I. Scope of Rules – One Form of Action

~~***Rule 1. Scope and purpose of rules.***~~
Rule 1. Scope and purpose.

These rules govern the procedure in all civil actions and proceedings in West Virginia trial courts of record ~~in all actions, suits, or other judicial proceedings of a civil nature whether cognizable as cases at law or in equity, with the qualifications and exceptions~~, except as stated in Rule 81. They ~~shall~~must be construed ~~and~~, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.

COMMITTEE COMMENT ON RULE 1

Rule 1 is changed to be consistent with the corresponding federal rule. The Rule uses the word "must" rather than the word "should." The remainder of the proposed changes are only to the style and organization of the rule and are intended to make the rule more easily understood.

~~Rule 2. One form of action.~~ ***Rule 2. One form of action.***

There ~~shall be~~is one form of action ~~to be known as "~~ the civil action~~"~~.

COMMITTEE COMMENT ON RULE 2

Rule 2 is changed to be consistent with the corresponding federal rule. There are no substantive changes to Rule 2.

II. Commencement of Action; Service of Process, Pleadings, Motions and Orders

~~Rule 3. Commencement of action.~~
Rule 3. Commencing an action.

~~Complaint.~~ ~~–~~A civil action is commenced by filing a complaint with the court.

(a) For a complaint naming more than one individual plaintiff not related by marriage, a derivative or fiduciary relationship, each plaintiff ~~shall~~must 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 a circuit court.

(b) Civil case information statement. Every complaint ~~shall~~must be accompanied by a completed civil case information statement, or the electronic equivalent, in the form prescribed by the Supreme Court of Appeals.

~~**(c) Divorce complaints.** – Every divorce complaint involving spousal support, child support, child custody, or child visitation shall be accompanied by an application for services pursuant to Title IV-D of the Social Security Act [FN1] and no hearing shall be conducted, except upon motion for emergency temporary relief, until an application for services pursuant to Title IV-D of the Social Security Act has been filed.~~

COMMITTEE COMMENT ON RULE 3

The title of Rule 3 is changed to be consistent with the corresponding federal rule. The rule otherwise maintains the language of the current West Virginia Rule except that subsection (c) of the current rule concerning divorce complaints is deleted. Divorce proceedings are governed by the *Rules of Practice and Procedure for Family Court*. The rule maintains the requirement of a civil case information statement which is not required in the corresponding federal rule. A completed civil case information sheet must accompany a complaint before a clerk has authority to file a complaint. See Syl. Pt. 5, *Cable v. Hatfield*, 202 W.Va. 638, 505 S.E.2d 701 (1998). Application of the Rule in cases where electronic filing is required is addressed in the *West Virginia Trial Court Rules*. *See* W.Va. Trial Court Rule 15A.17.

~~***Rule 4. Summons.***~~ ***Rule 4. Summons.***

(a) Contents and Amendments.

(1) *Content*~~*s*~~**.** A summons must:

(A) name the court and the parties;

(B) be directed to the defendant;

(C) state the name and address of plaintiff's attorney or, if unrepresented, the plaintiff;

~~**(D) (a) Form. –** The summons shall be signed by the clerk, bear the seal of the court, identify the court and the parties, be directed to the defendant, and state the name and address of the plaintiff's attorney or, if unrepresented, of the plaintiff. It shall also~~ state the time within which the defendant must appear and defend~~, and~~;

(E) notify the defendant that a failure to ~~do so will~~appear and defend may result in a default judgment ~~by default~~ against the defendant for the relief demanded in the complaint~~. The court may allow a summons to be amended.~~

(F) be signed by the clerk; and

(G) bear the court's seal.

(2) *Amendments***.** The court may permit a summons to be amended.

(b) Issuance. ~~– Upon the filing of~~On or after filing the complaint, the ~~clerk shall forthwith issue~~plaintiff must present a summons to ~~be served as directed by~~the clerk for signature and seal. If the summons is properly completed, the clerk must sign, seal and issue it to the plaintiff for service on the defendant. A summons, or a copy ~~of the summons if~~that is addressed to multiple defendants, ~~shall~~must be issued for each defendant to be served.

(c) Service ~~with complaint; by whom made. –~~.

(1) *In General.* A summons ~~shall~~must be served ~~together~~ with a copy of the complaint. The plaintiff is responsible for ~~directing the clerk in the manner of service of~~having the summons and complaint served within the time allowed ~~under subdivision (k)~~by Rule 4(i) and must furnish the

necessary copies to the person who makes service.

(2) *By Whom.*

(A) ~~**(2)** Service may be effected by any~~A person ~~who is not a party and~~ who is at least 18 years ~~of age~~old and not a party may serve a summons and complaint.

(B) ~~**(3)**~~ By Deputy Sheriff. At the plaintiff's ~~request of the plaintiff,~~ and upon payment of ~~the~~ applicable fees and costs ~~of,~~ service~~, the clerk shall:~~ may be made by a deputy sheriff.

~~**(A)** Deliver the summons and complaint to the sheriff for service as directed by the plaintiff; or~~
~~**(B)** Make service by either certified mail or by first class mail as directed by plaintiff; or~~

(C) ~~Forward a copy of the summons and complaint~~ By the Clerk to the Secretary of State~~,~~. Upon payment of applicable fees and costs by the plaintiff, the clerk must serve the West Virginia Secretary of State as statutory attorney-in-fact~~,~~ for service as specified by any applicable statute.

(D) To the Secretary of State. A party may, upon payment of applicable fees, serve the West Virginia Secretary of State as statutory attorney-in- fact for service as specified by any applicable statute.

(E) By the Clerk, upon payment of applicable fees, by either certified mail or by first class mail, as directed by the plaintiff.

(d) Manner of Service. Service may be effectuated by personal or substitute service ~~shall~~and must be made ~~in the following manner~~upon:

(1) ~~*Individuals.* – Service upon~~ An individual, other than ~~an infant~~a minor, incompetent person~~,~~ or ~~convict may be made~~incarcerated person within the State of West Virginia by:

(A) ~~Delivering a copy of the summons and complaint to the individual personally~~ Personaldelivery;~~or~~

(B) ~~Delivering~~Leaving a copy of the summons and complaint at the ~~individual's~~individual's dwelling ~~place~~ or usual place of abode ~~to a member of the individual's family who is above the age of sixteen (16) years and by advising such person of the purport of the summons and complaint; or~~with someone the age of 18 or above who

resides there;

(C) Delivering a copy ~~of the summons and complaint~~ to an agent or attorney-in-fact authorized by appointment or statute to receive ~~or accept~~ service of ~~the summons and complaint in the individual's behalf~~process for the individual;~~ or~~

(D) By Deputy Sheriff;

(E) From the Secretary of State;

(F) ~~**(D)**~~ By Certified Mail from the Clerk~~ sending~~. The clerk may send a copy of the summons and complaint ~~to the individual to be served~~ by certified mail, return receipt requested, and delivery restricted to the ~~addressee~~individual to be served; or

(G) ~~**(E)**~~ By First Class Mail from the Clerk~~ sending~~. The clerk may send a copy of the summons and complaint by first class mail, postage ~~prepaid, to the person to be served~~pre-paid, with two copies of a notice and ~~acknowledgment~~acknowledgement conforming substantially to Form ~~14 and~~11 with a return envelope, postage ~~prepaid,~~pre-paid and addressed to the clerk to the individual to be served.

The plaintiff ~~shall~~must furnish the person making service with such copies of the summons and complaint or order as are necessary and ~~shall advance~~must pay the costs of service. For service by certified mail from the clerk, the plaintiff ~~shall~~must pay ~~to~~ the clerk a fee of twenty dollars for each complaint to be served. For service by first class mail from the clerk, the plaintiff ~~shall~~must pay ~~to~~ the clerk a fee of five dollars for each complaint to be served.

Service pursuant to ~~subdivision~~Rule 4(d)(1)(~~D~~F) ~~shall~~or (G) must not be the basis for the entry of a default or a judgment by default unless the record contains a return receipt showing acceptance by the defendant or a return envelope showing refusal of the ~~registered or~~ certified mail by the defendant. If delivery of the summons and complaint pursuant to ~~subdivision~~Rule 4(d)(1)(~~D~~F) or (G) is refused, the clerk, promptly upon receipt of the notice of such refusal, ~~shall~~must mail to the defendant, by first class mail, postage prepaid, a copy of the summons and complaint and a notice that despite such refusal, the case will proceed and that judgment by default ~~will~~may be rendered against the defendant unless the defendant appears to defend the suit. Any such default or judgment by default ~~shall~~must be set aside pursuant to Rule 55 (c) or Rule 60(b) if the defendant demonstrates to the court that the return receipt was signed by or

delivery was refused by an unauthorized person.

The notice and ~~acknowledgment~~acknowledgement of receipt of the summons and complaint pursuant to ~~subdivision~~Rule 4(d)(1)(~~E~~G) ~~shall~~must be executed in the manner prescribed on Form ~~14~~11. Unless good cause is shown for failure to complete and return the notice and ~~acknowledgment~~acknowledgement of receipt of the summons and complaint pursuant to ~~subdivision~~Rule 4(d)(1)(~~E~~G) within ~~twenty (20)~~21 days after mailing, the court may order the payment of the cost of personal service by the ~~person~~individual to be served.

Service pursuant to ~~subdivision~~Rule 4(d)(1)(~~E~~G) ~~shall~~must not be the basis for entry of default or ~~a~~ judgment by default unless the record contains a notice and ~~acknowledgment of~~acknowledgement of receipt of the summons and complaint. If no acknowledgment of service pursuant to ~~subdivision~~Rule 4(d)(1)(~~E~~G) is received by the clerk within ~~twenty (20)~~21 days after the date of mailing, service of such summons and complaint ~~shall~~must be made under subdivisions (d)(1)(A), (B), (C), ~~or~~ (D) or (E).

(2) ~~*Infants and Incompetents Under 14 Years.* Upon an infant~~**A minor or incompetent** ~~younger than 14 years of age,~~**person.** A minor or an incompetent person in West Virginia must be served by delivering a copy of the summons and complaint to the ~~infant's or incompetent's~~infant's or incompetent person's guardian or conservator who is resident in the State~~; or,~~. If there be no such guardian or conservator, then to either the ~~infant's or incompetent's~~infant's or incompetent person's father or mother if they be found in the State. If there is no such guardian or conservator and ~~if~~ the father or mother cannot be found in the State, service ~~of the summons and complaint shall~~must be made upon a guardian *ad litem* appointed under Rule 17(c). But, if any of the persons upon whom service is directed to be made by this paragraph is a plaintiff, then service ~~shall~~must be upon the person who stands first in the order named in this paragraph who is not a plaintiff.

~~**(3)** *Infants and Incompetents 14 Years or Older.* – Upon an infant or incompetent 14 years of age or older, by making service as provided in paragraph (2) above, and in addition by making service upon the infant or incompetent as provided in paragraph (1) above.~~

(3) ~~**(4)** *Convicts.*~~ **Incarcerated persons.** Upon a person confined in the penitentiary or jail of this or any other state, or of the United States, by delivering a copy of the summons and complaint to that ~~person's~~person's committee, guardian, or like fiduciary resident in the State~~; or,~~. If there be no such committee, guardian~~,~~ or like fiduciary, or if the committee, guardian~~,~~ or like fiduciary is a plaintiff, then service ~~of process shall~~must

be made upon a guardian *ad litem* appointed under Rule 17(c).

(4) *Corporations, Partnerships or Associations*

(A) **(5)** Domestic Private Corporations. Service upon a domestic private corporation, by:

(i) **(A)** by delivering or mailing in accordance with paragraphRule 4(1c) above(2) a copy of the summons and complaint to an officer, director, or trustee thereof; or,. If no such officer, director, or trustee be found in the State, by delivering a copy thereof to any agent of the corporation including, in the case of a railroad company, a depot or station agent in the actual employment of the company; but excluding, in the case of an insurance company, a local or soliciting agent; or

(ii) **(B)** by delivering or mailing in accordance with paragraphRule 4(1c) above(2) a copy thereof of the summons and complaint to any agent or attorney in factattorney-in-fact authorized by appointment or by statute to receive or accept service inof process on its behalf.

(B) **(6)** Domestic Public Corporations.

(i) **(A)** Upon a City, town, or village, by delivering or mailing in accordance with paragraphRule 4(1c) above(2) a copy of the summons and complaint to its mayor, city manager, recorder, clerk, treasurer, or any member of its councilcounsel or board of commissioners;.

(ii) **(B)** Upon a County commission of any county or other tribunal created to transact county business, by delivering or mailing in accordance with paragraphRule 4(1c) above(2) a copy of the summons and complaint to any commissioner or the clerk thereof or,. If they be absent, to the prosecuting attorney of the county;.

(iii) **(C)** Upon a Board of education, by delivering or mailing in accordance with paragraphRule 4(1c) above(2) a copy of the summons and complaint to the president or any member thereof or,. If they be absent, to the prosecuting attorney of the county;.

(iv) **(D)** Upon any Other domestic public corporation, (i)corporations, including state agencies by delivering or mailing in accordance with paragraphRule 4(1c) above(2) a copy of the summons and complaint to any officer, director, or governor

thereof~~,~~ or ~~(ii)~~ by delivering or mailing in accordance with ~~paragraph~~Rule 4(~~1~~c) ~~above~~(2) a copy ~~thereof~~ of the summons and complaint to an agent or ~~attorney in fact~~attorney-in-fact authorized by appointment or ~~by~~ statute to receive or accept service ~~in~~on its behalf.

