



Supreme Court of Appeals State of West Virginia

News

Administrative Office
1900 Kanawha Blvd., East
Bldg. 1, Room E-316
Charleston, West Virginia 25305
(304) 340-2305 Jennifer Bundy
(304) 340-2306 April Harless
(304) 558-4219 / TTY
(304) 558-1212 / FAX
Web Site: <http://www.state.wv.us/wvsca>
Information Services Division
Email: Jennifer.bundy@courtwv.gov
Email: April.harless@courtsww.gov

Supreme Court issues Revised Rules of Appellate Procedure for 60-day public comment period For immediate release Monday, May 17, 2010

CHARLESTON, W.Va. – The Supreme Court of Appeals of West Virginia today released for public comment Revised Rules of Appellate Procedure.

“The revised rules modernize and comprehensively change the appellate process to provide a decision on the merits in every appeal and ensure greater transparency at every step,” said Chief Justice Robin Jean Davis.

Only two previous rules are unchanged. Eighteen of the rules are new or contain new material. The rest have been rewritten, and many have been substantially rewritten. No changes were made to any statutory requirements. Supreme Court Clerk Rory Perry II has written extensive “Clerk’s Comments” at the end of each rule summarizing the changes in that rule and the purpose of those specific changes.

“The Rules of Appellate Procedure were written in 1864 and have been amended and modified several times, but the last major change was after the Judicial Reorganization Amendment of 1974. Now, rules that do not conform to modern legal practice simply have to be fixed,” Chief Justice Davis said.

“Times have changed. Transparency is the rule of government today. The rules have to be comprehensible to all interested constituencies and to the public-at-large,” Chief Justice Davis said.

For example, “The proposed rules indicate the Court’s acknowledgement that we understand the public has a right to know why we decide to hear arguments in one case and not another,” Chief Justice Davis said.

The nomenclature “grant” and “refuse” will no longer be used because a decision on the merits will be issued in every properly filed appeal. Those decisions either will be in the form of a full opinion or memorandum decision. Memorandum decisions will be non-precedential but will be subject to rehearing; they will not be published in the *West Virginia Reports*.

“No court of last resort in the country allows full oral argument in every case that is appealed, and no court of last resort issues a full opinion in every appeal. The revised rules are consistent with this general national practice,” Chief Justice Davis said.

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“Because more will be required of the Court, more will be required of attorneys practicing before the Court. The revised rules require a record that is more exacting and more detailed and require a response to be filed in every appeal from circuit court before the Court will decide the issues in the case,” Chief Justice Davis said.

For example, one major change will require the party that files an appeal to be responsible for preparing a paginated and indexed record for appeal, a return to the practice which prevailed in West Virginia until the 1970s. Currently, petitioners often designate the entire original record in a case for appeal, which is then indexed by a circuit clerk and sent to the Supreme Court Clerk. This makes it difficult for attorneys to cite specific places in the record and transcript in their briefs.

Under the revised rules, only material relevant and necessary for the Court to decide a case should be part of the appellate record. The revised rules indicate the Court prefers an appendix record rather than a designated original record. An appendix record contains copies of original documents used in the lower tribunal. Respondents also can file an appendix, or parties can do it jointly. If an appendix is used, both sides can cite more easily from the same document, and it will allow Court staff more freedom to use copies of original documents rather than worry about removing original documents from the Clerk’s Office and the concerns associated with handling original documents.

The revised rules are not a response to criticism from any party or any special-interest group. Clerk Perry has been making notes about obsolete rules and ways to improve case management since he became Clerk in July 2000. Those changes form the core of the revised rules.

The revised rules will be out for public comment for 60 days. “The public and the legal community are invited and encouraged to comment,” Chief Justice Davis said.

Over the next two weeks Clerk Perry will provide free 90-minute Continuing Legal Education seminars about the rules in ten locations throughout the state. The public and the press are invited to attend and ask questions at the conclusion of each seminar. Printed copies of the rules will be distributed to each person who attends.

The rules also are posted on the Supreme Court website at <http://www.state.wv.us/wvsca/rules/appellate-revisions.htm>

Decisions on the merits

Under the revised rules, the current Motion Docket will be eliminated. Instead, the Court will have two separate argument dockets – under either **Rule 19** or **Rule 20** of the revised rules.

The revised rules provide for the Court to issue a full written opinion in every case it assigns to a Rule 20 Docket. The Rule 20 Docket is similar to the current Argument Docket, in which both sides appear to make 15-minute arguments. Under the revised rules, cases will be more carefully screened before reaching that stage.

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Currently, there are no written criteria for why the Court decides to put a case on the Argument Docket. The revised rule adapts criteria for Rule 20 arguments from the Final Report of the Independent Commission on Judicial Reform and spells out that the Court will put a case on the **Rule 20 Docket** if

- it involves an issue of first impression;
- it involves an issue of fundamental public importance;
- it involves a constitutional question regarding the validity of a statute, municipal ordinance, or court ruling; or if
- it involves inconsistencies or conflicts among the decisions of lower tribunals.

