be secured (in whole or in part); it is not assessed in cases involving only a personal recognizance bond. The fee is collected from the surety. If a bond is secured by two different bond instruments, this fee is collected for each type of bond instrument. The following chart indicates the person or entity that is responsible for payment of this fee.

Type of Bond	Responsible Party	Assessment Authority
Personal Recognizance	No Fee Assessed	§ 59-1-11(d)
10% Recognizance Bonds without surety	Person Tendering Ten Percent of Bail in Cash	§ 59-1-11(d)(5)
10% Recognizance Bond with surety	Surety	§ 59-1-11(d)(4)
Surety Company Bond	Surety Company	§ 59-1-11(d)(3)
Real Estate	Owner of Real Estate	§ 59-1-11(d)(2)
Cash	Person Tendering Cash Bond	§ 59-1-11(d)(1)

Typically, a defendant who is entitled to court-appointed counsel would not have cash sufficient to post a cash bond or a ten percent recognizance bond. However, if a defendant is entitled to court-appointed counsel and the defendant is posting cash for a bond or a ten percent recognizance bond, the fee should not be assessed until the defendant has been convicted. (*State ex rel. Holcomb v. Nibert*, 575 S.E.2d 109 (W. Va. 2002); Supreme Court Memorandum, 03-17). However, the clerk should notify the circuit judge if a defendant has posted a substantial amount of cash so he or she can determine whether the defendant has sufficient assets to obtain his or her own legal representation.

5.14 COSTS IN CRIMINAL CASES

Note: A complete listing of costs and their statutory references is set forth in the Criminal Case Cost Schedule.

When a defendant is convicted by trial or plea, the clerk is required to tax costs incident to the prosecution. (W. Va. Code § 62-5-7). The clerk has the

duty to tax costs, both those that are automatically assessed and those that are set forth in the final order without regard to whether the costs will be collected. It is the duty of prosecutor to undertake efforts to collect criminal costs, which would include requesting that the clerk issue a writ of execution. (W. Va. Code §§ 62-5-7; 62-4-8). West Virginia Code § 62-4-8 requires a prosecutor to take action to collect fines. This same responsibility to initiate actions to collect costs is imposed upon a prosecutor by a provision in West Virginia Code § 62-5-7.

In general, various statutes establish the amount of permissible court costs. (See e.g., W. Va. code § 62-11C-4). However, certain fees may be increased by legislative rule, as oppose to the amendment of the statute. These include the law enforcement training fee and community corrections fees. (See W. Va. Code §§ 30-29-4; 62-11C-4).

Some basic costs are mandatory for all felony or misdemeanor convictions. (See Criminal Cost Schedule). These costs should be assessed by the clerk without regard to whether a final order imposes them. Some costs, however, may not be assessed unless a court order, usually a sentencing order, expressly provides for the assessment. In these situations, the specific amount of the assessment must also be established by court order. Additionally, some costs require the clerk to establish a special account, to follow specific accounting practices or to follow other special procedures. A discussion of each of these specific costs and requirements is set forth below.

5.14.1 Costs in Pretrial Diversion Cases

West Virginia Code § 62-11C-9(d) requires the payment of court costs if a criminal case is disposed of by a pretrial diversion program or agreement. Pretrial diversion agreements are to be in writing, and the requirement to pay court costs must be included as part of any pretrial diversion agreement. (W. Va. Code §§ 61-11-22; 62-11C-9(d)). When taxing costs in pretrial diversion cases, the clerk should assess costs as provided by the written pretrial diversion agreement.

Occasionally, the prosecutor and a defendant will enter into a pretrial diversion agreement, and it will be apparent that they did not consider the assessment of costs. For example, the parties may enter in a pretrial diversion agreement concerning numerous cases involving forgery and uttering which would result in an uncommonly high assessment for costs. When this occurs, the clerk should assess costs as if the defendant were convicted of the charged offenses. The parties are, however, free to make a subsequent agreement concerning costs.

This statutory provision was enacted because costs in a criminal case are only assessed upon conviction. (W. Va. Code § 62-5-7). Since one result of a pretrial diversion program or agreement may be to allow an individual to avoid a criminal conviction, this provision establishes financial responsibility for court costs even though an individual, if successful in a pretrial diversion program, may not be convicted of a criminal offense.

5.14.2 Costs in Expungement of Certain First Offense Misdemeanors

Certain first-offense misdemeanor cases may be subject to deferral of conviction: a) possession of a controlled substance (W. Va. Code § 60A-4-407); b) possession of salvia divinorum (W. Va. Code § 60A-4-413(b)); c) driving under the influence (W. Va. Code § 17C-5-2b); and d) underage consumption (W. Va. Code § 60-6-26). Typically, these cases are handled in magistrate court. It should be noted, however, that any criminal costs for the offenses are assessed as if a person were convicted of the offense. (W. Va. Code §§ 17C-5-2b(i); 60-6-26(f); and 60A-4-407(c)).

5.14.3 Mandatory Felony Costs

Upon conviction, the following types of costs are automatically assessed by the clerk in all felony cases: a) the cost established by West Virginia Code § 59-1-11(c)(2); b) the prosecutor's fee; c) community corrections fee; and d) the law enforcement training fee. Although West Virginia Code § 59-1-11(c)(2) establishes the amount for part of the basic felony cost, this cost is remitted to five different funds: a) the courthouse facility improvement fund (CFIF); b) the regional jail and correctional facility authority (RJA); c) the court security fund (CSF); d) the regional jail operations partial reimbursement fund (RJPRF); and e) the county. The specific amount for remittance to each fund is set forth in the Criminal Cost Schedule. The prosecutor's fee, established by West Virginia Code § 59-2-17(d), is remitted to the courthouse facility improvement fund (CFIF) and to the prosecutor. The community correction fee, established by West Virginia Code § 62-11C-4(d), is remitted to the community corrections fund (CCF). The law enforcement training fee, established by West Virginia Code § 30-29-4, is remitted to the law enforcement training fund (LET).

5.14.4 Mandatory Misdemeanor Costs

Upon conviction, the following types of costs are automatically assessed in all misdemeanor cases by the clerk: a) the cost

established by West Virginia Code § 59-1-11(c)(1); b) the prosecutor's fee; c) the crime victim compensation fee; d) the community corrections fee; and e) the law enforcement training fee. Upon collection, the part of the basic misdemeanor cost established by West Virginia Code § 59-1-11(c)(1) is remitted to the following funds: a) the regional jail and correctional facility authority (RJA); b) the court security fund (CSF); c) the regional jail operations partial reimbursement fund (RJPRF); and d) the county. The specific amount for remittance to each fund is set forth in the Criminal Cost Schedule. The prosecutor's fee, established by West Virginia Code § 59-2-17(a), is remitted to: a) the courthouse facility improvement fund (CFIF); and b) the county. The crime victim compensation cost, established by West Virginia Code § 14-2A-4(a), is remitted to the crime victim compensation fund (CVC). The community corrections fee, established by West Virginia Code § 62-11C-4(d), is remitted to the community corrections fund (CCF). The law enforcement training fee, established by West Virginia Code § 62-11C-4(d), is remitted to the law enforcement training fund (LET).

5.14.5 Restitution

At sentencing, a judge must order a defendant to pay restitution for physical, psychological or economic injuries unless the payment of restitution is impractical. (W. Va. Code § 61-11A-4(a)). Specific requirements for restitution should be included in the sentencing order. In addition to restitution to victims, if anyone has already provided compensation to a victim for a loss relating to the criminal offense (for example, insurance company or employer) the court may order restitution to that person or entity as well. The order of restitution must require that all restitution due to victims be made before restitution to others be made. (W. Va. Code § 61-11A-4(e)). Thus, if restitution is ordered to the victim and to another, payments to the victim have first priority. A restitution order may be enforced by the same procedures as a civil judgment. (W. Va. Code § 61-11A-4(h)). Many different types of crimes may involve the payment of restitution; and for some crimes the sentencing court is required to order restitution. For example, restitution is to be ordered in cases involving financial exploitation of an elderly person. (W. Va. Code § 61-2-29b).

Local practice may vary with regard to the payment of restitution. In some counties, the clerk collects restitution, deposits the funds, and pays the victim. In other counties, the defendant must submit a money order or certified check to the circuit clerk, payable to the victim. The clerk may then photocopy the money order or check, file the photocopy and forward the money order or check to the victim.

Occasionally, a victim cannot be located. If the clerk receives a restitution payment and cannot locate the victim, the funds must be remitted to the unclaimed property division in the Treasurer's Office.

5.14.6 Local Crime Victim's Assistance Program Cost

Either in addition to or instead of restitution, the court may order a defendant to financially contribute to a local crime victim's assistance program or juvenile mediation program. (W. Va. Code § 61-11A-4(i)). The program must be approved by the local circuit court, and the program must be a West Virginia nonprofit corporation. Since this subsection does not establish an amount for this cost, it must be imposed by a court order.

5.14.7 Magistrate Court Fee

If the magistrate court provided services, the circuit clerk assesses a magistrate court fee upon conviction. (W. Va. Code § 50-3-2(c)). The criminal case history sheet forwarded from the magistrate court clerk will indicate whether this cost should be assessed.

5.14.8 Crime Victims Fund/Community Corrections Fund

The clerk is required to automatically assess a fee for each **felony count** for which a defendant is convicted. (W. Va. Code § 62-5-10(a)). Although the statute establishes different time periods for payment, these costs would normally be paid when other costs are paid. If the court required payment of this cost before other costs, this provision must be included in an order. When a clerk collects these fees, the clerk shall transmit specified portions of the costs, as established by West Virginia Code § 62-5-10(a), to the State Treasurer for deposit to the crime victims compensation fund and to the community corrections fund.

5.14.9 Arrest Fee

If the sheriff arrests a defendant, the circuit clerk must assess an arrest fee upon conviction. (W. Va. Code § 59-1-14). The case history sheet will indicate whether the clerk assesses this cost.

5.14.10 Initial Transportation Cost

If a defendant was transported to the regional jail by a law enforcement agency, the clerk should assess a cost for the initial trip to the regional jail. (W. Va. Code § 7-7-13). The cost of

transportation is the mileage at the current reimbursement rate. In order for this cost to be assessed, the law enforcement agency must submit a statement to the circuit clerk listing the mileage and total amount of reimbursement.

5.14.11 Court Reporter Fee

The court is required to impose a court reporter's fee at a minimum amount of $5.00. (W. Va. Code § 51-7-6). The court has the discretion to establish the exact amount of the fee. When the clerk collects this fee, he or she remits the funds to the sheriff.

5.14.12 Court-Appointed Counsel Fees

West Virginia Code § 29-21-16(g)(1) provides that a judge may order a convicted criminal defendant to repay the costs of court-appointed counsel and other costs of the defense, such as expert witness fees. To require a convicted criminal defendant to repay these costs, the judge must find that repayment would not impose an undue burden on the defendant and must specify the terms of repayment in an order.

The circuit clerk is required to accept payments for the cost of court-appointed counsel. When the clerk collects these payments, he or she must keep records of all amounts collected and must forward them to the Auditor on a quarterly basis. (W. Va. Code § 29-21-16(h)).

5.14.13 Jury Costs

If a panel of prospective jurors is required to report, the actual cost of jury service in circuit court may be assessed against a criminal defendant who is convicted. (W. Va. Code § 52-1-17(c)). The actual cost of the jurors' service is the allowable daily fee for each juror and each juror's mileage to and from the courthouse. The cost assessed for a **magistrate court jury** is the same as in circuit court, the actual costs of the jurors' service.

For the purposes of assessing juror costs, a conviction may result from a jury trial, a bench trial or a plea. (W. Va. Code § 52-1-17(c)(1)). If a jury is required to report and the defendant decides to enter a plea, the cost attributable for the jurors' service should still be taxed to the defendant.

In order to assess costs for a jury, there must be a specific provision in an order. (W. Va. Code § 52-1-17(c)). The court has the discretion, however, to forego the assessment of jury costs. The reasons for this

decision must be set forth in a written order. (W. Va. Code § 52-1-17(c)(3)).

The circuit clerk must remit jury costs to the State Treasurer on the tenth day of the following month after the costs have been collected. (W. Va. Code § 52-1-17(d)(1)). In cases involving a **circuit court jury trial**, one half (1/2) of the collected costs must be deposited to the parent education and mediation fund, and one half (1/2) must be deposited to the domestic violence legal services fund. (W. Va. Code § 52-1-17(d)(2)).

The remittance of jury costs discussed in this paragraph applies only to magistrate court jury costs, **not** to circuit court jury costs. **Therefore, the circuit clerk would only follow this procedure for a case involving a magistrate court jury trial that was appealed to circuit court.** For all jury costs collected in this type of case, the first $200.00 is remitted as follows: a) one half (1/2) is deposited to the parent education and mediation fund; and b) one half (1/2) is deposited to the domestic violence legal services fund. Any amounts collected that exceed $200.00 are remitted to the State's general revenue fund.

5.14.14 Fines

As allowed by specific criminal statutes, the court may set fines within amounts established by particular criminal statutes. In general, the clerk is required to forward the collected amount of any fine to the State Treasurer for the support of free schools. Specific statutes may, however, require the fines to be directed to different funds.

5.14.15 DNA Sampling Fee

West Virginia Code § 15-2B-6 requires persons who are convicted of qualifying criminal offenses to provide a DNA sample for inclusion in the DNA database maintained by the West Virginia State Police. A defendant found not guilty of a qualifying offense by reason of insanity or mental disease or defect is also required to provide a DNA sample. (W. Va. Code § 15-2B-3(12)). If a defendant is required to submit a DNA sample and he or she was convicted after July 1, 2011, a mandatory fee of $150 should be assessed unless the court finds that the imposition of the fee would create an undue hardship. (W. Va. Code § 15-2B-15). This fee provision does not apply to persons required to provide a DNA sample following an acquittal by reason of insanity or mental disease or defect.

The clerk should review conviction and sentencing orders to determine whether a defendant was ordered to provide a DNA sample following conviction of a qualifying offense after July 1, 2011, and if so, whether the court made a finding that waived the required fee. If there was no waiver, the clerk should automatically assess the mandatory fee. Upon collection, such fees are to be remitted to the State Treasurer for deposit in a special account known as the "West Virginia State Police DNA Database Account." The qualifying offenses are specified in subsections of West Virginia Code § 15-2B-6. The chart below lists the different qualifying offenses. The list is unavoidably complex due to various amendments to the statute. Look for language in the conviction and sentencing orders directing the defendant to provide a DNA sample.

QUALIFYING OFFENSES FOR DNA SAMPLING

W. Va. Code § 15-2B-6(a) applies to the following offenses:

61-2-1 first and second degree murder
61-2-4 voluntary manslaughter
61-2-7 attempt to kill or injure by poison
61-2-9 malicious or unlawful assault; assault; battery
61-2-9a stalking and harassment (only when a felony)
61-2-10 assault during commission of or attempt to commit a felony
61-2-10a violent crimes against the elderly
61-2-10b malicious assault; unlawful assault; battery; and assault on governmental representatives, health care providers, and emergency medical service personnel
61-2-12 robbery or attempted robbery
61-2-14 abduction of person; kidnapping or concealing child
61-2-14a enticing away; kidnapping or holding hostage any person
61-8-12 incest
61-8B-1, *et seq.* sexual offenses
61-8D-1, *et seq.* child abuse offenses

W. Va. Code § 15-2B-6(c) applies to the following offenses:

61-2-5 involuntary manslaughter
61-2-13 extortion or attempted extortion by threats
61-3-1 burning, etc. of a dwelling or outbuilding; first degree arson
61-3-2 burning, etc. of other buildings or structures; second degree arson
61-3-3 burning personal property of another of the value of five hundred dollars or more; third degree arson
61-3-4 attempt to commit arson; fourth degree arson
61-3-5 burning, or attempting to burn, insured property
61-3-7 causing injuries during an arson-related crime
61-3-11 burglary; entry of dwelling or outhouse

61-3-12 entry of building other than dwelling; entry of railroad, traction or motor car, steamboat or other vessel (only when a felony)
61-3-13(a) simple larceny of goods or chattels of the value of one thousand dollars or more
61-3E-3 illegal possession of destructive devices, explosive materials or incendiary devices
61-3E-4 criminal use of destructive device, explosive material or incendiary device
61-3E-5 causing death or injury
61-3E-10 wanton endangerment involving destructive devices, explosive materials or incendiary devices
61-4-3 counterfeiting

W. Va. Code § 15-2B-6(d) applies to the following offenses:
60a-4-401, *et seq.* offenses under the Uniform Controlled Substances Act (only when a felony)
61-2-1 attempted murder
61-2-14a attempted enticing away; kidnapping or holding hostage any person
61-8B-1, *et seq.* attempted sexual offenses

Other Circumstances Requiring DNA Sampling:
Any person subject to sex offender registration on or after June 10, 2011. [W. Va. Code § 15-2B-6(h)]

Any person accepted from another state under any interstate compact or reciprocal agreement if convicted in another jurisdiction of an offense which would be considered a qualifying or equivalent offense if committed in this state. [W. Va. Code § 15-2B-6(i)]

5.14.16 Additional Assessments for DUI Offenses

5.14.16.1 Additional DUI Cost

In addition to other fines and costs, West Virginia Code § 59-1-11a(a) establishes an assessment for circuit court convictions in DUI cases, including DUIs for operation of a motor boat, jet ski or motorized vessel. This assessment applies when a defendant is convicted, either by plea or by trial. This assessment further applies to convictions in circuit court after an appeal from magistrate or municipal court. (W. Va. Code § 59-1-11a(b) and (c)). When these funds are collected, the clerk forwards them to the sheriff.

5.14.16.2 Additional 20% Fine

In DUI cases involving motor vehicles, West Virginia Code § 14-2A-4(a) requires a person who pleads guilty or is found guilty at trial to pay an additional fee of 20% of any fine established by West Virginia Code § 17C-5-2. These funds are forwarded to the crime victims compensation fund on a monthly basis. (W. Va. Code § 14-2A-4(b)).

5.14.17 Payments for Drug Testing

When placed on probation, a defendant may be subject to court-ordered drug testing and may be required to pay for it, provided he or she is able. (West Virginia Supreme Court Administrative Order, 3/21/90, Appendix A). The probation officer or other official will provide the clerk with an invoice indicating the cost of the drug test. When these fees are collected, the clerk must: a) issue a receipt to the payor of the drug test; b) remit the fees to the sheriff; and c) report the monthly collections and remittances on the criminal charge fund report. (See Section 6.4).

5.14.18 HIV Testing

West Virginia Code § 16-3C-2(f) mandates court-ordered HIV testing of any person charged or convicted of prostitution, sexual abuse or assault, incest or sexual molestation.[1] Both adults and juveniles are subject to these provisions. (See W. Va. Code § 16-3C-1(d); W. Va. C.S.R., Title 64, Series 64, Section 4.3). These test results are filed with the circuit clerk, but they should be maintained under seal and are closed to public inspection. (See Section 4.8.21).

The court shall order a person convicted of any of these offenses to pay the State for the costs of HIV testing or counseling. (W. Va. § 16-3C-2(f)(12)). A juvenile respondent or defendant may be excused from this type of restitution if he or she lacks the ability to pay these costs. When the clerk collects these funds, he or she shall remit them to the State Treasurer for credit to the HIV testing fund. The Bureau of Public Health may use these funds for HIV testing and counseling. (W. Va. Code § 16-3C-2(f)(13)).

5.14.19 Wildlife Forfeiture Costs

Wildlife forfeiture costs may be assessed when a defendant violates a criminal law and, as a result, wildlife is injured, killed or destroyed.

[1] There are no criminal offenses in West Virginia designated as "sexual molestation."

(W. Va. Code § 20-2-5a). The exact amount of the assessment is based upon the type of wildlife that was harmed. (W. Va. Code § 20-2-5a(1)-(11)). Therefore, a court order must establish the amount of the cost. The court order should also establish the time period for repayment, but the time period cannot exceed a period of 60 days. The clerk forwards these funds to the State Treasurer for credit to the Division of Natural Resources.

5.14.20 Regional Jail - Cost of Incarceration

When a defendant is convicted and is incarcerated in a regional jail as a result of the conviction, the court may require the defendant to pay the cost of incarceration for a maximum period of 30 days. (W. Va. Code § 7-8-14). Although the statute could be interpreted to apply only to misdemeanor convictions, the language is broad enough to allow a court to impose this cost in felony cases. Further, the court must consider a defendant's ability to pay when it imposes this cost. The clerk must, therefore, follow a court order with regard to the assessment of this cost.

The total amount of this cost is figured by multiplying the specified number of days by the established regional jail per diem rate. The clerk remits any funds collected to the sheriff. (Supreme Court Memorandum, 04-07).

5.14.21 Litter Control Violations

All litter control violations are misdemeanors, and West Virginia Code § 22-15A-4(a)(4)-(6) establishes the amount of a fine based upon the weight and volume of the litter. Additionally, fines may be doubled for subsequent violations. Therefore, a court order must establish the amount of the fine. The clerk disburses these funds to the State Treasurer.

5.14.22 Litter Control Civil Penalty

In addition to any fine for a litter control violation, West Virginia Code § 22-15A-4(c) establishes a civil penalty ranging from $100 to $1,000. When civil penalties are collected, one-half of the funds are disbursed to State Treasurer for the litter control fund and one-half of the funds are disbursed to the county or the regional solid waste authority. (W. Va. Code § 22-15A-4(d)).

5.14.23 Witness Fees

A witness may be paid an appearance fee and reimbursed for expenses for appearing at the rate of $10 per day, $0.15 per mile from his or her residence to the courthouse, and tolls paid for the days that a witness is required to appear. (W. Va. Code §§ 59-1-16 and -17; 62-5-1). A witness may also be reimbursed for lodging and meals, but only if allowed under the travel guidelines for State employees. (See Section 10.2).

If witness fees and expenses are paid to a witness who appears on behalf of the prosecution and the defendant is convicted, the witness fees are taxed as costs against the defendant. (W. Va. Code §§ 62-5-2 and -7). Similarly, if a defendant who is entitled to court-appointed counsel is convicted, and a defense witness was paid with public funds, the witness fees may be taxed by the court as a cost against the defendant. (W. Va. Code §§ 29-21-16(g)(1) and 62-5-7). The costs for defense witnesses may only be imposed if the court determines that the costs can be paid without undue hardship. (W. Va. Code § 29-21-16(g)(2)). When the clerk collects any such reimbursed witness fees, the clerk forwards the funds to the sheriff along with the completed criminal charge fund report.

5.14.24 Teen Court Program Cost

A county commission or municipality may establish a mandatory cost in the amount of $5.00 or less for conviction of any felony or misdemeanor offense, including traffic violations, but not for violations of municipal parking ordinances. This cost is assessed upon conviction after a finding of guilt, a guilty plea, or a no-contest (*nolo contendre*) plea.

This fee is **not** assessed when a juvenile participates in a teen court program. The fees must be used to operate a teen court program as defined by West Virginia Code § 49-4-716. When collected, the fees are deposited into an account for the operation of a local teen court program.

5.15 ALTERNATIVE SENTENCING FEES

5.15.1 Community Corrections Fees

The West Virginia Community Corrections Act, West Virginia Code §§ 62-11C-1, *et seq*., established additional fees and costs to defray the cost of creating and administering alternative sentencing programs. As set forth in detail below, the community corrections and home

incarceration fee may be imposed **in addition** to the standard probation and home incarceration fees.

5.15.1.1 Mandatory Community Corrections Fee

In all **criminal cases**, except municipal parking fines, an additional mandatory cost is imposed. (W. Va. Code § 62-11C-4(d)). This cost is not dependent upon the defendant's ability to pay. This cost is forwarded to the community corrections fund.

5.15.1.2 Community Corrections Probation Fee

If a person is placed on probation, a variable fee that does not exceed a specified amount per month may be imposed. (W. Va. Code § 62-11C-4(b)). The community corrections probation fee may be imposed **in addition** to the monthly probation fee allowed by West Virginia § 62-12-9(a). This fee is subject to the defendant's ability to pay and must be included in a court order. When collected, these fees are forwarded to community corrections fund.

5.15.1.3 Community Corrections Home Incarceration Fee

When a person is placed on home incarceration, a fee, in a specified amount per day, may be imposed. (W. Va. Code § 62-11C-4(c)). When assessing this cost, the court must consider the defendant's ability to pay. It will not, therefore, be imposed in every case. When the fee is assessed, it will not vary. This fee is collected by the circuit clerk, not the sheriff. This fee is forwarded to the community corrections fund. This fee may be assessed **in addition** to the home incarceration fee that is payable to the sheriff. (See Section 5.15.3).

5.15.1.4 Community Corrections Pretrial Supervision Fee

A criminal defendant who is required to participate in a pretrial release program may be assessed a daily supervision or participation fee. (W. Va. Code § 62-11C-7(b)). In addition, a defendant who is later convicted of a charged offense that subjected him or her to pretrial supervision may be assessed a monthly fee, not to exceed a specified amount. (W. Va. Code § 62-11C-7(c)). This fee is considered a cost of prosecution. Both of these pretrial supervision fees are payable to the local community criminal justice board, not the circuit clerk. (W. Va. Code § 62-11C-7(d)).

5.15.1.5 Community Corrections Program Fee

When a defendant participates in a community corrections program, such as a day report center, a circuit judge, magistrate, municipal court judge or community criminal justice board may impose a participation fee. (W. Va. Code § 62-11C-7(a)). This cost is subject to defendant's ability to pay, and it is paid directly to the community criminal justice board. In turn, the fees will be remitted to the sheriff. The circuit clerk has no responsibility or authority to collect this fee. (W. Va. Code § 62-11C-7(a)).

5.15.1.6 Accounting Procedures

The clerk must maintain separate accounting records for all fees assessed and collected pursuant to the West Virginia Community Corrections Act, West Virginia Code §§ 62-11C-1, *et seq*. When the mandatory, probation or home incarceration fees are collected, the clerk remits them to the State Treasurer for deposit to the community corrections fund on the tenth day of the following month. The community corrections participation and pretrial supervision fees are paid directly to the local community criminal justice board, not to the circuit clerk.

5.15.2 Standard Probation Fees

When a person is released on probation, the court has the discretion to require the payment of a monthly probation fee, so long as the court finds that payment would not be an undue hardship. (W. Va. Code § 62-12-9(a)(5)). This fee may be assessed **in addition** to the community corrections probation fee. (W. Va. Code § 62-11C-4(b)). The clerk remits all collected probation fees to the State Treasurer for deposit to the general revenue fund.

5.15.3 Home Incarceration Fees

If a defendant is placed on home incarceration, he or she may be required to pay a home incarceration fee to the sheriff, as opposed to the circuit clerk. (W. Va. Code § 62-11B-5(7)). The court that considers a request for home incarceration must consider the defendant's ability to pay this fee. This fee is used to administer the home incarceration program. (W. Va. Code § 62-11B-7). This fee may be imposed **in addition** to the community corrections home incarceration fee established by West Virginia Code § 62-11C-4(c). (See Section 5.15.1.3).

5.15.4 Work Release

Note: For a discussion of the clerk's responsibilities associated with a financial responsibility program for inmates, including when inmates are participating in a work release program, see Section 5.19.

A defendant who is convicted of a misdemeanor and who is confined to jail may be released for employment purposes by the court. (W. Va. Code §§ 62-11A-1, *et seq*.). The court, however, may not order work release unless there are adequate facilities for the administration of this privilege in the facility where the defendant is confined. Although the court is still authorized to allow work release, the circuit clerk is no longer authorized or required to collect an inmate's earnings or disburse the funds.

The Legislature has authorized the executive director of the Regional Jail Authority to establish a work program for qualified inmates that would allow them to be employed by local businesses or governmental entities. (W. Va. Code § 31-20-31(a)). Under this statutory provision, the Regional Jail Authority or the Division of Corrections has the authority to determine whether an inmate is qualified to participate in a work program. The administrator of each regional jail facility is required to manage and administer the compensation received by any inmate participating in this program.

5.15.5 Supervised Release Fee

West Virginia Code § 62-12-26 provides for the extended supervision of defendants convicted of sexual offenses or child abuse. When this supervision is ordered, the court may impose a fee, not to exceed a specified amount per month, to defray the costs of this type of supervision. (W. Va. Code § 62-12-26(f)). When establishing this fee, the court should consider the defendant's ability to pay. The clerk remits these fees to the State Treasurer to the parole supervision benefit fund.

5.15.6 Costs for Electronic Monitoring and Polygraph Examinations

Some convicted sex offenders may be subject to electronic monitoring or polygraph examinations, or both. (W. Va. Code §§ 62-11D-2 and -3). An offender may be subject to these procedures when he or she is serving a period of probation, parole or supervised release. Unless an offender demonstrates an inability to pay for these procedures, he or she is required to pay the costs for them. (W. Va. Code §§ 62-11D-2(c) and -3(c)). By the adoption of the financial affidavit and

application, the Supreme Court has established that a sex offender who is required to undergo electronic monitoring or polygraph examinations may receive a waiver of these costs upon the approval of a fee waiver.

5.16 WEST VIRGINIA SUPREME COURT PROCEEDINGS

According to the Rules of Appellate Procedure, the primary responsibility for preparing and transmitting the circuit court record to the Supreme Court Clerk lies with litigants and their counsel, not the circuit clerk. However, Rule 8 of the Rules of Appellate Procedure provides that the Supreme Court, by order, may allow the parties to proceed on a designated record, which must be prepared by the circuit clerk. The fees and costs for preparing and transmitting the record may only be assessed and collected by the circuit clerk when the parties are allowed to proceed on the designated record.

5.16.1 Preparation of Record

The clerk may assess a fee for arranging papers in a file, more commonly referred to as preparing the record, in certified questions, writs of error, or appeals. (W. Va. Code § 59-1-11). The clerk remits one-half of the fee to the courthouse facilities improvement fund and one-half to the county. This fee should only be assessed and collected when the parties are proceeding on a designated record.

5.16.2 Bond for Costs

When a party has been permitted to proceed on a designated record, the petitioner is required to deposit sufficient money or post a bond to cover costs associated with preparing and transmitting the record to the Supreme Court Clerk. (Rule 8(g), RAP). The clerk may establish the amount of the bond to cover the following costs: a) the expenses of preparing and indexing the record; b) fees for certifying necessary copies of orders; c) costs for transmission and return of the record; and d) costs of making the transcript.

In many counties, the clerk establishes a standard amount that must be deposited when a petition for appeal is filed. The clerk should note on the petition that the bond has been deposited. At the conclusion of the appellate proceedings, the clerk returns any excess funds to the petitioner.

5.16.3 Transmission of Record

As established by West Virginia Code § 59-1-11(c), the clerk collects the actual cost of certified mail for the cost of transmitting the record to the Supreme Court Clerk.

5.16.4 Civil Appeal Fee

West Virginia Code § 59-1-13 provides that the Supreme Court Clerk, (not the circuit clerk), is to assess and collect a $200 docket fee in civil appeals. If the appellant was granted a fee waiver in the case by the lower court, the docket fee will be waived by the Supreme Court Clerk. The docket fee does not apply to criminal cases, worker's compensation cases, or original jurisdiction actions.

5.17 SUSPENSION OF DRIVER'S LICENSE FOR FAILURE TO PAY COURT COSTS OR FAILURE TO APPEAR

West Virginia Code § 62-4-17 provides for the suspension of a driver's license or the privilege to operate a motor vehicle in West Virginia if a person fails to pay fines or costs or fails to appear as required. This provision applies to all criminal offenses in circuit court, including appeals from magistrate court. The clerk is responsible for notifying the Division of Motor Vehicles both when license suspension is appropriate and when a license should be reinstated because costs have been paid. A form Notice and Verification of Satisfaction should be used to communicate the necessary information to the DMV. (Appendix B).

To complete the necessary form, the clerk will need to obtain identifying information for the defendant. To suspend a license, the DMV requires a defendant's full name and address and at least one of the following three items: a) a driver's license number, b) a social security number, or c) date of birth. This information ordinarily appears in the paperwork transferred from magistrate court. Typically, this information would be included on the arrest warrant on the criminal disposition report (CDR). If the required information is not available, the clerk should not send the form because the DMV will be unable to suspend the driver's license. Because the clerk is required to notify DMV when a defendant fails to appear or pay costs, the clerk must establish a system to monitor cases for either of these failures.

5.17.1 Driver's License Suspension -- Failure to Pay Costs

A defendant in a criminal case who fails to pay costs or fines at the time established by the court may be subject to a driver's license suspension. (W. Va. Code § 62-4-17(a)). As set forth below,

however, local practice determines the specific procedures associated with license suspension.

West Virginia Code § 62-4-17(c) requires the clerk to notify the DMV when costs have not been paid by the time established by the court. However, there is no general statutory time established by statute that determines the time of payment of costs in original circuit court criminal cases, as opposed to appeals from magistrate or municipal court appeals. The court, therefore, must specify the time frame for payment in a general order or in a specific order in each case. If the time period for payment is not specified by an order, the clerk will not have a time at which DMV should be notified.

In addition to establishing the time period for the repayment of costs, the court has the discretion to determine whether a defendant has the ability to pay costs that have been assessed. To avoid license suspension, a defendant may request that the court find that he or she is financially unable to pay all or a portion of the costs. (W. Va. Code § 62-4-17(c)). The defendant must request this relief before the time period for payment expires. If the court finds that the defendant is unable to pay these costs, the clerk should **not** notify DMV. West Virginia Code § 62-4-17(c), however, does not establish specific procedures or guidelines to determine financial status. Each court has the discretion to determine this issue.

Further, the court must provide a person with written notice of the following: a) the failure to pay costs within the time specified by the court will result in a license suspension; and b) the suspension may result in other consequences for the driver. (W. Va. Code § 62-4-17(a)). Local practice will determine the type of written notice that is provided. It is typical for this type of notice to be included in a sentencing order, typically those which release the defendant to probation or a community corrections program.

5.17.2 Driver's License Suspension -- Misdemeanor Appeals

When a defendant who is a West Virginia resident appeals a conviction from magistrate or municipal court and the defendant is either convicted or the conviction is affirmed, the defendant is required to pay fines and costs within 180 days from the date of judgment entered by the circuit court or the expiration of any stay of execution. (W. Va. Code §§ 8-10-2b(a); 50-3-2a(c)(1)). If the defendant fails to pay within this 180-day time period, the clerk must notify the DMV using the same procedures as a conviction originally imposed by the circuit court. The only distinction from a conviction in circuit court is that a conviction originally imposed by a magistrate or municipal court

and appealed to circuit court is subject to the definite time period for payment of 180 days. There is an exception to the 180-day time period, and it is implicated if the defendant is a non-resident and the conviction involved a motor vehicle violation. In these cases, the clerk is required to notify the DMV if payment is not made within 80 days from the date of judgment and the expiration of any stay of execution. (W. Va. Code §§ 8-10-2a; 50-3-2a(c)(1)).

5.17.3 Failure to Appear: Driver's License Suspension

If a defendant in any criminal case fails to appear or otherwise respond within 15 days of a scheduled appearance date, his or her driver's license may be suspended. (W. Va. Code § 62-4-17(c)). The circuit clerk is responsible for sending a notice to DMV for each defendant who fails to appear or respond within the required time frame. If a defendant fails to appear and the clerk notifies the DMV, the clerk must send a notice of the defendant's appearance when the defendant appears as required.

5.17.4 Second Chance Driver's License Program

The Second Chance Driver's License Act (effective June 10, 2016) established a program to assist individuals whose driver's license have been suspended or revoked due to unpaid court costs. (W. Va. Code §§ 17B-1-1, *et seq.*). Specifically, an eligible individual may obtain a stay on the suspension or revocation of his or her license from the Division of Motor Vehicles (DMV) conditioned upon acceptance into the Second Chance Driver's License Program and compliance with a repayment schedule for unpaid fines and court costs. The program is administered by the Division of Justice and Community Services (DJCS).

A person wishing to participate in the program must submit an application to DJCS, which then contacts the courts and DMV to verify the total amount of the applicant's unpaid fines and court costs. (W. Va. Code § 17B-7-5(a)-(b)). All courts are to provide a full accounting of all unpaid fines and court costs of an applicant within 30 days of a request from DJCS. The accounting must list the remaining unpaid amounts, separately listing the fine and the court costs, for each court order for which unpaid balances remain. (W. Va. Code § 17B-7-5(c)-(d)). Any unpaid fines and court costs, whether or not reported to DJCS by a court may not be collected separately by the court while the participant remains in good standing with the program. (W. Va. Code § 17B-7-5(d) and (j)). Upon acceptance into the program and establishment of a repayment schedule, the participant will remit monthly payments to DJCS. (W. Va. Code § 17B-7-6(a)). Upon

receipt of the first monthly payment, DJCS will issue a certificate of compliance which will result in a stay of the participant's license suspension or revocation by the DMV. (W. Va. Code §§ 17B-7-6(b) and 17B-7-7(a)). A removal of the stay of the suspension or revocation can result from failure to make payments as scheduled or a conviction of another criminal offense during participation in the program. (W. Va. Code §§ 17B-7-6(c)-(d) and 17B-7-7(c)-(d)).

Upon completion of all monthly payments under the repayment schedule, DJCS will issue a program completion certificate to the DMV and the court or courts to whom the participant owed unpaid fines and costs. (W. Va. Code § 17B-7-6(e)). Upon receipt of the program completion certificate, the court or courts shall enter an order acknowledging payment in full of the previously unpaid fines and court costs. (W. Va. Code § 17B-7-6(f)).

Participants in the program do not submit their monthly payments to the courts; rather, the payments are made to DJCS. (W. Va. Code § 17B-7-5(g)). After receipt of a participant's monthly payment, DJCS makes disbursements to the courts identified in the repayment schedule, as follows: 1) 100% of the portions of payments identified as payment of a fine, forfeiture or penalty; and 2) 95% of the portions of payments which are court costs. The Act requires that courts accept and document these payments of 95% of total unpaid court costs as payment in full of the amount owed. (W. Va. Code § 17B-7-9(b)). The DJCS retains the remaining five percent to cover the costs incurred by DJCS in administering the program. Finally in regard to these payments, the Act states that courts that receive disbursements from DJCS are responsible for making statutory disbursements of amounts of court costs received according to the requirements of the code. (W. Va. Code § 17B-7-9(c)).

The statutory disbursement provisions regarding payments received from DJCS and how clerks are to handle disbursements of such payments raise some unanswered questions. This is particularly true in relation to the receipt of 95% of costs and how to handle the required remittances and accounting of those costs. The Act directs that DJCS and DMV shall promulgate emergency and legislative rules to implement the statutory provisions. Until those rules are promulgated, it is unlikely the program will be implemented. Hopefully, those rules will provide a further guidance as to clerks' responsibilities. In the absence of specific rules, the disbursements received from DJCS should be apportioned and remitted in the same manner as payments toward satisfaction of fines and costs received directly from defendants. The only difference being that payments received from DJCS for costs should be apportioned and remitted up

to 95% of the statutory (or assessed) amount. For example, for the $75 assessed under West Virginia Code § 62-5-10 for each felony conviction, a total of $71.25 will ultimately be remitted to the State Treasurer; with $47.50 apportioned and remitted for the Crime Victim's Compensation Fund and $23.75 apportioned and remitted for the Community Corrections Fund. With respect to accounting procedures, the Act directs that the payments of 95% of court costs be accepted and documented as payment in full. (W. Va. Code § 17B-7-9(b)(2)). Clerks should consult with appropriate county commission and state auditor personnel for the acceptable accounting practices to follow in this regard.

5.18 FAILURE TO PAY COSTS -- DNR VIOLATIONS

In appeals from magistrate court involving hunting or fishing violations, a defendant who fails to pay fines and costs within 180 days of judgment by the circuit court may have his or her hunting or fishing license suspended. (W. Va. Code § 50-3-2a(c)(2) and (3)). The clerk is required to notify the Division of Natural Resources if required costs and fines have not been paid within the 180-day time period. The clerk should use the same procedures used to notify the DMV for failure to pay fines and costs. The clerk must monitor these types of cases so that the DNR will be properly notified when costs have not been paid.

5.19 FINANCIAL RESPONSIBILITY PROGRAM FOR INMATES

Note: In addition to the work programs discussed below, a court has jurisdiction to allow an inmate to be released for employment purposes. (W. Va. Code §§ 62-11A-1, et seq.). However, the clerk does not receive and administer the inmate's wages. (W. Va. Code § 62-11A-1). See Section 5.15.4.

Under West Virginia Code § 25-1-3c, earnings of an inmate while held in a Division of Corrections prison or work-release center are subject to deductions for court-ordered financial obligations. A similar provision applies to inmates of regional jail facilities participating in work programs authorized by the Regional Jail Authority. (W. Va. Code § 31-20-31). The most common court-ordered obligations are court costs and fines, victim restitution, and child support obligations under a support order.

To facilitate the payment of court costs and restitution for an inmate who has been committed to the custody of the Division of Corrections, the clerk is required to complete a form titled "Restitution and Criminal Costs." (Appendix B). The form is a summary and lists the total amount of costs and the total amount of restitution. It does not list each court cost separately. Since local practice varies with regard to restitution payments, the clerk should indicate

on the form whether restitution checks are made payable to the clerk or to the victim. The completed form should be faxed to the DOC Records Division at 304-558-8430. If the clerk has received funds from the DOC before the clerk provided the form to the DOC, the credited payments should be noted in the comments section of the form and the amounts received should be credited to the total amount due.

The amounts of money deducted from an inmate's earnings for court-ordered obligations (except child support) are normally disbursed to the clerk of the court imposing the particular financial obligation. Both the Division of Corrections and the Regional Jail Authority utilize a distribution formula that directs higher proportions of inmate earnings toward any child support and victim restitution obligations. Once any victim restitution is fully satisfied, further payments can be applied to court costs and fines, and any other court ordered financial obligations.

Payments from inmate earnings for child support would typically be sent by the correctional facility to the Bureau of Child Support Enforcement or the custodial parent, depending upon the directive in the particular family court order. If restitution to a crime victim has been ordered by the circuit court, these payments should be mailed to the circuit clerk so that the amounts paid can be deducted from the total restitution due before forwarding the payment to the victim. In circuit clerk offices that require restitution checks be made payable to the victim, any check made payable to the circuit clerk should be returned to the correctional facility with a request that it be reissued in the victim's name and returned to the clerk. In addition to restitution to victims, if anyone has already provided compensation to a victim for a loss relating to the criminal offense (for example, insurance company or employer) the court may order restitution to that person or entity as well. The order of restitution must require that all restitution due to victims be made before restitution to others be made. (W. Va. Code § 61-11A-4(e)). Thus, if restitution is ordered to the victim and to another, payments to the victim have first priority.

The payments made by correctional facilities from inmate earning are going to be partial payments in virtually every case. Even if the court did not order any victim restitution or impose any fine, a single payment from an inmate's earnings is very unlikely to satisfy the mandatory assessed court costs and any additional court costs imposed by order. There is no statutory priority as to how to apply partial payments to the various court costs in a case. Although each payment could be credited on a pro-rata basis among the different court costs, this method will add significant complexities to bookkeeping and remittance tasks. The more practical method is to credit partial payments to one court cost until fully satisfied, then proceed to the next one (perhaps in the order that the costs were assessed or imposed). By whatever method the partial payments are credited to satisfy the various court costs, these partial payments must be included in the **next** remittance

to the appropriate office (e.g., state treasurer or auditor) for the cost(s) for which the partial payment was applied. Partial payments should not be held for remittance until the full amount of a cost is satisfied. The statutory provisions regarding remittance require the forwarding of all amounts received during that period. (See W. Va. Code §§ 62-5-10(b); 62-11C-4).

CIRCUIT COURT CIVIL COST SCHEDULE

Note: Fees and costs are not collected from persons with approved fee waivers.

FILING FEES

Note 1: Unless an exception applies, all filing fees are due when the case is initiated or when a party files a claim, such as a counterclaim that results in the assessment of a filing fee. (See Section 5.2).

Note 2: Filing fees should not be collected from a party with an approved fee waiver. At the conclusion of the proceeding, filing fees may be assessed against and collected from a party who does not have an approved fee waiver and is not the prevailing party. Any such costs collected from a defendant are remitted to the respective funds as if the fee had been collected at the initiation of the case.

General Civil Case: Filing Fee for Plaintiffs or Petitioners

Total Fee	*Assessment Authority*	*Remittance Authority*	*Amount of Remittance*	*Fund*
$200.00	§ 59-1-11(a)(1)	§ 59-1-31	$20.00	County
		§ 59-1-28a(a)(1)	$60.00	RJA
		§ 59-1-28a(a)(2)	$5.00	CSF
		§ 59-1-28a(a)(3)	$20.00	RJPRF
		§ 59-1-11(a)(1)	$30.00	CFIF
		§ 59-1-11(a)(1)	$20.00	DVLSF
		§ 59-1-11(a)(1)	$45.00	LSF

Medical Professional Liability Action: Filing Fee for Plaintiffs

Total Fee	*Assessment Authority*	*Remittance Authority*	*Amount of Remittance*	*Fund*
$400.00	§ 59-1-11(a)(2)	§ 59-1-28a(a)(3)	$20.00	RJPRF
		§ 59-1-28a(a)(1)	$60.00	RJA
		§ 59-1-28a(a)(2)	$5.00	CSF
		§ 59-1-28a(f)	$285.00	PICF
		§ 59-1-11(a)(2); § 59-1-28a(g)	$10.00	CFIF
		§ 59-1-31	$20.00	County

Filing Fees for Defendants, Respondents or Intervenors

Note: Filing fees are assessed and collected in civil cases when the following types of documents are filed: a counterclaim, cross claim, third party complaint or motion to intervene. A party is not, however, liable for more than one filing fee. A party who files a counterclaim, cross claim, third party complaint or motion to intervene in a medical malpractice case is assessed the same filing fee as a defendant in a general civil case.

Total Fee	*Assessment Authority*	*Remittance Authority*	*Amount of Remittance*	*Fund*
$200.00	§ 59-1-11(a)(6)	§ 59-1-11(a)(6)	$200.00	LSF

Fraudulent Lien or Court Record

Note: There is a cause of action for the filing of fraudulent liens or fraudulent court records. (W. Va. Code §§ 38-16-502; 61-5-27). West Virginia Code § 38-16-504 expressly establishes a filing fee for this type of case. The filing fee for a general civil case does not apply.

Total Fee	*Assessment Authority*	*Remittance Authority*	*Amount of Remittance*	*Fund*
$15.00	§ 38-16-504	§ 59-1-31	$15.00	County

Guardianship/Conservatorship

Total Fee	*Assessment Authority*	*Remittance Authority*	*Amount of Remittance*	*Fund*
$110.00	§ 44A-2-1(c)	§ 59-1-31	$75.00	County
		§ 44A-2-1(c)	$35.00	EGCF

Removal of Magistrate Court Case to Circuit Court

Note: This fee is collected by the magistrate court clerk and is forwarded to the circuit clerk.

Total Fee	*Assessment Authority*	*Remittance Authority*	*Amount of Remittance*	*Fund*
$200.00	§ 50-4-8	§ 59-1-31	$20.00	County
	§ 59-1-11(a)(1)	§ 59-1-28a(a)(1)	$60.00	RJA
		§ 59-1-28a(a)(2)	$5.00	CSF
		§ 59-1-28a(a)(3)	$20.00	RJPRF
		§ 59-1-11(a)(1)	$30.00	CFIF
		§ 59-1-11(a)(1)	$20.00	DVLSF
		§ 59-1-11(a)(1)	$45.00	LSF

Appeal of Magistrate Court Case to Circuit Court

Note: This fee is collected by the magistrate court clerk and forwarded to the circuit clerk.

Total Fee	*Assessment Authority*	*Remittance Authority*	*Amount of Remittance*	*Fund*
$200.00	§ 50-5-12(a)	§ 59-1-31	$20.00	County
	§ 59-1-11(a)(1)	§ 59-1-28a(a)(1)	$60.00	RJA
		§ 59-1-28a(a)(2)	$5.00	CSF
		§ 59-1-28a(a)(3)	$20.00	RJPRF
		§ 59-1-11(a)(1)	$30.00	CFIF
		§ 59-1-11(a)(1)	$20.00	DVLSF
		§ 59-1-11(a)(1)	$45.00	LSF

Appeals in Personal Safety Order Proceedings

Note: The assessment of fees and costs in personal safety order appeals are subject to different procedures than those generally followed for civil appeals from magistrate court. For an explanation of these procedures, see Section 5.10.4.6.

Family Court Appeals

Note: When a party appeals to circuit court, no filing fee is assessed. Additionally, the clerk has no duty to prepare the record for appeal to circuit court so the clerk should not collect fees for the preparation of the record for an appeal established by West Virginia Code § 59-1-11(b)(8).

Domestic Violence Civil Proceedings/Appeals to Circuit Court

Note: Fees and costs in domestic violence protective order proceedings are governed by West Virginia Code § 48-27-308 and Rule 4(b), RDVCP. The general filing fee and assessment procedures for civil cases do not apply. See Family Court Cost Schedule for the assessment of costs in these proceedings.

Action Remaining on Docket for More Than Three Years

Note: This fee is assessed after a case has remained on the docket for three years. After the initial assessment, the fee is assessed at the beginning of each following year. If the case remains on the docket for a partial year, the party is still required to pay this fee.

Total Fee	*Assessment Authority*	*Remittance Authority*	*Amount of Remittance*	*Fund*
$20.00	§ 59-1-11(b)(10)	§ 59-1-31	$20.00	County

FEES FOR SERVICE

Note 1: The clerk provides postage for persons with approved fee waivers from the clerk's postage fund.

Note 2: Costs for personal service by the sheriff or service on the secretary of state are not collected from persons with approved fee waivers.

Note 3: Local practices will vary with regard to accounting procedures for postage.

Personal Service by Sheriff

Note 1: The general fee for service by the sheriff applies to service of an order, notice, summons, subpoena, levying any type of prejudgment or postjudgment attachment, or serving writs of possession or execution.

Note 2: The county commission sets the fee for personal service of documents by the sheriff, but it may not exceed $25.00. (W. Va. Code § 59-1-14). If the local county commission sets a fee lower than $25.00, the lower fee must be assessed.

Total Fee	*Assessment Authority*	*Remittance Authority*	*Amount of Remittance*	*Fund*
$25.00	§ 59-1-14	§ 59-1-14	$23.00	Sheriff
			$2.00	DSR

Service of Complaints and Petitions by First Class Mail

Total Fee	*Assessment Authority*	*Remittance Authority*	*Amount of Remittance*	*Fund*
$5.00	RCP 4(d)(1)	§ 59-1-31	$5.00	CPF

Service of Other Documents by First Class Mail

Note: If the court orders the clerk to send specific documents, the clerk may not collect actual cost of postage.

Total Fee	*Assessment Authority*	*Remittance Authority*	*Amount of Remittance*	*Fund*
Actual Postage	§ 59-1-11(c)	§ 59-1-31	Actual Postage	CPF

Service of Complaints and Petitions by Certified Mail, Restricted Delivery

Total Fee	*Assessment Authority*	*Remittance Authority*	*Amount of Remittance*	*Fund*
$20.00	RCP 4(d)(1)	§ 59-1-31	$20.00	CPF

Service of Other Documents by Certified Mail, Restricted Delivery

Note: If the court orders the clerk to send documents, the clerk may not collect actual cost of postage.

Total Fee	*Assessment Authority*	*Remittance Authority*	*Amount of Remittance*	*Fund*
Actual Postage	§ 59-1-11(c)	§ 59-1-31	Actual Postage	CPF

Secretary of State

Total Fee	*Assessment Authority*	*Remittance Authority*	*Amount of Remittance*	*Fund*
$25.00	§ 59-1-2(a)(6)(D) & (E)	§ 59-1-2(a)(6)	$20.00	SOS
		§ 59-1-31	$5.00	CPF

Publication

Note: When a party serves a defendant by publication, the party pays the newspaper directly unless the party has an approved fee waiver. Publication

*fees for persons with approved fee waivers are paid by the Administrative Office. (*Johnson v. Stevens*, 265 S.E.2d 764 (W. Va. 1980)). (See Section 5.6).*

COSTS FOR DOCUMENTS

Note: When assessing fees, the clerk must add the applicable costs for service of a document unless a private process server is used.

Subpoena

Amount	*Assessment Authority*	*Remittance Authority*	*Fund*
$0.50	§ 59-1-11(b)(9)	§ 59-1-31	County

Writ of Possession

Amount	*Assessment Authority*	*Remittance Authority*	*Fund*
$25.00	§ 59-1-11(b)(4)	§ 59-1-31	County

Writ of Execution

Amount	*Assessment Authority*	*Remittance Authority*	*Fund*
$25.00	§ 59-1-11(b)(4)	§ 59-1-31	County

Abstract of Judgment

Amount	*Assessment Authority*	*Remittance Authority*	*Fund*
$5.00	§ 59-1-11(b)(1)	§ 59-1-31	County

Photocopies of Any Document

Fee	*Assessment Authority*	*Remittance Authority*	*Fund*
$1.00 per page	§ 59-1-11(b)(2)	§ 59-1-31	County

Facsimile Transmissions

Note: This fee only applies to documents ***transmitted*** *by the clerk, not to facsimiles received by the clerk. It cannot be collected from persons with*

approved fee waivers or from judicial officers or employees. (Rule 12.03(p), TCR).

Fee	*Assessment Authority*	*Remittance Authority*	*Fund*
$2.00 per page	Rule 12.03(p), TCR	§ 59-1-31	County

MISCELLANEOUS COSTS

Fee for Establishment of Separate Bank Account

Note: This one-time administrative fee is assessed when a court order requires the establishment and maintenance of funds into a federally insured interest-bearing account or other interest-bearing instrument.

Assessment Authority	*Remittance Authority*	*Amount*	*Fund*
§ 59-1-11(b)(11)	§ 59-1-11(b)(11)	$50.00	County

Circuit Court Juror Costs

Note: In the circuit court, the actual cost of the jurors' service, $40/day plus mileage, is assessed against the losing party or as the court order otherwise provides.

Assessment Authority	*Remittance Authority*	*Amount*	*Fund*
§ 52-1-17(c)	§ 52-1-17(d)(2)	½ of costs	PE&MF
		½ of costs	DVLSF

Juror Costs – Magistrate Court Appeals

Note: The remittance of jury costs below applies only to magistrate court jury cases that were appealed to circuit court.

Assessment Authority	*Remittance Authority*	*Amount*	*Fund*
§ 52-1-17(c)	§ 52-1-17(d)	$100.00	PE&MF
		$100.00	DVLSF
		Balance	TRE

Statutory Attorney Fee

Note: Although this fee is commonly referred to as a statutory attorney fee, any prevailing party is entitled to this fee.

Amount	*Assessment Authority*	*Party Entitled to Payment*
$10.00	§ 59-2-14	Prevailing Party

Court Reporter Fees

Note: The court has the discretion to establish the exact amount of the fee.

Amount	*Assessment Authority*	*Remittance Authority*	*Fund*
$5.00 (minimum)	§ 51-7-6	§ 51-7-6	Sheriff

Witness Fees

Note: The party issuing the subpoena is initially responsible for the payment of the witness fee to the clerk. Upon receipt of this fee, the clerk remits the collected amount to the witness. Any witness fees incurred should be taxed as a cost of the proceeding in favor of the prevailing party. (See Section 10.2.2).

Amount	*Assessment Authority*	*Remittance Authority*	*Person Entitled to Payment*
$10.00/day	§ 59-1-16, and -17	§ 59-1-16 and -17	WIT
$0.15/mile	S. Ct. Administrative Order		

Preparation of Record

Note: This cost may be assessed whenever the clerk must prepare the record for transmission of the record to another court, such as removal to federal court or to another circuit court.

Amount	*Assessment Authority*	*Remittance Authority*	*Amount of Remittance*	*Fund*
$10.00	§ 59-1-11(b)(8)	§ 59-1-11(b)(8)	$5.00	CFIF
		§ 59-1-31	$5.00	County

Special Assessment on MPLA Claims

Amount	*Assessment Authority*	*Fund*
1% of gross amount of settlement or judgment	§ 29-12D-1a(c)	PICF

WEST VIRGINIA SUPREME COURT PROCEEDINGS

Note: These fees and costs are only assessed when the Supreme Court orders that the parties may proceed on a designated record. (Rule 8(g), RAP).

Preparation of Record

Amount	*Assessment Authority*	*Remittance Authority*	*Amount of Remittance*	*Fund*
$10.00	§ 59-1-11(b)(8)	§ 59-1-11(b)(8)	$5.00	CFIF
		§ 59-1-31	$5.00	County

Transmission of Record to Supreme Court

Total Fee	*Assessment Authority*	*Remittance Authority*	*Amount of Remittance*	*Fund*
Actual Postage	§ 59-1-11(c)	§ 59-1-31	Actual Postage	CPF

Bond for Appeal Costs

Note 1: When the circuit clerk is preparing and transmitting the record, the allowable costs that the bond covers includes the following: a) preparing and indexing the record; b) payment for certifying orders; c) costs of transmitting and returning the record; and d) the costs of transcripts.

Note 2: The clerk must note on the petition that the bond has been posted. (Rule 8(g), RAP).

Amount	*Assessment Authority*	*Remittance Authority*	*Amount of Remittance*	*Fund*
Established by Clerk	Rule 8(g), RAP	§ 59-1-31	Assessed Cost	County

FAMILY COURT COST SCHEDULE

Note: Fees and costs are not collected from persons with approved fee waivers.

FILING FEES

Note 1: Unless an exception applies, all filing fees are due when the case is initiated. (See Section 5.2). Exceptions include cases filed by the BCSE, UIFSA or UCCJEA cases, registry of foreign support or custody orders or domestic violence cases.

Note 2: A filing fee is not collected from a petitioner who has an approved fee waiver. When the case is final, it can be assessed against a respondent who does not prevail and who does not have an approved fee waiver.

*Note 3: Unlike civil cases, a party who files a counterclaim or motion to intervene in a family court case is **not** assessed a filing fee. (W. Va. Code § 59-1-11(a)(6)).*

Divorce, Annulment or Separate Maintenance

Total Fee	*Assessment Authority*	*Amount*	*Remittance Authority*	*Fund*
$135.00	§ 59-1-11(a)(3)	$20.00	§ 59-1-31	County
		$10.00	§ 59-1-28a(b)(1)	RJA
		$30.00	§ 59-1-28a(b)(2)	FPS
		$70.00	§ 59-1-28a(b)(3)	FCF
		$5.00	§ 59-1-28a(b)(4)	CSF

Miscellaneous Family Court Cases

Note: Miscellaneous family court cases include child support actions, name changes, minor guardianship cases and sibling visitation cases but do not include petitions for modification of a family court order.

Total Fee	*Assessment Authority*	*Remittance Authority*	*Amount of Remittance*	*Fund*
$200.00	§ 59-1-11(a)(1)	§ 59-1-31	$20.00	County
		§ 59-1-28a(a)(1)	$60.00	RJA
		§ 59-1-28a(a)(2)	$5.00	CSF
		§ 59-1-28(a)(3)	$20.00	RJPRF
		§ 59-1-11(a)(1)	$30.00	CFIF
		§ 59-1-11(a)(1)	$20.00	DVLSF
		§ 59-1-11(a)(1)	$45.00	LSF

Modification

*Note 1: This fee applies to cases involving the modification of orders establishing a parenting plan, child support or spousal support. It does **not** apply to expedited petitions for the modification of child support.*

*Note 2: This fee is assessed when a party seeks the modification of a **temporary** or **final** family court order. (Supreme Court Memorandum 03-11).*

Total Fee	*Assessment Authority*	*Remittance Authority*	*Amount of Remittance*	*Fund*
$85.00	§ 59-1-11(a)(4)	§ 59-1-28a(c)	$85.00	FCF

Expedited Modification of Child Support

Note 1: This fee applies to petitions for expedited modification of child support orders. (W. Va. Code § 48-11-106). It also applies to petitions for expedited modification of child support when the BCSE has recalculated child support pursuant to the administrative procedure established by West Virginia Code §§ 48-18-201 through -206. (See Section 12.15).

*Note 2: This fee is assessed when a party seeks the expedited modification of a **temporary** or **final** child support order. (Supreme Court Memorandum 03-11).*

Total Fee	*Assessment Authority*	*Remittance Authority*	*Fund*
$35.00	§ 59-1-11(a)(5)	§ 59-1-28a(c)	FCF

Domestic Violence Protective Order Proceedings

Note 1: Fees and costs are not assessed until the case is final. (W. Va. Code § 48-27-308; Rule 4, RDVCP).

Note 2: Fees and costs may only be assessed against a ***petitioner*** *when the court denies a petition after the presentation of evidence and the court also finds that the petitioner is not a victim of domestic violence, sexual assault or stalking. (Rule 4(d), RDVCP). Fees may not be assessed against a petitioner if he or she either fails to appear, does not present evidence, or moves to terminate a protective order. (Rule 4(b) and (c), RDVCP).*

Note 3: Partial payments are applied in the following order: FCF, MAG, CSF, RJA. (Rule 4(e), RDVCP).

Total Fee	*Assessment Authority*	*Remittance Authority*	*Amount of Remittance*	*Fund*
$50.00	§ 48-27-508	§ 48-27-508	$25.00	FCF
	Rule 4(d)-(f), RDVCP	Rule 4(e), (f), RDVCP	$10.00	MAG
			$5.00	CSF
			$10.00	RJA

Family Court Appeals

Note: When a party appeals to circuit court, no filing fee is assessed. Additionally, the clerk has no duty to prepare the record for appeal to circuit court so the clerk should not collect fees for the preparation of the record for an appeal established by West Virginia Code § 59-1-11(b)(8).

FEES FOR SERVICE

Note 1: The clerk provides postage for persons with approved fee waivers from the clerk's postage fund.

Note 2: Costs for personal service by the sheriff or service on the secretary of state are not collected from persons with approved fee waivers.

Note 3: Local practices will vary with regard to accounting procedures for postage.

Personal Service by Sheriff

Note: The county commission sets the fee for personal service by the sheriff, but it may not exceed $25.00. (W. Va. Code § 59-1-14). If the local county commission sets a lower fee than $25.00, the lower fee must be assessed.

Total Fee	*Assessment Authority*	*Remittance Authority*	*Amount of Remittance*	*Fund*
$25.00	§ 59-1-14	§ 59-1-14	$23.00	Sheriff
			$2.00	DSR

Service of Petitions by First Class Mail

Total Fee	*Assessment Authority*	*Remittance Authority*	*Amount of Remittance*	*Fund*
$5.00	Rule 4(d)(1), RCP	§ 59-1-31	$5.00	CPF

Service of Other Documents by First Class Mail

Note: If the court orders the clerk to send documents, the clerk may not collect the actual cost of postage.

Total Fee	*Assessment Authority*	*Remittance Authority*	*Amount of Remittance*	*Fund*
Actual Postage	§ 59-1-11(c)	§ 59-1-31	Actual Postage	CPF

Service of Petitions by Certified Mail, Restricted Delivery

Total Fee	*Assessment Authority*	*Remittance Authority*	*Amount of Remittance*	*Fund*
$20.00	Rule 4(d)(1), RCP	§ 59-1-31	$20.00	CPF

Service of Other Documents by Certified Mail, Restricted Delivery

Note: If the court orders the clerk to send documents, the clerk may not collect the actual cost of postage.

Total Fee	*Assessment Authority*	*Remittance Authority*	*Amount of Remittance*	*Fund*
Actual Postage	§ 59-1-11(c)	§ 59-1-31	Actual Postage	CPF

Secretary of State

Total Fee	*Assessment Authority*	*Remittance Authority*	*Amount of Remittance*	*Fund*
$25.00	§ 59-1-2(a)(6)	§ 59-1-2(a)(6)	$20.00	SOS
		§ 59-1-31	$5.00	CPF

Publication

*Note: When a party serves a defendant by publication, the party pays the newspaper directly unless the party has an approved fee waiver. Publication fees for persons with approved fee waivers are paid by the Administrative Office. (*Johnson v. Stevens*, 265 S.E.2d 764 (W. Va. 1980)). (See Section 5.6).*

MISCELLANEOUS FEES

Duplicate Recordings

Note: If the cost of the recording exceeds $5.00, the actual cost may be assessed. (W. Va. Code § 51-2A-8(c)).

Total Fee	*Assessment Authority*	*Remittance Authority*	*Amount of Remittance*	*Fund*
$5.00	§ 51-2A-8(c)	S. Ct. Memorandum, 6/20/90	$5.00	AO
	Rule 5(b), RFCP			

Mandatory Parent Education

Total Fee	*Assessment Authority*	*Remittance Authority*	*Fund*
$25.00	§ 48-9-104(c)	§ 48-9-104(c)	PEF

Advanced Child-Focused Parent Education

Note1: Parties only attend these classes if the court has ordered them to do so. Parties with approved fee waivers are not required to pay the fee. A court order may reduce the amount of the fee or require one of the parties to pay the fee for the other party.

Note 2: A party may pay for each individual session instead of paying the entire fee at one time. However, the fee for each individual session must be paid before the party attends a specific session. (Rule 37a, RFCP).

Total Fee	*Assessment Authority*	*Remittance Authority*	*Fund*
$60.00 or $10.00 per class	Rule 37a, RFCP	§ 48-9-104(c); § 48-9-604	PEF

Subpoena

Amount	*Assessment Authority*	*Remittance Authority*	*Fund*
$0.50	§ 59-1-11(b)(10)	§ 59-1-31	County

Photocopies

Fee	*Assessment Authority*	*Remittance Authority*	*Fund*
$1.00 per page	§ 59-1-11(b)(2)	§ 59-1-31	County

Facsimile Transmissions

*Note: This fee only applies to documents **transmitted** by the clerk, not to facsimiles received by the clerk. It cannot be collected from persons with approved fee waivers or from judicial officers or employees. (Rule 12.03(p), TCR).*

Fee	*Assessment Authority*	*Remittance Authority*	*Fund*
$2.00 per page	Rule 12.03(p), TCR	§ 59-1-31	County

Forms

Fee	*Assessment Authority*	*Remittance Authority*	*Fund*
$0.10/page $10.00 maximum	Rule 5(f), RFCP	§ 59-1-31	County

Parenting Plan Violations

Note: This fee may be assessed by the court without regard to whether the person has an approved fee waiver. The exact amount of the penalty must be established by a court order.

Penalty	*Amount*	*Assessment/Remittance Authority*	*Fund*
First Offense	$100 (maximum)	§ 48-9-501(a)(5)	PEF
Second Offense	$500 (maximum)	§ 48-9-501(a)(5)	PEF
Third or Subsequent Offense	$1000 (maximum)	§ 48-9-501(a)(5)	PEF

WEST VIRGINIA SUPREME COURT PROCEEDINGS

Note: These fees and costs are only assessed when the Supreme Court orders that the parties may proceed on a designated record. (Rule 8, RAP).

Preparation of Record

Amount	*Assessment Authority*	*Remittance Authority*	*Amount of Remittance*	*Fund*
$10.00	§ 59-1-11(b)(8)	§ 59-1-11(b)(8)	$5.00	CFIF
		§ 59-1-31	$5.00	County

Transmission of Record to Supreme Court

Total Fee	*Assessment Authority*	*Remittance Authority*	*Amount of Remittance*	*Fund*
Actual Postage	§ 59-1-11(c)	§ 59-1-31	Actual Postage	CPF

Bond for Appeal Costs

Note 1: When a party has been permitted to proceed on a designated record, a petitioner is required to deposit a bond for appeal costs for the preparation and transmission of the record. (Rule 8(g), RAP). The clerk has the authority to establish the amount of the bond.

Note 2: The bond is set to cover the following costs: a) preparing and indexing the record; b) payment for certifying orders; c) costs of transmitting and returning the record; and d) the costs of the transcripts.

Note 3: The clerk must note on the petition that the bond has been posted.

Amount	*Assessment Authority*	*Remittance Authority*	*Amount of Remittance*	*Fund*
Established by clerk	Rule 8(g), RAP	§ 59-1-31	Assessed Costs	County

FAMILY AND CIRCUIT COURT COST SCHEDULE FOR SUGGESTIONS AND SUGGESTEE EXECUTIONS

FAMILY AND CIRCUIT COURT SCHEDULE OF COSTS AND FEES FOR SERVICE OF SUGGESTIONS AND SUGGESTEE EXECUTIONS

SUMMARY

WRIT OF SUGGESTION

Personal Service.....$50.00*

Service by Certified Mail $45.00

Service by First-Class Mail $30.00

Service by Secretary of State $50.00

SUGGESTEE EXECUTIONS

Private Employer:

Personal Service.....$50.00*

Service on Employer by Certified Mail, Return Receipt Requested, and Restricted Delivery $45.00

Service by First-Class Mail $30.00

Service by Secretary of State $50.00

Federal Governmental Employer:

Personal Service.....$50.00*

Service on Employer by Certified Mail, Return Receipt Requested, and Restricted Delivery $45.00

State Governmental Employer:

Service by First-Class Mail $26.00

County and Municipal Governmental Employers:

Service by First-Class Mail $26.00

* The total fee will change if personal service fee set by County Commission is less than $25.00. If the County Commission has set a lower fee, subtract the difference between $25.00 and the lower fee to get the actual total for this fee.

SCHEDULE

Suggestion

Note 1: Fees and costs are not collected from persons with approved fee waivers.

Note 2: A suggestee is a third party who either is in possession of the judgment debtor's property or who owes money to the judgment debtor. (W. Va. Code § 38-5-10).

Personal Service on Suggestee

Type of Fee	*Amount*	*Assessment Authority*	*Remittance Authority*	*Amount of Remittance*	*Fund*
Suggestion/ Service of Notice on Debtor	$25.00	§ 59-1-11(b)(3)	§ 59-1-31	$25.00	County
Personal Service	$25.00	§ 59-1-14	§ 59-1-14	$23.00	Sheriff
			§ 59-1-14	$2.00	DSR
Total	$50.00				

Service by Certified Mail on Suggestee/Restricted Delivery

Type of Fee	*Amount*	*Assessment Authority*	*Remittance Authority*	*Amount of Remittance*	*Fund*
Suggestion/ Service of Notice on Debtor	$25.00	§ 59-1-11(b)(3)	§ 59-1-31	$25.00	County
Service by Certified Mail	$20.00	§ 38-5-10(a); Rule 4(d)(1), RCP	§ 59-1-31	$20.00	CPF
Total	$45.00				

Service by First Class Mail on Suggestee

Type of Fee	*Amount*	*Assessment Authority*	*Remittance Authority*	*Amount of Remittance*	*Fund*
Suggestion/ Service of Notice on Debtor	$25.00	§ 59-1-11(b)(3)	§ 59-1-31	$25.00	County
Service by First Class Mail	$5.00	§ 38-5-10(a); Rule 4(d)(1), RCP	§ 59-1-31	$ 5.00	CPF
Total	$30.00				

Service by Secretary of State on Suggestee

Type of Fee	*Amount*	*Assessment Authority*	*Remittance Authority*	*Amount of Remittance*	*Fund*
Suggestion/ Service of Notice of Debtor	$25.00	§ 59-1-11(b)(3)	§ 59-1-31	$25.00	County
Service on Secretary of State	$25.00	§ 59-1-2	§ 59-1-2(a)(6)	$20.00	SOS
			§ 59-1-31	$5.00	CPF
Total	$50.00				

Suggestee Execution – Private Employer

Note: When a private employer is served with a suggestee execution, the notice to the debtor is served by certified mail, return receipt requested. (W. Va. Code § 38-5A-4).

Personal Service on Private Employer

Type of Fee	*Amount*	*Assessment Authority*	*Remittance Authority*	*Amount of Remittance*	*Fund*
Suggestee Execution/ Service of Notice on Debtor	$25.00	§ 59-1-11(b)(5)	§ 59-1-31	$25.00	County
Personal Service	$25.00	§ 59-1-14	§ 59-1-14	$23.00	Sheriff
			§ 59-1-14	$2.00	DSR
Total	$50.00				

Service on Private Employer by Certified Mail

Note: Initially, the suggestee execution must be sent to the employer by certified mail, return receipt requested, delivery restricted to the addressee. (W. Va. Code § 38-5A-5).

Type of Fee	*Amount*	*Assessment Authority*	*Remittance Authority*	*Amount of Remittance*	*Fund*
Suggestee Execution/ Service of Notice on Debtor	$25.00	§ 59-1-11(b)(5)	§ 59-1-31	$25.00	County
Service by Certified Mail	$20.00	§§ 38-5A-5; Rule 4(d)(1), RCP	§ 59-1-31	$20.00	CPF
Total	$45.00				

Service on Private Employer by First-Class Mail

Type of Fee	*Amount*	*Assessment Authority*	*Remittance Authority*	*Amount of Remittance*	*Fund*
Suggestee Execution/ Service of Notice on Debtor	$25.00	§ 59-1-11(b)(5)	§ 59-1-31	$25.00	County
Service by First-Class Mail	$5.00	§ 38-5A-5; Rule 4(d)(1), RCP	§ 59-1-31	$5.00	CPF
Total	$30.00				

Service on Private Employer by Secretary of State

Type of Fee	*Amount*	*Assessment Authority*	*Remittance Authority*	*Amount of Remittance*	*Fund*
Suggestee Execution/ Service of Notice on Debtor	$25.00	§ 59-1-11(b)(5)	§ 59-1-31	$25.00	County
Service on Secretary of State	$25.00	§ 59-1-2	§ 59-1-2(a)(6)	$20.00	SOS
			§ 59-1-31	$5.00	CPF
Total	$50.00				

Suggestee Execution – Federal Governmental Employer

Note: A federal employer may only be served by personal service or by certified mail. It may not be served on the Secretary of State or by first-class mail. (5 C.F.R. § 582.202).

Personal Service on Federal Governmental Employer

Type of Fee	*Amount*	*Assessment Authority*	*Remittance Authority*	*Amount of Remittance*	*Fund*
Suggestee Execution/ Service of Notice on Debtor	$25.00	§ 59-1-11(b)(5)	§ 59-1-31	$25.00	County
Personal Service	$25.00	§ 59-1-14	§ 59-1-14	$23.00	Sheriff
			§ 59-1-14	$2.00	DSR
Total	$50.00				

Service on Federal Governmental Employer by Certified Mail

Type of Fee	*Amount*	*Assessment Authority*	*Remittance Authority*	*Amount of Remittance*	*Fund*
Suggestee Execution/ Service of Notice on Debtor	$25.00	§ 59-1-11(b)(5)	§ 59-1-31	$25.00	County
Certified Mail	$20.00	§ 59-1-11(c), Rule 4(d)(1), RCP	§ 59-1-31	$20.00	CPF
Total	$45.00				

Suggestee Execution – State Employer

Note 1: W. Va. Code § 38-5B-4 requires service of the notice to the debtor by certified mail, return receipt requested.

Note 2: When a judgment debtor is a state employee, the auditor must be served with a suggestee execution. Service on the Secretary of State is not an option. (W. Va. Code § 38-5B-5).

Service on Auditor by First-Class Mail

Type of Fee	*Amount*	*Assessment Authority*	*Remittance Authority*	*Amount of Remittance*	*Fund*
Suggestee Execution/ Service of Notice on Debtor	$25.00	§ 59-1-11(b)(5)	§ 59-1-31	$25.00	County
Auditor Fee	$1.00	§ 38-5B-8	§ 38-5B-8	$1.00	AUD
Total	$26.00				

Suggestee Execution – County/Municipal Employer

Note 1: W. Va. Code § 38-5B-4 requires service of the notice to the debtor by certified mail, return receipt requested.

Note 2: In cases involving a county or municipal employer, service of the employer by the Secretary of State is not allowed. The auditor for the political subdivision or other comparable governmental officer must be served. (W. Va. Code § 38-5B-5).

Service on County/Municipal Employer by First Class Mail

Type of Fee	*Amount*	*Assessment Authority*	*Remittance Authority*	*Amount of Remittance*	*Fund*
Suggestee Execution/ Service of Notice on Debtor	$25.00	§ 59-1-11(b)(5)	§ 59-1-31	$25.00	County
Political Subdivision	$1.00	§ 38-5B-8	§ 38-5B-8	$1.00	PS
Total	$26.00				

Vacation or Modification of Suggestee Execution

Amount	*Assessment Authority*	*Remittance Authority*	*Fund*
$1.00	§ 59-1-11(b)(6)	§ 59-1-31	County

CIRCUIT COURT CRIMINAL COST SCHEDULE

MISCELLANEOUS COSTS

Note: The following fees are assessed when the service is provided, not upon conviction.

Bond Processing Fee

Note: If bond is secured by two different bond instruments, this fee is collected for each bond instrument. (W. Va. Code § 59-1-11(d)).

Total Fee	*Assessment Authority*	*Remittance Authority*	*Remittance Amount*	*Fund*
$25.00	§ 59-1-11(e)	§ 59-1-11(e)	$25.00	CFIF

Type of Bond	*Responsible Party*	*Assessment Authority*
Personal Recognizance	No Fee Assessed	§ 59-1-11(e)
10% Recognizance Bonds without surety	Person Tendering Ten Percent of Bail	§ 59-1-11(e)(5)
10% Recognizance Bond with surety	Surety	§ 59-1-11(e)(4)
Surety Company Bonds	Surety Company	§ 59-1-11(e)(3)
Real Estate	Owner of Real Estate	§ 59-1-11(e)(2)
Cash	Person Tendering Cash Bond	§ 59-1-11(e)(1)

Bail Piece

Total Fee	*Responsible Party*	*Assessment Authority*	*Remittance Authority*	*Remittance Amount*	*Fund*
$10.00	Surety	§ 59-1-11(f)	§ 59-1-11(f)	$10.00	CFIF

Subpoena

Note 1: This fee is not assessed when a defendant is entitled to court-appointed counsel or when the State requests a subpoena.

Note 2: The county commission sets the fee for personal service by the sheriff, but it may not exceed $25.00. (W. Va. Code § 59-1-14). If the local county commission sets a lower fee than $25.00, the lower fee must be assessed.

Type of Fee	*Fee*	*Assessment Authority*	*Remittance Authority*	*Remittance Amount*	*Fund*
Document	$0.50	§ 59-1-11(b)(9)	§ 59-1-31	$0.50	County
Service	$25.00	§ 59-1-14	§ 59-1-14	$23.00	Sheriff
Total	$25.50			$2.00	DSR

Facsimile Transmissions

Note: This fee only applies to documents ***transmitted*** *by the clerk, not to facsimiles received by the clerk. It cannot be collected from judicial officers or employees. (Rule 12.03(p), TCR).*

Fee	*Assessment Authority*	*Remittance Authority*	*Fund*
$2.00 per page	Rule 12.03(p), TCR	§ 59-1-31	County

Photocopies

Note: A person who is entitled to court-appointed counsel is entitled to one free copy of his or her own criminal file. (Syl. Pt. 1, Rhodes v. Leverette, *239 S.E.2d 136 (W. Va. 1977)).*

Fee	*Assessment Authority*	*Remittance Authority*	*Fund*
$1.00 per page	§ 59-1-11(b)(2)	§ 59-1-31	County

BASIC FELONY COSTS - $152.00

Note: Upon conviction, the costs set forth below are automatically assessed in all felony cases. (W. Va. Code § 62-5-7). Costs may also be assessed as provided for by a written pretrial diversion agreement. (W. Va. Code § 62-11C-9).

Type of Fee	*Fee Amount*	*Assessment Authority*	*Remittance Authority*	*Amount of Remittance*	*Fund*
Felony	$105.00	§ 59-1-11(d)(2)	§ 59-1-11(d)(2) § 59-1-28a(e) § 59-1-28a(e) § 59-1-28a(e) § 59-1-31	$10.00 $40.00 $5.00 $30.00 $20.00	CFIF RJA CSF RJPRF County
Prosecutor's Fee	$35.00	§ 59-2-17(d)	§ 59-2-17(d) § 59-1-31	$5.00 $30.00	CFIF PROS
Community Corrections Fee	$10.00	§ 62-11C-4(d)	§ 62-11C-4(d)	$10.00	CCF
Law Enforcement Training Fee	$2.00	§ 30-29-4	§ 30-29-4	$2.00	LET
Total	**$152.00**				

BASIC MISDEMEANOR COSTS - $122.00

Note: Upon conviction, the costs set forth below are automatically assessed in all misdemeanor cases. (W. Va. Code § 62-5-7). Costs may also be assessed as provided for by a written pretrial diversion agreement. (W. Va. Code § 62-11C-9).

Type of Fee	*Fee Amount*	*Assessment Authority*	*Remittance Authority*	*Amount of Remittance*	*Fund*
Misdemeanor Fee	$85.00	§ 59-1-11(d)(1)	§ 59-1-28a(e) § 59-1-28a(e) § 59-1-28a(e) § 59-1-31	$40.00 $5.00 $30.00 $10.00	RJA CSF RJPRF County
Prosecutor's Fee	$15.00	§ 59-2-17(a)	§ 59-2-17(a) § 59-1-31	$5.00 $10.00	CFIF County
Crime Victim Compensation Fund	$10.00	§ 14-2A-4(a)	§ 14-2A-4(b)	$10.00	CVC
Community Corrections Fee	$10.00	§ 62-11C-4(d)	§ 62-11C-4(d)	$10.00	CCF
Law Enforcement Training Fee	$2.00	§ 30-29-4	§ 30-29-4	$2.00	LET
Total	**$122.00**				

ADDITIONAL FELONY AND MISDEMEANOR COSTS

Note: Unless otherwise noted, all fees and costs listed in this section may be assessed in felony or misdemeanor cases. The amount of many of these costs must be established by court order. A pretrial diversion agreement may also establish responsibility for these costs.

DNA Sampling Fee

Note: This is a mandatory assessment upon conviction after July 1, 2011, of certain ("qualifying") offenses, unless the court finds that imposition of the fee results in undue hardship. (See Section 5.14.15).

Amount	*Assessment Authority*	*Remittance Authority*	*Person Entitled to Payment*
$150.00	§ 15-2B-15	§ 15-2B-15	DNA

Restitution

Note: Restitution payments due to victims have first priority; restitution ordered to anyone who has compensated the victim for a loss (e.g. insurance company) would have secondary priority.

Amount	*Assessment Authority*	*Remittance Authority*	*Person Entitled to Payment*
Court Order	§ 61-11A-4(a)	§ 61-11A-4	Victim

Local Crime Victim's Assistance Program Cost

Note: A court order must establish that the defendant is responsible for this cost and must also establish the amount of it.

Amount	*Assessment Authority*	*Remittance Authority*	*Fund*
Court Order	§ 61-11A-4(i)	§ 61-11A-4(i)	LCV

Magistrate Court Fee

Note: This fee is addressed when the magistrate court provided services in circuit court cases. The criminal case history sheet will indicate whether this cost should be assessed.

Amount	*Assessment Authority*	*Remittance Authority*	*Fund*
$10.00	§ 50-3-2(c)	§ 50-3-2(c)	MAG

Crime Victims Fund / Community Corrections Fund

Note: This fee is automatically assessed for each felony count of conviction.

Fee	*Assessment Authority*	*Remittance Authority*	*Amount of Remittance*	*Fund*
$75.00	§ 62-5-10(a)	§ 62-5-10(b)	$50.00	CVC
		§ 62-5-10(b)	$25.00	CCF

Sheriff's Arrest Fee

Note: This fee is assessed if the sheriff arrested the defendant. The case history sheet will indicate whether the clerk assesses this cost.

Fee	*Assessment Authority*	*Remittance Authority*	*Amount of Remittance*	*Fund*
$25.00	§ 59-1-14	§ 59-1-14	$25.00	Sheriff

Initial Transportation Cost

Note: This fee is addressed when the defendant is initially transported to regional jail by a law enforcement agency. To have this cost assessed, the law enforcement agency must submit a statement to the clerk listing the mileage and the amount due.

Fee	*Assessment Authority*	*Remittance Authority*	*Fund*
Mileage	§ 7-7-13	§ 7-7-13	Law Enforcement Agency

Court Reporter Fee

Note: The amount of the fee must be established by court order.

Fee	*Assessment Authority*	*Remittance Authority*	*Amount of Remittance*	*Fund*
$5.00 (minimum)	§ 51-7-6	§ 51-7-6	$5.00	Sheriff

Public Defender/Appointed Attorney Fee

Note: The amount of the fee must be established by court order.