(C) ~~**(7)**~~ Foreign corporations and business trusts qualified to do business~~. – Upon a foreign corporation, including a business trust, which has qualified to do business~~ in the State~~,~~ by delivering or mailing in accordance with ~~paragraph~~Rule 4(~~1~~c) ~~above~~(2) a copy of the summons and complaint ~~as provided~~in the same manner as service upon a domestic private corporation as set forth in Rule 4(d)(~~5~~4)(A).

(D) ~~**(8)**~~ Foreign corporations and business trusts not qualified to do business~~. – Upon a foreign corporation, including a business trust, which has not qualified to do business~~ in the State~~,~~
~~**(A)**~~ by delivering or mailing in accordance with ~~paragraph~~Rule 4(~~1~~c) ~~above~~(2) a copy of the summons and complaint to any officer, director, trustee~~,~~ or agent of such corporation~~;~~ or
~~**(B)**~~ by delivering or mailing in accordance with ~~paragraph~~Rule 4(~~1~~c) ~~above copies thereof~~(2) a copy of the summons and complaint to any agent or ~~attorney in fact~~attorney-in-fact authorized by appointment or by statute to receive or accept service ~~in~~on its behalf.

(E) ~~**(9)**~~ Unincorporated associations~~. – Upon an unincorporated association which is~~ subject to suit under a common name, ~~by~~but delivering in accordance with Rule 4(c)(2) a copy of the summons and complaint to any officer, director~~,~~ or governor thereof~~,~~ or ~~by delivering or mailing in accordance with paragraph (1) above a copy of the summons and complaint~~ to any agent or ~~attorney in fact~~attorney-in-fact authorized by appointment or by statute to receive or accept service ~~in~~on its behalf~~; or,~~. If no such officer, director, governor~~,~~ or appointed or statutory agent or ~~attorney in fact~~attorney-in-fact be found in the State, then by delivering or mailing in accordance with ~~paragraph~~Rule 4(~~1~~c) ~~above~~(2) a copy of the summons and complaint to any member of such association and publishing notice of the pendency of such action once a week for two successive weeks in a newspaper of general circulation in the county wherein such action is pending. Proof of publication of such notice is made by filing the ~~publisher's~~publisher's certificate of publication with the court.

(e) Constructive Service.

(1) *Service by Publication.* If the plaintiff files with the court an affidavit:

(A) That the defendant is a foreign corporation or business trust for which no officer, director, trustee, agent~~,~~ or appointed or statutory agent or ~~attorney in fact~~attorney-in-fact is found in the State upon whom service may be had; or

(B) That the defendant is a nonresident of the State for whom no agent~~,~~ or appointed or statutory ~~agent or attorney in fact~~attorney-in-fact is found in the State upon whom service may be had; or

(C) That the plaintiff has used due diligence to ascertain the residence or whereabouts of the defendant, without effect; or

(D) That process, delivered to the sheriff of the county in which the defendant resides or is, has twice been delivered to such officer and has been returned without being executed; or

(E) That there are or may be persons, other than those named in the complaint as plaintiff and defendant~~,~~ interested in the subject matter of the action~~,~~ whose names are unknown to the plaintiff and who are made defendants by the general description of unknown defendants; then the clerk ~~shall~~must enter an order of publication against such named and/or unknown defendants. Every order of publication ~~shall~~must state the ~~title~~caption of the action; the object thereof; the name and address of the ~~plaintiff's~~plaintiff's attorney, if any; that a copy of the complaint may be obtained from the clerk; and that each named and/or unknown defendant must appear and defend on or before a date set forth in the order, which ~~shall~~must be not fewer than 30 days after the first publication thereof; otherwise, ~~that~~ judgment by default ~~will~~may be rendered against the defendants at any time thereafter. Every such order of publication ~~shall~~must be published once a week for two successive weeks (or ~~for~~ such period as may be prescribed by statute, whichever period is longer) in a newspaper of general circulation in the county ~~wherein~~where such action is pending. Proof of service by publication is made by filing the ~~publisher's~~publisher's certificate of publication with the court.

(2) *Service by Mailing.* When plaintiff knows the residence of a defendant upon whom service has been unsuccessfully attempted as described in Rule 4(e)(1)(D), or when plaintiff knows the residence of a nonresident defendant or the principal office of a nonresident defendant foreign corporation or business trust for which no officer, director, trustee, agent, or appointed or statutory agent or attorney in fact is found in the State upon whom service may be had, plaintiff ~~shall~~must obtain constructive service of the summons and complaint upon such defendant

by the method set forth in Rule 4(d)(1)(D). The summons in such instance ~~shall~~must notify the defendant that the defendant must appear and defend within thirty days of the date of mailing pursuant to Rule 4(d)(1)(D); otherwise, that judgment by default ~~will~~may be rendered against the defendant at any time thereafter. However, service pursuant to Rule 4(d)(1)(D) ~~shall~~must not be the basis for the entry of a judgment by default unless the record contains a return receipt showing acceptance by the defendant or a return envelope showing refusal of the certified mail by the defendant. If delivery of the summons and complaint sent by certified mail is refused, the clerk, promptly upon notice of such refusal, ~~shall~~must mail to the defendant, first class mail, postage prepaid, a copy of the summons and complaint and a notice that despite such refusal the case will proceed and that judgment by default will be rendered against defendant unless defendant appears to defend the suit. If plaintiff is unable to obtain service of the summons and complaint upon such defendant by use of the method set forth in Rule 4(d)(1)(D), then, upon affidavit to such effect filed with the court, the clerk ~~shall~~must issue an order of publication, and the procedures described in subdivision (e)(1) ~~shall~~must be followed to effectuate constructive service.

(f) Personal Service Outside State. Personal service of a copy of the summons and complaint may be made outside of this State on any defendant. If any such defendant be then a resident of this State and if the plaintiff ~~shall~~must, during the pendency of the action, file with the court an affidavit setting forth facts showing that the defendant is such a resident, such service ~~shall~~must have the same effect as personal service within this State and within the county of the defendant's residence; otherwise, such service ~~shall~~must have the same effect as constructive service. In either case, the summons ~~shall~~must notify the defendant that the defendant must appear and defend within 30 days after service, otherwise judgment by default ~~will~~may be rendered against the defendant at any time thereafter.

(g) Summons; Service Thereof in Addition to Constructive Service. The plaintiff may, at any time before judgment, have a copy of the summons and complaint served on a defendant in the manner provided by subdivisions (d) or (f) of this rule, although constructive service under subdivision (e) of this rule has been made. After such service under subdivision (d) of this rule, the action ~~shall~~must proceed as in other cases of personal or substituted service within the State; and after such service under subdivision (f) of this rule, the action ~~shall~~must proceed as in other cases of personal or constructive service.

(h) ~~Process Part of Record. –~~ ~~Summonses, complaints, proofs of service and returns endorsed thereon, all orders and notices served or published, all proofs of service and certificates of publication, and all other papers filed relating to such process, orders, and notices, are a part of the record of an action for all purposes.~~**Proving Service.**

(1) ~~**(i)**~~ *Affidavit Required.* Proof of service must be made to the court. Except for service by a deputy sheriff, proof must be by the server's affidavit.

(2) ~~**Proof**~~*Validity of Service* ~~**or Publication.** — The person serving the process or order or publishing a notice or order shall make proof of service of publication to the court promptly and in any event within the time during which the person served must respond to the process, notice, or order. If service is made by a person other than the sheriff or clerk, that person shall make proof thereof by affidavit~~*; Amending Proof.* Failure to ~~make proof of~~prove service ~~or publication within the time required~~ does not affect the validity of ~~the~~ service ~~of~~. The ~~process, notice, or order~~court may permit proof of service to be amended.

~~**(j) Amendment.** — At any time in its discretion and upon such terms as it deems just, the court may allow any process, notice, or order, or proof of service or publication thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process, notice, or order issued or was entered.~~

(i) ~~**(k)**~~ **Time Limit for Service.** If ~~service of the summons and complaint is not made upon~~ a defendant is not served within 120 days after the ~~filing of the~~ complaint is filed, the court~~, upon~~ —on motion or on its own ~~initiative~~ after notice to the plaintiff~~, shall~~ — must dismiss the action without prejudice ~~as to~~against that defendant or ~~direct~~order that service be ~~effected~~made within a specified time~~; provided that~~. But if the plaintiff shows good cause for the failure, the court ~~shall~~must extend the time for service for an appropriate period.

COMMITTEE COMMENT ON RULE 4

Rule 4 has been changed in format to be substantially consistent with the corresponding federal rule of civil procedure and for ease of identifying the methods and manner of service. However, certain provisions of the corresponding federal rule, specific to federal law, have been deleted and state specific provisions per the current rule have been maintained.

Subdivision (c)(2) deletes any reference to the court ordering service by the sheriff and maintains that service by the sheriff is upon payment of applicable fees and costs.

Subdivision (d) maintains the ability to serve via certified mail and first-class mail if served by mail from the clerk and also maintains the ability to serve through the West Virginia Secretary of State pursuant to West Virginia law. Subdivision (d) also increases the time for return of a notice and

acknowledgement of receipt of the summons and complaint to 21 days to be consistent with other time frame rules proposed to be increased throughout the Rules.

The waiver provision of the federal rule is not recommended for adoption in the state rule.

The provision for personal service has been changed to permit service upon a person 18 *or above* as in the current West Virginia rule rather than "someone of suitable age and discretion who resides there" per the federal rule. The Committee specifically considered the current stated minimum age of 16 and recommends an increase to the age of 18 for an individual to accept service of process for another so that only adults are subject to service of process.

The provision for serving the Secretary of State also includes those instances when the Secretary of State is an attorney-in-fact.

The proposed rule deletes the distinction between service on infants and incompetents 14 or younger and those age 14 or older. The proposed rule also changes reference from "convict" to "incarcerated person" and includes those incarcerated in jails as well as penitentiaries.

The proposed rule maintains the various subdivisions of the current rule with respect to service on domestic private corporations, domestic public corporations, foreign corporations and business trusts qualified to do business, foreign corporations and business trusts not qualified to do business, unincorporated associations and deletes provisions in the federal rule concerning serving the United States, its agencies, corporations, officers or employees.

Provision (d)(4)(B)(4) includes a proposal to specifically identify state agencies as domestic public corporations per Syl. Pt. 1, *White v. Berryman,* 187 W.Va. 323, 418 S.E. 917 (1992).

~~Rule 4.1 Service of other process.~~
Rule 4.1 Service of other process.

(a) Generally. Whenever an order of court provides for service of a rule, or of an order in lieu of summons or a rule, upon a party, service ~~shall~~must be made in the manner provided in Rule 4(d), unless the order prescribes a different mode of service. Rule 45 governs the service of subpoenas.

(b) Process part of record. Original, mesne, and final writs and process of every nature, and proofs of service and returns endorsed thereon, and all orders and notices served or published, and all proofs of service and certificates of publication and all other papers filed in relation to such process, orders, and notices, are a part of the record of an action for all purposes.

COMMITTEE COMMENT ON RULE 4.1

Rule 4.1 is the same as the prior rule except that it uses the word "must" rather than the word "shall". Changes to the corresponding federal rule are inapplicable.

Rule 5. ~~Service~~Serving and Filing ~~of~~ Pleadings and Other Papers.

(a) Service: When Required.

(1) *In General.* Unless these rules provide otherwise, each of the following papers must be served on every party:

(A) an order stating that service is required;

(B) ~~**(a) Service: when required.** – Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to~~a pleading filed after the original complaint, unless the court ~~otherwise~~ orders otherwise under Rule 5(c) because ~~of~~there are numerous defendants~~, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every~~;

(C) a discovery paper required to be served on a party, unless the court orders otherwise;

(D) a written motion ~~other than~~, except one ~~which~~that may be heard ex parte~~,~~; and ~~every~~

(E) a written notice, appearance, demand, offer of judgment, designation of record on appeal, ~~and~~or any similar ~~paper shall be served upon each of the parties. For purposes of this rule, guardians ad litem are considered parties~~.

(2) *If a Party Fails to Appear.* No service ~~need be made on parties~~is required on a party who is in default for ~~failure~~failing to appear except ~~that pleadings asserting new or additional claims~~as provided in Rule 55(b)(2). But a pleading that asserts a new claim for relief against ~~them shall~~such a party must be served ~~upon them in the manner provided for service of summons in~~on that party under Rule 4.

~~**(b) Same: how made.** – Whenever under these rules service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to the attorney or party; or by mailing it to the attorney or party at the attorney's or party's last known address or, if no address is known, by leaving it with the clerk of the court; or by facsimile transmission made to the attorney or party pursuant to the West Virginia Supreme Court of Appeals Rules for Filing and Service by Facsimile Transmission. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at the attorney's or party's office with a clerk or other person in~~

~~charge thereof; or, if the office is closed or the person to be served has no office, leaving it at the person's dwelling house or usual place of abode with some member of the person's family above the age of 16 years. Service by mail is complete upon mailing.~~

(b) Service: How Made.

(1) *Serving an Attorney***.** If a party is represented by an attorney, service under this rule must be made on the attorney unless the court orders service on the party.