Under the revised rules, for cases on the **Rule 19 Docket**, the Court can issue a memorandum decision, issue an opinion, or refer those cases to the Rule 20 Docket for another argument and a full opinion, or issue an appropriate order (for example, if the appeal is premature or the case has settled).

In Rule 19 Docket cases, both sides will appear to make five-minute arguments. Therefore, the Rule 19 Docket affords an expanded opportunity for oral argument. A case can be put on the Rule 19 Docket if

- the assignments of error involve the application of settled law;
- the case claims an unsustainable exercise of discretion where the law governing that discretion is settled;
- the case claims insufficient evidence or a result against the weight of the evidence;
- the case involves a narrow issue of law; or if
- a hearing is required by law, as in a case involving an appeal from a Public Service Commission decision.

Under the revised rules, the Court also may issue **memorandum decisions** affirming the decision of a lower court

- in cases in which no substantial question of law is presented and the Court does not disagree with the decision of the lower tribunal;
- if upon consideration of the applicable standard of review and the record presented, the Court finds no prejudicial error; or
- if other just cause exists for the Court to affirm or reverse the case summarily.

In these cases, the memorandum decision shall contain a succinct statement of the reason the underlying decision is being affirmed or reversed.

Providing greater transparency

One of the main goals of the revised rules is to provide greater transparency in the appellate process. This is achieved in many ways.

For the first time, the Court has established in its appellate rules written criteria for deciding whether oral argument should be held in a case.

Appellate briefs will continue to be provided on the Court website in all Rule 20 Docket cases before oral argument, as has been the Court's practice since 2004. However, new **Rule 40** requires attorneys to be more careful in document preparation. For example, the use of juvenile names, personal identifiers, Social Security numbers, and sensitive financial or medical information will be restricted in Supreme Court filings because they eventually may be posted on the Internet. Rule 40 also provides a process to request that the Court redact or remove documents from the Court's website.

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Rule 40 requires that cases which were confidential in a lower court, like child abuse and neglect, will remain confidential in the Supreme Court. However, because there is an important public interest in cases on the Rule 20 Docket, appellate briefs in those cases will continue to be posted on the Court's website, even if they are otherwise confidential. A party who does not want a brief to be posted must file a motion to seal and the Court will consider the matter.

An effort also has been made, as much as possible, to make the revised rules more readable so they are more accessible to the general public.

Throughout the rules, sections governing the Court's consideration of cases have been added that clearly outline the decision options at each critical stage.

Once the rules become effective, the Court will change its internal operations to accommodate the schedules of attorneys and the public. For example, the Supreme Court Clerk's Office will set check-in and tentative times for oral arguments in each case on the Rule 19 and Rule 20 Dockets, rather than the current system. And opinions will be released only at 3 p.m., rather than at 10 a.m. and 3 p.m., so anyone interested in a certain opinion has to check only once a day.

Many of the new requirements for attorneys who practice before the Supreme Court are aimed at increasing transparency as well as streamlining the appellate process.

Under the revised rules, a single counsel of record must be identified in court filings. Counsel for a party must be identified when they contribute in any way to *Amicus* briefs.

Attorneys will be required to list assignments of error presented for review with reference to a specific page number of the transcript or the pleading where the issue was raised. And for the first time, attorneys must tell the Court what they want: a Rule 19 argument, a Rule 20 argument, or memorandum decision, and why. This will guide the Court's choice.

For the first time, respondents must file briefs in cases on appeal before the Court will decide whether to hear argument. And respondent briefs will be required to respond specifically to each assignment of error in the petitions to which they are responding. In an appropriate case, a summary response may be filed in lieu of a brief. However, a response brief will remain optional in workers' compensation appeals.

Media access rules that previously were separate now have been incorporated into the revised rules, as **Rule 42**, to make them easier to find and follow. The major changes to the media rules accommodate modern court and media practices.

For example, instead of requiring 24-hour notice to bring a camera into the Supreme Court Chamber, the revised rule requires members of the media to notify the Court public information officer "as far in advance as is practicable." Only one television camera and one still camera – without flash – will continue to be allowed in the Chamber at one time, on a first-come, first-served basis. The media will continue to be responsible for pooling arrangements, but the new rule allows the public information officer and the Clerk to participate in pooling arrangements in certain circumstances.

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The revised media rule also allows, for the first time, a limited number of reporters to use laptop computers in the Supreme Court Chamber in an area set aside for that purpose. That space will be available on a first-come, first-served basis. Laptops previously were not allowed in the Chamber.

Brief summary of the new appellate process

Once a final order is entered in a lower tribunal, the party filing an appeal will have 30 days to file a notice of appeal and transcript request in the Supreme Court Clerk's Office. Copies must be served on the circuit clerk in the county in which the case originated, any court reporter from whom a transcript is required, and every party in the case.