Fee	*Assessment Authority*	*Remittance Authority*	*Fund*
Court Order	§ 29-21-16(g)(1)	§ 29-21-16(h)	AUD

Circuit Court Juror Costs

Note: Juror costs are assessed as follows: $40.00 per day plus mileage.

Assessment Authority	*Remittance Authority*	*Amount*	*Fund*
§ 52-1-17(c)	§ 52-1-17(d)(2)	½ of costs	PE&MF
		½ of costs	DVLSF

Juror Costs – Magistrate Court Appeals

Note: The actual cost of jurors' service is assessed. The remittance of jury costs below applies only to magistrate court jury cases that were appealed to circuit court. For the first $200 collected, one-half is deposited to the parent education and mediation fund, and one-half is deposited to the domestic violence legal services fund. Any amount collected that exceeds $200 is remitted to the State's general revenue fund.

Assessment Authority	*Remittance Authority*	*Amount*	*Fund*
§ 52-1-17(c)	§ 52-1-17(d)	$100.00	PE&MF
		$100.00	DVLSF
		Balance	TRE

Fines

Note: Fines are disbursed as indicated below, unless a specific statute establishes an alternate disbursement.

Fine	*Assessment Authority*	*Remittance Authority*	*Fund*
Court Order	§ 62-4-1	§ 62-4-1	TRE
	W. Va. Const. art. XII, § 5	W. Va. Const. art. XII, § 5	

Additional DUI Assessment

Note 1: This fee is automatically assessed for all DUI convictions including DUIs for operation of a motor boat, jet ski, or motorized vessel. This fee is assessed in addition to any fine established by West Virginia Code §§ 17C-5-2 or 20-7-18b.

Note 2: In addition to original circuit court convictions, this fee is also assessed by the circuit clerk when a defendant appeals from magistrate or municipal court and is convicted in circuit court.

Fee	*Assessment Authority*	*Remittance Authority*	*Amount of Remittance*	*Fund*
$55.00	§ 59-1-11a(a)-(c)	§ 59-1-11a(a)-(c)	Total Fee	Sheriff

DUI Fee/Crime Victims Compensation Fund

Note: This fee applies to DUI convictions for operation of a motor vehicle.

Fee	*Assessment Authority*	*Remittance Authority*	*Fund*
20% of Imposed Fine	§ 14-2A-4(a)	§ 14-2A-4(b)	CVC

Drug Testing

Fee	*Assessment Authority*	*Remittance Authority*	*Fund*
Invoiced Amount	3/21/90 S. Ct. Admin. Order	3/21/90 S. Ct. Admin. Order	Sheriff

Restitution for HIV Testing

Fee	*Assessment Authority*	*Remittance Authority*	*Fund*
HIV Testing	§ 16-3C-2(f)(12)	§ 16-3C-2(f)(13)	HIV

Wildlife Forfeiture Costs

Note: The amount of the fee is dependent upon the type of wildlife that was injured or killed.

Fee	*Assessment Authority*	*Remittance Authority*	*Fund*
Court Order	§ 20-2-5a	§ 20-2-5a	DNR

Regional Jail/Cost of Incarceration

Note: The fee is variable, but the court cannot impose an amount greater than the cost of incarceration for 30 days. The amount of the fee must be included in a court order.

Fee	*Assessment Authority*	*Remittance Authority*	*Fund*
30 days incarceration (maximum)	§ 7-8-14(a)	§ 59-1-31	County

Litter Control Fines

Note: All litter control violations are misdemeanors, and the amount of the fine is dependent upon the amount of the litter. The amount of a fine may be doubled by court order for subsequent violations. (W. Va. Code § 22-15A-4(a)(7)).

Amount	*Assessment Authority*	*Remittance Authority*	*Fund*
$100 - $25,000	§ 22-15A-4(a)(4)-(6)	§ 62-4-1	TRE

Failure to Maintain Litter Receptacles

Note: This fine only applies to state agencies or political subdivisions that control public areas and fail to maintain litter receptacles.

Amount	*Assessment Authority*	*Remittance Authority*	*Fund*
$30/day	§ 22-15A-4(g)	§ 62-4-1	TRE

Civil Penalty for Litter Control Violations

Note: This fee is assessed in addition to the fines noted above.

Amount	*Assessment Authority*	*Remittance Authority*	*Fund*
$200 - $1,000	§ 22-15A-4(c)	§ 22-15A-4(c)	1/2 LCF
		§ 22-15A-4(d))	1/2 SWA

Witness Fees

Note 1: If a witness appears on behalf of a defendant who is entitled to court-appointed counsel or on behalf of the prosecution, the witness will be reimbursed by the sheriff. In turn, the sheriff will be reimbursed by the Administrative Office. (See Sections 10.2.6 through 10.2.8).

Note 2: Upon conviction, the clerk assesses the costs of witness fees.

Amount	*Assessment Authority*	*Remittance Authority*	*Amount*	*Fund*
$10.00/day; $0.15/mile	§§ 59-1-16 and 17; S. Ct. Administrative Order; Rule 17(b), R. Cr. P.	§ 59-1-16 and 17	Witness fees	Sheriff

Teen Court Program Cost

Note: To be assessed, a county commission or municipality must adopt an ordinance establishing this fee. When established, the fee is assessed in all cases for a felony or misdemeanor conviction, including traffic violations but excluding municipal parking violations. The fee is assessed when a person pleads no contest, pleads guilty, or is found guilty at trial.

Fee	*Assessment Authority*	*Remittance Authority*	*Remittance Amount*	*Fund*
$5.00 (maximum)	§ 49-4-716(g)	§ 49-4-716(g)	Total Fee	TCAF

ALTERNATIVE SENTENCING FEES

Community Corrections Pretrial Release Fees

Note: A pretrial supervision fee, not to exceed $7 per day, may be imposed when a defendant participates in a pretrial release program. In addition, a fee not to exceed $30 per month may be imposed upon conviction when a defendant has participated in a pretrial release program. These fees are paid directly to the community criminal justice board, not to the circuit clerk. (W. Va. Code § 62-11C-7(d)).

Community Corrections Probation Fee

*Note: The amount of the fee must be established by court order, and it may be assessed **in addition** to the standard probation fee established by West Virginia Code § 62-12-9(a)(5).*

Fee	*Assessment Authority*	*Remittance Authority*	*Fund*
$35.00/mo. (maximum)	§ 62-11C-4(b)	§ 62-11C-4(b)	CCF

Community Corrections Home Incarceration Fee

*Note: The community corrections home incarceration fee is collected by the circuit clerk and is remitted to the community corrections fund. Since the court must consider the defendant's ability to pay when assessing this cost, it will not be imposed in every case. When the fee is assessed, it will not vary. It may be imposed **in addition** to the home incarceration fee which is collected by the sheriff. (See W. Va. Code § 62-11B-5(7)).*

Fee	*Assessment Authority*	*Remittance Authority*	*Fund*
$2.50/day	§ 62-11C-4(c)	§ 62-11C-4(c)	CCF

Community Corrections Supervision/Participation Fee

Note: The community corrections participation fee shall be paid directly to the community criminal justice board. The circuit clerk no longer has the authority or responsibility to collect this fee. (W. Va. Code § 62-11C-7(d)).

Standard Probation Fee

*Note: The exact amount of this fee must be established by court order. This fee may be assessed **in addition** to the community corrections probation fee.*

Fee	*Assessment Authority*	*Remittance Authority*	*Fund*
$20.00/mo. (maximum)	§ 62-12-9(a)(5)	§ 62-12-9(a)(5)	TRE

Supervised Release Fee

Note: Defendants convicted of sexual offenses or child abuse may be assigned to supervised release and may be assessed a supervised release fee by the court based upon the ability to pay. A court order must establish the amount of the fee.

Fee	*Assessment Authority*	*Remittance Authority*	*Fund*
$50.00/mo. (maximum)	§ 62-12-26(f)	S. Ct. Memorandum 03-9	PSB

APPEALS TO THE WEST VIRGINIA SUPREME COURT

Note 1: These fees and costs are not collected if a person is entitled to court-appointed counsel.

Note 2: These fees and costs are only assessed when the Supreme Court orders that the parties may proceed on a designated record. (Rule 8(g), RAP).

Preparation of Record

Amount	*Assessment Authority*	*Remittance Authority*	*Amount of Remittance*	*Fund*
$10.00	§ 59-1-11(b)(8)	§ 59-1-11(b)(8)	$5.00	CFIF
		§ 59-1-31	$5.00	County

Transmission of Record to Supreme Court

Total Fee	*Assessment Authority*	*Remittance Authority*	*Amount of Remittance*	*Fund*
Actual Postage	§ 59-1-11(c)	§ 59-1-31	Actual Postage	CPF

Bond for Appeal Costs

Note 1: When the circuit clerk is preparing and transmitting the record, the allowable costs that the bond covers includes the following: a) preparing and indexing the records; b) payment for certifying orders; c) costs of transmitting and returning the record; and d) the costs of transcripts.

Note 2: The clerk must note on the petition that the bond has been posted. (Rule 8(g), RAP).

Amount	*Assessment Authority*	*Remittance Authority*	*Amount*	*Fund*
Established by Clerk	Rule 8(g), RAP	§ 59-1-31	Assessed Cost	County

COST SCHEDULE ABBREVIATIONS

Fund Code	Name of Fund
AUD	State Auditor
CCF	WV Community Corrections Fund
CFIF	Courthouse Facility Improvement Fund
County	Circuit Clerk County Fund
CPF	Clerk's Postage Fund
CSF	Court Security Fund
CVC	Crime Victims Compensation Fund
DNA	State Police DNA Database Account
DNR	Department of Natural Resources
DSR	Deputy Sheriff Retirement Fund
DVLSF	Domestic Violence Civil Legal Services Fund
EGCF	Enforcement of Guardianship & Conservatorship
FCF	Family Court Fund
FPS	Family Protection Services Board
HIV	HIV Testing Fund
JUR	Juror
LCCJ	Local Community Criminal Justice Account
LCF	Litter Control Fund
LCV	Local Crime Victim’s Assistance Program/Juvenile Mediation Program
LET	Law Enforcement Training
LSF	Civil Legal Services Fund
MAG	Magistrate Court Fund
MLF	Medical Liability Fund - Replaced with Patient Injury Compensation Fund (effective July 1, 2016)
PE&MF	Parent Education and Mediation Fund
PEF	Parent Education Fund
PICF	Patient Injury Compensation Fund
PO	Post Office
PROS	Prosecuting Attorney
PS	Political Subdivision
PSB	Parole Supervision Benefit Fund
RJA	Regional Jail and Correctional Facility Authority
RJPRF	Regional Jail Operations Partial Reimbursement Fund
Sheriff	Sheriff's Department
SOS	Secretary of State
SWA	Local or Regional Solid Waste Authority
TCAF	Teen Court Administration Fund
TRE	State Treasurer
VIC	Victim
WIT	Witness

Chapter 6

FINANCIAL REPORTS AND ACCOUNTS

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6.1 FINANCIAL REPORTS OVERVIEW

The circuit clerk is the fee officer of the circuit and family courts. In conjunction with this role, the circuit clerk is charged with the responsibility to periodically report certain information about the fees and accounts of the courts to agencies of the federal, state and local governments. Generally, the submission of these reports is mandated by various statutes, although the reporting form and data required is often determined by the receiving agency. Chart 6 on the following page summarizes the statutorily required financial reports that circuit clerks must complete.

Official reports sent to agencies of state and local government may be posted to the Administrative Order Book in the clerk's office. Copies of federally required reports to the Internal Revenue Service regarding large cash bail payments, discussed in Section 6.12, should be kept for five years in a file designated for these IRS reports.

Finally, each type of financial report is intended for a specific receiving agency. Copies of a report should be provided to other agencies only when specifically directed. Submitting copies of financial reports to other agencies when not required is unnecessary and inefficient. It is not necessary, for instance, to send copies of reports for the State Auditor and State Treasurer to the Administrative Office. However, copies of certain reports must be distributed to other agencies in addition to the intended receiving agency. For example, a copy of the federally required report of a large cash bail payment must be sent to the appropriate U.S. Attorney's Office at the time the original report is submitted to the IRS. (See Section 6.12). The clerk must follow the instructions applicable to each reporting form, and only provide copies to other agencies when specifically directed to do so.

FINANCIAL REPORTS (Chart 6)

REMITTANCE REPORT ***(Submitted To)***	**SCHEDULE**	**CODE REF**
Monthly Financial Statement of the Clerk of the Circuit Court *(Sheriff)*	10th of Month	59-1-11a 59-1-31
Remittance Report to State Treasurer *(State Treasurer)*	10th of Month	59-1-28a and others as listed on the remittance report
Family Court Recordings *(Administrative Office)*	Specified only as Monthly	51-2A-8(c)
Criminal Charge Fund Report *(Sheriff/State Auditor)*	10th of Month	62-5-5 59-1-15 59-1-17 51-7-6 29-21-16(h)
General Revenue or Office Accounts Report *(County Commission)*	Annually/July 1	59-1-37
Juror Reimbursement Report *(Sheriff)*	End of each Term	52-1-17 52-1-19 52-1-20

6.2 MONTHLY FINANCIAL STATEMENT OF THE CLERK OF THE CIRCUIT COURT

West Virginia Code § 59-1-31 requires the circuit clerk, on a monthly basis, to pay into the county treasury all fees, costs, penalties, commissions or other income collected during the month. The State Tax Department's prescribed form for this remittance is the *Monthly Statement of the Clerk of the Circuit Court*. Once the remittance form is completed, the clerk should write the check(s) and remit the month-ended revenues to the sheriff of the county. In some counties, the report is provided to the county clerk, as well as the sheriff. The circuit clerk should maintain a copy of the report for audit purposes.

West Virginia Code § 59-1-31 expressly excludes all amounts designated by West Virginia Code § 59-1-28a to be paid to other accounts from filing fees and certain assessed costs in civil and criminal cases from the monthly remittance to the county general fund. The clerk remits the amounts due under West Virginia Code § 59-1-28a to the State Treasurer, who also receives other statutorily designated funds as discussed in the following section.

6.3 REMITTANCE REPORT TO STATE TREASURER

The circuit clerk must remit to the State Treasurer certain portions of filing fees and court costs collected for the circuit court and family court each month. West Virginia Code § 59-1-28a is the primary statutory authority for remittances to the State Treasurer by the circuit clerk. Additional statutory authority for specific funds is listed on the remittance report. These apportioned amounts are deposited by the Treasurer in the accounts for various statutory funds. Although some of the statutes relating to these different fund accounts contain differing dates regarding when these remittances are due to the State Treasurer, the tenth of each month is generally considered the appropriate deadline.

The State Treasurer's Office prescribes and provides the remittance form. (See Appendix B). The clerk should forward the completed form on a monthly basis, along with one check payable to the State Treasurer for the total amount due.

6.4 CRIMINAL CHARGE FUND REPORT

West Virginia Code § 62-5-5 requires the circuit clerk to certify a list of collected criminal charge reimbursements to the State Auditor. To fulfill this requirement, the clerk completes the Criminal Charge Fund Report. (Appendix B). This form includes entries for collected amounts for court reporter fees (W. Va. Code § 51-7-6), witness fees, miscellaneous court fees and payments for drug tests. When the report is complete, the clerk forwards

it to the sheriff by the tenth of the month. The clerk also submits a check, payable to the sheriff, for all collected amounts. In turn, the sheriff submits a copy of the report and the remitted funds to the State Auditor. The clerk should retain a copy of the report for audit purposes.

6.5 FAMILY COURT DUPLICATE RECORDING FEES

The Family Court must provide a duplicate copy of the recording of a hearing upon the request of either party and the payment of the actual cost of the duplicate recording or $5.00, whichever is greater. (W. Va. Code § 51-2A-8(c)). It is the responsibility of the circuit clerk to collect and receipt the fee for each duplicate recording. Upon presentation of the paid receipt to the Family Court staff, that office provides the duplicate recording to the person requesting it. If a duplicate recording is requested by the Bureau for Child Support Enforcement (BCSE) and the fee is billed, the circuit clerk may give the BCSE representative a "Verification of Invoice" if needed for presentation to the Family Court staff to obtain the duplicate recording. Typically, the circuit clerk invoices the local BCSE monthly for these duplicate recording fees, along with any other court charges regularly invoiced to the BCSE office. (See Sections 5.8 and 12.7).

The clerk should submit a report or listing of the cases for which recordings are duplicated and the payments received on a monthly basis to the Administrative Office. The form for this remittance and report is provided by the Administrative Office. (See Appendix B). A check payable to the State of West Virginia should be forwarded to the Administrative Office. The clerk should retain a copy of the report for audit purposes.

6.6 GENERAL REVENUE OR OFFICE ACCOUNTS REPORT

West Virginia Code § 59-1-37 expressly allows a circuit clerk to maintain an interest-bearing account for the clerk's general office fund. (See Section 6.9.2). A clerk is required to report to the county commission by July 1 of each year regarding any interest-bearing accounts for general office use, the amount on deposit in any account and the amount of interest earned. There is no standard form for this report.

6.7 JUROR REIMBURSEMENT REPORT

At the end of each term of court, the circuit clerk is required to report to the sheriff the amount of reimbursement for each juror and the total amount of reimbursement for all jurors. (W. Va. Code §§ 52-1-19 and -20). Each juror is entitled to reimbursement of $40 per day for each day he or she must report. Each juror is entitled to mileage reimbursement for the round-trip between the juror's residence and the courthouse.

To fulfill this reporting requirement, an order is typically prepared that lists the name of each juror, the number of days of attendance, mileage from the juror's residence to the courthouse, the amount due to each juror, and the total amount of reimbursement for all jurors for the term. A certified copy of the order regarding juror reimbursement is directed to the sheriff.

6.8 ENFORCEMENT OF GUARDIANSHIP AND CONSERVATORSHIP ACT FUND

West Virginia Code § 44A-2-1(c) established a filing fee for guardianship and conservatorship cases and indicates that a portion of the fee shall be directed to the Enforcement of Guardianship and Conservator Act Fund (EGCF). The fund is administered by the State Treasurer. (W. Va. Code § 44A-2-1(c)). The clerk should send the portion of the filing fees collected to the Treasurer along with other funds that are remitted to that office.

6.9 INTEREST-BEARING ACCOUNTS

6.9.1 Interest-Bearing Accounts Pursuant to a Court Order

Subject to a court order in a specific case, the clerk may be required to deposit money into an interest-bearing account. When required to do so, the clerk collects a one-time administrative fee from the person depositing the funds with the court. (W. Va. Code § 59-1-11(b)(11); Circuit Court Civil Cost Schedule). Ideally, the court order should specify the type of interest-bearing account that should be established for the funds that are deposited with the court. If the order is not clear, the clerk should consult with the judge assigned to the case to determine whether or not:

a. This will be a one-time deposit;
b. A one-time payout will result;
c. There will be multiple deposits;
d. There will be multiple payouts; and
e. The length of time anticipated for the court to hold the funds.

If the court does not provide direction concerning the specific type of interest-bearing account to establish, the clerk should use the information noted above to determine whether to set up a certificate of deposit, money market account or interest-bearing checking account. Minimum initial deposit requirements, minimum balance charges, and interest rate information will be available from local banks, but should be confirmed before making a final determination in a particular case because account requirements and rates change often, even weekly. General considerations for each type of account are set forth below.

a. *Certificate of Deposit*: Certificates of Deposit are beneficial for one-time deposits and one-time disbursements. West Virginia State Tax Department guidelines direct earned interest to be recorded and receipted at the time of renewal or withdrawal. However, deposits are generally subject to early-withdrawal penalties if deposits are not maintained for set periods (e.g., 6 months, 12 months, 24 months). If the anticipated disbursements are not consistent with the CD deposit terms, another type of account is probably more appropriate.

b. *Money Market Account*: A money market account may be a good option if multiple deposits and disbursements must be made. Additional factors include the estimated length of time that the money would be deposited, available interest rates, and other types of accounts that are available. Many banks offer limited check-writing privileges with these accounts. The State Auditor's guidelines dictate recordation and receipt of earned interest on a monthly basis.

c. *Interest-Bearing Checking Account*: If the clerk must make multiple deposits and frequent withdrawals, an interest-bearing checking account may be the best option. The clerk should compare the interest rates and check-writing costs with money market accounts (which offer limited check-writing privileges). The clerk should also consider any minimum balance requirements and account charges if the account balance is less than the required minimum balance. As with a money market account, the clerk must record and receipt interest on a monthly basis.

With any type of account related to a specific case, the clerk must confirm that the financial institution will send the required earned interest statements for record-keeping and auditing purposes. It is imperative that interest be recorded and receipted when earned. This practice enables the clerk to maintain a scrupulous accounting of all funds. Additionally, it is also important to have written guidelines from the bank on early withdrawal penalties and other account charges so that this information may be relayed to the depositors when the account is established. If possible, withdrawal orders should always specify the exact dollar amount to be disbursed, and to whom checks are to be drawn. In this instance, the clerk must ensure that dollar amounts noted in any disposition order reflect the amount of money in an account.

To maintain accurate records for auditing purposes, it is best practice for the clerk to follow the procedure set forth below for deposits and withdrawals from special accounts. The clerk should not deposit any checks received for a court-ordered special account directly into the account. Rather, the clerk should deposit a check into the circuit

clerk's general office account, and then should write a check from the clerk's account to the interest-bearing account. This practice enables the circuit clerk to accurately account for all funds. The same procedure should be followed when the clerk makes withdrawals from the account, (*i.e.* the bank issues a check to the clerk, the clerk deposits it into the clerk's account and then issues checks to the payees). This practice should be followed even if the special account is some type of checking account.

Copies of documents detailing all transactions and corresponding receipts may be maintained in the court file. However, the clerk should also establish a separate file and maintain all necessary information regarding the account until the account has been closed, and an office audit has been conducted for that period. However, all originals of certificates of deposit must be kept in a secure location, not in the court file.

6.9.2 Interest-Bearing Account for Clerk's Office Fund

West Virginia Code § 59-1-37 allows circuit clerks to invest any fee, cost, percentage, penalty, commission, allowance, bond, deposit, surety or other cash payment or sum held by the clerk and to remit any interest earned to the general county fund. All money collected, except for funds that are required by court order to be in special interest-bearing accounts (See Section 6.9.1), may be invested at the discretion of the clerk in an account or accounts which do or do not pay interest. The applicable types of accounts include savings accounts, money market accounts, interest-bearing checking accounts, regular checking accounts, or any other type of account in an insured banking institution. However, the requirements of the individual bank, such as minimum balances or restrictions on the number of checks, may limit the types of accounts that are established.

In some instances, when required by a specific statute or court order, a refund or reimbursement of fees, costs or other payments may include any interest earned on such amount. Otherwise, the clerk remits all interest earned to the general county fund on no less than a quarterly basis. (W. Va. Code § 59-1-37). If funds are not paid out at the end of the month and may remain in the account for a period of time, the clerk may transfer the funds to a longer term investment with a higher interest rate. A sufficient balance should be maintained in the clerk's general office account, however, so that the clerk has sufficient funds to conduct the business of the office.

If the clerk maintains an interest-bearing account for the clerk's general office account, any interest earned should be receipted and paid into the county general fund on a regular basis, but no less often than quarterly. (W. Va. Code § 59-1-37). In addition, the clerk must report to the County Commission by July 1 of each year regarding any interest-bearing accounts for general office use, the principal of any account and the interest earned.

If the clerk has interest-bearing account funds that exceed the bank's FDIC-insured limits, the bank will need to pledge additional collateral to cover any loss (above FDIC coverage) should the bank fail. The assets pledged by the bank would be included in the bank's collateral management report submitted to the clerk.

6.10 GENERAL RECEIVERS

West Virginia Code §§ 51-6-1, *et seq.* provides for the appointment by the circuit court of a general court receiver, an agent of the court who acts as the custodian of any property interests subject to a legal dispute. The terms of the appointment of the general receiver are determined by a court order. The general court receiver manages the property which is the subject of a legal action until the litigation is resolved or the rightful ownership or control of the property is determined, and the lawful owner is located. The receiver's services are typically required if funds are deposited with the court, and the person or entity entitled to the funds cannot be located. For example, if a property dispute results in the sale of the property in question, and one of the recipients of the proceeds of the sale cannot be located, the general receiver will hold the recipient's share, until the recipient is found and claims his or her share.

The duties of the general receiver are defined by court order; he or she may only act according to an order of the court. As established by a court order, the general court receiver will primarily receive and invest money that is the result of a judgment, order or decree of the court. The funds may be paid to the court directly or may be deposited to a bank and held for the court. Eventually, the general receiver will remit the funds to the proper person. Without language in a court order authorizing the establishment of a particular type of account, the general receiver has no authority to loan any money out at interest, invest any money, or re-invest any interest or dividends. As directed by a court order, the general receiver is paid a percentage of the amount received and invested or the amount disbursed. (W. Va. Code § 51-6-7).

The general receiver is liable for all deposits of money and interest made to him or her. (W. Va. Code § 51-6-5). The receiver cannot accept money or securities until a bond, with good security approved by the court, is posted.

The amount of the bond must be at least sufficient to cover the amount of the money or securities which may be deposited; and the general receiver cannot accept any securities and money in excess of the bond posted. (W. Va. Code § 51-6-6). If the general receiver posts bond with a state-licensed indemnity or surety company, the premiums for establishing or continuing the bond are treated as a cost of administering the receivership and are paid by the general receiver out of the funds in his or her possession, as ordered by the court. If the general receiver gives bond with a surety which is not an indemnity or surety company, the receiver must give a new bond at least every two years after appointment and appear before the court to be examined under oath as to the sufficiency of the surety on the bond. (W. Va. Code § 51-6-6).

The general receiver is required to keep an accurate and itemized account showing the amounts credited to each case. On the first day of the term of court, the receiver is to appear before the court and report a general statement of accounts as outlined in West Virginia Code § 51-6-8. Failure to keep accurate accounts or to timely report may result in a fine of not less than $100 or more than $1000 and the forfeiture of the bond. (W. Va. Code § 51-6-9).

At the first term of court after January 1 of each year, the court is to order one of its commissioners in chancery (other than the general receiver) to audit and settle the accounts, examine the bond of the general receiver, and report to the circuit court at the next term. (W. Va. Code § 51-6-10). The court will order the report to be recorded with the circuit clerk if the court is satisfied that there are no questions about the accounts and bonding of the general receiver. (W. Va. Code § 51-6-11). Such reports are to be entered and indexed in a general receiver's book in the clerk's office and are a matter of public record. (W. Va. Code § 51-6-12). For recording a commissioner's report on the accounts of the general receiver, the circuit clerk may charge a fee of $.50 in each case listed in such reports, payable out of funds held by the general receiver in these cases. (W. Va. Code § 51-6-13). If a report is not filed, an audit of the accounts for the clerk's office will indicate that a required report has not been filed.

6.11 UNCLAIMED MONEY

Since the passage in 1997 of the Uniform Unclaimed Property Act (W. Va. Code §§ 36-8-1, *et seq.*), it is not necessary for the circuit clerk to hold unclaimed money for seven years in a special holding account. Unclaimed money held by a court is presumed abandoned one year after becoming distributable. (W. Va. Code § 36-8-2(a)(11)). Any such abandoned distributable funds held by the clerk as of the end of each fiscal year (June 30), should be remitted to the State Treasurer's office before November 1. (W. Va. Code § 36-8-7(d)). The instructions and forms are found on the

State Treasurer's website at http://www.wvsto.com. Any unclaimed money should be maintained in the regular checking account. Once the money has been distributable for one year, it should be remitted to the Treasurer at the end of the next year fiscal year.

6.12 REPORTING CASH BAIL OVER $10,000 TO THE IRS

Under the provisions of the federal Violent Crime Control and Law Enforcement Act of 1994, a circuit clerk must report to the Internal Revenue Service (IRS) any cash bail payments of **more than** $10,000 in cases involving state offenses that are substantially similar to certain federal offenses involving illegal drugs, racketeering, and money laundering. When required to report a cash bail payment, a clerk must complete IRS form 8300. IRS forms are available on the Internet at www.irs.gov.

For purposes of this law, "cash" means coin and currency, cashier's checks, bank drafts, traveler's checks, or money orders. However, a cashier's check, bank draft, traveler's check, or money order is not treated as cash if the funds are proceeds from a bank loan. As proof that it is from a bank loan, the clerk may rely on a copy of the loan document, a written statement from the bank, or similar proof. If multiple cash payments are made to satisfy bail and the initial payment does not exceed $10,000, the initial payment and subsequent payments must be aggregated and reported once the multiple payments exceed $10,000 in total.

IRS Form 8300 must be filed after receipt of more than $10,000 in cash bail for an individual charged with an applicable state offense. However, multiple cash payments made to satisfy **separate** bail requirements for an individual are not required to be aggregated. For example, if in April a clerk receives $6,000 in cash bail for an individual charged with a drug-related offense, and in May receives $7,000 in cash bail for the same individual charged with another drug-related offense, no aggregation and reporting is required. (See 26 C.F.R. § 1.6050I-2).

A list of West Virginia criminal offenses substantially similar to any federal offense involving a controlled substance or racketeering (money laundering is not the subject of any West Virginia offense) is not easily summarized. Since posting of more than $10,000 cash bail is rare, clerks are advised to report all such payments exceeding $10,000 in any drug-related offense or conspiracy offense to ensure compliance with the federal law. There are civil and criminal penalties for non-compliance.

The clerk is required to file Form 8300 within 15 days after receiving the payment. If the reporting requirement is triggered by the aggregation of payments, the form must be filed within 15 days of the receipt of the final payment that caused the total payments to exceed $10,000. The completed

form should be mailed to: Internal Revenue Service, Detroit Computing Center, P.O. Box 32621, Detroit, MI 48232.

Form 8300 requires a clerk to provide the correct taxpayer identification number (TIN) of the person charged with the offense. The clerk is also required to report the TIN of the person who deposits the cash. A TIN may be a social security number (SSN), an employer identification number (EIN) or an individual taxpayer identification number (ITIN). However, the clerk is not required to provide a TIN for a licensed bail bondsman. (26 C.F.R. § 1.6050I-2(c)(2)).

A clerk is required to verify the identification of the person who posts the cash bond. To fulfill this requirement, the clerk should require the payor to produce a driver's license or other form of photo identification. The clerk should maintain a photocopy of the type of identification provided. There is no exception to this requirement for a bail bondsman.

In addition to filing Form 8300 with the IRS, the clerk is also required to report the same information to the U.S. Attorney for the jurisdiction where the defendant resides and to the U.S. Attorney where the offense occurred within the same time period for reporting to the IRS. (26 C.F.R. § 1.6050I-2(d)). To fulfill this requirement, the clerk should provide a copy of the completed Form 8300 to the appropriate U.S. Attorney. The contact information for U.S. Attorneys Offices in West Virginia are:

For Boone, Cabell, Clay, Fayette, Greenbrier, Jackson, Kanawha, Lincoln, Logan, Mason, McDowell, Mercer, Mingo, Monroe, Nicholas, Putnam, Raleigh, Roane, Summers, Wayne, Wirt, Wood, and Wyoming Counties:

Southern District U.S. Attorney
P.O. Box 1713
Charleston, WV 25326
(304) 345-2200 - Charleston
(304) 529-5178 - Huntington

For all counties not listed above:

Northern District U.S. Attorney
P.O. Box 591
Wheeling, WV 26003
(304) 234-0100

If a defendant resides in another state, the address of the appropriate U.S. Attorney should be available from a U.S. Attorney's Office in West Virginia.

In addition to filing Form 8300 with the IRS, the clerk is required to notify a payor that his or her payment and identity has been reported to the IRS. This statement must be provided to the payor by January 31 of the following year that the payment was received by the clerk. The statement must include: a) the clerk's name and address; b) the name and address of any contact person for the clerk; c) the total amount of cash that was reported to the IRS; and d) a statement that this information has been reported to the IRS.

The clerk is required to maintain a copy of any Form 8300 filed with the IRS for a period of five years. Additionally, the clerk is required to maintain a statement provided to a payor for a period of five years. A copy of the completed Form 8300 and the notice to the payor should be maintained for five years in a file designated for Form 8300 reporting. Copies of these documents may also be maintained in the court file.

Chapter 7

STATISTICAL REPORTING

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Note: This chapter addresses statistical reporting associated with caseloads for circuit and family courts. This chapter does not address special reporting requirements for certain types of cases, including those reports submitted to the Division of Vital Statistics, Division of Motor Vehicles, Criminal

Identification Bureau, Division of Corrections, Regional Jail Authority, and Superintendent of the State Police. These matters are addressed in Sections 3.10 and 3.11.

7.1 INTRODUCTION

The West Virginia Supreme Court is constitutionally vested with general supervisory control over all courts of the State, with the Chief Justice serving as the administrative head. (W. Va. Const. Art. 8, Sec. 3). Clerks of the circuit court are officers within the judicial system created under Article 8 of the State Constitution. (W. Va. Const. Art. 8, Sec. 9). The circuit clerks, therefore, are under the hierarchy of administrative control established by that article that places overall supervisory authority for the State's judicial system in the Supreme Court, by and through its chief justice and administrative director. (*Rutledge v. Workman*, 332 S.E.2d 831 (W. Va. 1985)).

In order to maintain the efficient operation and fiscal management of the circuit, family and magistrate courts throughout the State, the Supreme Court relies upon a variety of data to track judicial activity. Most of the data must be provided by the local courts, principally through regular reports of the court clerks. Circuit clerks play a vital role to ensure the expeditious handling and timely disposition of circuit and family court cases by providing up-to-date statistics on the numbers and movement of cases in these courts. Under West Virginia Code § 51-1-17(e), magistrate and circuit clerks are to provide the Supreme Court administrative director with all requested information and statistical data bearing upon the state of the court dockets and any other information relating to the business of the courts. For circuit clerks, these reporting responsibilities to the administrative director involve both circuit court and family court activities. (Rule 16.13(a), TCR; W. Va. Code §§ 51-2A-7(c); 51-2A-16(c)).

All statistical reports must be submitted directly to the Supreme Court Administrative Office (AO) who holds the responsibility summarizing the data. Reports should be submitted via entry into the Supreme Court statistics database, as described below. Prior to submission to the AO, judges must be given the opportunity to review their statistical reports. The chief circuit judge should receive all statistical reports by the tenth of the month for review. All judges should receive their respective caseload, pending and disposed reports for review by the tenth of the month. Any edits requested by a judge should be completed and the reports submitted to the AO by the twentieth of the month. A list of all required reports and submission timelines are set out in the following Chart 7.1. All questions concerning these reports should be directed to the Office of Statistics and Data Collection within the Court Services Division of the Administrative Office.

Statistical reports should be submitted to the Administrative Office by entry into the Supreme Court's statistics database (please follow instructions available in the appendix). If you have difficulty submitting reports, please contact the Office of Statistics and Data Collection, phone: (304) 340-2743; email: wv.stats@courtswv.gov.

The following sections provide an overview of assembling the data and completing the various Supreme Court statistical reports. (*Financial* reports and accounting requirements for circuit clerks are discussed in Chapter 6.) For detailed instructions on monthly reporting submissions please refer to the "Statistical Reporting Instruction Manual" provided in the Appendix.

Chart 7.1 Statistical Reports by Circuit Clerks

REPORT	SCHEDULE	DUE DATE for Judicial Review	DUE DATE to AO	W. Va. CODE REFERENCE
Circuit Court Caseload	Monthly	10th of the month	20th of the month	51-1-17
Circuit Court Pending Case Age	Monthly	10th of the month	20th of the month	51-1-17
Circuit Court Disposed Case Age	Monthly	10th of the month	20th of the month	51-1-17
Family Court Caseload	Monthly	10th of the month	20th of the month	51-1-17 51-2A-7(c)
Family Court Pending Case Age	Monthly	10th of the month	20th of the month	51-1-17 51-2A-7(c)
Family Court Disposed Case Age	Monthly	10th of the month	20th of the month	51-1-17 51-2A-7(c)
Annual Juror Qualification Questionnaire	Annually	March 1	March 1	52-1-16
Family Court Appeals Subject Matter	Monthly	10th of the month	20th of the month	51-1-17 51-2A-16(c)
Domestic Appeals and Extraordinary Writs	Monthly	10th of the month	20th of the month	51-1-17 51-2A-16(c)
Divorce Action	Monthly	10th of the month	20th of the month	59-1-28a(b)
Pro Se Statistical	Monthly	10th of the month	20th of the month	51-1-17
Treatment (for applicable circuits)	Monthly	10th of the month	20th of the month	62-15-10, 49-5-2b
Disposed by Jury Trial	Monthly	10th of the month	20th of the month	N/A
Transferred to Mass Litigation	Only during months with activity	10th of the month	20th of the month	N/A

7.2 CIRCUIT COURT REPORTING SYSTEM

The timely progress of cases filed in the circuit courts are generally governed by the time standards for different types of cases set forth in the provisions of Trial Court Rule 16. To facilitate the monitoring of compliance with these time standards, as authorized by Trial Court Rule 16.13(a), the administrative director requires each circuit clerk to submit monthly summaries of case filing and disposition activity for the circuit court. Data must be submitted monthly on separate sets of forms for each circuit judge who is assigned cases in the county, except for judges on temporary assignments. Data for judges on temporary assignment or visiting judges should be included in the chief circuit judge's reporting unless otherwise instructed by the judge. The data from these reports is used to monitor workloads and case management in circuit courts; to allocate resources and prepare the judicial budget; and to respond to inquiries from other agencies of federal and state government as well as nationally based judicial research organizations. These reports are comprised of three parts: Caseload Summary, Pending Case Age and Disposed Case Age reports. Prior to submitting the reports to the AO, the clerk also submits a copy to the chief and each subject judge for review. Clerks should retain their own copies in accordance with the record retention schedule. (See Section 3.17). Pertaining to all three reports, the closed date for reporting purposes is not affected by any subsequent appeal in a case. Likewise, an appeal in a case would not be part of the pending or disposed timeframe calculations.

7.2.1 Circuit Court Caseload Report

The first form, "Circuit Court Caseload Report," is an overall summary of case filing and disposition activity, by case type, for a particular month. This report provides a "running inventory" -- a) beginning with the cases pending at the start of the month; b) adding those cases transferred in from another judge in the county or newly filed; c) deducting those cases transferred out to another judge in the county or disposed (closed); and d) ending with the number of cases pending at the close of the month. Report definitions and full instructions for the Circuit Court Caseload Report are available in the Appendix. Upon completing these reports please refer to further instructions within the "Monthly Statistical Reporting Checklist" before submission.

7.2.2 Circuit Court Pending Case Age Report

Second, the "Circuit Court Pending Case Age Report" requires that the age of all **pending** cases be reported monthly for each circuit court judge. The timeframes in this form are based upon the case progress standards established under Trial Court Rule 16 for each

case type. Base the calculations on the number of months since the case filing date until the end of the reporting month.

7.2.3 Circuit Court Disposed Case Age Report

The third form, "Circuit Court Disposed Case Age Report," provides details on the total time required to reach final disposition in all cases **closed** during the reporting month. These disposed cases are reported in terms of being closed either under or over the specific timeframes and case categories of Trial Court Rule 16. The calculations for this report are to be based upon the time between the case filing date and the date of entry by the clerk of a final order or other document that closes the case in the circuit court.

7.3 FAMILY COURT REPORTING SYSTEM

Similar to the circuit court caseloads, there is a reporting system for monitoring caseloads in the family courts. The three report forms to be completed monthly by the circuit clerk for each family court judge handling cases in the county (except specially assigned judges) are similar in format and function to the circuit court forms. The family court forms are also to be submitted directly to the AO, with copies provided to the chief and each subject judge prior to submission. Clerks should retain their own copies in accordance with the record retention schedule. (See Section 3.17). Pertaining to all three reports, the closed date for reporting purposes would not be affected by any subsequent appeal in a case. Likewise, an appeal in a case would not be part of the pending or disposed timeframe calculations. For detailed instructions on these monthly reporting submissions please refer to the "Monthly Statistics Reporting Checklist" and the "Statistical Reporting Instruction Manual" provided in the Appendix.

7.3.1 Family Court Caseload Report

The first form, "Family Court Caseload Report," is an overall summary of case filing and disposition activity, by case type, for a particular month. This report is to provide a "running inventory" – a) beginning with the cases pending at the start of the month; b) adding those cases transferred in from another judge in the county or newly filed; c) deducting those cases transferred out to another judge in the county or disposed (closed); and d) ending with the number of cases pending at the close of the month. Report definitions and full instructions for the Family Court Caseload Report are available in the Appendix. Upon completing these reports please refer to further instructions within the "Monthly Statistical Reporting Checklist" before submission.

7.3.2 Family Court Pending Case Age Report

Second, the "Family Court Pending Case Age Report" requires that the age of all **pending** cases for each family court judge be reported monthly. Base the calculations on the number of months since the case filing date until the end of the reporting month.

7.3.3 Family Court Disposed Case Age Report

The third form, "Family Court Disposed Case Age Report," provides details on the total time required to reach final disposition in all cases **closed** during the reporting month. The calculations for this report are to be based upon the time between the case filing date and the date of entry by the clerk of a final order or other document that closes the case in family court.

7.3.4 Closure of Domestic Violence Cases

Trial Court Rule 16 provides time standards and includes guidance concerning final judgments for various types of cases, but it does not provide express guidance for the closure of domestic violence protective order cases. Consequently, clerks have used different standards to report when a domestic violence case is "closed" or "final."

Because Trial Court Rule 16 generally indicates that cases are closed when final orders are entered by the trial court, domestic violence proceedings should be treated in a similar manner. In domestic violence proceedings, a case, therefore, should be considered closed after the family court judge conducts a final hearing and prepares an order. One outcome after the final hearing may be the denial of a protective order when the magistrate court has either denied or granted an emergency protective order. A second outcome may be the issuance of a protective order for 90 or 180 days.

It is relatively common that a litigant will request some type of relief or modification of the protective order after the final hearing. For example, a litigant may request the termination or modification of a protective order. Additionally, a litigant may request the extension of a 90-day protective order or file a contempt petition. Although these subsequent proceedings may arise after the final hearing, domestic violence protective order cases should still be considered "final" or "closed" for statistical purposes once the family court has conducted a final hearing and prepared an order.

7.4 ANNUAL REPORT ON JUROR QUALIFICATION QUESTIONNAIRES

The "Annual Report on Juror Qualification Questionnaires" is required by West Virginia Code § 52-1-16. Each circuit clerk is to submit this report by March 1, based upon the juror information from the previous calendar year. The required information includes whether the clerk used a jury box or jury wheel for jury selection, and data regarding the gender, age, and race of each person for whom a juror qualification form was received.

7.5 FAMILY COURT APPEALS REPORTING

Circuit clerks must complete two reporting forms each month to facilitate the Supreme Court's compliance with the legislative reporting requirements of West Virginia Code § 51-2A-16. The information conveyed by these reports includes the number of appeals from family court to the circuit court; the subject matter of the appeals; the number of *pro se* appeals filed; the average time periods in which appeals are concluded; the number of cases remanded following appeal; and other details so as to enable the legislature to study appellate procedures in family court matters and consider statutory changes in the appellate system. Data must be submitted by circuit clerks monthly on separate sets of forms for each circuit judge handling family court appeals, except judges on temporary assignments. Those appeals handled by judge on temporary assignments or visiting judges, should be reported on the chief circuit judge's report. Even if there are no family court appeals to report during a particular month, submit these reports indicating "no activity." The chief and each subject circuit court judge should receive copies for judicial review before the reports are submitted to the AO. Clerks should retain their own copies in accordance with the record retention schedule. (See Section 3.17).

7.5.1 Family Court Appeals Subject Matter Reports

As indicated by its title, the form "Family Court Appeals in Circuit Court Subject Matter Report" pertains specifically to the various subject matters involved in appeals from family court. An appeal in a particular family court case may involve more than one subject-matter area. In order to permit the circuit clerk to accurately report the total numbers by subject area, each circuit judge (or the judge's law clerk) is to provide the circuit clerk with a "Family Court Appeals in Circuit Court Subject Matter *Checklist*" **for each family court case in which an appeal was filed** during that month. Since the circuit clerk must prepare the Subject Matter Reports by the tenth of the following month for judicial review, each circuit judge in the county should promptly submit the Checklists by the end of the month. The clerk then totals up the Checklist subject matters and prepares a Report regarding

each circuit judge. Please make sure to list the circuit judge assigned the appeal on the Subject Matter Report, not the family court judge of the original case. After judicial review, the clerk submits the reports to the AO by the twentieth of the month. In completing these Reports, the subject-matter category "Domestic Violence" does not pertain to appeals from domestic violence (DV) cases arising under West Virginia Code, Chapter 48, Article 27. Rather, this category is only for domestic relations (D) cases in which a subject matter of the appeal involves domestic violence issues.

7.5.2 Circuit Court Appellate Reporting

The "Circuit Court Appellate Reporting" form is designed to provide the additional necessary data, other than the subject-matter breakdown, pertaining to appeals from family court. This information aids in monitoring timeframe compliance in these appeals, as well as providing the data necessary for the legislative reports required under West Virginia Code § 51-2A-16. Please list the circuit judge assigned the appeal on the appellate report, not the family court judge in the original case. As with other reports, these reports are provided to the chief circuit judge and the presiding circuit judge for review by the tenth of the month. All final reports are submitted to the AO by the twentieth of the month. The reporting form was updated in December 2009 to include domestic writs and the number of appeals in domestic violence cases originating in family court. Report definitions and full instructions for the Appellate Report are available in the Appendix. Upon completing these reports please refer to further instructions within the "Monthly Statistical Reporting Checklist" before submission.

7.6 DIVORCE ACTION REPORT

West Virginia Code § 59-1-28a(b) requires circuit clerks to report to the Supreme Court, at the end of each month, the number of family court actions filed by persons unable to pay; and to pay into the appropriate accounts the filing fees actually received. The "Divorce Action Report" provides the necessary information on both the number of family court cases in which the filing fees were paid and the number of cases in which the fees were waived. The form should be completed at the end of each month and submitted to the AO by the twentieth of the following month, following judicial review by the tenth. If needed for your calculations, the "Divorce Action Worksheet" is for office use only. Please do not submit the worksheet to the AO, only the summary report is necessary as submitted in the form within the Court Statistics Database.

7.7 CIRCUIT COURT PRO SE STATISTICAL REPORT

Circuit clerks must provide monthly data to the Supreme Court regarding **circuit court** cases with one or more *pro se* (unrepresented) litigants. Only **civil** cases are reported. The "Circuit Court Pro Se Statistical Report" is to be submitted to the AO by the twentieth of each month, providing the pertinent data for the previous month. Prior to submission to the AO the chief judge should receive a copy for review by the tenth of the month.

7.8 TREATMENT REPORT

The “Treatment Report” is a case number listing of the final case numbers for each treatment court case type, and the accompanying count of cases filed during the month. This report is only applicable to counties with drug courts. If there have not been any treatment court cases during a month, submit a blank report for that month. Full instructions for this report are available in Section 10 of the Appendix.

7.9 CASES DISPOSED BY JURY TRIAL

This report is a case number listing of cases disposed by jury trial as summarized on the Circuit Caseload Report. Therefore, the cases should be listed upon disposition in accordance with statistical guidelines and should be reported in the same month as they appear in the summarized total on the Judge’s caseload report. The sum of case numbers listed should total the number of jury trial dispositions on the caseload report for the same time period. Do not list cases on the Cases Disposed by Jury Trial Report until they have met the statistical closing/disposition criteria for the case type. Consider a jury trial to have occurred when the jury is struck; that is, when the jurors and alternates are selected and sworn. It is not necessary for a case to be tried to verdict by the jury. Do not include mistrials. Report these cases as jury trial disposition only when the case has a final disposition.

7.10 CASES TRANSFERRED TO MASS LITIGATION

This report is a case listing of all cases transferred to the Mass Litigation Panel upon receipt of an administrative order directing the transfer of such cases. Any cases related to a mass ligation filed after the initial transfer to the Mass Litigation Panel has occurred should also be reported in this manner upon transfer to the Panel. Full instructions for this report are available in Section 10 of Appendix D.

Chapter 8

BONDS

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8.1 SURETIES AND BONDSMEN

8.1.1 Surety Defined

A surety can be a private person, bail bondsman, or surety company who secures a criminal defendant's bail with money, property or a promise to pay money, depending upon the type of bond authorized by the court. Although it is not typical, a defendant may also serve as his or her own surety by posting cash or real property. Sureties are also referred to as "obligors." In addition, the term surety is sometimes used to refer to property that secures bail. Surety bonds may also be posted in civil cases when a party is required to post a bond.

8.1.2 Bondsmen

The conduct and qualifications of bondsmen are established by statute. (W. Va. Code §§ 51-10-1, *et seq.*; W. Va. Code §§ 51-10A-1, *et seq*.). Bail bondsman are required to charge a bonding fee of no less than ten percent of the amount of the bond. (W. Va. Code § 51-10-5a). The fee may be paid as follows: a) in full at the time the bond is issued; or b) at least three percent (3%) paid at the time the bond is issued with the remainder to be paid in not more than 12 months. Bail bondsman are required to issue receipts if a defendant or other person provides the bondsman with collateral or security.

Circuit courts in counties having a population of more than 200,000 must enter an order or adopt a local rule specifying the qualifications of bondsmen and the terms and conditions of their business in that county; courts in counties with a population of 200,000 or less may have such a rule. (W. Va. Code § 51-10-8). The responsibilities of the circuit clerk in relation to bondsmen and their business should be specified in some way, typically in an administrative order.

Applications to be a bondsman are filed in the circuit court and processed as a miscellaneous proceeding. The "license" is valid for a period specified by the court and is renewed by filing an affidavit with the court. When a renewal affidavit is filed, local practice varies with regard to whether a filing fee is collected or a new case file is established.

Bondsmen are required to file with the court a list of persons employed by them as agents, clerks, or representatives. The bondsman or surety company must also file an affidavit for each employee, agent, clerk, or representative that states that they will comply with the relevant statutory requirements. (W. Va. Code § 51-10-8).

The circuit clerk should maintain a list of licensed bondsmen in the office. The list should be current, and the clerk should promptly remove names of those whom are no longer authorized to serve as bail bondsman. The list of licensed bondsmen is to be posted in a conspicuous place in each police station, sheriff office, jail or other detention facility, municipal court, and magistrate court. It should also be made available upon request to persons detained in custody. The circuit clerk should also keep an up-to-date log listing each bondsman and the total dollar amount of the outstanding recognizances undertaken in circuit court.

Occasionally, a surety company will fail. When a clerk receives notification of a failure from the Administrative Office, the clerk should remove the company from the list of authorized surety companies or bail bondsmen.

8.1.3 Bailpiece

A bailpiece is a document that names both the defendant subject to bail and the surety on the bail. If a surety requests a bailpiece, either a judge or clerk must issue one. The clerk collects a fee for the issuance of a bailpiece. (W. Va. Code § 59-1-11). A bailpiece may be issued by a magistrate or magistrate clerk, or a circuit judge or circuit clerk.

The bailpiece is the surety's proof that he or she is the surety for the named defendant. It also entitles a surety to obtain assistance from any law enforcement officer to arrest the defendant, provided that the law enforcement officer is authorized to execute an arrest warrant. A surety may also arrest a defendant without a bailpiece. (W. Va. Code § 62-1C-14). If a bondsman arrests a defendant and does not have a

bailpiece, the defendant must be surrendered to the circuit court or a magistrate.

If the clerk or court is unavailable to issue a bailpiece, a bondsman may also take a defendant to a regional jail. (W. Va. Code § 62-1C-14). The regional jail must take the defendant into custody, provided that the bondsman has been approved by a circuit court to conduct his or her business within a county. The bail bondsman must obtain a bailpiece on the next judicial day and present it to the regional jail. (W. Va. Code § 62-1C-14).

8.2 BONDS IN CRIMINAL CASES

To allow a defendant to be released from custody, a court may require a criminal defendant to post a bond, commonly called a bail bond, to ensure that the defendant appears for all hearings and complies with other terms and conditions as established by court order. The court may allow a defendant to be released on bail throughout the course of a criminal case, including an appeal.

At the conclusion of a criminal case, any property or cash should be released from the bond. Clerks may be notified that the bond should be released by the express terms of the final order, either a sentencing order or a dismissal order. In some counties, the final orders will not expressly provide for the release of the bond; however, the entry of these orders notify the clerk that the bond should be released. The funds from a cash bond may be disbursed to cover fines, costs, and fees if the defendant is convicted, provided that the person who posted the bond has consented to these payments. (Sections 8.2.1 and 8.2.4).

There are two general types of bonds: a) cash or b) recognizance. In turn, there are four kinds of recognizance bonds: a) personal; b) real property; c) ten percent fee recognizance; and d) surety company. A bond may also be split so that the bond is posted through a combination of different types of recognizance or a combination of recognizance and cash.

8.2.1 Cash Bond

A cash bond is an amount of cash that must be deposited with the clerk by either a defendant or some other person, who is commonly called a surety. (W. Va. Code § 62-1C-2(a); Rule 31.01, TCR). If the defendant appears and is found not guilty or the charge is otherwise dismissed, the clerk will refund the bond to the person who posted it. (W. Va. Code § 62-1C-12). If the defendant is convicted, the bond will be disbursed to cover any fine, costs and fees -- provided that the defendant or the surety consented to such disbursal. If the surety

does not consent to the payment of costs, the funds should be returned to the surety. (*Robertson v. Goldman*, 369 S.E.2d 888 (W. Va. 1988)).

8.2.1.1 Cash Bond Checklist

a. The defendant and the surety sign the criminal bail agreement or other bond form.
b. The clerk collects the amount of bail set by the court and provides the defendant or other surety a receipt. (W. Va. Code § 62-1C-2).

8.2.2 Personal Recognizance Bond

A personal recognizance bond is generally issued when the court is reasonably certain that the person admitted to bail will appear for scheduled hearings. (W. Va. Code § 62-1C-1a). The bond instrument states that the bond is for a specific sum of money, but no money is actually collected. If the defendant does not appear for hearings, he or she could be held liable for the amount of the bond. A defendant can only be released on a personal recognizance bond if a court order allows this type of release. If a defendant is charged with a felony, the circuit court, but not the magistrate court, may allow a defendant to be released on his or her own recognizance. If a defendant is charged with a misdemeanor, the magistrate or circuit court may allow a personal recognizance bond. (W. Va. Code § 62-1C-4).

8.2.2.1 Personal Recognizance Bond Checklist

a. The court order must expressly indicate that the defendant may be released on his or her own recognizance. (W. Va. Code § 62-1C-1a).

b. The defendant must sign the criminal bail agreement or other bond form. (W. Va. Code § 62-1C-4; Rule 31.01(b), TCR).

8.2.3 Property Recognizance Bond

A real property bond may be posted by the defendant or by someone else on the defendant's behalf to ensure that the defendant appears as required. (W. Va. Code § 62-1C-4; Rule 31.01(b), TCR). Any property used to secure bail must be located in West Virginia.

The court typically requires an affidavit of justification of surety signed by the county clerk of the county where the property is located. If a

recent assessment showing greater property value is not in the most current land books in the county clerk's office, the records in the county assessor's office may be used for the justification of surety. The justification of surety indicates that the defendant or the surety owns property in a particular county of sufficient value to cover the bond. When property is used to secure a bond, the assessed value of the property less all liens and encumbrances must be at least one-half of the amount of bail. (W. Va. Code § 62-1C-4). If some other indication of ownership is presented to the court and is acceptable to the court, the court may waive the requirement of a justification of surety.

Occasionally, a person wanting to act as surety on a property bond will seek to do so under a power of attorney involving real property in another person's name. If presented with this circumstance, the clerk should do two things. First, the clerk should require that the proposed surety provide a certified copy of the power of attorney from the office of the county clerk where the property is located. A document granting power of attorney to another does not have to be recorded for acts of the appointed agent to be effective. But in this situation, if the property securing the bond ever became the subject of an enforcement action to collect on a forfeited bond, having the power of attorney already of record in the county clerk's office will avoid one potential impediment in the collection process. Second, the clerk should review the power of attorney document to make sure that the powers conferred upon the agent include the authority to encumber real estate owned by the principal.

If a property bond is posted, the clerk must prepare a Notice of Bond Encumbrance and forward it to the county clerk in the county where the property is located.

Later, after the conditions of the bond have been satisfied, or any forfeiture of the bond has been set aside or remitted, the court is required to exonerate the surety and release the bond. A surety may also be exonerated by a deposit of cash in the amount of the bail, or by a timely surrender of the defendant into custody. (W. Va. Code § 62-1C-12). When real property is released from bond, the clerk must complete a Release of the Notice of Bond Encumbrance and forward it to the county clerk. (Rule 31.01(b)(1)(A) and (B); TCR).

8.2.3.1 Property Recognizance Bond Checklist

a. The defendant and all persons with any ownership interest in the real property must sign the criminal bail agreement or other bond form.

b. The real estate posted as security for bail must be located in West Virginia.

c. If the court has required a justification of surety, the defendant or other surety must provide a justification of surety affidavit signed by the county clerk or the assessor where the real estate is located.

d. Under oath, the defendant or other surety must provide information to the circuit clerk regarding all liens and encumbrances against the property. Examples of liens and encumbrances are: mortgages, deeds of trust, purchase contracts, judgments, service liens, mechanics liens, or tax liens. Typically, this information must be listed on the back of the justification of surety.

e. Additionally, the defendant or other surety must list every case, whether criminal or civil, in which the property has been used to secure a bond, unless the bond has been released.

f. The assessed value of the property less liens and encumbrances must equal at least one-half the amount of the bail. Additional security will be required if the value of the property less liens and encumbrances does not equal one-half of the amount of bail.

g. The circuit clerk must complete a Notice of Bond Encumbrance and promptly provide it to the county clerk where the property is located. (Rule 31.01(b)(1)(A), TCR).

h. The circuit clerk is notified when the property should be released from the bond by receipt of an order, typically a sentencing or dismissal order.

i. When the real estate is released from the bond, the circuit clerk must complete a Release of Notice of Bond Encumbrance and provide it to the county clerk where the property is located. (Rule 31.01(b)(1)(B), TCR).

8.2.4 Ten Percent Recognizance Bond

As a form of a recognizance bond, a court may allow a defendant to deposit ten percent of the amount required for bail. (Rule 31.01(c)(2), TCR). The court may or may not require the remainder of the bond amount to be secured by another form of security, such as property.

For example, a court could set bail at the amount of $5,000 and order that the defendant pay $500 to the clerk's office and not require any further security. A court could also order the defendant to pay $500 and secure the remainder of the bond amount with another form of surety, such as property. (Rule 31.01(c), TCR).

As with a cash bond, the ten percent fee shall be refunded if the defendant meets the conditions of the recognizance. If not, the fee shall be remitted to the Auditor if the bond is forfeited and enforced. The defendant may also be liable for the remaining total amount of the bond. As with a cash bond, the funds may be used to pay fines, court costs or fees upon convictions if the defendant or other surety consents to these payments.

8.2.4.1 Ten Percent Fee Recognizance Checklist

a. A court order must allow a defendant to post 10% of the bail amount.

b. The defendant or other surety must deposit 10% of the bail amount with the circuit clerk.

c. The clerk provides a receipt for the amount of cash deposited. (W. Va. Code § 62-1C-2).

d. The defendant and any other surety must sign the criminal bail agreement.

8.2.5 Combination or Split Bond

Bond may also be secured using a combination of cash and recognizance. For example, a court could allow a defendant to post a bond partially secured by the defendant's own recognizance and partially secured by either cash or real property. In this particular split-bond circumstance, the order setting bail must specifically allow the defendant to post a bond through personal recognizance and a second form of security. This is because a defendant cannot be released on his or her own recognizance, in whole or in part, unless authorized by the court. A second example of a spit bond occurs when a defendant posts a combination of cash and property to secure a bond. Suppose a judge sets bail at $40,000, the defendant or other surety has $1,000 in cash and real property that could secure bail in the amount of $39,000. The combination of the cash and the property could be posted to secure the bond. When a defendant secures a bond through a combination of recognizances or cash, the defendant and any surety must complete the requisite forms for each type of

bond. Additionally, the clerk collects a bond processing fee for **each** bond instrument. (Section 8.2.7).

8.2.6 Surety Company or Bail Bondsman

A surety company (or bail bondsman), who is authorized to do business in the State and in the county may post bond on a defendant's behalf. (W. Va. Code § 62-1C-4; see Section 8.1). The bond form must be signed by both the defendant and an authorized representative of the surety company or bondsman.

8.2.6.1 Surety Company or Bail Bondsman Checklist

a. The clerk maintains a list of authorized surety companies or bail bondsmen, as well as a list of authorized representatives of the surety companies or any bail bondsmen.

b. To post a bond, the surety company or bail bondsman must be authorized by the circuit court to conduct a criminal bonding business in the county. (See Section 8.1.2).

c. The defendant and an authorized representative of the surety company or bail bondsman must sign the criminal bail agreement or other bond form.

8.2.7 Bond Processing Fee

In criminal cases, West Virginia Code § 59-1-11 authorizes a circuit clerk to collect a bond processing fee when bond is posted, for deposit to the courthouse facilities improvement fund. This fee is collected when bond is secured except in cases of a personal recognizance bond. The fee is collected from the surety. If a bond is secured by two different bond instruments, this fee is collected for each type of bond instrument. The following chart indicates the person or entity that is responsible for payment of this fee.

Type of Bond	Responsible Party	Assessment Authority
Personal Recognizance	No Fee Assessed	§ 59-1-11(d)
10% Recognizance Bonds without surety	Person Tendering Ten Percent of Bail in Cash	§ 59-1-11(d)(5)
10% Recognizance Bond with surety	Surety	§ 59-1-11(d)(4)
Surety Company Bond	Surety Company	§ 59-1-11(d)(3)
Real Estate	Owner of Real Estate	§ 59-1-11(d)(2)
Cash	Person Tendering Cash Bond	§ 59-1-11(d)(1)

Typically, a defendant who is entitled to court-appointed counsel would not have cash sufficient to post a cash bond or a ten percent recognizance bond. However, if a defendant is entitled to court-appointed counsel and the defendant is posting cash for a bond or a ten percent recognizance bond, the fee should not be assessed until the defendant has been convicted. (*State ex rel. Holcomb v. Nibert*, 575 S.E.2d 109 (W. Va. 1988); Supreme Court Memorandum, 03-17). However, the clerk should notify the circuit judge if a defendant has posted a substantial amount of cash so he or she can determine whether the defendant has sufficient assets to obtain his or her own legal representation.

8.2.8 IRS Reporting Requirements for Cash Bond

Under the provisions of the federal Violent Crime Control and Law Enforcement Act of 1994, a circuit clerk must report to the Internal Revenue Service (IRS) any cash bail payments of **more than** $10,000 in cases involving state offenses that are substantially similar to certain federal offenses involving illegal drugs, racketeering, and money laundering. When required to report a cash bail payment, a clerk must complete IRS form 8300. IRS forms are available on the Internet at www.irs.gov.

For purposes of this law, "cash" means coin and currency, cashier checks, bank drafts, traveler checks, or money orders. However, a cashier's check, bank draft, traveler's check, or money order is not treated as cash if the funds are proceeds from a bank loan. As proof that it is from a bank loan, the clerk may rely on a copy of the loan

document, a written statement from the bank, or similar proof. If multiple cash payments are made to satisfy bail and the initial payment does not exceed $10,000, the initial payment and subsequent payments must be aggregated and reported once the multiple payments exceed $10,000 in total.

IRS Form 8300 must be filed after receipt of more than $10,000 in cash bail for an individual charged with an applicable state offense. However, multiple cash payments made to satisfy **separate** bail requirements for an individual are not required to be aggregated. For example, if in April a clerk receives $6,000 in cash bail for an individual charged with a drug-related offense, and in May receives $7,000 in cash bail for the same individual charged with another drug-related offense, no aggregation and reporting is required. (See 26 C.F.R. § 1.6050I-2).

A list of West Virginia criminal offenses substantially similar to any federal offense involving a controlled substance or racketeering (money laundering is not the subject of any West Virginia offense) is not easily summarized. Since posting of more than $10,000 cash bail is rare, clerks are advised to report all such payments exceeding $10,000 in any drug-related offense or conspiracy offense to ensure compliance with the federal law. There are civil and criminal penalties for non-compliance.

The clerk is required to file Form 8300 within 15 days after receiving the payment. If the reporting requirement is triggered by the aggregation of payments, the form must be filed within 15 days of the receipt of the final payment that caused the total payments to exceed $10,000. The completed form should be mailed to: Internal Revenue Service, Detroit Computing Center, P.O. Box 32621, Detroit, MI 48232.

Form 8300 requires a clerk to provide the correct taxpayer identification number (TIN) of the person charged with the offense. The clerk is also required to report the TIN of the person who deposits the cash. A TIN may be a social security number (SSN), an employer identification number (EIN) or an individual taxpayer identification number (ITIN). However, the clerk is not required to provide a TIN for a licensed bail bondsman. (26 C.F.R. § 1.6050I-2(c)(2)).

A clerk is required to verify the identification of the person who posts the cash bond. To fulfill this requirement, the clerk should require the payor to produce a driver's license or other form of photo identification. The clerk should maintain a photocopy of the type of

identification provided. There is no exception to this requirement for a bail bondsman.

In addition to filing Form 8300 with the IRS, the clerk is also required to report the same information to the U.S. Attorney for the jurisdiction where the defendant resides and to the U.S. Attorney where the offense occurred within the same time period for reporting to the IRS. (26 C.F.R. § 1.6050I-2(d)). To fulfill this requirement, the clerk should provide a copy of the completed Form 8300 to the appropriate U.S. Attorney. The contact information for U.S. Attorneys Offices in West Virginia are:

For Boone, Cabell, Clay, Fayette, Greenbrier, Jackson, Kanawha, Lincoln, Logan, Mason, McDowell, Mercer, Mingo, Monroe, Nicholas, Putnam, Raleigh, Roane, Summers, Wayne, Wirt, Wood, and Wyoming Counties:

Southern District U.S. Attorney
P.O. Box 1713
Charleston, WV 25326
(304) 345-2200 - Charleston
(304) 529-3258 - Huntington

For all counties not listed above:

Northern District U.S. Attorney
P.O. Box 591
Wheeling, WV 26003
(304) 234-0100

If a defendant resides in another state, the address of the appropriate U.S. Attorney should be available from a U.S. Attorney's Office in West Virginia.

In addition to filing Form 8300 with the IRS, the clerk is required to notify a payor that his or her payment and identity has been reported to the IRS. This statement must be provided to the payor by January 31 of the following year that the payment was received by the clerk. The statement must include: a) the clerk's name and address; b) the name and address of any contact person for the clerk; c) the total amount of cash that was reported to the IRS; and d) a statement that this information has been reported to the IRS.

The clerk is required to maintain a copy of any Form 8300 filed with the IRS for a period of five years. Additionally, the clerk is required to maintain a statement provided to a payor for a period of five years. A

copy of the completed Form 8300 and the notice to the payor should be maintained for five years in a file designated for Form 8300 reporting. Copies of these documents may also be maintained in the court file.

8.2.9 Witness Bail

Although this situation may rarely arise, a court may set bail for a witness who is required to testify in a criminal case. (W. Va. Code § 62-1C-15). Bail is conditioned upon the appearance of the witness, as directed by the court. With regard to processing the bond, the clerk should follow the directives of any order that requires a witness to post a bond. The clerk may use standard criminal bond forms for witnesses who are required to post a bond.

8.2.10 Attorneys

An attorney in a criminal case is not permitted to act as a surety on any bond for a criminal defendant. (Rule 31.01(d), TCR).

8.2.11 Post-Conviction Bail

In criminal cases, a defendant may seek post-conviction bail in circuit court unless the offense is punishable by life imprisonment, the offense involved a deadly weapon, or the offense involved violence toward another person. (W. Va. Code § 62-1C-1; Rule 6(e), RAP). If the circuit court does not grant post-conviction bail due to one of these statutory exceptions, the defendant may seek review by filing a summary petition directly with the Supreme Court Clerk, not with the circuit clerk. (Rule 6(e), RAP). The Supreme Court may either grant or deny the petition. Occasionally, the Supreme Court will remand a motion for post-conviction bail for a hearing in circuit court. A defendant who is granted post-conviction bail will post bond with the circuit clerk. The circuit clerk should maintain orders from the Supreme Court regarding post-conviction bail in the circuit court file.

8.3 CRIMINAL BOND FORFEITURE AND ENFORCEMENT

8.3.1 Bond Forfeiture Defined

If a defendant acts as surety for himself or herself, a bond is to be ordered forfeited by the court when the defendant **either** violates any terms and conditions of bail or willfully fails to appear. (W. Va. Code § 62-1C-7(1)). If another person acts as a surety for the defendant, the bond is to be forfeited **only** for the defendant's willful failure to appear. The surety is not responsible for the other terms and conditions

imposed upon the defendant. (W. Va. Code § 62-1C-7(2)). Therefore, this statutory provision indicates that bond posted by a surety could not be forfeited if a defendant violated a term of his or her release, such as a prohibition on consuming alcoholic beverages. The applicable procedural rule, however, indicates that the court should declare a bond forfeiture for any breach of bond conditions; and makes no qualification with respect to whether the defendant or another person acts as surety. (Rule 46(e)(1), R. Cr. P.).

The declaration of bond forfeiture must be made before bond enforcement proceedings may be initiated. After a court has found that a bond has been forfeited, a court has the discretion to set aside forfeiture. (W. Va. Code § 62-1C-8; Rule 46(e)(2), R. Cr. P.).

8.3.2 Enforcement

After a court has declared that a criminal bond has been forfeited, it may be subject to enforcement through the following procedure:

a. By written motion, a prosecutor requests a judgment of default;

b. If the surety is a person other than the defendant, then the surety is to be given ten days notice by certified mail to appear and show cause why a judgment of default should not be entered;

c. If the defendant acted as surety, or if no appearance is made by the third-party surety after such notice, the court may enter a judgment of default;

d. If a surety appears, the court decides based upon the particular circumstances whether to enter judgment for the State or set aside the forfeiture. (W. Va. Code §§ 62-1C-8 and 62-1C-9; Rule 46(e)(2), R. Cr. P.); and

e. A judgment for the State should be entered at the same term of court in which the forfeiture was declared. (W. Va. Code § 62-1C-9).

Once judgment has been entered, the prosecutor may enforce the judgment in the same manner as civil judgments. (W. Va. Code § 62-1C-9). By entering into a bond, sureties submit to the jurisdiction and venue of the circuit court and irrevocably appoint the circuit clerk as their agent upon whom any papers affecting their liability may be served. (Rule 46(e)(3), R. Cr. P.). Even after a court has entered a

judgment against a defendant or other surety, the court has the option of remitting the judgment. (Rule 46(e)(4), R. Cr. P.). If this type of judgment is fully remitted, it is no longer subject to enforcement. A judgment may be remitted in whole or in part. (*State v. Hedrick*, 514 S.E.2d 397 (W. Va. 1999)). Therefore, the clerk should follow the directives of any court order with regard to a judgment that has been remitted.

The liability of sureties may be enforced by the State by motion within the criminal case; although any execution issued upon the judgment would be pursuant to civil law. (W. Va. Code § 62-1C-9; Rule 46(e)(3), R. Cr. P.). In some situations, prosecutors will pursue a bond forfeiture against a surety through a separate civil action, rather than seek bond forfeiture within the criminal case. If a separate civil action is filed, the Rules of Civil Procedure would govern the period for response and other procedural aspects.

8.3.3 Bond Enforcement Proceedings -- Disbursal of Funds

If the clerk collects proceeds as a result of a bond forfeiture, certain fees or expenses are deducted. When a bond has been forfeited, West Virginia Code § 30-29-4(b) requires the collection of a $2.00 fee for the Law Enforcement Training Fund (LET). Because West Virginia Code § 62-5-7 provides for the assessment of costs only upon conviction, the $2.00 LET cost may not be collected at the time a bond is posted, even though West Virginia Code § 30-29-4(b) states that the LET fee "shall be added to the amount of any cash or property bond . . .." Therefore, when the clerk collects proceeds after enforcement proceedings, the clerk disburses $2.00 to the treasurer.

If the prosecutor or a law enforcement agency incurred expenses to return a defendant, reimbursement from the collected bond proceeds are provided to the appropriate office or agency. The prosecutor or law enforcement agency should be required to submit an itemized list of expenses to the court and receive approval for the reimbursement from the court before the clerk may deduct expenses from bond proceeds.

If a forfeited **recognizance** bond, as opposed to a cash bond, is enforced, the clerk should deduct five percent (5%) of the net (after disbursal of expenses) amount recovered. The clerk disburses this fee to the prosecutor. (W. Va. Code § 59-2-17(c)). After the clerk deducts fees and costs discussed above, the clerk remits the balance of collected funds from bond enforcement proceedings to the Auditor.

8.3.4 Exoneration

The surety on a bond, including a defendant, may be exonerated from any further liability on a bond. (W. Va. Code § 62-1C-12; Rule 46(f), R. Cr. P.). Exoneration may occur at different procedural stages of a criminal case or during civil proceedings for the enforcement of a bond. Throughout either type of proceedings, a bond may be exonerated when a defendant is placed in custody. (W. Va. Code § 62-1C-12; Rule 46(f), R. Cr. P.) A typical example of this type of exoneration occurs when a bail bondsman surrenders a defendant into the custody of the State.

A surety is exonerated by the circuit court from any further liability on a bond when a defendant makes all required court appearances. (*Robertson v. Goldman*, 369 S.E.2d 888 (W. Va. 1988)). If a surety has posted a cash bond and has not consented to any payment of court costs or fines on behalf of a convicted defendant, then the cash shall be returned to the surety. If a surety has posted real property, the defendant has made all appearances, and the case is final, the court will exonerate the surety. The clerk then has a duty to release the property from the bond. To do so, the clerk must complete a Release of Notice of Bond Encumbrance and forward it to the county clerk in the county where the property is located.

A surety who has signed a recognizance may also be exonerated from a bond by depositing cash in the amount of the bail. (W. Va. Code § 62-1C-12; Rule 46(f), R. Cr. P.). Typically, a surety would make a deposit of cash to release a lien against his or her real property.

8.4 BONDS IN CIVIL CASES

In addition to bonds in criminal cases, the circuit clerk is responsible for receiving and holding bonds in different types of civil cases. In general, a court order must direct a party to post a bond in an order and should provide any special directives to the clerk with regard to the bond. Examples of such court-ordered bonds in civil proceedings include: injunction bonds (W. Va. Code § 53-5-9); temporary restraining order or preliminary injunction bonds (Rule 65, RCP); minor guardian bonds (W. Va. Code § 44-10-5); minor settlement proceedings (W. Va. Code § 44-10-14(h)(1)); and adult guardian and conservator bonds (W. Va. Code § 44A-1-9). (See Sections 8.4.3 through 8.4.18 herein).

In civil cases, the court has the discretion to specify both the type and amount of a bond. Subject to the directives of the judge, bond may be

posted in the following forms: a) personal recognizance; b) cash; c) real property; or d) surety company bond.

8.4.1 Procedures for Processing Bonds

When the circuit clerk processes a personal recognizance bond, the party posting the bond must sign the personal recognizance bond form. When processing a cash bond, the clerk collects the required amount of the bond and provides a receipt. The clerk signs and seals the cash bond form. In the case of a surety company bond, both the party and an authorized signatory of the bonding company must sign the form.

When a party secures a bond with real property in a civil case, all owners of the property must sign the bond form. If a court authorizes a party to secure a bond with real property, the court may require the property owner or owners to submit a justification of surety from the county clerk where the property is located. The court order may also require the clerk to prepare a notice of bond encumbrance and forward it to the county clerk in the county where the property is located. This practice would provide notice to any potential purchasers of the property. If the court required a notice of bond encumbrance, the clerk should complete a release of notice of bond encumbrance when the property is released from the bond. The clerk should follow any other specific directives of the court when a party secures a civil bond with real property.

8.4.2 Proceedings Against Sureties

A surety who secures a civil bond either required or permitted by the Rules of Civil Procedure (typically involving a restraining order or injunction) submits to the jurisdiction of the court with regard to the enforcement of the obligation. The clerk is required to accept motions or pleadings within the action relating to the bond seeking enforcement of a surety's obligation, and must mail copies of any such motion or pleading to the surety. (Rule 65.1, RCP). In other circumstances pertaining to civil bonds governed by statutory provisions, the filing of an independent action may be required in order to enforce surety liabilities. (e.g., W. Va. Code § 44A-1-9(d)).

8.4.3 Injunction Bonds

A court may grant a temporary restraining order, preliminary injunction or permanent injunction. (W. Va. Code § 53-5-9; Rule 65, RCP). The court order that grants such relief will generally require the party who sought the injunction to post a bond in an amount established by the

court. (Rule 65(c), RCP). The court determines the amount of the bond in its discretion deemed appropriate to adequately compensate a wrongfully enjoined party for costs and damages. A court also has the discretion to waive the bond requirement, but should make this express finding in an order. (*Kessel v. Leavitt*, 511 S.E.2d 720 (W. Va. 1998)).

When the clerk issues a summons in a case involving an injunction, the clerk must note on the summons whether any court-ordered bond has been posted. If the court has required a bond and it has not been posted, the clerk must note on the summons that the injunction will not take effect until the required bond has been posted. (W. Va. Code § 53-5-9). Similarly, if the court has waived the bond requirement, the clerk should make this notation on the summons. Notations concerning the bond will inform the parties of the status of the injunction.

8.4.4 Domestic Violence Civil Contempt Bonds

A party to a domestic violence proceeding may file a petition for civil contempt. (W. Va. Code § 48-27-901(a)). If the court finds that a party is in contempt of a protective order, the court may require the person to post a bond with surety to ensure compliance with the order. (W. Va. Code § 48-27-901(c)). Even if the contemnor has an approved fee waiver, he or she may **not** post a personal recognizance bond. (W. Va. Code § 48-27-901(c)).

A court may find that a contemnor has forfeited a bond for lack of compliance with the court order. (Rule 24(c), RDVCP). When the court makes this finding, the court will enter judgment and order forfeiture of the bond amount. The court may direct that any collected proceeds shall be paid to the party that is not in contempt. (Rule 24(c), RDVCP). If the court does not order any specific distribution of the bond proceeds, the clerk forwards any proceeds to the Auditor.

If a recognizance bond as opposed to a cash bond was posted, the obligor has 20 days to deposit the amount of the bond after the court has entered a forfeiture order. If a party or other surety fails to deposit the amount of the bond with the clerk within 20 days of the entry of the forfeiture order, the other party may request that the clerk issue a writ of execution, suggestion, or suggestee execution. (Rule 24(c), RDVCP).

8.4.5 Guardianship/Conservatorship Bonds

The presiding judicial officer has the discretion to require an appointed guardian to post a bond. (W. Va. Code § 44A-1-9(a)). A person or entity appointed as a conservator (except qualified banking institutions) is statutorily required to post a bond. (W. Va. Code § 44A-1-9(b)). If the sheriff or a representative or the department of health and human resources is appointed as a guardian or conservator, no bond is required. When a judicial officer requires a bond, he or she has the discretion to set the amount and form of any bond. Any bond must be posted in the circuit clerk's office.

If a surety executes a bond for an appointed guardian or conservator, that surety has consented to the court's jurisdiction and has also consented to being named as a party respondent to an action pertaining to the fiduciary duties of the guardian or conservator. (W. Va. Code § 44A-1-9(e)(2)). Therefore, a surety that is not a resident of West Virginia, including a company from another state, may serve as a surety for a bond that must be posted in a West Virginia guardianship or conservatorship case.

West Virginia Code § 44A-2-13(a)(2) requires a guardian or conservator to post any required bond before an order of appointment can be issued. However, West Virginia Code § 44A-1-9(c) allows a guardian or conservator to submit proof of bonding within 30 days of appointment. The contradiction between these statutes can best be resolved by considering the practical aspects of these proceedings, as explained below.

Typically, the judicial official determines at the hearing whether the alleged protected person meets the definition of a protected person and whether the petitioner should be appointed as guardian or conservator. Although a person will typically have been named as a guardian or conservator at the conclusion of the hearing, a written order cannot be entered until the following requirements have been met: 1) the petitioner executes an oath; 2) the petitioner posts any required bond; and 3) the petitioner completes the mandatory educational requirements or is exempt from this requirement. (W. Va. Code § 44A-2-13(a)). Therefore, the petitioner has 30 days to submit proof of bonding after the qualifying appointment as a guardian or conservator, but a written order cannot be entered until the bond has been posted and the other requirements have been completed.

Subject to the directives of the judicial officer, bond may be posted with surety in the following forms: a) personal recognizance; b) cash; c) real property; or d) surety company bond. (W. Va. Code § 44A-1-9). The judge has the discretion to modify the requirements of the bond whenever the court finds that a modification is in the best interests of the protected person or the estate. (W. Va. Code § 44A-1-9(c)). The judge should indicate the reduction or increase of any bond by written order.

8.4.6 Bonds in Minor Guardianship Cases

In minor guardianship cases, a guardian must post a bond and may not act as a guardian until he or she has done so, except in some instances in which the guardian has been nominated by a will. (W. Va. Code § 44-10-5). In the case of a testamentary appointment, the will must expressly waive the bond requirement and the court must also find that a bond is not necessary.

The court that appoints the guardian has the discretion to establish both the amount of a bond and the method to secure it. A bond may be secured by a surety company or by real property. It may also be secured by cash or by personal recognizance. The clerk should review the order that appoints a guardian for any specific instructions about the bond.

Occasionally, a person will serve as the guardian of more than one minor. When this situation occurs, the guardian is generally required to post a separate bond for each of the minors. However, if the court order clearly indicates that one bond is sufficient to protect the assets of all of the minors, the guardian is required to post only one bond. In the case of multiple bonds secured by real property, if the court requires a justification of surety, it should indicate that the property value is sufficient to cover the value of all of the bonds.

The circuit or family court has the discretion to appoint a curator to act with all the powers and duties of a guardian when a guardian has not yet posted a bond or when there is no guardian. (W. Va. Code § 44-10-6). For example, a court may determine that a curator should be appointed when the guardian of a minor passes away, no successor guardian has been appointed, and the minor's estate must be managed during the interim period. Similar to a guardian, a curator must post any required bond before assuming any duties.

8.4.7 Minor Settlement Proceedings

As part of the court's approval of settlement proceedings involving a minor, the court has the discretion to require any person who is managing net settlement proceeds on behalf of the minor to post a bond to protect the funds. (W. Va. Code § 44-10-14(h)(2)). The circuit court has the discretion to determine both the amount of the bond and the method of securing the bond. Any required bond will be posted with the circuit clerk.

8.4.8 Bond for Past Due Support

A court may order an obligor who has a pattern of overdue support payments to post a bond or to provide other security to guarantee payment of past due support. (W. Va. Code § 48-14-701). The support payments may be for spousal support or child support. (W. Va. Code § 48-14-104). The court is expressly authorized to require an obligor to deposit stocks, bonds or other assets to be held in escrow by the court until the past due support has been paid. (W. Va. Code § 48-14-701). The clerk should follow the terms of the court order requiring such a bond and to process the bond in the same manner as bonds in civil cases.

8.4.9 Civil Appeals From Magistrate Court

In an appeal from a judgment in a civil case in magistrate court, the magistrate court or clerk collects a bond and forwards it to the circuit clerk. (W. Va. Code § 50-5-12(a)). The amount of the bond, set by the magistrate, cannot be less than the court costs of the appeal, and cannot be more than the cost of the judgment and the costs of the appeal. A person with an approved fee waiver is not required to post this bond. (Syl. Pt. 5, *Bay v. Marshall*, 2011 WL 1795834). Additionally, a governmental agency or authority is not required to post this bond. At the conclusion of the appeal, the court should, by order, direct the clerk as to whom should receive the bond or any portion thereof.

In some cases, the bond is set by the magistrate at an amount sufficient to cover the judgment entered in magistrate court. Ideally, the final order resolving the appeal should direct the clerk as to who should receive the bond or any portion thereof. If the final order is silent on this issue, the clerk should only release the bond to the appellant if that party prevailed in circuit court; or if the appellee who prevailed in magistrate court also prevails in circuit court, the bond should not be released to the appellant unless the clerk obtains a written statement from the appellee that the judgment has been

satisfied. Otherwise, the clerk should obtain an order from the court that directs how the bond should be disbursed.