(2) *Service in General***.** A paper is served under this rule by:

(A) handing it to the person;

(B) leaving it:

(i) at the person's office with a clerk or other person in charge or, if no one is in charge, in a conspicuous place in the office; or

(ii) if the person has no office or the office is closed, at the person's dwelling or usual place of abode with someone the age of 18 or above and of suitable discretion who resides there;

(C) mailing it to the person's last known address—in which event service is complete upon mailing;

(D) leaving it with the court clerk if the person has no known address;

(E) in counties where West Virginia E-Filing is utilized, by electronic service pursuant to Rule 15 of the West Virginia Trial Court Rules, or otherwise by sending it by facsimile transmission pursuant to Rule 12 of the West Virginia Trial Court Rules;

(F) sending it by other electronic means if the person consented in writing—in which event service is complete upon transmission, but is not effective if the serving party learns that it did not reach the person to be served; or

(G) delivering it by any other means that the person consented to in writing—in which event service is complete when the person making service delivers it to the agency designated to make delivery.

(c) Serving Numerous Defendants.

(1) ~~**(c) Same: numerous defendants.** – In any action in which there are~~*In General***.** If an action involves an unusually large ~~numbers~~number of defendants, the court may, ~~upon~~on motion or ~~of~~on its ~~own initiative, may~~, order that ~~service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that~~:

(A) defendants' pleadings and replies to them need not be served on other defendants;

(B) any ~~cross-claim~~crossclaim, counterclaim, ~~or matter constituting an~~ avoidance, or affirmative defense ~~contained therein shall be deemed to be~~in those pleadings and replies to them will be treated as denied or avoided by all other parties; and ~~that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties.~~

(C) filing any such pleading and serving it on the plaintiff constitutes notice of the pleading to all parties.

(2) *Notifying Parties***.** A copy of every such order ~~shall~~must be served ~~upon~~on the parties ~~in such manner and form~~ as the court directs.

(d) Filing; ~~certificate of service~~.

(1) ~~All papers~~*Required Filings; Certificate of Service***.** Any paper after the complaint that is required to be served ~~upon a party,~~ together with a certificate of service~~, shall~~ must be filed ~~with the court~~ within a reasonable time after service.

~~**(2)**~~ But disclosures under Rule 26(a) (1) or (2), and the following discovery requests and responses, must not be filed until they are used in the proceeding or ~~Unless filing is required by~~ the court ~~on motion or upon its own initiative,~~orders filing: depositions, interrogatories, requests for ~~admissions, requests for production and entry, and answers and responses thereto shall not be filed. Unless required to be filed for issuance of a subpoena for a deposition, a notice of deposition need not be filed~~documents or tangible things or to permit entry onto land, and requests for admission. Certificates of service of discovery materials ~~shall~~must be filed.

~~**(3)**~~ Unless otherwise stipulated or ordered, the party taking ~~the~~a deposition or obtaining any material through discovery is responsible for its custody, preservation, and delivery to the court if needed or ordered. ~~Such responsibility shall not terminate until one year after final disposition of the action. The responsibility shall not terminate upon dismissal of any party while the action is pending. The custodial responsibility of a dismissed party may be discharged by stipulation of the~~

~~parties to transfer the custody of the discovered material to one or more of the remaining parties.~~

(2) *How Filing Is Made—In General.* A paper not filed electronically is filed by delivering it:

(A) to the clerk; or

(B) to a judge who agrees to accept it for filing, and who must then note the filing date on the paper and promptly send it to the clerk.

(3) **~~(c)~~***Electronic Filing* **~~with the court defined.~~** ~~–~~ ~~The filing of papers with the court as required by these rules shall be made by filing them with the clerk of the court, who shall note thereon the filing date, except that the judge may permit the~~, *Signing, or Verification.* A court may allow papers to be filed ~~with the judge, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk; the notation by the clerk or the judge of the filing date on any such paper constitutes the filing of such paper, and such paper then becomes a part of the record in the action without any order of the court~~, signed, or verified by electronic means. A paper filed electronically is a written paper for purposes of these rules. Filing by facsimile is permitted pursuant to the West Virginia Supreme Court of Appeals Rules for Filing and Service by Facsimile Transmission.~~1~~ Electronic filing and service ~~is~~may be permitted ~~in limited circumstances~~ pursuant to the West Virginia Trial Court ~~Rule 15~~Rules.

(4) *Acceptance by the Clerk.* The clerk must not refuse to file a paper solely because it is not in the form prescribed by these rules.

COMMITTEE COMMENT ON RULE 5

The majority of changes to Rule 5 bring the rule into conformity with the corresponding federal rule of civil procedure.

Substantively, Rule 5(b)(ii)(F) permits service by e-mail upon prior written consent. Rule 5(b)(2)(E) provides for service by facsimile and e-filing when such capabilities are made available is permitted by the West Virginia Trial Court Rules.

Rule 5(a)(2) includes a reference to notice as provided in Rule 55(b)(2). Rule 5(b)(2)(B)(ii) changes the age for service from 16 to 18.

Rule 5.1. Privacy Protection For Filings Made with the Court.

(a) Redacted Filings. Whenever a party files a pleading or other document that is confidential in part or in its entirety, the party must identify, by cover letter or otherwise, in a conspicuous manner, the portion of the filing that is confidential. Any party or other person with standing may file a motion to unseal the case record or portion of a case record, setting forth good cause why the case record should no longer be confidential. An opposing party may respond to the motion within ten days from the date of filing of the motion. Upon its consideration, a court may, in its discretion, issue an order unsealing all or part of the case record, or issue an order denying the motion. Any party or other person with standing may file a motion to seal the case record or portion of a case record. The motion must state the legal authority for confidentiality. Upon filing of the motion to seal, the case record or portion of the case record that is the subject of the motion must be kept confidential pending a ruling on the motion. An opposing party may file a response to a motion to seal within ten days of the date of filing of the motion. Upon its consideration, the court may, in its discretion, issue an order sealing all or part of the case record, or issue an order denying the motion.

(b) Personal identifiers restricted. In order to protect the identities of juveniles and in order to avoid the unnecessary distribution of personal identifiers, any document filed with a trial court must comply with the following standards.

(1) Initials or a descriptive term must be used instead of a full name in: cases involving juveniles, even if those children have since become adults; cases involving crimes of a sexual nature that require reference to the victim of such crime; abuse and neglect cases; mental hygiene cases; and cases relating to expungements.

(2) Personal identifiers such as birth date and address may be used only when absolutely necessary to the disposition of the case.

(3) Social Security numbers may not be used. The last four digits should be utilized only.

(4) Sensitive financial information may be used only when necessary to the disposition of the case. The last four digits of financial account information should be utilized only.

(c) Exemptions from the Redaction Requirement. The redaction requirement does not apply to the following:

(1) the record of an administrative or agency proceeding;

(2) the official record of a court proceeding;

(3) the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed; or

(4) a *pro se* filing.

(d) Filings Made Under Seal. The court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the person who made the filing to file a redacted version for the public record.

(e) Protective Orders. For good cause, the court may:

(1) order redaction of additional information;

(2) limit or prohibit a nonparty's access to a document filed with the court; or

(3) enter a Medical Protective Order governing production of medical records and bills in a civil action. A proposed Medical Protective Order is set forth at Form 23.

(4) enter a general Protective Order governing production of confidential materials in a civil action. A proposed Protective Order (Confidentiality) is set forth at Form 24.

(f) Option for Additional Unredacted Filing Under Seal. A person making a redacted filing may also file an unredacted copy under seal. The court must retain the unredacted copy as part of the record.

(g) Option for Filing a Reference List. A filing that contains redacted information may be filed with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed. The list must be filed under seal and may be amended as of right. Any reference in the case to a listed identifier will be construed to refer to the corresponding item of information.

(h) Waiver of Protection of Identifiers. A person waives the protection of this Rule as to the person's own information by filing it without redaction and not under seal.

COMMITTEE COMMENT ON RULE 5.1

This proposed rule, if adopted, largely tracks Rule 5.2 of the Federal Rules of Civil Procedure but also incorporates provisions of Rule 40 of the West Virginia

Rules of Appellate Procedure. The proposed rule also permits, upon determination of good cause, entry of a Medical Protective Order and general Protective Order (Confidentiality) and provides form Orders (Form 23 and Form 24).

Rule 6. Computing and Extending Time; Time for Motion Papers.

(a) ~~Computation.~~ Computing Time. The following rules apply in computing any time period ~~of time prescribed or allowed by~~specified in these rules, ~~by the~~in any local ~~rules of any~~rule or court~~, by~~ order ~~of court~~, or ~~by~~in any ~~applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included.~~statute that does not specify a method of computing time.

(1) *Period Stated in Days or a Longer Unit.* When the period is stated in days or a longer unit of time:

(A) exclude the day of the event that triggers the period;

(B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and

(C) include the last day of the period ~~so computed shall be included, unless it,~~ but if the last day is a Saturday, ~~a~~ Sunday, or ~~a~~ legal holiday, ~~in which event~~ the period ~~runs~~continues to run until the end of the next day ~~which~~that is not a Saturday, ~~a~~ Sunday, or ~~a~~ legal holiday. ~~When the period of time prescribed or allowed is fewer than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule and in Rule 77(c), "legal holiday" includes~~

(2) *Period Stated in Hours.* When the period is stated in hours:

(A) begin counting immediately on the occurrence of the event that triggers the period;

(B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

(C) if the period would end on a Saturday, Sunday, or legal holiday, the period continues to run until the same time on the next day that is not a Saturday, Sunday, or legal holiday.

(3) *Inaccessibility of the Clerk's Office.* Unless the court orders otherwise, if the clerk's office is inaccessible:

(A) on the last day for filing under Rule 6(a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday, or legal holiday; or

(B) during the last hour for filing under Rule 6(a)(2), then the time for filing is extended to the same time on the first accessible day that is not a Saturday, Sunday, or legal holiday.

(4) *"Last Day" Defined.* Unless a different time is set by a statute or court order, the last day ends:

(A) for electronic filing or filing via facsimile, at midnight in the court's time zone; and

(B) for filing by other means, when the clerk's office is scheduled to close.

(5) *"Next Day" Defined.* The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(6) *"Legal Holiday" Defined.* "Legal holiday" means:

(A) the day set aside by statute for observing New ~~Year's~~Year's Day, Martin Luther ~~King's~~King Jr.'s Birthday, President's Day, Memorial Day, West Virginia Day, Independence Day, Labor Day, Columbus Day, ~~Veteran's~~Veterans' Day, Thanksgiving Day, or Christmas Day~~,~~;

(B) any day on which a general, special, or primary election is held in the State, or in the county in which the circuit court sits~~, and~~;

(C) any ~~other~~ day ~~appointed as~~declared a holiday by the Governor or ~~by the~~ President of the United States ~~as a day of special observance or thanksgiving, or a day for the general cessation of business~~or any other legal holiday so designated by the West Virginia Legislature.

(b) Extending Time.

(1) ~~**(b) Enlargement**. – When by these rules or by a notice given thereunder or by order of court~~*In General.* When an act ~~is required~~may or ~~allowed to~~must be done ~~at or~~ within a specified time, ~~all the parties to the action, by written stipulation filed with the court, may agree at any time to a different period, or the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where~~

~~the failure to act was the result of excusable neglect; but it may~~the court may, for good cause, extend the time:

(A) with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or

(B) on motion made after the time has expired if the party failed to act because of excusable neglect.

(2) *Exceptions.* A court must not extend the time ~~for taking any action~~to act under Rules 50(b) and (d), 52(b), 59(b), (~~c) and (~~d), and (e), and 60(b)~~, except to the extent and under the conditions stated in them~~.

~~(c) Unaffected by expiration of term. –~~ ~~The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a term of court. The continued existence or expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action which has been pending before it.~~

(c) ~~(d) For~~ Motions , Notices of Hearing, and Affidavits~~—~~.

(1) ~~*Service; motion.* – Unless a different period is set by these rules or by the court,~~*In General.* Once the parties have completed filing memoranda and responses as provided in subsection (c)(3), the circuit court must either schedule argument or decide the motion based on the materials submitted. A written motion ~~(other than one which may be heard ex parte),~~and notice of the hearing ~~on the motion, and any supporting brief or affidavits shall~~must be served ~~as follows~~at least 30 days before the time specified for the hearing, with the following exceptions:

(A) ~~at least 9 days before the time set for the hearing, if served by mail, or~~When the motion may be heard ex parte;

(B) ~~at least 7 days before the time set for the hearing, if served by hand delivery or by fax to the opposing attorney, or if left with a person in charge at the opposing attorney's office, or in the event that the opposing party is not represented by counsel, then if served by hand delivery or by fax to the opposing party, or if left at the party's usual residence with a person capable of accepting service pursuant to Rule 4(d)(1)(B).~~When these rules set a different time;

(C) When a court order sets a different time, which the court may do on its own or upon a motion by a party showing good cause; or

(D) When the Court sets a different schedule under Rule 16.

(2) ~~*Service; response.* – Unless a different period is set by these rules or by the court, any response to a written motion, including any supporting brief or affidavits, shall be served as follows:~~Supporting Affidavit. Any affidavit supporting a motion must be served with the motion. Except as Rule 59(c) provides otherwise, any opposing affidavit must be served at least 7 days before the hearing, unless the court permits service at another time.

~~**(A)** at least 4 days before the time set for the hearing, if served by mail, or~~

~~**(B)** at least 2 days before the time set for the hearing, if served by hand delivery or by fax to the opposing attorney, or if left with a person in charge at the opposing attorney's office, or in the event that the opposing party is not represented by counsel, then if served by hand delivery or by fax to the opposing party, or if left at the party's usual residence with a person capable of accepting service pursuant to Rule 4(d)(1)(B).~~

(3) ~~*Filing.* – Unless the court sets a different period, a written motion, notice of hearing on the motion, and any supporting briefs or affidavits shall be filed at least 7 days before the hearing, and any response to a motion and supporting briefs or affidavits shall be filed at least 2 days before the hearing.~~*Response and Reply Memoranda.* Memoranda and other materials in response to motions must be filed and served on opposing counsel and unrepresented parties within 21 days of service of the motion. Any reply memoranda must be filed and served on opposing counsel and unrepresented parties within 7 days from the date of service of the memorandum in response to the motion. Surreply memoranda may not be filed except by leave of the court. These times for serving memoranda may be modified by the judicial officer to whom the motion is addressed.