Notices of appeal will be filed in the Supreme Court Clerk's Office instead of the circuit clerk's office in the county in which the case originated, as they are now. The notices of appeal filed in the Supreme Court Clerk's Office will allow the Clerk to issue scheduling orders and will make it easier for the public and the press to follow cases in which they are interested.

A transcript request must be filed along with a notice of appeal, so the Supreme Court Clerk's Office can better manage the time of court reporters working on transcripts statewide to ensure there are no delays.

As soon as is practicable, the Supreme Court Clerk's Office will issue a scheduling order that will indicate when the petitioner's brief and response brief should be filed, whether and when a transcript should be filed, and other deadlines. When the petitioner's brief and appendix are filed, the appeal will be deemed "perfected." The deadline for perfecting an appeal will align with applicable statutory deadlines. After the respondent's brief and appendix (if any) are filed, and a reply brief (if any) are filed, the appeal will be deemed "mature" and the case will be ripe for the Court's consideration and conference.

It is anticipated that it will take approximately four months from the date an appealable order is entered in a lower court to the date an appeal is "perfected." It will take an additional 65 days for an appeal to be "mature." So it will take a total of about six months from the day a final order is entered in a lower tribunal for a case to be ready for the Court to consider the matter.

At conference, the Court will decide whether to put a case on a Rule 20 Docket, to put it on a Rule 19 Docket, to issue a memorandum decision without argument, or to issue an order (in cases which are dismissed, withdrawn, untimely, settled, non-conforming, etc.).

After a Rule 20 Docket, the Court will sit in conference to decide those cases. The Court will issue opinions in those cases.

After a Rule 19 Docket, the Court will sit in decision conference and in each case decide whether to enter a memorandum decision, an opinion, an order, or to put the case on a Rule 20 Docket for further argument.

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There are specific rules governing certified questions from other courts; original jurisdiction cases (writs of *mandamus*, writs of prohibition, *habeas corpus*, writs of *certiorari*); appeals from family courts, the Human Rights Commission, the Public Service Commission; disciplinary cases; and for abuse and neglect cases. These rules modify the previous rules governing those and bring them into conformity with the new process, taking into account specific statute and timeline differences inherent in each type of case.

Rule 25 updates the rule on petitions for rehearing. It makes it clear that such petitions are granted only in exceptional cases and that a response to a petition for rehearing is not required. The rule also makes it clear that “repetition of argument previously presented to the Court in the case is not a proper basis for a petition for rehearing.”

Continuing Legal Education and Public Education Seminars on revised rules

Clerk Perry will conduct ten 90-minute seminars on the Revised Rules of Appellate Procedure. The seminars will be free and open to the public. Attorneys who attend are eligible to receive 1.8 CLEs in office management and ethics. Registration in advance is not required.

The seminars will be at the following locations

- 10:30 a.m. to noon on Monday, May 17, at the Embassy Suites Hotel in Charleston;
- 3:30 p.m. to 5 p.m. on Tuesday, May 18, at the Ohio County Public Library Auditorium, 52 16th St., in Wheeling;
- 3:30 p.m. to 5 p.m. on Wednesday, May 19, at the Fayette County Courthouse in Fayetteville;
- 10:30 a.m. to noon on Thursday, May 20, at the Judge Black Judicial Annex, Fort Boreman Room, in Parkersburg;
- 11 a.m. to 12:30 p.m. Friday, May 21, at the Upshur County Courthouse, in Buckhannon;
- 10:30 a.m. to noon Monday, May 24, at the Chief Logan State Park Conference Center in Logan;
- 11 a.m. to 12:30 p.m. Tuesday, May 25, at the West Virginia University College of Law, Marlyn E. Lugar Courtroom, in Morgantown;
- 1 p.m. to 2:30 p.m. on Wednesday, May 26, at the South Branch Inn in Moorefield;
- 2 p.m. to 3:30 p.m. on Thursday, May 27, at the Dunn Building, County Commission Hearing Room, in Martinsburg;
- 10:30 a.m. to noon, Thursday, June 3, at the Pullman Plaza Hotel in Huntington.

The locations and dates were chosen to give the legal community and the public in every region of West Virginia an opportunity to participate.

At the conclusion of the public comment period, the Court will review all the written comments before voting whether to approve the revised rules.

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Comments on the revised rules must be in writing and received by the Supreme Court Clerk no later than July 19, 2010.

E-mail comments are permissible but not preferred. Include the phrase “rule comments” in the subject line. Address e-mail comments to rory.perry@courtswv.gov.

Comments may be mailed to

Clerk Rory Perry

Supreme Court of Appeals of West Virginia

State Capitol

Room E-317

1900 Kanawha Blvd. E.

Charleston, WV 25305

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