8.4.10 Appeals From Tax Commissioner or Office of Tax Appeals

A taxpayer who appeals the decision of the tax commissioner or the office of tax appeals in circuit court is required to post a cash bond or corporate surety bond within 90 days of filing the appeal. The amount of the bond must be at least the amount of the tax liability (including penalties) as established by the administrative decision subject to the appeal. A litigant is not required to post a bond if the tax commissioner certifies to the circuit clerk that the litigant has sufficient assets to secure performance of the court's orders. (W. Va. Code §§ 11-10-10; 11-10A-19).

8.4.11 Administrative Agency Appeals

Unless required by a specific statute governing an administrative agency appeal, a party is not required to post a bond to appeal a final order of an administrative agency to circuit court. (W. Va. Code § 29A-5-4(b)).

8.4.12 Recovery of Personal Property-Detinue

Detinue is a civil action that allows a plaintiff to recover from a defendant a specific item or the value of the item. The plaintiff must have title to the property, i.e., must be the owner. (W. Va. Code § 55-6-1).

8.4.12.1 Bond by Plaintiff

To obtain possession of the property before trial, the plaintiff may request a prejudgment hearing, which must be held not less than five nor more than ten days after service upon the defendant of the verified complaint, summons, and notice of prejudgment hearing. (W. Va. Code § 55-6-1). Since the court must conduct any requested prejudgment hearing, the amount of the bond would typically be established in the order following the prejudgment hearing. After the prejudgment hearing, upon the posting by the plaintiff of a bond in the amount of at least double the value of the property, the court may order that the property be seized by the sheriff. (W. Va. Code § 55-6-2). The sheriff must hold the property for three days. At the end of the three-day period, the sheriff must deliver the object to the plaintiff, unless the defendant posts a bond as set forth below.

8.4.12.2 Bond by Defendant - Redelivery Bond

During the three-day period while the sheriff retains the seized property, the defendant is entitled to have the property returned by executing a bond in the amount of at least double the value of the property. Again, the value of the property and the value of any redelivery bond would typically be established by the prejudgment hearing order. The bond should be approved by the sheriff and held by the clerk. (W. Va. Code § 55-6-4). The clerk may request that the court enter an order with regard to any bond posted by the defendant.

8.4.13 Prejudgment Attachment

In a civil case, a plaintiff may seek and obtain a prejudgment attachment of property if it appears that the property may not be available to satisfy a judgment at a later date. (W. Va. Code §§ 38-7-1, *et seq.).* A prejudgment attachment subjects property to a lien, but a prejudgment attachment, standing alone, does not entitle a party to obtain possession of the property. (W. Va. Code § 38-7-1). A prejudgment attachment is issued by the clerk upon the filing of an affidavit.

If a plaintiff seeks possession of the property subject to a prejudgment attachment, a court must conduct a prejudgment hearing not less than five days and not more than ten days after the affidavit that provided the basis for the attachment is filed. To obtain possession of the property, the plaintiff must post a bond. The court order, entered after the prejudgment hearing, should establish the amount of any bond and any other specific requirements. However, the amount of the bond must be at least twice the value of the property. (W. Va. Code § 38-7-8). Additionally, the minimum amount of the bond must be $500.

A defendant whose property has been seized subject to a prejudgment order can have the property returned by posting a bond, conditioned upon producing the property at a time and place required by the court. (W. Va. Code § 38-7-20). Although the statute does not expressly indicate that a court would enter an order with regard to the defendant's bond, a court would typically enter an order approving the sufficiency and form of the bond and approving the return of the property to the defendant.

As part of prejudgment attachment proceedings, the plaintiff may attach money or property of a civil defendant held by a third party, a garnishee. (W. Va. Code § 38-7-15). To attach property held by a garnishee, the plaintiff requests an endorsement on the prejudgment attachment. The endorsement designates who the garnishees are.

The endorsement requires the garnishee to answer the attachment and to provide relevant information concerning the funds or property that may be garnished.

As part of these proceedings, a court may order a garnishee to post a "forthcoming bond" in the amount established by the court. (W. Va. Code § 38-7-15). By posting this bond, the garnishee agrees to have the property forthcoming at such time and place as the court may order. The circuit clerk holds the bond subject to the terms of the court order.

8.4.14 Bond of Special Commissioner

Under the provisions of West Virginia Code § 55-12-1, the court may order the sale of property in any part of the State as part of a pending civil action and appoint a special commissioner or special receiver to make the sale. Special commissioners must be residents of the State and must execute a bond in an amount set by the court before making a sale or receiving any money. A partition suit is an example of a type of case in which a special commissioner could be appointed.

8.4.15 Special Receiver Bond

In a pending case concerning money or property of a person, corporation, firm, or partnership, a court may appoint a special receiver if there is danger of the loss or misappropriation of money or property at issue. (W. Va. Code § 53-6-1). Before undertaking his or her duties, the special receiver is required to post a bond as established by court order. A case involving the dissolution of a partnership or corporation is an example of a type of case in which a special receiver could be appointed.

8.4.16 Guardian Bond-Sale of Property

A court may order the sale, lease, or mortgage of the estate of a minor, mentally incompetent person, or a convict if the court determines it to be in his or her best interest. (W. Va. Code §§ 37-1-1, *et seq*.). If a sale or lease is ordered, the guardian or committee for the minor, mentally incompetent person, or convict must execute a bond conditioned on the appropriate application of the proceeds. (W. Va. Code § 37-1-14). The bond is to be payable to the State. If any bond already executed by the guardian or committee is sufficient, the court may determine that no additional bond is required.

8.4.17 Appeals From County Commissions

In an appeal from orders of a county commission, the circuit court may require the posting of a bond. (W. Va. Code § 58-3-5). Unless authorized by a specific statute, the county commission is not authorized to require a party to post a bond to perfect an appeal. (W. Va. Code § 58-3-1a). Typically, the circuit court would set the amount of bond in the initial order.

8.4.18 Writs of Certiorari

In a case involving a petition for writ of certiorari from lower tribunals to circuit court, a litigant is required to post a bond to obtain a stay or suspension of the judgment of the lower tribunal. By order, the circuit court sets the amount of the bond. (W. Va. Code § 53-3-5).

Chapter 9

JUROR MANAGEMENT AND PAYMENT

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9.1 OVERVIEW OF JURY ADMINISTRATION

The jury system in circuit court involves both petit and grand juries. In general, the statutory provisions governing the selection of petit juries apply to grand juries. (W. Va. Code § 52-2-2). In addition to the management of juries for circuit court, the circuit clerk also provides panels of prospective jurors for magistrate court and, occasionally, municipal court. (W. Va. Code §§ 8-10-2(c); 52-1-26; Rule 7.04, TCR).

Responsibility for the management and selection of jurors in each county is vested in the circuit clerk subject to the supervision and control of the circuit court. (W. Va. Code § 52-1-4). The circuit clerk is responsible for compiling and maintaining a master list of residents of the county for juror selection, selecting names or identifying numbers for the jury box or wheel and selecting specific juror panels. (W. Va. Code §§ 52-1-5(a); 52-1-6(c); and 52-1-7(a)). The statutory procedures for selecting jurors are mandatory. Alternative methods may not be used. (*State ex rel. Stanley v. Sine,* 594 S.E.2d 314 (W. Va. 2004)).

The chief judge of a circuit, or the judge in a single-judge circuit, must enter a general order on juror selection that prescribes various procedures for jury administration and directs the clerk with regard to these duties. (W. Va. Code § 52-1-7(a)). This order will generally specify the size of the master

list, the method of compilation, random selection procedures, qualification process, use of electronic methods, and other discretionary procedures for jury administration. The order should be amended to reflect any changes in procedures over time. Although a judge must enter an order governing jury selection procedures, the judge must comply with the public policies for jury selection, especially random selection, and must follow the statutorily mandated procedures for jury selection. (*State ex rel. Stanley v. Sine*, 594 S.E.2d 314 (W. Va. 2004)).

The clerk must maintain all records and papers associated with the selection and service of jurors from the master list, jury box, or jury wheel for a period of at least four years. (W. Va. Code § 52-1-16). If the local order governing jury procedures specifies a longer period, the clerk must follow the provisions of the order.

9.2 JURY SELECTION BY COMPUTER

West Virginia Code § 52-1-7a expressly authorizes the use of computers for juror selection, provided that the chief judge approves this method of juror management. Typically, the general order governing jury selection would include any provisions relating to computerized jury management. When a computer is used for jury selection, the jurors must be selected from the statutorily required source lists -- the list of licensed drivers and the list of registered voters. (W. Va. Code § 52-1-5(a)). As explained in detail in Section 9.3.1, use of state income tax rolls is not acceptable because it is likely that women would be under-represented in the prospective juror pool. In addition to selecting jurors from the required lists, the odds of selecting any particular name must be substantially equal to ensure that jurors are selected randomly. (W. Va. Code § 52-1-7a). When a county uses juror management software, written documentation of the automated selection procedures must be available for review by the judge or other interested parties.

The Administrative Office has purchased juror management software and provided it to counties for jury management. The use of this software ensures the efficient selection of jurors and greatly reduces the time required for jury management and administration.

9.3 MASTER LIST

9.3.1 Sources for Master List

A master list of county residents must be compiled for juror selection purposes from not less than two of the following source lists: registered voters, licensed drivers and state personal income tax rolls. (W. Va. Code § 52-1-5(a)). The purpose of this provision is to include a broader cross-section of the population on the master list and

spread the responsibility of service across a broader segment of the population.

At the present time, use of the income tax rolls is not acceptable since the second name on a joint tax return is not included on the list, which would likely result in an under-representation of women. In addition, only the zip codes and not the county of residence are available for sorting. Use of other lists, such as telephone books, real property lists, city directories, in addition to the voters and drivers lists, is also not acceptable since they are not authorized by statute. While the goal of such multiple combinations is commendable, merging multiple lists will often mean only a small incremental increase to the coverage achieved by merging just the voters and drivers lists. This is because the coverage of the drivers list is generally high, ranging from 60% to 85% of the population. Any gain realized by merging multiple lists will often be outweighed by the additional labor to eliminate duplicates and the increased paperwork, especially in non-computerized counties.

9.3.2 Methods for Compiling the Master List

A new master list must be compiled every two years to keep the list current. (W. Va. Code § 52-1-5(b)). There are two methods for combining the required source lists, the drivers and voters lists, to create the master list. The first method is to merge the entire lists, the full voters and the full drivers, and then check the combined list for duplicates. This process is very long and tedious unless the process is computerized or the county population is very small. It also results in a master list that is very large, representing as much as 75% to 85% of the county population. The size of the master list created by a full list merge will far exceed the juror needs for a two-year period. Therefore, unless the process is computerized, full list combination may represent a substantial waste of time and effort for most counties.

The second method to create the master list is to combine a sample from the drivers list and a sample from the voters list. (W. Va. Code § 52-1-6(c)). This method maintains the equal probability of selection for all persons, but reduces the number of names that must be manipulated and checked for duplication. In addition, it provides an opportunity to tailor the size of the master list to the two-year needs of the court.

The following formula should assist courts in determining the appropriate size of the master list:

Numbers of jurors summoned per term of court = _____
x
Number of terms per year = _____
x
Number of years master list to be used = _____
x
A factor to ensure that an adequate number of jurors is available for unanticipated, controversial or lengthy trials during the period;
Suggested: 25% increase; that is, a factor of 1.25 = _____

Recommended size of master list: _____

For example:

Number of jurors summoned per term of court = 200
x
Number of terms per year (3) = 600
x
Number of years master list to be used (2) = 1200
x
1.25 = 1500
Recommended size of master list: 1500

Sampling is a viable, easier alternative that should be considered by all courts, especially those that are non-computerized. However, it is essential that the correct statutory procedure for sampling be followed. (W. Va. Code §§ 52-1-5(a); 52-1-6(c)). Failure to calculate the appropriate "key number" (explained below), sample the lists correctly and thoroughly check for duplicates may seriously jeopardize the random selection process.

Whether a clerk combines the full lists or samples from each list, criteria for the identification of duplicates must be established and uniformly applied in the selection process. Checking for duplicates is necessary in order to retain equal probability of selection for each name on the combined list -- the defining characteristic of random selection. Rules for recognizing a duplicate name will vary by county depending on the information available on the voters list. At least one criterion in addition to the name should be used. For example, if the last name and date of birth match, the name will be considered a duplicate and one occurrence will be removed.

To obtain the initial drivers license and voters lists:

a. Counties that use computers must contact DMV directly to obtain a list of licensed drivers and to arrange for the

proper formatting and configuration of computer files for their particular system. For non-computerized counties, printed lists of licensed drivers are obtained from the DMV by the Administrative Office and are distributed to the counties.

b. Obtain computer file or list of registered voters from the Secretary of State.

To merge both lists:

a. For a full list combination, merge both lists.

b. Check the entire combined list for duplicates utilizing the rules established for your court.

To obtain a sample from each list:

a. Designate the drivers list as the primary list since it is larger than the voters list. The voters list is the secondary list since it is smaller and, therefore, easier to check for duplicates.

b. Determine the number of names required for the master list using the formula noted above.

c. Divide the total number of names on the drivers list, the primary list, by the number of names required for two years. If the result is not a whole number, round up to the next whole number. This is the key number.

d. Randomly select a number from 1 to the key number inclusive; this is the start number. It is important that this number be selected randomly, preferably by using a table of random numbers. A new start number should be randomly selected each time the master list is compiled.

e. Select names from the drivers list by beginning with the start number and taking each key number name after that. For example, name #1 is the start number. Name #2 is the name of the start number plus the key number. Name #3 is the number of name #2 plus the key number. Name #4 is the number of name #3 plus the key number, and so on.

f. Continue until the number of names desired for the two-year period is selected from the drivers list, even if it requires starting again at the beginning of the list.

g. If the number of names desired is obtained before the entire drivers list is sampled, it indicates that the key number has been miscalculated. The key number should result in the entire drivers list being used.

h. Select names from the voters list, the secondary list, by using the same start number and key number as was used on the drivers list. This ensures that the same percentage of names, not the same number, is selected from each list. Go through the entire voters list once.

i. Check the names selected from the voters list against the **entire** drivers list for duplicates. Do not compare just the samples from each list; it is not sufficient. If a name from the voters list sample is found on the drivers list, remove it from the voters list sample. If not found, the name remains. Continue until all names in the **voters list sample** have been checked on the **entire drivers list.**

j. Combine the remaining names in the voters list sample with the sample obtained from the drivers list. This combined list is the master list. It will be larger than the number required; the extent will depend on the amount of overlap between the two original source lists.

If the master list, obtained by either method, is approximately equal to or greater than the estimated 18-years-and-over population of the county, it indicates some problem with the list. It may have been combined incorrectly; there may be a problem with undetected duplicates (either across lists or internal to one or both); or one or both lists may contain a substantial number of names of people that are no longer county residents or are deceased. An unusually large master list in relation to the population should be considered a warning sign. The source lists and the procedures should be reviewed before proceeding.

9.4 PANEL SELECTION

Each county is to maintain a jury box or wheel to hold the names or identifying numbers of prospective jurors from the master list. (W. Va. Code § 52-1-6(a); Rule 7.02, TCR). A jury "box" is simply a non-electronic device, such as an actual box or "bingo" wheel which holds either paper ballots or numbered balls or pellets that correspond to specific names. (W. Va. Code § 52-1-3(7)). Courts utilizing a jury box should consider using reusable numbered balls or ballots to avoid having to type and cut up slips of paper with names each time the box is refilled. The numbers will correspond to positions on the list rather than to any specific name, and thus can be used with different lists over time. A jury "wheel" is any electronic device; *e.g.*, a computer, in which the names or identifying numbers of prospective jurors have been entered into a data file. (W. Va. Code § 52-1-3(6)).

Depending on local practice, the entire master list may be placed in the box or wheel or only the number needed for the term of court or term of jury service. If only a portion of the names from the master list are to be placed in the box or wheel, it is essential that the selection of these names be random. This may be accomplished by utilizing a key number system of selection similar to that used for compilation of the master list. In this instance, the number of names on the master list would be divided by the number of names desired for the term to yield the key number. A random start number would be selected and selection would continue as outlined for the master list. The key number and start number are unique to each selection process and depend entirely on the size of the list and the number of names desired. Do not automatically use the same key number or start number as in the master list combination for the selection of names for the box or wheel or for subsequent panel selections; the key number must be recalculated at each juncture. Alternatively, juror names or identifying numbers may be manually scrambled and picked at random. In no instance should a sequential portion of an alphabetized list be placed in the box or wheel, even if the original list was randomly selected and then alphabetized. (Syl. Pt. 3, *State ex rel. Stanley v. Sine*, 594 S.E.2d 314 (W. Va. 2004)). This applies to the selection of panels as well. While the list may represent a random selection, the appearance of names limited to a certain segment of the alphabet on a panel will raise questions as to whether the selection process was truly random.

Generally, the court order on jury selection should specify the number of names to be placed in the jury box or wheel. (W. Va. Code § 52-1-6(b)). Specifies certain minimum numbers based on county population size as measured in the last census. However, there is flexibility in this procedure and the box or wheel may be refilled any time the numbers appear to be insufficient. The following chart indicates the minimum number of names to be placed in the jury wheel or box.

County Population	Minimum Number of Potential Jurors
Less than 15,000	200
At least 15,000 but less than 50,000	400
At least 50,000 but less than 90,000	800
At least 90,000	1,600

The circuit clerk is required to periodically remove the names of persons who have reported to the court and served as petit, grand or magistrate court jurors within the preceding two years. The names should be removed "in October of each even-numbered year or at such other time as the court may direct." (W. Va. Code § 52-1-6(b)). Therefore, there is flexibility in the timing of this event if another time of year or odd-numbered years are more convenient for the court. It is not necessary to purge and refill the entire box or wheel. Rather, the clerk removes only that the names of jurors who have served.

The number of jurors selected for each circuit court panel is governed by a 1986 Supreme Court Administrative Order. (Appendix A). This order limits the size of panels to 25 prospective jurors for criminal trials and 14 prospective jurors for civil cases. Permission to exceed these limits because of the complexity or notoriety of a case must be obtained from the Administrative Office by the judge presiding in the case or the clerk acting on the judge's behalf.

9.5 TERM OF SERVICE

The amount of time that jurors are required to serve varies by county. The majority of courts have a term of jury service that coincides with their term of court. Other courts have four or six-week terms.

Regardless of the length of the term of service, West Virginia Code § 52-1-23 sets forth certain restrictions on the actual amount of service that can be required of jurors. In any two-year period, a person cannot be required:

a. to attend more than 30 court days, unless it is necessary to complete a particular case;

b. to serve on more than one grand jury;

c. to serve as both a grand and petit juror; or

d. to serve as a petit juror at more than one term of court.

9.6 QUALIFICATION AND SUMMONING

Qualification and summoning of jurors may be accomplished as a one-step or a two-step procedure. A one-step procedure -- combining the qualification questionnaire and summons in one mailing -- is recommended since it lowers costs, reduces administrative time and generally produces as high or higher a yield as the two-step procedure. Courts that use two steps and pre-qualify the entire master list for the two-year period often find they must send another questionnaire to update the previous information when they summon jurors. However, each court may have a different experience and should use that experience to determine the most productive procedure for the county. The juror qualification questionnaire or form must be served upon prospective jurors by first-class mail at least 20 days before they are required to report for duty. (W. Va. Code § 52-1-5a(a)). The contents of the qualification questionnaire are prescribed by West Virginia Code § 52-1-5a(a), and its form is subject to approval by the circuit court.

Qualifications for jury service are listed in West Virginia Code § 52-1-8. To be qualified to serve on a jury, a prospective juror must be a U.S. citizen, must be at least 18 years old and must be a resident of the county. A prospective juror must also be able to read, speak and understand English. A person who has a hearing impairment is still qualified to serve on a jury, provided that he or she can communicate in American Sign Language or signed English. A prospective juror is disqualified from jury service if he or she has the lost the right to vote because of a criminal conviction. A prospective juror is also disqualified if he or she has been convicted of perjury, false swearing or a crime punishable by imprisonment for more than a year under state or federal law. (W. Va. Code §§ 52-1-5a(a)(11); 52-1-8(b)(6)).

In some circumstances, prior jury service within the last two years will result in disqualifying a prospective juror. To be disqualified for this reason, a prospective juror must have been summoned, must have attended court sessions, and must have been reimbursed for his or her service. Even if a prospective juror did not actually serve as a juror, he or she is disqualified from jury service, provided that he or she attended actual court sessions and was reimbursed for service within the preceding two years.

A prospective juror may be disqualified from serving as a juror because he or she has a substantial physical or mental disability that prevents him or her from providing satisfactory jury service. The court, however, may require the prospective juror to submit a physician's certificate with regard to the disability.

Although a prospective juror may be disqualified because of a disability, a person with a physical disability who, with a reasonable accommodation, can

provide competent service should not be disqualified on the basis of the disability alone. However, a prospective juror with a physical disability may be disqualified if the circuit judge finds that the juror's ability to evaluate the potential evidence is inhibited. As established by West Virginia Code § 52-1-8(e)(1), a reasonable accommodation may include an interpreter for the hearing impaired, a spokesperson for the speech impaired, real-time court reporting or a reader for the visually impaired. These examples are not, however, an exhaustive list of reasonable accommodations that could be provided to jurors.

A prospective juror who is 70 years or older is not automatically disqualified from serving as a juror. However, a prospective juror who is 70 years or older is automatically excused upon request.

An officeholder is disqualified from serving on a grand jury (but not on a petit or magistrate court jury). An officeholder is an official who is elected or appointed to a public office and who exercises sovereign power. An employee of an officeholder would not, however, be disqualified from serving as a grand juror. Syl. Pts. 1 and 2, *State v. Bailey*, 220 S.E.2d 432 (W. Va. 1975) (overruled on other grounds by *State ex rel. D.D.H. v. Dostert*, 269 S.E.2d 401 (W. Va. 1980)). Examples of public officials who could be considered officeholders include county commissioners or members of the West Virginia House of Delegates.

Even if a person is qualified to serve as a juror, he or she may be excused from jury service based upon undue hardship, extreme inconvenience or public necessity. (W. Va. Code § 52-1-11). There are, however, no automatic exemptions based upon occupation or factors, other than those circumstances in which a prospective juror is disqualified.

The court is required to determine whether a prospective juror is disqualified based on information in the form or any other evidence. (W. Va. Code § 52-1-8(a)). In turn, the clerk is required to enter this determination upon the form and on the list of names drawn from the jury wheel or box.

If a prospective juror fails to return the questionnaire, the circuit clerk may require him or her to appear before the clerk to complete the form. (W. Va. Code § 52-1-5a(c)). In some counties, the clerk will require a juror who has not completed the questionnaire to complete it the first day that the juror reports for service.

As well as the juror questionnaire, the summons for jury duty must be served upon prospective jurors by first-class mail or personal service at least 20 days before they are required to report for jury duty. (W. Va. Code § 52-1-7(b)). The local court determines the form and contents of the summons. Courts are encouraged to avoid forms that contain archaic legal terminology

or forms that are directed to the sheriff when service is by first-class mail directly to the prospective juror.

The summons package should also contain a letter, pamphlet, or other document that advises prospective jurors about the practical aspects of service. Many individuals may have never performed jury duty or have been to the courthouse. Such informational material allays fears, reduces calls to the clerk, and may make people more willing to serve.

There is no need for this initial orientation material to detail the trial process or discuss legal terminology; such information is better conveyed just prior to actual service in the court. The initial information should focus on practical matters such as: the length of the term of service; how jurors are selected; the procedure for obtaining excuses; disqualifications; reimbursement; appropriate dress; and other threshold questions that jurors may have. Pamphlets or handbooks describing jury service are available from the Administrative Office.

The procedure for obtaining excuses from jury service should be clearly stated in the summons or accompanying information. It is recommended that every court establish procedures to handle excuses before the first day of service. The policy as to whether all requests must be in writing, whether medical excuses require confirmation from a doctor, and whether any excuses can be resolved by telephone are matters to be decided by each court. In addition to clearly stating the procedure to request an excuse from jury service, the summons or accompanying information material should clearly communicate how a prospective juror will be informed about his or her request to be excused from jury service.

The circuit clerk is responsible for monitoring the return of qualification questionnaires and the number of jurors excused. In some courts, the clerk may be responsible for reviewing the forms for disqualification and granting certain types of excuses. For instance, in some courts, clerks are authorized to excuse those 70 or older upon request, grant medical excuses with a doctor's statement, or excuse those jurors who would have to serve during vacations. In other courts, the judge may wish to review and determine all exemptions from service. This is a matter of local policy. However, the clerk should develop a procedure for monitoring the excuses, disqualifications, undeliverables, and postponements so that the number of available jurors can be predicted in advance and the availability of particular jurors for service in the future is known.

9.6.1. Access to Juror Qualification Forms for Petit Jurors

Before the 2014 enactment of Senate Bill 405, names of qualified jurors and completed juror qualification forms were subject to

disclosure to the public. The 2014 amendments to West Virginia Code §§ 52-1-5a and -9 placed limits on disclosure that specify both who may examine completed qualification forms and when the qualification forms may be reviewed. The purpose for limiting access to this information is to protect the privacy of jurors and to prevent harassment. The discussion in this section applies to names of petit jurors and their questionnaires, but not to grand jurors whose information may only be reviewed by written permission of the court. For a discussion of access to names of grand jurors and qualification forms for grand jurors, see Section 9.15.

The first limitation on the review of juror qualification forms involves who may inspect and review the forms. West Virginia Code § 52-1-5a(e) states that counsel of record may inspect and review completed juror questionnaire forms, provided that the prospective jurors have been selected as part of a jury panel. The reason for the review, of course, is to assist with jury selection. When a *pro se* party is conducting a jury trial, he or she should have the equivalent ability to review and inspect names of prospective jurors and their qualification forms.

West Virginia Code § 52-1-5a(e) refers to allowing access to counsel of record "upon request," but does not identify any specific method for the request. It can be inferred that an oral request to the clerk by counsel of record (or a *pro se* party) should be sufficient. However, access to juror qualification forms upon request to the clerk ends when the jury trial has concluded. Access to forms after a trial is discussed in more detail below.

West Virginia Code § 52-1-5a(e), as amended, does not establish a method for allowing other persons or members of the public to review completed juror questionnaire forms. The 2014 amendment to West Virginia Code § 52-1-9 deleted subsection (c), a provision that allowed the public access to names of jurors and completed qualification forms. By necessary implication, therefore, persons other than counsel of record (or *pro se* parties) should not be allowed to review completed juror questionnaire forms, unless a court order authorizes the inspection or review.

The deletion of subsection (c) of West Virginia Code § 52-1-9 also seems to suggest that the names of petit jurors should be subject to the same limited access as qualification forms. However, the relevant statute, West Virginia Code § 52-1-5a, does not expressly refer to the names of jurors, and there could be a public interest in knowing the names of prospective jurors. In addition, the Supreme Court has not provided any guidance on this issue. If the clerk has any questions

about whether the names of petit jurors should be disclosed, he or she should seek guidance from the circuit court.

Local practice may determine what specific documents are provided to counsel of record (or a *pro se* party) to assist with jury selection. Some courts make the originals of the questionnaires available for review in the clerk's office, while others provide copies of the entire questionnaire or a portion of the questionnaire. In addition, the Supreme Court's juror management software produces the "Juror Profile" which summarizes the information from the juror qualification questionnaire, and would be an acceptable method to allow review. Further, a court could, in cooperation with the local bar, develop a "juror information card" which contains only those items of information most relevant to jurors. All of these methods are acceptable ways for counsel of record (or a *pro se* party) to review information about prospective jurors to assist with jury selection and with a trial.

The time in which counsel of record (and *pro se* parties) may review juror qualification forms without a written court order is limited. The forms may be reviewed from the time that persons are selected as prospective jurors until the conclusion of a jury trial for which they were selected as jurors. After the completion of a jury trial, the qualification forms may only be disclosed by a written court order. The statute refers to the "written permission" of the court, and in almost all circumstances, this would entail a written court order. Similarly, the court is required to deny any post-trial request to review juror qualification forms in writing, i.e. a written court order, and provide it to all parties and the person who requested the review of the records.

The statute does not directly address the method for a post-trial request to review juror qualification forms. If the court were conducting a hearing, an oral motion to review the questionnaires could certainly be addressed by the court. If, however, there is no pending proceeding or hearing, a party or other interested person would have to file a written motion to obtain permission from the court to review the completed juror questionnaires.

9.6.2 Juror Qualification Forms and HIPAA

As required by West Virginia Code § 52-1-5a(a)(8), a juror qualification form elicits information about whether a prospective juror has any physical or mental disability that would substantially impair a person's ability to serve as a juror. Information about accommodation for a disability is also elicited. The description of a disability would necessarily include some limited medical information about an individual.

Concerns about the privacy standards established by HIPAA have been raised. However, HIPAA applies to "covered entities" or indirectly to "business associates" of covered entities. The courts or offices of circuit clerks do not meet the definition of "covered entities" because a covered entity is a health plan, a health care clearinghouse or a health care provider who transmits any health information in electronic form. (45 C.F.R. § 160.103). Similarly, the office of the circuit clerk would generally not be considered a "business associate." Therefore, circuit clerks and the records they maintain are not subject to HIPAA privacy standards.

Even in the unlikely case that a circuit clerk or court were found to be a covered entity and subject to HIPAA privacy standards, HIPAA allows for the disclosure of "protected health information to the extent that such use is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law." (45 C.F.R. § 164.512(a)(1)). Since West Virginia Code § 52-1-5a allows limited disclosure of juror qualification forms, the disclosure of the information falls within an exception to HIPAA. In addition, the other type of disclosure, i.e. disclosure by a court order, would similarly fall within this exception to HIPAA.

If a prospective juror raises any concern about access to a juror qualification questionnaire, the clerk should advise the individual that information would only be made available if a person were selected to serve on a jury panel and would only be made available to counsel of record or a *pro se* party or as allowed by a court order. Secondly, the clerk may inform the individual that information concerning a disability or medical condition can be as general as possible but specific enough so that the juror may be excused, if requested, or so that the juror will receive some type of reasonable accommodation.

9.7 ORIENTATION

Jury service orientation actually includes all efforts -- pre-service, during service, and post-service -- to provide information to jurors on all aspects of the system. It may include letters, handbooks, messages on the telephone answering device, or audio-visual materials. Most courts concentrate their orientation efforts on the first day that prospective jurors report for service. Orientation may be conducted by the judge, the circuit clerk or a combination of the two. It should be limited to an hour or less to allow time for jurors to participate in actual trials that day, as well as to avoid overwhelming the jurors with information. Conducting orientation on a day when no jury trials are scheduled is strongly discouraged for it is not a productive use of juror time or juror reimbursement funds. Jurors, however, should be reimbursed for any day they report even if they only participate in orientation.

Again, for many people, jury service is their first experience with the courts. Efforts to make service a positive experience will pay off in a greater willingness to serve again and better community relations. The following procedures help create positive experiences for jurors:

a. Clearly mark the route to the courtroom or jury assembly area from the entrance of the courthouse.

b. Avoid roll-call of jurors; jurors should be checked in by marking the name on a list as they arrive or by having them pick up their numbered juror buttons or labels. (The remaining buttons or labels will indicate which jurors are not present.)

c. Begin orientation promptly.

d. To the extent the physical facilities allow, keep jurors segregated from the general public, and from parties and witnesses to the actions they will decide. Distribution of juror buttons or labels at orientation helps with this task by making identification of jurors easier for court personnel, attorneys and parties.

e. The first day of service is usually the best time to gather information on each juror's round-trip mileage from residence to the courthouse and to determine which jurors will require verification of service for their employers.

9.8 VOIR DIRE

Many courts voir dire and empanel several juries on one day and set the actual trials for subsequent days or weeks; a practice often referred to as "multiple voir dire" or "single day empanelment." When multiple juries are chosen on one day, courts generally will return all names or identifying numbers to the pool for each selection. An alternative to this procedure is to withhold names or identifying numbers of those selected for trial until all members of the panel have been selected at least once or the number of remaining names is insufficient to fill the jury box. While this alternative represents a departure from a strictly random selection process, it is generally considered to be acceptable since it results in more equitable participation for all jurors because it avoids having a small percentage of jurors who serve on almost all trials and a small percentage who serve on none.

The clerk in the courtroom should have recorded each juror name from the panel on a jury list sheet which contains the style of the case and provides space to list jurors and note plaintiff and defendant strikes. A copy of the

basic jury list should be distributed to the judge, court reporter and attorneys for each side. The jury list sheet will ultimately specify the actual trial jurors and alternates and will become a permanent part of the case file. Jurors selected for a trial will be sworn by the courtroom clerk prior to the start of the trial.

9.9 JUROR REIMBURSEMENT AND ACKNOWLEDGMENT

Payment to jurors is to reimburse them for their **expenses** and is not considered compensation. This distinction may be important for tax purposes.

Throughout the term of service, the clerk must keep accurate records of each juror's days of attendance so that reimbursement may be calculated. In non-computerized courts, the clerk will usually aggregate the information on the juror check-in sheet at the end of the term. Effective November 8, 2001, the West Virginia Supreme Court, by administrative order, set the rate of juror reimbursement at $40 per day, the maximum allowed by West Virginia Code § 52-1-17(a). (Appendix A).

9.9.1 Juror Reimbursement Calculation

In computerized counties, juror reimbursement may be calculated by a computer, and a printout or other computer-generated report may be substituted for the juror reimbursement form, discussed below, as long as it contains, in some format, the following items for each juror:

a. Total days attended;
b. Total amount of money due for attendance;
c. Total mileage;
d. Total amount of money due for mileage and tolls; and
e. A grand total due.

To manually calculate juror reimbursement, for each juror:

a. Add the number of days attended during the term of each court. Days on which a juror reported but was excused upon his or her own request should not be included.

b. Multiply the total days attended by $40. This is the total per diem due for attendance.

c. Multiply the total days attended by the round-trip mileage between the juror's residence and the courthouse (obtained from prospective jurors at

orientation). Multiply this amount by the mileage rate per mile to obtain the total payment for mileage. Add to this any tolls incurred. (There may be slight differences in mileage calculations between those calculated by hand and those calculated by computer. These differences typically occur because the software will round up a half-cent on a daily basis. The Administrative Office will reimburse a sheriff's office at the rate calculated by the juror software).

d. Combine the per diem amount and mileage amount to obtain the total amount to be paid by the sheriff to the juror.

e. Each of the above items of information must be listed for each juror who served during the term on the Juror Reimbursement Form.

9.9.2 Reimbursement Procedures

At the end of each term of court, the circuit clerk reports to the sheriff the amount of reimbursement for each juror and the total amount of reimbursement for all jurors. (W. Va. Code §§ 52-1-19 and -20). Typically, an order is prepared that lists the name of each juror, the number of days of attendance, mileage from the juror's residence to the courthouse, the amount due each juror, and the total amount of reimbursement for all jurors for the term. A certified copy of the order regarding juror reimbursement is directed to the sheriff.

Upon receipt of the order, the sheriff, in turn, issues a check for each juror, and sends them to the circuit clerk for delivery to the jurors. All juror fees paid by the sheriff will be reimbursed by the Administrative Office. If any sheriff fails to pay fees as required by law, he or she may be found in contempt of court. (W. Va. Code § 52-1-20). *The clerk should not send any documentation of juror costs to the Administrative Office because a county will only be reimbursed if the sheriff submits the order and other verification of payment to the Administrative Office.*

9.9.3 Verification of Jury Service

In addition to reimbursement, some jurors may require verification of jury duty for their employers. When jurors report for service, jurors should be asked if they will require verification so that it can be made available to them immediately upon completion of their service.

9.9.4 Juror Acknowledgement

Some courts may wish to enclose a letter or certificate of appreciation with the juror reimbursement checks. The Administrative Office will not reimburse a county for expenses incurred in producing or sending such certificates.

The West Virginia Supreme Court has designated February as "Juror Appreciation Month." The Supreme Court both recognizes and appreciates the contributions and sacrifices that jurors make when they are summoned and encourages circuit courts to do the same. The Supreme Court website, http://www.courtswv.gov, lists specific ideas that a circuit court or local bar could implement as a way to recognize the contributions jurors make to the justice system.

9.10 SPECIAL JURIES

9.10.1 Notorious or Controversial Trials

It is essential to anticipate and plan for the extra juror demands that highly publicized or controversial trials may pose for a court. If possible, the clerk should consult with the presiding judge before the term to determine if there will be a need for additional jurors for any trials scheduled that term and, if so, the expected panel size. Based on that information, the clerk can determine whether the regular venire will suffice; the normal venire summoned for the term must be increased; or a separate group should be summoned specifically for the controversial trial. It is important to determine the most efficient procedure that will ensure an adequate number of jurors in advance because a summons for jury service must be served at least 20 days in advance.

At times, a controversial trial will require a judge in a circuit to recuse himself or herself from the trial. If this happens, the Supreme Court will assign a judge from another circuit to preside at the trial. In this case, the clerk should consult with the specially assigned judge concerning the procedure to summon additional jurors and the number of additional jurors required.

9.10.2 Sequestered Juries

In certain cases, it may be necessary for the trial jurors to be sequestered; that is, kept together day and night for the duration of the trial so as not be exposed to publicity or other outside influences concerning the trial. To sequester a jury, the court issues an order and places the jury in the custody of the sheriff. (W. Va. Code §§

52-1-17(b); 62-3-6). The order should direct the sheriff as to the amount of money which should be spent for lodging and meals.

Generally, the following guidelines apply to expenditures for sequestered juries:

a. The meal allowance for each juror should not exceed $30 per day.

b. Jurors will not be reimbursed for room service charges, bar bills, laundry, or long distance phone calls.

c. Charges for entertainment will be reviewed on a case-by-case basis in light of the duration of the trial and nature of the expense.

d. Jurors will be paid $40 for each day of attendance at the court and the standard state mileage rate for any travel to and from the courthouse in their personal car.

It is best practice for the county commission or sheriff to pay expenses associated with a sequestered jury and then to obtain reimbursement from the Administrative Office. This procedure is preferable to attempting to arrange for direct payment to a vendor by the Administrative Office. All requests for reimbursement for expenses of sequestered juries should be accompanied by one certified copy of a court order directing that such expenses be incurred.

The cost of overtime for deputy sheriffs assigned to sequestered jurors will also be reimbursed by the Administrative Office. An order should be entered by the judge directing payment of the overtime. One certified copy of this type of order, along with an invoice from the sheriff listing the hours and dates worked, should be forwarded to the Administrative Office.

9.10.3 Out-of-County Juries/Change of Venire

The procedure for summoning a jury from another county may be applied in criminal cases and when a civil case is referred to the Mass Litigation Panel. (W. Va. Code § 52-1-14). In mass litigation cases, however, jurors may only be summoned from contiguous counties.

A court may summon a jury from another county if it determines that a suitable number of qualified jurors **cannot** be found in the county where the trial will be held. Because of the number of witnesses or other reasons, the court may determine that a change of venue is not

the most efficient solution. Under these circumstances, a jury may be summoned from another county to hear the case in the original venue. In addition, the presiding judge must request approval from the Supreme Court and temporary assignment to the county from which the jurors are to be summoned.

To summon jurors from another county, the presiding judge must enter an order specifying the county or counties from which the jurors are to be summoned, the number of jurors to be summoned, and the day the prospective jurors are to report for voir dire. A certified copy of the order must be sent to the circuit clerk in the county in which the jurors are to be summoned.

Upon receipt of the order, the circuit clerk in the county from which the jurors will be drawn shall select a panel of jurors by following the standard procedure to select a petit jury. The clerk shall draw a separate jury pool specifically for the trial. When the panel has been selected, the clerk who drew the pool shall certify the proceedings and the names of the jurors to the circuit clerk where the trial will be conducted. The circuit clerk from the county in which the jurors were selected shall summon the jurors to appear for jury service in the county where the trial will be held.

When preparing the summons, the clerk should make sure that the special conditions of the service are clear. The juror information letter or other material should also be revised to explain the terms of their service. By agreement, the two courts will determine which court will handle juror excuses. Although the clerk of the county where the jurors reside is responsible for summoning the jurors, the clerk of the original county is responsible for the cost of summoning the jurors.

In most if not all cases, the presiding judge will travel to the county from which the jurors are summoned to select the jury and alternates. Transporting the entire panel to the trial site would generally be costly and unnecessary. It may be necessary for the clerk or a deputy clerk to accompany the judge to assist with the orientation of jurors and arrangements for their service.

The responsibility for arranging the transportation, housing and meals of the out-of-county jurors is the responsibility of the court in which the trial is to be held. The reimbursement of the initial panel, as well as the trial jurors and alternates, will also be handled by the clerk in the county in which the trial is held. In short, except for the process of selection and summoning the special panel, the court in which the trial is held is responsible for all administrative tasks associated with an out-of-county jury.

Restrictions and guidelines for the expenditures on out-of-county juries are generally the same as those for sequestered juries. (Section 9.10.2). An exception can be made to allow the jurors a limited number of long distance telephone calls to communicate with family, employers, or friends in their county. Restrictions on the number and length of these phone calls should be clearly communicated in writing to the jurors. As with sequestered juries, all requests for reimbursement should be accompanied by one certified copy of a court order directing that such expenses be incurred.

9.11 MAGISTRATE COURT JURIES

When a magistrate court schedules a jury trial, the circuit clerk is required to provide a panel of qualified jurors to the magistrate court from the same panel available for circuit court. The clerk must not maintain separate panels of jurors for magistrate and circuit court. (Rule 7.03, TCR). As part of the duty to provide a juror panel for magistrate court, the circuit clerk is responsible for contacting members of the magistrate court jury panel to appear at a specified date, time, and place.

The size of a magistrate court jury panel is governed by a combination of statutes and rules. In both civil and criminal cases, a magistrate court jury consists of six persons. (W. Va. Code § 50-5-8(d)). This statutory subsection, as well as Rule 4 of the Administrative Rules for Magistrate Courts (ARMC), provides that a magistrate court jury panel should consist of ten persons. In many counties, the practice is to summon more than ten qualified jurors (up to 14) in order to seat a six-member jury. This practice allows for the dismissal of prospective jurors for cause.

Additionally, the magistrate court clerk is both authorized to and responsible for informing the circuit clerk of the required number of prospective jurors that must be summoned. (Rule 7.04, TCR). The magistrate court clerk must do so no later than five days before the scheduled trial date. (Rule 7.04, TCR). The magistrate court clerk is not authorized to request more than 14 prospective jurors unless the presiding magistrate has consulted with the chief judge, and they have agreed that it is necessary to summon more jurors. (Rule 4(a), ARMC). For this reason, no more than 14 prospective jurors would be routinely summoned for a magistrate court jury trial. Only in exceptional cases would it be necessary for the circuit clerk to summon more than 14 prospective jurors.

The circuit clerk is responsible for the payment of magistrate court jurors and should use the same procedures as are used in circuit court. (Rule 7.04, TCR). To facilitate the payment of magistrate court jurors, the magistrate court clerk must complete a juror reimbursement form listing the information required for reimbursement and forward the forms to the circuit clerk. Upon

completion of service in magistrate court, a juror's name should be returned to the circuit court pool of jurors.

9.12 CIRCUIT COURT JURIES

In a circuit court civil case, the jury consists of six members. In a criminal case, the jury includes 12 members. (W. Va. Code § 56-6-11).

9.13 JURORS FOR CONDEMNATION CASES

Besides compiling the master list for general petit juries, the clerk must compile a list of people who pay real property taxes in the county. From this source, the clerk must compile and maintain a list of freeholders who are eligible to serve as jurors in condemnation cases. (W. Va. Code § 52-1-5(c)). Typically, the clerk randomly selects property owners that appear on the master list. In condemnation cases, the jury consists of 12 persons who own real property. (W. Va. Code § 54-2-10).

9.14 MUNICIPAL COURT JURIES

Upon the written request of a municipal court, the circuit clerk should certify a list of jurors from the panel or pool of jurors available for service in the circuit court to serve as jurors in municipal court. (*Scott v. McGhee*, 324 S.E.2d 710 (W. Va. 1984)). The municipal court clerk should indicate the required size of the panel. Municipal court juries are composed of 12 persons. (W. Va. Code § 8-10-2(c)). Since they are chosen from the already-selected petit jury panel, the jurors do not have to be residents of the municipality to be eligible to serve on a municipal court jury, just residents of the county. (W. Va. Code § 52-1-8(b)(1)). The municipality is responsible for the costs of notification and payment of reimbursements for municipal court jurors. (*Scott v. McGhee*, 324 S.E.2d 710 (W. Va. 1984)). Typically, as with circuit court juries, the circuit clerk summons the jurors; the sheriff handles the juror payments; and the municipal court reimburses the clerk and sheriff for these costs.

9.15 GRAND JURIES

It is the responsibility of the grand jury to meet and consider potential criminal matters presented by the prosecutor to determine whether or not indictments should be issued. All felonies punishable by life imprisonment must be prosecuted by indictment. All other felonies may be prosecuted by information if prosecution by indictment is waived by the defendant. (Rule 7, R. Cr. P.). Misdemeanors may be prosecuted by indictment or information.

9.15.1 Term of Service

Grand jurors generally serve for one term of court, but the court has the discretion to require grand jurors to serve for a period up to one year. (W. Va. Code § 52-2-14; Rule 6(g), R. Cr. P.). This one-year limitation may be extended for up to an additional six months if the court determines that such extension is in the public interest. (Rule 6(g), R. Cr. P.). Although the service of a grand jury may be extended, this procedure would be rarely used. Typically, grand jurors serve during one term of court.

In most courts, the grand jury meets at or near the beginning of each term of court. A grand jury should be selected for each term of court, unless the prior grand jury is still available for service. (W. Va. Code § 52-2-1). By written order, a court may, however, dispense with the grand jury for one or two of the three annual terms of court. (W. Va. Code § 52-2-1).

9.15.2 Selection, Summoning and Access to Grand Juror Questionnaire Forms

A grand jury must be selected at least 30 days before the beginning of the term of court. (W. Va. Code § 52-2-3). The court has the authority, however, to direct the clerk to select names for a grand jury at other times in addition to the beginning of the term.

To select a grand jury, the clerk draws 16 names from the jury wheel or jury box to constitute the grand jury. The clerk then draws an additional number of names, as specified by court order, for the purpose of providing alternates to the original 16 jurors. The alternates are selected for service in the order in which they are drawn. Fifteen grand jurors constitute a quorum. (W. Va. Code § 52-2-4; Rule 6(a), R. Cr. P.).

Because a shortage of grand jurors could result in a delay in grand jury proceedings and the return of indictments, it is vital that the court summon a more than sufficient number of alternates to balance the disqualifications and excusals. If there is a shortage, a court can authorize a clerk to select and summon additional grand jurors. If it appears just prior to the first day of service that the number of prospective grand jurors is too large, a certain number can be notified by the telephone call-in device that their appearance is not necessary. Those called-off in this manner would be the last drawn in the original selection of grand jurors for the term.

Grand jurors are summoned in the same manner as petit jurors. (W. Va. Code § 52-1-7(b)). Summons should be served on prospective grand jurors at least 20 days before the day they are required to report. However, grand jurors should be selected 30 days before they are summoned.

Effective June 4, 2014, completed juror questionnaire forms for prospective or active grand jurors are considered confidential. (W. Va. Code § 52-2-16). The clerk may only release the forms with the "written permission," i.e. a written order, of the circuit court.

9.15.3 Reimbursement

Grand jurors are reimbursed at the same rates as petit jurors; that is, $40 for each day of attendance and the standard mileage rate for travel to and from the courthouse. There are no restrictions on the total number of days for which grand jurors may be reimbursed in any term of court. (W. Va. Code § 52-2-13).

9.15.4 Access to Grand Jury Records

As a general rule, grand jury proceedings are closed and matters considered by a grand jury are confidential. (Rule 6(e)(2), R. Cr. P.). The clerk has a duty to automatically maintain grand jury records, orders and subpoenas under seal to prevent disclosure of grand jury proceedings. (Rule 6(e)(6), R. Cr. P.). Additionally, a court reporter's recordings, notes or transcripts should be automatically sealed when they are filed with the court. (Rule 6(e)(1), R. Cr. P.). Because Rule 6(e)(6) does not establish a non-discretionary period during which these records must be sealed, the clerk should follow the directives of the court concerning the time and manner for maintaining the records under seal.

The circuit court has the discretion to order the disclosure of grand jury proceedings in some circumstances. (Rule 6(e)(3), R. Cr. P.; W. Va. Code § 52-2-15(c)(2)(A)-(B)). The clerk may, therefore, disclose grand jury records pursuant to the terms of a court order.

To prevent disclosure of grand jury proceedings, the Legislature has established a misdemeanor penalty for certain persons who disclose matters occurring before a grand jury. The penalties are a fine of not more than $1,000 or a thirty day jail sentence. The statute specially identifies grand jurors, interpreters, stenographers, operators of recording devices, typists and attorneys for the state as subject to this code section. The statute also refers to official personnel that are necessary to assist the attorney for the state. (W. Va. Code § 52-2-

15(c)(1)(B)). It is important, therefore, to scrupulously maintain the secrecy of grand jury proceedings.

Occasionally, attorneys file motions with attached grand jury records in criminal cases. The clerk should be careful to prevent the inadvertent disclosure of grand jury records and should alert attorneys with regard to this issue. It is however, the responsibility of attorneys to request, and the court to order, that the specific records be sealed when they are filed in a specific criminal file. (Rule 10.03, TCR).

9.16 ANNUAL JUROR QUALIFICATION QUESTIONNAIRE REPORT

The circuit clerk is required to complete an annual report, the Annual Juror Qualification Questionnaire Report, for submission to the Administrative Office by March 1 of each year. (W. Va. Code § 52-1-16; see also Section 7.4). The report documents the means by which prospective juror names are selected and the demographic characteristics of those jurors. The juror management software purchased by the Administrative Office can be used to complete this report.

9.17 ASSESSMENT AND REMITTANCE OF JURY COSTS

Note: In addition to this section, see Chapter 5 and the civil and criminal cost schedules for circuit court procedures for assessing and remitting jury costs.

9.17.1 Assessment of Jury Costs

When juror costs are assessed in circuit court, the clerk assesses the actual cost of the jurors' service plus mileage. (W. Va. Code § 52-1-17(c)). Actual costs may include the per diem and mileage of the panel assembled for jury striking as well as the per diem and mileage of the trial jurors for each subsequent day of trial. For all jury demands made in magistrate court on or after July 1, 2007, actual juror costs are assessed. (W. Va. Code § 52-1-17(c)). Before this date, the assessment for magistrate court jury costs was $200.00.

According to West Virginia Code § 52-1-17, the court may state simply that jury costs are assessed or the court may specify an actual amount to be assessed. Although the statute contemplates that jury costs are to be routinely assessed, the circuit court does have the discretion, when fairness and justice so require, to forego assessment of jury costs. (W. Va. Code § 52-1-17(c)(1)). If a court decides not to assess jury costs, the court should include this finding in a written order.

The clerk should consult with the court to determine procedures for assessing jury costs. It may be that the clerk can be directed, by general order, to calculate and assess the per diem and mileage of the initial panel and subsequent trial days unless the order specifically directs otherwise. The court may have to be more specific in cases where the costs are to be prorated or where one panel is used to select multiple juries. (W. Va. Code § 52-1-17(c)(2)). In the latter instance, the court may wish to apportion the cost of the initial panel since it is ordinarily larger than would be the case if only one jury was being selected. There may be other situations where the appropriate assessment is ambiguous. For example, the panel called for a case that settles before the jury is sworn might be used to select a jury for another case. In such instances, the clerk should consult with the trial judge to determine if the assessment is correct. Ideally, the general order should establish routine procedures for as many situations as possible.

9.17.2 Remittance of Jury Costs

The circuit clerk must remit collected jury costs to the treasurer on the tenth day of the following month. (W. Va. Code § 52-1-17(d)(1)). For jury costs assessed after a circuit court trial, one-half of the collected costs must be deposited to the parent education and mediation fund, and one-half must be deposited to the domestic violence legal services fund. (W. Va. Code § 52-1-17(d)(2)).

The following remittance of jury costs in this paragraph applies only to magistrate court jury costs, **not** to circuit court jury costs. Therefore, the circuit clerk would only follow this procedure for a case involving a magistrate court jury trial that was appealed to circuit court. For all jury costs collected in this type of case, the first $200.00 is remitted as follows: a) one-half is deposited to the parent education and mediation fund; and b) one-half is deposited to the domestic violence legal services fund. Any amounts collected that exceed $200.00 are remitted to the State's general revenue fund.

9.18 RETENTION OF JUROR RECORDS

Retention of juror records is controlled by statute rather than being covered in the Record Retention Schedule discussed in Chapter 3. Under West Virginia Code § 52-1-16, all records and papers compiled by a circuit clerk in connection with selection and service of jurors must be preserved by the clerk for at least four years after the date such jurors were selected, or for a longer period if ordered by the court.

9.19 JUROR NOTES

Questions have arisen as to whether juror notes should be maintained in a case file. This section addresses notes that individual jurors may be allowed to take during a trial, not notes that a jury may send to a trial judge. As a basic principle, the trial court judge has the discretion to decide whether jurors may take notes during a trial. Syl. Pt. 5, *State v. Triplett*, 421 S.E.2d 511 (W. Va. 1992). Although it is permissible for jurors to take notes so long as the trial judge allows this practice, it has been well-recognized that a jury is subject to a deliberative process privilege. *State v. Scotchel*, 285 S.E.2d 384 (W. Va. 1981). In *Scotchel*, the Supreme Court held that: "A jury verdict may not be ordinarily impeached based on matters that occur during the jury's deliberative process which matters relate to the manner or means the jury uses to arrive at its verdict." Syl. Pt. 1*, Scotchel*, 285 S.E.2d 384. Jurors are also prohibited from testifying about their deliberations or mental processes. (W. Va. R. Evid. 606). Since jurors are afforded this broad deliberative process privilege, the notes that individual jurors take should not be maintained in the case file.

In contrast, notes that a jury sends to a trial judge should be maintained because they are part of the record. See *State v. Allen*, 455 S.E.2d 541 (W. Va. 1994). Other matters of record, such as the jury verdict form, must also be maintained in the case file.

Chapter 10

WITNESSES, ACCOMMODATIONS AND INTERPRETERS

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10.1 OVERVIEW

Section 10.2 outlines the responsibilities of a circuit clerk with regard to the reimbursement and payment of fact witnesses in both civil and criminal cases. Additionally, Section 10.2 summarizes the procedures associated with compelling witness attendance by subpoena when a witness resides outside the jurisdiction of the court. Section 10.3 addresses the procedures for the appointment and payment of expert witnesses when experts are paid with public funds.

Section 10.4 provides general information about accommodating persons with disabilities. Section 10.5 addresses specific procedures for the appointment and payment of interpreters for people with hearing or communication disabilities and for people who cannot communicate in English.

10.2 WITNESS MANAGEMENT AND PAYMENT

10.2.1 Fact Witness Fees and Expenses Generally

The statutes governing witness reimbursement do not expressly limit the reimbursement discussed in this section to fact witnesses. For practical purposes, however, these payments are limited to fact witnesses because the payments are nominal and because subsequently adopted statutes and rules govern the payment of expert witnesses with public funds. For a complete discussion of the appointment and payment of expert witnesses, see Section 10.3.

The Supreme Court has established that witnesses appearing under subpoena, whether they testify in a civil or criminal case and whether they are residents of West Virginia or not, may be paid $10.00 per day for appearing to testify. Witnesses are entitled to this appearance fee for each day they are required to show up to testify, even if the hearing is continued or, for some other reason, their testimony is delayed until another day. They also may be reimbursed at the rate $0.15 per mile (plus any tolls paid) for travel. Parking charges are not reimbursable. The Court adopted this uniform standard for witness fees and mileage reimbursement because the relevant statutory provisions established different rates for reimbursement. (W. Va. Code §§ 59-1-16 and -17; 62-5-1; and 62-6A-3). Although these rates for reimbursement are broadly applied, a West Virginia resident who appears before a grand jury may not collect these fees and expenses. (W. Va. Code § 59-1-16). A witness may only be reimbursed for expenses that are actually incurred. Therefore, a witness who is driven to the courthouse by a second witness is not entitled to mileage. Additionally, a witness may only be reimbursed for round-trip mileage between his or her residence and the courthouse.

10.2.2 Witness Reimbursement in Civil Cases

In all civil cases, the party who issued the subpoena is responsible for witness reimbursement. In addition to reimbursement for appearing, the witness is entitled to reimbursement for bridge, ferry and road tolls. (W. Va. Code § 59-1-16). To be reimbursed, the witness must file a certificate with the clerk. The certificate must itemize the allowable expenses for the witness. The clerk should reimburse the witness when the party who issued the subpoena has deposited the allowable amount of witness reimbursement with the clerk. At the conclusion of the proceedings, any witness reimbursement is taxed as a cost in favor of the prevailing party.

10.2.3 Non-Resident Witnesses in Civil Cases

For civil cases, there are no statutory procedures for compelling a witness from another state or jurisdiction to attend a trial or deposition in this State. A circuit clerk should not knowingly issue a civil subpoena that is intended to be served on a non-resident witness in another state or country.

10.2.4 Depositions of West Virginia Residents in Foreign Jurisdiction Cases

The procedure for obtaining discovery from West Virginia residents for a foreign case is governed by the recently adopted Interstate Depositions and Discovery Act (hereinafter "Act") and the West Virginia Rules of Civil Procedure. The Act is codified as West Virginia Code §§ 56-12-1 *et seq.* and went into effect on June 10, 2016. The purpose of the Act is to promote uniformity among the different states and provide an interstate discovery procedure that can be easily and efficiently implemented with minimum judicial oversight and intervention.

Under the Act, a "foreign jurisdiction" is a state other than West Virginia, and "state" means any state of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, or any territory that is subject to the United States' jurisdiction. A "foreign subpoena" is a subpoena issued under the authority of a court of record in a foreign jurisdiction. This includes anyone who is authorized under the law of the other state to issue a subpoena, which usually includes on attorney of record for a party in the proceeding. The term "subpoena" includes a subpoena to give testimony, a subpoena duces tecum for production of books, documents, records, electronically stored information or tangible items, or to permit inspection of premises under the control of the person subpoenaed. The deposition subpoena will typically relate to a civil case in the foreign jurisdiction. However, as long as the foreign jurisdiction allows for depositions in another type of proceeding, it would be covered under the Act as well.

To obtain discovery from a West Virginia resident for a foreign case, the party must first submit a foreign subpoena to the clerk in the county where discovery will be conducted and pay the necessary filing fee.[1] The applicable filing fee is the fee set under West Virginia Code § 59-1-11(a)(1), "for instituting any civil action under the Rules of Civil Procedure, any statutory summary proceeding, . . . or any other action, case, suit or proceeding." The fee for issuance of a subpoena is set by subsection (b)(9) of the same statute.

[1] The National Conference of Commissioners on Uniform States Laws anticipated that the party requesting a subpoena for a foreign case would be required to pay a filing fee. In the comments to the Act, NCCUSL provides an example of how a party can obtain a subpoena for a foreign case and specifically states that the requesting party will pay any necessary filing and issuance fees with the court in the county where discovery will be conducted.

The clerk will open a new case and assign a "P" civil case number to the matter.[2] Then, the clerk must promptly issue a West Virginia subpoena and return it to the requesting party for service upon the person from whom discovery is sought. The subpoena must include (1) the terms used in the foreign subpoena and (2) the names, addresses, and phone numbers of all counsel of record and all parties not represented by counsel. Ideally, the requesting party or counsel will have obtained a copy of the West Virginia subpoena form and prepared it for the clerk's signature and issuance. If not, the clerk can either complete the subpoena if all the required information was provided or send a blank (and unsigned) subpoena form to the requester for completion and return to the clerk for issuance.

The West Virginia Rules of Civil Procedure apply to subpoenas issued under the Act; and the subpoena must be served in accordance with these rules. This would include the witness fee and mileage provisions related to service. (Rule 45(b)(1), RCP). The Act also requires that any application to enforce, quash, or modify the subpoena must be filed with the circuit court in the county where discovery will take place. The Act applies to cases pending at the time it goes into effect.

Prior to this Act, Rule 28(d) of the West Virginia Rules of Civil Procedure provided the procedure for taking depositions of a West Virginia resident when a case is pending in a foreign jurisdiction. Under Rule 28(d), a petition may be filed in the circuit court of a West Virginia county where the deponent resides, is employed, or transacts business in person. If the circuit court granted the petition, the clerk would prepare and issue the subpoena according to any special directives of the court's order.

At this time, the Act and Rule 28(d) provide alternate procedures for obtaining a deposition subpoena to compel discovery from a West Virginia resident for a foreign case. Unless and until the West Virginia Supreme Court amends Rule 28(d) in view of the Act, either the procedure provided in the Rule 28(d) or the Act is appropriate. The Act provides a more expeditious procedure and will likely be utilized more often.

10.2.5 Witness Reimbursement in Criminal and Juvenile Cases

The allowable fees and expenses for witnesses set forth below apply to fact witnesses in grand jury proceedings, criminal, and juvenile cases. The fees and expenses apply to both residents and non-

[2] See chapter 2 for a detailed discussion of case number assignments.

residents of West Virginia. However, a witness who appears before a grand jury is only entitled to fees or expenses if the witness is **not** a West Virginia resident.

There are some instances when a witness may not be reimbursed. As noted previously, a West Virginia resident who appears before a West Virginia grand jury **may not** be reimbursed for allowable fees and expenses. (W. Va. Code § 59-1-16). Additionally, a State, county or municipal employee who appears in his or her official capacity in **magistrate court** is not entitled to compensation for appearing as a witness. (Rule 5(b), ARMC).

In circuit court, State employees who appear in their official capacity are **not** entitled to reimbursement for the appearance. They are entitled to mileage reimbursement if they travel in a personal vehicle. However, employees of local governments, such as city police officers, may receive witness fees for circuit court appearances. Since legal authority does not establish clear guidelines for these types of witnesses, the chief judge may establish local rules with regard to their compensation. For example, a local rule could be established that governs whether a police officer who testifies during his or her normal shift may receive witness compensation.

In addition to reimbursement for mileage, the guidelines as set forth below are used to determine whether a witness may be entitled to reimbursement for travel, meals or other expenses.

a. **Other Forms of Transportation**: A witness who must travel 250 miles or more is entitled to mileage reimbursement, but the amount of the mileage reimbursement cannot exceed customary airline fare plus mileage from the airport to home and the airport to the courthouse.

b. **Lodging**: Actual cost of a single room in a hotel, but no extra costs such as phone calls, room service or bar bills.

   Lodging expenses are **not** allowed if the witness testifies in the county where he or she resides or if the witness lives within 100 miles of the courthouse. An exception to this rule is allowed if the witness is disabled, and the disability prevents the witness from traveling on a daily basis.

c. **Meals**: A witness may only be reimbursed for meals if he or she is entitled to reimbursement for lodging. As of

2005, reimbursement for the entire day cannot exceed $30 for in-state travel and $50 per pay for out-of-state travel.

d. **Bridge, Road and Ferry Tolls**: Amount of any tolls

e. **Parking**: No reimbursement

f. **Parking Tickets**: No reimbursement

10.2.6 Payment Procedure for In-State Witnesses in Criminal and Juvenile Cases

The following payment procedure applies to fact witnesses who reside in West Virginia and who are required to appear in a criminal or juvenile proceeding on behalf of the prosecution. The payment procedure also applies to fact witnesses who appear on behalf of a defendant or juvenile respondent who is entitled to court-appointed counsel because Rule 17(b) of the Rules of Criminal Procedure expressly provides that a witness subpoenaed on behalf of such a defendant shall be paid "in the same manner in which similar costs are paid in case of a witness subpoenaed on behalf of the state." Although Rule 17(b) provides for reimbursement for witnesses for defendants entitled to court-appointed counsel, Rule 17(b) also requires a court to find that the witness is necessary to present an adequate defense before the subpoena can be issued.

The procedure for witness payment follows:

a. By sworn affidavit, each witness shall certify to the circuit clerk the number of days he or she appeared as a witness and the number of miles traveled. Although local practice may vary, the clerk may request that the witness produce the subpoena that compelled his or her attendance.

b. The circuit clerk should prepare a certificate that shows the number of days that the witness was required to appear, the amount of witness fees, reimbursement for mileage and any other allowable expense. The clerk should provide the certificate to the witness.

c. The witness should present the certificate to the sheriff of the county where the witness appeared, and the sheriff will reimburse the witness for the amount due.

d. The sheriff submits the following information and documents to the Administrative Office: 1) the original certificate prepared by the circuit clerk; 2) the name of the witness; 3) the number of days that the witness appeared; 4) the amount of mileage; 5) the amount of any other allowable expenses; and 6) the total amount of reimbursement.

e. Upon receipt of the required documentation, the Administrative Office will reimburse the sheriff for the witness fees and expenses.

10.2.7 Non-Resident Witnesses in Criminal and Juvenile Cases

West Virginia has enacted the *Uniform Act to Secure the Attendance of Witnesses From Without a State in Criminal Proceedings*. (West Virginia Code §§ 62-6A-1, *et seq.).* All 50 states have enacted this uniform act or a substantially similar law. It governs the procedures for compelling witnesses from one state (including the District of Columbia and any U.S. territory) to attend either grand jury or criminal proceedings in another state. This uniform act is premised upon the generally held view that the subpoena power of a state does not extend beyond its borders. The procedures for summoning a West Virginia resident to another state are the same procedures for compelling a non-resident witness to appear in West Virginia. (W. Va. Code §§ 62-6A-2 and -3).

When necessary to compel the attendance of a non-resident witness, at the request of the prosecuting attorney or defendant, the judge where the criminal proceeding will be conducted must issue a certificate to a judge of a court of record in the county where the witness resides. The certificate must include the following: a) a finding that the named witness is a material witness; and b) the specific date(s) on which the presence of the witness is required. The judge who receives the certificate conducts a hearing to determine whether the witness is material and whether attendance at the hearing would place an undue hardship on the witness. The judge should also determine whether the summoning state will exempt the witness from arrest or service of process for matters which arose before issuance of the summons while the witness appears in the summoning state (and any other state through which the witness will travel).

In addition, the person who requests a non-resident witness subpoena should provide the witness fee and payment for mileage, lodging and meals in advance. It is not mandatory to tender the payment, but most judges reviewing an out-of-state certificate under this uniform act

require the payment before they will direct the clerk to issue a subpoena. Typically, a check is tendered when the certificate is sent to the judge of the state where the witness resides. If the court approves the issuance of the subpoena and the witness fees and expenses are provided, the witness is subject to lawful penalties for failing to appear in response to the subpoena.

If the judge where the witness resides makes the findings noted above, he or she will enter an order directing the clerk of the court to issue a subpoena or summons to compel the attendance of the witness at the out-of-state criminal proceeding. When preparing the subpoena, the circuit clerk should follow the directives of the order that requires the witness to appear. Without such an order, the clerk should refrain from issuing any subpoena compelling a State resident to travel to another state to testify in a criminal trial. In a similar vein, a circuit clerk in this State should not knowingly issue a subpoena for a non-resident witness to appear for a criminal trial in this State. Under the uniform act, that subpoena would have to be issued by a court and clerk in the non-resident witness's state.

10.2.8 Criminal and Juvenile Witness Fees Taxed as Costs

If witness fees and expenses are paid to a witness who appears on behalf of the prosecution and the defendant is convicted, the witness fees are taxed as costs against the defendant. (W. Va. Code §§ 62-5-2 and -7). When witness fees are paid by a convicted defendant in this situation, the clerk forwards the funds to the sheriff. Similarly, if a defendant who is entitled to court-appointed counsel is convicted, and a defense witness was paid with public funds, the witness fees may be taxed by the court as a cost against the defendant. (W. Va. Code §§ 29-21-16(g)(1) and 62-5-7). The costs for defense witnesses may only be imposed if the court determines that the costs can be paid without undue hardship. (W. Va. Code § 29-21-16(g)(2)). When the clerk collects any such reimbursed witness fees, the clerk forwards the funds to the sheriff along with the completed criminal charge fund report.

10.3 EXPERT WITNESSES

Note: The payment of expert witnesses in civil cases is arranged for and paid by the party who requires the testimony of the witness. The procedures outlined in this section only apply to experts in the specific types of proceedings noted below. Additionally, the procedures outlined below only apply when an expert witness is paid with public funds.

10.3.1 Expert Defense Witnesses in Criminal Cases

To present a defense, a criminal defendant may require expert witness testimony. (Rules 28(a), R. Cr. P.). If a defendant is entitled to an appointed attorney, Public Defender Services is required to pay the expert fees to assist the defendant with the presentation of a defense. (Rule 35.05(b), TCR; W. Va. Code § 29-21-13a(e)). When an expert is appointed, the court is required to approve the fee for the expert in advance. (Rule 35.05, TCR). If the charged offense is a felony offense and an allowable sentence is life imprisonment, there is no statutory limit for expert assistance and other expenses. For all other criminal offenses, the total amount of expert assistance and other expenses is limited to $1,500 unless the defendant establishes good cause to exceed the statutory limit. (W. Va. Code § 29-21-13a(e)).

When the expert has completed his or her services, a proposed payment order, a direct expense voucher or an invoice will be submitted to the court. When the judge signs the payment order, the clerk should process the payment order in the same manner as payment orders for court-appointed attorneys. It should be noted that Public Defender Services now requires invoices for private investigators to be included as part of a lawyer's voucher. After July 1, 2008, Public Defender Services will no longer accept direct expense vouchers for investigative services.

10.3.2 Expert Witnesses for the State in Criminal Cases

The State may present expert witness testimony in a criminal case. (Rule 28(a), R. Cr. P.). When an expert is required, the court must approve the expert's fee in advance. (Rule 35.05, TCR). The payment of an expert witness for the State is split between the local prosecuting attorney's office and the Administrative Office. The office of the prosecuting attorney is required to pay for the expert's preparation, which includes evaluation, report writing, consultation, or other services. The Administrative Office is responsible for the expert's fee for testifying and expenses associated with the testimony, such as travel expenses. (Rule 35.05(a), TCR). At the conclusion of the expert's services, the circuit court will enter orders requiring payment by the prosecuting attorney and the Administrative Office for their respective portions of the expert witness fees. When a payment order directs payment by the Administrative Office, the circuit clerk should forward one certified copy of the payment order and the invoice to the Administrative Office.

10.3.3 Witnesses Appointed by the Court

If a court appoints an expert for its own assistance, the Administrative Office is responsible for the expert's entire fee. (Rule 35.05(c), TCR). When the expert has completed the required services, the court will enter an order directing the Administrative Office to pay the expert witness. The clerk should forward one certified copy of the payment order and supporting invoices to the Administrative Office.

10.3.4 Competency and Criminal Responsibility Evaluations

The West Virginia Department of Health and Human Resources (DHHR) is responsible for payment of expert evaluations relating to a criminal defendant's competency to stand trial or criminal responsibility. (Rule 35.05, TCR; W. Va. Code § 27-6A-1). When an expert performs these types of evaluations, the court will enter an order requiring DHHR to pay for the expert services.

10.3.5 Sexual Offender Evaluations

If a criminal defendant is convicted of a sexual offense as defined by West Virginia Code §§ 61-8B-1, *et seq.* or of filming sexually explicit conduct of minors as defined by West Virginia Code §§ 61-8C-1, *et seq*., he or she must undergo a sexual offender evaluation to be eligible for probation. (W. Va. Code § 62-12-2(e)). When this type of evaluation is ordered, the trial court enters an order directing the DHHR to pay for the evaluation. (Rule 35.05, TCR).

10.3.6 Expert Witness Fees in Abuse and Neglect Cases

In abuse and neglect cases, a court may appoint an expert to examine a child or other party and to testify with regard to the results of the examination. (W. Va. Code § 49-6-4; Rule 27.01, TCR). Typically, the appointed expert is a physician, psychiatrist or psychologist.

When the court appoints an expert, the court should enter an order that establishes the amount of the fee in advance. (Rule 27.02, TCR). The payment responsibility for an expert witness is split between the DHHR and the Administrative Office. (Rule 27.02, TCR; *Hewitt v. DHHR*, 575 S.E.2d 308 (W. Va. 2002)). According to Trial Court Rule 27.02, the DHHR is financially responsible for the evaluation, report writing, consultation and any other preparation, but not actual testimony. Although DHHR is responsible for this portion of the expert's fee, compensation of the expert is limited to the Medicaid rate. (W. Va. Code § 49-7-33). When the expert completes these

services, the court will enter an order directing the DHHR to pay this part of the expert fee.

The Administrative Office is financially responsible for the payment of expert **testimony and related expenses,** such as travel to the courthouse. (Rule 27.02, TCR). After the expert has testified, a proposed payment order and an invoice or voucher will be submitted to the court. Once the court enters the payment order, the clerk should forward one certified copy of the payment order and the supporting invoice to the Administrative Office.

In addition to the appointment of an expert pursuant to Trial Court Rule 27.02, an expert witness may be appointed by the court at the request of a respondent. In this situation, the DHHR is responsible for payment at the Medicaid rate for an examination and evaluation. (*In re Chevie V.*, 700 S.E.2d 815 (W. Va. 2010)). The Administrative Office is responsible for the payment for testimony and related expenses. The clerk should forward any payment orders to the Administrative Office for any testimony and related expenses.

10.3.7 Expert Witnesses in Juvenile Cases

The payment of expert witnesses in juvenile cases is similar to the payment of experts in abuse and neglect cases. The DHHR is financially responsible for the evaluations of juveniles and other services, but limits payment to the Medicaid rate. (W. Va. Code § 49-7-33). Applying the payment responsibility as set forth in Trial Court Rule 27.02 to juvenile cases, the West Virginia Supreme Court has established that the Administrative Office is financially responsible for expert witness **testimony and related expenses** in juvenile cases. (Syl. Pt. 2, *Hewitt v. DHHR*, 575 S.E.2d 308 (W. Va. 2002); *State ex rel. Artimez v. Recht*, 613 S.E.2d 76 (W. Va. 2005)).

The procedures for payment of an expert in a juvenile case are identical to the payment of an expert in an abuse and neglect case: a) the court should pre-approve the fee in advance; b) when the expert's services are complete, the court should enter orders directing DHHR to pay for the evaluation, report writing or other preparation, and directing the Administrative Office to pay for testimony and related expenses; and c) the clerk should submit one certified copy of the payment orders for testimony and related expenses to the Administrative Office. If directed by the order, the clerk should also submit a certified copy to the DHHR for payment of the other components of the expert services not payable by the AO.

10.3.8 Expert Witnesses in Mental Health Cases

A county commission is financially responsible for expert witness testimony in mental health cases, including experts called by an individual who qualifies for a court-appointed attorney. (W. Va. Code § 27-5-4(r)).

10.4 ACCOMMODATIONS FOR PERSONS WITH DISABILITIES

10.4.1 Americans with Disabilities Act (ADA)

In general, Title II of Americans with Disabilities Act (ADA), requires courts to provide reasonable accommodations to persons with disabilities because they have a right of access to the courts. (42 U.S.C. §§ 12131 through 12165; *Tennessee v. Lane*, 541 U.S. 509 (2004)). When providing judicial services, the local court system has an affirmative obligation to provide reasonable accommodations to any qualified person with a disability. (42 U.S.C. § 12132).

10.4.2 Accommodations

The civil case information sheet has a section regarding the accommodation of parties or witnesses with disabilities. When a party indicates that an accommodation is needed on the CCIS, the clerk should highlight this information and forward it to the presiding judge. This information may also be forwarded to the local ADA coordinator or other personnel who may be responsible for arranging for an accommodation for courthouse access or court-related services.

Personnel in the circuit clerk's office should be familiar with any standard accommodations that are available for disabled persons. For example, some courthouses are wheelchair accessible at an auxiliary entrance, not at the main entrance. As another example, some counties maintain a wheelchair in the courthouse. Further, an assistive listening device is available through the Administrative Office. (Supreme Court Memorandum 02-17). Shipping of the device must be arranged in advance of a proceeding. When accommodations are requested, personnel in the circuit clerk's office should provide information concerning accommodations and should also provide contact information for the local ADA coordinator and for the ADA coordinator for the West Virginia court system.

10.4.3 Notice of Compliance

A Notice of Compliance with Title II of the Americans with Disabilities Act of 1990 is available on the Supreme Court's website. This notice should be posted in the circuit clerk's office.

10.4.4 Grievance Procedure

The Supreme Court has adopted a grievance procedure to address complaints of discrimination related to a disability. (Supreme Court Memorandum 00-18). Information and forms concerning the grievance procedure should be maintained in the clerk's office and provided to any member of the public when requested. The forms and information are also available on the Supreme Court website.

10.5 INTERPRETER SERVICES

In general, courts are required to appoint interpreters for court proceedings and preparation for court proceedings if a person requires an interpreter. The most common circumstances requiring the appointment of an interpreter are when a person has a hearing impairment or does not speak English. However, there may be other reasons why a person requires an interpreter, such as a person has cerebral palsy that impairs speech. This section provides specific guidance for the appointment of interpreters for persons with hearing impairments and language barriers. The procedures, however, could be applied to other situations in which an interpreter is required.

10.5.1 Accommodations for Persons with Communication Disabilities

With specific regard to communication disabilities, the courts are required by regulations implementing the ADA to take appropriate steps to ensure that communications with applicants, participants, and members of the public with disabilities are as effective as communications with others. (28 C.F.R. § 35.160). These steps include providing auxiliary aids and services such as qualified interpreters, notetakers, transcription services, written materials, and closed-caption decoders. (28 C.F.R. § 35.104). In determining what type of auxiliary aids or services are necessary, primary consideration must be given to the requests of an individual with disability. (28 C.F.R. § 35.160).

10.5.2 Applicable State Authority for the Appointment of Interpreters

West Virginia Code § 57-5-7(a) establishes that a party, a witness, or a juror with a hearing impairment has the right to a qualified interpreter to assist at every stage of a court proceeding. Specifically, West Virginia Code § 57-5-7(a) requires the appointment of an interpreter if a person cannot readily understand or verbally communicate the English language" because the person is deaf, is a deaf-mute, or has any other hearing impairment.

West Virginia Code § 57-5-7(b)(3) provides specific guidance concerning the stages at which a person is entitled to an attorney in both criminal and juvenile cases. An interpreter should be provided at any stage during which a person has a right to be represented by an attorney. Further, a person's waiver of his or her right to counsel does not waive his or her right to an interpreter.

The West Virginia Interpreter for the Deaf Act (W. Va. Code §§ 5-14A-1, *et seq.*) requires a court to appoint an interpreter for any deaf person who is a "complainant, defendant, or witness." (W. Va. Code § 5-14A-3(a)). According to this act, a "deaf person" is defined as "one whose sense of hearing is nonfunctional for the ordinary purposes of life." (W. Va. Code § 5-14A-2(a)). The act further provides that an interpreter shall be appointed to interpret the proceedings to the person with a hearing impairment, to interpret the person's statements, and to assist a person to prepare for the court proceedings with counsel.

In addition, Rule 28(b) of the West Virginia Rules of Criminal Procedure provides that a court may appoint an interpreter when needed. Similarly, Rule 43(f) of the West Virginia Rules of Civil Procedure and Rule 56 of the Rules of Practice and Procedure for Family Court allow a court to appoint an interpreter, if necessary. With specific regard to mental health cases, West Virginia Code § 27-5-1(b)(1) requires a court to appoint interpreters for deaf persons or persons who require a foreign language interpreter in involuntary commitment proceedings.

Based upon the statutes and rules cited above, including the ADA, it is easily concluded that a court has a duty to ensure that the services of an interpreter are available when necessary for any participant (party, witness or juror) in a court proceeding having a hearing impairment or other physical disability impairing effective communication in the proceeding. Court personnel, including circuit clerks, should assist a judge or other judicial official to obtain the services of an interpreter.

10.5.3 Accommodations for Spectators with a Special Interest in a Proceeding

Although applicable statutes and regulations address the appointment of interpreters for parties, witnesses and jurors, the Supreme Court has also adopted a policy for providing a communication accommodation, including an interpreter, for the following courtroom spectators:

a. Any parent, guardian, conservator or guardian ad litem of a minor or incompetent person who is a party or witness in any case;

b. Any parent, guardian, conservator or guardian ad litem of a minor or incompetent person who is a victim in a criminal case;

c. The spouse of a victim in a criminal case; and

d. Any person when a circuit judge finds good cause for the appointment of an interpreter for a spectator. *(Interpreter Information for West Virginia Court Personnel, July 1999, Appendix A).*

10.5.4 Procedures for the Appointment of Interpreters

Every person who needs an interpreter is required to notify the court 48 hours in advance and request the appointment of an interpreter for the scheduled proceeding. (W. Va. Code § 5-14A-6). Although a person is required to request an interpreter 48 hours in advance, court personnel should ensure that all individuals who require an interpreter are provided with one, even if a timely request is not made. If an interpreter is not available, the proceeding should be rescheduled until an interpreter is available. (Supreme Court Memorandum 02-17). If a person makes an oral request for an interpreter, the circuit clerk should provide an interpreter request form and should also provide any needed assistance with the completion of the form.

When the request form is completed, the clerk should forward it to the appropriate judge. If a person who requires an interpreter is appearing in circuit or family court, the presiding judge appoints an interpreter. If a person appearing in magistrate court requires an interpreter, the chief circuit judge has the authority to appoint an interpreter.

10.5.5 Selection of Interpreters

West Virginia Code § 5-14A-2 defines a "qualified interpreter" as an interpreter who is certified by the National Association of the Deaf (NAD) or the Registry of Interpreters for Deaf (RID). The statute also indicates that a court may appoint an interpreter whose qualifications have been "otherwise determined" if a NAD or RID interpreter is not available. However, Title 192, Section 3.3.16 of the Code of State Regulations indicates that interpreters in legal settings should possess a Level III, IV, or V NAD Certification or a RID Comprehensive Skills Certification (CSC) or Certificate of Interpretation and Certificate of Transliteration (CI/CT) from RID. Since legal proceedings can have a significant effect on participants, a court should appoint interpreters who possess the level of certification set forth in applicable state regulations, if at all possible.

The West Virginia Commission for the Deaf and Hard of Hearing compiles a list of interpreters and their respective certification levels. (Appendix A). Additionally, a list of qualified interpreters, also compiled by the West Virginia Commission for the Deaf and Hard of Hearing, is available online at www.wvdhhr.org/wvcdhh/.

10.5.6 Oath for Interpreters

Before participating in any proceeding, a qualified interpreter is required to make an oath or affirmation to truly interpret the proceedings in an understandable manner and to interpret statements to the best of the interpreter's skill and judgment. (W. Va. Code § 5-14A-8; W. Va. Code § 57-5-7(e)). If the oath or affirmation is in written form signed by the interpreter, the form should be maintained in the case file.

10.5.7 Fees and Expenses for Interpreters Serving Out of Court

In criminal and juvenile cases where the person qualified for appointed counsel, and in mental hygiene involuntary commitment cases, the applicable constitutional and statutory provisions require the State (through the Court Administrator's Office) to pay for an interpreter for preparation time with counsel before court hearings. In all other cases, it is the responsibility of the attorney or the agency or firm that employs the attorney to pay the costs for an interpreter to provide these out-of-court services. Attorneys and law firms are places of public accommodation and thus are required to provide necessary interpreter services without charge to people who are deaf or hearing-impaired. (28 C.F.R. §§ 36.104; 36.301(c) and 36.303(b)(1)).

10.5.8 Fees and Expenses for Interpreters Serving in Court

The West Virginia Commission for the Deaf and Hard-of-Hearing establishes by rule the minimum fee schedule for interpreter services for deaf persons. (192 C.S.R. §§ 1-A; Appendix A). The Administrative Office pays for all interpreters for court proceedings without regard to the income of the person who requires the services of an interpreter.

Interpreters should be paid for all travel time and all time spent in court. An interpreter should be paid for a minimum of two hours even if the time for travel and interpreting is less than two hours. (192 C.S.R. § 1.3.3.1). Travel regulations for state employees govern any reimbursement for mileage and meals. (192 C.S.R. § 1.3.3.4).