(d) ~~**(b)**~~ **Additional Time After ~~service by mail~~**. ~~– Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, 3 days shall be added to the prescribed period~~**Certain Kinds of Service.** When a party may or must act within a specified time after being served and service is made under Rule 5(b)(2)(C) (mail), (D) (leaving with the clerk), or (F) (other means consented to), 3 days are added after the period would otherwise expire under Rule 6(a).

COMMITTEE COMMENT ON RULE 6

Rule 6 is changed to be consistent with the corresponding federal rule of civil procedure.

Rule 6(a)(6)(A) maintains state-specific legal holidays from the current West Virginia rule as provided in W.Va. Code §2-2-1(a). Rule 6(a)(6) includes a provision for designation of legal holidays by the West Virginia Legislature per *Postlewait v. City of Wheeling,* 231 W.Va. 1, 743 S.E. 2d 309 (2012).

Consistent with federal rule, the rule removes the current provisions of West Virginia Rule 6 if the period of time prescribed or allowed is fewer than 11 days when computing time.

The rule provides that responses to motions be filed within 21 days and replies within 7 days, which is a change from the current rule which sets those dates in relation to the date set for hearing. The rule also provides that written motion and notice of the hearing must be served at least 30 days before the time specified for the hearing subject to specific exceptions.

Instances in which 3 extra days are permitted under subsection (d) apply only to mailing, leaving documents with the clerk, and other means consented to.

III. Pleadings and Motions

~~Rule 7. Pleadings allowed; form of motions.~~
Rule 7. Pleadings Allowed; Form of Motions and Other Papers.

(a) Pleadings. ~~– There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross claim; a third party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third party answer, if a third party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.~~Only these pleadings are allowed:

(1) a complaint;

(2) an answer to a complaint;

(3) an answer to a counterclaim designated as a counterclaim;

(4) an answer to a crossclaim;

(5) a third-party complaint;

(6) an answer to a third-party complaint; and

(7) if the court orders one, a reply to an answer or a third-party answer.

(b) Motions and Other Papers.

(1) ~~An application to the~~*In General.* A request for a court ~~for an~~ order ~~shall~~must be made by motion ~~which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.~~. The motion must:

(A) be in writing unless made during a hearing or trial;

(B) state with particularity the grounds for seeking the order; and

(C) state the relief sought.

(2) *Form.* The rules ~~applicable to~~governing captions and other matters of form ~~of~~in pleadings apply to ~~all~~ motions and other ~~papers provided for by these rules.~~

~~**(3)** All motions shall be signed in accordance with Rule 11.~~

~~**(c) Demurrers, pleas, etc., abolished.** – Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used.~~

COMMITTEE COMMENT ON RULE 7

There are no substantive changes proposed for Rule 7. The rule is changed to be consistent with the corresponding federal rule of civil procedure.

~~***Rule 8. General rules of pleading.***~~ ***Rule 8. General Rules of Pleading.***

(a) ~~Claims~~Claim for Relief. A pleading ~~which sets forth~~that states a claim for relief~~, whether an original claim, counterclaim, cross-claim, or third-party claim, shall~~ must contain:

(1) ~~(1)~~ a short and plain statement of the claim showing that the pleader is entitled to relief~~.~~;; and

(2) ~~(2)~~ a demand for ~~judgment for~~the relief ~~the pleader seeks.~~sought, which may include relief in the alternative or ~~of several~~different types ~~may be demanded.~~of relief.

(3) Every such pleading ~~shall~~must be accompanied by a completed civil case information statement in the form prescribed by the Supreme Court of Appeals.

(b) Defenses; Admissions and Denials.

(1) *In General.* In responding to a pleading, a party must:

(A) state in short and plain terms its defenses to each claim asserted against it; and

(B) admit or deny the allegations asserted against it by an opposing party.

(2) *Denials—Responding to the Substance.* A denial must fairly respond to the substance of the allegation.

(3) ~~**(b) Defenses; form of denials.** – A party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If a party is without~~ *General and Specific Denials.* A party that intends in good faith to deny all the allegations of a pleading may do so by a general denial. A party that does not intend to deny all the allegations must either specifically deny designated allegations or generally deny all except those specifically admitted.

(4) *Denying Part of an Allegation.* A party that intends in good faith to deny only part of an allegation must admit the part that is true and deny the rest.

~~(5)~~ *Lacking Knowledge or Information.* A party that lacks knowledge or

information sufficient to form a belief ~~as to~~about the truth of an ~~averment, the party shall~~allegation must so state, and ~~this~~the statement has the effect of a denial. ~~Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, the pleader shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, the pleader may make denials as specific denials of designated averments or paragraphs, or may generally deny all the averments except such designated averments or paragraphs as the pleader expressly admits; but, when the pleader does so intend to controvert all its averments, the pleader may do so by general denial subject to the obligations set forth in Rule 11.~~

(6) *Effect of Failing to Deny.* An allegation—other than one relating to the amount of damages—is admitted if a responsive pleading is required and the allegation is not denied. If a responsive pleading is not required, an allegation is considered denied or avoided.

(c) Affirmative Defenses. ~~— In pleading to a preceding pleading, a party shall set forth affirmatively~~

(1) *In General.* In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including:

- accord and satisfaction~~,~~;
- arbitration and award~~,~~;
- assumption of risk~~, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata,~~;
- contributory negligence;
- discharge in bankruptcy
- duress;
- estoppel;
- failure of consideration;
- fraud;

• illegality;

• injury by fellow servant;

• laches;

• license;

• payment;

• release;

• res judicata;

• statute of frauds~~,~~;

• statute of limitations~~, waiver, and any other matter constituting an avoidance or affirmative defense. When~~; and

• waiver.

(2) *Mistaken Designation.* If a party ~~has~~ mistakenly ~~designated~~designates a defense as a counterclaim, or a counterclaim as a defense, the court ~~on terms~~must, if justice ~~so~~ requires, ~~shall~~ treat the pleading as ~~if there had been a proper designation~~though it were correctly designated, and may impose terms for doing so.

~~**(d) Effect of failure to deny.** – Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.~~

(d) ~~(e)~~ Pleading to Be Concise and Direct; ~~consistency.~~ –Alternative Statements; Inconsistency.

(1) *In General.* Each ~~averment of a pleading shall~~allegation must be simple, concise, and direct. No technical ~~forms of pleading or motions are~~form is required.

(2) *Alternative Statements of a Claim or Defense.* A party may set ~~forth~~out two or more statements of a claim or defense ~~alternately~~alternatively or hypothetically, either in ~~one~~a single count or defense or in separate ~~counts or defenses. When two or more~~ones. If a party makes alternative statements~~ are made in the alternative and one of them if made independently would be sufficient~~, the pleading is ~~not made~~

~~insufficient by the insufficiency of~~sufficient if any one of them is sufficient.

(3) ~~or more of the alternative statements~~*Inconsistent Claims or Defenses*. A party may ~~also~~ state as many separate claims or defenses as ~~the party~~it has, regardless of consistency ~~and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in Rule 11.~~.

(g) ~~Construction of~~Construing Pleadings. ~~All~~ Pleadings ~~shall~~must be ~~so~~ construed so as to do ~~substantial~~ justice.

COMMITTEE COMMENT ON RULE 8

There are only minor substantive changes proposed for Rule 8. The rule is changed to be consistent with the corresponding federal rule of civil procedure. The rule maintains subsection (a)(3) concerning the Supreme Court of Appeals' mandated civil case information statement. The corresponding federal rule deleted discharge in bankruptcy as an affirmative defense which has been maintained from the current West Virginia Rule.

Adoption of language consistent with the federal Rule does not constitute adoption of a "plausibility" standard for applying Rule 8. See, *Roth v. DeFeliceCare, Inc.*, 226 W. Va. 214, 220, 700 S.E.2d 183, 189 n.4 (2010)([U]nder the federal rules, more than a notice pleading is required insofar as a plaintiff is required to plead facts to show that the plaintiff has stated a claim entitling him to relief. Under West Virginia law, however, this Court has not adopted the more stringent pleading requirements as has been the case in federal court and all that is required by a plaintiff is 'fair notice.'"). *See also*, *Gomez v. A.C.R. Promotions, Inc.*, No. 17-1048, 2019 WL 2499617, at *2 (W. Va. June 17, 2019)("Accordingly, the *Conley* standard remains the controlling law in West Virginia."); *Goldstein v. Peacemaker Properties, LLC*, 241 W. Va. 720, 730, 828 S.E.2d 276, 286 (2019)(W.Va.R.Civ. Pro. 8 "contrasts to pleading under the federal rules, which require a plaintiff "to plead facts to show that the plaintiff has stated a claim entitling him to relief.").

~~Rule 9. Pleading special matters.~~ ***Rule 9. Pleading Special Matters.***

(a) Capacity or Authority to Sue; Legal Existence.

(1) *In General.* Except when required to show that the court has jurisdiction, a pleading need not allege:

(A) a party's capacity to sue or be sued;

(B) ~~**(a) Capacity.** – It is not necessary to aver the capacity of a party to sue or be sued or the~~a party's authority ~~of a party~~ to sue or be sued in a representative capacity; or

(C) the legal existence of an organized association of persons that is made a party. ~~When a party desires~~

(2) ~~to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, the party desiring to raise the issue shall do so by specific negative averment, which shall include such~~*Raising Those Issues.* To raise any of those issues, a party must do so by a specific denial, which must state any supporting ~~particulars as~~facts that are peculiarly within the ~~pleader's~~party's knowledge.

(b) Fraud~~,~~ or Mistake, ~~condition of the mind, negligence.~~ – ~~In all averments of~~**; Conditions of Mind.** In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake ~~shall be stated with particularity~~. Malice, intent, knowledge, and other ~~condition of mind of a person may be averred~~conditions of a person's mind may be alleged generally. ~~Negligence may also be averred generally.~~

(c) Conditions Precedent. In pleading ~~the performance or occurrence of~~ conditions precedent, it ~~is sufficient to aver~~suffices to allege generally that all conditions precedent have occurred or been performed ~~or have occurred. A denial of performance or occurrence shall be made specifically and~~. But when denying that a condition precedent has occurred or been performed, a party must do so with particularity.

(d) Official Document or Act. In pleading an official document or official act, it ~~is sufficient to aver~~suffices to allege that the document was legally issued or the act legally done ~~in compliance with law~~.

(e) Judgment. In pleading a judgment or decision of a domestic or foreign court, a judicial or quasi-judicial tribunal, or ~~of~~ a board or officer, it ~~is~~

~~sufficient to aver~~suffices to plead the judgment or decision without ~~setting forth matter~~ showing jurisdiction to render it.

(f) Time and Place. ~~For the purpose of~~An allegation of time or place is material when testing the sufficiency of a pleading~~, averments of time and place are material and shall be considered like all other averments of material matter~~.

(g) Special ~~damage.~~ ~~When items~~**Damages.** If an item of special damage ~~are~~is claimed, ~~they shall~~it must be specifically stated.

(h) Eminent Domain. In proceedings to condemn real or personal property pursuant to Rule 71a, pleadings ~~shall~~must state with particularity: (1) A description of the property; and (2) the purpose for which the property is to be used. Further, if the proceeding is brought by a public utility, a copy of its Certificate of Convenience and Necessity must be attached as an exhibit to the complaint as a condition of maintaining the eminent domain action.

COMMITTEE COMMENT ON RULE 9

Rule 9 is changed to be consistent with the corresponding federal rule of civil procedure. The rule differs from the corresponding federal rule of civil procedure by deleting reference to admiralty or maritime claims. The rule maintains the current subsection (h) concerning eminent domain actions.

~~Rule 10. Form of pleadings.~~ ***Rule 10. Form of Pleadings.***

(a) Caption; Names of Parties. Every pleading ~~shall contain~~must have a caption ~~setting forth~~with the court's name ~~of the court, the~~, a title ~~of the~~, a civil action~~, the file~~ number, and a ~~designation as in~~ Rule 7(a)~~. In the complaint~~ designation. The title of the ~~action shall include the names of~~complaint must name all the parties~~, but in~~; the title of other pleadings ~~it is sufficient to state the name of~~, after naming the first party on each side ~~with an appropriate indication of~~, may refer generally to other parties.

(b) Paragraphs; Separate Statements. ~~All averments of claim or defense shall be made~~A party must state its claims or defenses in numbered paragraphs, ~~the contents of~~each ~~of which shall be~~limited as far as practicable to a ~~statement of a~~ single set of circumstances~~; and~~. A ~~paragraph may be referred to~~later pleading may refer by number ~~in all succeeding pleadings.~~to a paragraph in an earlier pleading. If doing so would promote clarity, each claim founded ~~upon~~on a separate transaction or occurrence—and each defense other than ~~denials shall~~a denial—must be stated in a separate count or defense ~~whenever a separation facilitates the clear presentation of the matters set forth~~.

(c) Adoption by Reference; Exhibits. ~~Statements~~A statement in a pleading may be adopted by reference ~~in a different part of~~elsewhere in the same pleading or in ~~another~~any other pleading or ~~in any~~ motion. A copy of ~~any~~a written instrument ~~which~~that is an exhibit to a pleading is a part ~~thereof~~of the pleading for all purposes.

COMMITTEE COMMENT ON RULE 10

Rule 10 is changed to be consistent with the corresponding federal rule of civil procedure. However, the reference in the federal rule to "file number" has been changed to "civil action number" to comply with Rule 2.

~~***Rule 11. Signing of pleadings, motions and other papers; representations to court; sanctions.***~~

Rule 11. Signing of pleadings, motions and other papers; representations to court; sanctions.

(a) Signature. Every pleading, motion and other paper ~~shall~~must be signed by at least one attorney of record in the attorney's individual name, or~~,~~ by a party personally if the party is ~~not represented by an attorney, shall be signed by the party. Each~~unrepresented. The paper ~~shall~~must state the signer's address, e-mail address and phone number, ~~if any,~~ and The West Virginia State Bar identification number, if any. ~~Except when otherwise specifically provided by~~Unless a rule or statute~~, pleadings~~ specifically states otherwise, a pleading need not be verified or accompanied by affidavit. The court must strike an unsigned paper ~~shall be stricken~~unless the omission ~~of the signature is~~is promptly corrected ~~promptly~~ after being called to the attorney's or party's attention ~~of the attorney or party~~.

(b) Representations to court. By presenting to the court ~~(~~a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating~~) a pleading, written motion, or other paper,~~ —an attorney or unrepresented party ~~is certifying~~certifies that to the best of the person's knowledge, information, and belief formed after an inquiry reasonable under the circumstances,

(1) it is not being presented for any improper purpose, such as to harass ~~or to~~, cause unnecessary delay, or ~~needless~~needlessly increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions ~~therein~~are warranted by existing law or by a nonfrivolous argument for the ~~extension, modification, or reversal of~~extending, modifying, or reversing existing law or the ~~establishment of~~establishing new law;

(3) the ~~allegations and other~~factual contentions have evidentiary support or, if specifically so identified, ~~are~~will likely ~~to~~ have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on ~~a~~belief or lack of information ~~or belief~~.

(c) Sanctions.

(1) ~~**(c) Sanctions.**~~ —*In General.* If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been

violated, the court may~~, subject to the conditions stated below,~~ impose an appropriate sanction upon ~~the attorneys~~any attorney, law ~~firms~~firm, or ~~parties~~party that ~~have~~ violated ~~subdivision (b) or are~~the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for violations committed by its partners, associates, and employees.

~~**(1)** *How Initiated.* –~~

(2) ~~**(A)** *By Motion.* –~~ *for Sanctions.* A motion for sanctions ~~under this rule shall~~must be made separately from other motions ~~or requests~~ and ~~shall~~must describe the specific conduct alleged to violate ~~subdivision~~Rule 11(b). ~~It shall~~The motion must be served ~~as provided in~~under Rule 5, but ~~shall~~it must not be filed with or be presented to the court ~~unless, within 21 days after service of the motion (or such other period as the court may prescribe), the~~if the challenged paper, claim, defense, contention, allegation, or denial is ~~not~~ withdrawn ~~or appropriately corrected~~within 21 days after service or within another time the court sets. If warranted, the court may award to the prevailing party ~~prevailing on the motion the~~ reasonable expenses and ~~attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.~~attorney's fees, and other expenses.

(3) ~~**(B)**~~ *On the Court's Initiative.* On its own ~~initiative~~, the court may ~~enter an~~ order ~~describing the specific conduct that appears to violate subdivision (b) and directing~~ an attorney, law firm, or party to show cause why ~~it~~conduct specifically described in the order has not violated ~~subdivision~~Rule 11(b) ~~with respect thereto~~.

(4) ~~**(2)** *Nature of sanction; limitations.* –~~ *a Sanction.* A sanction imposed ~~for violation of~~under this rule ~~shall~~must be limited to what ~~is sufficient~~suffices to deter repetition of ~~such~~the conduct or comparable conduct by others similarly situated. ~~Subject to the limitations in subparagraphs (A) and (B),~~ The sanction may ~~consist of, or~~ include, nonmonetary directives ~~of a nonmonetary nature,~~; an order to pay a penalty into court~~,~~; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of ~~some~~part or all of the reasonable expenses and attorneys' fees ~~and other expenses incurred as a direct result of~~directly resulting from the violation.

(5) *Limitations on Monetary Sanctions.* The court must not impose a monetary sanction:

> **(A)** ~~**(A)** Monetary sanctions may not be awarded~~ against a represented party for ~~a violation of subdivision~~violating Rule

11(b)(2).; or

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before aon its own, unless it issued the show-cause order under Rule 11(c)(3) before voluntary dismissal or settlement of the claims made by or against the party whichthat is, or whose attorneys are, to be sanctioned.

(2) (6) *Requirements for an Order.* — WhenAn order imposing sanctions, the court shallsanction must describe the sanctioned conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) Inapplicability to discovery. Subdivisions (a) through (c) of This rule dodoes not apply to disclosures, discovery requests, responses, objections, and motions that are subject to the provisions ofunder Rules 26 through 37.

COMMITTEE COMMENT ON RULE 11

Rule 11 is changed to be consistent with the corresponding federal rule of civil procedure. Rule 11(c)(2) retains language that reasonable expenses, including attorney's fees "may" be awarded, leaving the sanction to the discretion of the circuit court. See, *Warner v. Wingfield*, 224 W. Va. 277, 284, 685 S.E.2d 250, 257 (2009)(Circuit court did not abuse its discretion in granting sanctions); *Davis ex rel. Davis v. Wallace*, 211 W.Va. 264, 565 S.E.2d 386 (2002); *McDougal v. McCammon*, 193 W.Va. 229, 455 S.E.2d 788 (1995). *See*, e.g., *Crystal Mountain W. Virginia, LLC v. Cty. Comm'n of Ohio Cty.*, No. 19-0482, Mem. Dec., 2020 WL 3408103 (W. Va. June 18, 2020).

Rule 12. Defenses and Objections~~ –~~: When and how presented~~ – By pleading or motion –~~; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing.

~~(a) When presented. –~~
(a) Time to Serve a Responsive Pleading.

~~**(1)** A defendant shall serve an answer within 20 days after the service of the summons, unless before the expiration of that period the defendant files with the court and serves on the plaintiff a notice that the defendant has a bona fide defense, and then an answer shall be served within 30 days after the defendant was served; except that when service of the summons is made on or accepted on behalf of a defendant through or by an agent or attorney in fact authorized by appointment or by statute to receive or accept service on behalf of such defendant or when service of process is made upon a defendant in the manner provided in Rule 4(e) or (f), the answer shall be served within 30 days after service of the summons or not later than the day specified in the order of publication. Every answer shall be accompanied by a completed civil case information statement in the form prescribed by the Supreme Court of Appeals.~~
(1) *In General.* Unless another time is specified by this rule or a statute, the time for serving a responsive pleading is as follows:

(A) A defendant must serve an answer:

(i) within 30 days after being served with the summons and complaint. Every answer must be accompanied by a completed civil case information statement in the form prescribed by the Supreme Court of Appeals as required by Rule 3(b).

(B) A party ~~served with a pleading stating a cross-claim against that party shall~~must serve an answer ~~thereto~~to a counterclaim or crossclaim within ~~20~~30 days after being served~~. The plaintiff shall~~ with the pleading that states the counterclaim or crossclaim.

~~**(2)** **(C)** A party must serve a reply to a counterclaim in the~~an answer within ~~20~~30 days after ~~service of the answer or, if a reply is ordered by the court, within 20 days after service of the order~~being served with an order to reply, unless the order ~~otherwise directs~~specifies a different time.

~~**(3)** **(2)** *Effect of a Motion.* Unless~~ the court sets a different time~~ is fixed by court order, the service of~~, serving a motion ~~permitted~~ under this rule alters these periods ~~of time~~ as follows:

~~**(A)**~~ **(A)** if the court denies the motion or postpones its disposition until the trial ~~on the merits~~, the responsive pleading ~~shall~~must be served within ~~10~~14 days after notice of the court's action~~;~~ or

~~**(B)**~~ **(B)** if the court grants a motion for a more definite statement, the responsive pleading ~~shall~~must be served within ~~10~~14 days after the service of the more definite statement.

(b) How ~~presented.~~ to Present Defenses. Every defense~~, in law or fact,~~ to a claim for relief in any pleading~~, whether a claim, counterclaim, cross claim, or third-party claim, shall~~ must be asserted in the responsive pleading ~~thereto~~ if one is required~~, except that~~. But a party may assert the following defenses ~~may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process,~~by motion:

(1) lack of subject-matter jurisdiction;

(2) lack of personal jurisdiction;

(3) improper venue;

(4) insufficient process;

(5) insufficient service of process;

(6) failure to state a claim upon which relief can be granted~~,~~; or

(7) failure to join a party under Rule 19.

~~**(b)**~~ A motion making any of these defenses ~~shall~~must be made before pleading if a ~~further~~responsive pleading is ~~permitted~~allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at the trial any defense to that claim. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. ~~If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.~~

(c) Motion for judgment on the pleadings. After the pleadings are closed— but ~~within such time as~~early enough not to delay ~~the~~ trial~~, any~~—a party may move for judgment on the pleadings.

~~(c)~~ (d) Result of Presenting Matters Outside the Pleadings. If, on a motion ~~for judgment on the pleadings~~under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion ~~shall~~must be treated as one for summary judgment ~~and disposed of as provided in~~under Rule 56~~, and~~. All parties ~~shall~~must be given a reasonable opportunity to present all the material ~~made~~that is pertinent to ~~such a~~the motion ~~by Rule 56~~.

~~**(d) Preliminary hearings.** The defenses specifically enumerated (1) (7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.~~
(e) Motion for more definite statement. ~~If~~ A ~~pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the~~ party may move for a more definite statement ~~before interposing~~of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion ~~shall~~must be made before filing a responsive pleading and must point out the defects complained of and the details desired. If the ~~motion is granted~~court orders a more definite statement and the order ~~of the court~~ is not obeyed within ~~10~~14 days after notice of the order or within ~~such other~~the time ~~as~~ the court ~~may fix~~sets, the court may strike the pleading ~~to which the motion was directed or make such~~or issue any other appropriate order ~~as it deems just~~.

~~(f)~~ (f) Motion to strike. ~~Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon the party or upon the court's own initiative at any time,~~ The court may ~~order stricken~~strike from ~~any~~a pleading ~~any~~an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:

~~**(g) Consolidation of defenses in motion.** A party who makes a motion under this rule may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this rule but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated.~~

(1) on its own; or

(2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.

(g) Joining motions.

(1) *Right to Join.* A motion under this rule may be joined with any other motions allowed by this rule.

(2) *Limitation on Further Motions.* Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.

~~(h) Waiver or preservation~~(h) Waiving and Preserving of Certain Defenses.

(1) *When Some Are Waived.* A party waives any defense listed in Rule 12(b)(2)— (5) by:

(A) omitting it from a motion in the circumstances described in Rule 12(g)(2); or

(B) failing to either:

(i) make it by motion under this rule; or

(ii) include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course.

(1) ~~A defense of~~**(2)** *When to Raise Others.* Failure to state a claim upon which relief can be granted, ~~a defense of failure~~ to join a ~~party indispensable under Rule 19, and an objection of failure~~person required by Rule 19(b), or to state a legal defense to a claim may be ~~made~~raised:

~~**(2)**~~ **(A)** in any pleading ~~permitted~~allowed or ordered under Rule 7(a)~~, or by motion for judgment on the pleadings, or at the trial on the merits.~~;

(B) by a motion under Rule 12(c); or

(C) at trial.

~~**(3)** Whenever it appears by suggestion of the parties or otherwise that~~**(3)**

Lack of Subject-Matter Jurisdiction. If the court determines at any time that it lacks subject-matter jurisdiction ~~of the subject matter~~, the court ~~shall~~must dismiss the action.

(i) Hearing Before Trial. If a party so moves, any defense listed in Rule 12(b)(1)—(7) —whether made in a pleading or by motion— and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial.

COMMITTEE COMMENT ON RULE 12

Rule 12 is changed to be consistent with the corresponding federal rule of civil procedure.

Rule 12(a) provides for a uniform time of 30 days, different from the federal rule, for answer to a complaint, reply to an answer, cross-claim or counterclaim regardless of the matter of service.

The Rule includes a reference to the requirement of a civil case information sheet in Rule 3(b) in amended provision 12(a)(1)(A)(i). The mandatory requirement of the civil case information sheet required in Rule 3 has been affirmed by the Supreme Court of Appeals. *Cable v. Hatfield*, 202 W. Va. 638, 639–40, 505 S.E.2d 701, 702–03 (1998)(Rule 3 of the West Virginia Rules of Civil Procedure requires, in mandatory language, that a completed civil case information statement accompany a complaint submitted to the circuit clerk for filing. In the absence of a completed civil case information statement, the clerk is without authority to file the complaint.); *Lanick v. Amtower Auto Supply, Inc.*, No. 12-0207, Mem. Dec., 2013 WL 2149864, at *2 (W. Va. May 17, 2013).

Rule 13. Counterclaim and ~~cross-claim~~Crossclaim.

(a) Compulsory Counterclaim.