10.5.9 Checklist for Appointment Procedures

a. A person who requires an interpreter for court proceedings should file a request in writing with the circuit clerk. Although the request should be filed 48 hours in advance, the proceedings should be rescheduled if an interpreter is unavailable. (Supreme Court Memorandum 02-17).

b. Possible interpreters should be selected from the list maintained by the Commission for the Deaf and Hard-of-Hearing with first preference given to interpreters who possess a III, IV, or V NAD certificate or a RID CSC or CI/CT certificate.

c. An interpreter should be contacted and should agree to serve.

d. The proposed interpreter's name and contact information, as well as a copy of the written request, should be forwarded to the presiding circuit or family court judge.

e. The presiding judge will enter an order of appointment.

f. If the judge does not appoint an interpreter, a person who requires the service of an interpreter may seek assistance from the circuit clerk, the local ADA coordinator or the ADA coordinator for the West Virginia court system to obtain the assistance of an interpreter. (W. Va. Code § 57-5-7(d)).

10.5.10 Checklist for Payment Procedures

The procedures for payment of an interpreter are set forth below.

a. The interpreter should be provided with a blank invoice form.

b. When the proceedings are concluded, the interpreter must complete and sign the invoice and then forward it to the judge who appointed the interpreter.

c. Only reasonable and necessary expenses, as governed by the travel regulations for State employees, may be included.

d. Advance approval must be obtained from the Supreme Court Administrative Office if transportation expenses will involve anything other than mileage for use of a personal automobile.

e. The presiding judge must examine and certify the invoice.

f. The judge must complete and sign the order of payment and forward the invoice and payment order to the clerk.[3]

g. The clerk must provide the Administrative Office with one certified copy of the payment order and the supporting invoices.

10.5.11 Foreign Language Interpreters

The presiding judge should appoint a foreign language interpreter if a party or witness requires these services during court proceedings. However, a prospective juror who is unable to read, speak or understand the English language is disqualified from jury service. (W. Va. Code § 52-1-8).

There is no requirement that a foreign language interpreter be licensed or certified before interpreting in a court proceeding. Additionally, there is no formal certification process. The Administrative Office, however, maintains a list of individuals who provide foreign language interpretation. Whenever an interpreter is

[3] Circuit and family courts formerly had the discretionary authority to direct that interpreter compensation be included in the taxation of costs in civil cases. Pursuant to amendments to the pertinent rules adopted by the Supreme Court (effective February 7, 2013) interpreter compensation may not be taxed as part of costs. See Rule 43, RCP and Rule 56, RFCP.

necessary in any court proceeding because a party or witness speaks only a foreign language, the interpreter must be sworn to truly interpret. (W. Va. Code § 57-5-7(e)).

If a party or witness needs a foreign language interpreter, a form request for an interpreter should be completed and filed on the person's behalf. This is the same form used to request an interpreter for a deaf person. This form, as well as an order of appointment, are available in Spanish on a magistrate court form. Although the presiding judge has the power to appoint an interpreter, parties and counsel may provide input into the selection. The interpreter establishes the fee, and the presiding judge determines whether the fee is reasonable. If the judge approves the fee by order, the Administrative Office will pay the interpreter fees. With the exception of the established fees and related regulations, the clerk should follow the same procedures for payment of a foreign language interpreter as for an interpreter for a person who is hearing-impaired.

Chapter 11

SPECIAL PROCEDURES AND PROCEEDINGS

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This chapter outlines some special court procedures and proceedings that have certain unique features and requirements that are not addressed in the general recordkeeping and case-processing discussions of Chapter 3. In some instances, the procedures involve responsibilities that the clerk must only undertake on a periodic basis, or the type of case is rarely filed. In others, the initiation or paperwork procedures are different from other civil or criminal cases.

11.1 BOUND OVERS

Felony cases generally originate in magistrate court when a magistrate conducts a preliminary hearing concerning the criminal complaint to determine if there is probable cause to believe that the defendant committed the alleged offense. (Rules 3-5, R. Cr. P.). (See Section 2.2). If probable cause is not found, the charges are dismissed. (Rule 5.1(b), R. Cr. P.). If probable cause is found, the case is bound over to the circuit court. Once a case is bound over, the magistrate court clerk forwards all case documents, including but not limited to the criminal case history sheet, any orders

admitting a defendant to bail, any justification of surety or any notice of bond encumbrance. (Rule 5.1(c)(2), R. Cr. P.). Any electronic recording of the preliminary hearing is also forwarded to circuit court. Further, any funds that were posted for bond in magistrate court will be forwarded to the circuit clerk. In turn, the circuit clerk should issue a receipt to the magistrate court so that the transfer of funds is tracked. Prior to indictment or information, the circuit clerk should maintain all records pertaining to these cases in the bound over case file.

When felony cases are bound over, the circuit clerk assigns a case number in the following form: **16-B-###**. Although local practices may vary, each county should have a consistent system for assigning bound over case numbers and identifying whether certain offenses could be assigned the same bound over number. For example, the clerk could maintain related charges under the same bound over number based upon the date of the offense, based upon the magistrate case numbers that appear on a bond order or based upon the receipt of the documents from magistrate court at the same time. In some counties, an administrative order governs local practices for the assignment of numbers for criminal cases that have been bound over to circuit court.

Bound over cases must be assigned to a judge, and in some counties, certain bound over cases will be assigned to a particular judge. For example, if a criminal defendant has a prior open, pending bound over case, the subsequently filed bound over case may be assigned to the presiding judge in the first case. The clerk should follow the directives of any administrative order or directives from the judge with regard to the assignment of cases.

Although the clerk designates a number for the bound over case and assigns a judge, the bound over cases are **not counted** as new or pending cases for statistical reports. The reason for this policy is that the cases will either be assigned a new circuit court criminal number once the circuit court case is "initiated" by the filing of an indictment or information, or it will be dismissed either for failure to prosecute or because the grand jury returns a "no true bill." Typically, there is very minimal activity in bound over cases.

When an indictment or information is filed, the clerk assigns each case either a felony number "F" or a misdemeanor number "M." The "F" and "M" case number designations should not be assigned or used prior to indictment or the filing of an information. The exception to this rule is that a misdemeanor transfer (from magistrate court or another circuit court) will be assigned an "M" number. This would occur, for example, when misdemeanor charges are transferred to circuit court to be combined with felony charges against the same defendant and a plea agreement is worked out on all charges. In all other cases, a case file will not receive a misdemeanor or felony number if

the case is never presented to the grand jury or if the grand jury returns a "no true bill."

Felony charges bound over to circuit court may be dismissed if an information is not filed or the charges are not presented to the grand jury for more than one year following the date on which the charge is bound over from magistrate court. (Rule 48(b), R. Cr. P.). It is the responsibility of the circuit clerk to establish a system to monitor cases for dismissal under this rule, similar to dismissals under Rules of Civil Procedure 4(k) and 41(b). Cases eligible for dismissal should be brought to the attention of the court at the end of each term of court by listing them on a form dismissal order which also directs the clerk to return any bail deposited with the court. Cases will be dismissed without prejudice on the court's own motion. No notice to the State is required. However, a copy of the proposed order may be provided to the prosecutor for review prior to submission of the order to the judge. Dismissal orders on bound over cases should be entered in the criminal order book.

11.2 CHANGE OF NAME

A petitioner may file a petition for a change of his or her own name or the petitioner's child or ward. (W. Va. Code §§ 48-25-101, *et seq*.). The family court may also order a name change in a divorce case. However, a name change in a divorce case is not subject to the procedural requirements established by West Virginia Code §§ 48-25-101, *et seq.* and does not require the filing of a separate petition. (W. Va. Code § 48-5-613).

A name change petition may be filed in either circuit or family court. (W. Va. Code § 48-25-101(a)). If the petitioner files in circuit court, the clerk should designate the case as a miscellaneous proceeding and assign it a "P" number. Unless closed by a specific court order, the case file for a name change petition filed in circuit court is subject to public access, as are general civil cases. If the name change petition is filed in family court, the clerk should assign the case a "D" number. As with other family court case files, the case file for a name change petition is not subject to public access, but the order and the index entry are subject to public access.

After a petitioner has filed a name change petition, he or she must publish a notice of the time and place for the hearing. The notice must be published at least 10 days before the hearing. The publication must indicate that the hearing may be rescheduled without further notice. (W. Va. Code § 48-25-101(b)). The petitioner should file proof of the publication either at or before the hearing.

The notice must include the petitioner's proposed name unless the petition alleges that the name change has been sought for personal safety reasons.

The notice must be published as a Class I legal advertisement in a newspaper of general circulation. The Secretary of State makes this designation, and the circuit clerk should inform a petitioner of the approved newspapers in which the required notice may be published. The publication area for the newspaper is the county where the name change petition is filed. If a person has an approved fee waiver, publication costs may be paid by the Administrative Office. (Section 5.6).

As required by West Virginia Code § 48-25-101, the verified petition for a name change must include the following information:

a. That the petitioner has been a resident of the county for a year prior to the filing of the petition; or that the petitioner is a nonresident of the county but was born and married in the county, and was previously a resident of the county for at least fifteen years;

b. The reason for the change of name;

c. The new name desired;

d. That the name change is not for the purposes of avoiding debt or creditors;

e. That the petitioner is not a registered sex offender under state or federal law;

f. The name change is not for the purposes of avoiding state or federal law regarding identity;

g. The name change is not sought for an improper or illegal purpose;

h. The petitioner is not a convicted felon in any jurisdiction;

i. The name change is not sought for any purpose of evading detection, identification or arrest by any local, state, or federal law-enforcement agency; and

j. Whether or not the petitioner desires to protect his or her identity for personal safety reasons.

For good cause, a court may conduct a closed hearing on a name change petition. (W. Va. Code § 48-25-101(b)). When the circuit court enters an order granting the change of name, the petitioner must file a certified copy of

the name change order with the clerk of the county commission. (W. Va. Code §§ 48-25-104 and -105).

West Virginia Code § 48-25-103 establishes certain circumstances in which a court may not grant a petition for a name change. First, a court may not order a name change while a person is incarcerated for a felony conviction. Additionally, a court may not order a name change during the time period in which a petitioner is required to register as a sex offender. (W. Va. Code §§ 61-8F-1, *et seq.*). Further, the court may not grant a name change if a petitioner has been convicted of first-degree murder or kidnapping (W. Va. Code §§ 61-2-1; 61-2-14a) for a period of ten years after the petitioner has been released from imprisonment or discharged from parole, whichever occurs later. If a person is not eligible for a name change and yet files a petition for a name change, he or she may be subject to a misdemeanor prosecution. (W. Va. Code § 48-25-107(d)).

11.3 WAIVER OF MARRIAGE LICENSE WAITING PERIOD FOR MINORS

A circuit court judge may enter an order which dispenses with the two full day waiting period that is required for issuance of a marriage license when either **one** or **both** of the applicants is **under the age of 18**. (W. Va. Code § 48-2-103). West Virginia Code § 48-2-103 expressly identifies the circuit court as having jurisdiction over this type of case. Therefore, this type of case may not be filed in family court.

When the judge enters an order that waives the waiting period, the order must be recorded in the appropriate order book in the office of the circuit clerk. The applicant must provide a certified copy of the order to the county clerk who will attach it to the marriage license application. The county clerk must follow the directives of the order with regard to issuing the marriage license.

11.4 WAIVER OF PRE-ABORTION NOTIFICATION OF PARENT

West Virginia Code § 16-2F-4 provides that a minor, who objects to the notification of her parent or legal guardian prior to obtaining an abortion (as required by West Virginia Code § 16-2F-3), may petition the circuit court in her county of residence to waive this requirement. West Virginia Code § 16-2F-4 does not require that the petition be in any specific form, only that it contain the following information: the petitioner's age and education; county and state of residence; and her reasons for the desired waiver. No filing fee is to be assessed. (W. Va. Code § 16-2F-4(i)). In these cases, files and orders are not subject to public access and are sealed at the conclusion of the proceedings. (See Chapter 4).

11.5 FUGITIVE FROM JUSTICE

The Uniform Criminal Extradition Act establishes procedures for the arrest and extradition of fugitives from justice. (W. Va. Code §§ 5-1-7 through 5-1-13). Fugitives from justice are persons wanted for a crime committed in another state. (W. Va. Code § 5-1-7(c)). For example, a person may have committed a crime in Ohio and subsequently fled to West Virginia. The state where the crime was committed is referred to as the "demanding state," and the state where the person is present is referred to as the "asylum state."

Upon a written demand for extradition from the governor or other executive authority of another state, the governor of this State may sign a warrant authorizing the arrest of a fugitive present in this State. (W. Va. Code §§ 5-1-7; 5-1-8). This type of warrant is referred to as a "governor's warrant" or "rendition warrant." A fugitive from justice case is more typically initiated in the magistrate court by the filing of a criminal complaint that alleges that the person is a fugitive from justice. Most often, a fugitive is identified when he or she has been detained by a police officer in the asylum state for other reasons. If a law enforcement officer identifies a person with outstanding criminal charges in another state, the officer may arrest the fugitive without a warrant. (W. Va. Code § 5-1-9(e)). If a fugitive is arrested in this situation, he or she must be promptly presented to a judge or magistrate. Alternatively, the demanding state may contact law enforcement in the asylum state in the county where the fugitive is believed to be present. The law enforcement officer in the asylum state would then file a criminal complaint in magistrate court and obtain a fugitive from justice warrant from a magistrate. (W. Va. Code § 5-1-9(d)). This warrant would authorize a law enforcement officer to arrest the fugitive. Once the magistrate court proceedings are complete, the magistrate court clerk automatically forwards the file to the circuit court for further extradition proceedings.

When the circuit clerk receives this type of case from magistrate court, the clerk assigns the case a miscellaneous criminal petition number (16-PCR-### or 16-P-###). The appropriate coding should indicate that the case is a criminal petition. A hearing is to be held before the circuit court to determine whether the fugitive will waive the right to the issuance of a governor's warrant and other procedural protections in extradition proceedings. (W. Va. Code § 5-1-11(b)). Since this initial hearing must be scheduled quickly,[1] the circuit clerk must immediately provide copies of the file to the assigned circuit judge and to the prosecuting attorney once it has been transmitted from magistrate court.

[1] "[T]aken forthwith before a judge of a court of record in this state, ..." W. Va. Code § 5-1-9(a).

At this initial hearing, the court will inform the fugitive of the extradition request, the criminal charges in the demanding state, the right to counsel, and the right to challenge extradition. (W. Va. Code § 5-1-11(b)). At this hearing, the fugitive may waive the right to challenge extradition. If the fugitive does so, he or she must sign a waiver of extradition form. The original is to be forwarded to the Governor of West Virginia to be filed in the Office of the Secretary of the State. Local practice will determine who forwards the waiver for filing. A copy of the wavier will be provided to the law enforcement officer who receives the fugitive. The clerk should retain a copy of the waiver in the circuit court file. If the fugitive does not waive the right to challenge extradition, an order that reflects the fugitive's choice is typically prepared and should be maintained in the case file.

If the fugitive does not waive extradition, the judge is required to establish a reasonable period of time in which to file a petition for a writ of habeas corpus. When this initial hearing is conducted, a copy of the governor's warrant or other arrest warrant and any order from the hearing should be filed in the miscellaneous criminal petition file. After the hearing concerning the warrant, the fugitive may challenge his or her extradition by filing a petition for a writ of habeas corpus. (W. Va. Code § 5-1-9(a)). When addressing a habeas corpus petition in an extradition case, the court in the asylum state is limited to a consideration of the following matters: "[W]hether the extradition papers are in proper form; whether there is a criminal charge pending in the demanding state; whether the petitioner was present in the demanding state at the time the criminal offense was committed; and whether the petitioner is the person named in the extradition papers." (Syl. Pt. 2, in part, *State ex rel. Mitchell v. Allen*, 185 S.E.2d 355 (W. Va. 1971)).

When a fugitive challenges extradition through a petition for a writ of habeas corpus, the clerk should open a new case file and assign a general civil case number (16-C-###). The clerk should collect the filing fee for a general civil case unless there is an approved fee waiver. Any application for a fee waiver should be reviewed and handled by the clerk under the process normally applicable to general civil cases. (See Section 5.5). A habeas corpus petition filed by a fugitive in these circumstances arises under the general habeas corpus provisions of West Virginia Code §§ 53-4-1, *et seq*. Such a petition does not arise under the post-conviction habeas corpus provisions (W. Va. Code §§ 53-4A-1, *et seq*.) for which there is a different procedure for review of fee waiver applications. (See Section 11.10.2). The clerk should maintain the habeas corpus case file in the same manner as other case files.

The Uniform Criminal Extradition Act establishes limits on time periods of incarceration arising from extradition proceedings. In addition, it establishes that a fugitive may be released on bond unless the charged offense is punishable by life imprisonment or death in the state where it was committed.

(W. Va. Code § 5-1-9(g)). The circuit clerk will process any bond from extradition proceedings in the same manner as other criminal bonds.

11.6 EXPUNGEMENTS

There are three general circumstances in which statutory provisions allow for expungement of criminal records by the circuit court. In addition, certain specific misdemeanor cases, such as possession of a controlled substance in an amount of less than 15 grams, may be expunged. The procedures to be followed are not specified in the same amount of detail in the statutes covering general expungement proceedings. Nevertheless, clerks should follow the same filing and case-processing procedures, except when, as discussed below, a specific statutory provision requires a different process for some particular aspect of the proceeding.

11.6.1 Expungement Based Upon a Pardon

Under West Virginia Constitution, Article 7, Section 11, the governor has the power to grant pardons for criminal convictions. (See also W. Va. Code § 5-1-16). Pursuant to the provisions of West Virginia Code § 5-1-16a, any person (except those convicted of certain offenses specified in subsection (e) of that statute) who receives a pardon by the governor may file a petition seeking expungement of all public records of the criminal conviction. A person is eligible for expungement under this statute one year after being pardoned and five years after discharging any sentence relating to the pardoned conviction (whichever is later).

The petition is to be filed in the circuit court of the county where the conviction occurred. Since no filing fee is specified by this statute, the clerk should collect the fee generally required for miscellaneous proceedings (W. Va. Code § 59-1-11(a)(1)), unless the petitioner qualifies for a fee waiver. The clerk should assign a "P" number to the case (16-P-###). The petition is to be served upon the prosecuting attorney, although the manner of service is not specified. Service should be accomplished by any appropriate method authorized by Rule 4(d) of the West Virginia Rules of Civil Procedure. In addition to serving the petition upon the county prosecutor, the petitioner is required to publish a Class I legal advertisement (in compliance with W. Va. Code, Chap. 59, Art. 3), with the publication area being the county where the petition is filed. Since the legal advertisement is required to publish "notice of the time and place that such petition will be made," the petitioner will need to obtain a hearing date from the court prior to publishing.

If the court grants the petition and orders the records expunged, the clerk should follow the sealing process and access limits set out in Section 4.12. If the court's expungement order directs any additional measures, those actions should be carried out as well.

11.6.2 Expungement Based Upon Dismissal or Not Guilty Finding

If a person has been found not guilty of criminal offense(s) or criminal charge(s) have been dismissed, he or she may file a petition in circuit court requesting the expungement of the criminal records. (W. Va. Code § 61-11-25). Criminal records are not eligible for expungement if the charges were dismissed in exchange for a guilty plea to another offense. Additionally, a person who has a previous felony conviction may not file a petition for expungement. Further, criminal records are exempt from expungement if the person was found not guilty by reason of mental illness, mental retardation or addiction of an offense subject to the sex offender registration requirements of West Virginia Code Chapter 13, Article 12. (W. Va. Code § 61-11-25(a)).

An expungement petition cannot be filed until 60 days have passed from the entry of the acquittal or dismissal order. (W. Va. Code § 61-11-25(b)). Although expungement actions relate back to earlier criminal cases, they are considered a civil remedy. However, the statute expressly states that no filing fee or costs are assessed or collected for this type of expungement petition. (W. Va. Code § 61-11-25(g)). The case should be assigned a miscellaneous petition number (16-P-###). No publication notice is required for this type of expungement proceeding. After the petition is filed, the court may set a hearing on the matter. If so, the court (or the clerk if directed by the court) is to give notice of the petition and hearing to the prosecuting attorney and the arresting agency. In such cases, the prosecutor and arresting agency may file a response to the expungement petition.

If the court grants the petition and orders the records expunged, the clerk should follow the sealing process and access limits set out in Section 4.12. If the court's expungement order directs any additional measures, those actions should be carried out as well.

11.6.3 Expungement of Certain Misdemeanor Conviction Records

West Virginia Code § 61-11-26 authorizes, subject to certain specified conditions and limitations, expungement for convictions of many types of misdemeanor offenses committed by persons who were between 18 and 26 years of age at the time of the offense or offenses arising

from the same occurrence. A verified petition must be filed in the circuit court of the county where the conviction or convictions occurred, setting forth the detailed information required by subsection (c) of that statute. As required by the statute, the clerk collects the filing fee for a general civil case. (W. Va. Code § 61-11-26(a)).

Once filed, the petition and any supporting documents must be served by the petitioner, in accordance with Rule 4 of the West Virginia Rules of Civil Procedure, upon the following: 1) the Superintendent of the State Police; 2) the prosecuting attorney; 3) the chief of police of the municipal police department where the offense was committed; 4) the chief officer of any other law-enforcement agency which participated in the petitioner's arrest; 5) the superintendent or warden of any institution where the petitioner was confined; 6) the magistrate court or municipal court which handled the petitioner's criminal charge; and 7) all other state and local government agencies whose records would be affected by the proposed expungement. (W. Va. Code § 61-11-26(d)). The prosecutorial agency that handled the criminal case (county prosecutor or municipal attorney) is obligated to serve the petition and any accompanying documents, by first class mail, upon any crime victims.

Any of the above-listed entities or any other interested individual or agency desiring to oppose the expungement may, within 30 days of receipt of the petition, file a notice of opposition and supporting documentation with the court; and serve a copy upon the petitioner by first class mail. The petitioner may file a reply within 10 days after service of any notice of opposition. (W. Va. Code § 61-11-26(e)). Within 60 days of the filing of the petition, the circuit court is to do one of three things: 1) summarily grant the petition; 2) summarily deny the petition; or 3) set the matter for hearing. (W. Va. Code § 61-11-26(g)). If the court sets the matter for hearing, the petitioner and all interested parties who have filed a notice of opposition are to receive notice of the hearing. (W. Va. Code § 61-11-26(h)). The statute does not state who is to send out the notice of hearing, but presumably this would be done by the court unless the court directs a party or the clerk to send out the notice.

If the court grants the petition and orders the records expunged, the clerk should follow the sealing process and access limits set out in Section 4.12 regarding both the expungement case file and the related criminal case file. If the court's expungement order directs any additional measures by the clerk, those actions should be carried out as well.

11.6.4 Expungement for Possession of Controlled Substances, First Offense DUI, and Underage Consumption

It should be noted that West Virginia Code § 60A-4-407 allows for the expungement of criminal records for misdemeanor possession of a controlled substance and possession of salvia divinorum, a psychoactive plant. (W. Va. Code § 60A-4-413(b)). In addition, West Virginia Code § 17C-5-2b allows for the expungement of first offense DUI convictions if a person successfully completes the Motor Vehicle Alcohol Test and Lock program. However, DMV records would not be subject to expungement. (W. Va. Code §§ 17C-5-2b(h)(1); 61-11-25(a)). Further, criminal records related to the underage purchase or consumption of alcohol may be subject to expungement. (W. Va. Code § 60-6-26).

Typically, these proceedings are handled in magistrate court because the offenses are misdemeanors. Additionally, the statutory provisions indicate that the court handling the case, most often the magistrate court, has the authority to expunge the criminal records. However, the circuit clerk should follow the sealing procedure noted above if the circuit clerk has records that are to be expunged for these offenses.

11.7 EMINENT DOMAIN

If property is to be taken for public use, a petition is filed in the circuit court in the county in which the property is located. The clerk should assign a general civil case number (16-C-###) to condemnation cases. The applicant is the person or entity that files the petition and seeks condemnation of the property. The defendants are any property owners or persons with a legally recognized interest in the property.

When a condemnation petition is filed, the circuit court will conduct an initial review of the petition. If the court determines that the applicant has a lawful right to take the property, five disinterested free holders will be appointed as commissioners. (W. Va. Code §§ 54-2-1 and -5). The commissioners are appointed by the following procedure: thirteen disinterested freeholders are nominated by the court, and both the applicant and defendant(s) have four strikes. (W. Va. Code § 54-2-6). Once eight of the names have been stricken, the remaining persons will serve as commissioners. The appointed commissioners will determine the amount of compensation due the owner(s) and will file a report with the court upon the conclusion of this stage of the proceedings. (W. Va. Code § 54-2-9). The court has the option of presiding over the hearings of the condemnation commission, or it may appoint a special condemnation commissioner to preside over the proceedings. (W. Va. Code § 54-2-7b). The fee for a special condemnation commissioner is taxed as a cost of the proceeding. (W. Va. Code § 54-2-1).

After the commissioners determine the amount of just compensation for the property, they are required to file a written report. (W. Va. Code § 54-2-9). Once the condemnation commissioners submit their report, upon court order, the applicant may deposit with the court the amount determined by the commissioners to be fair compensation for the owners. (W. Va. Code § 54-2-13). The clerk should follow the directives of the order as to the type of account which must be established for the funds. This deposit allows the applicant to enter and use the land for the purposes stated in the original petition.

Within ten days of the filing of the commissioners' report, the applicant or defendant(s) may file exceptions to the report and demand that a jury decide the question of compensation and damages. If a jury in a condemnation case is required, a panel of 12 freeholders must be empaneled from the master list of jurors. (W. Va. Code § 54-2-10).

West Virginia Code § 54-2-16a provides that the applicant is liable for all costs of condemnation proceedings in the court. These costs include the compensation of commissioners, any special condemnation commissioner and jurors. (W. Va. Code § 54-2-19). The court determines the amount of compensation for the commissioners, but compensation cannot exceed $50 per day. Jurors are reimbursed at the rates established for juror service in other civil and criminal cases.

When an order of appropriation is entered, the circuit clerk must file a certified copy of the order(s) of appropriation with the county clerk. The applicant pays the cost of the filing and recordation with the county clerk. (W. Va. Code § 54-2-20).

If the applicant is the State of West Virginia or a political subdivision of the State, the applicant may deposit an amount equal to the fair value of the property with the circuit clerk when the petition is filed. (W. Va. Code §§ 54-2-14; 54-2-14a). The deposit will either entitle the applicant to possession of the land or title to the land, depending upon the specific procedure that is followed. In a written order, the judge, however, must initially find that the purpose for the condemnation is public use and must also approve the amount of the deposit. Therefore, the clerk must follow the directives of this initial order with regard to the initial deposit.

If the applicant is a business corporation that is entitled to exercise the powers of eminent domain, the applicant may post a bond, payable to the property owner(s), in the circuit clerk's office to secure the payment for the value of the property. (W. Va. Code § 54-2-15). In an initial order, the court must approve the corporation's right to condemnation and the amount of the bond in an initial order. If the owner of the property does not object to this procedure, the applicant may enter and possess the land.

After the State of West Virginia, a political subdivision, or a business corporation entitled to exercise eminent domain makes any of the deposits noted above, condemnation proceedings that establish the value of the property may continue. These proceedings may involve the valuation of the property by condemnation commissioners or by a jury.

11.8 DISQUALIFICATION AND TEMPORARY ASSIGNMENT OF JUDGES

Trial Court Rule 17 governs the disqualification of circuit court and family court judges. (Rule 57(a), RFCP). According to Trial Court Rule 17.01, a party who seeks the disqualification of a judge must file a written motion and verified certificate within 30 days of discovering the grounds for disqualification. The certificate must indicate that the motion is grounded in fact, and disqualification is warranted under existing law or a good faith request for the modification or extension of existing law. The original motion must be filed in the clerk's office at least 21 days before any trial date or at least seven days in advance of a hearing. In addition to filing the original disqualification motion with the clerk, a party is also required to submit a copy of the disqualification motion to the judge. However, this procedure is not always followed. Therefore, the clerk should immediately notify the judge of the filing of any disqualification motion.

The judge shall respond to the disqualification motion by letter to the Chief Justice. The judge must also submit a copy of the disqualification motion to the Chief Justice. A copy of the judge's responsive letter shall be filed with the clerk, and copies of it shall be provided to counsel of record or to any unrepresented party. The Chief Justice is required to enter an order ruling on the disqualification motion within 14 days of receipt of the motion and the judge's response to it. The order shall be maintained in the case file.

Trial Court Rule 17.06 established a procedure for the assignment of a Kanawha circuit court judge for a case in a single-judge circuit if that circuit judge is unavailable. As established by West Virginia Code § 51-2-1(a), the Kanawha circuit court has concurrent jurisdiction with a single-judge circuit, provided that the presiding judge is unavailable. When any matter is referred from a single-judge circuit to the Kanawha County circuit court, the Kanawha County circuit clerk is required to transmit to the circuit clerk of the original court of venue a certified or attested copy of every document filed or order entered in the matter. The clerk of the court of original venue must file these documents in the case file. (Rule 17.06(f), TCR).

11.9 ADOPTION

West Virginia Code §§ 48-22-101, *et seq*. governs all West Virginia adoptions, including the adoption of adults, step-parent adoptions, and recognition of foreign adoptions. This section outlines circuit clerk responsibilities with regard to adoptions, including the important duty to maintain the confidentiality of all records.

11.9.1 Initiation of Adoption Proceeding

An adoption proceeding is initiated by the filing of a verified petition in the circuit clerk's office. (W. Va. Code § 48-22-502). The petition may be filed any time after the child is born, but the court may not conduct a hearing on the petition until the child has lived with the adoptive parent(s) for six months and the petition has been filed for a period of 45 days. (W. Va. Code § 48-22-502).

Typically, the petitioner files any consents for the adoption of the child and any affidavit of the birth mother at the time the petition for adoption is filed. The birth mother's affidavit provides relevant information about the paternity of the child if the father is unknown. Additionally, the petitioner should file nonidentifying information about the child, including medical and social information. This information may be provided to the adoptee once he or she has reached the age of majority and requests this information. (See Section 11.9.5).

11.9.2 Notice

A petitioner has the duty to serve a notice of the adoption proceeding upon persons who have parental, custodial or visitation rights with regard to the child, provided they have not consented to the adoption. (W. Va. Code § 48-22-601). Additionally, the petitioner must serve grandparents of the adoptee if the grandparent's child (parent of the adoptee) passed away with his or her parental rights intact. Further, the court has the discretion to require notice to be served on people who have relevant information about the child or may have parental rights with regard to the child.

In the case of an unknown father, the court may order that the notice of the adoption be served by publication. In such a case, the petitioner will file a copy of the published notice to establish proper service.

11.9.3 Confidentiality of Records, Orders and Indexes

All records of an adoption proceeding are to be maintained in a sealed file that cannot be opened without a court order. (W. Va. Code § 48-28-702(a)). As a matter of practice, the file may not be physically sealed until the adoption proceedings are final; however, the documents in an adoption file are confidential both while the proceedings are pending and after they are final. An adoption file may only be inspected if a court order allows for the inspection.

West Virginia Code § 48-22-702(a) requires the clerk to maintain a separate index for adoption cases. The index is not open to public inspection and must be stored in a locked or sealed container. Similarly, the clerk must maintain a separate order book for adoption cases that is not open for public inspection. It must also be stored in a locked or sealed container.

The circuit clerk has the additional duty to maintain the confidentiality of the identities of persons who had parental rights with regard to the child, the identities of adoptive parents and the identity of the adopted child. (W. Va. Code § 48-22-702). Therefore, the clerk must not disclose the names of any of these people without a court order. When faced with an inquiry, the clerk should simply indicate that all adoption records are sealed, and no information may be disclosed without a court order. Even if the adoptive parents and birth parents know each other's identities, the clerk still has a duty to maintain the confidentiality of all adoption information.

11.9.4 State Registrar of Vital Statistics

When the court enters an order granting an adoption, the circuit clerk must provide a certificate under seal that lists the following information, provided this information is known:

a. The adoptee's date and place of birth;

b. The names of the birth mother and of the legal or determined father;

c. The child's name;

d. The names and addresses of the adoptive parent(s); and

e. Any other information lawfully required by the Bureau of Vital Statistics. (W. Va. Code § 48-22-702(d)).

Although local practice may vary, it is typical for a petitioner to prepare the document and for the clerk to simply forward it to the Bureau of Vital Statistics. Upon receipt, the Registrar of Vital Statistics will issue a new birth certificate for the child. In turn, the birth certificate will be recorded in the appropriate county clerk's office.

11.9.5 Nonidentifying Information

A petitioner should attempt to obtain medical and social information about a child and should file a document that lists nonidentifying information when the petition is filed. (W. Va. Code § 48-22-502(f)). For practical purposes, it is helpful to have this information designated as nonidentifying information.

Additionally, birth parents may file medical, social or genetic information about the adoptee with the clerk. (W. Va. Code § 48-22-702(a) and (c)). The statute does not establish a specific time period during which this information may be filed, so it may be filed at any time. When this type of information is filed, the clerk must notify the court of the filing. In turn, the court must provide this information to an adult adoptee or the adoptive parents.

An adult adoptee or adoptive parents may file a written, notarized request for nonidentifying information from an adoption file. In response to a request, the clerk must provide nonidentifying information to the adult adoptee or adoptive parents. It is fairly typical for judges to informally review and approve any requests for nonidentifying information before the clerk discloses this information.

11.9.6 Adoption Registry

West Virginia Code § 48-23-301 requires the West Virginia Department of Health and Human Resources to maintain a voluntary adoption registry that allows adult adoptees, birth parents, and other appropriate people to register and obtain information about the adoptee, birth parents and any other relevant information. The circuit clerk has no duty to provide information to the adoption registry, but the clerk may inform people that the adoption registry is a method of obtaining information related to an adoption.

11.9.7 Petition for Identifying Information

West Virginia Code § 48-22-702(b) allows an adult adoptee or parents of a minor adoptee to file a verified petition with the court to seek identifying information about the adoptee or his or her birth parents.

When this type of petition is filed, the circuit clerk places the petition in the original adoption file, and does not collect a filing fee.

In some cases, the petitioner may not know whether the petition should be filed in a particular circuit court. If this is the case, the circuit clerk, at the direction of the circuit judge, should examine the adoption indexes to determine whether a petition should be filed in a particular county.

When a petition for identifying information is filed, the court or its designated agent, such as the Bureau of Children and Families or a private agency, may attempt to contact the birth parents to obtain consent to release this information. Without the consent of the birth parents, the court may also release information after a hearing in which the petitioner proves a compelling need for the information. (W. Va. Code § 48-22-702(b)(2)).

11.9.8 Dissent to an Adoption

West Virginia Code § 48-22-704(g) establishes a procedure by which a person, who was adopted as a minor, may vacate his or her adoption. A person who seeks to have his or her own adoption order vacated must have been adopted as a minor and must file an instrument of dissent within one year after reaching the age of majority. West Virginia Code § 48-22-704(a) does not establish any particular form for the dissent, but does require that it be "duly acknowledged" or notarized. The dissent must be filed in the circuit clerk's office where the adoption was granted. A copy of the dissent must also be filed in the county clerk's office in the county and state where the adoptee was born. Because the dissent has the legal effect of vacating a prior adoption order, the dissent should be maintained in the same case file as the original adoption.

11.9.9 Recognition of Foreign or International Adoptions

If an adoption occurs in a foreign country, the adoption may be recognized by the circuit court in the county where the adoptive parents reside. (W. Va. Code §§ 48-22-901 through 48-22-903). The adoptive parents must file a petition, a visa or other immigration documents for the child, a home study, and foreign adoption documents. (W. Va. Code § 48-22-902). When the petition is filed, the clerk collects a civil filing fee. The circuit court shall determine whether the documentation is sufficient to recognize the foreign adoption. (W. Va. Code § 48-22-903). Upon entry of an order recognizing a foreign adoption, the adoption will have the same force and effect as a West Virginia adoption.

11.10 POST-CONVICTION HABEAS CORPUS PROCEEDINGS

Post-conviction habeas corpus proceedings are **civil** cases that a convicted defendant may use to challenge the legality of his or her conviction, sentencing or imprisonment. Post-conviction habeas corpus cases are subject to proceedings different from other types of prisoner litigation, including cases that may challenge the conditions of an inmate's confinement. For example, a habeas corpus petition that alleges that a defendant's trial counsel was ineffective would be a post-conviction habeas corpus proceeding. However, a petition that alleges an inmate's constitutional rights have been violated because of inadequate medical care is not a post-conviction habeas corpus case. It is important to recognize the distinction between these types of cases because post-conviction habeas corpus proceedings are subject to different procedures than other types of prisoner litigation.

West Virginia Code §§ 53-4A-1, *et seq.* and the Rules Governing Post-Conviction Habeas Corpus Proceedings (RPHCP) establish the procedures for these types of cases. The Appendices to the post-conviction habeas corpus rules include forms for a petition (Appendix A, RPHCP) and an application for a fee waiver (Appendix B, RPHCP).

Post-conviction habeas corpus cases are usually filed after an appeal is final or after the period for filing an appeal has expired. A prisoner must first exhaust any post-conviction remedies established by the State, *i.e*. a post-conviction habeas corpus proceeding in State court, before he or she may seek habeas corpus relief in federal court.

11.10.1 Initial Review by Clerk

A post-conviction habeas corpus proceeding is initiated by the filing of an original petition and two copies with the clerk. (Rule 2(a), RPHCP). The petition must substantially conform to the form of a petition established by Rule 2 and Appendix A, RPHCP. A post-conviction habeas corpus petition must list the grounds for relief, a summary of any supporting facts, and the requested relief. (Rule 2(a), RPHCP). The petition must be legible, but is not required to be typewritten. The petition must also be verified.

When a post-conviction habeas corpus petition is filed, a clerk may conduct an initial review of the petition for its sufficiency. If the clerk determines that a petition is insufficient, a clerk may return a petition to a defendant with a statement of the reasons that a petition is insufficient. If a petition is returned due to an insufficiency, the clerk should retain a copy. (Rule 2(b), RPHCP). For example, a clerk could return a petition because the petition was not verified. If a clerk

has questions about the sufficiency of a petition, the clerk should consult the presiding judge.

11.10.2 Filing Fee/Fee Waiver Application

A petitioner must either submit the required filing fee for a general civil case or apply for a waiver of fees. A petitioner may apply for a fee waiver by submitting a completed Post-Conviction Habeas Corpus Form Application to Proceed In Forma Pauperis and Affidavit. (Rule 3(a), RPHCP; Appendix B, RPHCP). An authorized officer of the correctional facility must provide information about an inmate's trustee spending account on the bottom of the form.

Rule 3, RPHCP states that the petitioner must "demonstrate to the satisfaction of the **circuit court** that he or she is unable to pay the costs of the proceeding or to employ counsel." (Rule 3(a), RPHCP (emphasis added)). This is not the same procedure as used for fee waiver applications in other civil actions pursuant to West Virginia Code § 59-2-1. The specific language of the habeas corpus statute makes it clear that the **circuit court judge,** not the circuit clerk, must approve the fee waiver application. (W. Va. Code § 53-4A-4(a)).[2] If the court approves a fee waiver application, the court will enter an order indicating its approval. If the court does not approve the fee waiver application, the petition may not be filed unless the petitioner pays the filing fee for a general civil case.

If a habeas corpus petition concerns a prisoner's sentence or conviction, the prisoner is not subject to the delayed payment procedure established by West Virginia Code § 25-1A-3. The delayed payment procedure, for civil cases that challenge the actual conditions of confinement, involves periodic deductions from a prisoner's account at the correctional facility that are then submitted to the clerk on a biannual basis. (See Section 5.4).

Once the filing fee has been paid or the court has approved a fee waiver application, the clerk should file the petition and assign a general civil case number (16-C-###). Once the petition has been filed, the clerk should provide a copy of the petition to the assigned judge. (Rule 4(a), RPHCP; W. Va. Code § 53-4A-2).

[2] The pertinent language of this statute states: "If the court to which the writ is returnable . . . is satisfied that the facts alleged in this regard are true, and that the petition was filed in good faith, and has merit or is not frivolous, the court shall order that the petitioner proceed in forma pauperis . . .."

11.10.3 Initial Review by the Court

When a habeas corpus proceeding is filed, the court should conduct an initial review of the petition. (Rule 4, RPHCP). The court must first determine whether the petition was filed in the correct venue. A post-conviction habeas corpus proceeding may be filed in the county where the petitioner is incarcerated or in the county where the petitioner was convicted and sentenced. (Rule 3(a), RPHCP). If the petition was not filed in the proper venue, the court may order the transfer of a petition to the proper venue. If the court orders the transfer of a petition, the clerk transmits two certified copies of the petition, any other pleadings and any filing fee to the clerk of the court where venue is proper. The circuit clerk of the county where the petition was filed should retain the original petition in the case file.

After the initial review of a petition, the court may summarily dismiss a post-conviction habeas corpus petition. Alternatively, the court may appoint counsel and require the filing of an amended petition. The court may also require the respondent to file an answer. (Rule 4, RPHCP). Once the court has conducted an initial review, the duties of the circuit clerk will typically involve the entry of orders and the filing of subsequent pleadings.

11.10.4 Omnibus Hearing

If the court has appointed counsel and required the respondent to answer, the court may conduct an omnibus hearing. During an omnibus hearing, a petitioner must be represented by counsel or have knowingly and intelligently waived the right to counsel. The court must also conduct an inquiry into all grounds for post-conviction habeas corpus relief. (*Losh v. McKenzie*, 277 S.E.2d 606 (W. Va. 1981)). If an omnibus hearing is conducted, the court may summarily dismiss subsequently filed post-conviction habeas corpus petitions when the grounds for relief have been asserted or waived in a prior proceeding. (Rule 4(c), RPHCP).

11.11 FEDERAL BANKRUPTCY PROCEEDINGS

Bankruptcy proceedings are federal court cases that are governed by federal law. However, bankruptcy proceedings may affect State court cases that involve claims, including tort claims, or enforcement of judgments or other collection proceedings, including collection in family court cases. This section outlines the responsibilities of circuit clerks associated with a pending State court case when a State court case is subject to federal bankruptcy proceedings.

11.11.1 Automatic Stay

When a petitioner files a bankruptcy petition, all State court proceedings to pursue a claim or to enforce a judgment that arose before the filing of a bankruptcy petition are subject to an automatic stay. (11 U.S.C. § 362(a)). The stay is effective upon the filing of a bankruptcy petition, and no document is typically issued by the federal court that provides notice of an automatic stay. A certified copy of a bankruptcy petition is typically the only document that lists all creditors, debts, and property subject to the bankruptcy petition. The creditors, debts, and property listed in the bankruptcy petition are subject to the automatic stay.

Although the filing of a bankruptcy petition results in an automatic stay, not all State court proceedings are subject to an automatic stay. Family court actions to establish or modify child support, maintenance or spousal support are not subject to an automatic stay. (11 U.S.C. § 362(b)). Therefore, a divorce may proceed even though a party may have filed for bankruptcy. Additionally, the collection of child support or alimony from property that is **not included in the bankruptcy estate may be pursued**. However, enforcement proceedings in family court cases that involve property subject to the bankruptcy estate are subject to the automatic stay.

Another type of case that may be pursued is a claim or judgment against a tortfeasor's insurer, provided that the bankruptcy court has modified the automatic stay to allow the State court plaintiff to pursue damages limited to the amount of available insurance proceeds. (*Anderson v. Robinson*, 411 S.E.2d 35 (W. Va. 1991)). Finally, in other circumstances, a creditor or other claimant may seek relief from an automatic stay from the federal court. Proceedings involving collections or repossession of a motor vehicle or a house are examples of cases in which a creditor often seeks relief from an automatic stay. A federal court order would indicate whether a creditor could obtain this type of relief and continue to pursue a claim or enforcement of a judgment in a State court case.

11.11.2 State Court Procedures

When a party files a bankruptcy petition in federal court, he or she is responsible for notifying the West Virginia circuit clerk of the federal bankruptcy case. The circuit clerk should require a party to file a certified copy of the bankruptcy petition or other document, filed with the federal court and certified by it, that identifies the claim, debt or judgment subject to a stay in a bankruptcy case. Alternatively, a party

could file a form adopted by the Supreme Court titled "Affidavit: Notice of Filing of Bankruptcy Petition."

The filing of a certified copy of the bankruptcy petition or the form noted above triggers certain duties of the circuit clerk. When a circuit clerk has been notified of bankruptcy proceedings, the clerk should not issue any new process, such as a writ of execution or suggestion. Additionally, the clerk must notify a creditor or other claimant of the stay of execution and must release any funds to the debtor in the clerk's possession that have been seized, but not paid to the creditor or other claimant. (W. Va. Code § 38-4-27). The types of execution that may be stayed include a writ of possession, a writ of execution, a writ of suggestion or a suggestee execution. The clerk should consult the presiding judge if he or she has questions about the stay of execution.

A Supreme Court form titled "Stay of Execution When Bankruptcy Petition Filed" should be used to provide notice that a previously issued execution has been stayed. This form may be signed by the presiding circuit judge or the circuit clerk. A copy of the completed form should be maintained in the case file and provided to the judgment creditor, the judgment debtor, and the office holding the execution, such as the sheriff's office.

When State court proceedings are subject to a stay in federal bankruptcy cases, the clerk should close the file for statistical purposes, even though the circuit judge will not sign an order indicating that a case is final or that it should be struck from the active docket of the court. When the clerk "closes" the State court case file, the case should no longer be included in the pending caseload for a judge for statistical reporting purposes.

Even though a case is closed for statistical reporting purposes, a party may still file pleadings or other documents with the circuit clerk. For example, a party to a State court proceeding may obtain relief from an automatic stay from the federal bankruptcy judge. When this situation arises, the party to the State court case, typically a plaintiff, may file pleadings to initiate further action against a defendant. As another example, a specific debt or claim may not be discharged in a bankruptcy proceeding. When this situation arises, the party to a State court case may file pleadings to renew State court proceedings with regard to a claim or judgment.

11.12 PRE-PETITION PROCEEDINGS RELATING TO CHILD ABUSE AND NEGLECT

Although only circuit courts have jurisdiction to handle child abuse and neglect cases, allegations and information regarding child maltreatment sometimes arise in other types of cases properly before the family courts. Several rules promulgated by the West Virginia Supreme Court are designed to get the abuse and neglect matters promptly investigated and addressed in the appropriate forum. Certain specialized proceedings, with case-numbering and procedural features, can result from these rules.

11.12.1 Administrative Proceedings Arising from Domestic Relations or Domestic Violence Cases

During the course of a domestic relations case involving issues of custody or visitation of minor children, a family court may obtain information giving reasonable cause to suspect that a child (or children) has been abused or neglected. Similarly, allegations in a domestic violence proceeding may give rise to such reasonable suspicions of child maltreatment. In these circumstances, the family court is required to immediately report the suspected abuse or neglect to the Child Protective Services (CPS) Office of the Department of Health and Human Resources. When the written referral is sent to CPS, a copy is also transmitted by the family court to the appropriate circuit court. (Rule 48(b), RFCP; Rule 16a, RDVCP). A copy of the referral letter is also to be placed, under seal, in the family court case file by the circuit clerk.

Upon receiving a written referral from a family court, the circuit court is required to promptly issue and have served an administrative order in the name of and regarding the affected child or children. The administrative order will direct CPS to investigate the suspected child maltreatment and submit a report to the circuit court; or appear at a scheduled hearing to show cause why the investigative report has not been submitted. The circuit court's administrative order should schedule the hearing for a date not to exceed 45 days. The time interval may be substantially shortened if the court determines that the information in the family court's written referral presents reason to believe a child may be in imminent danger. (Rule 3a, RCANP).

Once the clerk receives the *Administrative Order Directing Investigation and Report*, a **"JAA"** number should be assigned and placed on the order (along with the family court case number from the case from which the written referral originated). Copies of the order are to be sent by fax or mail to the prosecuting attorney, the county supervisor of the local CPS office, and the family court that made the

written referral. (Rule 3a(c), RCANP). Because these administrative proceedings involve child abuse and neglect matters, the file should be handled as a confidential file similar to **"JA"** cases. (Rule 3a(d); Rule 6a(b), RCANP).

These administrative proceedings will typically be short-lived cases. In most of these administrative cases, CPS will investigate and either file its investigative report with the circuit court or will file an abuse/neglect petition, thereby starting a new **"JA"** case. The filing of the investigative report or abuse/neglect petition will usually occur before the scheduled hearing date, but could occur at the hearing. If an abuse/neglect petition was filed, or upon review of the investigative report the circuit court concludes that CPS is not under any obligation to file a petition, the court will file an *Administrative Order of Closure* to conclude the case. In either circumstance, the administrative case file would then be closed.

In a few instances, CPS will file a motion seeking a transfer of the administrative proceedings to the circuit court of another county that CPS believes is a more appropriate venue for the administrative proceedings. Such a motion must be filed with the circuit court within 10 days after service of the administrative order upon CPS. (Rule 3a(e), RCANP; Rule 25a(f), RDVCP). The clerk should send certified copies of the order granting or denying the motion to the referring family court and the prosecuting attorney. If the court grants the transfer motion, the clerk should also send certified copies of the order to the circuit court and prosecuting attorney in the county where the administrative proceedings are transferred. (Rule 3a(e), RCANP; Rule 25a(f), RDVCP). Finally, when a transfer motion is granted, the clerk should send to the circuit court in the county where the proceedings are being transferred the documents in the **"JAA"** file. At this early stage of the proceedings, other than the transfer order, the file likely contains only the family court referral letter, the circuit court administrative order initiating the **"JAA"** proceeding, and the Department's transfer motion.

11.12.2 Mandamus Proceedings Following the Filing of an Investigative Report

Another possible outcome for an administrative case would be when CPS files an investigative report finding no necessity to file an abuse/neglect petition; however the circuit court concludes, in view of the information then before the court, that it appears CPS has a statutory obligation to file an abuse/neglect petition. (Rule 3a(b), RCANP). In this instance, the circuit court will issue a *Mandamus Show Cause Order* which, by its terms, closes the **"JAA"** case and

opens a new mandamus proceeding. The clerk should assign a new **"JAM"** number for the mandamus case and note the new number on the show cause order (along with the closed **"JAA"** case number).

11.12.3 Contempt Proceedings Relating to Pre-Petition Investigations

The third (and least likely) path for an administrative case would be when CPS does not file an investigative report or abuse/neglect petition within the timeframe set in the administrative order. The circuit court may then issue a *Contempt Show Cause Order Regarding Prior Order Directing Investigation and Report*. The contempt matter would be addressed as part of the administrative case, with the same **"JAA"** case number. The administrative case would not be closed until the contempt issue is fully resolved.

Contempt proceedings could also arise in the course of a pre-petition mandamus (**"JAM"**) case. If a circuit court issues an order determining that CPS has a mandatory duty to file an abuse/neglect petition and CPS does not do so, the court may issue a *Contempt Show Cause Order for Failure to File an Abuse and Neglect Petition*. These contempt proceedings would remain part of the mandamus case, and all orders and other filings should bear the **"JAM"** number. The mandamus case would remain open until the contempt matter is fully resolved.

11.12.4 Removal of Family Court Infant Guardianship Cases to Circuit Court

Under West Virginia Code § 44-10-3, a petition seeking appointment of a guardian for a minor may be filed and heard in either family court or circuit court. (See Section 14.1 for a discussion of minor guardianship proceedings generally). If a minor guardianship petition is filed in family court and the judge learns that the basis of the petition, in whole or in part, is child abuse or neglect allegations, the family court must remove the case to circuit court. (Rule 13(a), RMGP).

When the circuit clerk receives the removal order, a new case number should be assigned, replacing the **"FIG"** number assigned when the petition was originally filed in family court. Rather than a **"CIG"** number typically assigned to circuit court infant guardianship cases, the case should be assigned a **"CIGR"** number to designate it as a removed case for case management and statistical purposes. Upon receiving the removal order from family court, the circuit clerk should immediately provide the order to the circuit court since a hearing

needs to be conducted within 10 days. (Rule 13(a), RMGP). Upon receiving notice of the removal, the circuit court must promptly see that CPS is given a notice of hearing and a copy of the petition. The petitioner and other parties must also be provided written notice of the circuit court hearing, which must be held within ten days of the removal from family court. Depending upon local practices or rules, the circuit clerk may be responsible for sending the notices to CPS and the parties.

The minor guardianship case in circuit court may, in some instances, generate other related proceedings. If the court deems it necessary or appropriate, the administrative and mandamus proceedings relating to child maltreatment investigations may be utilized when addressing the matters raised by the guardianship petition. (Rule 48a(b), RFCP).

11.12.5 DHHR Temporary Custody Ordered by Family Court

In limited situations, a family court judge may order the DHHR to take temporary custody of a child. (W. Va. Code § 49-4-302). To be subject to this statute, a child must be in the physical custody of a party to the case before the family court. To award temporary custody to the DHHR, the court must find, by clear and convincing evidence, that there is imminent danger to the physical well-being of a child; the child is not subject to a pending abuse and neglect case and there are no reasonable available alternatives to DHHR custody. These findings must be included in a written order.

Once the family court issues such an order, it must be immediately transmitted to the DHHR, the circuit court and prosecuting attorney. The circuit clerk will be required to transmit the order to those entities or individuals, unless the court directs otherwise or a different local practice is adopted. In addition, local practice may determine which circuit court judge in a multi-judge circuit will receive the orders. The order issued by the family court will be maintained in the family court file.

When the circuit court receives such an order, it is required to issue an order requiring the DHHR to investigate and submit a report to both the family and circuit court within 96 hours of when the child enters DHHR custody. The circuit court order and investigative report should also be maintained in the family court file.

The temporary custody order will automatically expire after 96 hours unless an abuse and neglect petition is filed. Any resulting abuse and neglect case would be handled under the standard procedures for abuse and neglect cases.

11.13 CONFIRMATION OF ARBITRATION AWARD AND RELATED PROCEEDINGS

Under the Federal Arbitration Act (9 U.S.C. §§ 1, *et seq.*), where persons or entities have agreed to arbitrate, they must generally do so rather than litigate their dispute in court, absent a judicial determination that the arbitration agreement is unenforceable. An arbitration agreement may be entered prospectively, in the event that a dispute later arises; or may be entered into by parties once a particular dispute has arisen, even after a suit is filed. The substantive provisions of the Federal Arbitration Act regarding the enforceability of arbitration agreements apply in state courts as well as federal courts. (*Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 115 S. Ct. 834 (1995); *State ex rel. Wells v. Matish*, 600 S.E.2d 583 (W. Va. 2004)). West Virginia also has an act that relates to the enforceability of arbitration agreements. (W. Va. Code §§ 55-10-1, *et seq.*). Any provisions of state law that would undercut the enforceability of arbitration agreements under the substantive provisions of the federal act, however, would be pre-empted and of no effect. But the procedural rules applicable in state court proceedings would generally apply to any proceeding brought in West Virginia circuit courts to enforce an arbitration agreement or an arbitration award already obtained. (*Southland Corporation v. Keating*, 465 U.S. 1, 104 S. Ct. 852 (1984)).

Issues pertaining to a particular arbitration agreement can arise in a civil suit already filed, and would be addressed by the circuit court during the course of the pending proceedings. In some instances, however, a person or entity with an existing arbitration award will want to seek enforcement in a particular jurisdiction where no suit is already pending. Such enforcement of an arbitration award is typically pursued by filing an "application (or petition) for confirmation of arbitration award" in a court that would have jurisdiction over the party against whom the arbitration award was made. Typically, attached to or accompanying the application should be, at least, the following documents: 1) the arbitration agreement; and 2) the arbitration award. When such an application is presented to a circuit clerk, a completed CCIS should be presented as well, and the normal filing fee for a civil action should be collected. The application should be assigned a "C" number and a summons issued with the appropriate response period indicated (e.g., 20 or 30 days) for the party being served. Service of the summons and application may be accomplished by any method permitted under Rule 4 of the Rules of Civil Procedure.

Once this proceeding (which, in many respects is similar to foreign judgment filing under W. Va. Code §§ 55-14-1, *et seq.*) has run its course, if an order confirming the arbitration award is signed by the circuit judge it should be entered and docketed as if it was a final judgment rendered in any other civil

action. Execution and other collection procedures for civil judgments would thereafter be applicable.

In addition to confirmation of an arbitration award, a party to an arbitration is also authorized to seek relief from the court when other issues related to an arbitration arise. (W. Va. Code § 55-10-7). These issues may include enforcement of a subpoena or other discovery-related issue. (W. Va. Code § 55-10-19). If a circuit court case has already been filed, the issues associated with the arbitration may be addressed within the pending case. If a civil case has not been initiated, the party seeking relief will need to file an initial motion or some type of case-initiating pleading. A completed CCIS and the normal filing fee for a civil case must also be submitted. The clerk should assign a "C" number to the case and issue a summons. The motion (or other case-initiating pleading) and summons may be served by any of the methods established by Rule 4 of the West Virginia Rules of Civil Procedure. (W. Va. Code § 55-10-7).

11.14 PETITION TO RESTORE RIGHT TO POSSESS FIREARMS

Under West Virginia Code § 61-7-7(a)(4), any person adjudicated as a mental defective or who has been involuntarily committed to a mental institution loses the right to possess firearms. The Mental Health Registry Act, in West Virginia Code § 61-7A-5, established a procedure by which such persons may petition the circuit court to regain their right to possess firearms. Although persons who lost their firearm rights for other reasons may file a petition to regain such rights (under state law), this statutory procedure under West Virginia Code § 61-7A-5 **only** applies to persons who lost their right to possess firearms because they were found to be mentally defective or because they were involuntarily committed to a mental institution.

Such a person may file a petition in the county where he or she resides. Since no other filing fee is specified in the statute, the clerk would collect the filing fee for general civil cases required by West Virginia Code § 59-1-11(a). The clerk should assign a **"P"** number to the case (16-P-###). The statute provides that the prosecuting attorney shall represent the state in these proceedings and provide the court the petitioner's criminal history records. (W. Va. Code § 61-7A-5(g)). The petitioner should, therefore, serve the prosecuting attorney with a copy of the petition. If the court finds by clear and convincing evidence that the person is competent and capable of exercising the responsibilities concomitant with the possession of a firearm, the court may issue an order restoring the petitioner's rights to possess firearms under state law. (W. Va. Code § 61-7A-5(e)).

If the court issues an order that restores a petitioner's right to possess firearms, the circuit court or clerk is required to forward a certified copy of the order to the registry staff, which will result in the removal of the petitioner's

name from the State Mental Health Registry. In addition, the registry staff will inform the FBI or other federal entity operating the National Instant Criminal Background Check System (NICS) of the court's action to reinstate, under state law, the petitioner's right to possess firearms. (W. Va. Code § 61-7A-5(i)). Under the federal NICS Improvement Amendments Act of 2007, the involved federal agencies need to approve each state's process of restoration of firearm rights for those who were formerly adjudicated as a mental defective or committed to a mental institution before the state action restoring firearm rights will also lift the federal prohibition against possession of firearms by such persons. After statutory amendments were enacted by the Legislature in 2012, West Virginia's restoration process under West Virginia Code § 61-7A-5 was federally approved. Therefore, absent some other basis to prohibit firearm possession, a person who successfully petitions for restoration of firearm rights under this state statute would be permitted under federal law to purchase and possess a firearm.

Chapter 12

FAMILY COURT PROCEEDINGS

Note: This chapter generally outlines procedures for family court cases, including domestic violence cases. However, some specific types of family court proceedings are addressed in other chapters. Family court appeals are outlined in Chapter 15. Procedures for name changes are discussed in Chapter 11. Minor guardianship cases are addressed in Chapter 14.

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12.1 JURISDICTION OF FAMILY COURT

The family court has jurisdiction over domestic relations cases. Domestic relations cases include actions for divorce; annulment; separate maintenance; custodial responsibility, including interstate child custody (UCCJEA); child support, including interstate child support cases (UIFSA); and paternity cases. (W. Va. Code § 48-1-222). During the course of any case prosecuted under Chapter 48, a family court has jurisdiction to restrict contact between the parties. (W. Va. Code § 51-2A-2a). The court, however, may not issue such an order if the conduct of either party has previously risen to the level of domestic violence.

In addition to the types of cases noted above, the family court has jurisdiction over civil contempt proceedings relating to domestic relations cases; habeas corpus actions wherein the contested issue is child custody; grandparent visitation; sibling visitation; appeals from magistrate court when a magistrate denies a domestic violence protective order; and final domestic violence hearings. If an abuse or neglect proceeding is pending involving any child which is the subject of a grandparent visitation motion or petition, such motion or petition must be addressed in the circuit court. (W. Va. Code §§ 48-10-101(c) and -102(d)). The family court has concurrent jurisdiction with the circuit court over name change cases and minor guardianship cases. (W. Va. Code § 51-2A-2(13) and (17)). If a minor guardianship proceeding involves allegations of abuse and neglect, the circuit court is required to address the case. (Rule 13, RMGP).

With regard to sibling visitation, it should be noted that West Virginia Code § 51-2A-2(18) does not indicate that family courts share concurrent jurisdiction with the circuit court over sibling visitation cases. (Concurrent jurisdiction of circuit courts in proceedings typically heard in family courts arises from the constitutionally based status of circuit courts as courts of general jurisdiction. Syl. Pt. 5, *Lindsie D.L. v. Richard W.S.*, 591 S.E.2d 308 (W. Va. 2003)). In any event, due to the nature of these proceedings, sibling visitation cases would ordinarily be assigned to the family court when the case is filed. However, there may be some exceptions in which sibling visitation cases would be assigned to the circuit court. These limited exceptions include the following: a) cases in which, upon the circuit judge's approval, the petitioner insists on filing in circuit court; and b) cases in which there is a pending or prior abuse and neglect case involving the siblings. Typically, a clerk would not be aware of an abuse and neglect case involving the children. Therefore, it is the responsibility of the family court, once the case is heard, to determine whether the case should be transferred to circuit court because of a pending or prior abuse and neglect case.

The circuit court has concurrent jurisdiction with the family court for divorce, annulment, or separate maintenance cases if the cases do **not** involve the following issues associated with a minor child: a) establishment of a parenting plan or b) child support. To proceed with a divorce in circuit court, the parties must file a written separation agreement executed by both parties when the petition is filed. (W. Va. Code § 51-2A-2(b)). In addition to this type of divorce, the circuit court has jurisdiction over criminal contempt proceedings that arise out of a domestic relations case. (W. Va. Code § 48-1-304(a)). The circuit court also has concurrent jurisdiction over domestic violence protective order proceedings with both the magistrate and family court. (W. Va. Code § 48-27-301). As established by relevant statute and rules, the circuit court addresses appeals after a final domestic violence hearing in family court. As previously noted, the circuit court has concurrent jurisdiction with family court over name change cases and minor guardianship cases. (W. Va. Code § 51-2A-2(13) and (18)). If, however, a minor guardianship case is based upon allegations of abuse and neglect, the circuit court is required to hear the case. (Rule 13, RMGP).

12.2 GOVERNING STATUTES AND RULES

After passage of the Unified Family Court Amendment in 2000, the West Virginia Legislature established family courts and their jurisdiction. (W. Va. Code §§ 51-2A-1, *et seq.).* Family court proceedings are governed by Chapter 48 of the West Virginia Code. Additionally, Chapter 44, Article 10 of the West Virginia Code governs minor guardianship. (See Chapter 14).

Further, the West Virginia Rules of Practice and Procedure for Family Court (RFCP) specify various procedures for family court cases. The West Virginia

Rules of Practice and Procedure for Domestic Violence Civil Proceedings (RDVCP) govern domestic violence protective order proceedings. The Rules of Practice and Procedure for Minor Guardianship Proceedings (RMGP) cover the procedural aspects of proceedings seeking the appointment of guardians for minors or their estates.

12.3 FORMS

A circuit clerk must have available all family court forms approved by the West Virginia Supreme Court for distribution to the public. (Rule 5(f), RFCP). The clerk may collect allowable fees, but may not collect them if a person has an approved fee waiver. Although the clerk must provide the forms and should provide legal information, the clerk may not provide any legal advice. The forms are also available without cost on the Supreme Court's website, http://www.courtswv.gov.

The West Virginia Supreme Court has adopted the following types of forms for use in family court cases: petitions for divorce with instructions; answers to petitions for divorce with instructions; consolidated financial forms used for child support, spousal support and equitable division of marital property; parenting plan forms; forms for contempt proceedings; forms for the appointment and payment of guardians ad litem; petitions for modification of child support, including petitions for expedited modification; forms associated with mediation; and forms associated with parent education. Additionally, the Supreme Court has adopted forms for minor guardianship proceedings.

12.4 RECORDKEEPING

12.4.1 Pleadings, Orders and Miscellaneous Documents

Domestic relations cases should be recorded in their own docket. All papers filed with the clerk, process and returns, and orders and judgments should be noted in chronological order on the docket sheet assigned to the case. All orders entered in a domestic relations case should be bound in the domestic relations order book. Domestic relations cases should be indexed by the names of all parties to the case in the domestic relations case index.

12.4.2 Certificate of Name Change in Divorce

When a party to a divorce requests a name change, the court is required to issue a one-page certificate of divorce. The purpose for the certificate is to provide official proof of a name change for different purposes, such as obtaining a new driver's license. The certificate must include: a) the style of the divorce case; b) the name on the birth certificate of the party requesting the name change; c) the party's

date of birth; d) the party's social security number; e) the effective date of the name change; and f) the party's new name. The clerk must certify the certificate, but the certificate is **not** considered an order and should **not** be maintained in the domestic relations order book. (W. Va. Code § 48-5-613).

12.5 CONFIDENTIALITY OF FAMILY COURT CASE FILES

12.5.1 Access to Family Court Orders, Indexes and Files

All indexes and orders in domestic relations cases are public records. However, all pleadings, exhibits, recordings, transcripts, certificates of name change or other documents contained in the case file are confidential and are not open for public inspection, either while the case is pending or after the case is final. (W. Va. Code § 48-1-303; Rule 6, RFCP).

Parties to an action, designees who are authorized in writing, attorneys of record, a guardian ad litem, or any person who has standing to modify or enforce a support order may examine and copy any document in a confidential court file, provided that the documents have not been sealed by prior order. Additionally, a judge may enter an order allowing a person who is not a party to examine and copy documents in a family court file. (W. Va. Code § 48-1-303(d); Rule 6(b), RFCP). The order will specify the terms and conditions for examination of the file. If records have been sealed, a person must have a court order to examine the sealed records.

As noted above, a party to a family court case may designate another person in writing to access his or her family court file. (W. Va. Code § 48-1-303(d)). The Supreme Court has adopted a form that allows a party to make this designation.

12.5.2 Record of Access to Family Court Files

West Virginia Code § 48-1-303(e) requires the clerk to keep a written log of all people who examine confidential documents (*i.*e. pleadings or exhibits, but not orders) in a family court file. Anyone who examines the confidential documents, except for a judge or court personnel acting within the scope of their duties, must sign the log. The clerk must note the date and time that the documents are examined in the log.

12.5.3 Sealed Records

When sensitive information is disclosed during a family court case, a family court judge has the discretion to seal portions of a family court file, including any pleading, recording, evidence or document that contains this type of information. (W. Va. Code § 48-1-303(c); Rule 6(a), RFCP). If the court seals a file, or portions of it, no one, including the litigants themselves, may inspect the closed or sealed material without a court order. The court may close portions of the file either *sua sponte* or at the request of a party. Any directives to the clerk concerning sealing or other limitations on access to a file, or portions of it, must be clearly and distinctly listed in the last substantive paragraph of the order. (See Rule 11.02, TCR).

12.6 IDENTIFYING INFORMATION

Normally, pleadings must list the name, address and telephone number for counsel. If a party is self-represented, the party's name, address and daytime telephone number should also be listed. If a party files an affidavit that indicates that the disclosure of the identifying information would jeopardize the health, safety, or liberty of a child or the party, this information must be withheld from everyone except court personnel. A court, often *ex parte*, may also make this finding and thereby require the withholding of identifying information. (Rule 10(b), RFCP). (For the procedures for withholding identifying information in a domestic violence civil proceeding, see Section 12.20.4).

If a party's identifying information has been withheld and service of pleadings is required, the opposing party must present a copy of the pleading to the circuit clerk, must complete a form requesting indirect service, and must pay applicable service fees unless a fee waiver has been approved. The clerk must take any necessary steps to ensure that service is completed.

12.7 BUREAU FOR CHILD SUPPORT ENFORCEMENT

The Bureau for Child Support Enforcement (BCSE) is a unit of the West Virginia Department of Health and Human Resources and is responsible for the administration of the collection and enforcement of child and spousal support. (W. Va. Code § 48-18-101(a)). In general, the BCSE identifies and locates child and spousal support obligors, withholds child and spousal support from the income and other funds of an obligor and processes the disbursement of funds to an obligee. It also recoups funds from an obligor when public assistance has been provided to an obligee or minor child. Additionally, the BCSE is required to evaluate and assist parties with regard to the expedited modification of child support obligations. (W. Va. Code § 48-11-106a).

To fulfill these duties, the local office of the BCSE often appears as a party in cases involving child or spousal support. When the BCSE incurs fees, such as filing fees or fees for copying, the clerk must bill the BCSE on a monthly basis. (W. Va. Code § 48-18-128(a)). Additionally, the clerk must provide copies of relevant documents, such as the CCIS and IV-D withholding forms, to the local office for the BCSE even if the BCSE is not a party to a case. (See Section 12.9).

12.8 STYLE FOR DOMESTIC RELATIONS PROCEEDINGS

12.8.1 Cases Initiated By Individuals

The style for divorce, separate maintenance or an annulment is as follows:

In Re the Marriage of _____ and _____

The style for a child support or custody case when the parties are not married is as follows:

In Re the Child(ren) of _____ and _____

A party to a domestic relations case is identified as a "petitioner" or a "respondent."

12.8.2 Cases Initiated By the BCSE

As discussed above, the BCSE generally has the statutory duty to collect child and spousal support and to disburse funds to child support obligees. To fulfill these duties, the local office of the BCSE often files cases to collect child or spousal support and to establish paternity. The BCSE has adopted a policy for styling cases that it files. This policy indicates that the caretakers of children or child support obligees will no longer be identified as petitioners or plaintiffs. Rather, the BCSE will be designated as the sole petitioner or plaintiff and the parents or other caretakers will be designated as respondents or as defendants in paternity cases. When the BCSE files a modification or contempt petition, it will use the original case style.

The BCSE has adopted this policy for two reasons. First, this policy avoids the appearance that the BCSE is representing one of the parties. Secondly, it relieves the BCSE from having to file a financial statement when the case is initiated. (See Rule 9(a), RFCP). The party who files a case may, in general, choose how to style a case. Therefore, the BCSE may style cases in this manner. The examples below indicate how the BCSE is preparing case styles.

CHILD SUPPORT PETITIONS AND PATERNITY COMPLAINTS

Child Support

In re the children of Joan Jones and Martin Smith,

West Virginia Department of Health and Human Resources,
Bureau for Child Support Enforcement,
Petitioner,

And Civil Action No. _____
Joan Jones,
Respondent,

And
Martin Smith,
Respondent.

Child Support - Third Party Custodian

In re the children of Joan Jones and Martin Smith,

West Virginia Department of Health and Human Resources,
Bureau for Child Support Enforcement,
Petitioner,

And
David Lee,
Respondent,

And Civil Action No. _____
Joan Jones,
Respondent,

And
Martin Smith,
Respondent.

Paternity

West Virginia Department of Health and Human Resources,
Bureau for Child Support Enforcement,
Plaintiff,

vs. Civil Action No. _____

Joan Jones,
Defendant,

vs.
Martin Smith,
Defendant.

Paternity - Third Party Custodian

West Virginia Department of Health and Human Resources,
Bureau for Child Support Enforcement,
Plaintiff,

vs.
David Lee,
Defendant,

vs. Civil Action No. _____
Joan Jones,
Defendant,

vs.
Martin Smith,
Defendant.

UIFSA - Child Support Establishment

In re the children of Joan Jones and Martin Smith,

West Virginia Department of Health and Human Resources,
Bureau for Child Support Enforcement,
on behalf of the California Bureau for Child Support Enforcement,
Petitioner,

And Civil Action No. _____
Martin Smith,
Respondent.

UIFSA - Paternity Establishment

West Virginia Department of Health and Human Resources,
Bureau for Child Support Enforcement,
on behalf of the California Bureau for Child Support Enforcement,
Plaintiff,

vs. Civil Action No. _____

Martin Smith,
Defendant.

UIFSA - Registration Actions

In re the children of Joan Jones and Martin Smith,

West Virginia Department of Health and Human Resources,
Bureau for Child Support Enforcement,
on behalf of the California Bureau for Child Support Enforcement,
Petitioner,

And Civil Action No. _____
Martin Smith,
Respondent.

12.9 CASE INITIATION

12.9.1 Case Numbering

The clerk uses the following designation for domestic relations cases: 16-D-###. Domestic relations cases have their own numerical sequence and are not included in the numerical sequence for general civil cases. (See Chapter 2).

12.9.2 Petition and Related Documents

Domestic relations cases are initiated by the filing of a verified petition. Three copies of the Civil Case Information Statement for domestic relations cases (CCIS) must also be filed with each petition. (Rule 9(a), RFCP). It is the petitioner's responsibility to fill out this form and provide the necessary copies to the clerk. In all domestic relations cases, a completed financial statement (on the form approved by the Supreme Court) must also be filed with the petition. (Rule 9(a), RFCP).

Additionally, West Virginia Code § 48-1-231(b) requires a party to file an application for child support enforcement services with a domestic relations petition that may involve spousal support, child support, or child custody or visitation. (Rule 9(a), RFCP). Title IV-D of the federal Social Security Act, 42 U.S.C. §§ 651, *et seq*., is the basis for this requirement.

Upon receipt of the CCIS, the clerk will assign the domestic relations case number, send or hold one copy for the family court, send or hold one copy for the BCSE if child or spousal support is an issue in the

case, and file the original in the case file. It should be noted, however, that a new case number is **not** assigned to a modification or contempt petition regarding a previously entered family court order.

The circuit clerk is required to report the divorces or annulments granted by the circuit or family courts to the Bureau of Vital Statistics on a monthly basis. (W. Va. Code § 16-5-34). The clerk must report the following information:

a. The names and ages of the parties;
b. The date and place of the termination of the marriage;
c. The names of the parties' minor children; and
d. The date of the final decree.

To facilitate this reporting requirement, circuit clerks typically require the parties to file a Bureau of Vital Statistics form listing this information when the petition is filed.

12.9.3 Answer and Related Documents

Once a petition is served, the respondent should file a verified answer. Along with any answer, the respondent must file three completed copies of a CCIS and a completed financial statement. The respondent must also file a completed BCSE application in cases that may involve spousal support, child support, custodial responsibility, visitation or paternity. (Rule 9(c), RFCP).

12.9.4 Documents Forwarded to Family Court and BCSE

The clerk is required to send a copy of the CCIS filed with the petition or answer to the family court within five days of the filing of the pleading. (Rule 9(a) and (c), RFCP). If a party files a support enforcement application with the pleading, the clerk must send a copy of the application and the CCIS to the local BCSE office within five days of the filing of the pleading. (Rule 9(e), RFCP).

12.9.5 Checklist for Initiation of a Domestic Relations Case Involving Minor Children

a. A petitioner must file the following completed documents:

(1) Verified petition;
(2) Three completed copies of the CCIS;
(3) Completed financial statement;
(4) Completed BCSE application; and

(5) Bureau of Vital Statistics form (in divorces and annulments).

b. The party must pay the appropriate filing fee, unless a fee waiver has been approved.

c. The clerk must issue a summons and a parent education notice.

d. Within five days of the filing of the petition, the clerk must send a copy of the CCIS to the family court.

e. Within five days of the filing of the petition, the clerk must forward a copy of the CCIS and BCSE application to the local BCSE office.

12.10 PARENT EDUCATION

12.10.1 Mandatory Parent Education

In family court cases involving minor children, parties are required to attend parent education and file a certificate of completion with the circuit clerk. (Rule 36(b), RFCP; W. Va. Code § 48-9-104(b)). Parties can only be excused from attending parent education if a judge waives this requirement for good cause. Parties, however, are not required to attend sessions together. In cases involving domestic violence, parents should not attend the same parent education session. Parent education should be completed before a party undergoes mediation.

Parent education will instruct parents about the following matters:

a. How to prepare a parenting plan;

b. Mediation and other methods that facilitate agreement on a parenting plan;

c. The negative effects of divorce or family dissolution upon children and ways parents can lessen the negative effects;

d. Negative effects of domestic abuse on children; and

e. Resources for domestic abuse.

The circuit clerk collects a fee for parent education. (See Family Court Cost Schedule). If a party has an approved fee waiver, no fee is collected. The clerk must transmit all parent education fees to the

State Treasurer for deposit to the parent education fund. (W. Va. Code § 48-9-104(c)).

It is permissible for a party to attend parent education in a county other than the county where the family court case is pending. When this situation occurs, the party pays the parent education fee to the circuit clerk where the class is conducted. The clerk collects the fee and does not assign a family court case number. The clerk who collects the fee simply remits it to the State Treasurer. The litigant is responsible for filing a certificate of completion in the county where the case is pending.

12.10.2 Advanced Child-Focused Parent Education

Rule 37a of the Rules of Practice and Procedure for Family Court establishes the procedures for participation in advanced child-focused parent education. These classes consist of six sessions, and they address the following issues: a) reducing parental conflict; b) the children's best interests; and c) effective negotiation of parenting plans. Parties may only attend these classes if a court order requires them to do so.

The circuit clerk collects a fee for advanced child-focused parent education for each party who is required to participate. (See Family Court Cost Schedule). A party may pay the entire fee for the classes at one time or may pay for each individual class. However, the party may not attend a class unless payment is collected in advance or has been waived by the court. If a party has an approved fee waiver, no fee is collected. The family court may waive or reduce the fee even if a party does not have an approved fee waiver. Additionally, the court may require one party to pay the fees for both of the parties. Therefore, the clerk should review the terms of any court order that requires the parties to attend these classes or that addresses the fees for these classes.

12.11 PARENTING PLANS

In family court cases involving minor children, the parties should file parenting plans. (W. Va. Code §§ 48-9-101, *et seq*.). In general, a parenting plan includes the times minor children will spend with either parent, which parent or parents shall have authority to make major life decisions for the minor children, and other plans for the children, such as the arrangements for the transfer of the children between the parents.

Parties may file parenting plans either separately or jointly. A party who seeks a temporary order related to parenting must file a proposed temporary

parenting plan. A parenting plan is considered a pleading and must be verified. The circuit clerk and secretary-clerk of the family court should make parenting plans forms available, subject to allowable charges. The forms are also available on the Supreme Court website, http://www.courtswv.gov, at no cost.

12.12 RESTRICTION OF CONTACT BETWEEN PARTIES

During the course of any action prosecuted under Chapter 48 of the West Virginia Code, the family court may restrict contact between the parties. (W. Va. Code § 51-2A-2a(a)). The intent of the statute is to restrict behavior that does not rise to the level of domestic violence. However, the court may not enter such an order if the conduct by either party has previously risen to the level of domestic violence. (W. Va. Code § 51-2A-2a(b)). The order itself shall govern the restrictions on contact, and it shall also determine the duration of the restrictions. This type of order is enforceable through the court's contempt powers. However, this type of order does not implicate any restrictions on the possession of firearms. In addition, it is not subject to automatic extensions as some domestic violence protective orders are.

12.13 ENFORCEMENT OF A DOMESTIC RELATIONS ORDER

12.13.1 Civil Contempt Proceedings

If a party to a domestic relations order fails to follow the terms of the order, the aggrieved party may file a petition for civil contempt and request that the judge enforce the order. The following examples are situations in which a contempt petition would be appropriate: a) failure to pay child or spousal support; b) failure to make payments ordered to carry out the equitable distribution of marital property; or c) failure to follow the terms of a court-ordered parenting plan. These examples do not cover all possibilities when a contempt proceeding would be an appropriate remedy.

The circuit clerk should make available standardized forms and instructions for a contempt petition. When a contempt petition is filed, the clerk does not assign a new case number or collect a filing fee. Although the clerk does not collect a new filing fee, fees for service of the contempt petition or subpoenas are collected unless the party has an approved fee waiver.

If an indigent litigant faces the possibility of incarceration in contempt proceedings, the family court shall appoint an attorney. (W. Va. Code § 29-21-9). The circuit clerk should maintain the appointment orders in the same manner as circuit court appointment orders.

12.13.2 Enforcement of Parenting Plans

A family court may impose civil penalties for parenting plan violations. West Virginia Code § 48-9-501(a)(5) establishes the allowable amount of the penalty based upon whether the violation is a first, second, third or subsequent offense. When the clerk collects these fines, the funds are remitted to the parent education fund. (See Family Court Cost Schedule).

12.13.3 Affidavit of Accrued Support

Note 1: Circuit clerks must make available the form affidavits, discussed below, for use by support obligees, which forms are to be provided to the clerks by the BCSE. The BCSE is also to prescribe the notice form discussed below. (W. Va. Code § 48-14-205).

*Note 2: If a party seeks to create a lien on the **real** property of an obligor, an affidavit of accrued support is filed with the clerk of the county commission. (W. Va. Code §§ 48-14-301 through -308).*

A person to whom child support is owed (obligee) or the BCSE may file with the circuit clerk an affidavit of accrued support (Appendix B) and an abstract of the order establishing the child support obligation as a remedy for failure to pay child support. (W. Va. Code §§ 48-14-201 through -211). A child support order from another state may also be enforced through this procedure, provided the order has been registered. (See Section 12.19). The filing of these documents creates a lien against the **personal** property within the State of a child support obligor. The affidavit of accrued support is filed with the circuit clerk in the county where the obligee or obligor resides, in the county where the order originated or where the obligor's source of income is located.

An affidavit of accrued support filed with a circuit clerk must allege that the payment is at least **14** days in arrears. The affidavit should also contain the following information:

a. The obligee's and obligor's name and address;

b. The last four digits of the obligor's social security number, if known;

c. The court that entered the support order and the date of the entry;

d. Total amount of delinquent support owed;

e. The name and address of the obligor's source of income, if known.

When a party files an affidavit of accrued support, the circuit clerk issues a writ of execution, suggestion, or suggestee execution and collects the appropriate fee for the document. (W. Va. Code § 48-14-204). The affidavit of accrued support will indicate which documents the clerk should issue. The clerk must mail a copy of the affidavit and a notice of the filing to the obligor. (Appendix B). If the BCSE is not filing the affidavit on behalf of the obligee, the clerk must also forward a copy of the affidavit and notice to the BCSE. The notice must inform the obligor that he or she must contest the execution within 14 days by: a) informing the BCSE in writing for the reasons to contest the affidavit; or b) obtaining a hearing date and mailing written notice of the hearing to the obligee and the BCSE. If an obligor contests an affidavit of accrued support, the court may require the obligor to post a bond or some type of security to guarantee payment. Additionally, child support orders may be enforced in the same manner as other civil judgments.

12.14 MODIFICATION OF FAMILY COURT ORDERS

A party may seek modification of a prior order, including a temporary order that established spousal support, child support or an allocation of custodial responsibility. (W. Va. Code §§ 48-5-701; 48-9-401; 48-9-402; 48-11-105, 48-11-106, 48-11-106a; and 48-18-201 through -206). If the case involves minor children, parties may be required to attend parent education and pay the required fee again. (See Section 12.10). As one basis to modify such an order, a party must demonstrate a substantial change in circumstances. Based upon specific circumstances, a party may also seek modification of an order establishing custodial responsibility without demonstrating a substantial change in circumstances.

Occasionally, questions arise as to whether a party may file a modification petition or whether a new case must be filed. For example, suppose a party has obtained a *final* order in a separate maintenance case and later decides to obtain a divorce. He or she would have to file a new divorce case because he or she is not seeking to modify the separate maintenance order, but rather is seeking relief that would not be available by simply modifying the final order. In contrast, suppose a party seeks to modify a spousal support obligation. He or she would not have to file a new case because he or she is seeking to modify or change the terms of an order that has already been entered.