(1) ~~(a) Compulsory counterclaims. –~~ *In General.* A pleading ~~shall~~must state as a counterclaim any claim ~~which~~that—at the time of ~~serving the pleading~~its service—the pleader has against ~~any~~an opposing party~~,~~ if ~~it~~the claim:

(A) arises out of the transaction or occurrence that is the subject matter of the opposing ~~party's~~party's claim; and

(B) does not require ~~for its adjudication the presence of third parties of~~adding another party over whom the court cannot acquire jurisdiction. ~~But~~

(2) *Exceptions.* The pleader need not state the claim if:

(A) ~~(1) at the time~~when the action was commenced, the claim was the subject of another pending action~~,~~; or

(B) ~~(2) –~~the opposing party ~~brought suit upon the~~sued on its claim by attachment or other process ~~by which the court did not acquire~~that did not establish personal jurisdiction ~~to render a personal judgment~~over the pleader on that claim, and the pleader ~~is~~does not ~~stating~~assert any counterclaim under this rule ~~13~~.

(b) Permissive ~~counterclaims. –~~Counterclaim. A pleading may state as a counterclaim ~~any claim~~ against an opposing party ~~not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim~~any claim that is not compulsory.

(c) ~~Counterclaim exceeding opposing claim. –~~Relief Sought in a Counterclaim ~~may or may~~**.** A counterclaim need not diminish or defeat the recovery sought by the opposing party. It may ~~claim~~request relief ~~exceeding~~that exceeds in amount or ~~different~~differs in kind from ~~that~~the relief sought ~~in the pleading of~~by the opposing party.

(d) Counterclaim Against the State. These rules ~~shall not be construed to enlarge beyond the limits now fixed by law~~do not expand the right to assert ~~counterclaims~~a counterclaim—or to claim ~~credits~~a credit—against the State or ~~an officer~~a State official or agency ~~thereof~~.

(e) Counterclaim Maturing or Acquired After Pleading. – ~~A claim which either~~The court may permit a party to file a supplemental pleading asserting a counterclaim that matured or was acquired by the ~~pleader~~party after

serving ~~a pleading may, with the permission of the court, be presented as a counterclaim by supplemental~~an earlier pleading.

(f) ~~Omitted counterclaim.~~ ~~– When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, the pleader may by leave of court set up the counterclaim by amendment.~~**[Abrogated]**

(g) ~~Cross-claim~~Crossclaim Against a Co-party. A pleading may state as a ~~cross claim~~crossclaim any claim by one party against a co-party ~~arising~~if the claim arises out of the transaction or occurrence that is the subject matter ~~either~~ of the original action or of a counterclaim ~~therein or relating,~~ or if the claim relates to any property that is the subject matter of the original action. ~~Such cross-claim~~The crossclaim may include a claim that the ~~party against whom it is asserted~~co-party is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

(h) ~~Joinder of~~Joining Additional Parties. ~~– Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the provisions of Rules 19 and 20~~Rules 19 and 20 govern the addition of a person as a party to a counterclaim or crossclaim.

(i) Separate Trials; Separate Judgments. If the court orders separate trials ~~as provided in~~under Rule 42(~~c~~b), it may enter judgment on a counterclaim or ~~cross claim may be rendered in accordance with the terms of~~crossclaim under Rule 54(b) when ~~the court~~it has jurisdiction to do so, even if the opposing party's claims ~~of the opposing party~~ have been dismissed or otherwise ~~disposed of~~resolved.

COMMITTEE COMMENT ON RULE 13

There are no substantive changes proposed for Rule 13. The rule is changed to be consistent with the corresponding federal rule of civil procedure.

~~Rule 14. Third-party practice.~~ Rule 14. Third-Party Practice.

When a Defending Party May Bring in a Third Party.

~~(2) (a) When defendant may bring in third party.~~ ~~At any time after commencement of the action~~*Timing of the Summons and Complaint.* A defending party may, as ~~a~~ third-party plaintiff, ~~may cause~~serve a summons and complaint ~~to be served upon a person not a party to the action~~on a nonparty who is or may be liable to ~~the third-party plaintiff~~it for all or part of the ~~plaintiff's~~claim against it. But the third-party plaintiff~~. The third-party plaintiff need not~~ must, by motion, obtain the court's leave ~~to make the service if the third-party plaintiff~~if it files the third-party complaint ~~not later~~more than ~~10~~14 days after serving ~~the~~its original answer~~.~~ unless otherwise ~~the~~provided by order entered under Rule 16(b)(3)(A).

(2) *Third-Party* ~~plaintiff must obtain leave on motion upon notice to all parties to the action~~*Defendant's Claims and Defenses*. The person served with the summons and third-party complaint~~, hereinafter called the~~ the "third-party defendant~~, shall make any defenses to the third-party defendant plaintiff's claim as provided in Rule 12 and any counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant~~":

(A) must assert any defense against the third-party plaintiff's claim under Rule 12;

(B) must assert any counterclaim against the third-party plaintiff under Rule 13(a), and may assert any counterclaim against the third-party plaintiff under Rule 13(b) or any crossclaim against another third-party defendant under Rule 13(g);

(C) may assert against the plaintiff any defense that the third-party plaintiff has to the plaintiff's claim; and

(D) may also assert ~~any claim~~ against the plaintiff any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff.

(3) *Plaintiff's Claims Against a Third-Party Defendant.* The plaintiff may assert ~~any claim~~ against the third-party defendant any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff~~, and~~. The third-party defendant ~~thereupon shall~~must then assert any ~~defenses as provided in~~defense

under Rule 12 and any ~~counterclaims and cross-claims as provided in Rule 13. Any party may move to strike the third-party claim, or for its severance or separate trial.~~counterclaim under Rule 13(a), and may assert any counterclaim under Rule 13(b) or any crossclaim under Rule 13(g).

(4) *Motion to Strike, Sever, or Try Separately.* Any party may move to strike the third-party claim, to sever it, or to try it separately.

(5) *Third-Party Defendant's Claim Against a Nonparty.* A third-party defendant may proceed under this rule against ~~any person not a party to the action~~a nonparty who is or may be liable to the ~~third party~~third-party defendant for all or part of ~~the~~any claim ~~made in the action~~ against ~~the third party defendant~~it.

(a) When **~~plaintiff may bring in third party. –~~** ~~When a counterclaim~~a claim is asserted against a plaintiff, the plaintiff may ~~cause~~bring in a third party ~~to be brought in under circumstances which under~~if this rule would ~~entitle~~allow a defendant to do so.

COMMITTEE COMMENT ON RULE 14

Rule 14 is changed to be consistent with the corresponding federal rule of civil procedure subsection (6)(b) except sections of the corresponding federal rule concerning admiralty or maritime claims have been deleted as they are inapplicable.

The time frame for filing a third party claim has been expanded from 10 to 14 days after filing the original answer or as provided in a scheduling order entered under Rule 16(b)(3)(A).

~~Rule 15. Amended and supplemental pleadings.~~ Rule 15. Amended and Supplemental Pleadings.

(a) Amendments Before Trial.

(1) *Amending as a Matter of Course.* A party may amend its pleading once as a matter of course within:

(A) 21 days after serving it, or

(B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

(2) ~~**(a)**~~ *Other Amendments.* In all other cases, a party may amend ~~the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by~~its pleading only with the opposing party's written consent ~~of~~or the ~~adverse party; and~~court's leave ~~shall be~~. The court should freely ~~given~~give leave when justice so requires. ~~A party shall plead in~~

(3) *Time to Respond.* Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining ~~for response~~to respond to the original pleading or within ~~10~~14 days after service of the amended pleading, whichever ~~period may be the longer, unless the court otherwise orders~~is later.

(b) Amendments During and After Trial.

(1) ~~**(b) Amendments to conform to the evidence. –** When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it~~*Based on an Objection at Trial.* If, at trial, a party objects that evidence is not within the issues ~~made by~~raised in the pleadings, the court may ~~allow~~permit the pleadings to be amended ~~and shall do so freely when the presentation~~

~~of the merits of the action will be subserved thereby~~. The court should freely permit an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the ~~admission of such~~ evidence would prejudice ~~the party in maintaining the~~that party's action or defense ~~upon~~on the merits. The court may grant a continuance to enable the objecting party to meet ~~such~~the evidence.

~~(~~2~~)~~ *For Issues Tried by Consent.* When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move—at any time, even after judgment—to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue.

(c) Relation Back of Amendments.

~~(~~1~~)~~ *When an Amendment ~~of~~Relates Back.* An amendment to a pleading relates back to the date of the original pleading when:

~~(~~A~~)~~ **~~(1)~~** ~~relation back is permitted by~~ the law that provides the applicable statute of limitations ~~applicable to the action~~allows relation back; ~~or~~

~~(~~B~~)~~ **~~(2)~~** the amendment asserts a claim or defense ~~asserted in the amended pleading~~that arose out of the conduct, transaction, or occurrence set ~~forth~~out—or attempted to be set ~~forth~~out—in the original pleading; or

~~(~~C~~)~~ **~~(3)~~** the amendment changes the party or the naming of the party against whom a claim is asserted, if ~~the foregoing paragraph (2~~Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(~~k~~l) for ~~service of~~serving the summons and complaint, the party to be brought in by amendment ~~(A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and~~:

(i) received such notice of the action that it will not be prejudiced in defending on the merits; and

(ii) ~~(B)~~ knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity ~~of the proper party, the action would have brought against the party~~.

~~(~~d~~)~~ **~~(d)~~** **Supplemental Pleadings.** ~~Upon~~On motion ~~of a party~~and reasonable notice, the court may, ~~upon reasonable notice and upon such~~on

just terms~~ as are just~~, permit ~~the~~a party to serve a supplemental pleading setting ~~forth transactions or occurrences or events which have~~out any transaction, occurrence, or event that happened ~~since~~after the date of the pleading ~~sought~~ to be supplemented. ~~Permission may be granted~~The court may permit supplementation even though the original pleading is defective in ~~its statement of~~stating a claim ~~for relief~~ or defense. ~~If~~ The court ~~deems it advisable~~may order that the ~~adverse~~opposing party plead to the supplemental pleading~~, it shall so order, specifying the~~ within a specified time~~ therefor~~.

COMMITTEE COMMENT ON RULE 15

Rule 15 is changed to be consistent with the corresponding federal rule of civil procedure.

The proposed rule deletes any reference to notice to the United States as set forth in the corresponding federal rule of civil procedure.

~~***Rule 16. Pretrial conference; scheduling; management.***~~
Rule 16. Pretrial Conferences; Scheduling; Management.

(a) Purposes of a Pretrial ~~conferences; objectives.~~ Conference. In any action, the court may ~~in its discretion direct~~order the attorneys ~~for the parties~~ and any unrepresented parties to appear ~~before it for a conference or~~for one or more pretrial conferences ~~before trial~~ for such purposes as:

(1) expediting the disposition of the action;

(2) establishing early and continuing control so that the case will not be protracted because of lack of management;

(3) discouraging wasteful pretrial activities;

(4) improving the quality of the trial through more thorough preparation; and

(5) facilitating ~~the~~ settlement ~~of the case~~.

(b) Scheduling.

(1) ~~**(b)**~~ *Scheduling* ~~**and planning.**~~ *Order.* Except in categories of actions exempted by the Supreme Court of Appeals, the ~~judge shall, after consulting with the attorneys for the parties and any unrepresented parties, by a scheduling conference, telephone, mail or other suitable means, enter~~trial court must issue a scheduling order ~~that limits the time~~:

(A) after receiving the parties' report under Rule 26(f); or

(B) after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference.

(2) *Time to Issue.* The judge must issue the scheduling order as soon as practicable, but unless the judge finds good cause for delay, the judge must issue it within the earlier of 90 days after any defendant has been served with the complaint or 60 days after any defendant has appeared.

(3) *Contents of the Order.*

(A) ~~**(1)**~~ *Required Contents.* The scheduling order must limit the time to join other parties ~~and to~~, amend the pleadings~~;~~, complete discovery, and file motions.

~~**(2)** To file and hear motions; and~~

~~**(3)** To complete discovery.~~

(B) *Permitted Contents.* The scheduling order ~~also~~ may ~~include~~:

(i) modify the timing of disclosures under Rules (26)(a) and 26(d)(1);

(ii) set forth a discovery plan that includes:

(a) the subjects on which discovery may be needed;

(b) when discovery must be completed;

(c) whether discovery should be conducted in phases or be limited to particular issues; and/or

(d) disclosure of experts and reports, where applicable.

(iii) modify the extent of discovery;

(iv) provide for disclosure, discovery, or preservation of electronically stored information;

(v) include any agreements the parties reach or rulings of the court about asserting claims of privilege or of protection as trial-preparation material after information is produced, including agreements reached under West Virginia Rule of Evidence 502;

(vi) ~~**(4)** The date or~~set dates for pretrial conferences ~~before trial, a final pretrial conference, and~~and for trial; and

(vii) ~~**(5)** Any~~include other appropriate matters ~~appropriate in the circumstances of the case~~.

(4) *Modifying a Schedule* ~~shall not~~. A schedule may be modified ~~except by leave of the judge~~only for good cause and with the judge's consent.

(c) Attendance and Matter for Consideration at a Pretrial Conference.

(1) *Attendance.* A represented party must authorize at least one of its attorneys to make stipulations and admissions about all matters that can reasonably be anticipated for discussion at a pretrial conference. If appropriate, the Court may require that a party or its representative be present or reasonably available by other means to consider possible settlement.