The circuit clerk has forms available for modification proceedings. Modification proceedings are assigned the same domestic relations number

and are maintained in the same file as the original case. When filing a modification petition, a party, however, is still required to submit a completed CCIS.

The clerk collects a filing fee for the modification of a family court order, and the entire fee is remitted to the family court fund. (W. Va. Code § 59-1-11). When a party seeks modification of a temporary order, the clerk must still assess and collect the filing fee for a modification petition, even though the case is still ongoing and the original filing fee has been paid. (Supreme Court Memorandum, 03-11). When an order that modifies child support is issued, the clerk is required to send a copy of such order to the BCSE no later than five days from the entry of the order. (W. Va. Code § 48-11-105).

12.15 EXPEDITED PROCEDURE FOR CHILD SUPPORT MODIFICATION

A party to a child support order may seek an expedited modification of a child support obligation when there has been a substantial change in financial circumstances of a party. (W. Va. Code § 48-11-106). Typically, the substantial change in financial circumstances occurs because of a job loss, a promotion, or other change in employment status. The circuit clerk has forms available for this procedure. When a party files a petition for the expedited modification of a child support order, the clerk collects a filing fee that is deposited to the family court fund. (W. Va. Code §§ 59-1-11; 59-1-28a).

The party who seeks an expedited change in child support files a verified petition for expedited modification of child support along with any supporting documentation. After receiving the petition for modification, the family court tentatively recalculates the child support obligation. The secretary-clerk of the family court serves a notice of the filing and recalculation of the child support obligation on the other party by certified mail. The secretary-clerk also mails a copy of the modified child support obligation to the local BCSE. A party must contest the proposed modification within 14 days of the notice, or the family court will modify the child support obligation to the recalculated amount. When an order that modifies a child support obligation is issued, the clerk is required to send a copy of the order to BCSE no later than five days after it is entered. (W. Va. Code § 48-14-106).

12.16 BCSE PROCEDURE FOR EXPEDITED MODIFICATION OF CHILD SUPPORT

As an alternative to filing a petition for modification of a child support order with the court, a party may seek the expedited modification of a child support order through an administrative procedure conducted by the BCSE. (W. Va. Code §§ 48-11-106a; 48-14-107). To do so, a party must request in writing that the BCSE recalculate the child support obligation and must provide any relevant supporting documentation. (W. Va. Code §§ 48-18-201 and -202).

The BCSE is then required to provide notice to the opposing party of the requested recalculation. (W. Va. Code § 48-18-203). It may also request further documentation or may subpoena information from either party. (W. Va. Code § 48-18-203).

After the BCSE receives all relevant information, the BCSE may determine that a party is not entitled to modification of the child support obligation. (W. Va. Code § 48-18-205(a)). If so, the BCSE must notify the parties of this finding. In this situation, a party may file a modification petition with the court, even though the BCSE has determined that the child support obligation should not be modified.

If the BCSE determines that the child support obligation should be modified, the BCSE must recalculate the child support obligation and must file a petition and proposed order with the circuit clerk. (W. Va. Code § 48-18-205(b)-(d)). Additionally, the BCSE must file a notice to the parties, any relevant documentation, and a form and instructions for objecting to the proposed order. (W. Va. Code § 48-18-205(c)). When the BCSE files an expedited modification petition, the clerk assesses the filing fee for an expedited modification petition and includes the filing fee on the monthly BCSE invoice. (W. Va. Code § 48-18-206). (See Section 5.8).

When the BCSE files an expedited modification petition, the clerk is required to serve a copy of the petition and the proposed order on all parties by either personal service or by certified mail, return receipt requested. (W. Va. Code § 48-18-206(a)). The clerk should also serve all documents filed by the BCSE on the parties, including the notice, because the clerk is required to direct parties to file any objection within 20 days of receiving the notice. Service of the notice prepared by the BCSE will satisfy the clerk's duty to provide notice to the parties.

In addition to service of the petition, the circuit clerk is required to notify the family court within five days of the filing of an expedited modification petition by the BCSE. (W. Va. Code § 48-18-206(b)). Typically, the clerk provides notice to the family court by forwarding a copy of the CCIS, petition and proposed order to the family court. When an order is issued that modifies a child support obligation, the clerk must send a copy of the order to the BCSE no later than five days from the entry of the order. (W. Va. Code §§ 48-11-105; 48-14-106).

12.17 GUARDIANS AD LITEM OR ATTORNEYS FOR CHILDREN

In its discretion, a court may appoint a guardian ad litem or an attorney for minor children. (W. Va. Code § 48-9-302; Rule 46, RFCP; Rule 21, TCR). Trial Court Rule 21 is a general rule, and it governs the appointment, duties and payment of guardians ad litem in circuit, magistrate and family court,

including the appointment of guardians ad litem for adults. Trial Court Rule 21 does not, however, govern the appointment of guardians ad litem or attorneys for children in abuse and neglect proceedings.

Attorneys appointed as guardians ad litem in family court cases may serve on a voluntary basis, may be paid by a litigant-parent who has the ability to pay, or may be paid by the Administrative Office, provided that both parents are entitled to a waiver of fees. (Rule 21.02, TCR). An order, typically the final order, will indicate the party or entity who is responsible for the payment of the guardian ad litem fees.

Rules 21.05 and 21.06 of the Trial Court Rules govern the payment of guardians ad litem by the Administrative Office. To be eligible for payment by the Administrative Office, the guardian ad litem must represent a minor party who is indigent or **both** parents of the minor must be indigent. (Rule 21.05, TCR). As defined by Rule 21.04(a) of the Trial Court Rules, a person who is entitled to a waiver of fees meets the definition of "indigent." Therefore, a guardian ad litem in a family court case may be paid by the Administrative Office when both parents are entitled to a fee waiver.

Guardians ad litem who are paid by the Administrative Office are entitled to payment at the rate of $80 per hour for out-of-court services and $100 for in-court services. (Rule 21.06, TCR). The total compensation may not exceed $3,000. In exceptional cases, however, the Administrative Director may authorize compensation exceeding the total limit. (Rule 21.06, TCR). Mileage at the standard rate, but not office expenses (e.g., copies, postage, etc.), is also reimbursable.

To be paid by the Administrative Office, a guardian ad litem must submit an original invoice (voucher) and a prepared payment order to the family court. The circuit clerk is responsible for forwarding one certified copy of the payment order and voucher to the Administrative Office. In rare circumstances, the family court may exercise its discretion to tax the costs of the guardian ad litem to one or both parties or require that any compensation previously paid by the Administrative Office be repaid. (Rule 21.06, TCR).

12.18 REGISTRY OF OUT-OF-STATE CHILD CUSTODY DECREES

West Virginia Code § 48-20-305 provides that a child custody order of another state may be registered in West Virginia. The order may be registered either with or without a request for enforcement. Once such an order is registered, the order has the same effect and may be enforced with the same procedures as a West Virginia custody decree.

The circuit clerk maintains the registry of custody orders of other states. To register such an order, a person must submit the following documents and information to the clerk's office:

a. A letter or other document requesting registration;

b. Two copies of the custody order, and one must be a certified copy;

c. A statement by the person seeking registry, under the penalty of perjury, that to the best of the person's knowledge and belief the order has not been modified;

d. The name and address of the person seeking registration; and

e. The name and address of a parent or other custodian who has been awarded custody or visitation by the order.

When a foreign custody order is registered, it is filed as a foreign judgment. (W. Va. Code § 48-20-305(b)(1)). No filing fee is collected. The clerk may assign a case number when the order is registered, or the clerk may wait to assign a case number until enforcement proceedings are initiated.

A clerk must send a notice to the parent or other custodian, other than the party who seeks to register the order. The notice must state the following:

a. A registered determination is enforceable as of the date of the registration in the same manner as a determination issued by a West Virginia court;

b. A hearing to contest the validity of the registered determination must be requested in writing within 20 days after service of the notice; and

c. Failure to contest the registration will result in the confirmation of child custody determination and preclude further contest of that determination with respect to any matter that could have been asserted. (W. Va. Code § 48-20-305(c)(1)-(3)).

12.19 INTERNATIONAL AND INTERSTATE FAMILY SUPPORT CASES

The Uniform Interstate Family Support Act (UIFSA), West Virginia Code §§ 48-16-101, *et seq.*, is an uniform act that establishes procedures for both international and interstate family support cases. (See *Ellithorp v. Ellithorp*,

575 S.E.2d 94, n. 18 (W. Va. 2002)). UIFSA cases may address parentage of a child. They may also involve the establishment, modification or enforcement of child and/or spousal support orders. As a precursor to enforcement, UIFSA establishes procedures for the registration of support orders from a foreign country or another state.

As with other domestic relations cases, a case is initiated by the filing of a petition. However, the clerk does not collect a filing fee. (W. Va. Code § 48-16-313(a)).

12.19.1 BCSE Registry of Support Orders From Other States or Foreign Countries

West Virginia Code § 48-16-601 provides that a support order or income withholding order issued by another state or foreign country may be registered for enforcement in West Virginia. If an order is registered, it is subject to the same procedures used to enforce a West Virginia support order. (W. Va. Code § 48-16-603).

To register a support order from another state or a foreign country, a person must submit the following documents and information to the BCSE:

a. A letter requesting registration, modification and/or enforcement;

b. Two copies of the order to be registered, one of which must be certified, and any modification of the order;

c. A sworn statement by the person who requests registration or a certified statement by the custodian of the records that shows the amount of any arrearage;

d. The name of the obligor;

e. The obligor's address and social security number, if known;

f. The name and address of the obligor's employer and any other source of income the obligor, if known;

g. A description and the location of the property of the obligor in this state not exempt from execution;

h. The name and address of the obligee unless an affidavit has been filed indicating that the disclosure of this information would jeopardize the safety or liberty of a party or child; and

i. The person to whom support payments are to be remitted, if applicable. (W. Va. Code § 48-16-602(a)).

In turn, the BCSE forwards the documents and this information to the appropriate court. Upon receipt, the clerk must file the order as an order of a tribunal from another state or a foreign support order. (W. Va. Code § 48-16-602(b)). No filing fee is collected. The clerk may assign a case number when the order is registered, or the clerk may wait to assign a case number until enforcement proceedings are initiated.

When a support order from another state or a foreign support order is registered in West Virginia, the clerk must provide notice of the registry to the non-registering party, usually the child support obligor. (W. Va. Code § 48-16-605(a)). The clerk must forward the registered order, copies of any supporting documents and a notice. The notice must contain the following information:

a. A statement that a registered order is enforceable as of the date of registration in the same way as an order issued by a West Virginia court;

b. A hearing to contest the validity, modification or enforcement of an order must be requested within 20 days of the notice (unless the order is a convention support order registered under W. Va. Code § 48-16-707);

c. The failure to contest the validity or enforcement of the registered order results in the confirmation of the order and enforcement of it and any alleged arrearages; and

d. The amount of any alleged arrearages. (W. Va. Code §§ 48-16-605(b)(1)-(4), -609, and -616).

In interstate or foreign child support cases, it is common for different states or countries to have entered differing or contradictory orders. If a registering party indicates that there are two or more orders in effect, the notice must also:

a. Identify which order is alleged to be controlling and any consolidated arrears;

b. Notify the obligor of the right to a determination of which order is controlling;

c. State that the same procedures to contest the validity or enforcement of an order apply to cases involving differing or contradictory orders; and

d. Notify the obligor that failure to contest the registration of the order in a timely manner may result in confirmation of the alleged order as the controlling order.

12.19.2 Support Proceeding Under the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance

West Virginia Code §§ 48-16-701, *et seq.*, establishes procedures through which the BCSE or an individual may pursue family support issues involving foreign countries which are parties to the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance. Under West Virginia Code § 48-16-704, the BCSE is authorized to assist with cases involving international family support issues. An individual may also file a direct request seeking establishment or modification of a support order or determination of parentage of a child. (W. Va. Code § 48-16-705). A "direct request" is simply a petition filed by an individual in a West Virginia family court that involves an obligee, obligor or child residing outside of the United States. As with other UIFSA proceedings, no filing fee is collected.

12.19.3 Registration of Convention Support Order

Either the BCSE or an individual may request registration of a convention support order, an order issued by a foreign country which is a party to the above-referenced Hague Convention. To register a foreign support order, the following documents and/or information must be presented to the clerk:

a. A complete text of the support order or an abstract or extract of the support order drawn up by the issuing foreign tribunal;

b. A record stating that the support order is enforceable in the issuing country;

c. If the respondent did not appear and was not represented in the proceedings in the issuing country, a record attesting, as appropriate, either that the respondent had proper notice of the proceedings and an opportunity to be heard or that the respondent had proper notice of the support order and an opportunity to be heard in a challenge or appeal on fact or law before a tribunal;

d. A record showing the amount of arrears, if any, and the date the amount was calculated;

e. A record showing a requirement for automatic adjustment of the amount of support, if any, and the information necessary to make the appropriate calculations; and

f. If necessary, a record showing the extent to which the applicant received free legal assistance in the issuing country. (W. Va. Code § 48-16-706).

If the original records or documents are not in English, the individual must submit the documents in the original language, as well as an English translation. (W. Va. Code § 48-16-713). As with other cases initiated under UIFSA, a filing fee is not collected. However, an obligor may be assessed a filing fee. (W. Va. Code § 48-16-313).

When a clerk receives a request for registration of a convention support order, the clerk must notify the nonregistering party. The notice must inform the nonregistering party that:

a. The registered order is enforceable as of the date of registration;

b. The nonregistering party must request a hearing within 30 days after notice is received if he or she lives in the United States or within 60 days if he or she lives in a foreign country;

c. The failure to contest the order will result in confirmation and enforcement of the order and any alleged arrearages; and

d. The amount of any alleged arrearages. (W. Va. Code §§ 48-16-605 and -707).

If the registering party indicates that there are two or more orders in effect, the notice must also:

a. Identify which order which is alleged to be controlling;

b. Notify the obligor of the right to a determination of which order is controlling;

c. Notify the obligor that he or she must contest whether the order alleged to be the controlling order by the registering party is, in fact, the controlling order within 30 days if he or she lives in the United States or within 60 days if he or she lives in a foreign country; and

d. Inform the nonregistering party that failure to contest the order may result in a finding that the alleged controlling order is, in fact, the controlling order. (W. Va. Code §§ 48-16-605 and -707).

The family court will, in turn, conduct any necessary proceedings to determine the validity of the order.

12.20 DOMESTIC VIOLENCE CIVIL PROCEEDINGS

12.20.1 Governing Statutes and Rules

West Virginia Code §§ 48-27-101, *et seq*. governs domestic violence protective order proceedings. Additionally, the Rules of Practice and Procedure for Domestic Violence Civil Proceedings (RDVCP) establish procedures for these cases. West Virginia Code §§ 48-28-1, *et seq.* governs the registration and enforcement of protection orders entered by a court of another state. (See also W. Va. Code § 48-27-802).

With regard to some procedures, a domestic violence statute and a procedural rule may conflict. If the conflict relates to a procedural matter, such as the types of pleadings that may be filed, as opposed to a substantive matter, such as the definition of domestic violence, the procedural rule controls. (Syl. Pt. 1, *Stern Bros., Inc. v. McClure*, 236 S.E.2d 222 (W. Va. 1977)). The reason for this conclusion is that Article 8, Section 3 of the West Virginia Constitution vests the

Supreme Court with the power to promulgate procedural rules. In addition, West Virginia Code § 48-27-1101 expressly provides that: "Pleadings, practice and procedure in domestic violence matters before the court are governed by the rules of practice and procedure for domestic violence civil proceedings promulgated by the West Virginia Supreme Court of Appeals." Finally, Rule 1 of the Rules of Practice and Procedure for Domestic Violence Civil Proceedings provides that: "If these rules conflict with other rules or statutes, these rules shall apply."

12.20.2 Fees and Costs

Fees and costs in domestic violence protective order proceedings are not subject to the general procedures that apply to other types of cases. Rule 4 of the Rules of Domestic Violence Civil Proceedings is the primary authority governing the assessment of fees and costs in protective order proceedings. (See also W. Va. Code § 48-27-308). As with other civil cases, a party may receive a waiver of fees and costs by completing the required financial affidavit and application. If the application is approved, fees and costs may not be assessed against this party.

Unlike other civil cases, no fees or costs may be assessed until the case is considered final. (W. Va. Code § 48-27-308). Depending upon the duration and outcome, a domestic violence case is considered final at one of the following different procedural stages. First, a case is final if the magistrate denies the petition for an emergency protective order, and no appeal to family court is filed. (Rule 4(a), RDVCP). Second, the case is final at the conclusion of family court proceedings, provided no appeal to circuit court is filed. If a party appeals to circuit court, the case is final at the conclusion of those proceedings. (Rule 4(e), RDVCP). The only exception to finality at this stage would be if a party appeals the circuit court order to the Supreme Court. To pursue a timely appeal, a party would have to file a notice of appeal in the Supreme Court within 30 days of entry of the circuit court order. (Rule 5(b), RAP).

If a magistrate denies a petition for an emergency protective order, fees and costs may only be assessed against a petitioner if the court also makes the express finding that the petitioner is not a victim of domestic violence, sexual assault or stalking. The magistrate court clerk will collect the fees unless the petitioner appeals the denial to family court. If an appeal is filed, no fees are assessed or collected until the appeal is resolved by the family court. (Rule 4(a), RDVCP).

Fees and costs may **not** be assessed against a petitioner if he or she fails to appear or to present evidence at the final hearing in circuit or family court. (Rule 4(b), RDVCP). Similarly, fees and costs may **not** be assessed against a petitioner who moves to terminate a protective order. (Rule 4(c), RDVCP).

If a family court (or circuit court exercising concurrent jurisdiction) denies a protective order after all evidence and testimony is presented, the court may assess fees and costs against the petitioner. (Rule 4(d), RDVCP). However, the court must find that the petitioner is **not** a victim of domestic violence, sexual assault or stalking. If a court assesses fees and costs against a petitioner, he or she is required to pay them within 10 days of the entry of the order assessing these costs.

If the court grants a protective order, fees and costs shall be assessed against a respondent. (Rule 4(e), RDVCP). The respondent must pay the fees and costs within 10 days. If the final order results from an appeal in circuit court, the assessed fees and costs remain due within 10 days even if an appeal is sought in the Supreme Court. The only exception would be if, upon application, either the circuit court or the Supreme Court granted a stay regarding the assessed fees and costs. (Rule 28, RAP).

Partial payments for fees and costs are applied in the following order: family court fund; magistrate court fund; court security fund; regional jail fund. (Rule 4(e), RDVCP). In addition to the assessment of costs for those above-mentioned funds, fees are assessed when a sheriff or other law enforcement officer serves orders or pleadings. (Rule 4(f), RDVCP; W. Va. Code § 48-27-701). Similarly, fees for service of orders or pleadings are assessed when a circuit clerk serves orders or pleadings by certified mail. (Rule 4(f), RDVCP).

Pursuant to Rule 4(g) of the Rules of Domestic Violence Civil Proceedings, the court is required to compel parties to appear if any assessed costs are not paid within 10 days of the entry of the order. Since the language of the rule refers to a "party," this provision could be applied against either a petitioner or respondent, provided that fees and costs have been assessed by the court.

12.20.3 Attorney Fees for the Benefit of the Domestic Violence Legal Services Fund

An award of attorney fees discussed in this section is **not** part of the assessment of fees or costs in a domestic violence protective order proceeding. Rather, it is a method to generate revenue for the

Domestic Violence Legal Services Fund (DVLSF), a special revenue account of the Treasury that is used to provide legal services to domestic violence victims. (W. Va. Code § 48-26-603).

West Virginia Code § 48-26-603(b) allows a court to order a nonprevailing party to pay reasonable attorney fees in any civil case to the DVLSF provided that the statutory requirements are met. First, the prevailing party must be entitled to attorney fees by statute or common law. Secondly, the prevailing party must inform the court that attorney fees will not be requested. If both requirements are met, the court may order the nonprevailing party to remit a specified attorney fee award to this fund. For a discussion of the remittance of this fee, see Chapter 5.

12.20.4 Identifying Information Withheld

If a petitioner requests that identifying information, such as an address, be withheld, the magistrate court is required to seal the domestic civil case information statement and any document with the petitioner's address or other contact information. (Rule 8(f), RDVCP). As a matter of practice, however, the circuit clerk needs information from the CCIS to process the domestic violence case file. It is typical for the magistrate court clerk to forward the file to the circuit clerk without sealing the CCIS. Once the circuit clerk processes the case file, he or she then seals the CCIS. This procedure is acceptable so long as contact information is not disclosed to anyone other than court personnel. Court employees must not disclose this information to anyone except a court official or a law enforcement officer. (Rule 11(g), RDVCP).

If identifying information has been sealed and the opposing party is required to serve pleadings on the petitioner, the clerk must arrange for service. The party requesting service must complete a form for request for indirect service and must pay any fees for service, unless a fee waiver has been approved. (Rule 11(g), RDVCP).

12.20.5 Confidentiality of Domestic Violence Case Files

Domestic violence case files are subject to the same confidentiality rules as any other domestic relations proceedings; that is - pleadings, recordings, transcripts, exhibits and other documents are confidential, but orders and indexes are subject to public access. (See Section 12.5; Rule 6, RDVCP; Rule 6, RFCP). The files may be reviewed by a party, a party's designee and counsel of record, including a guardian *ad litem*.

In addition to the access noted above, the clerk must supply records of a domestic violence civil proceeding to any person who presents a subpoena *duces tecum* issued by either a state or federal court in a **criminal** case. (W. Va. Code § 48-27-312; Rule 6(b), RDVCP). Further, protective order case files are subject to a subpoena issued in another West Virginia domestic violence protective order case. If a subpoena is presented to a circuit clerk in the situations previously noted, the clerk should maintain the subpoena in the case file to maintain a record of the access allowed.

If a subpoena is issued in a **state-court civil** case other than a West Virginia protective order case, the clerk should refuse the requested access because West Virginia Code § 48-27-312 does not allow access by subpoena in a **state-court civil** case other than a West Virginia protective order proceeding. Rather, a party involved in another **state-court civil** case and who also seeks access to a domestic violence case file, provided he or she was not a party to the domestic violence case, must obtain a court order to allow inspection or copying. (See Section 4.8.3). If a subpoena is issued in a **federal civil case**, the clerk should follow the detailed procedure discussed in Section 4.7.2.

12.20.6 Procedural Summary of a Protective Order Proceeding

To initiate a protective order proceeding, a petitioner files a verified petition in the magistrate court. (W. Va. Code § 48-27-304; Rule 8(a), RDVCP). When the petitioner files a petition, a magistrate conducts an emergency hearing and determines whether an emergency protective order (EPO) should be granted. If an EPO is not granted, a party may file an appeal to the family court within five days of the entry of the order. (W. Va. Code § 48-27-510(a); Rule 18(a), RDVCP). No filing fee is assessed when a petitioner appeals the denial of an EPO. If an EPO is granted, the family court will conduct a hearing to determine whether a final protective order should be granted. (Rule 18(b), RDVCP).

After a final hearing, the family court has the discretion to enter a protective order for a period of 90 or 180 days. (W. Va. Code § 48-27-505(a)). When certain aggravating factors have been established at a hearing, a family court may enter a protective order for a one-year period. (W. Va. Code § 48-27-505(b)). A party may appeal to circuit court within ten days of the entry of an order that either grants or denies a final protective order. (W. Va. Code § 48-27-510(b); Rule 19, RDVCP). No bond is required for the appeal. Additionally, no filing fee is assessed when a party appeals to circuit court.

12.20.7 Receipt of Domestic Violence Files

As noted previously, a petitioner files a petition in the magistrate court. If the magistrate enters an EPO or if the petitioner appeals the denial of an EPO, the magistrate court clerk forwards the file to the circuit clerk. To facilitate the delivery of domestic violence files, circuit clerks and family court staff should have a facsimile machine on at all times. (Rule 16, RDVCP).

If a magistrate granted an EPO, the circuit clerk should assign the case a domestic violence number, 16-DV-##. If a magistrate denied the request for an EPO and the petitioner appeals, the clerk should assign the case a domestic violence appeal number, 16-DV-AP-##. As with other domestic relation cases, a circuit court appeal of a family court order in a domestic violence case retains the same case number as the family court proceeding.

12.20.8 Subsequently Filed Documents

Subsequent to the initial petition, all documents filed in a domestic violence case must be submitted to the circuit clerk. (Rule 8, RDVCP). Some examples of subsequent pleadings that may be filed with the circuit clerk are: an answer, a request for extension of protective order, a motion to terminate protective order, and a petition for civil contempt. It should be noted, however, that magistrate courts have jurisdiction over criminal cases in which the offense is a violation of a domestic violence protective order. (W. Va. Code § 48-27-903; Rule 8(d), RDVCP).

12.20.9 Service of EPO, Petition and Notice of Hearing

A magistrate must serve the respondent with a notice of the family court final hearing and the EPO if the respondent is present at the emergency hearing conducted before the magistrate. However, respondents are rarely present at these hearings. (Rules 10 and 11, RDVCP). If the respondent is not present, the sheriff (or other law enforcement agency) is required to serve the respondent in person with a copy of the petition, the EPO, and the notice of the family court hearing. (Rules 10(a) and 11(a), RDVCP). Law enforcement officers are required to attempt to serve all protective orders, including EPOs, within 72 hours of receipt and must attempt service at any address provided by a petitioner. (W. Va. Code § 48-27-701; Rule 11(a), RDVCP). Law enforcement officers are required to file returns of service within five days of service or attempted service if the service attempts were unsuccessful. (Rule 11(a), RDVCP).

It is not uncommon for personal service of an EPO to have been unsuccessful. If the family court finds that service of an EPO was unsuccessful and continues the final hearing, the court is required to instruct the clerk in the continuance order to serve the EPO (or TEPO), the petition and notice of hearing via certified mail, restricted delivery, return receipt requested to the most current or last known address of the respondent. (Rule 11(a), RDVCP).[1] If the return of service is not received by the clerk within 30 days or service by mail is unsuccessful, the court is required to continue the final hearing and instruct the clerk to serve the respondent by publication, as detailed below, in the respondent's last known county of residence. The court has the discretion to require service by certified mail simultaneously with service by publication as described below. (Rule 11(a), RDVCP).

12.20.10 Out-of-State Service of Protective Orders

There are several methods of serving petitions and protective orders on respondents outside of the State of West Virginia. As an initial method of service, West Virginia Code § 48-27-311 states that any protective order served in accordance with Rule 4(f) of the West Virginia Rules of Civil Procedure will have the same effect as a protective order served in West Virginia. This provision, Rule 4(f), allows for personal service of a respondent in another state. If the petitioner files an affidavit while the case is pending that shows that the respondent is, at the time of service, a resident of the state, then the service is considered to be personal service. If such an affidavit is not filed, then this type of service is considered constructive service.

As a second method of service outside the state, West Virginia Code § 48-27-311 by reference to West Virginia Code § 56-3-33a, establishes that service on a nonresident may be made through the Secretary of State. This statute, West Virginia Code § 56-3-33a, indicates that committing an act of domestic violence in the state or committing an act of domestic violence against a West Virginia resident that has an effect within West Virginia, is considered the equivalent to appointing the Secretary of State to be his or her agent for service of process. With the exception of costs, the process for submitting a domestic violence petition or order to the Secretary of State is the same as submitting a complaint in a civil case. However,

[1] West Virginia Code § 48-27-311 addresses service of domestic violence protective orders, including emergency protective orders, and allows for service of protective orders by first class mail simultaneous with service by publication. However, this provision conflicts with Rule 11(a), RDVCP, which requires service of an emergency protective order via certified mail, if personal service is unsuccessful. When there is a conflict between a procedural rule and a statute, the procedural rule controls. (Rule 1, RDVCP). Therefore, the clerk must continue to follow the provisions of Rule 11(a), RDVCP with regard to service of an emergency protective order.

no fees may be collected for service until the case is considered final. Once costs for service are collected, the clerk forwards the funds to the Secretary of State.

Rule 11(j) of the Rules of Domestic Violence Civil Proceedings also establishes a detailed procedure for service of protective orders in other states. Under Rule 11(j), the court is required to attempt personal service on a respondent by transmitting a copy of the petition and order to the applicable out-of-state law enforcement agency in the respondent's most current county of residence. If this type of service is unsuccessful, the court is required to direct the circuit clerk to serve the respondent by first class mail at the most current known residence and by publication in the most current known county of residence. The court, however, has the discretion to require the clerk to serve the respondent by certified mail.

12.20.11 Service by Publication

As noted above, a family court should direct a clerk to serve notice of the domestic violence proceedings via publication if a return of service for certified mail is not received by the clerk within 30 days or if service by certified mail is unsuccessful. Alternatively, the court may direct the clerk to serve notice by certified mail simultaneous with service by publication.

Upon receipt of such an order, the clerk is required to prepare the notice for publication. The order of publication must include the following information: the respondent's name and last known address, the magistrate court case number and the family court case number, the county where the case has been filed, the date of the scheduled hearing and where the respondent may obtain a copy of the petition and the order. (Rule 11a, RDVCP). The publication order shall not include the petitioner's name or any other identifying information. (Rule 11a, RDVCP). The clerk is responsible for submitting the publication order to the newspaper in the last known county in which the respondent resides. (Rule 11(a), RDVCP). The notice must be published as a Class I legal advertisement.

Typically, the newspaper invoices the clerk who, in turn, prepares and submits a payment order to the family court judge. The clerk should then forward the order of payment, along with the newspaper's original invoice and certificate of publication to the Administrative Office for payment.

12.20.12 Service of Pleadings by Respondent

If a respondent needs to serve a document upon the petitioner, the respondent is to serve the document by mail. (Rule 11(f), RDVCP). In domestic violence civil proceedings, however, it is common for the petitioner's address and other identifying information to be sealed in the file. When identifying information has been sealed and the respondent wants to serve pleadings on the petitioner, upon request, the circuit clerk is required to arrange for service of the pleadings. (Rule 11(g), RDVCP). Service shall be made by first class mail. (Rule 11(f), RDVCP).

To request service by the clerk, the respondent must submit a copy of the pleading and a completed form requesting indirect service. The respondent must also pay the costs of service unless he or she has an approved fee waiver.

12.20.13 Service of Final Domestic Violence Protective Orders

If the family court awards a domestic violence protective order and the respondent is present, the family court personally serves the order at the end of the hearing. If the respondent is not present, the sheriff or other law enforcement agency must immediately attempt personal service of the order. (Rule 11(b), RDVCP). To facilitate personal service, the clerk is required to send certified copies of the order to the local office of municipal police, the sheriff and the West Virginia State Police no later than the close of the next business day. (W. Va. Code § 48-27-601(a)).

By statute, law enforcement is required to attempt service of protective orders without delay, and such initial attempts must be made within 72 hours of receipt of the orders. (W. Va. Code § 48-27-701). The clerk has the discretion to serve the final protective order by first-class mail at the same time that personal service is attempted. (Rule 11(b), RDVCP). The law enforcement agency is required to file the return of service within five days of completing service. (Rule 11(b), RDVCP). The law enforcement agency is not required to maintain copies of the order after service.

If the clerk does not receive the return of service within five days, the clerk is required to serve the domestic violence protective order by first-class mail, and by publication in accordance with West Virginia Code § 48-27-311. (Rule 11(b), RDVCP). The order must be published one time using a Class I legal advertisement in the most current known county in which a respondent resides. (See Section

12.20.11 for further discussion on how publication notices are processed and paid.)

12.20.14 Domestic Violence Registry

The domestic violence registry is the database of all orders entered in protective order proceedings in West Virginia and is maintained by the West Virginia Supreme Court. (W. Va. Code § 51-1-21; Rule 21, RDVCP). Protective orders from other jurisdictions may also be entered into the registry if a petitioner believes enforcement of an out-of-state protective order would be necessary in West Virginia. (See Section 12.20.15). Protective orders are enforceable regardless of whether they have been entered in the domestic violence registry. The registry allows law enforcement to quickly and easily access orders entered in protective order proceedings.

An order entered in a protective order proceeding by the family court or circuit court will be placed in the domestic violence registry. Circuit clerks are not directly responsible for entry of orders in the domestic violence registry. Dependent upon local procedure, either the court or circuit clerk is required to forward a copy of a protective order to the magistrate court clerk who, in turn, must enter the protective order into the domestic violence registry. (W. Va. Code §§ 48-27-505(g) and -601(a); Rule 21, RDVCP). Once the information has been entered into the registry, the information will be forwarded to Federal Bureau of Investigation (FBI) for inclusion in the National Crime Information Protection Order File. This file is used for the validation and enforcement of protective orders, especially when interstate enforcement is an issue. Additionally, the file is used for background checks for the purchase of weapons.

Before the development of the domestic violence registry, copies of protective orders were transmitted to law enforcement agencies who, in turn, were required to maintain them to facilitate enforcement. Although local law enforcement agencies will receive copies of protective orders to serve respondents, local law enforcement agencies are no longer required to maintain copies of protective orders after service. (W. Va. Code § 48-27-601(a)).

12.20.15 Registration of Foreign Protection Orders

West Virginia Code § 48-28-5(a) permits an individual to register a protection order from a jurisdiction outside of this State (referred to as foreign protection orders). Failure to register a foreign protection order does not affect its enforceability in this State. (W. Va. Code §§ 48-27-802(c); 51-1-21(c)). But in some circumstances, such

registration facilitates more effective enforcement by local police agencies.

A person seeking to register a foreign protection order must provide a certified copy of the order, and also submit an affidavit by the protected individual indicating that, to the best of his or her knowledge, the order is in effect at the time of the request for registration. (W. Va. Code § 48-28-5(b)). Only a person protected by the foreign protection order, or his or her representative, may register a foreign protection order. (W. Va. Code §§ 48-27-802(b); 51-1-21(b)). These statutes do not specify what is needed to act as a representative of a protected person for purposes of registering a foreign protection order. To assure that the person is an authorized representative, circuit clerks can require proof, such as a power of attorney or affidavit of authority executed by the protected person.

All foreign protection orders are entered into the domestic violence registry database by the Court Services Division in the Administrative Office of the Supreme Court. (W. Va. Code § 48-28-5(c)). No fee is charged for registration of a foreign protection order. (W. Va. Code § 48-28-5(f)). When a person presents a foreign protection order for registration to a circuit clerk, the clerk should: a) ascertain that it is a certified copy; b) ascertain that the individual presenting the order is a protected person under the order, or his or her authorized representative; c) obtain the affidavit by the protected person stating that, to the best of his or her belief, the order is currently in effect (using the approved affidavit form which also provides other information needed for the registration process); d) by scan/e-mail or fax, transmit the order **and** affidavit to the Court Services Division in the Supreme Court Administrative Office; e) make a record of completion of the above-steps for the clerk's own records on the original affidavit form; f) return the original certified order to the person registering it, if requested; and g) let the person know that the Supreme Court Administrative Office will send to the protected person a copy of the proof of registration of the order. The clerk does not "file" the foreign protection order as a new case or assign it a case number. Once the above-steps are completed, the clerk's involvement is completed.

12.20.16 Domestic Violence Support Orders

If a domestic violence order establishes, modifies, or terminates child or spousal support, a copy of the order and a completed IV-D application must be forwarded by hand delivery or by fax, to the local BCSE by the next judicial day after the entry of the order. (Rule 22, RDVCP). In some counties, the family court staff handles this task. If

the order directs the circuit clerk to forward the order to BCSE, it should be done in the same manner (hand delivery or fax) and time frame (next judicial day).

12.20.17 Extensions of Protective Orders

12.20.17.1 Extension of 90 or 180 Day Protective Orders

When the family court enters a final protective order, the court has the discretion to make the order effective for a period of 90 or 180 days. (W. Va. Code § 48-27-505(a)). In addition, the petitioner has the option of requesting an extension of the order for a period of an additional 90 days.

To request an extension, the petitioner must file a written request with the circuit clerk before the original order expires. As long as the request is timely filed, the court shall extend the protective order for the additional 90 days. When a request for extension is filed, the clerk must send a copy of the request to the respondent by first-class mail to the last known address of the respondent as indicated by the court file. Once an order of extension is issued, it is to be served upon the respondent by law enforcement, which has the responsibility to file a return of service within five days of service. If the clerk does not receive a return of service within this time period, the clerk, as directed by the court, shall serve the order of extension of protective order on the respondent by first-class mail, to the last known (or most current) address of the respondent. (Rule 11(c), RDVCP). The court may, however, require the clerk to serve an order of extension by certified mail, restricted delivery, return receipt requested.

12.20.17.2 Extension by Subsequent Domestic Relations Case

A protective order is also extended when a petitioner **subsequently** becomes a party to an action for divorce, separate maintenance, annulment, custody, paternity or child support. (W. Va. Code § 48-27-401(d)). The party who files the domestic relations case has the duty of informing the clerk that a protective order is in effect. (Rule 9b, RDVCP). The CCIS for a domestic relations case expressly asks whether a protective order is in effect.

The protective order will remain in effect until: a) the court enters a temporary order (other than a procedural order) or final order in a divorce case; b) an order modifying the

protective order is entered; or c) a final order is entered. When the subsequent filing of a family court case extends a protective order as a matter of law, the clerk must personally serve the respondent with a notice of the extension of the protective order or provide it to law enforcement for service on the respondent. The clerk has the discretion to serve the notice of extension by first-class mail at the same time that personal service is attempted. (Rule 11(e), RDVCP). As with service of protective orders, law enforcement must file a return of service within five days of service. If the clerk does not receive the return of service within this five day period, the clerk has the duty to serve the notice of extension by first-class mail to the respondent's last known address and by publication. (Rule 11(e), RDVCP).

In addition to serving the notice of automatic extension, the clerk must file the notice of automatic extension both in the domestic relations case and in the protective order case files. (Rule 9b, RDVCP). The circuit clerk must also transmit the notice of automatic extension to the magistrate court so that it may be included in the domestic violence registry. (Rule 9b, RDVCP).

12.20.17.3 Extension of One-Year Protective Order

In cases involving certain aggravating factors, a court has the option of granting a protective order for one year. (W. Va. Code § 48-27-505(b)). If a court has entered a one-year protective order, the court is authorized to extend a protective order as long as necessary to protect the safety of the petitioner. (W. Va. Code § 48-27-505(c)). To extend a one-year protective order, the court is required to conduct a hearing and may only extend the protective order by issuing an order. Therefore, the clerk will not be required to issue a notice of extension, as is required in cases involving a subsequently filed domestic relations case.

12.20.18 Domestic Violence Civil Contempt Proceedings

Petitions for civil contempt of a protective order should be filed with the circuit clerk in the county where the violation occurred or where the order was entered. (W. Va. Code § 48-27-901(a)). The Supreme Court has adopted forms for family court civil contempt proceedings. The petition for contempt is filed with the family court if the family court granted the protective order. Similarly, the petition is filed with the circuit court if a circuit court granted the protective order. The court

must conduct a hearing on the petition for contempt within **five** days of the filing of the petition. (W. Va. Code § 48-27-901(b)). Therefore, the clerk must notify the presiding judge as soon as possible when a family court civil contempt proceeding is filed.

A petition for contempt and a show cause order are to be served immediately by law enforcement, and a return of service must be filed within five days. If the court finds that personal service was not successful and reschedules the hearing, the court should direct the clerk to serve the respondent by first class mail and by publication. The court has the discretion to require the clerk to serve the respondent by certified mail. (Rule 11(c), RDVCP).

If the court finds the respondent in contempt, it may order him or her to post a cash bond to ensure compliance with the court's order. The bond may not be a personal recognizance bond, and an approved fee waiver will not excuse a respondent from posting a cash bond. However, the court must make a finding that the respondent has the ability to post bond in the required amount. (Rule 24(b), RDVCP; W. Va. Code § 48-27-901(c)).

The respondent has 10 days in which to post the bond. If the respondent fails to post the bond within this time period, the circuit clerk is required to notify the court. The court is required to order the respondent to appear and may impose any terms necessary for enforcement. (Rule 24(b), RDVCP).

Bonds posted are thereafter subject to forfeiture upon the court's finding of a contemnor's failure to comply with the contempt order. When a court makes this type of finding, the court will render a judgment of default and order forfeiture of the bond. The court has the discretion to order the clerk to remit the amount of the bond to the party not held in contempt. If the court does not award the amount of the bond to a party to the contempt proceeding, the clerk disburses the funds to the auditor. (Rule 24(c), RDVCP). If the contemnor does not pay the amount of the bond within 20 days of the forfeiture order, the clerk is required to issue execution upon the request of a party. (Rule 24(c), RDVCP).

12.20.19 Purging of Domestic Violence Files

West Virginia Code § 48-27-511 provides that a circuit court, upon motion, may order the purging of a domestic violence protective order file two years after the entry of a final protective order. The circuit court has the discretion to order that the protective order and any references to it are purged from the records maintained by law

enforcement agencies. Furthermore, the circuit court may order the clerk to seal the domestic violence case file. If a file is sealed, it may not be opened without a court order. An order from a circuit court that directs the purging of a domestic violence protective order from law enforcement files, or directs the sealing of a domestic violence case file has no bearing on the Domestic Violence Registry maintained by the Supreme Court. Information regarding a domestic violence case may only be removed from the Domestic Violence Registry at the direction of the Supreme Court.

12.20.20 Restriction of Contact Between Parties

During the course of any action prosecuted under Chapter 48 of the West Virginia Code, the family court may restrict contact between the parties. (W. Va. Code § 51-2A-2a(a)). The intent of the statute is to restrict behavior that does not rise to the level of domestic violence. However, the court may not enter such an order if the conduct by either party has previously risen to the level of domestic violence. (W. Va. Code § 51-2A-2a(b)). The order itself shall govern the restrictions on contact, and it shall also determine the duration of the restrictions. This type of order is enforceable through the court's contempt powers. However, this type of order does not implicate any restrictions on the possession of firearms. In addition, it is not subject to automatic extensions as some domestic violence protective orders are.

Chapter 13

MENTAL HEALTH CASES

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13.1 OVERVIEW

West Virginia Code §§ 27-5-1, *et seq.* governs all applications for involuntary hospitalizations. The circuit court has jurisdiction over mental health cases, and the circuit clerk maintains the case files. (W. Va. Code § 27-5-1(a)). As determined by local practice, circuit clerks may also be required to notify participants of hearings and to perform other administrative tasks associated with a mental health case.

As required by West Virginia Code § 27-5-1(a), the chief judge of a circuit appoints a mental hygiene commissioner to conduct proceedings in mental health cases. When a court enters an order that appoints an individual as a mental hygiene commissioner or that reflects that an individual is no longer serving as a mental hygiene commissioner, the clerk should provide a copy of the order to the Mental Health Division of the Administrative Office. Although it is not typical, a circuit judge may also conduct these hearings. Further, a chief judge has the option of designating a magistrate to conduct probable cause hearings when a circuit judge or mental hygiene commissioner is unavailable. (W. Va. Code § 27-5-2(c)). A magistrate will typically be designated by the entry of an administrative order which may provide specific guidance concerning

a magistrate's duties. A magistrate, however, may not conduct final commitment proceedings.

Typically, there will be two types of hearings in these cases -- probable cause hearings and final commitment hearings. A person may be named as a respondent in these proceedings if the applicant alleges that the person is: a) addicted to alcohol or controlled substances; or b) mentally ill and because of the mental illness is likely to cause serious harm to self or others. A person who is subject to these proceedings is initially taken into custody by law enforcement, usually by the sheriff's department, for a mental health examination. After the examination, a person is entitled to a probable cause hearing to determine whether the person is likely to cause harm to himself or herself or is addicted and requires treatment. Subsequent to the probable cause hearing, a person may be subject to treatment, either as an inpatient or as an outpatient pursuant to a voluntary treatment agreement. A person may also be subject to final commitment proceedings.

It is not unusual for these cases to be initiated and probable cause hearings to be conducted on an emergency basis after normal business hours, including weekends or holidays. For this reason, the circuit clerk may be required to maintain a current list of contact numbers, including cell phones and pager numbers, for all participants.

13.2 FORMS FOR MENTAL HEALTH CASES

West Virginia Code § 27-5-1(f) requires the Supreme Court to provide standard forms for these proceedings. These forms include forms for the initial application, reports from mental health providers, and form orders. These detailed forms are tailored for the different stages of the proceedings and for the possible outcomes of hearings in mental health cases. With specific regard to orders, the forms indicate the different recipients of each type of order. When processing an order, the clerk should send a copy of the order to each individual or entity noted in the specific form order.

13.3 CASE NUMBERING

Each mental health case should receive a **"MH"** designation in the case number in the following form: **16-MH-###**. Mental health cases are assigned their own set of sequential numbers. (See Chapter 2). If, at a later date, a new petition is filed regarding an individual with a previous petition, a new **"MH"** case number is to be assigned. The new petition should not be combined with the case number assigned to any previous petition.

For cases involving transport requests for the voluntary hospitalization of minors, the clerk should assign a case number in the following form: **16-MH(Vol)-###**. For statistical purposes, these cases should be counted separately from involuntary commitment cases.

13.4 RECORDKEEPING

Mental health cases should be recorded in the mental health docket. All papers filed with the clerk, process and returns, and orders and judgments should be noted in chronological order on the docket sheet assigned to the case. The mental health docket must be kept separate from other dockets and must be kept under lock or otherwise secured from inspection or copying by anyone.

All orders entered by the circuit court in mental health cases should be bound in a separate mental health order book. Mental health cases should be indexed by the name of the respondent in a mental health case index. The mental health order book and index must be kept separate and distinct from all other order books and indexes and must be kept under lock or otherwise secured from inspection or copying by anyone. Upon entry of a commitment order or a dismissal order, the mental health case file should be stored in a secure, separate location with other mental health cases.

13.5 ACCESS TO MENTAL HEALTH CASE FILES

All records of proceedings and all filed documents in mental health case files are confidential and should be maintained in a locked cabinet or other secure method. However, a respondent always has the right to inspect or copy his or her file. (W. Va. Code § 27-5-4(c)(3)). Additionally, a respondent may authorize another person to inspect or copy the file. Although West Virginia Code § 27-5-4(c)(3) does not specify the type of authorization required, a clerk should not allow inspection of the file without written authorization.

West Virginia Code § 27-5-4(c)(3) also indicates that a legal representative of a respondent may inspect a file or authorize another individual to inspect the file. Presumably, the term "legal representative" includes a respondent's attorney. However, it also would include a person that has been designated by a court, such as a guardian. It also would include a person designated by a respondent, such as a person authorized by an executed power of attorney. Additionally, access to a mental health case file can be authorized by court order. Further, a sheriff in a concealed weapon permit investigation may review a mental health case file. (See Section 4.11).

An exception to confidentiality regarding certain information in mental hygiene case files is authorized by West Virginia Code §§ 61-7A-1, *et seq.* This article established the State Mental Health Registry which authorized and required circuit clerks to supply the Administrator of the West Virginia Supreme Court or the West Virginia State Police with the name and certain other identifying information of all persons involuntarily committed to a mental institution in mental hygiene proceedings (as well as other persons adjudicated as a "mental defective" as defined in that Act). Although the statute assigns this duty to circuit clerks, the Division of Mental Hygiene and Treatment Court Services of the Supreme Court Administrative Office has developed a procedure in which mental hygiene commissioners, circuit court judges, and magistrates are primarily responsible for this reporting requirement. For a detailed discussion of what information is to be provided, see Section 3.12.3.

13.6 INITIATION OF THE CASE

A mental health case may be filed either in the county where the respondent resides or where the respondent may be found. (W. Va. Code § 27-5-2(c)). To initiate such a case, an applicant must file a completed application under oath with the circuit clerk or with a mental hygiene commissioner. Alternatively, the application could be presented to a magistrate if the chief judge of the circuit has designated a magistrate to accept applications for involuntary hospitalizations and to conduct probable cause hearings. (W. Va. Code § 27-5-2(c)). The circuit clerk, however, maintains all case files for mental health cases regardless of where the application is originally presented. There is no filing fee for this type of case.

An application **cannot** be filed with the circuit clerk via facsimile because the applicant must complete an oath in the presence of a circuit clerk or a judicial official. (Rule 12.04(a), TCR). However, subsequent pleadings may be filed by facsimile.

13.6.1 Applicants

Any adult may apply for an individual's involuntary hospitalization if the respondent is not incarcerated. If the respondent is incarcerated, then the chief administrative officer of the facility where the respondent is incarcerated is the only person who may apply for the respondent's involuntary hospitalization. When an application is filed by a chief administrative officer of a correctional facility, the application must include a statement that the correctional facility cannot reasonably provide necessary treatment or services. (W. Va. Code § 27-5-2(a)(1) and (2)). Because of the difference in application requirements for an incarcerated person,

there are two application forms, one for an incarcerated respondent and one for a respondent who is not.

A mental hygiene case may be initiated by the chief medical officer of a mental health facility when the discharge of a voluntary patient is requested. The request for discharge may come from the voluntary patient, his or her parents, guardian, spouse or adult next of kin. (W. Va. Code §§ 27-4-1 and -3).

13.6.2 Application Filed with Circuit Clerk

The clerk should provide application forms to potential applicants and should also provide the two-page information packet to them. The clerk should politely direct applicants to read the "Important Information to Applicants" because the material contained in the attachment provides helpful information and may answer many questions.

Before filing, the clerk should inquire whether the applicant has tried to receive emergency assistance from the regional mental health facility serving the jurisdiction and should encourage the applicant to do so. **A listing of each of the regional mental health facilities and their service areas with emergency contact information appears at the end of this chapter. The clerk should provide the regional mental health facility information for the jurisdiction to the applicant.** However, the clerk is not permitted to refuse filing of an application if the applicant chooses to file the application instead of contacting the regional mental health facility for emergency assistance.

Due to the emergency nature of these proceedings, the clerk must immediately present all filed applications to a mental hygiene commissioner or circuit judge. If both the mental hygiene commissioner and circuit judge are unavailable for immediate presentation of the application, the applications should be presented to a magistrate, provided that the chief judge has designated a magistrate to accept applications and hold probable cause hearings.

13.6.3 Application Filed with Mental Hygiene Commissioner

An applicant may present an application to the mental hygiene commissioner for subsequent transmission to the office of the circuit clerk. (W. Va. Code § 27-5-2(c); Rule 5(e), RCP). However, it is best practice to present an original application to the mental

hygiene commissioner only if the circuit clerk's office is closed and a clerk is unavailable to accept the application for filing.

13.6.4 Application Filed with a Magistrate

If no mental hygiene commissioner or circuit judge is available for immediate presentation of an application, the application may be presented to a magistrate who has been designated by the chief judge of the circuit court to accept applications and hold probable cause hearings. Unless the chief judge of the judicial circuit orders otherwise, the designated magistrate may transfer the application or matter back to a mental hygiene commissioner or circuit judge should either become available for immediate presentation of the application or other related matter. This transfer may occur at any time throughout the probable cause proceedings, including matters concerning voluntary treatment agreements.

13.7 INITIAL REVIEW OF AN APPLICATION

13.7.1 Denial of Application

If the respective judicial officer denies the initial application, the clerk must transmit a copy of the denial order to the applicant. When an initial application is denied, the case is dismissed from the docket.

13.7.2 Application Granted

If the respective judicial officer grants the application, he or she will enter an order requiring the sheriff to detain the respondent and requiring a mental health center to provide or arrange for a mental health examination. This order is commonly referred to as a "pick-up order." The order will also appoint counsel for the respondent. The judicial officer may require the probable cause hearing to be conducted forthwith or within twenty-four hours. (W. Va. Code § 27-5-2(e)). An individual can only be detained for a period of twenty-four hours if there is an administrative order that establishes a program for respondents that provides for their safe and humane treatment during this initial detention period. (W. Va. Code § 27-5-2(e)).

In some counties, circuit clerks may be required to notify participants of mental health proceedings. Depending upon local practice, duties of the circuit clerk may include: a) notification of the regional mental health center, sheriff, applicant and attorneys; b) coordination of the sheriff's pick-up of the respondent and

transportation to the examination; and c) scheduling of the probable cause hearing. Because of the number of participants involved in these proceedings, as well as the emergency nature of the proceedings, ongoing cooperation and contact with the judicial officer handling the matter and the other participants is required. When required to notify participants, the circuit clerk should maintain a listing of emergency contact numbers, including cell and fax numbers, if available, for the participants in these proceedings.

It is not unusual for mental health proceedings to occur after normal business hours. The chief judge may direct the circuit clerk to be available to fulfill notification, coordination and scheduling duties for these emergency proceedings after business hours. If the chief judge does not direct the clerk's participation after normal business hours for these proceedings, the pleadings and orders may be filed with the circuit clerk on the next business day and the respective judicial officer can fulfill the notification, coordination and scheduling duties to the extent necessary after normal business hours.

13.8 CONTINUANCES

13.8.1 Continuance for Medical Reasons

Although West Virginia Code § 27-5-2 establishes strict time limits for mental health cases, the time limits do not apply if a respondent requires medical treatment for a physical condition, and as a result, the time requirements cannot be met. (W. Va. Code § 27-5-2(e)). A continuance for medical reasons may occur at any time during the proceedings. When a judicial officer grants a continuance for medical reasons, the clerk may be required to provide immediate notification to all parties involved so that the parties know that the scheduled hearing has been continued.

13.8.2 Postponement by Respondent

West Virginia Code § 27-5-2(f) allows a respondent to request the postponement of a probable cause hearing for a period not to exceed forty-eight hours. If the judicial officer grants a request for postponement, the clerk may be required to immediately notify all persons involved in the proceedings.

13.9 PREHEARING DISMISSAL BASED UPON REPORT OF EXAMINER

Before a probable cause hearing, a respondent will be released if the mental health examiner concludes that the respondent is: a) not mentally ill or addicted; or b) is mentally ill, but unlikely to cause harm to self or others. (W. Va. Code § 27-5-2(e)). In this situation, the mental health professional will indicate this finding on the requisite form. After receiving the certificate from the mental health professional, the judicial officer will enter a dismissal order, and a probable cause hearing will not be conducted. Depending upon local practice, the clerk may be required to notify all participants immediately concerning the dismissal.

13.10 THE PROBABLE CAUSE HEARING

If the application is granted and the mental health professional finds that the respondent is addicted or is mentally ill and likely to cause harm to self or others, a judicial officer must conduct a probable cause hearing.

13.10.1 Prosecuting Attorney

The prosecuting attorney, or one of his or her assistants, must represent all applicants in final commitment hearings, but not in probable cause hearings unless the prosecuting attorney deems it to be in the public interest to appear at the probable cause proceedings. (W. Va. Code § 27-5-1(c)). So that the prosecuting attorney may make this determination, the clerk must provide orders related to the probable cause hearing to the office of the prosecuting attorney.

13.10.2 Finding of No Probable Cause

After a probable cause hearing, the respective judicial officer may find **no probable cause** to conclude that the respondent should be subject to an involuntary hospitalization. If so, the case will be dismissed.

13.10.3 Finding of Probable Cause: Involuntary Hospitalization

If probable cause is found, an individual may be involuntarily hospitalized for further examination and treatment. If a respondent is hospitalized, the hospitalization is subject to the requirements and limitations set forth in West Virginia Code § 27-5-3. On the basis of the involuntary hospitalization order the clerk must follow the reporting requirements relating to the State Mental Health Registry. (See Section 3.12.3).

There are two different form orders addressing involuntary hospitalization resulting from a probable cause hearing: a) one for West Virginia residents, and b) one for nonresidents. The reason for the different forms is that nonresidents may be transferred to their state of residence for treatment. (W. Va. Code § 27-5-4(p)). The form order for nonresidents requires the clerk to provide a copy of the order to the Secretary of DHHR so that he or she may arrange for the transfer.

13.10.4 Finding of Probable Cause: Voluntary Treatment Agreement

If probable cause is found, the respondent may also be released to outpatient treatment pursuant to a voluntary treatment agreement. (See Section 13.11). The language of the State Mental Health Registry Act (W. Va. Code §§ 61-7A-1, *et seq.*) and analogous federal law is broad enough to consider such a disposition to be an "adjudication" and "commitment." Therefore, the clerk should follow the reporting requirements outlined in Section 3.12.3.

13.11 VOLUNTARY TREATMENT AGREEMENTS

Either during the probable cause hearing or the final commitment hearing, the judicial official may consider whether the respondent is amenable for release to outpatient treatment. (W. Va. Code § 27-5-2(g)). To implement this option, a voluntary treatment agreement must be in writing and must be approved by the respondent, respondent's counsel and the judicial officer. If a respondent is released pursuant to a voluntary treatment agreement, the following two motions may be filed to address subsequent developments in the case.

13.11.1 Motion for Involuntary Hospitalization for Noncompliance with Voluntary Treatment Agreement

If a respondent fails to comply with a voluntary treatment agreement, a motion for involuntary hospitalization may be filed. Although West Virginia Code § 27-5-2(g) does not specify who may file this motion, the mental health provider will typically file the motion because the provider is in the best position to monitor the respondent's compliance with treatment.

If possible, the motion should be presented to the judicial officer who approved the voluntary treatment agreement and ordered the release. If this judicial officer is unavailable, it should be presented to the circuit court judge, mental hygiene commissioner or magistrate. A magistrate, however, does not have jurisdiction over

a motion addressing a respondent's failure to comply with a voluntary treatment agreement if the voluntary treatment agreement resulted from a final commitment proceeding. (W. Va. Code § 27-5-4(i)).

After the motion for non-compliance is filed, the judicial officer may order the detention of the respondent and may set a hearing time. (W. Va. Code § 27-5-2(a)). Although the statute does not expressly establish the time limits within which a hearing must be conducted, it can be concluded that the hearing must be held forthwith or within twenty-four hours, as is a probable cause hearing.

When a detention order for lack of compliance with a voluntary treatment agreement is entered, the clerk must transmit attested copies to the sheriff, regional mental health center/treatment provider, the movant and all counsel of record. As when an initial application for an involuntary hospitalization is granted, the clerk may be required to provide immediate and prompt notification to all participants. Depending upon local practice, the circuit clerk may be required to coordinate the sheriff's pick-up of the individual, notify the participants, and schedule the hearing. After the hearing, the judicial officer may enter an order either granting or denying the motion for involuntary hospitalization.

13.11.2 Motion for Cancellation or Modification of Voluntary Treatment Agreement

When a respondent is released pursuant to a voluntary treatment agreement, he or she may file a motion seeking to cancel or modify the agreement. (W. Va. Code § 27-5-2(g)). Normally, the clerk should forward the motion to the judicial official who approved the voluntary treatment agreement and ordered the release. If this judicial officer is unavailable, the motion should be forwarded to a judicial officer handling mental health cases. However, the motion should not be forwarded to a magistrate if the release pursuant to a voluntary treatment agreement occurred as a result of a final commitment hearing.

Once the judicial officer enters an order scheduling a hearing on the motion, the clerk transmits copies of both the motion and the order to the regional mental health center or treatment provider, the respondent, respondent's counsel of record, the applicant and the applicant's counsel of record. After the hearing, the judicial officer will enter an order that rules on the motion to modify the voluntary treatment agreement.

13.12 FINAL COMMITMENT PROCEEDINGS

Final commitment proceedings may be conducted by a circuit court judge or a mental hygiene commissioner only. A magistrate has no jurisdiction over final commitment proceedings. (W. Va. Code §§ 27-5-2(c); 27-5-4(b)). The prosecuting attorney has a duty to represent all applicants at final commitment hearings. (W. Va. Code § 27-5-1(c)). In counties where a state hospital is located, the chief judge may appoint attorneys to represent applicants at final commitment proceedings. (W. Va. Code § 27-5-1a). Because final commitment proceedings are usually conducted in the county where a state hospital is located, appointing attorneys in this capacity decreases the burden on the local prosecutor's office.

13.12.1 Initiation of Final Commitment Proceedings

To initiate final commitment proceedings, an applicant must file an application under oath and a certificate of a physician or psychologist stating that the individual is addicted or is mentally ill and is likely to cause serious harm to self or others because of the mental illness. (W. Va. Code § 27-5-4(b)). In lieu of a certificate, the applicant may file an affidavit that indicates that the individual has refused to submit to an examination. (W. Va. Code § 27-5-4(d)(2)).

In almost all cases, the chief medical officer of a mental health facility will be the applicant in final commitment proceedings because West Virginia Code § 27-5-3(a) imposes a duty on chief medical officers to initiate final commitment proceedings within 15 days of admission. The application form approved by the West Virginia Supreme Court is titled "Chief Medical Officer's Application for Final Commitment." However, West Virginia Code § 27-5-4 does not limit applicants for final commitment proceedings to chief medical officers of mental health facilities.

The applicant may file the application and the certificate (or affidavit) with the circuit clerk or file the documents with the mental hygiene commissioner for subsequent transfer to the circuit clerk. The application may be filed in the individual's county of residence, where the individual is found, or in the county where the individual is hospitalized. (W. Va. Code § 27-5-4(b)).

13.12.2 Denial of Application

After an initial review of the application, a judicial officer may deny the application if he or she determines that the alleged facts are

insufficient to warrant involuntary hospitalization. (W. Va. Code § 27-5-4(e)).

13.12.3 Application for Institution of Final Commitment Proceedings Granted

After reviewing an application, a judicial officer may determine that the alleged facts are sufficient to warrant involuntary hospitalization and will set a hearing on the application. If so, West Virginia Code § 27-5-4(e) requires the circuit clerk to serve a notice of the hearing on the participants. The application for final commitment proceedings should also be served with the notice of hearing. The following chart indicates who must be served and the required or recommended method of service. (W. Va. Code § 27-5-4(e)).

Person or Entity Entitled to Notice	**Method of Service**
Respondent	Personal service of process not less than eight days before the hearing
Applicant(s)	No method is specified by statute, but personal service is recommended
a. Respondent's spouse or one of the respondent's parents or guardians, provided the person receiving notice is not also the applicant; or b. If none, respondent's next of kin.	Personal service or certified mail, return receipt requested
a. Regional or state mental health center that is evaluating the respondent for the final hearing; or b. The state, regional or community health center where the respondent was admitted after the probable cause hearing.	No method is specified by statute; therefore, notice by telephone or facsimile is acceptable

Circuit court of the county where the respondent resides, if the hearing will be conducted in a different county	Certified mail, return receipt requested
Prosecuting attorney where the hearing is conducted	No method is specified by statute; therefore, notice by telephone or facsimile is acceptable
Respondent's Attorney	No method is specified by statute; therefore, notice by telephone or facsimile is acceptable
Sheriff of the county where the hearing is conducted	Telephone call or copy of transport order

13.12.4 Final Commitment Hearing

13.12.4.1 Prehearing Dismissal

After the commencement of final commitment proceedings, West Virginia Code § 27-5-4(f)(1) requires the presiding judicial officer to appoint a physician or psychologist to examine the respondent and report the findings. If the report does not confirm that the respondent is mentally ill and is a danger to self or others or does not confirm that the individual is addicted, then the proceedings are dismissed. (W. Va. Code § 27-5-4(f)(3)).

13.12.4.2 Dismissal after Final Commitment Hearing

After a final commitment hearing, the judicial officer may dismiss the proceedings because the applicant did not prove that the respondent was addicted or mentally ill and is a danger to self or others.

13.12.4.3 Final Commitment Granted

After a final commitment hearing, the judicial officer must find that the individual is mentally ill and likely cause to harm to self or others or that the individual is addicted to order

further involuntary hospitalization. West Virginia Code § 27-5-4(k) governs the terms and limitations for this type of hospitalization. If involuntary commitment for treatment is ordered, the mental hygiene commissioner must follow the reporting requirements relating to the State Mental Health Registry. (See Section 3.12.3).

13.12.4.4 Voluntary Treatment Agreement

After a final commitment hearing, a judicial officer may release a respondent pursuant to a voluntary treatment agreement. Typically, the respondent would be required to participate in outpatient treatment. (See Section 13.11). The language of the State Mental Health Registry Act (W. Va. Code §§ 61-7A-1, *et seq.*) and analogous federal law is broad enough to consider such a disposition to be an "adjudication" and "commitment." Therefore, the clerk should follow the reporting requirements outlined in Section 3.12.3.

13.12.4.5 Commitment to Responsible Person

Instead of ordering an involuntary hospitalization, West Virginia Code § 27-5-4(o) allows a judicial officer to release a respondent to a responsible person who has agreed to care for him or her. The responsible person may be required to post a bond with the circuit clerk.

13.12.4.6 Final Commitment of a Nonresident of West Virginia

If a respondent is not a West Virginia resident and the judicial officer grants the application for final commitment, the clerk must provide notice to the Secretary of DHHR by sending a copy of the order to him or her. (W. Va. Code § 27-5-4(p)).

13.12.4.7 Commitment of Resident of Another County

If a judicial officer grants an application for final commitment and the respondent is not a resident of the county where the hearing was conducted, the circuit clerk must forward a certified copy of the commitment order to the clerk of the circuit court where the respondent resides. (W. Va. Code § 27-5-4(m)).

If the respondent is **not** hospitalized at the time of the hearing and the respondent is **not** a resident of the county where the hearing is conducted, the presiding judicial officer enters two orders: a) an order that grants the final commitment; and b) an order certifying the transcript or recording of the final commitment proceedings. (W. Va. Code § 27-5-4(n)(1)). When an order is entered in this situation, the circuit clerk must forward the order and the transcript or other recording of the hearing forthwith to the circuit clerk of the county where the respondent resides. The clerk who receives the order and transcript must immediately present the order and the transcript or other recording to the circuit judge or mental hygiene commissioner.

After receiving the transcript and order, the judicial officer must review the transcript to confirm the hospitalization of the respondent. (W. Va. Code § 27-5-4(n)(2)). If the judicial officer enters an order that finds that the respondent should have been hospitalized, the circuit clerk must immediately forward a copy of the order to the clerk of the circuit court where the hearing was conducted. In turn, the clerk of the circuit court where the hearing was conducted must transmit three attested copies of the order to the sheriff, and must provide copies to respondent's counsel of record, the prosecuting attorney and to the regional mental health center. (W. Va. Code § 27-5-4(n)(3)).

An order may also be entered that requires the respondent's county of residence to reimburse the county where the final commitment hearing was conducted for the expenses of the hearing. When this type of order is entered, the circuit clerk transmits the order to the respondent's county of residence.

13.13 ORDERS TO RETURN INVOLUNTARY PATIENT TO MENTAL HEALTH FACILITY

If an involuntary patient has been released from a mental health facility either on a trial visit or to a responsible person, the chief medical officer of a mental health facility may present a sworn notice that requests readmission of the patient. (W. Va. Code § 27-7-4). The notice will include facts concerning the original commitment and the patient's current condition.

A copy of the notice must be sent to the patient. The notice shall also be filed with the clerk of the circuit court that originally ordered the patient's

admission and to the clerk of the circuit court where the patient resides. Further, the notice must be sent to the **circuit court** or **mental hygiene commissioner** in the county where the patient may be found. Depending upon local practice, the notice may be sent to the circuit clerk of the county where the patient may be found, as opposed to the circuit court or mental hygiene commissioner. If so, the clerk must forward the notice to either the circuit court or mental hygiene commissioner. The circuit court or mental hygiene commissioner of the county where the respondent is located may, if satisfied, order that the patient should be readmitted and authorize any health officer or police officer to take the patient into custody and transport him or her back to the mental health facility where the notice originated.

In some cases, the county where the patient is found may be a county other than where the earlier commitment proceeding was conducted or where the patient resided. If this is the case, the clerk will need to open a new case file to maintain the notice, any orders and other records associated with the notice of readmission.

If a respondent has been committed and escapes from a facility, the chief medical officer of the mental health facility may sign an order directing the sheriff to take the respondent into custody and return him or her to the mental health facility. (W. Va. Code § 27-7-5).

13.14 PAYMENT FOR EXPENSES OF MENTAL HEALTH CASES

The Administrative Office of the Supreme Court is responsible for payment of the mental hygiene commissioner and any court reporter. When a payment order for a mental hygiene commissioner is entered, the clerk must transmit one certified copy along with the attached voucher to the Administrative Office.

Public Defender Services is responsible for payment for an attorney for a respondent if the respondent qualifies for appointed counsel. (W. Va. Code § 29-21-2(2)). The clerk should process a payment order for appointed attorneys in the same manner as payment orders in criminal cases.

The county commission is responsible for all other hearing expenses associated with a mental health case. (W. Va. Code § 27-5-4(r)(2)). Specifically, county commissions are financially responsible for the payment of expert witnesses called by a respondent who qualifies for court-appointed counsel.

13.15 TRANSPORT REQUESTS FOR THE VOLUNTARY HOSPITALIZATION OF MINORS

West Virginia Code § 27-4-1 has established a process through which a parent or legal guardian of a minor may request transport by the sheriff for the voluntary mental hospitalization of a minor. The following individuals may request voluntary hospitalization of a minor: the parents of a minor; a parent if only one parent is living; if the parents live separate and apart, the parent with custody; or a guardian with legal custody. (W. Va. Code § 27-4-1(a)(2)).

When a parent or guardian is arranging with a mental health facility for the voluntary hospitalization of a minor, these individuals may also request that the sheriff transport the minor to the mental health facility. (W. Va. Code § 27-4-1(b)). To obtain this assistance, the minor must be violent or combative or the parent or guardian must face other circumstances that make them unable to transport the minor. The West Virginia Supreme Court has adopted forms to facilitate this process.

To obtain assistance with transport, the parent or guardian must file an Affidavit for Voluntary Hospitalization Transport by Sheriff of Minor To and From Mental Health Facility. This form must be filed in the circuit court of the county where the minor resides or in the county where the minor may be found. In turn, the circuit clerk must forward the affidavit to the appropriate judicial officer. The mental hygiene commissioner or circuit court judge will conduct an *ex parte* review of the application. If a circuit court judge or mental hygiene commissioner is not available, a magistrate may review the affidavit and rule upon it. Once the judicial officer reviews the affidavit, an order will be issued that either grants or denies the request. An order denying the request must be transmitted to the affiant. If the judicial officer grants the request, the clerk must transmit two certified copies of the order and the affidavit to the sheriff. One copy is for the sheriff, and the second copy is for delivery to the mental health facility. The clerk must also provide a copy to the affiant.

These cases should be assigned a case number in the following format: **16-MH(Vol)-###**. For statistical purposes, these cases should not be counted as involuntary commitment cases. Although the cases are assigned a case number, no filing fee should be assessed or collected. These cases should be maintained as confidential files because they involve mental health records of minors. (See W. Va. Code §§ 27-3-1; 27-5-4(c); and 49-7-1). These statutes do not expressly refer to cases involving the transport of minors with regard to voluntary hospitalizations, but they establish general principles of confidentiality for cases involving both minors and mental health. The most specific statute that governs access to records involving a juvenile is West Virginia Code § 49-5-101.

Under this statute, access to these records should only be allowed to the following: the minor; a parent whose rights have not been terminated; the attorney of the child or the parent; with the written consent of the child or someone authorized to act on the child's behalf, or by a court order. (W. Va. Code § 49-5-101).

Chapter 14

GUARDIANSHIP OF MINORS, MINOR SETTLEMENT PROCEEDINGS, AND GUARDIANSHIPS OR CONSERVATORSHIPS OF PROTECTED PERSONS

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This chapter addresses three different types of proceedings. First, Section 14.1, Guardianship of Minors, discusses procedures related to the appointment of guardians for minors and their estates. (W. Va. Code §§ 44-10-1, *et seq*.). Secondly, Section 14.2 addresses procedures for court approval of a settlement of a minor's claim for damages. Third, Section 14.3, Guardianships or Conservatorships, outlines procedures for the appointment of guardians or conservators when an adult is unable to manage his or her personal or financial affairs without assistance. (W. Va. Code §§ 44A-1-1, *et seq*.; W. Va. Code §§ 44A-2-1, *et seq*.; W. Va. Code §§ 44A-3-1, *et seq*.; and W. Va. Code §§ 44A-4-1, *et seq*.). A guardianship or conservatorship may be appropriate when a person is mentally impaired and because of the impairment cannot meet the requirements for his or her care or cannot manage property or financial affairs without assistance. A guardianship or conservatorship may also be appropriate if a person is missing.

These three types of proceedings address different situations -- the first involves guardians for minors; the second involves minor settlement proceedings; and the third involves protection and assistance for mentally impaired adults. There are different statutory requirements and procedures for each type of case. Therefore, a circuit clerk should be familiar with the appropriate procedures for each type of case.

14.1 GUARDIANSHIPS OF MINORS

Effective June 6, 2004, jurisdiction over the guardianship of minors or their estates was concurrently established in both circuit and family courts. (W. Va. Code §§ 44-10-3(a); 51-2A-2(a)(17)). Before June 6, 2004, the county commission had jurisdiction over these cases, and all pleadings were filed with the county clerk. West Virginia Code §§ 44-10-1, *et seq.* governs the procedures for the appointment of a guardian for minors or their estates, and any subsequent proceedings in minor guardianship cases. Additionally, the West Virginia Supreme Court has adopted the *Rules of Practice and Procedure for Minor Guardianship Proceedings* (RMGP). These procedural rules govern all minor guardianship cases in circuit and family court arising under West Virginia Code §§ 44-10-1, *et seq.*, except those proceedings seeking circuit court approval of a settlement of a minor's claims for damages for injury to person or property. The proceedings involving settlement of a minor's injury claims are governed by the procedures set out in the Minor Settlement Proceedings Reform Act codified in West Virginia Code § 44-10-14. (Rule 1, RMGP). The Supreme Court has also adopted a set of forms that may be used for minor guardianship cases.

14.1.1 Case Initiation

To seek appointment as the guardian of a minor or the minor's estate, a petitioner must file a verified petition and a completed civil case information sheet. If a fee waiver has not been approved, the clerk collects a filing fee for a miscellaneous civil case. The amount of the filing fee is the same whether the case is filed in the family or circuit court. (Rule 3(b) and (c), RMGP).

Venue for a minor guardianship petition is proper in the county where the minor has resided for the last six months. (W. Va. Code § 44-10-3(b)). In extraordinary circumstances, a court may allow a case to proceed before six months have elapsed.

A petitioner has the option to proceed either in family or circuit court. The clerk should assign a case number according to the specific court in which the petitioner elects to proceed. If the petitioner chooses to proceed in circuit court, the clerk should assign the case a **"CIG"** number: **16-CIG-###**. The clerk should assign a **"FIG"** number, **16-FIG-###**, if the petitioner opts to proceed in family court. A petitioner may choose to proceed in a particular court based upon scheduling or other local concerns. If a petitioner files in family court, and the court determines that the case involves allegations of child abuse or neglect, the family court will have to remove the case to circuit court. (Rule 13, RMGP). When this occurs, the clerk will need to assign a new case number to the removed case, designating it with a **"CIGR"** number. (For further discussion of these removed minor guardianship cases, see Section 11.12.4).

A petitioner may seek to be appointed guardian over more than one minor in one petition, when the minors are siblings or half-siblings. (Rule 3(a), RMGP). It is not necessary for a petitioner to file a separate petition or pay additional filing fees for each minor in this situation.

In addition to the petition, other documents may be filed when the case is initiated. When a minor is age 14 or over, he or she may nominate a guardian. (W. Va. Code § 44-10-4; Rule 6(a), RMGP). The parent of a minor would normally have priority for appointment of a guardian, but he or she may file a form that waives this priority. (W. Va. Code § 44-10-3(a); Rule 8, RMGP).

14.1.2 Notice to the Court

When a party files a guardianship petition, Rule 4(a) of the Minor Guardianship Rules, requires the circuit clerk to provide a copy to the court, forthwith. This is because West Virginia Code § 44-10-3(e) and Rule 4 require the court to conduct a hearing within **ten days** of the filing of the petition. Because of the short, mandatory time frames, circuit clerks should notify the assigned judge on the day that a petition has been filed. Under West Virginia Code § 44-10-3(e), the circuit clerk is required to notify the court of the filing of a guardianship petition within two days. Given the forthwith requirement under Rule 4(a), the clerk should, therefore, notify the court of the filing of a guardianship petition forthwith, but no later than two days after it is filed.

If local practice requires the clerk to provide notice of the hearing, the clerk should obtain a hearing date from the assigned judge, and should prepare and transmit the notice as soon as possible. The notice of hearing is to be served along with the petition, and a summons prepared by the clerk, upon every non-petitioner parent, any other person with custodial interests listed in the petition, any minor in the petition over 14 years of age, and counsel of record, if any. The petitioner may be served the notice of hearing by first class mail. (Rules 4(a) and 5(a), RMGP).

In some circuits, it may be more convenient for the family or circuit judge's office to prepare and send out the notice. Additionally, some circuits may require the petitioner to do so. Regardless of the local practice for the preparation of the notice of hearing, the clerk should notify the assigned judge of a minor guardianship petition as soon as possible. Additionally, even if the judge's office handles mailing out the hearing notice, the clerk needs to promptly process the petition and summons for service in accordance with Rule 5(a), RMGP.

14.1.3 Access to Minor Guardianship Files

Case indexes and court orders in minor guardianship cases are not confidential, but all other records are confidential. (W. Va. Code § 44-10-3(l)). This confidentiality provision applies uniformly to minor guardianship cases in both circuit and family courts. Because the statute expressly identified "all other records" as confidential, the pleadings, exhibits, transcripts, or any other filed documents are not subject to public access. Since orders and indexes are public records but the case files are not, the confidentiality of all (circuit

and family court) minor guardianship cases should be maintained in the same manner as family court domestic relations cases.

West Virginia Code § 44-10-3(l) allows access to minor guardianship records by a party, counsel of record or the presiding judicial officer. In addition, another family court or circuit court that is presiding over another proceeding involving the minor may review the minor guardianship file. (W. Va. Code § 44-10-3(l)). Anyone else must obtain a court order before he or she can review or copy a minor guardianship file. The applicable provision of the Minor Guardianship Rules is similar to the confidentiality and access to records restrictions imposed by the statute. (Rule 7(b), RMGP). Rule 7(b) does not, however, refer to other judges who are presiding over a different case involving a minor, as persons who are allowed access to a minor guardianship file. Under Rule 1 of the Minor Guardianship Rules, these rules apply if there is a conflict with other rules or statutes. However, this statutory provision supplements, as opposed to conflicts with, the provisions of Rule 7(b). Therefore, family or circuit courts who are presiding over a different case involving the minor may access a minor guardianship case file. Additionally, by rule, the hearings in these cases are closed proceedings. (Rule 7(a), RMGP).

The June 14, 2006 amendment to West Virginia Code § 44-10-3 that first established the confidentiality of records (except orders and indexes) in minor guardianship cases was silent as to whether the confidentiality provision has any retroactive application. It is a general rule of construction that: "A statute is presumed to be prospective in its operation unless expressly made retrospective." (W. Va. Code § 2-2-10(bb)). But even with that rule of construction taken into consideration, it is reasonable to conclude that the confidentiality provision of West Virginia Code § 44-10-3 can be applied to all minor guardianship files, including cases initiated and closed before June 14, 2006. First of all, this statutory amendment did not change the confidentiality requirements for minor guardianship cases in family court. By rule, everything in the family court minor guardianship case files, except orders, was confidential even before this statutory amendment. (Rule 6, RFCP). Secondly, existing (pre-June 14, 2006) circuit court minor guardianship case files can simply now be treated as closed files, much the same way most clerk's offices treat old domestic relations case files that pre-dated the confidentiality rules applying to those types of cases. Applying the new confidentiality provision to prior circuit court minor guardianship case files is simply a current (nonretroactive) application of the law to files as they now exist in the circuit clerk offices. There should not be many circuit court minor guardianship

cases that pre-date the 2006 confidentiality provision, since the change-over from county commission to court jurisdiction for these cases only occurred on June 6, 2004.

14.1.4 Bonds

A guardian must post a bond and may not act as a guardian until he or she has done so, unless the guardian has been nominated by a will. In the case of a testamentary appointment, the will must expressly waive the bond requirement and the court must also find that a bond is not necessary. (Rule 9(a) and (b), RMGP).

The court that appoints the guardian has the discretion to establish both the amount of a bond and the method to secure it. A bond may be secured by a surety company, by real property, by cash, or by personal recognizance. The clerk should review the order that appoints a guardian for any specific instructions about the bond. When the clerk processes a bond in a minor guardianship case, the clerk follows the same procedures for processing other civil bonds. These procedures are discussed in detail in Section 8.4. If the appointed guardian fails to satisfy the bond requirements within 15 days after the order of appointment, the clerk is required to notify the court. (Rule 9(a), RMGP).

14.1.5 Bonds in Cases Involving Multiple Minors

Occasionally, a person will serve as the guardian of more than one minor. When this situation occurs, the guardian should post a separate bond for each of the minors. However, if the court order clearly indicates that one bond is sufficient to protect the assets of all of the minors, the guardian is required to post only one bond. In the case of multiple bonds secured by real property and a justification of surety is required, the justification of surety must indicate that the property value is sufficient to cover the value of all of the bonds.

14.1.6 Curators

The circuit or family court has the discretion to appoint a curator or temporary guardian to act with all the powers and duties of a guardian when a guardian has not yet posted a bond or when there is no guardian. (W. Va. Code § 44-10-6; Rule 9(c), RMGP). For example, a court may determine that a curator should be appointed when the guardian of a minor passes away, no successor guardian has been appointed, and the minor's estate must be managed. Similar to a guardian, a curator or temporary guardian must post a

bond before assuming any duties. (W. Va. Code § 44-10-6). In such temporary situations, a personal recognizance bond is often found sufficient; but the court will make that determination.

14.1.7 Subsequent Proceedings

It may be necessary for a court to address issues and circumstances that arise subsequent to the appointment of a guardian. For example, a guardian may seek to resign, or an interested party may seek the revocation or termination of the guardianship. (Rule 15, RMGP). Another example is when a guardian needs to expend more than the annual income from the minor's estate for the support or education expenses of the minor. (Rule 14, RMGP). The pleadings, orders and other documents associated with a subsequent petition are filed and maintained in the original case file, without additional filing fees. (Rule 14(a), RMGP).

14.2 MINOR SETTLEMENT PROCEEDINGS

The Minor Settlement Proceedings Reform Act, West Virginia Code § 44-10-14, governs the procedures for obtaining court approval of a settlement for a minor's claim for damages and the release of any person or entity alleged to be liable for the damages. Typically, minor settlement proceedings involve a minor's claim for damages as a result of a personal injury.

Although the procedures for minor settlement proceedings are set forth in the Article 10 of Chapter 44 which governs the appointment of guardians for minors, the procedures for a minor settlement proceeding are distinct from a guardianship proceeding for a minor. As an initial distinction, a family court judge lacks jurisdiction to approve a minor settlement. Secondly, the ten-day time frame for a hearing and other procedures for a guardianship case do not apply to a minor settlement proceeding.

As of May 21, 2002, West Virginia Code § 44-10-14 governs all minor settlement proceedings, whether or not a lawsuit has been filed. Prior to this date, West Virginia Code § 56-10-4 governed minor settlement proceedings if a lawsuit had not been filed.

If a lawsuit has not been filed on behalf of a minor, a verified petition must be filed with the circuit court. When this type of petition is filed, the circuit court collects the filing fee for a miscellaneous civil proceeding. The circuit clerk assigns a number in the following format: **16-P-###**. If a civil suit has been filed, a motion may be filed in the underlying civil suit. In

this situation, the clerk files the motion in the original case file and does not collect an additional filing fee.

West Virginia Code § 44-10-14 indicates that a petition or motion for approval of a minor settlement may be filed by a parent, guardian or next friend. When obtaining approval of a minor settlement, it is not necessary for a person to be appointed as a guardian pursuant to West Virginia Code § 44-10-3(a). However, a person who has been previously appointed as a guardian in a minor guardianship proceeding would be entitled to seek court approval of a minor settlement.

When a motion or petition for approval of a minor settlement is filed, the court will appoint a guardian ad litem for the minor. (W. Va. Code § 44-10-14(d)(1)). The guardian ad litem must file an answer recommending whether the settlement should be approved. (W. Va. Code § 44-10-14(d)(2)).

After the circuit court conducts a hearing on the petition or motion, the court will enter an order that either approves or rejects the settlement. If the court approves the settlement, the court will approve payments that may be properly deducted from the settlement proceeds, such as attorney fees and medical bills. The remainder of the funds are referred to as "net settlement proceeds."

If a circuit court approves a minor settlement and the amount of the net settlement proceeds is less than $25,000, the court may order the placement of the funds into a bank or other financial institution with a principal place of business in West Virginia. (W. Va. Code § 44-10-14(g)(4)). When the funds are deposited, the financial institution must file a written acknowledgment that the funds have been deposited. The clerk should file the acknowledgement in the appropriate case file.

To ensure that the net settlement proceeds are properly managed, the circuit court will appoint a fiduciary commissioner or fiduciary supervisor to oversee the investment of the net settlement proceeds. An initial report and an annual report of the funds and any income must be filed with the fiduciary commissioner or supervisor. (W. Va. Code § 44-10-14(d)(5) and (h)(3)). When the fiduciary commissioner or supervisor is appointed, the clerk shall provide a certified copy of the order of appointment to the official. A court may, however, waive the referral to a fiduciary commissioner or supervisor and the reporting requirements if the net settlement proceeds are less than $25,000. (W. Va. Code § 44-10-14(h)(4)).

In addition to appointing a fiduciary commissioner or supervisor, the court has the discretion to appoint a conservator to actually invest and manage

the net settlement proceeds. (W. Va. Code § 44-10-14(h)). Although this subsection refers to the appointment of a "conservator," this term is used in a generic sense. It should not be confused with a conservator who manages the financial affairs of a mentally incompetent adult. The court has the discretion to appoint any appropriate person to serve as a minor's conservator. (W. Va. Code § 44-10-3). A person who has previously been appointed as a minor's guardian is considered an appropriate person to serve as a conservator.

The court has the discretion to require a conservator or other person who is managing net settlement proceeds on behalf of a minor to post a bond to protect the funds. (W. Va. Code § 44-10-14(h)(2)). The circuit court has the discretion to determine both the amount of the bond and the method of securing the bond. Any required bond will be posted with the circuit clerk. If a bond is required, the clerk should follow the standard procedures for processing a bond in a civil case. (See Section 8.4).

14.3 GUARDIANSHIPS OR CONSERVATORSHIPS

West Virginia circuit courts have jurisdiction over guardianship and conservatorship proceedings of protected persons. (W. Va. Code § 44A-1-2). "Protected persons" are defined as persons who have a mental impairment and because of the mental impairment need assistance to manage their personal affairs or their financial affairs. (W. Va. Code § 44A-1-4). If a court finds that a person is a "missing person," the court may also appoint a guardian or conservator to handle the person's affairs. (W. Va. Code § 44A-1-4(11)). A guardian is appointed to handle the personal affairs of a protected person, and a conservator is appointed to manage the financial affairs of a protected person. It should be noted that a protected person is only subject to the Mental Health Registry as a result of a guardianship or conservatorship proceeding if the person's mental impairment arises from either mental illness or insanity. The mental hygiene commissioner who presides over the hearing has the authority to make such a finding and also has the duty to report any such persons who should be properly included in the state Mental Health Registry. (See Section 3.12 for more information about the state Mental Health Registry).

A circuit court judge may preside over guardianship and conservatorship proceedings. Additionally, the circuit court may appoint a mental hygiene commissioner to conduct the hearings. (W. Va. Code § 44A-2-9). When a court enters an order that appoints an individual as a mental hygiene commissioner or that reflects that an individual is no longer serving in that capacity, the clerk should provide a copy of the order to the Mental Health Division of the Administrative Office.

When a mental hygiene commissioner has been appointed to conduct guardianship and conservatorship cases, he or she will prepare a recommended order to the circuit court. In turn, the circuit court has the discretion to enter the recommended order or to enter an alternate order. It is important for the clerk to timely provide a copy of the order to the mental hygiene commissioner who conducted the final hearing. This is especially important when a mental hygiene commissioner would need to submit the person's information to the Mental Health Registry because this information must be submitted within three days of the entry of the order.

14.3.1 Confidential Files

Guardianship and conservatorship files are confidential files and are not open to the public while the case is pending and after it is closed. (W. Va. Code § 44A-2-5). Although the file is closed, the protected person and his or her attorney may inspect or copy the file. Another party may file a written petition requesting that he or she be allowed to inspect or copy the file. The court or mental hygiene commissioner has the authority to allow a party to the case to inspect or copy the file if the party has shown good cause. (W. Va. Code § 44A-2-5).

It should be noted that the sheriff may review a guardianship or conservatorship file if the respondent has applied for a license to carry a concealed deadly weapon. (W. Va. Code § 61-7-4(a)(11); See Section 4.11). In addition, the circuit clerk is required to provide a notice of appointment to the county clerk whenever a guardian or conservator is appointed. The notice includes the protected person's name, the case name and number and the name of any guardian or conservator. (W. Va. Code § 44A-2-13(d); See Section 14.3.11).

Additionally, guardianship and conservatorship hearings are not open to the public. However, people who are entitled to notice of a hearing may attend the hearing. Persons or entities who wish to attend a hearing may request permission from the circuit court or the mental hygiene commissioner. (W. Va. Code § 44A-2-9(b)).

14.3.2 Forms for Guardianship and Conservatorship Proceedings

The West Virginia Supreme Court has adopted a set of forms for guardianship or conservatorship cases. These forms include: an original petition, an evaluation report, form orders and reports for guardians or conservators. The circuit clerk should maintain copies of these forms and distribute them to the public upon request,

subject to allowable charges for copying. The circuit clerk should also have available copies of required educational material for guardians or conservators for distribution to people who request this information, subject to allowable charges. (See Section 14.3.8).

14.3.3 Petitioners

The court may appoint any adult to serve as the guardian or conservator of a protected person. (W. Va. Code § 44A-1-8(a)). To be appointed as a guardian or conservator, a person must show that he or she has the background and ability to serve as a guardian or conservator and that he or she is capable of providing an active or suitable guardianship or conservatorship for the protected person. (*Id.*). A court may appoint one person to serve as the guardian and appoint another person to serve as the conservator. The court may also appoint coguardians or coconservators. (W. Va. Code § 44A-1-8(b)). A person is ineligible to serve as a guardian or conservator, however, if he or she is employed by or affiliated with a public agency, entity or facility that provides substantial personal services or financial assistance to a protected person unless the provisions set forth in West Virginia Code § 44A-1-15 are satisfied. In general, this statute requires a person who is employed by an agency that provides services to the protected person to obtain court approval to serve as a guardian or conservator and to be employed by the agency.

Certain entities may also serve as guardians or conservators. A nonprofit corporation may serve as a protected person's guardian or conservator so long as the corporation is properly licensed and does not provide substantial services or financial assistance to the alleged protected person. (W. Va. Code § 44A-1-8(b) and (c)). A bank or trust company may be appointed to serve as a conservator. (W. Va. Code § 44A-1-8(f)). Additionally, a division or agency of the West Virginia Department of Health and Human Resources may be appointed to serve as a guardian, but only if no individual or nonprofit agency is willing to serve. (W. Va. Code § 44A-1-8(g)). As a matter of last resort, a sheriff may be appointed to serve as the guardian or conservator of a protected person. (W. Va. Code § 44A-1-8(h)).

14.3.4 Types of Guardianships or Conservatorships

As noted previously, a guardian manages the personal affairs of a protected person, and a conservator manages the financial affairs

of a protected person. Dependent upon the specific circumstances in a case, a petitioner may seek appointment to serve in either or both capacities. Additionally, guardianships or conservatorships may be limited by the terms of the order of appointment, and are referred to as "limited" guardianships and conservatorships. For example, a guardianship may be limited to making health care decisions. (W. Va. Code §§ 44A-2-11 and -12). A petitioner may also seek appointment as a temporary guardian or conservator, if warranted by the circumstances. (W. Va. Code § 44A-2-14). The form petition will indicate the type of guardianship or conservatorship that the petitioner is seeking.

14.3.5 Protected Persons

Any adult may be subject to these proceedings because he or she has a mental impairment that causes an inability to meet the requirements for his or her personal care or health or cannot manage financial affairs without assistance. Although the statutory definition of a protected person refers to an "adult," a petition may be filed when an alleged protected person is at least seventeen years and ten months old. (W. Va. Code § 44A-2-1a). In the case of such a minor, a mental hygiene commissioner must not conduct the hearing until 14 days before the protected person's eighteenth birthday. If a circuit judge conducts the hearing, he or she must not conduct it until seven days before the protected person's eighteenth birthday.

As noted previously, a person meets the statutory definition of a "protected person" if a court finds that a person is a "missing person." (W. Va. Code § 44A-1-4(13)). A "missing person" is an adult whose whereabouts are unknown and who has been absent from his or her usual residence for a period of six months. (W. Va. Code § 44A-1-6(11)).

14.3.6 Initiation of a Guardianship or Conservatorship Case

14.3.6.1 Initial Documents

Guardianship or conservatorship cases are initiated by the filing of a verified petition. West Virginia Code § 44A-2-2 lists the mandatory contents of a petition. Information about the alleged protected person's nearest relatives is important because these persons must be served with a copy of the petition and notice of hearing. Upon the filing of a petition, the circuit clerk assigns a case number in the following form: **16-G-**###.

In addition to the petition, an evaluation report from a licensed physician or psychologist that indicates that an alleged protected person needs a guardian or a conservator must be filed. Alternatively, a petition may be filed with a motion to file a petition without an evaluation report. In turn, the judicial officer will enter an order that either grants or denies the motion.

When a petitioner seeks to be appointed as a conservator, a petitioner must file a statement that lists the financial resources of a protected person. This statement is typically filed when the petition is filed or shortly thereafter.

Initially, a petitioner is responsible for the filing fee, for service fees and other allowable fees, unless a fee waiver has been approved. However, the petitioner, upon appointment as guardian or conservator, may be reimbursed from the protected person's estate, should there be sufficient funds. (W. Va. Code § 44A-2-1(c)).

West Virginia Code § 44A-2-1 indicates that the circuit clerk is not required to a petition for filing that is not "administratively complete." This term is not defined more specifically in Chapter 44A of the West Virginia Code. The clerk's review should be limited, however, to issues such as whether all required forms have been submitted, whether the petition has been signed and other issues of this nature.

When a petition is filed, the circuit clerk should forward a copy of the petition to mental hygiene commissioner or circuit judge or otherwise notify them of the filing. Upon receipt, the judicial officer must appoint counsel for the alleged protected person. (W. Va. Code § 44A-2-7). Additionally, the judicial officer should promptly set a hearing time because a hearing must be conducted within sixty days from the filing of the petition. (W. Va. Code § 44A-2-6(a)).

14.3.6.2 Notice of Hearing

Once the judicial officer sets a hearing date, a notice of hearing must be prepared. Although local practice may vary, the circuit clerk often has the responsibility to prepare the notice. The notice of hearing must contain the statement mandated by West Virginia Code § 44A-2-6(d) that informs the alleged protected person of his or her rights. For this

reason, the form notice adopted by the Supreme Court should always be used.

14.3.6.3 Service of Protected Person and Nearest Relatives

The petitioner has the responsibility to arrange for service of the protected person and on his or her nearest relatives. The petition, notice of hearing, and evaluation report must be personally served on the alleged protected person at least 14 days before the hearing. (W. Va. Code § 44A-2-6(b)). If the alleged protected person is a "missing person," the documents are served by certified mail at the person's last known address.

Additionally, the petitioner must serve the petition and notice of hearing by certified mail, return receipt requested, on all persons whose names and addresses appear in the petition, provided they are seven years or older, at least 14 days before the hearing. (W. Va. Code § 44A-2-6(c)). The certified mail return receipts must be filed with the circuit clerk either on or before the date of the hearing. The statute expressly indicates that the petitioner has the responsibility to obtain proper service and to file proof of service with the circuit clerk before the hearing.

14.3.7 Bonds

The presiding judicial officer has the discretion to require an appointed guardian to post a bond. (W. Va. Code § 44A-1-9(a)). However, a person or entity appointed as a conservator (except a qualified banking institution) is statutorily required to post a bond. (W. Va. Code § 44A-1-9(c)). If the sheriff or a representative or the department of health and human resources is appointed as a guardian or conservator, no bond is required.

If a surety executes a bond for an appointed guardian or conservator, that surety has consented to the court's jurisdiction and has also consented to being named as a party respondent to an action pertaining to the fiduciary duties of the guardian or conservator. (W. Va. Code § 44A-1-9(e)(2)). Therefore, a surety that is not a resident of West Virginia, including a company from another state, may serve as a surety for a bond that must be posted in a West Virginia guardianship or conservatorship case.

When a judicial officer requires a bond, he or she has the discretion to set the amount and form of any bond. Any bond must be posted

in the circuit clerk's office. When a bond is posted in a guardianship or conservatorship case, the clerk follows the procedures for processing a bond in a civil case. (See Section 8.4). West Virginia Code § 44A-2-13(a) requires a guardian or conservator to post a required bond before an order of appointment can be issued.

Once bond has been posted in the clerk's office, the presiding circuit judge may determine whether the posted bond is sufficient. (W. Va. Code § 44A-1-9(a) and (b)). When reviewing a bond, the judge has the discretion to modify the requirements of the bond. After the review, the judge should indicate the approval or modification of any bond by written order. West Virginia Code § 44A-1-9(c) expressly states that proof of bonding must be submitted to the court within 30 days after the entry of the order regarding bond. Therefore, when bond is increased or additional security is required, proof of bonding must be submitted to the court within 30 days after any order is entered.

14.3.8 Mandatory Education

Any person appointed to serve as a guardian or conservator must complete the mandatory education within 30 days of appointment, unless the court waives this requirement because the petitioner has completed the training during the last three years. (W. Va. Code § 44A-1-10(a)). The West Virginia Supreme Court is responsible for coordinating the educational program and updating training materials. (W. Va. Code § 44A-1-10(c)). The educational material is available on the West Virginia Supreme Court website in an online tutorial. (http://www.courtswv.gov/public-resources/guardian-conservator/index.html). Printed versions of the educational material have been provided to the mental hygiene commissioners for distribution. The educational material may also be obtained from the circuit clerk, subject to allowable charges for copying. Once the guardian or conservator reviews the educational material, he or she must file an affidavit in the circuit clerk's office indicating the completion of this requirement. It is typical for an appointed guardian or conservator to come to the clerk's office immediately after the hearing to complete this affidavit.

14.3.9 Oath of Appointment

If a person is appointed as a guardian or conservator, he or she must swear or affirm to faithfully perform his or her duties. (W. Va. Code § 44A-2-13(a)(1)). A completed form titled "Oath of Appointment" must be filed with the circuit clerk. Although local

practice may vary, the circuit clerk may administer this oath. It is common for an appointed guardian or conservator to come to the clerk's office immediately after a hearing so that he or she can complete the oath.

14.3.10 Orders

After the judicial officer conducts the hearing, he or she may enter an order of appointment provided that the following requirements have been met:

a. A completed "Oath of Appointment" has been filed;
b. Any required bond has been posted; and
c. An affidavit certifying completion of educational requirements has been filed. (W. Va. Code § 44A-2-13(a)).

West Virginia Code § 44A-2-13a requires orders to be entered by the circuit court within 14 days after the hearing if the mental hygiene commissioner presided and within seven days after the hearing if the circuit judge presided. Although this requirement is imposed on circuit courts, the circuit clerk should process any orders expeditiously so that orders are available to interested parties as soon as possible.

An appointed guardian or conservator has the duty to provide a copy of the order of appointment to the protected person and to all persons notified of the petition within 14 days following the entry of an order of appointment. (W. Va. Code § 44A-2-13(c)). He or she is further required to provide a statement concerning appellate or modification rights to the same individuals. This required statement is included on the form order of appointment, so a guardian or conservator is not required to send a separate notice.

14.3.11 Notice of Appointment

Within ten days following the entry of an order that appoints a guardian or conservator, the circuit clerk is required to send a notice of appointment to the county clerk. (W. Va. Code § 44A-2-13(d)). The notice should list the name of the protected person, the case name and number, and the names of the guardian or conservator. The statute indicates that the notice will be recorded with deeds or powers of attorney. It is likely that the notices will be recorded with the powers of attorney.

14.3.12 Reports of Guardians and Conservators

14.3.12.1 Reports of Guardian

Once a guardian has been appointed, he or she is required to file reports that includes information about the protected person, such as his or her mental, physical or social condition. The reports must be filed with the circuit clerk. If a fiduciary commissioner or other person has been appointed by the court to monitor the guardianship, then the reports must also be provided to them. (W. Va. Code § 44a-3-11(a)).

A guardian must file a report within six months of appointment. (W. Va. Code § 44A-3-11(a)). Reports must also be filed by December 31 of each year thereafter. These deadlines are applicable to all active guardianships, whether or not they were initiated before the 2009 amendments to West Virginia Code § 44A-3-11 that altered filing timeframes. The filing date for reports was a procedural change so it is applied retroactively.

Additionally, a guardian must file a report upon his or her resignation or removal. If the appointment of a guardian is terminated, the court may find that it is not necessary to file a report. Otherwise, a report must be filed upon termination. Finally, a court may also require a guardian to file reports more frequently than on an annual basis.

14.3.12.2 Reports of Conservator

A conservator is required to file an initial inventory and subsequent accountings with the circuit clerk. The conservator must also file the report with a fiduciary commissioner or other person who has been appointed to supervise the conservatorship.

A conservator must file an inventory of a protected person's real and personal property within 60 days of appointment. (W. Va. Code § 44A-3-8(a)). The conservator must provide a copy of the inventory to the persons or entities who received notice of the original hearing. (W. Va. Code § 44A-3-8(b)).

A conservator must also file a verified accounting within six months of appointment. (W. Va. Code § 44A-3-11(a)).

Accountings must also be filed by December 31 of each year thereafter. These deadlines are applicable to all active conservatorships, whether or not they were initiated before the 2009 amendment to West Virginia Code § 44A-3-11 that altered filing timeframes. The filing date for the reports was a procedural change so it is applied retroactively.

Additionally, a conservator must file an accounting upon resignation or removal. An accounting must also be filed upon the termination of the conservatorship, unless all persons entitled to the estate agree. The court has the discretion to modify or waive the time periods for filing an accounting. (W. Va. Code § 44A-3-10(a)).

14.3.12.3 Monitoring by Circuit Clerks

The circuit clerk is required to notify the court if the required reports, inventory and accountings are not filed. (W. Va. Code § 44A-3-11(b)). A clerk must, therefore, develop a procedure to monitor whether the required reports and accountings have been filed. The clerk also must notify the court if the reports are administratively incomplete. Although the term "administratively incomplete" is not expressly defined, it would include situations in which the report or accounting is not signed as required, pages are missing or there is a request for compensation but no itemized statement supporting such a request. Although a circuit clerk is required to monitor whether reports and accountings are filed, he or she has no duty to verify the accuracy of the reports or accountings or otherwise monitor the contents of the report.

14.3.12.4 Review by Fiduciary Commissioner or Other Person Appointed by the Court

When appropriate, a court may appoint a fiduciary commissioner to provide oversight of any guardianship or conservatorship. (W. Va. Code §§ 44A-2-1(f); 44A-3-11(b)). A court may also appoint another person to oversee the guardianship and conservatorship and report to the court as set forth by the order of appointment. (*Id.*). The amendments to Chapter 44A do not set forth specific qualifications for an "other person" who is appointed to oversee guardianships or conservatorships. However, such a person will be paid by the Supreme Court from the Enforcement of Guardianship and Conservatorship Act

Fund. It is likely, therefore, that such a person will be an employee of the West Virginia Supreme Court and will provide services either statewide or in multiple counties.

A fiduciary commissioner or other person appointed by the court has a duty to review reports and accountings filed by guardians and conservators. As required by statute, they are to review reports and accountings semi-annually. (W. Va. Code §§ 44A-1-9(f); 44A-3-11(b)). If reports or accountings are not filed or there are questions or discrepancies that arise, the person appointed to oversee the guardianship and conservatorship may initiate further proceedings by seeking relief from the court or mental hygiene commissioner.

With regard to accountings, a fiduciary commissioner is required to serve a copy of the proposed accounting by U.S. mail on the protected person, all entities and persons who received notice of the petition or other individuals or entities who are interested in the accounting. (W. Va. Code § 44A-3-11(c)(2)). The fiduciary commissioner may not publish a notice of the accounting. Any person or entity served with a copy of the accounting may file exceptions to it with the fiduciary commissioner. Any party who is aggrieved by a settlement or decision of the fiduciary commissioner may appeal the decision to circuit court within four months of the decision. (W. Va. Code § 44A-3-11(c)(5)).

14.3.13 Subsequent Proceedings

Once a guardian or conservator has been appointed, circumstances may require the court to conduct subsequent proceedings. These proceedings could include the transfer of a case to another county or state, the termination, revocation or modification of appointment of a guardian or conservator, the sale of a protected person's real estate, or estate planning. Subsequent proceedings may be conducted by either the court or a mental hygiene commissioner. (W. Va. Code § 44A-2-15).

Unless the court otherwise orders, a notice of hearing, the petition and other relevant documents must be personally served on the protected person and must be mailed to an appointed counsel of record for a protected person. (W. Va. Code § 44A-2-15). It must also be mailed to any individual who would be entitled to notice of an original petition and to any facility that is responsible for the care of a protected person. If the person filing the petition is not the

guardian or conservator, the notice, petition and other relevant documents must be served on the guardian or conservator. Service must be completed at least 14 days before the hearing. (W. Va. Code § 44A-2-15(b)). The certified mail receipts must be filed either on or before the date of the hearing.

Subsequent petitions and pleadings should be maintained in the original case file. When a subsequent petition is filed, a clerk must notify the judge or mental hygiene commissioner of the filing of the petition. In matters involving subsequent petitions, the clerk must process notices and orders in the same manner as an original petition.

14.3.14 Termination of Appointment of a Guardian or Conservator

If a protected person dies, the guardianship or conservatorship should be terminated. To seek termination, the guardian or conservator must file a certified death certificate with the circuit clerk. (W. Va. Code § 44A-4-1(b)). A petition for termination should also be filed.

The appointment of a guardian or conservator is terminated upon the death, resignation or removal of the guardian or conservator. (W. Va. Code § 44A-4-1(a)). Also, the appointment is terminated when the case is transferred to another jurisdiction. If a conservatorship had been established in the case of a missing person, the conservatorship is terminated upon the location of the missing person, the production of a certified death certificate, or when the person can be presumed dead pursuant to West Virginia Code §§ 44-9-1, *et seq.*

When a guardianship or conservatorship is terminated, the court or mental hygiene commissioner must prepare a termination order. The termination order should discharge any bond that had been posted.

14.3.15 Transfer of Guardianship Proceedings

14.3.15.1 Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act

In 2009, the Legislature enacted the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act, West Virginia Code §§ 44C-1-1, *et seq.* This uniform act establishes factors for jurisdiction for guardianship and

conservatorship proceedings and provides guidance for determining jurisdiction between states. It also establishes a procedure for transferring a guardianship or conservatorship proceeding from one state to another. Further, it establishes a procedure for the registration of guardianship or conservatorship proceedings issued in another state. Article One titled "General Provisions," Article Three titled "Transfer of Guardianship or Conservatorship," and Article Four titled "Registration and Recognition of Orders From Other States" apply to guardianships and conservatorships without regard to when the case was initiated. (W. Va. Code § 44C-5-3). Article Two titled "Jurisdiction" applies to cases initiated on or after July 11, 2009.

14.3.15.2 Transfers Between Jurisdictions

Article 3 of Chapter 44C establishes procedures for the transfer of a guardianship or conservatorship between states. Pursuant to West Virginia Code § 44C-1-3, a West Virginia court may treat a foreign country as if it were a state. Therefore, a guardianship or conservatorship could be transferred from a foreign country. Regarding intrastate transfers, West Virginia Code § 44A-1-7(a) indicates that a guardianship or conservatorship may be transferred from one county in West Virginia to another county by a circuit court with jurisdiction ordering the transfer, based upon a finding that the interests of the protected person will be best served by the transfer to the other circuit court. If a guardianship or conservatorship case is transferred from one West Virginia circuit court to another it is **not** necessary to follow the procedures established by West Virginia Code §§ 44C-3-1, *et seq.*

14.3.15.3 Transfer to Another Jurisdiction

To transfer a guardianship or conservatorship to another state, a guardian or conservator must file a petition requesting a transfer in the court that originally established the guardianship or conservatorship. (W. Va. Code § 44C-3-1(a)). Notice of a transfer petition must be given to all persons who would be entitled to notice of a petition for the original appointment of a guardian or conservator. (W. Va. Code § 44C-3-1(b)). The code section does not specify the type of notice required. It can be concluded, however, that the protected person should be personally served and other persons entitled to notice should be served by certified mail.

The petitioner has the responsibility of filing a copy of the certified mail receipts with the circuit clerk. (See W. Va. Code § 44A-2-15).

Upon receipt of a petition to transfer, a court may conduct a hearing to determine whether the guardianship or conservatorship may be transferred. (W. Va. Code § 44C-3-1(c)). If the court determines that the petition to transfer should be granted, it will enter a provisional order that allows the transfer.

To complete the transfer, the petitioner must file a petition in the new jurisdiction and must include a certified copy of the provisional transfer order from the original jurisdiction. (W. Va. Code § 44C-3-2(a)). When the clerk receives a petition to transfer from another jurisdiction, he or she must open a new case file and assign a case number as follows: **16-G-###**. The clerk should also collect a filing fee. (W. Va. Code § 44A-2-1(c)). As with the filing of a new guardianship or conservatorship case, the clerk should follow local practice to notify the court or mental hygiene commissioner of the transfer petition. When a petition to transfer to West Virginia is filed, notice of the petition must be given to all persons who would be entitled to notice in both the original state and in West Virginia. Notice shall be given by the methods established by West Virginia law. Therefore, the protected person must be personally served and all other persons entitled to notice must be served by certified mail. The petitioner has the responsibility to file proof of service with the circuit clerk. (See W. Va. Code § 44A-2-6). Provided that the required statutory conditions have been met, the court may provisionally accept the transfer.

Once the new jurisdiction has provisionally accepted the transfer, the petitioner must file the provisional order in the court of original jurisdiction. The court will then enter a final order confirming the transfer and terminating the guardianship, provided that all the documents required to terminate a guardianship have been filed. In West Virginia, a guardian or conservator would be required to file a final report or accounting unless the court excuses the guardian from doing so or the persons entitled to the protected person's estate waive their right to an accounting. (W. Va. Code § 44A-3-11(a)(5)).

Upon receipt of a final order from the original jurisdiction that confirms the transfer and terminates the guardianship or conservatorship in the original state, the new jurisdiction must enter a final order that accepts the proceeding and appoints the guardian and conservator to that office in its jurisdiction. (W. Va. Code § 44C-3-2(e)). Within 90 days, the court that accepts the transfer of a guardianship and conservatorship must determine whether the terms of the guardianship or conservatorship must be modified so that its terms conform to state law in the new jurisdiction.

14.3.15.4 Notice of Appointment

When a guardianship case has been transferred, the guardian or conservator is appointed to that office in the new jurisdiction. (W. Va. Code § 44C-3-2(e)). Therefore, the circuit clerk should file a notice of appointment with the county clerk within ten days of the entry of the final order that accepts the transfer of the case. The notice should include the name of the protected person, the case name and number and the names of any guardian or conservator. (W. Va. Code § 44A-2-13(d)). (See Section 14.3.11).

14.3.16 Registration of Foreign Guardianship and Protective Orders

Article 4 of Chapter 44C establishes a procedure for the registration of guardianship or protective orders entered by the court of another state. For the purposes of this article, the term protective order is defined as "an order appointing a conservator or other order related to the management of an adult's property." (W. Va. Code § 44C-1-2(12)).

To register a guardianship order from another state, a guardianship proceeding may not be pending in West Virginia. Before presenting a foreign order for registry, a guardian must first give notice to the appointing court of his or her intent to register the order in another state. (W. Va. Code § 44C-4-1). Although this code section refers to giving notice to the appointing court, it is silent as to the requirements for such a notice. However, a copy of such notice should be filed when the certified order is presented for registry.

West Virginia Code § 44C-4-1 indicates that a foreign guardianship order may be registered in any appropriate county. It is likely, therefore, that such an order would be registered in a county where

a "protected person" is receiving health care or other similar services.

To register a foreign protective order, a conservatorship proceeding may not be pending in West Virginia. (W. Va. Code § 44C-4-2). A conservator must first give notice to the appointing court that he or she will be registering the protective order in West Virginia. However, the code section is silent as to the specific requirements of such a notice. A copy of the notice should, however, be filed when the certified order is presented for registry. In addition, proof of any bond should be filed. A protective order may be filed in any county in which property of the protected person is located.

When a foreign guardianship or protective order is registered, the statute indicates that it is filed in the same manner as a foreign judgment. (W. Va. Code §§ 44C-4-1 and -2). Therefore, the clerk should collect the filing fee for guardianship or conservatorship cases. (W. Va. Code §§ 55-14-5; 44A-2-1(c)). When a foreign judgment for money is filed, the clerk is required to mail a notice to a judgment debtor. (W. Va. Code § 55-14-3). This procedure, however, does not appear to apply to a foreign guardianship or protective order. Rather, notice is provided to interested persons before the order is registered. Until the relevant statutes are amended, the clerk should not be required to provide notice to interested persons of the registry of a foreign guardianship or protective order.

When a foreign judgment order is filed, the clerk should assign the following type of case number: **16-G-###**. The case file should be considered a closed file, as are other guardianship and conservatorship proceedings.

When a foreign guardianship or protective order is registered in West Virginia, the circuit clerk should provide a notice of appointment to the county clerk. (W. Va. Code § 44A-2-13(d)). The notice should include the case name and number, the name of the protected person and the names of any guardian or conservator.

Chapter 15

APPEALS

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15.1 OVERVIEW

This section outlines procedures for appeals from lower courts or administrative agencies to circuit court. These cases include appeals from magistrate courts, municipal courts, county commissions, family courts and administrative agencies. Additionally, this section summarizes the procedures for an appeal of a circuit court or family court case to the West Virginia Supreme Court, as well as circuit clerk responsibilities with regard to certified questions.

15.2 MAGISTRATE COURT APPEALS TO CIRCUIT COURT

In both civil and criminal cases, a party may appeal a judgment entered in magistrate court. If the magistrate court conducted a jury trial, the circuit judge reviews the record of the magistrate case in the appeal. If the magistrate court conducted a bench trial, the circuit judge conducts a *de novo* bench trial. (W. Va. Code §§ 50-5-12(b) and -13(b)).

In both civil and criminal cases, a party may file a petition for appeal within 20 days of a final judgment order or the denial of a motion for post-judgment relief (*e.g.* denial of a motion for a new trial or motion to set aside a judgment). When a party files an appeal, the circuit clerk assigns

a misdemeanor appeal number "16-M-AP-###" in criminal cases and a civil appeal number "16-C-AP-###" in civil cases.

If a party fails to file an appeal within 20 days of the final judgment, a circuit court has the discretion to allow a party to file an appeal, provided that this request is made within 90 days of the final judgment. (W. Va. Code §§ 50-5-12(a); 50-5-13(a)). To request permission to file an appeal after the 20-day period has elapsed, a party must file a petition or other type of written request with the circuit clerk. The clerk should assign the case a petition number: 16-P-###. If the underlying magistrate court case is a civil case, the magistrate clerk collects a filing fee, unless the party has an approved fee waiver. If the underlying case is a criminal case, no filing fee is collected. Once the circuit court determines whether or not a party may file a late appeal, the miscellaneous petition file is closed.

If the circuit court allows a party to file a late appeal, the magistrate court clerk should process the magistrate case file in the same manner as other magistrate appeals. (See Sections 15.2.1 and 15.2.2). In a civil case, the magistrate court clerk collects the circuit court filing fee and bond for the appeal, provided the party does not have a fee waiver. In a criminal case, the magistrate court clerk collects any appearance bond required by the magistrate. The magistrate court clerk then forwards the file, along with any fee and bond collected, to the circuit clerk. Upon receipt, the circuit clerk should open a new magistrate appeal file with the appropriate case number for a civil or criminal appeal from magistrate court.

15.2.1 Appeals from Magistrate Court – Civil Cases

When a party appeals a civil case, the appellant files a completed magistrate form titled "Civil Appeal Bond" with the magistrate court clerk. The magistrate court clerk is responsible for collecting the circuit court filing fee and the appeal bond set by the magistrate. However, no fee or bond is required if a fee waiver has been approved by the magistrate court. (W. Va. Code § 50-5-12(a)). If the magistrate court conducted a jury trial, the party appealing the judgment must also file a petition for appeal and must designate portions of the record relied upon in the appeal. (W. Va. Code § 50-5-12(c)). When all necessary documents are filed and payments are collected, the magistrate clerk forwards the circuit court filing fee, any bond, and the magistrate court file to the circuit clerk's office. As noted previously, the circuit clerk assigns the case file a civil appeal number: 16-C-AP-###. At the conclusion of the appeal, the court should, by order, direct the clerk as to whom should receive the bond or any portion thereof.

15.2.2 Appeals from Magistrate Court – Criminal Cases

In misdemeanor appeals, the magistrate may require the defendant to post an appearance bond, either by recognizance or cash. The amount of the bond may not exceed the maximum amount of any fine that could be imposed for the offense. The magistrate court clerk collects the bond and forwards the file and any bond collected to the circuit clerk. The circuit clerk assigns the case file a misdemeanor appeal number: 16-M-AP-###.

If the defendant fails to appear as required, the bond may be forfeited. If the bond is forfeited, the LET bond forfeiture fee must be disbursed to the State Treasurer. Additionally, the clerk forwards five percent (5%) of the amount recovered on a recognizance bond to the prosecuting attorney. (W. Va. Code § 59-2-17(c)). The remainder of the bond, less any other deductions, should be disbursed to the Auditor. (W. Va. Code § 30-29-4(c)); (See Section 8.3).

If the magistrate court conducted a jury trial, the defendant must also file a petition for appeal setting forth the grounds for the appeal and designating the relevant portions of the record or transcript. In response, the prosecuting attorney may designate additional portions of the record. (W. Va. Code § 50-5-13(c)).

Costs assessed in circuit court upon conviction in circuit court include misdemeanor conviction costs and all costs intended as reimbursement to magistrate court for expenses incurred in handling the case originally, including the magistrate court fee. (See Chapter 5). CVC, RJA, LET, CSF and LCF assessments would not be assessed twice. (See Circuit Court Criminal Cost Schedule).

15.2.3 Removals from Magistrate Court - Civil Cases

Civil cases filed in magistrate court may be removed to circuit court at any time before trial, subject to the following conditions. If the amount in controversy is less than $2,500.00, the case may be removed to circuit court upon the agreement of the parties and payment of the circuit court filing fee. If the amount in controversy is $2,500.00 or more, any party may remove the case to circuit court upon payment of the circuit court filing fee. (W. Va. Code § 50-4-8). In either situation, the magistrate court clerk collects the circuit court filing fee and forwards the fee and the magistrate court file to the circuit clerk. Upon receipt, the circuit clerk assigns the case a general civil case number: 16-C-###.

15.2.4 Transfer from Magistrate Courts - Criminal Cases

Because circuit courts have concurrent jurisdiction with magistrate courts over misdemeanor cases, the parties may agree to proceed with a misdemeanor case in circuit court. (W. Va. Code § 51-2-2). If the misdemeanor case is filed in circuit court and is not joined with felony charges, the circuit clerk should assign the case file a misdemeanor designation: 16-M-##.

15.3 MUNICIPAL COURT APPEALS TO CIRCUIT COURT

A defendant may appeal a municipal court conviction to the circuit court. (W. Va. Code § 8-34-1(a)). If the municipal court conducted a jury trial, the circuit court judge reviews the municipal court record. If the municipal court conducted a bench trial, the circuit court judge conducts a *de novo* bench trial. (W. Va. Code § 8-34-1(e) and (f)).

A party may file a petition for appeal within 20 days of a final judgment order or the denial of a motion for post-judgment relief (*e.g.* denial of a motion for a new trial). (W. Va. Code § 8-34-1(d)). When a party files an appeal, the circuit clerk assigns a misdemeanor appeal number: 16-M-AP-##.

If a party fails to file an appeal within 20 days of the final judgment, a circuit court has the discretion to allow a party to file an appeal, provided that this request is made within 90 days of the final judgment. (W. Va. Code § 8-34-1(d)). To request permission to file an appeal after the 20 day period has elapsed, a party must file a petition or other written request with the circuit clerk. The clerk should assign the case a petition number: 16-P-###. Since any appeal to circuit court brought pursuant to West Virginia Code § 8-34-1 would arise from a criminal, not civil case, the clerk would not collect a filing fee when a party files a petition to appeal after the 20 day period has expired. Once the circuit court determines whether a party may file a late appeal, the miscellaneous petition file is closed.

If the circuit court allows a party to file a late appeal, the municipal court clerk should process the file in the same manner as other municipal court appeals and forward the file to the circuit clerk. Upon receipt, the circuit clerk should open a new circuit court file and assign a misdemeanor appeal number: 16-M-AP-##.

If the defendant fails to appear as required, the bond may be forfeited. If the bond is forfeited, the LET fee of $2.00 must be disbursed to the State Treasurer. Additionally, the clerk forwards five percent (5%) of any amount recovered on a recognizance bond to the prosecuting attorney. (W. Va. Code § 59-2-17(c)). The remainder of the bond, less other

deductions, should be disbursed to the Auditor. (W. Va. Code § 30-29-4(c)); (See Section 8.3).

If the municipal court conducted a jury trial, the defendant must also file a petition for appeal setting forth the grounds for the appeal and designating the relevant portions of the record or transcript. In response, the municipal prosecutor may designate additional portions of the record. (W. Va. Code § 8-34-1(f)).

Costs assessed in circuit court upon conviction in circuit court include municipal conviction costs and all costs intended as reimbursement to municipal court for expenses incurred in handling the case originally. The municipal court disposition sheet will indicate the assessment for these types of costs. CVC, RJA, LET, CSF and LCF assessments would not be assessed twice. (See Chapter 5).

15.4 APPEALS FROM COUNTY COMMISSIONS

There are several different methods and procedures for appealing a final order of a county commission. If a party appeals a ruling that relates to the elective share of a spouse, the procedures for the appeal are governed by West Virginia Code § 58-3-1a. According to this section, an appeal must be filed within four months of the final order. The party must file a request for appeal with the clerk of the county commission who, in turn, collects the circuit court filing fee. The county clerk must forward the filing fee, the final order, and the request for appeal to the circuit clerk. A party appealing pursuant to West Virginia Code § 58-3-1a, is entitled to such an appeal as of right and to a trial *de novo*. No bond may be collected from the party.

The remaining sections of Article 3 of Chapter 58 govern appeals in the following types of cases: a) contested elections tried by a county commission; b) contempt; c) the establishment of a roadway, bridge, public landing, ferry or mill; d) probate of a will; e) the appointment and qualification of a personal representative; and f) any other types of cases specifically allowed by statute. (W. Va. Code §§ 58-3-1 and -2). In these cases, a party must file the following documents: a) a petition for appeal with the circuit court; b) the order that is subject to appeal; and c) a record of the proceedings. (W. Va. Code § 58-3-4). An appeal may only proceed and be docketed if the circuit court enters an order that allows the case to proceed. (W. Va. Code § 58-3-5). This initial circuit court order may require a party to post a bond. Although the statute does not expressly indicate whether the county clerk or circuit clerk collects the filing fee, the circuit clerk would ordinarily collect the filing fee when a party presents the petition for appeal and the record from the county commission. Since the circuit court has the authority to either grant or refuse the petition for

appeal by entering a preliminary order, the clerk should provide the petition for appeal to the presiding circuit judge when it is filed.

As noted previously, a circuit court has the authority to either grant or refuse the petition for appeal. If a judge refuses the appeals, a literal reading of West Virginia Code § 58-3-6 indicates that the petition for appeal would not be filed in circuit court if it were refused. However, it is most likely that the circuit court judge would enter an order refusing the appeal. It would be necessary, therefore, to open a case file and assign a civil action number so that there would be a record of the refusal in circuit court.

In addition to the methods noted above, a party may file an appeal from an order of the county commission when it is acting in its capacity as an appraisal review board or the board of equalization and review. (W. Va. Code §§ 11-1A-18 and 11-3-25). In such cases, the party must file the record of the proceedings before the county commission and the clerk should collect a civil case filing fee.

Unless a party is appealing from a decision of the county commission in its capacity as the board of equalization and review, the clerk assigns a general civil case number to the appeal: 16-C-###. In an appeal from a tax assessment issued by the board of equalization and review, the clerk assigns an administrative agency appeal number "AA."

15.5 ADMINISTRATIVE AGENCY APPEALS

15.5.1 Types of Administrative Agency Appeals

State administrative agencies, such as the Division of Motor Vehicles or the Human Rights Commission, conduct administrative hearings and issue final orders or decisions. In general, parties to an administrative agency case may file an appeal in circuit court to request review of a final order issued by an administrative agency.

One method for seeking review of an administrative agency decision is to file a petition for appeal under the State Administrative Procedures Act (APA). (W. Va. Code §§ 29A-5-1, *et seq.*). In some cases, a specific statute will establish a procedure for seeking judicial review from an adverse ruling of an administrative agency. (See, e.g., W. Va. Code § 9-2-13). If there is no established appeal procedure, a party could seek redress by filing a petition for a writ of certiorari. (Syl. Pt. 2, *State ex rel. Ginsberg v. Watt*, 285 S.E.2d 367 (W. Va. 1981)). Whether a case is initiated under the APA or not will affect the type of documents that must be filed with the initial petition for appeal.

The following *agencies* are **not** subject to APA:

a) the board of probation and parole;
b) the public service commission;
c) the board of public works; and
d) the secondary schools activities commission.

(W. Va. Code § 29A-1-3(b)).

Additionally, West Virginia Code § 29A-1-3(c) exempts the following *types of cases* from the APA:

a) the conduct of inmates or other persons admitted to public institutions;
b) open seasons for wildlife and other issues decided by the Division of National Resources;
c) the conduct of persons in the military; and
d) the receipt of public assistance.

Further, Article 5 of Chapter 29A, the article governing contested cases, does not apply to:

a) the workers' compensation fund;
b) the bureau of employment programs (BEP);
c) the state tax commissioner;
d) the state road commissioner; and
e) the teachers' retirement board.

(W. Va. Code § 29A-5-5).

One example of an administrative agency appeal that is not subject to the APA is an unemployment compensation appeal. (W. Va. Code § 21A-7-17). Other types of administrative appeals which are not subject to the APA involve grievances addressing the receipt of public assistance or grievances involving Medicaid providers and the DHHR. (W. Va. Code § 9-2-13).

15.5.2 Application of Rules of Procedure for Administrative Appeals and Rules of Civil Procedure

If the APA applies to an administrative agency appeal, then the Rules of Procedure for Administrative Appeals apply to the administrative agency appeal. (Rule 1(a), RPAA). Conversely, if the APA does not apply to the administrative agency appeal, the Rules of Civil Procedure apply. (Rules 71b, 81(a)(1), RCP).

There are some procedural differences to a case when the Rules of Procedure for Administrative Appeals apply, most notably regarding

filing requirements. If a case is subject to the APA and the RPAA, the petitioner must file a docketing statement, proof of service and a designation of the record when the case is filed. (Rules 2(d)-(f) and 4, RPAA). If a case is **not** subject to the APA, then the petitioner is not required to file these documents. For example, a claimant who is appealing a denial of a claim for unemployment compensation would not be required to file a docketing statement, proof of service and a designation of the record at the time of the filing of the petition. If the clerk has a question regarding the application of the RPAA to filing requirements in specific cases, he or she should consult with the presiding circuit judge.

When an administrative agency appeal is subject to the APA and the RPAA, the clerk should **not** issue a summons. (Rule 2(e), RPAA). If a party is filing an administrative appeal pursuant to a statute other than the APA, the clerk should issue a summons. (Rule 81(a)(1), RCP). If a party files a petition for an extraordinary writ to challenge an administrative agency decision, a summons should be issued because extraordinary writs are subject to the West Virginia Rules of Civil Procedure. (Rule 71b, RCP).

If an administrative agency appeal is subject to the APA, the party filing the appeal is responsible for serving the petition on the state agency and other parties by registered or certified mail. (Rule 2(e), RPAA). When the appeal is filed in circuit court, the petitioner is required to file a certificate of service with the petition and docketing statement. Although a certificate of service must be filed with the petition, the party should file a return receipt or other delivery confirmation promptly after he or she has received it.

When an administrative agency appeal is filed, the clerk should assign a number in the following form: 16-AA-###. Unless required by a specific statute governing a particular agency, a party is not required to post a bond to appeal to circuit court. (W. Va. Code § 29A-5-4(b); Rule 2(h), RPAA). After the petition has been filed, the clerk should maintain any subsequently filed documents, including the record from the administrative agency, in the same manner as pleadings in other cases.

15.5.3 Filing Fees for Administrative Agency Appeals

To initiate an administrative agency appeal, a party must pay the general filing fee for a civil case. (W. Va. Code § 59-1-11). When a state agency files an administrative agency appeal, the state agency is also liable for a filing fee. (W. Va. Code §§ 59-1-11 and -15). To collect the filling fee, the clerk should provide the agency

with an invoice to present to the auditor. In turn, the auditor will forward the payment to the circuit clerk.

Although the filing fee will not be tendered when a state agency files an administrative appeal, it is best practice for the clerk to file the case when case-initiating documents are presented, not when the filing fee from the auditor is received. (See *W. Va. DHHR v. Hess*, 432 S.E.2d 27 (W. Va. 1993)). Under *Hess*, the clerk has a duty to accept a case for filing when documents are presented if the statute of limitations could expire before the fee is received. To ensure compliance with *Hess*, the clerk should simply accept a case for filing when the state agency presents the documents for filing.

15.5.4 DHHR Administrative Agency Appeals Involving Minors

In administrative agency appeals from the DHHR Board of Review or the Bureau of Medical Services, cases and records involving a minor are to be filed and maintained under seal. (W. Va. Code § 9-2-13(f)). When a party submits this type of appeal involving a minor, the clerk must automatically maintain the file as a confidential or sealed file because the applicable statute provides that this file must be "sealed" by operation of law. (See Section 4.8.22).

15.5.5 Supreme Court Appeals in Administrative Agency Cases

After the circuit court rules on the administrative appeal, any party may appeal to the Supreme Court. (W. Va. Code § 29A-6-1). As with an appeal, the original Notice of Appeal is filed in the Office of the Clerk of the Supreme Court of Appeals. To appeal to the Supreme Court, the party must follow the procedures set forth in Rule 5 of the Rules of Appellate Procedure unless a specific statute governing the agency indicates otherwise. (See Section 15.9).

15.6 FAMILY COURT APPEALS

15.6.1 Overview

A party may appeal a final judgment of a family court to circuit court. (W. Va. Code § 51-2A-11(a); Rule 28(a), RFCP). The circuit court ruling on the family court appeal may then be appealed to the Supreme Court. (Rule 34(b), RFCP; W. Va. Code § 51-2A-15(b)). A party may also appeal a final order of the family court directly to

the Supreme Court, but only if both parties waive their right to appeal to circuit court. (W. Va. Code § 51-2A-15(a); Rule 26(a), RFCP). To file a direct appeal to the Supreme Court, the parties must follow specific filing requirements discussed in detail below.

15.6.2 Family Court Appeals to Circuit Court

A party may appeal a final family court order to circuit court by filing a petition for appeal in the office of the circuit clerk. (W. Va. Code § 51-2A-11(a)). A temporary order may not be appealed. In family court appeals to circuit court, the circuit clerk does not collect an additional filing fee.

To appeal a family court order to circuit court, a party must file the petition for appeal within 30 days of the entry of the order. (W. Va. Code § 51-2A-11(a); Rule 28(a), RFCP). A party must file an original and two copies of the petition, and may also file a supporting memorandum of law. (Rule 28(b) and (c), RFCP). The clerk must note the date of filing on the original petition and each copy. (Rule 28(b), RFCP). Local practice will determine who should receive a copy of the petition for appeal.

In response to a petition for appeal, the other party may file a response or a cross-petition for appeal. (Rule 28(e) and (f), RFCP). Either of these documents must be filed within 15 days after the petition for appeal was filed. (W. Va. Code § 51-2A-11(d) and (e); Rule 28(e) and (f), RFCP). A supporting memorandum of law may also be filed. As with the original petition, the other party must submit the original and two copies of the responsive documents.

If a party files a cross-petition for appeal, the opposing party (initial appellant) has 15 days in which to file a response. Although the initial appellant may file a response to a cross-petition, this party may not file a reply to a response to the original petition for appeal. (Rule 28(g), RFCP).

Once the pleadings associated with the appeal have been filed, the circuit court reviews the record of the family court proceedings. (W. Va. Code § 51-2A-14(b)). The family court record includes the recording of the proceedings, the pleadings, exhibits and any other filed documents. (W. Va. Code § 51-2A-8(d)). The circuit clerk does not have any statutorily mandated responsibility to prepare the record when a party appeals to circuit court.

After reviewing the pleadings, the circuit court may refuse to consider the petition for appeal. (W. Va. Code § 51-2A-14(a); Rule

31(b), RFCP). Alternatively, the circuit court may grant the petition for appeal and address the issues raised by the parties. (Rule 31(c) RFCP; W. Va. Code § 51-2A-14(a)). If the circuit court grants the petition for appeal, the court must schedule oral argument on the appeal if either party requests a hearing or in the discretion of the court. (W. Va. Code § 51-2A-14(d); Rule 31(c), RFCP). After considering the appeal, the circuit court may affirm or reverse the family court. The circuit court may also remand the case to the family court. (W. Va. Code § 51-2A-14(a) and (b); Rule 35(a), RFCP). In the case of a remand, the circuit court must enter temporary orders governing issues such as child support, spousal support or custodial responsibility.

The West Virginia Supreme Court has adopted forms that may be used to file a petition for appeal of a family court order. The circuit clerk should provide these forms to litigants upon request, subject to allowable charges for family court forms.

15.6.3 Appeals from Circuit Court to the Supreme Court

After a circuit court rules on a petition for appeal from family court, a party may file a petition for appeal to the Supreme Court. (W. Va. Code § 51-2A-15; Rule 34(b), RFCP). A party must file the Notice of Appeal according to the requirements established by Rule 5 of the Rules of Appellate Procedure. (Rule 34(b), RFCP). (See Section 15.9).

15.6.4 Transfer to Supreme Court

West Virginia Code § 51-2A-14(f) imposes a duty on circuit judges to rule on family court appeals within 60 days after the final appellate pleading may be filed. If a circuit judge does not do so or does not enter an order stating just cause for the delay in the entry of the order, the circuit clerk must provide the parties with written notice that the appeal will be transferred to the West Virginia Supreme Court within 14 days.

To prevent the transfer, **both** parties must file objections to the transfer. If only one party objects to the transfer, the clerk must transmit the file to the Supreme Court. (W. Va. Code § 51-2A-14(f)). Because the circuit clerk must monitor the status of a family court appeal, the circuit clerk should establish a system that identifies whether the circuit court has entered an order in each family court appeal. This system is similar to the system for monitoring cases for dismissal due to failure to serve or failure to prosecute.

If both parties do not object to the transfer, the circuit clerk must transmit the file and the record to the Supreme Court by certified mail at the end of the 14-day period established by West Virginia Code § 51-2A-14(f). Before sending the record to the Supreme Court, the clerk must arrange the file neatly so that the documents appear in the chronological order in which they were filed. The clerk must forward the original petition, one copy of the petition, a copy of the docket entries and the entire record to the Supreme Court Clerk by certified mail. The clerk must retain one copy of the petition for appeal in the circuit court file. Upon receipt of the foregoing documents, the appeal will be docketed in the Clerk's Office of the Supreme Court of Appeals. Prior to issuing a scheduling order, the Court may, in its discretion, direct that the appeal be summarily remanded to the circuit court with directions to issue a decision in the case. (Rule 13(c), RAP).

15.6.5 Family Court Appeal -- Filed Directly with Supreme Court

A petition for appeal may be filed directly with the Supreme Court by use of the following procedure. **Both parties** must file a notice of intent to appeal to the Supreme Court and a written waiver of their right to appeal to the circuit court. These documents may be filed jointly or separately, and are filed with the circuit clerk where the final order of the family court was entered. The notice of intent to appeal and waiver shall be in the same or substantially similar form as that contained in Appendix A of the Rules of Practice and Procedure for Family Court. (W. Va. Code § 51-2A-15(a); Rule 13(b), RAP). These documents must be filed in the circuit clerk's office within 14 days after the entry of a family court order. (Rule 13(b), RAP). If only one party files a notice of intent to appeal and a waiver, the notice of intent to appeal is treated as a petition for appeal to the circuit court.

When the notice of intent to appeal and waiver are filed, the clerk must note the date of filing on these documents. If both parties file the notice and waiver the circuit clerk must include these documents with the record when the file is transmitted to the Supreme Court Clerk.

As soon as practicable after receipt of the foregoing documents from the circuit clerk, the appeal will be docketed, the Court will issue a scheduling order, and the case will proceed in accordance with Rules of Appellate Procedure 5 through 10. (Rule 13(b)(2), RAP).

15.7 APPEALS IN DOMESTIC VIOLENCE PROTECTIVE ORDER PROCEEDINGS

Note: For a complete discussion of domestic violence protective order proceedings, see Section 12.20.

15.7.1 Appeals from Magistrate Court

To initiate protective order proceedings and to obtain an emergency protective order, a party must file a domestic violence petition in magistrate court. If a magistrate **denies** the petition, a party may appeal to family court by filing an appeal in magistrate court within five days after the petition was denied. (W. Va. Code § 48-27-510(a); Rule 18(a), RDVCP). When a party appeals the denial of a petition, the magistrate court clerk should forward the file to the circuit clerk. Upon receipt, the circuit clerk assigns the case a number in the following form: 16-DV-AP-###. No appeal bond is required. Fees and costs, if any, are taxed by the circuit clerk at the conclusion of the proceedings.

15.7.2 Appeal of Family Court Order

Either party may appeal to circuit court after a final domestic violence hearing is conducted by the family court. (W. Va. Code § 48-27-510(b); Rule 19(a), RDVCP). To do so, the party must file a petition for appeal in the office of the circuit clerk within 10 days after the entry of the family court order granting or denying the final protective order. No appeal bond is required. (W. Va. Code § 48-27-510(b); Rule 19(c), RDVCP). As soon as possible, the circuit clerk must notify the presiding circuit judge that a domestic violence appeal has been filed because the circuit judge must hear the appeal within 10 days of the filing of the petition. (W. Va. Code § 48-27-510(c); Rule 19(a), RDVCP).

15.7.3 Appeal to Supreme Court

After a circuit court addresses the petition for appeal, an aggrieved party may seek additional appellate relief in the Supreme Court. To do so, the party must file a Notice of Appeal in the Supreme Court within 30 days of entry of the judgment that is being appealed. (Rule 5, RAP). The procedures for such an appeal will be the same as civil and criminal appeals. (See Section 15.9).

15.8 APPEALS IN PERSONAL SAFETY ORDER PROCEEDINGS

15.8.1 Overview

A personal safety order provides protection to a person who has been subject to a sexual offense, stalking or repeated credible threats of bodily injury by a person who is not a family or household member. (Personal Safety Act, W. Va. Code §§ 53-8-1 *et seq.*). Petitions seeking protection under this act are filed and heard in magistrate court.

Venue is proper in the following counties: a) the county where the alleged actions occurred; b) where the respondent lives; or c) where the petitioner lives either temporarily or permanently. (W. Va. Code § 53-8-1(f)).

Once the magistrate has granted or denied relief, an aggrieved party may appeal to the circuit court. Specifically, if the magistrate denies a temporary personal safety order, the petitioner may appeal to the circuit court. If the magistrate grants a temporary personal safety order, the case is scheduled for a final hearing in magistrate court. Upon the final hearing, the magistrate may either grant or deny a final personal safety order, from which either party may appeal to the circuit court.

15.8.2 Appeal Process

An appeal petition is to be filed with the magistrate court clerk. No fees may be charged for filing or other services in a personal safety order case until the case is finally resolved. (W. Va. Code § 53-8-13(a)). Therefore, the magistrate clerk will not collect an appeal filing fee to be forwarded to the circuit clerk. There is no bond required for an appeal. When an appeal petition is filed, the magistrate clerk is to transmit the case file and appeal petition to the circuit clerk. The magistrate court order remains in effect until superseded by an order of the circuit court. (W. Va. Code § 53-8-9(c)(1)).

Under the magistrate court case-numbering system, personal safety order cases are designated by an "S" (16-S-1, 16-S-2, etc.). Consistent with other types of magistrate court appeals, the circuit clerk is to assign an appeal number with the "S-AP" designation (16-S-AP-001, 16-S-AP-002, etc.).

15.8.3 Confidentiality

All documents contained in the court file, including all documents forwarded from magistrate court, are confidential and not available for public inspection. The file is available for inspection and copying by the parties, attorneys of record, guardians *ad litem*, law enforcement, and persons authorized by a party in writing. (W. Va. Code § 53-8-2(a)). In the latter situation, require that the written authorization be notarized to assure its validity. Appeals in these cases are to be heard *de novo* in the circuit court. (W. Va. Code § 53-8-9(b)). Appeal hearings, like the court files, are closed to the general public, but persons whom the court determines to have a legitimate interest in the proceedings may attend. (W. Va. Code § 53-8-2(b)(1)).

A person (e.g. non-party) without access to a court file may file a written motion in the case seeking access. Upon a showing of good cause, the court may enter an order permitting the person to examine documents in the file, and may also authorize obtaining copies of the documents. (W. Va. Code § 53-8-2(c)). Any order permitting such access is required to specify the particular documents that may be examined and, if authorized, copied; as well as the arrangements under which the examination and copying may take place. Therefore, before permitting access the clerk should carefully review the order to ascertain whether it gives access to the entire file or only specified documents, whether copies may be made, and any other arrangements or limitations imposed by the court.

Records in the court file of a personal safety order case may not be obtained by bare subpoena.[1] If both the petitioner and respondent waive their right to confidentiality, court records specified in the written waivers (of both) may be obtained by subpoena. Alternatively, the relevant statutory language provides that a person seeking to subpoena documents from one of these court files may do so "only by court order and upon full compliance with statutory and case law requirements." (W. Va. Code § 53-8-2(d)). This "full compliance" language presumably refers to providing, at the least, notice to the parties and an opportunity to be heard by the court prior to any order authorizing the release of confidential records. In any event, if a subpoena is served upon a clerk seeking records from one of these confidential files, and it is not accompanied by

[1] This discussion about the requirements for a subpoena to be in compliance with state law relates only to **state** court subpoenas. A subpoena issued by a federal court would not be subject to these state law requirements. See Chapter 4, Section 4.7.

either written waivers of confidentiality signed by both parties or a court order authorizing release of the records, the clerk should first notify the person who had the subpoena issued and inform them of the deficiency. If the person declines to rectify the deficiency and insists that the clerk should comply with the bare subpoena, the clerk should immediately inform the circuit court judge who is hearing (or heard) the case appeal. If that judge is not available, the clerk should inform the chief circuit judge.

15.8.4 Orders

Upon hearing the appeal, the circuit court will: 1) deny the personal safety order (and thereby terminate any such order issued by magistrate court); or 2) grant the personal safety order (with or without modification to any order issued by magistrate court).

If the circuit court denies the personal safety order, *and the magistrate court below had also denied the order*, only the parties would need to be served with copies of the circuit court's denial order. Any party not served with the order at the conclusion of the hearing would be served by the clerk via first class mail to their last known address. If the circuit court denies the personal safety order, *thereby terminating a prior safety order issued by magistrate court*, any party not served with the order at the conclusion of the hearing would be served by the clerk via first class mail to their last known address. Also, because a personal safety order was previously issued by magistrate court, any law enforcement agency to which a copy of the previous order was transmitted (and any other person or agency that was provided a copy of the order by magistrate court) will need to be provided a copy of the circuit court order terminating the prior order. Service by the clerk upon law enforcement agencies can be either by fax or first class mail. Service on other persons or agencies who received the earlier order should be by first class mail.

If the circuit court grants the personal safety order on appeal, *regardless of whether prior safety order was earlier issued by magistrate court,* any parties present at the conclusion of the hearing should be served with the order by the court. Otherwise, the court should direct the clerk as to how service should be accomplished. The relevant statutory provision states that parties may be served by first class mail or by other means at the discretion of the court. (W. Va. Code § 53-8-7(e)(1)). Sending a copy of the order by first class mail to the **petitioner** is certainly sufficient (unless the court directs another type of service). But for due process reasons, particularly since there are criminal penalties

for violations of personal safety orders, ideally the first attempt at service upon the respondent should be by law enforcement. All law enforcement agencies are required to serve personal safety orders, without delay. (W. Va. Code § 53-8-14). In addition to service upon parties, appropriate law enforcement agencies should be faxed or mailed copies of personal safety orders, and likewise the order should be transmitted to any other person or agency the court directs. (W. Va. Code § 53-8-7(e)(1)). Copies of these orders are not transmitted to the Domestic Violence Registry or any similar type of database. (W. Va. Code § 53-8-16).

The procedure for assessment of fees and costs in personal safety order cases is set out in West Virginia Code § 53-8-13. Specific details may be found in Chapter 5 (Fees and Costs) in Section 5.4.13.

15.8.5 Sealed Records

If sensitive information has been disclosed in a hearing, pleading, or other document, the court may order the information sealed in the court file. (W. Va. Code § 53-8-2(a)). Additionally, either party to a personal safety order case may file a written request with the clerk seeking to seal all court records relating to the case. (W. Va. Code § 53-8-17(b)). A request for sealing may not be filed until two years after the entry of the final order, or the denial or dismissal of the petition. (W. Va. Code § 53-8-17(c)). When a request for sealing is filed, the clerk should inform the court that handled the case. The court will need to schedule a hearing, with notice to the parties. Following the hearing the court may order the sealing of the court records (including any index or docket entries) if good cause is found, and no personal safety orders are still in effect and no criminal charges against the respondent are pending. (W. Va. Code § 53-8-17(d)). If the court orders the sealing of the case records, within 60 days of the entry of the order each custodian of court records must advise the court and parties in writing of compliance with the order. (W. Va. Code § 53-8-17(f)).[2]

Under this statute, "court records" are defined as the official record of the court "that the clerk of a court or other court personnel keeps." (W. Va. Code § 53-8-17(a)(2)). However, there is some ambiguity created elsewhere in the statute since "sealing" is defined to also include records maintained by any law enforcement

[2] Regarding records held by the clerk, sealing means "removing to a separate secure area to which persons who do not have a legitimate reason for access are denied access." (W. Va. Code § 53-8-17(a)(4)(A)).

agency. (W. Va. Code § 53-8-17(a)(4)(C)).[3] Any order to seal should therefore be carefully reviewed by the clerk to see if it should be forwarded to any law enforcement agencies.

Other ambiguities in the statute are found in Subsection (e), which regulates who may get access to sealed records, and how such access is obtained. (W. Va. Code § 53-8-17(e)). Subsection (e)(1) states that the following persons can, "for a legitimate reason," access a sealed record:

A) A law-enforcement officer;
B) An attorney who represents or has represented the petitioner or the respondent in a proceeding;
C) A prosecuting attorney; or
D) An employee of the Department of Health and Human Resources. (W. Va. Code § 53-8-17(e)(1)).

Any other person (apparently even a party not represented by an attorney) must subpoena the records or file a motion and demonstrate to the court why access to the sealed file should be granted. (W. Va. Code § 53-8-17(e)(2)).

Subsection (e) creates a number of uncertainties for clerks who must control access to sealed files. Sealing a court file is generally understood to mean that no person is entitled to access without a court order. Yet, Subsection (e)(1) appears to authorize certain persons access as long as they provide the clerk with a "legitimate reason." Even more perplexing, under this provision a DHHR employee would have access to a sealed file, but before it was sealed would have to file a motion and obtain a court order to examine a confidential (but unsealed) file. (See W. Va. Code § 53-8-2). There are other inconsistencies and ambiguities in the provisions relating to access to sealed files. Accordingly, whenever *anyone* seeks access to a sealed court file in a personal safety order case, the clerk should first obtain guidance from the court as to whether a court order is required. If an order is deemed unnecessary in a particular instance, the clerk should obtain written approval from the court that can be placed in the file.

[3] "Sealing" is also defined to require removal of any electronic information about a proceeding on any *public* website maintained by the magistrate court, circuit court, or Supreme Court of Appeals. (W. Va. Code § 53-8-17(a)(4)(B)). However, the confidentiality provisions of Section 53-8-2 already preclude the possibility that any court website would have any case information posted on a public-accessible site.

15.9 APPEALS TO WEST VIRGINIA SUPREME COURT -- CIVIL AND CRIMINAL

To appeal to the Supreme Court, a party to a final judgment of a circuit court must file the Notice of Appeal in the Office of the Clerk of the Supreme Court of Appeals within 30 days of entry of the judgment that is being appealed. (W. Va. Code § 58-5-1; Rule 5, RAP). Final orders include orders that rule on post-judgment motions. Even if a case is not completed, a party may also file a Notice of Appeal in civil cases involving multiple claims or parties if the circuit court expressly determines "that there is no just reason for delay and upon an express direction for the entry of judgment." (Rule 54(b), RCP). For example, a party may file an appeal of an order that grants summary judgment to one party even though the remaining parties will proceed to trial, provided that the order contains the finding previously noted. Additionally, orders in abuse and neglect cases may be appealed before a case is final. Further, juvenile transfer orders are another type of order that may be appealed before a final order is entered.

15.9.1 Stay of Judgment, Appeal Bond

In a criminal or civil case, an appellant may move for a stay of a circuit court judgment by filing a written motion in circuit court. (Rule 28(a), RAP). If the circuit court does not grant a stay or the relief is unacceptable, a party may then request a stay from the Supreme Court of Appeals. (Rule 28(b), RAP). When the Supreme Court of Appeals rules on a motion for a stay, a copy of the order will be provided to the circuit clerk and should be maintained in the circuit court case file.

In civil cases, the circuit court or the Supreme Court of Appeals may condition a stay upon the posting of a bond in an amount determined by the discretion of the court. If so, the provisions of West Virginia Code § 58-5-14 apply. If the court requires a party to post a bond, the party posts the bond with the circuit clerk, whether or not the Supreme Court or circuit court ordered the posting of the bond. Any bond shall be filed within such time as provided by the circuit court or the Supreme Court of Appeals. (Rule 28(c), RAP). If a party does not do so, the appeal may be dismissed. For this reason, the circuit clerk must immediately report the posting of a bond to the Supreme Court Clerk. Typically, this notice is provided by sending a copy of the bond to the Supreme Court Clerk.

15.9.2 Post-Conviction Bail

In criminal cases, a defendant may seek post-conviction bail in circuit or magistrate court unless the offense is punishable by life imprisonment, the offense involved a deadly weapon, or the offense involved violence toward another person. (W. Va. Code § 62-1C-1; Rule 34, RAP). If a lower court does not grant post-conviction bail, the defendant may seek review by filing a summary petition directly with the Supreme Court Clerk, not the circuit clerk. (W. Va. Code § 62-1C-1(c)).

Under Rule of Appellate Procedure 34, the petitioner shall file with the Clerk of the Supreme Court of Appeals an original and 10 copies of the petition for bail, and the petition may not exceed 15 pages. (See Rule 38, RAP). The petitioner shall serve a copy of the petition upon the prosecuting attorney. (See Rule 37, RAP). The prosecuting attorney shall file an original and 10 copies of the response and the response may not exceed 15 pages. The response shall be filed within 14 days of the filing of the petition with the Clerk of the Supreme Court of Appeals.

The Supreme Court of Appeals may either grant or deny the petition. If granted, the Supreme Court of Appeals may direct the circuit court to set bail. The circuit clerk should maintain orders from the Supreme Court regarding post-conviction bail in the circuit court file.

15.9.3 Initiation of Appeals

Under the Rules of Appellate Procedure, there are two distinct milestones for initiating an appeal: a) docketing the appeal and b) perfecting the appeal. Under Rule of Appellate Procedure 5(b), an appeal is docketed by the timely and proper filing of an original and five copies of a Notice of Appeal within 30 days of the entry of the judgment that is being appealed. The Notice of Appeal is filed with the Supreme Court Clerk.

For most civil appeals, a statutory docket fee must be submitted to the Supreme Court Clerk with the Notice of Appeal. (W. Va. Code § 59-1-13). The docket fee will not be required if the appellant was granted a fee waiver earlier in the case by the lower court, and a copy of the waiver is submitted with the Notice of Appeal. The statutory docket fee does not apply to criminal cases, appeals from the Worker's Compensation Board of Review, or original jurisdiction actions.

The Notice of Appeal contains basic information about the case and informs the Supreme Court of Appeals and the other parties about the nature of the issues on appeal and whether transcripts have been requested. The party appealing shall serve copies of the Notice of Appeal, including the attachments, on all parties to the case, on the circuit clerk, and on each court reporter from whom a transcript is requested. The circuit clerk's office should maintain its copy of the Notice of Appeal in the lower court case file.

The Supreme Court of Appeals may extend the period for filing a Notice of Appeal. The party seeking an extension must file a motion in the Supreme Court pursuant to Rule of Appellate Procedure 39(b), and show good cause for the extension. (See Rules 5(b) and 11(b), RAP).

When the Notice of Appeal is timely and properly filed, the Clerk of the Supreme Court of Appeals will assign a case number and the case will be docketed. Shortly thereafter, the Court will issue a scheduling order that will contain all the necessary deadlines that apply to the next stage: perfecting the appeal. (See Rule 5(d), RAP). An appeal is perfected according to the date set forth in the scheduling order. This date normally coincides with the statutory deadline for appeals (four months in most cases), unless the deadline has been extended by order. An appeal is perfected when the petitioner files a brief with the Clerk of the Supreme Court of Appeals and an appendix record, unless the Court has entered an order that allows the petitioner to proceed on a designated record.

15.9.4 Transcripts

After the final order is entered, the petitioner should determine whether a transcript will assist the Supreme Court of Appeals in deciding the issues on appeal. The petitioner is responsible for making the initial determination as to whether a written transcript of a proceeding in the lower tribunal will assist the Court in deciding the issues on appeal. The petitioner is encouraged to confer with the other parties to the case, however, because all the parties to the case should agree on the contents of the record on appeal. (See Rule 9(a), RAP).

Before completing the formal transcript request, the petitioner must handle two preliminary matters. First, the petitioner must contact each court reporter who will be involved in preparing any portion of the transcript and obtain an estimate of the length of the transcript. The petitioner should be prepared to give each court reporter the date of the proceeding and the type of proceeding. If the petitioner

does not already have this information, it is useful to review the circuit clerk's docket sheet and/or the actual case file. The official court reporter may be able to assist. Second, the requesting party must make appropriate financial arrangements with each court reporter either by: a) immediate payment in full or by another payment method that is acceptable to the court reporter; or b) filing, in appropriate cases, an affidavit of indigency or order appointing counsel. (See Rule 9(b), RAP).

If the petitioner believes that a transcript is necessary for a fair consideration of the assignments of error in the appeal, the petitioner must complete the appellate transcript request form and make appropriate financial arrangements with each court reporter from whom a transcript is requested. If multiple court reporters are involved, a separate form must be completed for each court reporter. Because each transcript request must be carefully evaluated, it is important to provide complete and accurate information. It is the duty of the petitioner to complete the transcript request, not the court reporter. A request that simply lists "all transcripts" is not acceptable. Failure to make timely and satisfactory arrangements for transcript production, including necessary financial arrangements, may result in denial of motions for extension of the appeal period, or may result in dismissal of the appeal for failure to prosecute.

If the respondent, upon review of the petitioner's Notice of Appeal, is of the opinion that the transcripts listed by the petitioner, if any, are not adequate to permit the Court to fairly consider the assignments of error presented, the respondent shall, within fourteen days of receipt of the Notice of Appeal, request that additional transcripts be prepared by completing and filing an appellate transcript request form contained in Appendix A of the Rules of Appellate Procedure. The respondent's transcript request shall be served upon opposing counsel, on each court reporter from whom a transcript is requested, and be filed with the Clerk of the Supreme Court of Appeals. As appropriate, the Court will issue an amended scheduling order. The respondent shall provide a statement of costs to the Court if transcripts produced are included in a supplemental appendix under Rule of Appellate Procedure 7. (Rule 9(d). RAP).

The court reporter must provide the transcript within the deadline set forth in the scheduling order. A completed transcript is typically due 45 days from the court reporter's receipt of the appellate transcript request. The court reporter should promptly notify the Clerk of the Supreme Court of Appeals of any problem with the

appellate transcript request or the financial arrangements. When the transcript is completed, the court reporter must provide a copy to the requesting party, file the original transcript in the circuit clerk's office, and provide a completed certification – setting forth the date the transcript was filed – to the Clerk of the Supreme Court of Appeals. (See Rule 9(f), RAP).

Special requirements for appeals in abuse & neglect cases.

Appeals from a circuit court judgment in an abuse and neglect case are expedited, and the Court prefers those appeals to proceed initially without a transcript of testimony. (See Rule 11(b) and 11(i), RAP). Accordingly, transcript requests may not be approved, or may be deferred. If a transcript of a particular proceeding is necessary for the Court to review a disputed evidentiary or testimonial issue, then the petitioner must indicate why the transcript is necessary as part of the notice of appeal. Transcripts in abuse and neglect cases under Rule of Appellate Procedure 11 are not prepared for purposes of appeal unless specifically approved in advance by the Supreme Court of Appeals. (See Rule 9(f), RAP).

15.9.5 Scheduling Order

As soon as practicable after a timely and complete Notice of Appeal is filed, the Supreme Court of Appeals will enter a scheduling order. (Rule 5(d), RAP). The scheduling order will be mailed to counsel of record for all parties to the appeal. A scheduling order will contain a variety of deadlines and set forth the following:

Case caption and docket number: The scheduling order will contain a case caption and docket number. Both the caption and the docket number must be used on all subsequent filings in the case.

Type of record on appeal, associated deadlines: The scheduling order will state whether the record on appeal must be prepared using the appendix method set forth in Rule of Appellate Procedure 7 or the designated record method set forth in Rule of Appellate Procedure 8. (See Section 15.9.6). If the petitioner is directed to proceed using the appendix method, the scheduling order will contain a deadline for filing motions to proceed on the original record under Rule of Appellate Procedure 6(d). Typically, this deadline will be approximately two weeks from the date of the scheduling order.

Transcript deadline: If the petitioner requested a transcript, the scheduling order will set forth whether a transcript will be prepared and the extent of the transcript, along with a deadline for the court reporter to file the transcript in the circuit clerk's office and mail the transcript to the petitioner. If the court reporter is granted an extension of time to prepare the transcript subsequent to the scheduling order, then an amended scheduling order will be entered and all necessary deadlines will be adjusted.

Deadline for petitioner's list of record materials: If the petitioner is required to proceed using the appendix method, the scheduling order will set forth the deadline for the petitioner to prepare a list of the parts of the record that the petitioner intends to include in the record on appeal, and serve the list on the respondent under Rule of Appellate Procedure 7(e). Typically, this deadline will be approximately 10 days from the day the transcript is due. The deadline only applies if the parties do not agree on the contents of the record.

Deadline for perfecting the appeal: The deadline for perfecting the appeal will be set forth in the scheduling order. By default, all appeals are due within the time period set forth by statute. The statutory deadline is four months for civil and criminal appeals, and 60 days for appeals in abuse and neglect cases. Certain appeals such as direct appeals from a final order of the West Virginia Human Rights Commission and appeals from a final order of the Circuit Court of Kanawha County ruling on an appeal from the Human Rights Commission are due within 30 days. (See Rule 15, RAP). The deadline for perfecting the appeal may be extended by the circuit court or the Supreme Court of Appeals in certain circumstances. (See Rules 5(f) and 11(f), RAP). In order to permit adequate time to perfect the appeal following the completion of transcripts, the Court may extend the time period for appeal in the scheduling order. In most cases, the deadline for perfecting an appeal will be approximately 45 days from the day the transcript is due.

Briefing deadlines: The scheduling order will contain deadlines for filing the respondent's brief and the reply brief. In most cases, the deadline for filing the respondent's brief will be 45 days from the day the petitioner's brief is due. The reply brief, if one is deemed necessary by the petitioner, will typically be due 20 days from the day the respondent's brief is due.

Mature date: An appeal becomes "mature" for consideration by the Court after the reply brief is filed, or the time for filing the reply has

passed. Mature cases will be distributed to the Court for consideration in due course. Counsel will be informed in writing of any decision in the case.

15.9.6 Assembling the Record on Appeal

The Rules set forth two methods of providing the record on appeal: the appendix method set forth in Rule of Appellate Procedure 7 and the designated record set forth in Rule of Appellate Procedure 8. Under the appendix method, the record on appeal is assembled and filed by the petitioner. The circuit clerk does **not** have the duty to prepare the appendix if this method is used. The record must be prepared by the petitioner unless the Supreme Court grants permission by order to proceed on a designated record. (See Rule 6(d), RAP).

Under the designated record method, the record on appeal is assembled and filed by the circuit clerk using items designated by the parties. No matter which method is used, the parties share a joint responsibility for determining the contents of the record on appeal.

15.9.6.1 Appendix Method

Under Rule of Appellate Procedure 7, the petitioner is responsible for preparing and filing the appendix. The parties are encouraged to confer and agree on the contents of the appendix. If agreement is not reached, however, the parties must follow the process set forth in Rule of Appellate Procedure 7(e) and 7(f). The scheduling order will contain a date that the petitioner must serve on the respondent a list of all the parts of the record that the petitioner intends to include in the appendix, along with a list of any issues intended to be presented to the Court that were not included in the Notice of Appeal. Within 10 days, the respondent may serve on the petitioner a list of additional parts of the record to which it wishes to direct the Court's attention.

The petitioner must include the parts of the record listed by the respondent in the appendix. The parties must not list unnecessary parts of the record for inclusion in the appendix, because the entire record is always available to the Supreme Court of Appeals. If the petitioner considers parts of the record listed to be unnecessary, the petitioner may advise the respondent, who must then advance the cost of including those parts. The cost of the appendix is a

taxable cost. If any party causes unnecessary parts of the record to be included in the appendix, the Supreme Court of Appeals may impose the cost of those parts on that party. (See Rule 7(f), RAP).

The following points clarify common questions about the format of an appendix.

Copying: Parties are encouraged to use double-sided copies in order to reduce the size of the appendix. If necessary, the copies may be reduced slightly in size in order to accommodate the page numbers.

Page numbers: Each page of an appendix must be clearly numbered in a sequential fashion so that each page can be located by reference to a single page number. Page numbers must be legible and distinct from any other numbers that appear on the documents. Handwritten page numbers are permitted, but printed or stamped numbers are often more legible and are preferred. If necessary, individual volumes of an appendix may be numbered separately. If a volume is comprised solely of official transcripts in their entirety, additional page numbering is not required.

Cover page: Each volume of an appendix must contain a cover page with the case caption, the title and the volume number of the appendix, if applicable. If the case is confidential, the upper portion of the cover page must prominently state "Confidential Case." The lower portion of the cover page of each volume of the appendix must contain the name, address, telephone number, e-mail address, and West Virginia Bar Identification number of counsel. If the party is not represented by counsel, then the lower portion of the cover page must contain the party's address and telephone number.

Binding: Appendices must be fastened on the left side in a manner that will keep all the pages securely together and permit the Supreme Court of Appeals to easily disassemble for copying.

Certifications: Immediately following the cover page, each volume of an appendix must contain a certification page signed by counsel or an unrepresented party, certifying that: a) the contents of the appendix are true and accurate copies of items contained in the record of the lower tribunal; and b)

the petitioner has conferred in good faith with all parties to the appeal in order to determine the contents of the appendix.

Table of Contents: Immediately following the certification page, the appendix must contain a table of contents that briefly describes each item included in the appendix by reference to its page number and volume number, if applicable.

15.8.6.2 Designated Record Method

A designated record is an alternative method of preparing the record on appeal that may be used instead of – or in combination with – an appendix. In such cases, the circuit clerk has the responsibility for preparing and transmitting the record to the Supreme Court. A designated record is not permitted unless the Court specifically allows a designated record by order. The general requirements for proceeding on a designated record are set forth in Rule of Appellate Procedure 8. Although the appendix method is normally required as set forth in Rule of Appellate Procedure 7, proceeding on a designated record in whole or in part may be appropriate in certain circumstances. The designated record method can be used in instances where the petitioner is not represented by counsel or where exhibits that are not easily included in an appendix record need to be transmitted to the Court for review.

A party who wishes to proceed on a designated record should file a motion as early as possible, preferably at the same time that the Notice of Appeal is filed. The motion should specifically identify the items to be included. The Court, on its own motion or in the scheduling order, may allow the parties to proceed on a designated record either in whole or in part.

If a designated record is permitted by the Court, the petitioner must file with the clerk of the circuit court, within the time frame provided by order, an itemized designation of pleadings, orders, exhibits, and transcripts that are necessary for the Supreme Court of Appeals to decide the matters in the petition. (Rule 8(b), RAP). The respondent must file with the clerk of the circuit court, within the time frame designated by order, an itemized designation of additional parts of the record that are necessary for the

Court's consideration of the issues in light of the petitioner's designation. (Rule 8(c), RAP). Both designations must also be provided to the other parties in the case. The Court may, by order, require the parties to submit a joint designation under Rule of Appellate Procedure 8(d).

Once the designations are complete, the circuit clerk will assemble the record as set forth in Rule of Appellate Procedure 8(f). The circuit clerk must arrange the documents in chronological order and number each of the pages in the record. The circuit clerk must also prepare a table of contents that lists each item included in the designated record by reference to its page number and volume number, if applicable. Before the designated record is transmitted to the Supreme Court of Appeals, the petitioner must deposit with the clerk of the circuit court sufficient money or a bond for the costs associated with preparing and transmitting the designated record. (Rule 8(g), RAP).

15.9.7 Perfecting the Appeal and Briefing

15.9.7.1 Perfecting the Appeal

An appeal is perfected by filing with the Clerk of the Supreme Court of Appeals the petitioner's brief and the appendix or designated record according to the date set forth in the scheduling order. The deadlines for perfecting an appeal are set forth by statute. The statutory deadline is four months for civil and criminal appeals, and 60 days for appeals in abuse and neglect cases. Human rights commission appeals must be perfected within 30 days from a final order of the Human Rights Commission or final order of the Circuit Court of Kanawha County. (See Rule 15(a)-(c), RAP). Abuse and neglect appeals can be perfected without presentation of the transcript. (See Rule 11(g) and 11(i), RAP).

15.9.7.2 Petitioner's Brief

Rule of Appellate Procedure 10(c) sets forth the requirements for the petitioner's brief. The petitioner's brief must contain the following sections: table of contents (if the brief exceeds five pages); table of authorities (if the brief exceeds five pages); assignments of error; statement of the case; summary of argument; statement regarding oral

argument and decision; argument; conclusion; and certificate of service.

15.9.7.3 Respondent's Brief

Rule of Appellate Procedure 10(d) sets forth the requirements for filing the respondent's brief. The respondent's brief must contain the same requirements as the petitioner's brief set forth in Rule of Appellate Procedure 10(c), with the following exceptions: the statement of the case is necessary only if the respondent needs to correct any inaccuracies or omissions in the petitioner's brief, and the respondent does not need to restate the assignments of error. The respondent's brief must specifically respond to each assignment of error. The errors discussed in respondent's brief do not need to follow the order that the errors were presented in the petitioner's brief, unless following the same order would assist the Court. If the respondent's brief fails to respond to an assignment of error, the Court will assume that the respondent agrees with the petitioner's view of the issue.

Under Rule of Appellate Procedure 10(e), the respondent has the option of filing a summary response instead of a brief. The summary response must contain an argument responsive to the assignments of error but does not need to comply with all of the requirements of the brief. The summary response must cite to the record on appeal and demonstrate the authorities relied on for the points of fact and law presented. It must also contain a conclusion indicating the relief sought. A certificate of service must be attached to the summary response. A party who files a summary response is deemed to have waived oral argument.

Special requirements in abuse & neglect cases.

Under Rule of Appellate Procedure 11(h), the guardian ad litem for any minor child involved in an abuse and neglect appeal must file a brief or a summary response. If oral argument is held, the guardian must appear and present argument unless the Court orders otherwise. In addition, under Rule of Appellate Procedure 11(j), briefs filed by the parties must contain a concise summary of argument setting forth the current status of the minor children and any plans for permanent placement, and the current status of the

parental rights of the children's parents. Within one week of any oral argument or as set forth by order, the parties must provide a written statement of any change in the circumstances that were set forth in the briefs.