(2) ~~**(c) Subjects***Matters* for Consideration~~ **at Pretrial Conferences**. At any pretrial conference~~ under this rule consideration may be given, and,~~ the court may consider and take appropriate action~~, with respect to~~ on the following matters:

(A) ~~**(1)** The formulation and simplification of~~formulating and simplifying the issues, ~~including the elimination of~~and eliminating frivolous claims or defenses;

(B) ~~**(2)** The necessity or desirability of amendments to~~amending the pleadings if necessary or desirable;

(C) ~~**(3)** The possibility of~~ obtaining admissions ~~of fact and of~~and stipulations about facts and documents ~~which will~~to avoid unnecessary proof, ~~stipulations regarding the authenticity of documents, and~~and ruling in advance ~~rulings from the court~~ on the admissibility of evidence;

(D) ~~**(4)** The avoidance of~~avoiding unnecessary proof and ~~of~~ cumulative evidence~~;~~, and ~~limitations or restrictions on~~limiting the use of testimony under ~~Rule 702 of the~~ West Virginia ~~Rules~~Rule of Evidence 702;

(E) ~~**(5)**~~ determining the appropriateness and timing of summary adjudication under Rule 56;

(F) ~~**(6)** The control~~controlling and scheduling ~~of~~ discovery, including orders affecting disclosures and discovery under Rule 26 and Rules 29 through 37;

(G) ~~**(7)** The identification of~~identifying witnesses and documents, scheduling the ~~need and schedule for~~ filing and ~~exchanging~~exchange of any pretrial briefs, and ~~the date or~~setting dates for further conferences and for trial;

(H) ~~**(8)** The advisability of~~ referring matters to a commissioner under Rule 53 or ~~master~~53.1;

(I) ~~**(9)** The possibility of settlement or the use of extrajudicial~~settling the case and using special procedures to ~~resolve~~assist in resolving the dispute when authorized by statute or rule;

(J) ~~**(10)**~~ determining the form and ~~substance~~content of the pretrial order;

(K) ~~**(11)** The disposition~~disposing of pending motions;

(L) ~~**(12)** The need for~~adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems;

(M) ~~**(13)** An order for~~ordering a separate trial ~~pursuant to~~under Rule 42(b) ~~with respect to~~of a claim, counterclaim, ~~cross claim, or~~crossclaim, third-party claim, or ~~with respect to any~~particular issue~~in the case~~;

(N) ~~**(14)** An order directing a party or parties to present~~ordering the presentation of evidence early in the trial ~~with respect to~~on a manageable issue that ~~could~~might, on the evidence, be the basis for a judgment as a matter of law under Rule 50(a) or a judgment on partial findings under Rule 52(c);

(O) ~~**(15)** An order~~establishing a reasonable limit on the time allowed ~~for presenting~~to present evidence; and

(P) ~~**(16)** Such~~facilitating in other ~~matters as may facilitate~~ways the just, speedy, and inexpensive disposition of the action.

~~At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed. If appropriate, the court may require that a party or its representative be present or reasonably available by telephone in order to consider possible settlement of the dispute.~~

(d) Pretrial Orders. After any conference under this rule, the court should issue an order reciting the action taken. This order controls the course of the action unless the court modifies it.

(e) ~~**(d)**~~ **Final Pretrial Conference.** ~~Any~~ **and Orders**. The court may hold a final pretrial conference ~~shall be held as close to the time of trial as reasonable under the circumstances. The participants at any such conference shall~~to formulate a trial plan ~~for trial~~, including a ~~program for facilitating~~plan to facilitate the admission of evidence. The conference ~~shall~~ must be held as close to the start of trial as is reasonable, and must be attended by at least one ~~of the attorneys~~attorney who will conduct the trial for each ~~of the parties~~party and by any unrepresented ~~parties~~party.

~~**(e) Pretrial orders.** After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following~~The court may modify the order issued after a final pretrial

conference ~~shall be modified~~ only to prevent manifest injustice.

(f) Sanctions.

(1) *In General.* On motion or on its own, the court may issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)–(vii), if a party or its attorney:

(A) fails to appear at a scheduling or other pretrial conference;

(B) ~~**(f) Sanctions.** If a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney~~ is substantially unprepared to participate ~~in the conference, or if a party or party's attorney fails to~~ or does not participate in good faith~~,~~ in the ~~judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)~~conference; or

(C) fails to obey a scheduling or other pretrial order.

(2) ~~(2)(B), (C), and (D). In lieu~~*Imposing Fees and Costs.* Instead of or in addition to any other sanction, the ~~judge may require~~court must order the party ~~or the~~, its attorney ~~representing the party,~~ or both to pay the reasonable expenses—including attorney's fees—incurred because of any noncompliance with this rule, ~~including attorney's fees,~~ unless the ~~judge finds that the~~ noncompliance was substantially justified or ~~that~~ other circumstances make an award of expenses unjust.

COMMITTEE COMMENT ON RULE 16

Rule 16 is changed to be largely consistent with the corresponding federal rule of civil procedure. It addresses the procedure for initial scheduling orders and pretrial orders. It incorporates references to automatic disclosures that are included in the proposed Rule 26(a)(1), as well as the initial meeting of counsel and report under proposed Rule 26(f). The proposed rule departs slightly from its federal counterparts on the contents of the scheduling order to be issued in each qualifying case.

IV. Parties

Rule 17. ~~Parties~~ Plaintiff and Defendant; Capacity; Public Officers.

(a) Real Party in Interest.

(1) *Designation in General.* An action must be prosecuted in the name of the real party in interest. The following may sue in their own names without joining the person for whose benefit the action is brought:

(A) an executor;

(B) an administrator;

(C) a guardian;

(D) a bailee;

(E) a trustee of an express trust;

(F) a party with whom or in whose name a contract has been made for another's benefit; and

(G) a party authorized by statute.

(2) *Action in the Name of the State for Another's Use or Benefit.* When a law so provides, an action for another's use or benefit must be brought in the name of the state or any political subdivision thereof.

~~**(3) (a) Real party in interest.** – Every action shall be prosecuted in the name~~*Joinder of the Real Party in Interest.* ~~An executor, administrator, guardian, bailee, trustee of an express trust, or any other fiduciary, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by law may sue in that person's own name without joining the party for whose benefit the action is brought. When a law of the state so provides, an action for the use or benefit of another shall be brought in the name of the state or any political subdivision thereof. No action shall be dismissed on the ground that it is not prosecuted~~The court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed ~~after objection for ratification of commencement of the action by, or joinder or substitution of,~~for the real party in interest~~; and such~~ to ratify, join, or be substituted into the action. After ratification, joinder, or substitution ~~shall have the same effect as if~~, the action proceeds as if it had been originally commenced ~~in the name of~~by the real party in interest.

~~**(b)** [Reserved].~~

(b) Capacity to Sue or Be Sued. Capacity to sue or be sued is determined as follows:

~~**(c) Infants, incompetent persons, or convicts.** – Whenever an infant, incompetent person, or convict has a representative, such as a general guardian, curator, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant, incompetent person, or convict. An infant, incompetent person, or convict who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court or clerk shall appoint a discreet and competent attorney at law as guardian ad litem for an infant, incompetent person, or convict not otherwise represented in an action, or shall make such other order as it deems proper for the protection of the infant, incompetent person, or convict. A guardian ad litem is deemed a party for purposes of service; failure to serve a guardian ad litem in circumstances where service upon a party is required constitutes failure to serve a party.~~

(1) for an individual who is not acting in a representative capacity, by the law of the individual's domicile;

(2) for a corporation, by the law under which it was organized; and

(3) for all other parties, by the law of this state.

(c) Minor or Incompetent Person.

(1) *With a Representative.* The following representatives may sue or defend on behalf of a minor, incarcerated person, or incompetent person:

(A) a general guardian;

(B) a committee;

(C) a conservator; or

(D) a like fiduciary.

(2) *Without a Representative.* A minor or an incompetent person, or an incarcerated person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court must appoint a guardian ad litem—or issue another appropriate order—to protect a minor, incarcerated person, or incompetent person who is unrepresented in an action.

(d) Public Officer's Title and Name. A public officer who sues or is sued in

an official capacity may be designated by official title rather than by name, but the court may order that the officer's name be added.

COMMITTEE COMMENT ON RULE 17

Rule 17 is changed to be consistent with the corresponding federal rule of civil procedure.

See Black's Auto Repair and Towing v. Monongalia Country Magistrate Court, 211 W.Va. 661, 567 S.E.2d 671 (2002)(Held that "convict" means an incarcerated person, whether in jail or prison). The phrase "incarcerated person" is now used in place of "convict."

Rule 17(d) incorporates the provisions of former Rule 25(d)(2) which fit better with Rule 17.

Rule 18. Joinder of Claims ~~and Remedies~~.

(a) ~~Joinder of claims. –~~ In General. A party asserting a claim ~~to relief as an~~ original claim, counterclaim, cross-claim, or third-party claim~~,~~ may join, ~~either~~ as independent or ~~as alternate~~ alternative claims, as many claims, legal or equitable, as the party has against an opposing party.

(b) Joinder of ~~remedies; fraudulent conveyances. –~~ Contingent Claims. ~~Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. In particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to that plaintiff, without first having obtained a judgment establishing the claim for money.~~ A party may join two claims even though one of them is contingent on the disposition of the other; but the court may grant relief only in accordance with the parties' relative substantive rights. In particular, a plaintiff may state a claim for money and a claim to set aside a conveyance that is fraudulent as to that plaintiff, without first obtaining a judgment for the money.

COMMITTEE COMMENT ON RULE 18

Rule 18 is changed to be consistent with the corresponding federal rule of civil procedure.

~~Rule 19. Joinder of persons needed for just adjudication.~~ Rule 19. Required Joinder of Parties.

~~(a) Persons to be joined if feasible. –~~ ~~A person who is subject to service of process shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest, or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.~~

(a) Persons Required to Be Joined if Feasible.

(1) *Required Party.* A person who is subject to service of process must be joined as a party if:

(A) in that person's absence, the court cannot accord complete relief among existing parties; or

(B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:

(i) as a practical matter impair or impede the person's ability to protect the interest; or

(ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

(2) *Joinder* by Court Order. If a person has not been joined as required, the court must order that the person be made a party. A person who refuses to join as a plaintiff may be made either a defendant or, in a proper case, an involuntary plaintiff.

(3) *Venue.* If a joined party objects to venue and the joinder would make venue improper, the court must dismiss that party.

~~**(b) Determination by court whenever joinder not feasible. –** If a person as described in subdivision (a)(1) (2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.~~

(b) When Joinder Is Not Feasible. If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:

(1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;

(2) the extent to which any prejudice could be lessened or avoided by:

(A) protective provisions in the judgment;

(B) shaping the relief; or

(C) other measures;

(3) whether a judgment rendered in the person's absence would be adequate; and

(4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

~~**(c) Pleading reasons for nonjoinder. –** A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1) (2) hereof who are not joined, and the reasons why they are not joined.~~

(c) Pleading the Reasons for Nonjoinder. When asserting a claim for relief, a party must state:

(1) the name, if known, of any person who is required to be joined if feasible but is not joined; and

(2) the reasons for not joining that person.

~~**(d) Exception of class actions. –** This rule is subject to the provisions of Rule 23.~~

(d) Exception for Class Actions. This rule is subject to Rule 23.

COMMITTEE COMMENT ON RULE 19

Rule 19 is changed to be consistent with the corresponding federal rule of civil procedure except Section (a)(1) of the federal rule referring to subject-matter jurisdiction of the court is omitted.

~~***Rule 20. Permissive joinder of parties.***~~ ***Rule 20. Permissive Joinder of Parties.***

~~**(a) Permissive joinder.** – All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.~~

(a) Persons Who May Join or Be Joined.

(1) *Plaintiffs.* Persons may join in one action as plaintiffs if:

(A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and

(B) any question of law or fact common to all plaintiffs will arise in the action.

(2) *Defendants.* Persons may be joined in one action as defendants if:

(A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and

(B) any question of law or fact common to all defendants will arise in the action.

(3) *Extent of Relief.* Neither a plaintiff nor a defendant need be interested in obtaining or defending against all the relief demanded. The court may grant judgment to one or more plaintiffs according to their rights, and against one or more defendants according to their liabilities.

~~**(b) Separate trials.** – The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party~~

~~against whom the party asserts no claim and who asserts no claim against the party, and may order separate trials or make other orders to prevent delay or prejudice.~~

(b) Protective Measures. The court may issue orders—including an order for separate trials—to protect a party against embarrassment, delay, expense, or other prejudice that arises from including a person against whom the party asserts no claim and who asserts no claim against the party.

COMMITTEE COMMENT ON RULE 20

Rule 20 is changed to be consistent with the corresponding federal rule of civil procedure except the portions of FRCP 20 regarding *in rem* jurisdiction and jurisdiction in admiralty have been omitted.

~~Rule 21. Misjoinder and nonjoinder of parties.~~ ***Rule 21. Misjoinder and Nonjoinder of Parties.***

Misjoinder of parties is not ground for dismissal of an action. ~~Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.~~ On motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party.

COMMITTEE COMMENT ON RULE 21

Rule 21 is changed to be consistent with the corresponding federal rule of civil procedure.

~~***Rule 22. Interpleader.***~~ ***Rule 22 – Interpleader.***

~~Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that the plaintiff is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross claim or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in Rule 20.~~

(a) Grounds.

(1) *By a Plaintiff.* Persons with claims that may expose a plaintiff to double or multiple liability may be joined as defendants and required to interplead. Joinder for interpleader is proper even though:

(A) the claims of the several claimants, or the titles on which their claims depend, lack a common origin or are adverse and independent rather than identical; or

(B) the plaintiff denies liability in whole or in part to any or all of the claimants.

(2) *By a Defendant.* A defendant exposed to similar liability may seek interpleader through a crossclaim or counterclaim.

(b) Relation to Other Rules and Statutes. This rule supplements—and does not limit—the joinder of parties allowed by Rule 20.