15.9.7.4 Reply Brief

The petitioner's reply brief, if one is deemed necessary by the petitioner, will typically be due 20 days from the day the respondent's brief is due. The requirements for the reply brief are set forth in Rule of Appellate Procedure 10(g). The page limitation for the reply brief is 20 pages. (See Rule 38, RAP). The reply brief must comply with the same requirements that respondent must follow under Rule of Appellate Procedure 10 except that the reply brief does not need to contain a summary of argument if it is appropriately divided by topical headings. If a timely-filed respondent's brief asserts cross-assignments of error, the page limitation for the reply brief is extended to forty pages, and the time for filing a reply is extended, without need for further order, until 30 days after the date respondent's brief containing cross-assignments of error was filed.

After the response brief or summary response has been filed in accordance with Rule of Appellate Procedure 10, and any reply brief deemed necessary has been filed (or the time for filing a reply has expired), the appeal will be deemed to be mature. In due course, cases that are mature will be distributed to all of the members of the Supreme Court of Appeals for consideration in conference. The Court will carefully consider the written arguments of all parties along with the record on appeal. Then, the Court will: a) decide the case on the merits without oral argument; or b) set the case for oral argument and decide the case on the merits; or c) issue an appropriate order after considering any written and oral arguments by the parties (e.g. the appeal is premature because it is an appeal from an interlocutory ruling, or the appeal is dismissed because the case has been settled).

15.9.8 Costs

15.9.8.1 Duty of Circuit Clerk

Once the Supreme Court has addressed an appeal, the circuit clerk has the duty to tax and collect the costs of the appeal. (Rule 24, RAP). Rule of Appellate Procedure 24(f) sets forth the costs on appeal that are taxable in the circuit courts. Such costs include: costs incurred in the preparation and transmission of the record, the cost of the reporter's transcript, if necessary for the determination of the appeal, and the premiums paid for cost of appeal bonds or other bonds to preserve rights pending appeal. These costs shall be taxed in the circuit court as costs of the appeal in favor of the party entitled to costs under Rule of Appellate Procedure 24. The Clerk of the Supreme Court of Appeals shall prepare and certify an itemized statement of costs taxed in the Supreme Court for insertion in the mandate. If the mandate has been issued before final determination of costs, the statement, or any amendment thereof, may be added to such order at any time upon request of the Clerk. (Rule 24(e), RAP).

15.9.8.2 State as a Party

If the State of West Virginia, a state agency or state officer is a party to an appeal, costs may not be assessed either for or against the State unless a specific statute allows costs to be assessed. (See Rule 24(b), RAP). If a specific statute allows costs to be awarded against the State, then the circuit clerk taxes costs based upon the disposition of the case. (See Rule 24(a)-(b), RAP). For example, the West Virginia Freedom of Information Act allows a prevailing party to recover court costs from a state agency that wrongfully denies access to records. Therefore, in a Freedom of Information Act case the clerk would assess costs against the party who lost the appeal or would assess costs based upon the court's order. In cases involving the State as a party, the mandate should indicate whether or not costs may be taxed.

15.9.8.3 Party Responsible for Appeal Costs

Similar to the assessment of costs at the circuit court level, the prevailing party is not liable for the costs of an appeal. (See Rule 24(a), RAP). However, the Supreme Court may

order, or the parties may agree, to an assessment of costs different from the general provisions established by Rule of Appellate Procedure 24(a). Absent a court order or agreement to the contrary, the chart below indicates the party who is responsible for costs based upon the results of the appeal.

Supreme Court Ruling	Party Responsible for Costs
Appeal Dismissed	Petitioner
Judgment Affirmed	Appellant
Judgment Reversed	Appellee
Judgment Affirmed or Reversed, in Part	Assessed per Court Order
Judgment Vacated	Assessed per Court Order

15.10 CERTIFIED QUESTIONS

A certified question is a point of law in which a circuit court, federal court, or administrative tribunal seeks guidance from the Supreme Court. Parties to a circuit court case may request that the circuit court certify questions of law to the Supreme Court of Appeals. (W. Va. Code § 58-5-2; Rule 17, RAP). Other courts, such as federal district courts, also may certify questions to the West Virginia Supreme Court of Appeals. Certified questions from other court systems, however, do not involve circuit courts or circuit clerks because all pleadings are filed with the Supreme Court of Appeals.

To certify questions to the Supreme Court from a West Virginia circuit court, Rule of Appellate Procedure 17(a)(1) indicates that the circuit court must sign a certificate that states and answers the questions at issue. Typically, the "certificate" referred to in Rule of Appellate Procedure 17(a)(1) is an order that lists the questions, answers the questions, contains a notation of the extent to which the action is stayed pending resolution of the certified questions, and also contains a directive to the parties to prepare a joint appendix of the record sufficient to permit review of the certified question.

Under Rule of Appellate Procedure 17(a)(2), the clerk of the circuit court or administrative tribunal is directed to transmit the order certifying questions and a list of the docket entries to the Clerk of the Supreme Court of Appeals. After receipt of the order of certification, the Court will issue a scheduling order. (Rule 17(a)(3), RAP). The parties must file an original and one copy of the joint appendix, and it must be filed at the same time the petitioner's brief is filed, unless otherwise provided. Briefs in certified question cases need not strictly comply with the content requirements for assignments of error in Rule of Appellate Procedure

10(c)(3). Instead, the petitioner's brief must assign the specific points of legal error that arise from the circuit court's answer to the certified question, with the respondent's brief to follow a similar pattern. (Rule 17(a)(5), RAP).

After the response brief or summary response has been filed, and any reply brief deemed necessary has been filed, the certified question is deemed to be mature for consideration by the Court. The Court may, in its discretion, schedule the case for oral argument under Rule of Appellate Procedure 19 or 20, issue an order declining to accept the certified question, or issue another appropriate order.

For certified questions by federal or other courts, the clerk of the court where the certification order was entered must transmit the order certifying questions and a list of the docket entries in the case to the Clerk of the Supreme Court of Appeals. After receipt of the order of certification, the Supreme Court of Appeals will issue a scheduling order. The Supreme Court of Appeals may suspend briefing until after the Court has determined whether to accept the certified questions. After the response brief has been filed, and any reply brief deemed necessary has been filed (or the time for filing a reply has expired), the certified question is deemed to be mature for consideration by the Supreme Court of Appeals. The Court may, in its discretion, schedule the case for argument under Rule of Appellate Procedure 19 or 20, issue an order declining to accept the certified question, or issue an otherwise appropriate order. (Rule 17(b), RAP).

15.11 ORIGINAL JURISDICTION OF THE SUPREME COURT

In some cases, a petitioner may seek an extraordinary writ (mandamus, prohibition, habeas corpus, or certiorari) under the Supreme Court's original jurisdiction, not its appellate jurisdiction. (See Rule 16, RAP). A common example is a petition for a writ of prohibition sought to prohibit the enforcement of a circuit court order that resolves a discovery dispute. If so, the petition is filed with the Supreme Court Clerk, and the petitioner has the duty to file any documents, orders or pleadings as an addendum or appendix to the petition. For this reason, the circuit clerk does not have any duty to prepare and send the record to the Supreme Court Clerk in cases involving the Supreme Court's original jurisdiction. Rule 37 of the Rules of Appellate Procedure establishes the procedures for a case involving an extraordinary writ.

An original jurisdiction case will be docketed by filing an original and 10 copies of the petition and an original and one copy of the appendix in the Office of the Clerk of the Supreme Court. One copy of the petition and appendix shall be served on each of the respondents pursuant to Rule of

Appellate Procedure 37. If one or more of the respondents is an official of the State, or if the petition seeks relief based upon an argument that a statute, rule or other practice is unconstitutional, the petitioner shall serve a copy of the petition and appendix upon the Attorney General of the State of West Virginia. If one or more of the respondents is a county official, the petitioner shall serve a copy of the petition and appendix upon the prosecuting attorney of such county. A petition seeking expedited or emergency relief must be served upon all respondents contemporaneously with the filing of such petition with the Clerk of the Supreme Court of Appeals, and the petitioner must provide adequate proof of contemporaneous service. (Rule 16(c), RAP).

The petition must follow the format requirements set forth in Rules of Appellate Procedure 10 and 40(e), and contain the following sections: table of contents, table of authorities, questions presented, statement of the case, summary of argument, statement regarding oral argument and decision, argument, conclusion, verification, and certificate of service. (*See* Rule 16(d), RAP). The appendix must comply with the requirements set forth in Rules of Appellate Procedure 7 and 16(e).

After the petition is filed, the Court will issue a scheduling order. The scheduling order may set forth the dates on which a response may be filed or set forth other deadlines. If required by the Court, the respondent shall file and original and 10 copies of the response. The response must conform to the requirements in Rule of Appellate Procedure 16(d), except that no statement of the case or statement of facts need be made beyond what may be deemed necessary in correcting any inaccuracy or omission in the petition. If the response does not contain an argument in response to a question presented by the petition, the Court will assume that the respondent agrees with the petitioner's view of the issue. (Rule 16(g), RAP).

The respondent may file a summary response instead of a response. The summary response need not comply with all the requirements for a response but must contain an argument responsive to the questions presented, exhibiting clearly the points of fact and law being presented and the authorities relied on, and a conclusion, specifying the relief to which the party believes himself entitled. (See Rule 16(h), RAP).

After the response or summary response has been filed, or upon the date set forth in the scheduling order, the petition will be deemed mature. The Court will consider the written arguments of the parties. The Court may, in its discretion, decline to issue a rule to show cause, issue a rule to show cause, or issue an order appropriate to the circumstances of the case.

If a rule to show cause is issued, the Court will set forth: a) that the petition will be made returnable at a designated date upon the papers previously filed (then the Court will issue a memorandum decision); b) that the petition will be returnable for oral argument under Rule of Appellate Procedure 19 (then the Court will issue a memorandum decision or opinion); or c) the petition will be returnable for oral argument under Rule of Appellate Procedure 20 (then the Court will issue an opinion). (See Rule 16(i)-(j), RAP).

Appendix A

1) WVSC Administrative Order: Uniform Case Numbering System, November 17, 1995

2) WVSC Administrative Order: Standardized Circuit and Family Court Case Management Software, October 11, 2001

3) Record Retention Schedule

4) WVSC Administrative Order: Payment for Court-Ordered Drug Testing, March 21, 1990

5) Interpreter Information for West Virginia Court Personnel, July 1999

6) WV Registry of Interpreters, WV Commission for the Deaf and Hard-of-Hearing

7) Family Court Appeals Flow Chart

8) WVSC Administrative Order: Jury Selection Practices, March 5, 1986

9) WVSC Administrative Order: Increase in Reimbursement to Jurors, November 8, 2001

10) WVSC Administrative Order: Determining Eligibility for Waiver of Fees, Costs or Security in Civil Cases for the Year 2015, February 10, 2015

SUPREME COURT OF APPEALS
OF WEST VIRGINIA

ADMINISTRATIVE ORDER:
CIRCUIT COURT CASE NUMBERING

WHEREAS, West Virginia Code § 51-1-17 authorizes the Supreme Court to establish administrative procedures for the circuit courts; and

WHEREAS, Rule 79 of the West Virginia Rules of Civil Procedure authorizes the Supreme Court to prescribe the form and style of the civil docket book; and

WHEREAS, Rule 55 of the West Virginia Rules of Criminal Procedure authorize the Supreme Court to prescribe the form for keeping records in criminal proceedings; and

WHEREAS, a uniform method of numbering cases is essential to the operation of an efficient circuit court system;

NOW, THEREFORE, IT IS ORDERED that, effective January 1, 1996, the clerks of the circuit courts of West Virginia implement and thereafter maintain compliance with the uniform case numbering system set forth in Section 2, as amended effective January 1, 1996, of the Practice and Procedure Manual for Circuit Clerk Offices, which section is attached hereto and incorporated herein by reference; and

IT IS FURTHER ORDERED that supervising circuit judges shall be responsible for assuring that the case-numbering system herein mandated is timely and fully implemented.

ENTER, this 17th day of November 1995

Thomas E. McHugh

THOMAS E. McHUGH
Chief Justice

THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

ADMINISTRATIVE ORDER:
STANDARDIZED CIRCUIT AND FAMILY COURT
CASE MANAGEMENT SOFTWARE

WHEREAS, the Clerks of the Circuit Courts are officers within the judicial branch of government and within the hierarchy of administrative control established by the West Virginia Constitution, art. III, §3, with regard to their judicial functions; and

WHEREAS, pursuant to W. Va. Code §51-1-17(a), the Administrative Director of the Supreme Court of Appeals shall, when authorized by the Court and under the supervision and direction of the Court, have charge of all administrative matters relating to the offices of the Clerks of the Circuit Courts; and

WHEREAS, pursuant to W. Va. Code §51-1-17(c), the Administrative Director of the Supreme Court of Appeals of West Virginia may require the Clerks of the Circuit Courts to comply with any and all requests for information and statistical data bearing on the state of the dockets of the courts or such other information as may reflect the business transacted by the courts; and

WHEREAS, pursuant to numerous provisions of Senate Bill 5007, the Administrative Director of the Supreme Court of Appeals of West Virginia is charged with the duty of reporting comprehensive information and statistical data concerning family court cases to the Legislature, as well as circuit court cases; and

WHEREAS, pursuant to Senate Bill 5007, including *inter alia* W. Va. Code §51-2A-8(f), the Clerks of the Circuit Courts now have "... within the scope of the jurisdiction of family courts, all the duties and powers prescribed by law that clerks exercise on behalf of circuit courts..."; and

WHEREAS, pursuant to Senate Bill 5007, including *inter alia* W. Va. Code 48-27-507(e), the Clerks of the Circuit Courts are charged with the duty to provide copies of any domestic violence protective orders entered by the family court to the National Domestic Violence Registry; and

WHEREAS, only thirty-six (36) of the fifty-five (55) counties in West Virginia currently utilize the Supreme Court of Appeals' circuit court case management software system; and

WHEREAS, without utilization of the Court's case management software system, the Clerks of the Circuit Courts cannot comply with their duties under W. Va. Code §51-1-17(e) and W. Va. Code §48-27-507(e), and further cannot become a part of the integrated court technology project that the Court has initiated in order to create a unified court system that will best serve the needs of West Virginia's citizens and ensure their right of access to the courts;

NOW, THEREFORE, it is hereby ORDERED that all Clerks of the Circuit Courts will utilize the Supreme Court of Appeals' standard case management software system, which system will be installed and paid for by the Court in the office of every clerk where it has not already been installed; and

IT IS FURTHER ORDERED that in each of the aforesaid offices the Supreme Court of Appeals will be responsible for all costs of data conversion from existing software programs to the Court's standard case management software system; and

IT IS FURTHER ORDERED that in each of the aforesaid offices the Supreme Court of Appeals will be responsible for all costs of training the Clerks, and the Clerks' personnel, in the Court's standard case management software system; and

IT IS FURTHER ORDERED that in each of the aforesaid offices the Supreme Court of Appeals will permit the Clerks to maintain their current software programs, should the Clerks so desire, as parallel programs to the Court's standard case management software system; and

IT IS FURTHER ORDERED that the Administrative Director or her designee(s) may issue directives regarding procedures to be followed by the clerks of the circuit courts in effectuating the directives of this Order.

This Order is entered pursuant to a vote of the Supreme Court of Appeals of West Virginia (Chief Justice McGraw dissenting) at its Administrative Conference held on September 26, 2001.

ENTER this 11th day of October, 2001.

WARREN R. McGRAW
CHIEF JUSTICE

Entered: October 18, 2001
Betsy Castle, Clerk
By: [illegible], deputy

CIRCUIT COURT

RECORD RETENTION SCHEDULE

Promulgated on November 29, 1990 and Amended by the Supreme Court of Appeals by Administrative Order effective September 1, 1995

CIRCUIT COURT RECORD RETENTION SCHEDULE

The Circuit Court Record Retention Schedule is promulgated by the Supreme Court of Appeals under the provisions of §51-4-3, W.Va. Code. In addition to observing the correct time period for retention of each record delineated in the schedule, it is vital that circuit clerks follow appropriate procedures for destruction as well as permanent storage of records.

NOTIFICATION

Section 5-8-17, W.Va. Code, provides that no record shall be destroyed or otherwise disposed of unless it is determined by the Director of Archives and History that the record has no further administrative, legal, fiscal, research, or historical value (see also §57-1-7c, W.Va. Code). Therefore, the Director of Archives and History must be notified of any planned destruction of court records, except for the confidential case records and financial/personnel records specifically enumerated below. Prior to destruction, the clerk should list the type and time period of the records and note any that are of potential historical significance. Clerks may wish to use the attached Records Disposal Report form for this purpose since it will need to be completed when and if the records are destroyed. The listing should be sent to Archives and History at the following address:

Archives and History Section
Division of Culture and History
The Cultural Center
1900 Kanawha Blvd., E.
Charleston, WV 25305-0300

The Director of Archives and History has 30 days to reply and request that the records be held for the Section's review. If there is no reply, the records may be destroyed in accordance with the retention schedule.

It is not necessary to notify Archives and History of the planned destruction of the following records: Domestic Relations Case Files (confidential, see CIV. 22); Guardianship or Conservatorship Case Files (confidential, see CIV. 27); Mental Hygiene Case Files (Confidential, see CIV. 33); Juvenile Case Files (Confidential, see JUV. 1); Any Case File Sealed or Held Confidential by Order of the Court; Financial Records (see FIN. 1 through FIN. 13); and, Personnel Records (see PER. 1 through PER. 4).

DESTRUCTION OF RECORDS

Destruction of documents should be accomplished in a manner that ensures that records will not be subject to accidental disclosure to the public. It is recommended that documents be shredded and taken directly to a land fill, recycling center or other waste disposal facility. If

records can be incinerated, it is not necessary to shred them prior to bringing them to the incinerator. In either case, the process of destruction should be overseen by the clerk or a deputy designated by the clerk.

Destruction of audio cassettes is accomplished by erasing the entire contents of the tape. Cassette tapes may then be recycled.

Clerks must maintain a list of all destroyed records which shows the date disposed, the type of record (e.g., civil, criminal, financial, administrative, etc.), and the case number and style of case if appropriate. If the records are available on microfilm or optical disk, the reference number should be noted. The attached "Records Disposal Report" should be used for this purpose.

PERMANENT STORAGE

The retention schedule requires that many court records, most notably court orders and case indexes, be retained permanently. Permanent storage involves securing and preserving the original paper documents or the converting these documents to microfilm, optical disk or other electronic storage system.

Permanent storage of paper documents requires the use of low-acid record boxes and a document medium that meets archival standards.

At the present time, microfilm is the only alternative storage medium which meets archival standards for storing permanent records (see §57-1-7c, W.Va. Code). The master or original of the film must be stored off-site in a secure and environmentally controlled facility. A duplicate of the film is to be used in the clerk's office. Paper records may be destroyed once every image on the microfilm has been visually inspected to insure the record is complete.

The use of optical disk or other microimaging technology which uses electronic scanning and digitizing as opposed to a photographic type process is acceptable as an interim storage medium if it provides an exact copy of each document, prohibits alteration of any document, and readily shows any attempt to alter a document (see §51-4-3, W.Va. Code). A copy of each disk should be made prior to the expiration of the established disk-life, and, as with microfilm, a copy of the disk must be kept off-site in a secure and environmentally controlled facility. At this time imaging, while a convenient and acceptable solution to access and storage problems, is not considered permanent storage which meets archival standards.

Concern for the archival quality and security of alternative media is premised on the assumption that the retention period for most of the records which would be converted to such media is "permanent." For space considerations, some courts choose to convert other types of records to microfilm or disk and dispose of the paper records or move them to a storage facility. Such decisions should be made in light of a cost-benefit analysis which takes into

account how long the records must be maintained under the retention schedule and the rate of access. For example, it is questionable whether it makes sense to microfilm or otherwise convert misdemeanor case files which only need to survive in the court for ten years. On the other hand, it may be worthwhile to convert felony case files which have a retention period of 75 years.

CIRCUIT COURT
RECORD RETENTION SCHEDULE

ITEM	DESCRIPTION	REFERENCE	RETENTION PERIOD
ADM. 1	*ADMINISTRATIVE ORDERS* - Orders relating to administrative matters in circuit or magistrate court entered by the circuit court or Supreme Court.		1 year after a copy is entered in the Administrative Order Book
ADM. 2	*ADMINISTRATIVE ORDER BOOK*		Permanent
ADM. 3	*ALIEN DECLARATION OR NATURALIZATION BOOK* - Record of persons becoming naturalized citizens of the United States. Gives name of alien, place of residence, date of naturalization, and seal of judge		Transfer to State Archives and History Division
ADM. 4	*ATTORNEY'S OATH TO BE ADMITTED TO BAR* - Oath taken by attorneys to be admitted to bar and to practice law in the county.	30-2-3	Permanent
ADM. 5	*CORRESPONDENCE* - Not case related, general or administrative in nature		2 years
ADM. 6	*ELECTION RECORDS*		By statute and regulation of the Secretary of State
ADM. 7	*JURY COMMISSION RECORD BOOK* (obsolete) - Record of annual meetings of jury commissioners showing date of meeting and commissioners present.		4 years
ADM. 8	*MAGISTRATE ORDERS*		1 year after copy is entered in the Magistrate Order Book
ADM. 9	*MAGISTRATE ORDER BOOK*		Permanent
ADM. 10	*MOTIONS FOR JUDGMENT* - Any motion that may be filed and is filed separate from a case. If motion is part of a case file, dispose in accordance with retention period for that type of case.		50 years
ADM. 11	*STATISTICAL REPORTS* - Reports submitted to Supreme Court on caseload (Circuit Court Report and Pending Case Age) and juror usage (JSMR and Term Report)	51-1-17	2 years

ITEM	DESCRIPTION	REFERENCE	RETENTION PERIOD
CIV. 1	*ADOPTION ORDER BOOK* (confidential)	48-4-10	Permanent
CIV. 2	*ADOPTION CASE FILES* (confidential) - Petitions to the court for the adoption of children, all intermediate pleadings and final decree of the court, showing in addition to the text, name and address of petitioner.		Permanent
CIV. 3	*ALIMONY AND SUPPORT CASES LEDGER* (obsolete) This shows name and amount of payment set by the court for all alimony and support cases.		5 years
CIV. 4	*CHANCERY FILES* - Original papers in cases of chancery, including all orders, pleadings and decrees. Shows name of parties to suit, style of case, names of attorneys, disposition of case and all pleadings entered.		50 years for non-real property cases. Permanent for real property cases, Chief judge must approve disposal with advice from local Bar Committee
CIV. 5	*CHANCERY INDEX* - Index to Chancery Orders to include reports, orders for payment and other services.	56-4-2	Permanent
CIV. 6	*CHANCERY ORDER BOOK*		Permanent
CIV. 7	*CHANCERY ORDER BOOK FOR SALE OF LAND FOR SCHOOL FUND*	11A-4-16	Permanent
CIV. 8	*CHANCERY ORDERS* - Record of orders issued by superior court of law and chancery and Circuit Court. Gives names of parties to suit, date order entered, type of order, and status of case. Includes reports of special commissioners, orders for payment of fees, and other services to court.	56-4-2	50 years
CIV. 9	*CHANCERY RULE AND PROCESS BOOK* - Record of chancery rule days in Circuit Court and record of issuance of chancery process, orders, or decrees in said court. State cases at rules, style of case, date of process, return date, name of person summoned, officer to whom delivered with receipt, execution of process, pleadings. Also shows nature of case, the person to whom and the time it was delivered, or if mailed.	56-4-2	May be destroyed
CIV. 10	*CHANCERY TRIAL DOCKET*		May be destroyed
CIV. 11	*CIVIL APPEALS* - All papers and documents dealing with appeals of circuit court civil cases to the Supreme Court .	58-4-6	Use time periods listed for civil files (see CIV. 14)
CIV. 12	*CIVIL DOCKETS* - A listing of civil cases pending before the court at a given term of court		3 years
CIV. 13	*CIVIL DOCKET BOOKS/SHEETS* - A chronological listing of all papers filed with the clerk, process and returns, orders and judgments entered in a given case.	R.C.P. 79(a)	Use time periods listed for civil case files (see CIV.14)

ITEM	DESCRIPTION	REFERENCE	RETENTION PERIOD
CIV. 14	*CIVIL CASE FILES* - No service of process (any case) Tort case Contract case Real property rights Extraordinary writs, including habeas corpus Miscellaneous Proceedings/Petitions Payment on Accounts *Note: The following documents may be disposed apart from the other contents of the file to reduce bulk before long term storage:* Witness subpoenas Correspondence concerning scheduling, transmittals, or other administrative matters Envelopes Duplicate Copies	R.C.P. 4(1)	5 yrs after dismissal order 50 years 50 years Permanent 50 years 10 years 5 years if satisfied 30 days after the expiration of the appeal period
CIV. 15	*CIVIL DISCOVERY*	R.C.P. 30(f)(1)	If filed with the court, 1 year after disposition returned to attorney or destroyed by order of Chief Judge
CIV. 16	*CIVIL CASE EXHIBITS*	57-5-11	30 days after expiration of the appeal period (by court order and with notice to the party/owner)
CIV. 17	*CIVIL INDEX*	R.C.P. 79(c)	Permanent
CIV. 18	*CIVIL ORDER BOOK*	R.C.P 79(b)	Permanent
CIV. 19	*COURT REPORTER RECORDS IN CIVIL CASES* - Record of the court proceedings produced by the court reporter or electronic recording device. Includes notes, tapes and typed transcripts. *Note: All temporary or substitute reporters must file notes or tapes with clerk for storage until transcript is requested.* Tapes of Mental Hygiene Hearings Tapes of Guardianship Hearings Tapes of Family Law Master Hearings	51-7-4	10 years *Note: Original notes or tapes may be destroyed or returned to reporter after typed transcript is certified.* 10 years 10 years 5 years
CIV. 20	*DELINQUENT LAND BOOK*	11A-4-16	5 years after sale of property, however, permanent retention may be necessary if there is not adequate recordation in the office of the county clerk
CIV. 21	*DOMESTIC RELATIONS DOCKET BOOK/SHEETS* - A chronological listing of all papers filed with the court, process and returns, orders and judgments entered in a given case.	R.C.P. 79(a)	Use time periods listed for domestic relations case files (see CIV. 22)

ITEM	DESCRIPTION	REFERENCE	RETENTION PERIOD
CIV. 22	*DOMESTIC RELATIONS CASE FILES* - (confidential)		
	Divorce Cases		20 years, unless dismissed under R.C.P. 41(b), then destroy 4 years after dismissal
	Paternity		Permanent if established, 20 years if not established
	URESA		20 years
	Other Domestic Relations Cases		20 years
CIV. 23	*DOMESTIC RELATIONS ORDER BOOK*	R.C.P. 79(b)	Permanent
CIV. 24	*DOMESTIC RELATIONS CASE INDEX*	R.C.P. 79(c)	Permanent
CIV. 25	*EXECUTION OF ORDERS* - Record of original writs of execution issued on judgments. Shows names of judgment debtor and creditor, name of attorney, date of judgment, date and amount of execution, court in which rendered, costs, when returnable, to whom delivered, and returns.		10 years
CIV. 26	*EXECUTION ORDER BOOK (obsolete)*		10 years
CIV. 27	*GUARDIANSHIP/CONSERVATORSHIP CASE FILES* - (confidential)		75 years
CIV. 28	*GUARDIANSHIP/CONSERVATORSHIP ORDER BOOK* - (confidential)		Permanent
CIV. 29	*INTERMEDIATE COURT RECORDS* - Records on hand designated as intermediate court records.		Refer to specific record series in this retention schedule
CIV. 30	*LAW ORDER BOOKS* - Law orders of County Court and Circuit Court in all legal actions. Shows names of parties to suits, names of attorneys, type of case, order of decree issued, date or order and recordation.		Permanent
CIV. 31	*LAW FILES*		50 years, or permanent if real property
CIV. 32	*LAW PROCESS BOOKS* - Record or issuance of law process orders or decrees in Circuit Court. Shows nature of case, date and return day, person to whom and the time when it was delivered, or if mailed, date thereof, to whom mailed, and receipt from making delivery.		50 years
CIV. 33	*MENTAL HYGIENE CASE FILES* - (confidential)		75 years
CIV. 34	*MENTAL HYGIENE ORDER BOOK* - (confidential)		Permanent
CIV. 35	*PRAECIPE/PROCESS BOOK* (obsolete) - Record of writs of summons issued by Clerk of Circuit Court requiring appearance of person or papers in suits as stated on writs.	56-3-6	May be destroyed at the clerk's discretion
CIV. 36	*RECEIVER'S ACCOUNTS*	51-6-12	5 years after entry in receiver's docket

ITEM	DESCRIPTION	REFERENCE	RETENTION PERIOD
CIV. 37	*RECEIVER'S DOCKET* - Copies of reports made by general court receiver of funds in custody of court. Shows itemized accounts of receipts and disbursements.	51-6-12	Permanent
CIV. 38	*RECIPROCAL SUPPORT LEDGER* (obsolete)		5 years

ITEM	DESCRIPTION	REFERENCE	RETENTION PERIOD
CR. 1	*BOUND OVER CASES* - Dismissed in circuit court. Cases bound over from magistrate court to circuit court which are dismissed after 1 year of inaction in circuit court.	R.Cr.P. 48	Returned to prosecutor after dismissal. If prosecutor declines to accept, destroyed at the discretion of the circuit clerk.
CR. 2n	*CRIMINAL DOCKET* - A listing of criminal cases pending before the court at a given time of court.		3 years
CR. 3	*CRIMINAL DOCKET BOOKS/SHEETS* - A chronological listing of all papers filed with the clerk, process and returns, orders and judgments entered in a given case.		Use time periods listed for criminal case files (see CR.4)
CR. 4	*CRIMINAL CASE FILES* - All documents in criminal proceedings, including the information or indictment, all pleadings, motions, orders or decrees, the original pre-sentence investigation report and other tests or evaluations performed on the defendant.		
	Felony		75 years
	Misdemeanor		10 years
	Petitions ancillary to criminal proceedings in magistrate court		10 years (see CIV. 14)
	Note: The following documents may be disposed apart from the other contents of the file to reduce bulk before long term storage:		
	Witness subpoenas		
	Correspondence concerning scheduling, transmittals, or other administrative matters		30 days after expiration of the appeal period
	Envelopes		
	Duplicate copies		
CR. 5	*CRIMINAL EXHIBITS*	57-5-11	30 days after expiration of the appeal period (by court order and with notice to the party/owner)
CR. 6	*CRIMINAL INDEX*		Permanent
CR. 7	*CRIMINAL ORDER BOOK*	R. Cr.P. 55	Permanent
CR. 8	*COURT REPORTER RECORDS IN CRIMINAL CASES* - Record of the court proceedings recorded by the court reporter or electronic recording device. Includes note, Tapes and transcripts. *Note: All temporary or substitute reporters must leave notes or tapes with clerk for storage until transcript is requested or notes may be disposed in accordance with retention schedule.*	51-7-4	
	Felony		75 years
	Misdemeanor		10 years *Note: Original notes or tapes may be destroyed or returned to reporter after typed transcript is certified.*

ITEM	DESCRIPTION	REFERENCE	RETENTION PERIOD
CR. 9	*INDICTMENT BOOK, DRAWER OR ENVELOPE*		75 years
CR. 10	*INTERMEDIATE COURT RECORDS* - Records on hand designated as intermediate court records.		Refer to specific record series in this retention schedule
CR. 11	*WAIVER OF EXTRADITION*		10 years

ITEM	DESCRIPTION	REFERENCE	RETENTION PERIOD
FIN. 1	*ACCOUNTING AND FISCAL RECORDS* - Includes budget information, travel expense, financial reports and other operational type ledgers and reports. Includes the Monthly Statement of Clerk of the Circuit Court, the remittance to the sheriff.	59-1-30 59-1-31	1 year after clearance of audit exceptions
FIN. 2	*ATTORNEY'S RECEIPT BOOK* - Record of receipts given by attorneys for removal of documents from files for use in preparation of cases. States name of attorney, papers removed, date of removal, and date returned.		Destroy when all documents have been returned
FIN. 3	*BANKING RECORDS* - All cancelled checks, void checks, chick books, deposits, bank statements, debit and credit memos, and other pertinent banking procedure documents.		1 year after clearance of audit exceptions
FIN. 4	*CASH RECEIPTS BOOK OR AUTOMATED DATA RECORD* - Record of daily receipts showing name of fund or case date amount, and account debited or credited.	59-1-30	1 year after clearance of audit exceptions
FIN. 5	*CIRCUIT COURT BONDS* - Bonds given by court receivers, chancery commissioners, special commissioners, costs, appearance and forthcoming bonds filed with the Clerk of Circuit Court. Shows name of principal, date, amount and condition of bond, names of surety and date admitted to record.		Retain with case file
FIN. 6	*FEE BOOK (CASH JOURNAL)* - Clerks record of fees charged or collected for recordation and other services performed in their office. Gives names of person charged with fee, type of suit, kind of instrument and recordation; also receipts of the office.	59-1-19	1 year after clearance of audit exceptions
FIN. 7	*GRAND JURY PAYMENT RECORD* - Record of jurors summoned for grand jury service, showing name of juror, time served, mileage and amount allowed.	52-2-3	4 years
FIN. 8	*PETIT JURY PAYMENT RECORDS* - Record of jurors summoned for petit service, showing name of juror, days served, mileage and amount of reimbursement.	52-1-8	4 years
FIN. 9	*PROCUREMENT PROCEDURE RECORDS* - Requests for supplies n equipment, receiving reports, invoices, shipping documents, oil and gas tickets, and any other records used in the procurement of supplies equipment, or services.		1 year after clearance of audit exceptions.
FIN. 10	*VOUCHERS FOR COURT-APPOINTED COUNSEL*	29-21-13a(e)	1 year
FIN. 11	*WITNESS BOOKS* (obsolete) - Record of witnesses appearing in court cases, showing date of court term, style of cases, names of witnesses for complainant, names of witnesses for respondent, number of days attended, miles traveled, amount due, and date of payment.		May be destroyed at discretion of clerk
FIN. 12	*WITNESS FEE PAYMENT RECORDS* - Vouchers for witness fees, mileage, hotel and/or meal expense payable by the State.		1 year after clearance of audit exceptions
FIN. 13	*WORK RELEASE LEDGER* - Ledger of individual defendant incarcerated in county jail released on work release. Itemized collections and disbursements of defendant's earnings.	62-11A-1	1 year after clearance of audit exceptions

ITEM	DESCRIPTION	REFERENCE	RETENTION PERIOD
JUV. 1	*JUVENILE FILES* (**confidential**) - File may include a record of arrest; showing names, addresses, date, time age, date and place of birth, description, place of arrest, charge, disposition at time of arrest, name of judge, accomplices, arresting officer, remarks and disposition, vehicle, make and model, and license number. Cases are sealed and are not open to public inspection.		20 years after last hearing
JUV. 2	*JUVENILE ORDER BOOKS* (**confidential**) - Record of findings of Circuit Court in all cases of juvenile delinquency. Shows name of minor, date of hearing, charge, and disposition of case.	49-5-17	Permanent; whiteout or obliterate any reference to name of juvenile when the case file is expunged

ITEM	DESCRIPTION	REFERENCE	RETENTION PERIOD
PER. 1	*EMPLOYMENT APPLICATIONS*		2 years
PER. 2	*PERSONNEL ATTENDANCE RECORDS* - Includes time sheets/time cards, compensatory time records, monthly/weekly reports, etc.		1 year after clearance of audit exceptions
PER. 3	*PERSONNEL EMPLOYMENT RECORD CARDS* - Record card for each employee showing name, address, date of birth, emergency information, beginning and ending dates of employment, social security number, job position, wages, etc.		5 years after termination of employment or longer at the discretion of the clerk
PER. 4	*PERSONNEL FOLDERS*		5 years after termination of employment or longer at the discretion of the clerk

RECORDS DISPOSAL REPORT

Circuit Court of _____ **County** **Date:**

Date Destroyed	Record Type	Record Series	Film or Disk Ref #	Comments

This is to certify that the above records were destroyed in accordance with the Circuit Court Record Retention Schedule promulgated November 29, 1990 and amended by Supreme Court Administrative Order dated

_____.

_____ Date: _____

Circuit Clerk

THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

ADMINISTRATIVE ORDER

WHEREAS, Testing for drug use has become a necessary requirement in numerous cases under the jurisdiction of the Circuit Courts; and

WHEREAS, Non-indigent subjects of such required drug testing must bear the cost thereof; and

WHEREAS, The offices of the Circuit Clerks are the appropriate depositories for payment by subjects of drug testing;

NOW, THEREFORE, It is hereby ORDERED that court officers direct non-indigent subjects of drug testing to make payment to a Circuit Clerk within the judicial circuit; and

IT IS FURTHER ORDERED That the Circuit Clerk accept such payment and issue to the payor a receipt in duplicate; and

IT IS FURTHER ORDERED That the Circuit Clerk remit monthly to the County Sheriff all such payments collected; and

IT IS FURTHER ORDERED That the Circuit Clerk report monthly to the State Auditor all such collections and remittances.

ENTER this 21st day of March 1990

RICHARD NEELY
Chief Justice

Interpreter Information for West Virginia Court Personnel

(Prepared by Leslie Anderson, WV Supreme Court of Appeals Administrative Office)

July 1999

There are three different statutes (two State and one Federal) which address interpreter services in the courts for people who are deaf or hard of hearing or who are fluent only in a foreign language such that they are unable to understand and communicate readily in the English language. First, a party, a witness, or a juror with a hearing disability or a language barrier has a right to a qualified interpreter to assist at every stage of a court proceeding pursuant to W.Va. Code §57-5-7. Second, the West Virginia Interpreter for the Deaf Act [§5-14A-1 *et seq.*] requires that a qualified interpreter be appointed to interpret any court or grand jury proceeding for a complainant, defendant or witness who is deaf. Third, Title II of the ADA [Pub L No 101-336, 104 Stat 327 (1990), 42 USC §12101 *et seq.*], requires the courts to provide accommodation, as needed, to people with disabilities.

Because of federal supremacy, the ADA is controlling with respect to any conflicting provisions of the state statutes. Unless the state statutes require interpreter services over and above the services required under the ADA, the ADA provisions are to be followed.

Below are some specific issues which court personnel should be familiar with when an interpreter is needed.

> **NOTE: Unless otherwise indicated, the requirements and procedures applying to sign language interpreters for persons who are deaf or hard of hearing as set forth below also apply if a party, juror, or witness needs a foreign-language interpreter or needs an interpreter for any other reason [see §57-5-7(e)].**

a. **For Whom Will the Supreme Court Pay the Costs of an Interpreter?**: Unless a judicial officer seeks prior approval from the legal division of the Administrative Office for payment of the costs of an interpreter in circumstances not listed below, the Supreme Court will pay only for the

cost of an interpreter for a participant (such as a juror, witness or a party) and for the following courtroom spectators:

1. Any parent, guardian, conservator or guardian ad litem of a minor or incompetent person who is a party or witness in any case will be provided a reasonable communication accommodation at a court proceeding at the Supreme Court's expense.

2. Any parent, guardian, conservator or guardian ad litem of a minor or incompetent person who is a victim in a criminal case will be provided a reasonable communication accommodation at a court proceeding at the Supreme Court's expense.

3. The spouse of a victim in a criminal case will be provided a reasonable communication accommodation at a court proceeding at the Supreme Court's expense.

4. If a circuit judge concludes there is good cause for any other spectator of a court proceeding to be provided a reasonable communication accommodation at the Supreme Court's expense, then the judge in writing needs to request approval of such accommodation from a Supreme Court of Appeals Administrative Office legal division attorney. If a magistrate concludes that there is good cause for any other spectator of a court proceeding to be provided a reasonable communication accommodation at court expense, then the magistrate needs to submit a written request for approval of such accommodation from the chief circuit judge. If the chief judge agrees with the magistrate, he or she is to submit a request approval from a Supreme Court of Appeals Administrative Office legal division attorney [policy adopted by West Virginia Supreme Court of Appeals during the April 21, 1999 Administrative Conference].

b. **Notice of Necessity of Interpreter:** It is preferable for a person needing an interpreter to inform the court of such need [form SCA-M1030NP or SCA-C800] sufficiently in advance for an interpreter to be scheduled and appointed, but no less than two business days (not including Saturday, Sunday or holidays) in advance of when such accommodation will be needed [§5-14A-6]. The request may be in writing (form SCA-M1030NP or SCA-C800), but is not required to be in writing. Court personnel should immediately inform the judicial officer before whom the case is pending of any such request or otherwise follow the established procedure in their

county for processing the request for a reasonable accommodation regardless of whether the request is made in writing.

c. **Appointment of an Interpreter:** Appointment of a qualified interpreter in civil as well as in criminal and juvenile proceedings should follow the procedure provided in W.VA. Code §57-5-7(b)(3), i.e., appointment by order of the supervising circuit judge. (Although the statute does not expressly address appointment in **civil** cases, the practice for them should be consistent with that in criminal and juvenile cases.) Generally, court personnel following the procedure outlined below will be in compliance with W.Va. Code §57-5-7(b)(3); however, if the supervising or chief circuit judge establishes a different procedure, court personnel should follow that procedure.

Upon receiving a request for an interpreter court personnel should:

1. **Select an Interpreter.** Find out from the person making the request what kind of interpreter he or she will need (e.g., American Sign Language interpreter; oral interpreter; foreign language interpreter). If he or she needs an American Sign Language interpreter, then the appropriate court personnel should locate a potential interpreter, if one is not already known, by looking at the list of interpreters provided by the Commission for the Deaf and Hard of Hearing, which is located on pages 85-91.

> **NOTE:** Be aware that if an interpreter is used in a legal or mental health setting, the interpreter should have a NAD Level III, IV or V certificate **(the Commission for the Deaf and Hard of Hearing strongly recommends that an interpreter with a NAD Level IV or V certificate be used in a court proceeding)** or a RID, CSC or CI/CT certificate in order to be a qualified interpreter for those setting [192 CSR 1, §3.3.16 (rule promulgated by the Commission for the Deaf and Hard of Hearing) page 71]. If such an interpreter is not available, then court personnel should consult with the Commission for the Deaf and Hard of Hearing in order to find the next best available interpreter. **Court personnel can contact the Commission for the Deaf and Hard of Hearing at (304) 558-1675.**

Thus, before contacting an interpreter on the Commission's list, court personnel should check the interpreter's level of certification to make sure he or she is qualified to interpret in a legal setting. If the person making the request needs a foreign language interpreter and court personnel do not know of someone who is able to interpret the language of the person making the request, then court personnel should consult the legal division of the Administrative Office. If the person making the request is deaf or hard of hearing, but does NOT sign American Sign Language, then court personnel should consult the Commission for the Deaf and Hard of Hearing.

Before any request for an interpreter is forwarded to the supervising circuit judge, the potential interpreter should be contacted and agree to the terms of the assignment, including the fees for interpreting (fees are discussed on page 72).

2. **Forwarding the Request for an Interpreter to the Circuit Judge.** Once the court employee has the above information, he or she should send the request for an interpreter, the proposed interpreter's name and address, and an "Order for Appointment of an Interpreter" form [SCA-M1032NP or SCA-C801] to the supervising circuit judge [§5-14A-2]. If the judge finds the appointment to be appropriate, he or she will sign the "Order for Appointment of an Interpreter" form.

> **NOTE:** If the circuit judge is not available to appoint an interpreter, W.Va. Code §57-5-7(d) allows the **circuit clerk** to do so provided the circuit judge has authorized him or her to act in his stead.

d. **Oath:** All interpreters are required under oath or affirmation to represent that they will make a true interpretation which is understandable by the person needing assistance and by the court and that they will interpret to the best of their skill and judgment [§§5-14A-8 and 57-5-7(e)]. Form SCA-M1034NP or form SCA-C802 is the oath to be administered before

an interpreter begins to participate in a proceeding. The magistrate, magistrate clerk, magistrate assistant, circuit judge or circuit clerk may administer the oath.

e. **Compensation of Interpreters:** Minimum fees for interpreters appointed to assist people who are deaf or hard of hearing are set by the West Virginia Commission for the Deaf and Hard of Hearing [192 CSR 1, §3; pages 70-71]. Interpreters are to be paid from court funds for interpreting court proceedings [§5-14A-9; §57-5-7(c)]. Courts are prohibited from assessing fees against a party for providing such interpreter services for in-court proceedings [28 C.F.R. §35.130(f)], regardless of whether or not the person needing an interpreter qualifies for a waiver of fees and costs.

The Administrative Office policy is that the fees for interpreters may not exceed the minimum fee chart set forth in the Commission for the Deaf and Hard of Hearing rules [192 CSR Table 1-A; page 72] without prior approval from the Administrative Office. In the event there is a unique situation which would require paying an interpreter a fee above the amount listed in the minimum fee chart, the magistrate court, before seeking an appointment order from the supervising circuit judge, or the circuit court prior to appointing an interpreter needs to seek advance approval from the legal division of the Administrative Office by writing a letter (which may be mailed or faxed) setting forth the specific terms of the interpreter's employment as well as the reason for requesting approval to pay the interpreter a fee above that set forth in the minimum fee chart.

Please be aware that the Commission for the Deaf and Hard of Hearing has rules which must be followed when appointing and compensating an interpreter. The following are some of the more important rules; however, **PLEASE READ** the Commission's rules, a copy of which is on pages 67-72, before discussing the fee with an interpreter. Interpreters are to be paid for a minimum of two hours regardless of the actual time of the assignment [192 CSR 1, §3.3.1; page 70] and are paid a fee for cancellations [192 CSR 1, §§3.3.7 – 3.3.14; page 70]. Additionally,

the rules require that two interpreters be appointed for day-long sessions so that they can take turns interpreting a proceeding [192 CSR 1, §3.3.15; page 71].

> **IMPORTANT NOTE:** Fees for foreign language interpreters are NOT governed by W.Va. Code §5-14A-9. Reasonable fees need to be established by the circuit judge at the time of appointment.

Expense Reimbursement: Only reasonable and necessary expenses, not in excess of the prevailing rates for State employees, may be reimbursed [§57-5-7(c); 192 CSR 1 - §3.3.4; page 70]. Prevailing rates are those established for employees in the judiciary as detailed in Section 10 of the Supreme Court personnel manual and any memos updating that section. Of particular importance are two provisions: (a) for an interpreter to claim lodging reimbursement, travel of at least 80 round-trip miles must be necessary for the interpreter's appearance; (b) for an interpreter to claim meal reimbursement there must be an overnight stay.

> **NOTE:** Advance approval must be obtained from the Supreme Court Administrative Office if **transportation** expense will involve anything other than mileage for use of a personal automobile.

f. **Payment of Cost of Out-of-Court Interpreter Services Involving Legal Counsel:** Under the provisions of W.Va. Code §5-14A-1 *et seq.* and W.Va. Code §57-5-7, the courts appoint an interpreter to assist persons who are deaf or hard of hearing during in-court proceedings and in out-of-court preparation with counsel. While the court will appoint an out-of-court interpreter, legal counsel is responsible for the costs of those services; private attorneys, legal aid attorneys, and court-appointed or public defender attorneys are required by federal law to provide necessary interpreter services without charge to people who are deaf or hard of hearing [28 C.F.R. §104 and §§36.303(b)(1), 36.303(c), 36.301(c)].

g. **Payment Procedures:**

   1. The magistrate, magistrate assistant, circuit judge or circuit clerk needs to provide the interpreter with a blank invoice form [SCA-M1036NP or SCA-C803].

2. When the proceedings are concluded, the interpreter needs to complete and sign the invoice, and present it to the presiding magistrate or circuit judge. The hourly fee for a sign, oral, or foreign language interpreter has to be at the rate set in the order of appointment.
3. The magistrate or circuit judge who presided at the proceeding(s) must examine and certify the invoice.
4. The presiding magistrate or circuit judge must complete and sign the order of payment [SCA-M1038NP or SCA-C804] and forward the invoice and payment order to the clerk.
5. The clerk must transmit to the Supreme Court Administrative Office two certified copies of the payment order along with two copies of the appointment order and two copies of the invoice.

NOTE: The forms will not be printed, so they will need to be copied locally.

Interpreter Forms Needed for Court Personnel

Following are the forms that are needed when an interpreter is requested for court proceedings.

Name of Form	Magistrate Court Form Number	Circuit Court Form Number
Request for Interpreter Service	SCA-M1030NP	SCA-C800
Order of Appointment: Interpreter	SCA-M1032NP	SCA-C801
Oath or Affirmation of Interpreter	SCA-M1034NP	SCA-C802
Order of Payment: Interpreter Service	SCA-M1038NP	SCA-C803
Invoice for Interpreter Service	SCA-M1036NP	SCA-C804

Should you not be able to locate an interpreter, please call the West Virginia Commission for the Deaf and Hard of Hearing at (304) 558-1675 or 1-866-461-3578.

IN THE CIRCUIT COURT OF _____ COUNTY WEST VIRGINIA

_____
V. Case No.

_____

_____
Defendant

_____

OATH OR AFFIRMATION INTERPRETER

_____

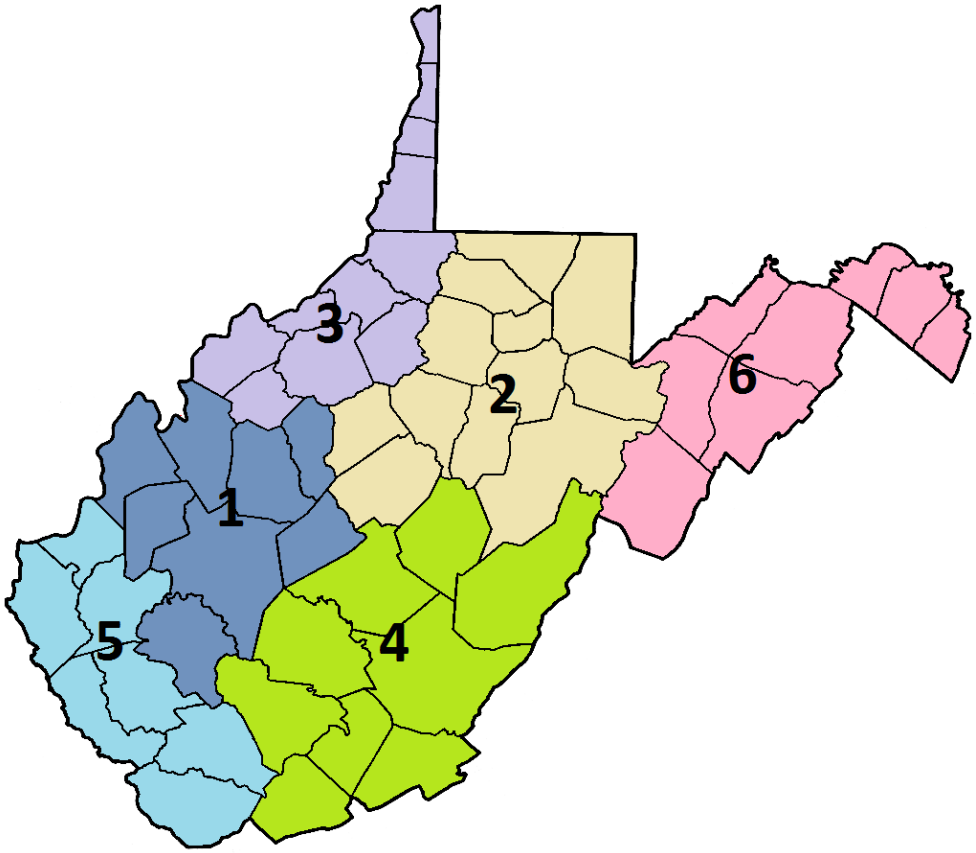
I solemnly swear or affirm that I will make a true interpretation in an understandable manner to the person for whom I am appointed and that to the best of my skill and judgment I will interpret any statements the person needing interpretation assistance desires be made in the English language.

_____
Signature of Interpreter

Taken, subscribed, and sworn or affirmed before me this _____ day of

_____, 20 ____.

West Virginia Registry of Interpreters



REGION 1	REGION 2	REGION 3	REGION 4	REGION 5	REGION 6
Boone	Barbour	Brooke	Fayette	Cabell	Berkeley
Calhoun	Braxton	Doddridge	Greenbrier	Lincoln	Grant
Clay	Gilmer	Hancock	Mercer	Logan	Hampshire
Jackson	Harrison	Marshall	Monroe	McDowell	Hardy
Kanawha	Lewis	Ohio	Nicholas	Mingo	Jefferson
Mason	Marion	Pleasants	Pocahontas	Wayne	Mineral
Putnam	Monongalia	Ritchie	Raleigh	Wyoming	Morgan
Roane	Preston	Tyler	Summers		Pendleton
	Randolph	Wetzel	Webster		
	Taylor	Wirt			
	Tucker	Wood			
	Upshur				

WEST VIRGINIA FEES FOR QUALIFIED INTERPRETER
WEST VIRGINIA CODE §5-14A-9

TABLE 192-1-A – MINIMUM FEES

QUALIFIED INTERPRETER LEVEL	MINIMUM HOURLY RATE*
CSC, CT & CI, RSC, CDI-P, SC:L, SC:PA, OIC:C, NAD Level V, NIC Master	$50.00
CI or CT, NAD Level IV, NIC Advanced, WVRIT Level IV	$45.00
IC, TC, IC/TC, OIC:S/V, OIC:V/S, NAD Level III, NIC, WVRIT** Level III	$40.00
NAD Level II, WVRIT** Level II	$25.00
NAD Level I, WVRIT** Level I	$20.00
NON-CERTIFIED/NON-SCREENED	$15.00
Assignments on weekends or between 10:00 PM - 7:00 AM	Hourly Rate plus $5.00 per hour

***If an interpreter works an assignment for more than one (1) hour without a team interpreter, then an extra $10.00 shall be added per hour.**

****The WVRIT screening is obsolete. Please replace this level of certification with the VQAS levels.**

INTERPRETER REFERRAL AGENCIES

AGENCY NAME	ADDRESS	PHONE	EMAIL
TRI-STATE INTERPRETING SERVICES	P.O BOX 81 ST. ALBANS, WV 25177	304-881-2846 (Voice) 304-721-9014 (Fax)	TRISTATETERP@GMAIL.COM
SIGN WORK SERVICES	P.O. BOX 4517 BRIDGEPORT, WV 26300	304-629-0703	SIGNWORKSSERVICES@GMAIL.COM
FRIENDS INTERPRETING SERVICES, LLC	P.O. BOX 905 RANSOM, WV 25438	304-809-0325 (Video Phone) 1-888-347-9179 (Voice) 304-728-3199 (Fax)	FIS@FRIENDSINTERPETINGSERVICES.COM WWW.FRIENDSINTERPRETINGSERVICES.COM

REGISTERED INTERPRETERS

REGION 1

(BOONE, CALHOUN, CLAY, JACKSON, KANAWHA, MASON, PUTNAM, AND ROANE)

NAME	CITY	PHONE	EMAIL	QUALIFICATION
JASMIN V. CANNISI-CAMPBELL	ST. ALBANS	304-881-2846	TRISTATETERP@GMAIL.COM	NIC ADVANCED
JENNIFER CASTO	FRAZIERS BOTTOM	304-380-6220	JENNIFERLCASTO@AOL.COM	NIC NAD III VQAS III/II
JULIE TURLEY	ST. ALBANS	304-546-8499	JBARIEL01@AOL.COM	NIC VQAS III/III
JOE BALOG	HURRICANE	304-654-9595	TWOSIGNERZ@YAHOO.COM	NAD IV
MELANIE WILKERSON	CHARLESTON	681-587-5131	TERPMEL73@GMAIL.COM	VQAS III/III
ANTONIA VAUGHAN	CLENDENIN	304-382-3510	MEOUS555@AOL.COM	VQAS III/II
ASHLEY COBB	DUNBAR	304-444-5565	ASH_NICHOLE@YMAIL.COM	VQAS II/II
KELLY GOLIGHTLY	DUNBAR	304-549-6001	KGERMANASL@HOTMAIL.COM	VQAS II/II
BRENDA HALL	CLENDENIN	304-767-0241	ELKRIV664@AOL.COM	VQAS II/II
TERRI L. HANSHAW	CHARLESTON	304-552-9769	TLFISIGN4HIM@AOL.COM	VQAS II/II
JESSICA WITHROW	EVANS	304-282-3286	JWITHROWASLTERP@GMAIL.COM	VQAS II/II

REGISTERED INTERPRETERS

REGION 2

(BARBOUR, BRAXTON, GILMER, HARRISON, LEWIS, MARION, MONONGALIA, PRESTON, RANDOLPH, TAYLOR, TUCKER, AND UPSHUR)

NAME	CITY	PHONE	EMAIL	QUALIFICATION
KRYSTAL GAINER	MORGANTOWN	614-595-4192	KRYSTAL.GAINER@GMAIL.COM	NIC
STEPHENIE WOODALL	LOST CREEK	304-624-3566 (Home) 304-838-2946 (Cell)	STEPHENIE.WOODALL@GMAIL.COM	NIC
TERESA MCGONIGLE	MORGANTOWN	304-290-8400	TERESAMCGONIGLE@HOTMAIL.COM TERESA.MCGONIGLE@MAIL.WVU.EDU	NAD III
DANIELLE MASSULLO	MORGANTOWN	301-801-4880	DANIELLEVMASSULLO@GMAIL.COM	NIC VQAS III/III
JOSHUA REASER	MORGANTOWN	304-282-1684	JOSHUA@VIATERP.COM	VQAS III/II
ENIS SCHAUFFNER	MORGANTOWN	304-282-8311	ESCHAUFFNER@GMAIL.COM ENIS.SCHAUFFNER@MAIL.WVU.EDU	VQAS III/II
KIMBERLY CALHOUN	MORGANTOWN	304-376-0523	KIMBERLYTHORN@GMAIL.COM	VQAS II/II
LAINIE FARENCE	FAIRMONT	304-365-7377	LMFARENCE@MAIL.WVU.EDU	VQAS II/II
JAMES PHILLIPS	FAIRMONT	304-366-3907	BIMPHILLIPS@HOTMAIL.COM	VQAS II/II

NAME	CITY	PHONE	EMAIL	QUALIFICATION
SARAH HOLLEN	BUCKHANNON	304-439-4940 (Home) 304-472-8832 (Cell)	SSHOLLEN@FRONTIER.COM	VQAS II/I

REGION 3

(BROOKE, DODDRIDGE, HANCOCK, MARSHALL, OHIO, PLEASANTS, RITCHIE, TYLER, WETZEL, WIRT, AND WOOD)

NAME	CITY	PHONE	EMAIL	QUALIFICATION
ROY FORMAN	WILLIAMSTOWN	304-552-4388	RB4MAN@YAHOO.COM	NAD V
MARY HENDERSON	FLEMING	304-210-7347	MFWEST777@GMAIL.COM	VQAS II/I

REGION 4

(FAYETTE, GREENBRIER, MERCER, MONROE, NICHOLAS, POCAHONTAS, RALEIGH, SUMMERS, AND WEBSTER)

NAME	CITY	PHONE	EMAIL	QUALIFICATION
ALYCE ALMOND	GHENT	304-222-1234	ALYCE.MATHERLY@GMAIL.COM	VQAS II/II
CONNIE KENDALL	RUPERT	304-661-3878	ECSIGNWHEEL@YAHOO.COM	VQAS II/II
RESSIE THOMAS	NICHOLAS	304-651-4847	RESSIELYNN@HOTMAIL.COM	VQAS II/I

REGISTERED INTERPRETERS

REGION 5

(CABELL, LINCOLN, LOGAN, MCDOWELL, MINGO, WAYNE, AND WYOMING)

NAME	CITY	PHONE	EMAIL	QUALIFICATION
LEIGH-ANN BREWER	MILTON	304-417-3244 (Home) 304-710-3139 (Fax)	BREWER13@MCTC.EDU	NIC
LINDA JOHNSON	HUNTINGTON	304-939-0447	LAJSIGNER@YAHOO.COM	NAD V
CODY CUTLIP	HUNTINGTON	304-816-6146	CCUTLIP82790@GMAIL.COM	VQAS II/II
ERIN MILLS	HUNTINGTON	304-617-5604	WILDIRISH25705@YAHOO.COM	VQAS II/II

REGION 6

(BERKELEY, GRANT, HAMPSHIRE, HARDY, JEFFERSON, MINERAL, MORGAN, AND PENDLETON)

NAME	CITY	PHONE	EMAIL	QUALIFICATION
JULIE ALLNUTT	MARTINSBURG	304-261-0603	JALLNUTT@ME.COM	NIC ADVANCED
JONAS J. BRINKS	HEDGESVILLE	240-357-8202	BRINKSJONAS@GMAIL.COM	NIC
CRYSTAL KENNEY	HARPERS FERRY	304-397-3784 (Home) 304-535-6874 (Cell)	BEACH101371@ME.COM	CI AND CT
CINDY KESSEL	ROMNEY	304-822-3703	CKESSEL@ATLANTICBB.NET	NAD IV
SHARI LOAR	ROMNEY	504-383-9466	SJLOAR@FRONTIERNET.NET	NAD IV

REGISTERED INTERPRETERS

OUT OF STATE

NAME	CITY	COUNTY/STATE	PHONE	EMAIL	QUALIFICATION
ALISHA DUNN	CARLISLE	NICHOLAS KENTUCKY	859-473-1777	ALSHNICOLE@GMAIL.COM	NIC
KRYSAL KRPAN	PASADENA	ANNE ARUNDEL MARYLAND	202-351-8404	KRYSTAL.KRPAN@GMAIL.COM	NIC
MELISSA MCMAHAN	CUMBERLAND	ALLEGANY MARYLAND	301-707-6513	MCMAHAN913@YAHOO.COM	VQAS III
NAN CRONK-WALKER	MYERSVILLE	FREDERICK MARYLAND	301-606-4452	NANCRONKWALKER@AOL.COM	CI AND CT
JANICE MARTIN	FREDERICK	FREDERICK MARYLAND	301-639-2151	JNGMARTIN@AOL.COM	IC AND TC
DENISE A. VOLLMER	FREDERICK	FREDERICK MARYLAND	301-801-9645	DAVOLLMER@HOTMAIL.COM	CSC
DIANA STOLINSKI	FREDERICK	FREDERICK MARYLAND	240-674-9169	DIANA.STOLINSKI@GMAIL.COM	NIC
JOHN KRPAN	LAUREL	PG MARYLAND	240-241-7191	JKRPAN@AOL.COM	CDI
CINDY MEASE	BIG POOL	WASHINGTON MARYLAND	301-667-2662	CLMEASE@GMAIL.COM	NAD IV
MARY HENDERSON	FLEMING	WASHINGTON OHIO	304-210-7347	MFWEST777@GMAIL.COM	VQAS II/I
DANULLE FILIP	PITTSBURGH	ALLEGHENY PENNSYLVANIA	412-400-2021	SLIPREQUESTS@GMAIL.COM	NIC ADV

NAME	CITY	COUNTY/STATE	PHONE	EMAIL	QUALIFICATION
BIRCHRI LEE	PITTSBURGH	ALLEGHENY PENNSYLVANIA	412-400-2021	SLIPREQUESTS@GMAIL.COM	NIC
JOANNE L. SHARER	PITTSBURGH	ALLEGHENY PENNSYLVANIA	412-400-2021	SLIPREQUESTS@GMAIL.COM	CI AND CT AND SC
BRIAN MILLIN	WAYNESBORO	FRANKLIN PENNSYLVANIA	717-788-1081 (Home) 301-526-1320 (Cell)	BRIAN.MILLIN@GMAIL.COM	NIC ADV
CHARLOTTE L. BELL	MIDLOTHIAN	CHESTERFIELD VIRGINIA	860-480-0004	CBELL303@YAHOO.COM	CI AND CT
CHRISTINE ROMP	PEARISBURG	GILES VIRGINIA	860-480-0004	CMROMP@GMAIL.COM	NIC CI AND CT
BETHANY STEELE	LEESBURG	LOUDOUN VIRGINIA	540-687-1901	SIGNTERPBETH@GMAIL.COM	VQAS III/II
AMANDA WHARTON STACEY	ROANOKE	ROANOKE VIRGINA	760-277-5634	ARW.STACEY@GMAIL.COM	NIC

Basic Outline of Family Court Appellate Procedure – as mandated by Senate Bill 5007

***Entry of a final order* of a family court judge**
(or judge assigned pursuant to 51-2A-19)

30 Days

Petition for Appeal due in circuit clerk's office
(Form 2) (Original + 2 copies)

15 Days

Response to petition for appeal due (may also file cross-petition)

14 Days to file Notice & Waiver (Form 1)

Note: If only one party files a notice & waiver, any petition filed is treated as a petition to circuit court.

60 Days

Waiver Appeal

Only if *both* parties file notice of intent to appeal directly to Supreme Court and waive right of appeal to circuit court—may use forms or regular appellate procedure (four-month deadline applies). 51-2A-15(a)

Transfer Appeal

If order *not* entered within 60 days, circuit clerk sends written notice to parties: unless objections received from both parties within 14 days, appeal will be *automatically transferred.* (Petition filed in circuit court stands as petition for appeal in supreme court.)

Circuit court must enter an order ruling on a petition for appeal *or* enter an order "stating just cause why the order has not been timely entered" 51-2A-14(e)

Note: If a petition for appeal is refused, any stay granted is automatically vacated. 51-2A-12

Supreme Court of Appeals

Traditional Appeal

Pursuant to Rules of Appellate Procedure and 58-5-1 et seq.

4 Months

FINAL DECISION
Circuit court may refuse the petition, affirm, reverse, or grant mixed relief.

REMAND ORDER
--Actions on remand must be set forth in order
--NOT an appealable order

By Rory Perry, Supreme Court Clerk, May 2002. For informat

SUPREME COURT OF APPEALS
CHARLESTON, WEST VIRGINIA
25305

THOMAS B. MILLER
Chief Justice

MEMORANDUM

TO: ALL CIRCUIT JUDGES
ALL CIRCUIT CLERKS

FROM: THOMAS B. MILLER, CHIEF JUSTICE

DATE: MARCH 5, 1986

RE: ADMINISTRATIVE ORDER ON JURIES

Your attention is directed to the enclosed Administrative Order, which sets guidelines on the number of persons who may be called in for jury selection. As you will note, this is being done in order to curtail our jury costs, which continue to increase despite the advent of the six-member civil jury.

Your prompt implementation of the provisions of this Order is appreciated.

Enclosure

A D M I N I S T R A T I V E O R D E R

WHEREAS, Recent attempts to curtail judicial spending and in particular the costs for jurors has continued to rise despite the fact that since July 1, 1985, six-member juries have been authorized in civil cases; it is felt that general guidelines must be imposed with regard to jury trials; and it is hereby

ORDERED, That until further notice, all circuit judges and circuit clerks are hereby directed to observe the following practices in the summoning and selection of persons to serve on the juries of their circuits:

(1) In advance of trial in all criminal cases in which a jury has been requested, the clerk shall select, in random rotation, not more than twenty-five (25) jurors to be present for each case which is called for trial.

(2) In advance of trial in all civil cases in which a jury has been requested, except for cases involving eminent domain, the clerk shall select, in random rotation, not more than fourteen (14) jurors to be present for each case which is called for trial. (This presupposes the parties are agreeable to two peremptory challenges each. If not, the panel should be eighteen.)

(3) In the event of multiple parties in a jury trial, the court may instruct the clerk to provide for such additional jurors as are necessary to allow for sufficient peremptory challenges for each party.

(4) In the event that the examination of jurors is expected to continue beyond one day, no jurors shall be required to attend other than those expected to be examined on each particular day; and, it is

FURTHER ORDERED, That, during the time this Order is in effect, the provisions of Paragraph Two of Rule XII of the Trial Court Rules for Courts of Record are suspended; and, it is

FURTHER ORDERED, That judges having before them cases involving particular publicity and notoriety may, with the written consent of the Administrative Director of the Courts, arrange to bring in more persons for the selection of a jury than those numbers provided herein, with such numbers to be fixed on a case-by-case basis by the Administrative Director; and, it is

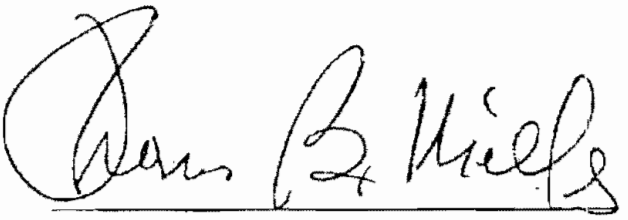
FURTHER ORDERED, That, in order to facilitate the calling and selection of jurors in multi-judge circuits where more than one jury trial is scheduled to be held on the same day, arrangements shall be made for the persons brought in for potential jury service to be divided among the several judges conducting jury trials in such a manner as to provide for the orderly and simultaneous selection of jurors by every judge having or contemplating a jury trial, and any contrary interpretation of Rule 11 of the Local Court Rules for Kanawha County Circuit Court is disapproved. The Administrative Director shall have authority to so designate the manner in which the venire is to be divided; and, it is

FURTHER ORDERED, That these limitations are to be established and observed coincident with the effective date of this Order; and, it is

FURTHER ORDERED, That this Order shall be and remain in effect until a subsequent Order is entered by the Supreme Court of Appeals of the State of West Virginia.

ENTER: This, the 5th day of March, 1986.

BY:



Chief Justice

THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

ADMINISTRATIVE ORDER:
INCREASE IN REIMBURSEMENT TO JURORS

WHEREAS, the Supreme Court of Appeals of West Virginia is required to reimburse jurors for jury duty pursuant to W.Va. Code § 52-1-17; and

WHEREAS, by previous Administrative Order of this Court entered on the 6th day of October, 2000, juror fees were increased to twenty dollars per day effective January 1, 2001, and to increase by an additional five dollars on January 1 of each subsequent year, until the reimbursement to jurors reaches forty dollars per day; and

WHEREAS, pursuant to the provisions of W.Va. Code § 52-1-17, juror fees in excess of twenty dollars per day have been granted without the prior approval of this Court, and in consideration of the importance of jurors' service to the administration of justice in both the magistrate and circuit courts of West Virginia, and in consideration of the substantial personal sacrifice of time and money which jurors incur in discharging this civic duty to their State and their fellow citizens, the Court has reconsidered its previous Order;

IT IS THEREFORE ORDERED that reimbursement to jurors for their service in magistrate and/or circuit court be, and it hereby is, increased from twenty dollars per day to forty dollars per day effective November 8, 2001, the date on which this order is made; and

IT IS FURTHER ORDERED that court costs, including payment of juror fees, are to be assessed by the trial court only at the conclusion of a case and in conformity with the provisions of W.Va. Code § 52-1-17(c); and

IT IS FURTHER ORDERED that private agreements between or among the parties, pro se or by counsel, as to the payment or division of juror fees shall not be published to the public or the jurors during the pendency of the proceedings prior to the receipt of the jury verdict, and shall be subject to approval, modification or rejection by the trial court, and no such agreement shall provide for juror compensation in excess of that provided for in W.Va. Code, § 52-1-17 and this Order; and

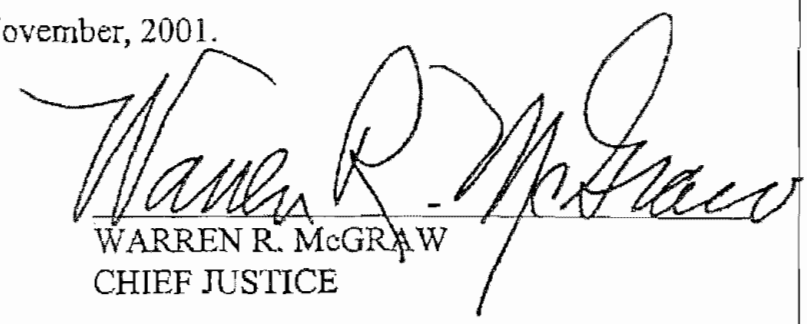
IT IS FURTHER ORDERED that, with due regard to the provisions of Section 38, Article VI of our Constitution, juror fees in excess of twenty dollars per day ordered by a trial court prior to November 8, 2001, under W.Va. Code § 52-1-17, shall be reimbursed to the county wherein such fees were incurred only with respect to jury service rendered on and after the date of the entry of the trial court order setting fees in excess of twenty dollars; and

IT IS FURTHER ORDERED that copies of this Order be disseminated to all circuit judges, magistrates, circuit clerks, magistrate clerks and sheriffs; and

IT IS FURTHER ORDERED that the Administrative Director, or her designee, may issue directives regarding procedures which are to be followed to effectuate the purposes of this ORDER.

Justice Davis, deeming herself disqualified, did not participate in the Court's discussion of this issue or the decision of the Court.

ENTERED this 8th day of November, 2001.



WARREN R. McGRAW
CHIEF JUSTICE

ADMINISTRATIVE ORDER

SUPREME COURT OF APPEALS OF WEST VIRGINIA

RE: DETERMINING ELIGIBILITY FOR WAIVER OF FEES, COSTS OR SECURITY IN CIVIL CASES FOR THE YEAR 2015

WHEREAS, The West Virginia Legislature, in enacting and amending W.Va. Code § 59-2-1; has provided that the Supreme Court of Appeals or the Chief Justice thereof shall establish and periodically review and update financial guidelines for determining the eligibility of civil litigants to proceed *in forma pauperis*; and

WHEREAS, the Supreme Court of Appeals adopted Rule 77(e) of the West Virginia Rules of Civil Procedure, and Rule 22 of the Rules of Civil Procedure for the Magistrate Courts of West Virginia, in accordance with W.Va. Code § 59-2-1; and

WHEREAS, an Administrative Order entered March 23, 2011, provides that the financial guidelines for determining the eligibility of civil litigants to proceed *in forma pauperis* shall be set based on 150 percent of the federal poverty guidelines in effect on January 1st of each year, and Ordered the Administrative Director to update the financial guidelines on an annual basis for the Court's consideration; and

IT IS THEREFORE ORDERED, that the financial guidelines attached hereto and incorporated herein by reference shall be in effect from the date of the entry of this Order until the date of the entry of a subsequent updated Order for 2016, and thereafter shall be set based on 150 percent of the federal poverty guidelines in effect on January 1st of each year or until such time as otherwise directed by further administrative order of the Chief Justice.

IT IS FURTHER ORDERED, that the Administrative Director is to update the financial guidelines on an annual basis for the Court's consideration.

ENTERED: Feb. 10, 2015

MARGARET L. WORKMAN
Chief Justice

Attest:
Rory L. Perry II, Clerk
Supreme Court of Appeals

Appendix B

1) Request for Legal Process to be Served by the West Virginia Secretary of State

2) Report to Division of Vital Statistics - Divorce and Annulments

3) Report to Division of Vital Statistics - Certificate of Paternity

4) Certificate of Adoption to Division of Vital Statistics

5) DMV - Abstract of Judgment Form

6) Authenticated Record Forms (Circuit Court and Family Court)

7) Records Disposal Report

8) List of FIPS Numbers and Sample Invoice

9) DMV - Notice and Verification of Satisfaction

10) Remittance Report to State Auditor - Criminal Charge Fund Report

11) Remittance Report to State Treasurer

12) Remittance Report to Supreme Court Administrative Office

13) Affidavit of Accrued Support (and Notice of Filing)

14) Restitution and Criminal Costs Summary

Request for Legal Process to be Served by the West Virginia Secretary of State

Please serve the named defendant, _____, in the attached matter according to the provision of law cited below. The fee of **$20** per defendant required by W. Va. Code §59-1-2 is attached ($30 if defendant is out of U.S.). Check all applicable:

☐ §21A-5-17c	Service on non-resident employer & others liable for unemployment compensation payments
☐ §29-19-14	Service on professional fund raising counsel, nonresident charitable organizations or professional solicitors soliciting contributions from people in this State
☐ §31D-5-504 & §56-3-13	Service on authorized domestic corporation
☐ §31D-15-1510	Service on authorized foreign corporation
☐ §31D-15-1510	Service on unauthorized foreign corporation
☐ §31B-1-111 & §31B-9-906	Service on authorized domestic or foreign limited liability company
☐ §33-4-12	Service on licensed insurer
☐ §33-4-13 & §33-2-22	Service on unlicensed or unauthorized foreign insurer
☐ §38-1A-7 & §38-1A-8	Service on non-resident trustee of a security trust
☐ §46A-2-137	Service on certain nonresidents under WV Consumer Credit and Protection Act
☐ §47-9-4	Service on authorized domestic or foreign limited partnership formed under §47-9, or limited liability partnership (LLP) formed under §47B-10 (see also §56-3-13a, §47B-9-6)
☐ §47-9-4	Service on unauthorized foreign limited partnership or LLP
☐ §56-3-31	Service on nonresident motor vehicle operator involved in an accident in this state, or on his/her insurer
☐ §56-3-33(a)	Service on individual under the long-arm statute because the individual is:

- ☐ (1) Transacting business in this state
- ☐ (2) Contracting to supply services or things in this State
- ☐ (3) Causing tortious injury in this state by act or omission (see §56-3-33(4) for description of causing tortious injury)
- ☐ (4) Non-support of minor children (pursuant to Lozinski v. Lozinski)
- ☐ (5) Causing injury in this State by breach of warranty
- ☐ (6) Having interest in, using or possessing real property in this State
- ☐ (7) Contracting to insure person, property or risk located in WV at the time of contracting

☐ §38-5A-5	Service of suggestee execution as provided for in §38-5A

IN THE FAMILY/CIRCUIT COURT OF _____ COUNTY, WEST VIRGINIA

INFORMATION REQUESTED BY DIVISION OF VITAL STATISTICS

[Pertaining to Divorces and Annulments]
Chapter 16, Article 5, Section 34 of
Code of West Virginia, as Amended

Civil Action Number: _____

Petitioner's Full Name: _____

Respondent's Full Name: _____

Petitioner's and/or Respondent's Maiden Name: _____

Age of Petitioner: _____ Age of Respondent: _____

Place of Marriage: _____
[COUNTY] [STATE]

Date of Marriage: ____/____/_____

Divorce: ☐ Yes ☐ No

Annulment: ☐ Yes ☐ No

Names of Children Under 18 Years of Age	Date of Birth
	/ /
	/ /
	/ /
	/ /
	/ /
	/ /
	/ /

Date of Decree: _____
[To be Completed by Clerk]

WEST VIRGINIA Department of Health & Human Resources

CERTIFICATE OF PATERNITY

(replaces Abstract of Judgment of Paternity)

In accordance with Chapter 16, Article 5, Section 17 of the West Virginia Code (revised 2006), for all judicial proceedings in West Virginia in which the paternity of a child was determined, the petitioner or petitioner's attorney is required to complete this form as is applicable through item A.3. and submit it immediately after the entry of the final order to the Clerk of the Circuit Court. The Clerk of the Circuit Court in the county in which the proceeding takes place will complete the Certification Section and submit the form to the Vital Registration Office. If the court determines and orders that the paternity of the child is different than on the filed birth certificate, the birth certificate will be amended to reflect the findings and order of the court.

A. INFORMATION TO BE SUBMITTED BY PETITIONER OR PETITIONER'S ATTORNEY

1 . Information From Child's Original Birth Certificate

a. Child's Name _____ b. Child's Date of Birth _____ (mm/dd/ccyy)

c. Child's Place of Birth (County and State) _____

d. Mother's Maiden Surname _____

e. Mother's Full Legal Name at Birth of Child _____

f. Mother's Social Security Number *(last 4 digits only)* **XXX - XX -** _____

2 . As To Paternity And Changes To The Birth Certificate, What Was Determined By The Court?

2a. ADD TO OR CONFIRM FOLLOWING ON CERTIFICATE - Father Established or Confirmed

A. Father's Name _____ B. Father's DOB _____ (mm/dd/ccyy)

C. Father's Place of Birth (County and State) _____

D. Father's Social Security Number *(all 9 digits)* _____

2b. REMOVE FATHER IF ON BIRTH CERTIFICATE - Man Adjudicated To Not Be Father

A. Name of Father to be Removed _____

2c. CHILD'S LAST NAME TO BE CHANGED - Order Specifically States Name to Be Changed

(Child's FULL name EXACTLY as it should appear on the birth certificate ONLY AS SPECIFIED IN THE ORDER)

_____

3. Petitioner Or Petitioner's Attorney's Information

a. Name _____ b. Agency _____

c. Address _____

B. CERTIFICATION BY THE CLERK OF THE COURT

a. Civil Action / Case # _____

b. County _____

c. Court _____

d. Date Order Signed _____

e. Date Order Entered *(if different than d.)* _____

f. Clerk's Signature / Title _____

g. Date _____

SEAL

Submit within 10 days after the end of the month the judgement was made to:
Corrections Unit, Vital Registration Office, PO Box 11012, Charleston, WV 25339-1012

WEST VIRGINIA Department of Health & Human Resources

STATE OF WEST VIRGINIA
CERTIFICATE OF ADOPTION
(formerly Adoption Information Form)

(Read information and instructions on reverse side before completing.)

A. INFORMATION REGARDING ORIGINAL STATUS OF CHILD

Original Name of Child _____ Birth Certificate No. _____

Sex _____ Date of Birth _____

Place of Birth _____

Name of Father _____

Name of Mother Before First Marriage _____

Current Legal Name of Mother _____

B. INFORMATION FROM ADOPTIVE PARENTS FOR NEW CERTIFICATE OF BIRTH

(All information requested below MUST be provided before a new birth certificate can be constructed for filing.)

Child's Name After Adoption _____

Adoptive/Biological Father	Adoptive/Biological Mother
Name _____	Full Current Legal Name _____
	Full Name Before First Marriage _____
Birth Date _____	Birth Date _____
Birth Place (State) _____	Birth Place (State) _____
Social Security No. _____	Social Security No. _____

Residence of Adoptive Parent(s): _____
Street *City* *County* *State* *Zip*

Mailing address *(if different)*: _____
Street *City* *State* *Zip*

Is this a single parent adoption, i.e., will only one parent appear on the birth certificate? ____Yes ____No

This adoption is by ***(mark one)*** :

( ) Stepparent w/ or w/o birth parent ( ) Grandparent(s) ( ) Other Relative(s) ( ) Non-Relative(s)

WV DHHR Representative, Licensed Adoption Agency Representative, Attorney, or Adoptive Parent if acting *pro se* providing this information:

Name _____ Title _____

Address _____ Telephone _____

Signature _____ Date _____

C. CERTIFICATION OF CLERK OF CIRCUIT COURT

Case or Civil Action No. _____

On this ____day of _____,20___ the Circuit Court of _____ County, Judge _____ presiding, ordered a decree of adoption in the case of the child and parent(s) described above.

The attorney was _____ Address _____

Signed and Sealed by: _____ Date _____
(Clerk of Circuit Court)

(Seal)

THIS FORM FOR OFFICIAL USE ONLY
UPON CONVICTION, PENALTIES FOR MISUSE INCLUDE FINES, IMPRISONMENT OR BOTH.

Mail to: VITAL REGISTRATION OFFICE, ATT: CORRECTIONS UNIT, PO BOX 11012, CHARLESTON, WV 25339-1012

STATE OF WEST VIRGINIA
CERTIFICATE OF ADOPTION
(formerly Adoption Information Form)

INSTRUCTIONS

Prompt submission of this report when properly completed will expedite the filing of a new birth certificate.

CLERK OF CIRCUIT COURT:
Under the provisions of West Virginia State Code §16-5-16, it is the duty of the Clerk of Circuit Court to forward this form, properly completed, to the Vital Registration Office within 10 days following the end of the month in which the final adoption decree was issued.

Sections A. and B. should be completed by the WV DHHR Representative, Licensed Adoption Agency Representative, Petitioner's Attorney, or the Adoptive Parent if acting *pro se*.

When the final decree of adoption is ordered by the Court, the Circuit Clerk should complete Section C. and mail the completed form to the:

Vital Registration Office
ATT: Corrections Unit
PO Box 11012
Charleston, WV 25339-1012

GENERAL INFORMATION

Upon receipt of the Certificate of Adoption from a Clerk of the Court (preferred), or upon receipt of a certified copy of a final decree of adoption accompanied by all other information necessary to locate the original birth certificate and construct the new post-adoption birth certificate (less preferred but acceptable), the State Registrar shall make and file a new birth certificate.

OUT OF STATE BIRTHS - ADOPTIONS IN WEST VIRGINIA:
Although birth certificates for these children are not placed on file in West Virginia, the State Registrar will forward Certificates of Adoption for persons born outside of West Virginia to the proper registration authorities in the state of birth where new birth certificates can be placed on file.

TO OBTAIN A SUPPLY OF BLANK CERTIFICATES OF ADOPTION:

1) Write to us at the address above, or
2) FAX a request on your letterhead to: 304-558-1051, or
3) Call us at: 304-558-2931 and ask to speak with the Corrections Unit, or
4) Print or download the PDF version of this form from our web site. Go to:

http://www.wvdhhr.org/bph/hsc/vital/Forms.asp

ABSTRACT OF JUDGEMENT

STATE OF WEST VIRGINIA CASE/CITATION NO. _____
V.

_____

Name: Last First Middle (not initial)

_____

Address: Street/Route City/Town State Zip Code

Driver License Type: ☐ Driving License ☐ GDL Level 1 ☐ GDL Level 3 ☐ CDL Instruction Permit ☐ Motorcycle Instr Permit
☐ Instruction Permit ☐ GDL Level 2 ☐ CDL ☐ Motorcycle Only ☐ Other: _____

Gender: ☐ Male _____/_____/_____
☐ Female Driver License No. Class State Social Security Number

____/____/_____
Date of Birth Weight Height Eye Color

Complete Only for Commercial Motor Vehicles: ☐ Coal Resource Transportation Sys.
CMV Type (Check 1) ☐ Veh Designed to Carry 16+ Passengers ☐ Haz Mat ☐ Other CMV Permit #: _____

Offense(s) charged: _____Date(s) committed: _____

West Va. Code Violation: Chapter _____Article _____Section _____

Municipal Ordinance Violated: _____

Offenses(s) for which convicted: _____

Was there a plea? ☐ Yes ☐ No If yes, what kind of plea? ☐ Guilty ☐ No Contest

If convicted of speeding, the defendant was driving _____ MPH in a _____ MPH zone.

Bail forfeited? ☐ Yes ☐ No Conviction Date: _____

Officer's Name: _____ Agency:_____

Violation ☐ did ☐ did not contribute to an accident
Appropriate box checked if accident resulted in ☐ fatality, ☐ personal injury, ☐ property damage

Owner/Lessee Name: ☐ Same as Violator _____

Address: _____

License Plate Number: _____ State: _____ VIN # _____

Make: _____ Year: _____ Model: _____ Body Style: _____ GVWR _____
(Gross vehicle weight ratio)

I hereby certify that the above is a true copy of the record of this court in the above-referenced case.

Signature: _____Title:_____

Court Name: _____

Address:_____ Date: _____

File No.:			
Hearing Date:	**Court Code**	**Conviction Code**	**Batch**

DMV USE ONLY

ATTESTATION OF KEEPER OF CIRCUIT COURT RECORD

STATE OF WEST VIRGINIA,
COUNTY OF _____, TO-WIT:

OFFICE OF THE CIRCUIT CLERK,
AT _____, WEST VIRGINIA

I, _____, Clerk of the Circuit Court in and for _____ County, West Virginia, do hereby certify the foregoing to be a true and accurate copy of as the same appears of record in my office at _____, West Virginia in _____ Order Book _____, at page(s) _____.

IN TESTIMONY WHEREOF, Witness my hand and seal of office at _____, West Virginia this _____ day of _____, 20_____.

(SEAL)

_____
Clerk of the Circuit Court

CERTIFICATE OF CIRCUIT JUDGE

STATE OF WEST VIRGINIA,
COUNTY OF _____, TO-WIT:

I, _____, Judge of the Circuit Court, do hereby certify that _____, by whom the annexed Record, Certificate and Attestation were made and given, and who, in his/her own proper handwriting, has thereunto subscribed his/her name and affixed his/her official seal, was at the time of so doing, and is now, Clerk of the Circuit Court, duly elected and qualified, and that the said attestation is in due form and made by the proper officer.

IN TESTIMONY WHEREOF, I have hereunto set my hand this _____ day of _____, 20____.

_____
Judge of the Circuit Court

STATE OF WEST VIRGINIA,
COUNTY OF _____, TO-WIT:

I, _____, Clerk of the Circuit Court, do hereby certify that Honorable _____, by whom the foregoing Attestation was made, and whose name is thereunto subscribed, was at the time of making the same, and still is, Judge of the Circuit Court in and for _____ County, West Virginia, duly elected and qualified according to law.

IN **TESTIMONY WHEREOF,** I have hereunto set my hand and affixed the seal of said Court this _____ day of_____, 20_____.

(SEAL)

_____
Clerk of the Circuit Court

ATTESTATION OF KEEPER OF FAMILY COURT RECORD

STATE OF WEST VIRGINIA,
COUNTY OF _____, TO-WIT:

OFFICE OF THE CIRCUIT CLERK,
AT _____, WEST VIRGINIA

I, _____, **Clerk of the Circuit Court** in and for _____ County, West Virginia, do hereby certify the foregoing to be a true and accurate copy of as the same appears of record in my office at _____, West Virginia in _____ Order Book _____, at page(s) _____.

IN TESTIMONY WHEREOF, Witness my hand and seal of office at _____, West Virginia this _____ day of _____, 20_____.

(SEAL)

_____
Clerk of the Circuit Court

CERTIFICATE OF FAMILY JUDGE

STATE OF WEST VIRGINIA,
COUNTY OF _____, TO-WIT:

I, _____, **Judge of the Family Court,** do hereby certify that _____, by whom the annexed Record, Certificate and Attestation were made and given, and who, in his/her own proper handwriting, has thereunto subscribed his/her name and affixed his/her official seal, was at the time of so doing, and is now, Clerk of the Circuit Court, duly elected and qualified, and that the said attestation is in due form and made by the proper officer.

IN TESTIMONY WHEREOF, I have hereunto set my hand this _____ day of _____, 20____.

_____
Judge of the Family Court

STATE OF WEST VIRGINIA,
COUNTY OF _____, TO-WIT:

I, _____, **Clerk of the Circuit Court,** do hereby certify that Honorable _____, by whom the foregoing Attestation was made, and whose name is thereunto subscribed, was at the time of making the same, and still is, Judge of the Family Court in and for _____ County, West Virginia, duly elected and qualified according to law.

IN **TESTIMONY WHEREOF,** I have hereunto set my hand and affixed the seal of said Court this _____ day of_____, 20_____.

(SEAL)

_____
Clerk of the Circuit Court

RECORDS DISPOSAL REPORT

Circuit Court of _____ **County** **Date:**

Date Destroyed	Record Type	Record Series	Film or Disk Ref #	Comments

This is to certify that the above records were destroyed in accordance with the Circuit Court Record Retention Schedule promulgated November 29, 1990 and amended by Supreme Court Administrative Order dated

_____.

Date:

WEST VIRGINIA COUNTY FIPS CODES

FIPS	COUNTY	FIPS	COUNTY
001	Barbour	059	Mingo
003	Berkley	061	Monongalia
005	Boone	063	Monroe
007	Braxton	065	Morgan
009	Brooke	047	McDowell
011	Cabell	067	Nicholas
013	Calhoun	069	Ohio
015	Clay	071	Pendleton
017	Doddridge	073	Pleasants
019	Fayette	075	Pocahontas
021	Gilmer	077	Preston
023	Grant	079	Putnam
025	Greenbrier	081	Raleigh
027	Hampshire	083	Randolph
029	Hancock	085	Ritchie
031	Hardy	087	Roane
033	Harrison	089	Summers
035	Jackson	091	Taylor
037	Jefferson	093	Tucker
039	Kanawha	095	Tyler
041	Lewis	097	Upshur
043	Lincoln	099	Wayne
045	Logan	101	Webster
049	Marion	103	Wetzel
051	Marshall	105	Wirt
053	Mason	107	Wood
055	Mercer	109	Wyoming
057	Mineral		

Betsy Castle
Circuit Clerk
101 W. Main St., Room 301
Kingwood, WV 26537
Invoice No.: 077111705

TAXATION OF COSTS FOR BUREAU OF CHILD SUPPORT ENFORCEMENT

Date of Service	Style of Case	Case No.	Service Requested	Amount

CIRCUIT COURT OF _____ COUNTY, WEST VIRGINIA

NOTICE OF FAILURE TO RESPOND, APPEAR OR PAY COURT-IMPOSED ASSESSMENTS

The defendant in the criminal case referred to below has failed, within the prescribed time limit, to:

☐ appear or otherwise respond in court ☐ pay court-imposed assessments

Therefore, the ☐ ***Division of Motor Vehicles*** ☐ ***Division of Natural Resources*** *[check appropriate box(es)]* is to suspend the defendant's license(s) in accordance with W.Va. Code § 50-3-2a and/or § 62-4-17.

Defendant'sName_____

Defendant'sMailingAddress_____

City _____ State _____ Zip _____

Driver's License No. _____ Licensing State _____

Date of Birth _____ Social Security No. _____

Hunting or Fishing License No. _____ Class _____

Criminal Case No. _____ Date Issued/Filed _____

_____ _____

Date of Notice Circuit Court Clerk Signature

VERIFICATION OF SATISFACTION

The above-referenced criminal case has been fully resolved in the following manner:

Disposition	**Date**	
☐ Paid in Full	_____	Receipt #_____
☐ Dismissed	_____	
☐ Other (explain on lines below)	_____	

_____

_____

_____ _____

Date of Verification Circuit Court Clerk Signature

Name of Circuit Clerk: _____ Telephone No.: _____

Mailing Address: _____

_____ County

Criminal Charges and Court Reporter Fee

For the Month of _____

Term of Court Mo/Yr	Defendant's Name	Case No.	Court Reporter 401	Circuit Court Witness Fee 402	Magistrate Court Witness Fee 403	Misc Court Fee 404	Drug Testing Fee 405
	Total per Page						
	Grand Total						

Page ___ of ____

To the best of my knowledge the above is a true and accurate statement of criminal charge reimbursements and court reporter fees paid to the Sheriff of this County during the month of _____. These monies are to reimburse the State of West Virginia for expenses incurred in behalf of the defendants and for court reporters' fees provided for by Chapter 51, Article 7, Section 6 of the Code of West Virginia 1931, as amended.

_____
Circuit Clerk

_____
Date

Make Remittance Payable to the Honorable Glen B. Gainer, III, State Auditor
And Return to the State Auditor's Office, County Collections Division, Room W212, Charleston 25305

March 1998

West Virginia
State Treasurer's Office
John D. Perdue, Treasurer

1900 Kanawha Boulevard East
Charleston, WV 25305
www.wvtreasury.com

Check Hotline: (304) 558-3599
Toll Free: 1-866-243-9010

REMITTANCE BY CIRCUIT COURT CLERK – FY 2016

00270105

FOR THE MONTH OF _____ **YEAR** _____ **TREAS NUMBER:** _____

BY THE CIRCUIT CLERK OF _____ **COUNTY, WEST VIRGINIA.**

REMITTANCE PREPARED BY: _____ **PHONE:** _____

	FUND	AUTHORITY	AMOUNT		REMITTED
1	**Court Security Fund**	§51-3-14(a)			
A	Civil Filing Fee	§59-1-28a(a)(2)	$5.00	1A	_____
B	Divorce Filing Fee	§59-1-28a(b)(4)	$5.00	1B	_____
C	Criminal Fee	§59-1-28a(e)	$5.00	1C	_____
2	**Crime Victim's Compensation Fund**	§14-2A-4(b)			
A	Misdemeanor Conviction	§14-2A-4(a)	$10.00	2A	_____
B	Felony Conviction	§62-5-10(b)	$50.00	2B	_____
C	20% of DUI Fine per §17C-5-2	§14-2A-4(a)		2C	_____
3	**Family Court Fund**	§51-2A-22			
A	Divorce Filing Fee	§59-1-28a(b)(3)	$70.00	3A	_____
B	Modification Filing Fee	§59-1-28a(c);§59-1-11(a)(4)	$85.00	3B	_____
C	Expedited Modification Filing Fee	§59-1-28a(c); §59-1-11(a)(5)	$35.00	3C	_____
D	Final Protective Order	§48-27-508	$25.00	3D	_____
4	**Family Protection Shelters Fund**				
	Divorce filing fee	§59-1-28a(b)(2)	$30.00	4	_____
5	**HIV Testing Fund**	§16-3C-2(f)(13)			
	Testing fees	§16-3C-2(f)(12)		5	_____

TOTAL OF LINES 1 – 5 ABOVE: _____

CIRCUIT COURT OF _____ **COUNTY**

REMITTANCE FOR THE MONTH OF _____

Version 2015.01 revised 4.23.2014

00270205

	FUND	AUTHORITY	AMOUNT		REMITTED
6	**Law Enforcement Training Fund**	§30-29-4(c)			
A	Criminal fees	§30-29-4(a)	$2.00	6A	
B	Bond forfeiture	§30-29-4(b)	$2.00	6B	
7	**Litter Control Fund**	§22-15A-4		7	
8	**General Revenue Fund**				
A	Probation Supervision Fees $0-$20/probationer/month	§62-12-9(a)(5)		8A	
B	Forfeited Recognizance 5% amount recovered	§59-2-17(c)		8B	
9	**W.Va. Community Corrections Fund**	§62-11C-4			
A	Probation Fee	§62-11C-4(b)	$0 - $35.00	9A	
B	Home Confinement Fee	§62-11C-4(c)	$2.50/day	9B	
C	Criminal Conviction	§62-11C-4(d)	$10.00	9C	
D	Felony Conviction	§62-5-10(b)	$25.00	9D	
10	**Regional Jail & Correctional Facility Fund**	§31-20-10(a)			
A	Civil Filing fees	§59-1-28a(a)(1)	$60.00	10A	
B	Criminal filing fees	§59-1-28a(e)	$40.00	10B	
C	Divorce filing fees	§59-1-28a(b)(1)	$10.00	10C	
11	**Timbering Operations Enforcement Fund** §19-1B-12a (civil penalty)	§19-1B-8	$500.00	11	
12	**Parent Education Fund** As required by court	§48-9-104(c) §48-9-104(c)	$0 - $25.00	12	
13	**Parent Education & Mediation Fund** 1/2 Total Jury Costs	§48-9-604 §52-1-17(d)(2)(B)(i)		13	
14	**Domestic Violence Legal Services Fund**	§48-26-603(a)			
A	1/2 Jury Costs	§52-1-17(d)(2)(B)(ii)		14A	
B	Civil Action Filing Fee	§59-1-11(a)(1)	$20.00	14B	
C	Attorney's Fees	§48-26-603(b)		14C	
15	**Medical Liability Fund** Medical liability filing fee	§29-12B-10 §59-1-28a(f)	$165.00	15	
16	**Parolee's Supervision Fee Fund** Court imposed - up to $40/month	§62-12-17(b) §62-12-17(a)(5)		16	

TOTAL OF LINES 6 – 16 ABOVE: _____

CIRCUIT COURT OF _____ **COUNTY**

REMITTANCE FOR THE MONTH OF _____

00270305

	FUND	AUTHORITY	AMOUNT		REMITTED
17	**Private Prison Fund**	§25-5-11(g)(2)			
	Violation penalty	§25-5-11(e)	$500/day	**17**	_____
18	**Courthouse Facilities Improvement Fund**	§29-26-6(a)			
A	Civil action filing fee	§59-1-11(a)(1)	$30.00	**18A**	_____
B	Medical liability filing fee	§59-1-11(a)(2)	$10.00	**18B**	_____
C	Appeals	§59-1-11(b)(8)	$5.00	**18C**	_____
D	Criminal fees				
	i. Felony conviction	§59-1-11(d)(2)	$10.00	**18Di**	_____
	ii. Bond fee	§59-1-11(e)	$25.00	**18Dii**	_____
	iii. Bail peace processing	§59-1-11(f)	$10.00	**18Diii**	_____
	iv. Misdemeanor fee	§59-2-17(a)	$5.00	**18Div**	_____
	v. Felony fee	§59-2-17(d)	$5.00	**18Dv**	_____
19	**Regional Jail Operations Partial Reimbursement Fund**	§31-20-10(b)			
A	Civil Filing Fees	§59-1-28a(a)(3)	$20.00	**19A**	_____
B	Criminal Fees	§59-1-28a(e)	$30.00	**19B**	_____
20	**Guardianship & Conservatorship Fund**	§44A-2-1(e)			
	Guardianship & Conservatorship Filing Fee	§44A-2-1(c)	$35.00	**20**	_____
21	**WV State Police DNA Database Account**	§15-2B-15			
	DNA Testing	§15-2B-15	$150.00	**21**	_____
	TOTAL OF LINES 17 – 21 ABOVE:				_____

CIRCUIT COURT OF _____ **COUNTY**

REMITTANCE FOR THE MONTH OF _____

00270405

	FUND	AUTHORITY	AMOUNT		REMITTED
22	**Division of Forestry Fund**				
	Civil penalty	§19-1A-3b	$500	**22**	_____
23	**Fund for Civil Legal Services for Low Income Persons**	§59-1-10(c)(4)(b)			
A	Civil Action Filing Fee	§59-1-11(a)(1)	$45.00	**23A**	_____
B	Motion to Intervene, Third Party Complaint				
	Cross Claim and Counterclaim Filing Fee	§59-1-11(a)(6)	$200.00	**23B**	_____

TOTAL OF LINES 22 – 23 ABOVE: _____

TOTAL REMITTANCE (TOTAL OF ALL PAGES)
Due by the 10th of the following month _____

For questions about the remittance form, please contact the Treasurer's Office at (304) 558-3599 or (304) 340-1578.

Please send the completed form to:

West Virginia State Treasurer's Office - Court Remittance Processing
PO Box 40286
Charleston, WV 25364

CIRCUIT COURT OF _____ **COUNTY**

REMITTANCE FOR THE MONTH OF _____

DUPLICATE TAPE FEES

CASE NO.	PARTY REQUESTING	NO. OF TAPES	TOTAL COLLECTED

Grand Total _____

Remittance _____

Circuit Clerk _____

Date _____

To the Clerk of the Family Court of _____ County, West Virginia

AFFIDAVIT OF ACCRUED SUPPORT

This day personally appeared before the undersigned authority,

_____, who after being first duly sworn says that:

1. _____, residing at _____, _____, is the obligee/judgment creditor of a support order entered on _____ by the _____ Court of _____, _____ in Civil Action Number _____.

2. _____, residing at _____, _____, Social Security Number (if known) _____ is the obligor/judgment debtor under this court order.

3. The support obligor is at least 14 days in arrears in payment of support.

4. From _____ through _____ no less than $_____ is the amount of the accrued support/judgment not paid by the obligor/ judgment debtor as shown on attached Exhibit A.

5. The name and address of the obligor's source of income is (if known) _____ _____.

WHEREFORE, the affiant requests the Clerk of the Family Court of this County to issue a _____ against the property of the obligor/judgment debtor.

_____
Affiant

STATE OF WEST VIRGINIA
COUNTY OF _____, TO WIT:

Subscribed and sworn before me this _____ day of _____, _____.

My commission expires: _____.

_____
Notary Public

In the Circuit/Family Court of _____ County, West Virginia

NOTICE OF FILING OF AFFIDAVIT OF ACCRUED SUPPORT/ABSTRACT OF ORDER

TO: _____

_____

_____

A writ of execution, abstract of order, suggestion, or suggestee execution has been issued against you based upon the attached "Affidavit of Accrued Support."

You may contest the "Affidavit of Accrued Support" if the amount claimed to be in arrears is incorrect or there are other mistakes of fact in the "Affidavit of Accrued Support." To contest the Affidavit, you must do so WITHIN FOURTEEN DAYS from the date of this notice. You may contest the "Affidavit of Accrued Support" by notifying the Bureau for Child Support Enforcement, _____, _____, _____ IN WRITING WITHIN FOURTEEN DAYS OF THIS NOTICE of the reasons why you contest the affidavit and by requesting a meeting with the Bureau for Child Support Enforcement on your contest.

If you contest the affidavit through the Bureau for Child Support Enforcement, the Bureau for Child Support Enforcement will:

1. Inform the Court of your contest whereupon the Court shall require you to give security, post a bond, or some other guarantee to secure payment of the overdue support.

2. Establish a meeting with you and also a hearing before the Family Court Judge.

As an alternative method of contesting the Affidavit, you may yourself obtain a date for a hearing before the Family Court Judge. You must mail written notice of such hearing to the obligee and the Bureau for Child Support Enforcement. The notice of the hearing must be prescribed by the Administrative Office of the Supreme Court of Appeals and made available through the circuit court clerk.

State and federal law provide for some exemptions to execution, suggestion or suggestee execution. You should seek competent legal advice as to whether your property being suggested or executed against is subject to an exemption and where and how to file your exemption.

Dated: _____ _____

Clerk of the Circuit Court

_____

Deputy

RESTITUTION AND CRIMINAL COSTS SUMMARY

To: DOC Records Division Fax No.: 304-558-8430

From: _____, _____ County Circuit Clerk

Address: _____

_____

_____

By: _____, Deputy Clerk

Re: _____

Date: _____ Case No.: _____

Comments: _____

_____

COURT COSTS: $_____ (make payable to Circuit Clerk)

RESTITUTION: $_____ ☐ (make payable to Circuit Clerk)
☐ (make payable to victim(s) named below and remit to our office for processing):

_____

_____

Circuit Clerk
Court Statistics Database
User Guide

Supreme Court of Appeals of WV
Administrative Office
Division of Court Services

Revised, Effective May 31, 2016

Circuit Clerk
Court Statistics Database
User Guide

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Project Overview

The West Virginia Supreme Court of Appeals Administrative Office (AO) takes great pride in administering our state's Court Statistics Project (CSP). Over the years, data has been compiled from each Circuit, Family and Magistrate Court in the state in a central database. In 2010, the AO began working to provide each Circuit Clerk with access to the Court Statistics Database. Each office has the ability to enter and review their own county's statistical data monthly. This system is utilized to simplify and expedite annual statistics reviews, allowing annual reporting to be available more quickly than in years past.

We would like to extend our appreciation to Adell Chandler, former Cabell County Circuit Clerk, and her staff for being our pilot office for this project. Their feedback and dedication helped make this project possible.

This project is managed by the AO's Court Services Division. Any questions or comments should be sent to Tabetha Blevins, Senior Analyst, within the Division of Court Services at (304) 340-2743, email wv.stats@courtswv.gov.

Section 1
Preparing for Data Entry

Before Entering Data into the Database

Prior to entering your statistics into the database, prepare your reports by following the guidelines laid out in the **Circuit Clerk Statistical Reporting Instruction Manual** included in the Appendix of the Circuit Clerk Manual. Once you are familiar with the material provided within the Instruction Manual, it is good practice to continue to utilize the **Monthly Statistics Checklist** provided within the Instruction Manual.

Accessing the Database

Open the courts Database by going to **http://wvdbs.courtswv.gov/**

- **You must access this site on a computer that is connected to the Court's Network.**
- It would be wise to **save this website as a favorite** within your Internet Explorer on the computer where you will be accessing the database in the future.
- Once you have reached the Internal Database Connection Site, select the link at the bottom of the page that reads **Court Statistics Database.**
- Login using the username and password assigned to your office.
    - If you do not have a username or password, or have forgotten yours, please contact the Statistics Office at (304)340-2743 or email wv.stats@courtswv.gov
- Once you have logged in, you will be at the main page of the website. Along the right hand side of the main page is a Description Box which explains the layout of the website **(Please Read for better instructions).**
- To the left of the screen are links to all the reports your office is required to report.

Helpful Hints

- For any questions about how to prepare your reports prior to data entry, please refer to the Circuit Clerk Statistical Reporting Instruction Manual located in the appendix of the Circuit Clerk Manual.
- Never leave a cell blank always put a zero (0) in the cell, and always create a blank report for inactivity within a month.
  NOTE: An error message will appear if a cell is left blank, contains a space or contains a non-digit character (i.e. a letter or symbol).
- Use the **Tab button** to go to the next cell, the arrow keys will not move you to the next cell.
- **Error Message when entering:** If you enter a report and an error message pops up when you click Create, Do Again; this most likely means the report has already been entered.
- **Visiting Judge**: If you have a report for a Visiting Judge, add the visiting judge's numbers onto the county's Chief Judge Report for the same month.
- **Judges Name not in the Database:** Reports should only be entered for Judges currently in office in your circuit. If your report lists a judge currently in office in your circuit and he or she is not listed, contact the Statistics Office, (304) 340-2743, or email wv.stats@courtswv.gov, to have the judge added to the database listing.

Section 2
Entering Statistical Records into the Database

Basic Entry Steps

- **Select a report to enter** on the main menu by selecting the "**Entry"** link for the report you wish to enter. This will take you to the **Data Entry Screen** for the selected report.

- **Create a new record** by selecting the appropriate County, Judge, Court, Year, and Month for the current report you are entering.

    - **Note:** If the report you are entering is not judge or court specific, you will only be asked to enter the County, Year and Month.

- **Move to the next data field** by pressing the **" TAB"** key on your keyboard.
    - **Note:** Arrow keys will not work.

- **Save data** by clicking "**Create, Do Again"** or **" Submit".**

- **Cancel data** record creation by clicking **"Cancel".**

- **Edit data** after report submission by clicking on the **"View, Search, Edit"** link; refer to Section 3 on Proofing Reports for more detailed instructions.

- **Delete a Record/Report** from the database by contacting the Statistics Office at (304) 340-2743, or email, wv.stats@courtswv.gov.

- Repeat above steps to enter and submit all monthly reports. See details below for specific reports.

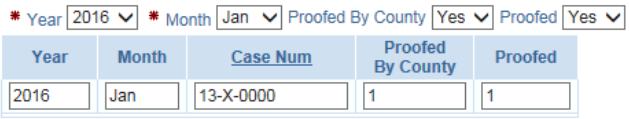
Treatment Report Entry – Special Rules

- **1st** enter the count of all treatment cases which were initiated during the month.
- Hit the **"Tab"** key on your keyboard to move to the next field.
- **2nd** enter the case number of the final case assigned during the month.
    - **Note:** Be sure to use the format **(YY-XXX-####)** when entering treatment court case numbers.
- If your county only has one type of treatment court, only enter the information for that particular court.
    - **Note:** For the treatment courts not in your county, leave a **"0"** as the number of cases initiated for the month and backspace the sample case number from the final case number field to leave the field blank **(see example below).**

	Number of Cases Initiated During the Month	Final Case Number Assigned During the Month
Adult Drug Court (TAD)	1	12-TAD-001
Adult Re-entry Court (TAR)	0	
Adult Mental Health Court (TAM)	2	12-TAM-002

Disposed by Jury Trial Entry - Special Rules

- **1st** click on “Add Row”.
- **2nd** enter the case number of a case which was disposed by jury trial in the month you are reporting.
- **3rd** to add additional cases, click “Add Row” again. Continue until all cases that were disposed by jury trial for the month are entered.
- **Note:** Formatting for these case numbers should be **(YY-X-####).**
- **If there are no cases disposed by jury trial during a given month, please enter a blank report.**
    - To do so, you will need to change the # signs in the case number filed to zeros, **(see example below).**
- **Note:** To cancel out of the Disposed by Jury Trial form, the case number format needs to be set to the right format if you’ve already started an entry.



Mass Litigation Entry – Special Rules

- **1st** click on “Add Row”.
- **2nd** enter the case number of a case which was transferred to the Mass Litigation Panel in the month you are reporting.
- **3rd** to add additional cases, click “Add Row” again. Continue until all cases that were transferred are entered.
    - **Note:** Formatting for these case numbers should be **(YY-X-###).**
- **Note:** To cancel out of the Mass Litigation form, the case number format needs to be in the right format if you’ve already started an entry.

Section 3
Proofing and Printing Statistical Reports

Proofing Saved Reports

When submitting paper copies, clerks provide signatures to certify they are in agreement with the content of reports. To provide this functionality within the database, each report should be proofed by the clerk (or their designee).

- **Select a report type to proof** on the main menu by selecting the link titled **"view, search, edit"**, this will take you to a list of all records entered for this specific report type.
- **Select the monthly report you need to proof** by choosing the County, Judge, Court, Year, and/or Month in the provided drop down boxes for the specific report you are working on.
    - Selecting more specific criteria will narrow the listing of records that are returned from your search.
- **Click the "Edit" button** which looks like a pencil to the left of the listed record to open the record.
- You will now see the record which you previously entered. Make sure the numbers in the record are accurate.
    - **If the data looks accurate** mark the **"Proofed by County"** field in the form header to **"Yes"**, then click **"Apply Changes"** to save as proofed.
    - **If data looks incorrect**, adjust the numbers by tabbing to the affected field and edit the values within. Once all numbers are accurate, select **"Yes"** for **"Proofed by County"**, then click the **"Apply Changes"** button.
    - **If any data needs to be investigated** mark the **"Proof by County"** field as **"No"**, a **"0"** should appear in each row under the Proofed by County column indicating the report has not been finalized. Then click the **"Apply Changes"** button.

Remember, you have not sent your final monthly reports to the AO until the proofing process is complete. Submitting the reports without proofing them is like submitting the paper copies without the Clerk's signature.

Printing Reports

- If you wish to print a report from the database, you may do so through the **"View, Search, Edit"** option for the report you wish to print on the main menu.
    - Once you have found the report you would like to print, click on the **"Edit"** button that looks like a pencil to the left of the listed record. This will open the record.
    - In the top right hand area of the form you will see a **"Printable Report"** button, click this button to print the report.

Section 4
Helpful Database Tools

Missing Reports

- On the Main Menu under the Reports section, you have a link called “Missing Reports”. This link will provide you with a list of records/reports, which have not been entered for a certain time period.
- Use this link to make sure you have entered all required records/reports into the stats database.

Not Proofed Link

- On the Main Menu under the Reports section you have a link called “Not Proofed”. This link will provide you with a list of records/reports which have not been marked as proofed for a certain time period.
- Use this link to make sure you have proofed all required records/reports.

Error Reports

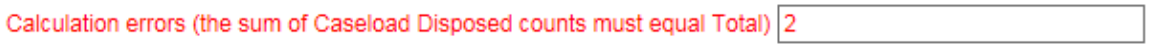
In order for these error reports to work properly, the “Circuit Caseload Report” must be entered first, followed by the Circuit Pending and Disposed Reports. If you try to enter a Circuit Pending or Disposed Report prior to entering the Circuit Caseload Report, the database will give you an error message stating that you must first enter the Circuit Caseload Report. Once you click okay on the error message, it will take you back to the main screen of the database.

Errors within your Circuit Caseload Report:

- The monthly checklist in your Court Statistical Reporting Manual, instructs you to check the prior months **END PENDING** numbers to make sure they match the current month’s **BEGIN PENDING** numbers. We have noticed a lot of issues with this in the data being submitted. Therefore, we are implementing an error checking feature that will alert you if the **BEGIN PENDING** numbers do not match the previous month’s **END PENDING** numbers on the Circuit Caseload Report.
- For example, if you have 256 END PENDING cases from April and enter 265 BEGIN PENDING cases for May, you will receive an error message.
    - The error message will be highlighted in red on the report.
    - If you try to leave the report without fixing the detected issues, you will receive an error message stating that there are errors on your report, however, in efforts to keep data entry simpler, you will be able to save the report with errors but we strongly encourage you to go back and resolve these issues as soon as possible.

Errors within your Circuit Pending & Disposed Reports:

- There will also be error checking capabilities that cross reference data entered from the Circuit Caseload Report with the Circuit Pending and the Circuit Disposed Reports individually. Once you enter the Pending and/or Disposed Reports, you will notice towards the top of the screen a **“Calculation Errors”** field listed in red **(as shown below).** This shows you the total count of cases pending or disposed which were reported on your corresponding monthly caseload report.



- Once you begin entering the data into the Pending or Disposed report the error calculation at the top should decrease to **ZERO**, unless you have issues with your data. These reports will also allow you to save the report with errors to avoid reentry of this data. However, these issues should be addressed and fixed accordingly.

Master Circuit Error Reports:

- We have now added a link under the Reports section of the home screen called the **"Circuit Error Reports".** These Error Reports will breakdown any issues within your Caseload, Pending, and Disposed Reports line by line, allowing you to more easily monitor issues within your submitted monthly reports.

Circuit Pending Error Report

Error: Pending report Total must equal Caseload report End Pending

County	Name	Month	Main Case Type	Sub Case Type	Circuit Pending Report Total	Circuit Caseload End Pending
Brooke	Recht, Arthur	(11) Nov	Circuit Civil	Divorce	83	84
Brooke	Recht, Arthur	(11) Nov	Circuit Civil	Guardianship	1	0
Brooke	Recht, Arthur	(11) Nov	Circuit Civil	Other Domestic Relations	2	75

1 - 3

- As you can see in the fake reports we entered under Judge Recht, the error reports will tell you which judge, month, and case type need to be reviewed. Once you review these issues and make edits to the corresponding reports to satisfy the errors, they will automatically be removed from your error list.
- Please note that these reports are fluid, so correcting one error can potentially throw additional errors. It is important to rerun the master error report, so that the additional errors can be fixed, as well.
- Please note that the Family Error Reports work exactly like the Circuit Error Reports.

Summary Reports

- You now have access to summary reports of your monthly submissions under the **SUMMARY REPORTS** section in the center of the database screen.
- You can click on any of the reports located under this heading to view summary reports for an individual judge or to view the county wide statistics by selecting ALL under the judge field.
- Once all fields are selected, you will click the "generate report" button then, click the "view report" button. This will pop up a separate screen which displays your summary report.
- If you have any issues with these reports, you can call (304) 340-2743 or email wv.stats@courtswv.gov.

Lock & Finalize Data

- **Once a year, the "Lock and Finalize" link will appear to allow all counties to sign off on their annual data.**
- Please review reports in the database to make sure all reports have been entered and proofed. You can check these by running the Missing Reports and Not Proofed under the Reports section. This must be completed before you can lock your data.
- Under the Reports Section, the Circuit Error Report and Family Error Report need to also have all the errors corrected before locking your data.
- Review the yearly Summary Reports located on the Court Statistics Database.
    - From the Main Page, select the Summary Report you would like to review. **Be sure to review all summary reports before locking and finalizing your data.**
- Once you have reviewed and made the necessary adjustments to all the monthly reports within the database, and are confident that your reports are accurate, **you will need to "Lock & Finalize" your data.** This will generate the Summary Packets, which you will send to your judges.
- You will need to print out an Individual Judge Summary Packets for each Judge within your county, and also a County Summary Packet for the Chief Judge within your county to complete the review.

Circuit Clerk
Statistical Reporting
Instruction Manual

Administrative Office
Division of Court Services
Supreme Court of Appeals of WV

Revised, Effective May 31, 2016

Circuit Clerk Statistical Reporting Instruction Manual

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Section I
General Statistical Reporting Instructions

Statistical Reports Required

- The following reports are collected by the WV Supreme Court Administrative Office from Circuit Clerks on a monthly basis.
    - Circuit Court Caseload Report (for each circuit judge)
    - Circuit Court Pending Case Age Report (for each circuit judge)
    - Circuit Court Disposed Case Age Report (for each circuit judge)
    - Family Court Caseload Report (for each family judge)
    - Family Court Pending Case Age Report (for each family judge)
    - Family Court Disposed Case Age Report (for each family judge)
    - Pro Se Report
    - Appellate Report (for each circuit judge)
    - Subject Matter Report (for each circuit judge)
    - Divorce Action Report
    - Treatment (only for counties with treatment courts)
    - Cases Disposed by Jury Trial
    - Cases Transferred to Mass Litigation
- The Annual Juror Qualification Report is collected by the WV Supreme Court Administrative Office from Circuit Clerks on an annual basis.

Report Submission

- Prior to report submission please refer to the Report Preparation Section and follow the instructions given in the Monthly Statistical Reporting Checklist.
- The reports listed above are submitted via electronic submission in the Court Statistics Database.
    - Full instructions for submitting via electronic submission in the Court Statistics Database are available within the Technical Assistance Guide for the Database as provided in the Appendix of the Circuit Clerk Manual.
- If you experience technical difficulties with electronic submission, reports may be submitted to the Court Services Division of the Administrative Office (AO) via alternative methods:
    - Fax :1-866-WV-STATS (987-8287)
        - Attn: Tabetha Blevins, Senior Analyst
    - If you have difficulty submitting the reports please call (304) 340- 2743.
    - If you have scanning capability, you can scan your monthly reports and send them via email to wv.stats@courtswv.gov
    - Please DO **NOT** mail any statistical reports without first attempting the above submission options and discussing any difficulties with staff at (304) 340-2743.

Judicial Review

- Monthly reports should be sent to judges for review by the tenth of the following month. Any adjustments requested by the judge should be completed by the clerk and the final version should be forwarded to the AO no later than the 20th of the month.

Record Retention

- The original copy of the reports should be filed and kept in the clerk's office each month along with the supporting detail report.

- The detail report should be printed monthly at the same time as the summary reports from the case management software. This report will be necessary to track reporting errors.

Visiting Judges

- Cases disposed by a visiting judge should be reported in the caseload of the circuit court judge who originally received the case. A separate report should **not** be submitted for a visiting judge, nor for a senior status judge. If reports are received by the AO for an unknown/visiting/senior status judge, the data will be added to the chief circuit judge's report.

Transferred Cases

- If cases are transferred from one judge to another judge within the county, enter the information in the transfer columns of the Circuit Caseload Report. If the judge receives cases, enter the number in the **TRANSFER IN** column. If the judge loses cases, enter the number in the **TRANSFER OUT** column. For the county overall, the total number of cases transferred in should always match the total number of cases transferred out. Do **not** count cases transferred within the county as new filings or dispositions. Please note: cases transferred to another county for disposition are reported as **DISPOSED OTHER** in the transferring county and as new **CASES FILED** in the recipient county.

Amended Reports

- If it is necessary to revise a report which has previously been submitted to the AO, adjust the values within the report in the statistics database. It is **not** necessary to send a report form labeled "AMENDED" at the top. Once the annual review has occurred, please notify the AO that you have amendments. **Note: Do not adjust figures on subsequent reports to correct a previous reporting error; the original figures must be amended**.

Report Preparation

- The report form should **not** be altered in any way. Any additional information that the reporting clerk may wish to convey should be discussed with the AO by calling or emailing the stats staff.

- **Fill in all spaces on the report form. If there are no cases for a particular category, record a zero (0) in that space. This verifies that a category has <u>not</u> been overlooked.**

- **Prior to report submission please follow the instructions given in the Monthly Statistical Reporting Checklist on the following page.** It is recommended that you make copies of the checklist and use one each month when preparing your reports. A copy of the checklist and any notes you have made during report preparation should be kept in the file with your original report copies and the corresponding detail reports.

<u>Statistical Closure</u>

- Make sure all case types are being statistically closed at the proper time. A list of stat closure rules can be found on the Stat Close Cheat Sheet on Page 5 of this handbook.

- Keep in mind, statistical closure can occur before the case is completely closed. An example of this is Child Abuse & Neglect cases. A **(JA)** case stat closes once all respondents have been dealt with, meaning all respondents have reached some type of disposition either dismissal, parental rights terminated, child has been returned home. Even though all the respondents have been dealt with, hearings will continue to be held to monitor the placement of the child.

Monthly Statistical Reporting Checklist

Please review this checklist each month before submitting your data.
Run the detail report each month when you run your summary reports.
We do not need a copy of the detail report at the AO, but it will assist you in tracking down and correcting errors.

Circuit Court Caseload

- D Begin Pending Numbers match End Pending from Last Month
- D All Rows follow the calculation: Begin Pending + In - Out + Filings - Disposed = End Pending
- D Only Circuit Court Case types are listed on the report
- D Any Transfers In have a corresponding Transfer Out on another judge's report within the County
- D Were there any jury trial dispositions during the month? If so, are they listed as a jury trial on your statistics?
- D A Report exists for every judge* with a current caseload within the county.
- D Any visiting Judge's statistics have been included on the Chief Judge's report (this maybe written in on the computer report)

Family Court Caseload

- D Begin Pending Numbers match End Pending from Last Month
- D All Rows follow the calculation: Begin Pending + In - Out + Filings - Disposed = End Pending
- D Only Case types for which Family Court has jurisdiction are listed on the report (for example, no General Civil)
- D Any Transfers In have a corresponding Transfer Out on another judge's report within the County
- D A Report exists for every judge* with a current caseload within the county.
- D Do you have any new filings listed in the old case types of 'Divorce' or 'Other Domestic Relations'? If so, these should be reviewed and assigned a specific family court case type as described in the Statistical Reporting Instruction Manual.

Pending Case Age Report for both Circuit and Family Court

- D The total of all columns within a category match the same category's End Pending number on the corresponding Caseload Report
- D A Report exists for every judge* with a current caseload within the county.

Disposed Case Age Report for Family Court

- D The total of all columns within a category match the same category's Disposed number on the corresponding Caseload Report
- D A Report exists for every judge who disposed of a case during the reporting month within the county

Disposed Case Age Report for Circuit Court

- D The total of all columns within a category match the same category's Disposed number on the corresponding Caseload Report (Disposed = Bench + Jury + Other)
- D A Report exists for every judge who disposed of a case during the reporting month within the county

Divorce Action Report

- D The total number of Paid + Waived under 'Filing Fee' for Divorces should equal the total number of divorce filings for the month as listed on the Family Court Caseload report and, possibly, the Circuit Court Caseload report.

*Note: *If not all judge's within the circuit have a caseload within the county, please alert AO stats staff so that we can mark them as inactive in your county and will no longer ask for their reports.*

When to Statistically Close (Dispose) a Case
CHEAT SHEET

Civil Cases

- **Civil Cases are reported as disposed upon entry of the final order unless otherwise specified herein.**
- **Adoption (A)** cases are disposed when the order of adoption is entered by the court.
- **Mental Health (MH)** cases are disposed when an order denying the application, finding no probable cause or otherwise dismissing the case is entered or when the court enters an order of commitment to a mental health facility or responsible person.
- **Guardianship/conservatorship (G)** cases are disposed when a dismissal order is entered on the original petition or when an order appointing a guardian or conservator is entered.
- **Condemnation (C)** cases are closed when the applicant deposits with the court the sum of money designated in the report
- **Uniform Enforcement of Foreign Judgments Act case** are disposed 30 days after the judgment is filed with the court, unless there is a stay on enforcement.
- Any case in which **Bankruptcy is declared** are disposed when the notice of bankruptcy is filed with the circuit court.
- **Cases with multiple defendants** report disposition when the last defendant's action is disposed. If the defendants have different types of dispositions, report the disposition using the following ranking scheme: 1. Jury Trial 2. Bench Trial 3. Other.

Criminal Cases

- **Criminal Cases are to be reported as disposed upon entry of final judgment or, in the case of a conviction, upon entry of the sentencing order.**
- **Unexecuted bench warrants, capiases, or summonses** more than one month old should be reported as disposed in the OTHER category.
- Cases placed on **pre-trial diversion** and cases wherein a **youthful offender's sentence is suspended** and the defendant is sent to a youthful offender facility pursuant to §25-4-6 are counted as disposed when such placements are made.
- **If filed as a felony (F) but disposed as a misdemeanor (M),** report the disposition in the felony (F) case category.

Juvenile Cases

- **Delinquency (JD)** cases are disposed when the juvenile is placed on a pre-adjudicatory improvement period or the petition is dismissed. Otherwise, delinquency cases are to be reported as disposed after termination of the proceeding.
- **Status offense (JS)** cases are disposed when the juvenile is placed on a pre-adjudicatory improvement period, the petition is dismissed or the juvenile is referred to the Department for services
- **Abuse and neglect (JA)** cases are disposed when a dispositional order is entered: for instance, an order terminating parental rights or a dismissal order. Until a dismissal or other dispositional order is entered in regard to all respondents (adults) the case should **not** be reported as disposed.

Domestic Cases

- **Domestic Cases are reported as disposed upon entry of the final order unless otherwise specified herein.**
- **Divorce (D)** - final divorce decree is entered, even if the case is bifurcated and not all issues are resolved
- **UIFSA (D)**
    - Cases in which your court is the initiating court are reported as disposed when the court certifies that the obligor owes support and orders that copies be made of the petition and sent to the responding court
    - Cases in which your court is the responding court are reported as disposed when the court enters an order establishing, enforcing, or modifying child support or other orders pursuant to §48-16-305
- **"Uniform Enforcement of Foreign Judgments Act"** - 30 days after the judgment is filed with the court, unless there is a stay on enforcement.

Section 2
Case Type Definitions

Circuit Civil

GENERAL CIVIL: All civil matters except domestic relation **(D)** cases, domestic violence **(DV)**, domestic violence appeals form the magistrate court **(DV-AP)**, adoption **(A)**, mental health cases (MH), guardianship/conservatorship cases **(G)**, administrative agency appeals (AA), civil appeals from magistrate court **(C-AP)**, miscellaneous civil proceedings **(P)**, and mass litigation **(C)** (all defined below). This category includes removals from magistrate court and all extraordinary writs, including habeas corpus. It also includes foreign judgments filed with the circuit clerk under the provisions of the "Uniform Enforcement of Foreign Judgments Act" (§55-14-1 et seq.).

DIVORCE: All actions for divorce, annulment, or separate maintenance, whether the matter is contested or uncontested. This remains on the circuit report for those rare cases where a circuit judge is assigned to hear this type of case.

Domestic Violence: All actions involving domestic violence or abuse as defined in §48-27-202.

DV – Appeals: All domestic violence cases on appeal from magistrate court.

OTHER DOMESTIC RELATIONS: All paternity, UIFSA, UCCJEA, adult neglect and abuse petitions, and other domestic relations cases. Do **not** include modifications or enforcements of original orders. This remains on the circuit report for those rare cases where a circuit judge is assigned to hear this type of case. Do **not** include registrations of foreign (out-of-state) orders on child custody or support under the provisions of §48- 20-305 or §48-16-602, unless enforcement proceedings are instituted along with the registration.

ADOPTION: All proceedings for adoption under Chapter 48, Article 22.

MENTAL HEALTH: All actions under §27-5-2 involving the involuntary commitment of persons alleged to be mentally ill or addicted. Also include any proceeding instituted by affidavit filed under §27-4-1(b) seeking transport of a minor for voluntary hospitalization in a mental health facility.

GUARDIANSHIP: All actions under §44A-1-1, et seq. relating to the appointment of guardians and conservators for persons in need of protection. *Note: In mental health and guardianship cases, include all cases whether handled by a mental hygiene commissioner or a judge. Cases should be counted on the report of the judge with review authority on the case.*

ADMINISTRATIVE AGENCY APPEALS: All actions under §29A-5-4 involving judicial review of contested cases from administrative agencies.

MAGISTRATE APPEALS: All civil cases on appeal from magistrate court.

OTHER CIVIL CASES: All other miscellaneous civil matters, which receive a **(P)** case number designation, except petitions: that are ancillary to criminal proceedings in magistrate court, do **not** involve a monetary judgment, generally require only one hearing, and usually are presented by petition rather than complaint. Examples of the exceptions include petitions for a change of name, expungements, or any other miscellaneous petition that meets one or more of the criteria above. Do **not** include petitions from magistrate court for bond reduction, psychological exam, or probation or other alternative sentence such as work release or home confinement (these are included in OTHER CRIMINAL CASES). Count a petition for an injunction only if it is the sole subject of a case, not if it is only one step in the proceedings of an ongoing case. Do **not** include administrative orders issued by the court.

CIRCUIT INFANT GUARDIANSHIP (CIG): Minor Guardianship cases filed in circuit court.

CIRCUIT INFANT GUARDIANSHIP REMOVED (CIGR): Minor Guardianship cases originally filed in family court and removed to circuit court.

JUVENILE ABUSE AND NEGLECT ADMINISTRATIVE PROCEEDINGS (JAA): Proceedings instituted by circuit court administrative order directing the DHHR to investigate and report on suspected child abuse and neglect.

JUVENILE ABUSE AND NEGLECT MANDAMUS PROCEEDINGS (JAM): **Cases** instituted by circuit court relating to determinations whether DHHR has a mandatory duty to file an abuse/neglect petition.

MASS LITIGATION: Cases wherein numerous individually-named plaintiffs sue a common defendant or defendants for injuries or damages caused by the same accident, product, or substance. These cases generally involve complex issues of liability and are difficult and time consuming to resolve. Examples include, but are not limited to, asbestos cases, industrial hearing loss cases, breast implant cases and other types of toxic torts. Do **not** double report mass litigation cases as both general civil and mass litigation filings. Count only in the **MASS LITIGATION** category. If you are unsure if a case should be classified as mass litigation, consult AO staff.

PERSONAL SAFETY APPEALS (S-AP): All proceedings under Chapter 53, Article 8.

Circuit Criminal

FELONY: All criminal cases involving offenses punishable by confinement in the penitentiary as provided in Section §61-11-1. Each indictment or information against each individual is considered a case. Be sure **NOT** to include bound overs, cases with a **(B)** case number, on statistical reports. Bound overs should only be counted when they officially become felony cases and are given an **(F)** case number. For a complete explanation of bound overs, refer to the Circuit Clerk Manual.

MISDEMEANOR: All criminal cases involving offenses not punishable by confinement in the penitentiary as provided in Section §61-11-1. Each information against each individual is considered a case.

MAGISTRATE APPEALS: All criminal cases on appeal from magistrate court.

OTHER CRIMINAL CASES: **(P or P-CR)**: OTHER CRIMINAL CASES: This case type includes criminal cases on appeal from municipal court and fugitive-from-justice cases. Do **not** include writs of habeas corpus in this category; report these cases as GENERAL CIVIL. This case type should also include petitions that are ancillary to criminal proceedings bound over from magistrate court, including: psychiatric evaluation; bond reduction issues; petitions for probation or other alternative sentences; home confinement as a condition of bail; revocation of home confinement; extradition (fugitive-from-justice warrant or detainer); search warrants/wiretaps; applications for outside witnesses; applications for ex parte orders; in re grand jury investigations/proceedings. Administrative actions within inactive (bound over) criminal cases which do not require a hearing do not merit the assignment of a separate miscellaneous criminal **(P or P-CR)** case number and should **not** be counted statistically, these include: appointment of counsel; funeral furlough order; payment vouchers; reassignment of counsel; dismissal of bound-over case.

Circuit Juvenile

DELINQUENCY: All matters involving juveniles who have committed an act which would be a crime under state law or municipal ordinance if committed by an adult (§49-1-202). Each juvenile named on a petition is considered a case.

STATUS OFFENSE: All matters involving juveniles who have not committed an act which would be considered a crime if committed by an adult but rather are alleged to be incorrigible, habitually truant, runaways, or in violation of state statues or local ordinances regarding use of alcoholic beverages by minors (§49-1-202).

CHILD ABUSE AND NEGLECT: All proceedings to determine if a child is neglected or abused under Chapter 49, Article 4, Part 6.

Family Court

DIVORCE WITH CHILD(REN): All actions involving children for divorce, annulment, or separate maintenance, whether the matter is contested or uncontested. This category is to be used for all divorce cases with child(ren) filed on or after January 1, 2002.

DIVORCE WITHOUT CHILD(REN): All actions not involving children for divorce, annulment, or separate maintenance, whether the matter is contested or uncontested. This category is to be used for all divorce cases without child(ren) filed on or after January 1, 2002.

CHILD CUSTODY WITHOUT DIVORCE: All actions involving child custody without divorce. This category is to be used for cases of this type filed on or after January 1, 2002. Do **not** include registrations of foreign (out-of-state) orders on child custody under the provisions of §48-20-305, unless enforcement proceedings are instituted along with the registration.

CHILD SUPPORT ONLY: All actions involving child support only. This category is to be used for cases of this type filed on or after January 1, 2002. Do **not** include registrations of foreign (out-of-state) orders on child support under the provisions of §48-16-602, unless enforcement proceedings are instituted along with the registration.

PATERNITY: All actions involving paternity. This category is to be used for cases of this type filed on or after January 1, 2002.

GRANDPARENT VISITATION: All actions involving grandparent visitation. This category is to be used for cases of this type filed on or after January 1, 2002.

ANNULMENT: All actions involving annulment. This category is to be used for cases of this type filed on or after January 1, 2002.

SEPARATE MAINTENANCE: All actions involving separate maintenance. This category is to be used for cases of this type filed on or after January 1, 2002.

OTHER: All actions involving other domestic relations not mentioned above. This category is to be used for cases of this type filed on or after January 1, 2002.

FIG: Minor Guardianship cases filed in family court.

DV: All actions involving domestic violence or abuse as defined in §48-27-202.

Section 3
Circuit Court Caseload Report
Reporting Instructions

Part 1: Circuit Civil

Beginning Pending

- Report by case category the number of civil cases pending before the court at the beginning of the reporting period. These figures should match the **END PENDING** numbers reported on the previous month's report.

- Review all rules for counting dispositions (see below) to ensure that no cases are reported as pending when they should be counted as disposed for purposes of this report; for example, cases in which bankruptcy has been filed.

Transfer

- Report by case category the number of cases transferred between or among judges within the same county. Cases received from another judge should be reported in the **TRANSFER IN** column. Cases sent to another judge should be reported in the **TRANSFER OUT** column. For the county overall, the total number of cases transferred **in** should equal the total number of cases transferred **out**.

- When a new judge takes the bench, all cases that are being transferred to his or her caseload from a previous judge should be entered into the **TRANSFER IN** column and not the **BEGIN PENDING** column. All cases being transferred from the previous judge should show up in the **TRANSFER OUT** column**,** leaving the **END PENDING** column as zeros.

Cases Filed

- Report by case category the number of cases filed during the reporting period. For reporting purposes, each complaint or petition is considered a case. Case category definitions are presented within an earlier section of this handbook.

- Include cases transferred to the reporting county from another jurisdiction.

- Do **not** count as new filings cases which were previously reported as disposed but which are reopened or resubmitted to the court. These include enforcement or modification of child support, custody, and visitation or other judgments or decisions of the court; contempt proceedings held subsequent to the close of a case; cases remanded from the appellate court; reinstated cases; and all motions and petitions filed in cases previously reported as disposed.

- Do **not** count as new filings orders that are registered (filed) in the circuit clerk's office under the provisions of §48-20-305 (registration of child custody decrees) and §48-16-602 (registration of support orders). Registration alone does **not** constitute a new case filing, but if a petition or comparable pleading seeking a remedy is filed at the same time as the order or at a later date, a **(D)** case number should be assigned and a case should be counted in the "Other" case type category of the Family Court Caseload Report.

- Count foreign (out-of-state) judgments filed under the provisions of §55-14-1 et seq. as new case filings.

- Do **not** double report mass litigation cases as both general civil and mass litigation filings. Once the clerk has received the order transferring the case to the Mass Litigation Panel, the original General Civil case should be statistically closed. The case will then only be counted in the county in which the Mass Litigation Panel will be handling the case.

Cases Disposed (Statistically Closed)

- Report by case category and type of disposition the number of cases disposed during the reporting period.

- Cases are reported as disposed upon entry of the final order unless otherwise specified herein.

- Divorce **(D)** cases are reported as disposed when the final divorce decree is entered, even if the case is bifurcated and not all issues are resolved.

- UIFSA **(D)** cases in which your court is the initiating court are reported as disposed when the court certifies that the obligor owes support and orders that copies be made of the petition and sent to the responding court in another state. Do **not** wait for the out-of-state court to enter an order in the matter or acknowledge receipt of the papers.

- UIFSA **(D)** cases in which your court is the responding court are reported as disposed when the court enters an order establishing, enforcing, or modifying child support or other orders pursuant to§48-16-305.

- Adoption **(A)** cases are reported as disposed when the order of adoption is entered by the court. Do **not** wait for a copy of the adoption certificate to be filed by the Division of Vital Statistics.

- Mental Health **(MH)** cases are reported as disposed when an order denying the application, finding no probably cause or otherwise dismissing the case is entered or when the court enters an order of commitment to a mental health facility or responsible person. Also include any proceeding instituted by affidavit filed under §27-4-1(b) seeking transport of a minor for voluntary hospitalization in a mental health facility and report as disposed when an order granting or denying the transport request is entered*. Note: In mental health include all cases whether handled by a mental hygiene commissioner or a judge. Cases should be counted on the report of the judge with review authority on the case.*

- Guardianship/conservatorship **(G)** cases are reported as disposed when a dismissal order is entered on the original petition or when an order appointing a guardian or conservator is entered. If there is a petition by guardian or conservator to mortgage or sell property of the protected person, such petitions should be reopened under the original guardianship case number. If a separate civil action is initiated on behalf of the protected person, a new general civil case should be opened. *Note: In guardianship cases, include all cases whether handled by a mental hygiene commissioner or a judge. Cases should be counted on the report of the judge with review authority on the case*.

- Condemnation **(C)** cases are reported as disposed when, pursuant to §54-2-14a, the applicant deposits with the court the sum of money designated in the report of the condemnation commissioners.

- Cases filed under the "Uniform Enforcement of Foreign Judgments Act" (§55-14- 1 et seq.) are reported as disposed 30 days after the judgment is filed with the court, unless there is a stay on enforcement.

- Any case in which bankruptcy is declared is reported as disposed when the notice of bankruptcy is filed with the circuit court. If the case is later reactivated, it is **not** counted again, either as a new filing or disposition.

- In civil cases involving multiple defendants, do **not** report the disposition until the last defendant's action is disposed. If the defendants have different types of dispositions, report the disposition that involves the greatest amount of judicial time using the following ranking scheme: **1. Jury Trial 2. Bench Trial 3. Other**.

- Do **not** include the disposition of cases previously reported as disposed which have been reopened or resubmitted to the court.

Bench Trial

- Report by case category the number of cases disposed by a bench trial. A bench trial is an adversarial proceeding in which there is no jury and a judge determines the issues of both fact and law in a case.

- Consider a bench trial to have occurred once an opening statement is made, or the first evidence is introduced. It is **not** necessary for a case to be tried to verdict by the judge.

- Do **not** include mistrials. Report these cases as bench trial disposition only when the case has a final disposition.

Jury Trial

- Report by case category the number of cases disposed by a jury trial.

- Consider a jury trial to have occurred when the jury is struck; that is, when the jurors and alternates are selected and sworn. It is **not** necessary for a case to be tried to verdict by the jury.

- Do **not** include mistrials. Report these cases as jury trial disposition only when the case has a final disposition.

Other

- Report by case category the number of cases disposed by any means other than a bench or jury trial. These would include default judgments and cases that are dismissed, withdrawn, or settled before trial.

- Also include as **OTHER**, consolidated cases; cases transferred to another court or jurisdiction; and cases which have a stipulation or conditional judgment signed by a judge.

- Also include as **OTHER**, cases that are dismissed under Rule of Civil Procedure 41(b) for failure to prosecute and under Rule of Civil Procedure 4(1) for failure to make service.

End Pending

- Report by case category the number of active civil cases pending before the court at the end of the reporting period. To the **BEGINNING PENDING**, add cases **TRANSFERRED IN**, subtract cases **TRANSFERRED OUT**, add **CASES FILED** and subtract the total number of **CASES DISPOSED**; that is,

BEGINNING PENDING	+ TRANSFER IN	- TRANSFER OUT	+ CASES FILED	- BENCH TRIAL	- JURY TRIAL	- OTHER TRIAL	= END PENDING

Part 2: Circuit Criminal

Beginning Pending

- Report by case category the number of cases pending before the court at the beginning of the reporting period. These figures should match the **END PENDING** numbers reported on the previous month's report.

- Do **not** include cases with unexecuted bench warrants, capiases, or summonses that are more than one month old. For reporting purposes, these cases should be counted as disposed in the **OTHER** category (See **CASES DISPOSED** below).

- Do **not** include cases placed on pre-trial diversion. For reporting purposes, these cases should be counted as disposed in the **OTHER** category (See **CASES DISPOSED** below).

- Do **not** include cases in which the sentence of a youthful offender has been suspended and the defendant has been committed to a youthful offender facility such as the Anthony Center. For reporting purposes, these cases should be counted as disposed in the **OTHER** category (See **CASES DISPOSED** below).

Transfer

- Report by case category the number of cases transferred between or among judges within the same county. Cases received from another judge should be reported in the **TRANSFER IN** column. Cases sent to another judge should be reported in the **TRANSFER OUT** column. For the county overall, the total number of cases transferred **in** should equal the total number of cases transferred **out**.

- When a new judge takes the bench, all cases that are being transferred to his or her caseload from a previous judge should be entered into the **TRANSFER IN** column and not the **BEGIN PENDING** column. All cases being transferred from the previous judge should show up in the **TRANSFER OUT** column**,** leaving the **END PENDING** column as zeros.

Cases Filed

- Report by case category the number of criminal cases filed during the reporting period. In felony and misdemeanor cases, each original indictment or information against each individual is considered a case. Do **not** report each count on an information or indictment as a case. Case category definitions are presented within an earlier section of this handbook.

- Cases are to be counted at the time an indictment or information is returned and a case number is assignment. Do **not** count cases prior to the filing of an information or indictment; specifically, do **not** count cases bound-over from magistrate court **(B)** as new filings.

- If one defendant is named on multiple informations or indictments which are filed at the same time or on the same day, report each information or indictment as a case.

- If multiple defendants are named on one information or indictment, report each defendant as a case.

- If one indictment/information contains both felony **(F)** and misdemeanor **(M)** counts, report the filing only in the felony category. Do **not** report the misdemeanor(s) separately.

- Do **not** count as new filings cases that were previously reported as disposed but which are reopened or resubmitted to the court. These include violations of probation; motions for a new trial, arrest of judgment, or correction/reduction of a sentence; cases remanded from the appellate court, contempt proceedings held subsequent to the close of a case; and all other motions and petitions filed after the disposition of the case, including petitions for work release.

- Do **not** count as new filings proceedings subsequent to a disposition to determine the defendant's eligibility for "habitual offender" or "sexually violent predator" status.

- Do **not** include petitions for appointment of counsel from Magistrate Court; they are **not** new case filings.

Cases Disposed (Statistically Closed)

- Report by case category and type of disposition the number of cases disposed during the reporting period.

- Cases are to be reported as disposed upon entry of final judgment or, in the case of a conviction, upon entry of the sentencing order. Do **not** wait for a probation period to end or fines/costs to be collected to report a criminal case as disposed.

- Cases with unexecuted bench warrants, capiases, or summonses that are more than one month old should be reported as disposed in the **OTHER** category. If the case is later reactivated, it is **not** counted again, either as a new filing or disposition.

- Cases placed on pre-trial diversion and cases wherein a youthful offender's sentence is suspended and the defendant is sent to a youthful offender facility pursuant to §25-4-6 are counted as disposed when such placements are made.

- If a case is filed as a felony **(F)** but disposed as a misdemeanor **(M)**, report the disposition in the felony **(F)** case category.

- Do **not** include the disposition of cases previously reported as disposed which are reopened or resubmitted to the court.

- Criminal cases with bifurcated trials are considered statistically closed with the entry of the first sentencing order.

- Criminal cases involving recidivism are considered statistically closed upon conclusion of recidivism proceedings and entry of a sentencing order.

Bench Trial

- Report by case category the number of cases disposed by a bench trial. A bench trial is an adversarial proceeding in which there is no jury and a judge determines the issues of both fact and law in a case.

- Consider a bench trial to have occurred once an opening statement is made or the first evidence is introduced. It is **not** necessary for the case to be tried to verdict by the judge.

- Do **not** report the taking of a plea as a bench trial. Such proceedings are **not** bench trials (see definition of **BENCH TRIAL** above).

- Do **not** include mistrials. Report these cases as a bench trial disposition only when the case has a final disposition.

Jury Trial

- Report by case category the number of cases disposed by a jury trial.

- Consider a jury trial to have occurred when the jury is struck; that is, when the jurors and alternates are selected and sworn. It is **not** necessary for the case to be tried to verdict by the jury.

- Do **not** include mistrials. Report these cases as a jury trial disposition only when the case has a final disposition.

Other

- Report by case category the number of cases disposed by any means other than a bench or jury trial. This would include dismissals on the prosecutor's motion or by the court and guilty or nolo contendere pleas before trial.

- Also include in the **OTHER**, consolidated cases; cases transferred to another court or jurisdiction; and cases where the defendant is declared mentally or physically unable to stand trial or to participate in the judicial process.

- Also include in the **OTHER**, cases that are considered disposed for reporting purposes due to an unexecuted bench warrant, capias, or summons that is more than one month old. For statistical purposes, these cases are reported as disposed even though they are **not** dismissed by the court. If reactivated, they are **not** counted again.

- Also include in the **OTHER**, criminal cases placed on pre-trial diversion or cases wherein a youthful offender is committed to a youthful offender center under a suspended sentence. It these cases are later reactivated, they should **not** be counted again, either as a filing or disposition.

End Pending

- Report by case category the number of active criminal cases pending at the end of the reporting period. To the **BEGINNING PENDING**, add cases **TRANSFERRED IN**, subtract cases, **TRANSFERRED OUT**, add **CASES FILED** and subtract the total number of **CASES DISPOSED**; that is,

BEGINNING PENDING	+ TRANSFER IN	- TRANSFER OUT	+ CASES FILED	- BENCH TRIAL	- JURY TRIAL	- OTHER TRIAL	= END PENDING

Part 3: Circuit Juvenile

Beginning Pending

- Report by case category the number of juvenile cases pending before the court at the beginning of the reporting period. These figures should match the **END PENDING** numbers reported on the previous month's report.

- Review all the rules for counting dispositions (see below) to ensure that no juvenile cases are reported as pending which could be reported as disposed for purposes of this report.

Transfer

- Report by case category the number of cases transferred between or among judges within the same county. Cases received from another judge should be reported in the **TRANSFER IN** column. Cases sent to another judge should be reported in the **TRANSFER OUT** column. For the county overall, the total number of cases transferred **in** should equal the total number of cases transferred **out**.

- When a new judge takes the bench, all cases that are being transferred to his or her caseload from a previous judge should be entered into the **TRANSFER IN** column and not the **BEGIN PENDING** column. All cases being transferred from the previous judge should show up in the **TRANSFER OUT** column, leaving the **END PENDING** column as zeros.

Cases Filed

- Report by case category the number of cases filed during the reporting period. Category definitions are presented within an earlier section of this handbook.

- In delinquency **(JD)** and status offense **(JS)** cases, each petition filed against each juvenile is considered a case.

- In child abuse and neglect **(JA)** cases, each child named on a petition is considered a case; for example, if multiple children from the same family or household are included on one petition each child named should be counted as a filing.

- Include cases transferred to the reporting court from another court or jurisdiction.

- Do **not** count as new filings cases which were previously reported as disposed but which are reopened or resubmitted to the court. These include: reviews of delinquency or status offense cases in which the juvenile is placed on an improvement period; status reviews in child neglect and abuse cases; violations of improvement periods in delinquency or status offense cases where no new petition is filed; petitions filed by the Department of Health and Human Resources pursuant to §49-5-11a after adjudication in a status offense case (for example, petitions to terminate DHHR's involvement, petitions to enforce compliance with a service plan, or petitions requesting out-of-home placement); and all motions files subsequent to the close of a juvenile case.

Cases Disposed (Statistically Closed)

- Report by case category and type of disposition the number of juvenile cases disposed during the reporting period.

- For reporting purposes, delinquency **(JD)** cases are considered disposed when the juvenile is placed on a pre-adjudicatory improvement period (§49-5-9(b)) or the petition is dismissed. Otherwise, delinquency cases are to be reported as disposed after termination of the proceeding by a dispositional (sentencing) order entered pursuant to §49-5-13.

- For reporting purposes, status offense **(JS)** cases are considered disposed when the juvenile is placed on a pre-adjudicatory improvement period (§49-5-9(b)), the petition is dismissed or the juvenile is referred to the Department of Health and Human Resources for services §49-5-11. Subsequent petitions by the Department to terminate involvement, enforce compliance with a service plan, request out-of-home placement, etc. would **not** be reported as new filings or dispositions.

- For reporting purposes, abuse and neglect **(JA)** cases are considered disposed when a dispositional order is entered pursuant to §49-6-5(a); for instance, an order terminating parental rights or a dismissal order. Until a dismissal or other dispositional order is entered in regard to all respondents (adults), however, the case should **not** be reported as disposed. Do **not** report an abuse and neglect case as disposed at the time a post-adjudicatory improvement period is granted under §49-6-5(c); report such a case as disposed only at the time a further dispositional order is entered under §49-6-5(a).

- Do **not** include the disposition of cases previously reported as disposed which reopened or resubmitted to the court.

Bench Trial

- For delinquency **(JD)** and status offense **(JS)** cases, report the number of cases disposed by bench trial. A bench trial is an adversarial proceeding in which there is no jury and the judge determines the issues of both fact and law in a case.

- For abuse and neglect **(JA)** cases, report the number of cases disposed by a dispositional hearing pursuant to §49-6-5(a).

- Consider a bench trial to have occurred once an opening statement is made or the first evidence is introduced. It is **not** necessary for the case to be tried to verdict by the judge.

- Do **not** include mistrials. Report cases in which there has been a mistrial as disposed only when the cases have a final disposition.

Jury Trial

- For **delinquency (JD)** cases, report the number of cases disposed by a jury trial.

- Consider a jury trial to have occurred when the jury is struck; that is, when the jurors and alternates are selected and sworn. It is **not** necessary for the case to be tried to verdict by the jury.

- Do **not** include mistrials. Report cases as a jury trial disposition only when the case has a final disposition.

Other

- Report by case category the number of cases disposed by any means other than a bench trial, dispositional hearing, or jury trial. This would include cases that are dismissed on the prosecutor's motion, dismissed by the court, or plead before trial.

- Include as **OTHER**, delinquency and status offense cases that are considered disposed for reporting purposes due to the placement of the juvenile on an improvement period, as well as status offense cases that are considered disposed for reporting purposes due to the referral of the juvenile to DHHR for services.

- Also include as **OTHER**, cases that are consolidated; cases transferred to another court or jurisdiction; and cases where the juvenile is declared mentally or physically unable to stand trial or participate in the judicial process.

End Pending

- Report by case category the number of active juvenile cases pending before the court at the end of the reporting period. To the **BEGINNING PENDING**, add cases **TRANSFERRED IN**, subtract cases, **TRANSFERRED OUT**, add **CASES FILED** and subtract the total number of **CASES DISPOSED**; that is,

BEGINNING PENDING	+ TRANSFER IN	- TRANSFER OUT	+ CASES FILED	- BENCH TRIAL	- JURY TRIAL	- OTHER TRIAL	= END PENDING

Section 4

Circuit Court Pending Case Age Report
Reporting Instructions

- For each case type, report the total number of cases pending which are “younger than” (under) and “older than” (over) the specified time standard.

- To determine the age of pending civil cases, use the date of filing of the complaint or petition.

- To determine the age of pending criminal cases, use the date of filing of the indictment or information.

- To determine the age of pending juvenile cases, use the date of filing of the petition.

- Review all rules for counting dispositions detailed above in the Circuit Court Caseload Reporting Instructions to ensure that no cases are reported as pending when they could be counted as disposed for purposes of this report and deleted from the pending case counts.

- The total number of pending cases for each case type should match the total number of **END PENDING** cases for each case type reported on the Circuit Court Caseload Report for the month.

Section 5

Circuit Court Disposed Case Age Report
Reporting Instructions

- For each case type, report the total number of dispositions during the month which were under and over the specified time standard. Include bench trial, jury trial, and other dispositions in this count.

- To determine the age of civil case dispositions, use the date of filing of the complaint or petition.

- To determine the age of criminal case dispositions, use the date of filing of the indictment or information.

- To determine the age of juvenile case dispositions, use the date of filing of the petition.

- Review all rules for counting dispositions detailed above in the Circuit Court Caseload Report Instructions to ensure that all cases that can be reported as disposed for reporting purposes are included.

- The total number of dispositions for each case type should match the total number of dispositions **(BENCH + JURY + OTHER)** reported on the Circuit Court Caseload Report for the month.

Section 6

Family Court Caseload Report
Reporting Instructions

Beginning Pending

- Report by case category the number of cases pending before the court at the beginning of the reporting period. These figures should match the **END PENDING** numbers reported on the previous month's report.

- Review all rules for counting dispositions (see below) to ensure that no cases are reported as pending when they could be counted as disposed for purposes of this report.

Transfer

- Report by case category the number of cases transferred between or among judges within the same county. Cases received from another judge should be reported in the **TRANSFER IN** column. Cases sent to another judge should be reported in the **TRANSFER OUT** column. For the county overall, the total number of cases transferred **in** should equal the total number of cases transferred **out**.

- When a new judge takes the bench, all cases that are being transferred to his or her caseload from a previous judge should be entered into the **TRANSFER IN** column and not the **BEGIN PENDING** column. All cases being transferred from the previous judge should show as being transferred out, leaving the **END PENDING** column as zeros.

Cases Filed

- Report by case category the number of cases filed during the reporting period. For reporting purposes, each complaint or petition is considered a case. Case type definitions are presented within an earlier section of this handbook.

- Include cases transferred to the reporting county from another jurisdiction.

- Do **not** count as new filings cases which were previously reported as disposed but which are reopened or resubmitted to the court. These include enforcement or modification of child support, custody, visitation or other judgments or decisions of the court; contempt proceedings held subsequent to the close of a case; cases remanded from the appellate court; reinstated cases; and all motions and petitions filed in cases previously reported as disposed.

- Do **not** count as new filings orders that are registered (filed) in the circuit clerk's office under the provisions of §48-20-305 (child custody decrees) and §48-16- 602 (support orders). Registration alone does **not** constitute a new case filing, but if a petition or comparable pleading seeking a remedy is filed at the same time as the order or at a later date, a case number should be assigned and the case should be counted within the appropriate category as defined within the case type definition section of this handbook.

- Count foreign (out-of-state) judgments filed under the provisions of §55-14-1 et seq. as new case filings.

Cases Disposed (Statistically Closed)

- Report by case category and type of disposition the number of cases disposed during the reporting period.

- Cases are reported as disposed upon entry of the final order unless otherwise specified herein.

- Divorce **(D)** cases are reported as disposed when the final divorce decree is entered, even if the case is bifurcated and not all issues are resolved.

- UIFSA **(D)** cases in which your court is the initiating court are reported as disposed when the court certifies that the obligor owes support and orders that copies be made of the petition and sent to the responding court in another state. Do **not** wait for the out-of-state court to enter an order in the matter or acknowledge receipt of the papers.

- UIFSA **(D)** cases in which your court is the responding court are reported as disposed when the court enters an order establishing, enforcing, or modifying child support or other orders pursuant to §48-16-305.

- Adoption **(A)** cases are reported as disposed when the order of adoption is entered by the court. Do **not** wait for a copy of the adoption certificate to be filed by the Division of Vital Statistics.

- Cases filed under the "Uniform Enforcement of Foreign Judgments Act" (§55-14- 1 et seq.) are reported as disposed 30 days after the judgment is filed with the court, unless there is a stay on enforcement.

- Do **not** include the disposition of cases previously reported as disposed which have been reopened or resubmitted to the court.

End Pending

- Report by case category the number of active cases pending before the court at the end of the reporting period. To the **BEGINNING PENDING**, add cases **TRANSFERRED IN**, subtract cases **TRANSFERRED OUT**, add **CASES FILED** and subtract the total number of **CASES DISPOSED;** that is,

BEGINNING PENDING	+ TRANSFER IN	- TRANSFER OUT	+ CASES FILED	- DISPOSED	= END PENDING

Section 7

Family Court Pending Case Age Report
Reporting Instructions

- Report for each case type the total number of cases pending which fall under the time period specified within each column heading. A single case will be listed under only one column. For example, any case that has been pending for 4 months should be included only within the 'Under 6 Months' column. This column header can be interpreted to include all cases that are greater than 3 months (the column to the left), and less than 9 months (the column to the right).

- To determine the age of pending cases, use the date of filing of the complaint or petition.

- Review all rules for counting dispositions detailed above to ensure that no cases are reported as pending when they could be counted as disposed for purposes of this report and deleted from the pending case counts.

- The total number of pending cases for each case type should match the total number of **END PENDING** cases for each case type reported on the Family Court Caseload Report for the month.

Section 8

Family Court Disposed Case Age Report
Reporting Instructions

- Report for each case type the total number of dispositions during the month which fall under the time period specified within each column heading. A single case will be listed under only one column. For example, any case that was disposed within 4 months should be included only within the 'Under 6 Months' column. This column header can be interpreted to include all cases that are greater than 3 months (the column to the left), and less than 9 months (the column to the right).

- To determine the age of case dispositions, use the date of filing of the complaint or petition.

- Review all rules for counting dispositions detailed above to ensure that all cases that can be reported as disposed for reporting purposes are included.

- The total number of dispositions for each case type should match the total number of dispositions reported on the Family Court Caseload Report for the month.

Section 9

Circuit Court Report on Domestic Appeals and Extraordinary Writs Reporting Instructions

This form was revised in December 2009 to include domestic extraordinary writs and a count of domestic violence appeals to Circuit Court.

Domestic Appeals to Circuit Court

- When categorizing appeals by "case type" for this form, always go by the type of the original filing, even if a later filing in the case (which is now being appealed) pertains to another case type. For example, if the original filing was a divorce with children, and a party later files a child support modification petition within the original case, an appeal from the child support filing would still be categorized under the "divorce with children" case type. Family Court case type definitions are provided earlier in this document for your reference. Once the case types are determined for the family court appeals being handled by a circuit judge, the other columns of this report can be completed for each applicable case type.

Domestic Extraordinary Writs

- Domestic Extraordinary Writ data collection was added to the form in December 2009, and includes writs of Prohibition and Writs of Mandamus. Instruction on what writs should be included in these fields is included below.

- **Writ of Prohibition:** Include writs of prohibition filed by parties in Circuit Court against family court attempting to stop any further action taken by family court.

- **Writ of Mandamus:** Include writs of mandamus filed by parties in Circuit Court seeking to compel family court to take action on a family court matter.

Domestic Violence Appeals to Circuit Court

- Below the appeals and writs table of the reporting form is a field to record the number of Domestic Violence Appeals from Family Court to Circuit Court filed during the reporting month. Please record the number of filings of appeals of domestic violence cases originating in Family Court that are being appealed to Circuit Court.

- The report columns describing the appeal and/or writ activity and status for the month should be completed under the following guidelines.

Activity Categories

- **Begin Pending:** All appeals and writs from the "End Pending" column of the previous month's report.

- **Filed:** All new appeals and writs filed during the month.

- **Granted:** Do **not** use this column for appeals, only for extraordinary writs that were granted.

Disposed Categories

- **Refused:** All appeals or extraordinary writs refused by circuit court order. (Rule 31(b), RFCP).

- **Withdrawn:** All appeals or extraordinary writs withdrawn by an appealing party.

- **Dismissed:** All appeals dismissed by circuit court order, based upon one of the following grounds,
    1) joint agreement of the parties;
    2) failure to properly perfect the appeal;
    3) failure to obey an order of the family court or circuit court;
    4) lack of an appealable order; or
    5) lack of jurisdiction. (Rule 30, RFCP).

- **Remanded Back to Family Court:** All appeals remanded to family court by circuit court order. (Rule 35, RFCP).

- **Final Decision Order on Appeal:** All appeals in which the circuit court affirms or reverses the family court order, or affirms or reverses the family court order in part (without remand). (Rule 34(b), RFCP). Any circuit court reversal also remanding the case to family court is **not** a "final decision order" and should be reported in the preceding "remanded" column.

- **Automatic Transfer to Supreme Court:** All appeals transferred to the Supreme Court in accordance with the provisions of West Virginia Code § 51-2A-14(f), after the circuit court fails to rule on an appeal within 60 days from the last day a reply to the petition for appeal could have been filed. "Direct" appeals to the Supreme Court pursuant to Rule 26, RFCP would **not** be included in this column (or anywhere else on this form).

- **Other:** All appeal or writ dispositions not included under another column.

- **Average Age of Appeal at Disposal:** The average length of time (days) it took to dispose of the appeals or writs. Calculate by adding the total number of days (from date appeal or writ filed until date final order entered) for all appeals/writs in the case type category, divided by the number of appeals/writs for that category.

- **End Pending:** All appeals or writs remaining on the circuit court's docket at the end of the reporting month. Calculate by adding the newly filed number to the begin pending number, and subtracting all disposed appeals and writs.

- **Just Cause Orders Entered:** All appeals still pending in which the circuit court entered an order during the reporting month stating just cause why a final decision has not been made within the normal 60-day timeframe. (Rule 34, RFCP).

- **Number of Pro Se Cases Filed:** All appeals or writs filed by an unrepresented party.

Section 10

Other Statistical Reports
(Subject Matter, Divorce Action, Pro Se, Treatment, Disposed by Jury Trial, Mass Litigation Report, and Juror)
Reporting Instructions

Subject Matter Report

- Report any Family Court case in which an appeal was filed during that month. Domestic violence appeals are **not** included in the subject matter category "Domestic Violence." This category is only for domestic relations **(D)** cases in which a subject matter of the appeal involves domestic violence issues.

Divorce Action Report

- Report the number of filings in each category **(Filing, Modification, and Expedited Modification)** according to whether the corresponding filing fee was paid or waived.

- The total number of Filing Fee Paid and Filing Fee Waived should equal the number of divorce filings reported for the month as listed on the Family Court Caseload report. **(Filing Fee Paid + Filing Fee Waived = Divorce Filings)**.

Pro Se Report

- This report is only for civil cases with one or more pro se, unrepresented, litigants.

- Report the number of litigants, the number of cases and the number of indigency affidavits granted for each category.

Treatment Report

If your county does not have a Treatment Court, do **not** submit a Treatment report.

For counties with Treatment Courts:

- Cases are counted on the Treatment Report upon referral which establishes the new case.

- The original case from which the referral to treatment court originated should be statistically closed within your case management system upon entry of the order officially diverting the case to treatment court. Report the disposition in the **DISPOSED OTHER** category on the corresponding monthly caseload report.

- Compile a listing of the final case numbers for each treatment court case type (Adult Drug Court **(TAD)**, Adult Re-entry Court **(TAR)**, and Adult Mental Health Court **(TAM)**) monthly, and the accompanying count of cases filed during the month. Use the case types applicable to your county's caseload.

- If there have **not** been any treatment court cases during a month, submit a blank report for that month by leaving the NUMBER OF CASES INITITATED DURING THE MONTH as ZEROS and deleting all of the case number information so that the FINAL CASE NUMBER ASSIGNED DURING THE MONTH is BLANK.

Disposed by Jury Trial Report

- Consider a jury trial to have occurred when the jury is struck; this is, when the jurors and alternates are selected and sworn. It is **not** necessary for a case to be tried to verdict by the jury.

- Compile a listing of case numbers with jury trial dispositions each month. If there were **not** any jury trial dispositions during a month, enter a blank report using a case number, such as **"15-X-0000"**.

- Only record jury trial dispositions when they have reached their statistical close date according to the guidelines in this Manual.

- Only include jury trials in Circuit Court. Do **not** include Magistrate jury trials.

- The number of cases listed on the Disposed by Jury Trial report each month should correspond with the total number of cases reported in the **DISPOSED JURY** column of the Circuit Court Caseload report for the month.

Mass Litigation Report

- **Upon receipt of an order directing the transfer of cases to the Mass Litigation Panel**, please compile a list of all cases transferred. Any cases related to this litigation filed after the initial transfer to the Mass Litigation Panel has occurred should also be reported in this manner upon transfer to the Panel.

- Cases transferred to the Mass Litigation Panel should be statistically closed within your case management system upon transfer. Statistical closure should be reflected on the corresponding caseload report as "Disposed Other,"

- Only the county transferring cases to the Mass Litigation Panel will submit a Mass Litigation Report. The county receiving the transferred cases does **NOT** submit a report of mass litigation cases.

Juror Report

- The information in this report is based upon Juror Qualification Questionnaire information from the previous calendar year

- Report the method of juror selection (box, computer or wheel) your county utilizes.

- Report the number of males and females who completed a juror questionnaire.

- Report the number of juror questionnaires completed for each age group.

- Report the number of jurors who provided information on race on completed questionnaires.

- Do **not** enter the number of blanks into the statistics database but do record them on the report form.