COMMITTEE COMMENT ON RULE 22

Rule 22 is changed to be consistent with the corresponding federal rule of civil procedure.

~~Rule 23. Class actions.~~ ***Rule 23. Class actions.***

(a) Prerequisites. **~~to a class action. –~~** One or more members of a class may sue or be sued as representative parties on behalf of all members only if: ~~(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.~~

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) ~~Class actions maintainable.~~ Types of Class Actions. ~~– An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:~~ A class action may be maintained if Rule 23(a) is satisfied and if:

(1) ~~The prosecution of~~ prosecuting separate actions by or against individual class members ~~of the class~~ would create a risk of:

(A) ~~I~~inconsistent or varying adjudications with respect to individual class members ~~of the class which~~ that would establish incompatible standards of conduct for the party opposing the class~~,~~; or

(B) ~~A~~adjudications with respect to individual class members ~~of the class which~~ that ~~would~~, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) ~~T~~the party opposing the class has acted or refused to act on grounds that apply generally ~~applicable~~ to the class, ~~thereby making appropriate~~ so that final injunctive relief or corresponding declaratory relief ~~with respect to~~ is appropriate respecting the class as a whole; or

(3) ~~T~~the court finds that the questions of law or fact common to the class members ~~of the class~~ predominate over any questions affecting only

individual members, and that a class action is superior to other available methods for the fairly and efficiently adjudicationng of the controversy. The matters pertinent to the findings include: ~~(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.~~

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

~~(c) Determination by order whether class action to be maintained; notice; judgment; actions conducted partially as class actions.~~

~~**(1)** As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.~~

~~**(2)** In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.~~

~~**(3)** The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2)~~

~~was directed, and who have not requested exclusion, and whom the court finds to be members of the class.~~

~~**(4)** When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.~~

~~**(d) Orders in conduct of actions.** – In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.~~

~~**(e) Dismissal or compromise.** – A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.~~

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

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) *Certification Order.*

(A) Time to Issue. At an early practicable time after a person sues

or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) Defining the Class; Appointing Class Counsel. An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) Altering or Amending the Order. An order that grants or denies class certification may be altered or amended before final judgment.

(2) *Notice.*

(A) For (b)(1) or (b)(2) Classes. For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) For (b)(3) Classes. For any class certified under Rule 23(b)(3)—or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3)—the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) *Judgment*. Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) *Particular Issues*. When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) *Subclasses*. When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) Conducting the Action.

(1) *In General*. In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require—to protect class members and fairly conduct the action—giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) *Combining and Amending Orders*. An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) *Notice to the Class*.

(A) Information That Parties Must Provide to the Court. The parties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class.

(B) Grounds for a Decision to Give Notice. The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to:

(i) approve the proposal under Rule 23(e)(2); and

(ii) certify the class for purposes of judgment on the proposal.

(2) *Approval of the Proposal*. If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:

(A) the class representatives and class counsel have adequately represented the class;

(B) the proposal was negotiated at arm's length;

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

(iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3);

and

(D) the proposal treats class members equitably relative to each other.

(3) *Identifying Agreements*. The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) *New Opportunity to Be Excluded*. If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) *Class-Member Objections*.

(A) In General. Any class member may object to the proposal if it requires court approval under this subdivision (e). The objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection.

(B) Court Approval Required for Payment in Connection with an Objection. Unless approved by the court after a hearing, no payment or other consideration may be provided in connection with:

(i) forgoing or withdrawing an objection, or

(ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.

(f) Appeals. A party may seek review of an order granting or denying class-action certification under this rule in the Supreme Court of Appeals, but not from an order under Rule 23(e)(1), by filing a Petition for a Writ of Prohibition with the Clerk of the Supreme Court of Appeals. A party must file any such petition within 30 days after the order being challenged is entered. The filing of the petition does not stay proceedings in the circuit court unless the circuit court judge or the Supreme Court of Appeals so orders.

(g) Class Counsel.

(1) *Appointing Class Counsel*. Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class

counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(2) *Standard for Appointing Class Counsel.* When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) *Interim Counsel.* The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) *Duty of Class Counsel.* Class counsel must fairly and adequately represent the interests of the class.

(h) Attorney's Fees and Nontaxable Costs. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special commissioner, as provided in Rule 54(d)(2)(D).

(i) Residual funds. When the claims process has been exhausted in class actions and residual funds remain, the court may, after notice to counsel of record and a hearing, distribute the residual funds to Legal Aid of West Virginia, to one or more West Virginia nonprofit organizations, schools within West Virginia universities or colleges, or foundations, which support programs that will benefit the class consistent with the objectives and purposes of the underlying causes of action upon which relief was based. With respect to checks or other methods of payment that are not cashed or otherwise negotiated by identified class members within a time period set by the Court or other unclaimed funds, the right to which is vested in identified class members, the Court may treat the funds as residual funds and distribute them pursuant to this subsection or declare the funds unclaimed property and order the funds paid over to the West Virginia Unclaimed Property Fund. The Parties may, subject to the requirements of Rule 23, provide for the treatment of unclaimed or residual funds.

COMMITTEE COMMENT ON RULE 23

The changes to Rule 23 are intended to make the rule consistent with the procedure for class actions utilized in federal rule of civil procedure 23. The only differences are in the process for appellate review of class certification decisions as described below, and the process for distribution of residual class settlement funds (cy pres) under Rule 23(i).

The rule changes the current practice for appellate review of class certification decisions. Under current practice, there are different standards for appellate review of a class certification decision, depending on whether the class is certified or if class certification is denied. Under existing procedure, an order denying class certification is a final and appealable order, while an order granting class certification is subject to discretionary review only by an extraordinary writ. The current federal rule permits discretionary review by the court of appeals. Federal courts look at five factors to determine the appropriateness of granting a Rule

23(f) petition: (1) whether the certification ruling is likely dispositive of the litigation; (2) whether the district court's certification decision contains a substantial weakness; (3) whether the appeal will permit the resolution of an unsettled legal question of general importance; (4) the nature and status of the litigation before the district court (such as the presence of outstanding dispositive motions and the status of discovery); and (5) the likelihood that future events will make appellate review more or less appropriate. *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 144 (4th Cir. 2001). The Supreme Court of Appeals applies a similar standard in determining whether to entertain and issue a writ of prohibition following the grant of class certification. *State ex rel. Surnaik Holdings of WV, LLC v. Bedell*, 852 S.E.2d 748, 755 (W. Va. 2020) (noting the following five factors to be considered: "(1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression." (quoting syl. pt. 4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996)). The intent of the rule is to place the parties in the same position as it relates to appellate review of class certification decisions.

~~Rule 23.1. Derivative actions by shareholders.~~ ***Rule 23.1. Derivative Actions.***

~~In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege (1) that the plaintiff was a shareholder or member at the time of the transaction of which the plaintiff complains or that the plaintiff's share or membership thereafter devolved on the plaintiff by operation of law, and (2) that the action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for the plaintiff's failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.~~

(a) Prerequisites. This rule applies when one or more shareholders or members of a corporation or an unincorporated association bring a derivative action to enforce a right that the corporation or association may properly assert but has failed to enforce. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of shareholders or members who are similarly situated in enforcing the right of the corporation or association.

(b) Pleading Requirements. The complaint must be verified and must:

(1) allege that the plaintiff was a shareholder or member at the time of the transaction complained of, or that the plaintiff's share or membership later devolved on it by operation of law;

(2) state with particularity:

(A) any effort by the plaintiff to obtain the desired action from the directors or comparable authority and, if necessary, from the shareholders or members; and

(B) the reasons for not obtaining the action or not making the effort.

(c) Settlement, Dismissal, and Compromise. A derivative action may be settled, voluntarily dismissed, or compromised only with the court's approval. Notice of a proposed settlement, voluntary dismissal, or compromise must be given to shareholders or members in the manner that the court orders.

COMMITTEE COMMENT ON RULE 23.1

Rule 23.1 is changed to be consistent with the corresponding federal rule of civil procedure.

~~Rule 23.2. Actions relating to unincorporated associations.~~ ***Rule 23.2. Actions Relating to Unincorporated Associations.***

This rule applies to ~~A~~an action brought by or against the members of an unincorporated association as a class by naming certain members as representative parties. The action may be maintained only if it appears that ~~the representative~~ those parties will fairly and adequately protect the interests of the association and its members. In ~~the~~ conducting ~~of~~ the action, the court may ~~make~~ issue any appropriate orders corresponding with those ~~described~~ in Rule 23(d), and the procedure for settlement, voluntary dismissal, or compromise ~~of the action~~ shall correspond with ~~that provided~~ the procedure in Rule 23(e).

COMMITTEE COMMENT ON RULE 23.2

Rule 23.2 Rule 21 is changed to be consistent with the corresponding federal rule of civil procedure.

~~***Rule 24. Intervention.***~~ ***Rule 24. Intervention.***

~~**(a) Intervention of right.** – Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of this State confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.~~

~~**(b) Permissive intervention.** – Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of this State confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or State governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.~~

~~**(c) Procedure.** A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of this State gives a right to intervene. When the constitutionality of a statute of this State affecting the public interest is drawn in question in any action to which this State or an officer, agency, or employee thereof is not a party, the court shall give notice thereof to the attorney general of this State.~~

(a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:

(1) is given an unconditional right to intervene by a statute; or

(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

(b) Permissive Intervention.

(1) ***In General.*** On timely motion, the court may permit anyone to

intervene who:

(A) is given a conditional right to intervene by a statute; or

(B) has a claim or defense that shares with the main action a common question of law or fact.

(2) ***By a Government Officer or Agency.*** On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on:

(A) a statute or executive order administered by the officer or agency; or

(B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.

(3) ***Delay or Prejudice.*** In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

(c) Notice and Pleading Required. A motion to intervene must be served on the parties as provided in Rule 5. The motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought.

COMMITTEE COMMENT ON RULE 24

Rule 24 is changed to be consistent with the corresponding federal rule of civil procedure.

~~Rule 25. Substitution of parties.~~ ***Rule 25. Substitution of parties.***

~~(a)~~ Death. –

~~(1)~~ ~~If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons. Unless the motion for substitution is made not later than 90 days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party.~~

~~(2)~~ ~~In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.~~

(1) *Substitution if the Claim Is Not Extinguished.* If a party dies and the claim is not extinguished, the court may order substitution of the proper party. A motion for substitution may be made by any party or by the decedent's successor or representative. If the motion is not made within 90 days after service of a statement noting the death, the action by or against the decedent must be dismissed.

(2) *Continuation Among the Remaining Parties.* After a party's death, if the right sought to be enforced survives only to or against the remaining parties, the action does not abate, but proceeds in favor of or against the remaining parties. The death should be noted on the record.

(3) *Service.* A motion to substitute, together with a notice of hearing, must be served on the parties as provided in Rule 5 and on nonparties as provided in Rule 4. A statement noting death must be served in the same manner. Service may be made in any judicial district.

(b) Incompetency; ~~Convict~~. If a party becomes incompetent or becomes ~~a convict~~ an incarcerated, the court ~~upon~~ may, on motion, permit the action to be continued by or against the party's representative. The motion must be served as provided in ~~subdivision (a) of this rule may allow the action to be continued by or against the party's representative~~ Rule 25(a)(3).

(c) Transfer of ~~i~~Interest. ~~In case of any transfer of~~ If an interest is transferred,

the action may be continued by or against the original party~~,~~ unless the court, ~~upon~~ on motion, ~~directs the person to whom the interest is transferred~~ orders the transferee to be substituted in the action or joined with the original party. ~~Service of the motion shall be made as provided in subdivision (a) of this rule.~~ The motion must be served as provided in Rule 25(a)(3).

(d) Public ~~o~~Officers; ~~d~~Death or ~~s~~Separation from ~~o~~Office.

~~(1)~~ ~~When a public officer is a party to an action in an official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and the officer's successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.~~

~~(2)~~ ~~A public officer who sues or is sued in an official capacity may be described as a party by the officer's official title rather than by name; but the court may require the officer's name to be added.~~

An action does not abate when a public officer who is a party in an official capacity dies, resigns, or otherwise ceases to hold office while the action is pending. The officer's successor is automatically substituted as a party. Later proceedings should be in the substituted party's name, but any misnomer not affecting the parties' substantial rights must be disregarded. The court may order substitution at any time, but the absence of such an order does not affect the substitution.

COMMITTEE COMMENT ON RULE 25

Rule 25 is changed to be consistent with the corresponding federal rule of civil procedure.

V. Depositions and Discovery

~~*Rule 26. General provisions governing discovery.*~~

~~**(a) Discovery methods.** – Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property for inspection and other purposes; physical and mental examination; and requests for admission.~~

~~**(b) Discovery scope and limits.** – Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:~~

~~**(1)** *In general.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.~~

~~The frequency or extent of use of the discovery methods set forth in subdivision (a) shall be limited by the court if it determines that:~~

~~**(A)** The discovery sought is unreasonably cumulative or duplicative or is obtainable from some other source that is more convenient, less burdensome, or less expensive;~~

~~**(B)** The party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or~~

~~**(C)** The discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation.~~

~~The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).~~

~~**(2)** *Insurance agreements.* – A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a~~

judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

(3) *Trial preparation: materials.* – Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is:

(A) A written statement signed or otherwise adopted or approved by the person making it; or

(B) A stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) *Trial preparation: experts.* – Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A) (i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the

facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

(ii) A party may depose any person who has been identified as an expert whose opinions may be presented at trial.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) *Unless manifest injustice would result*:

(i) The court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(A)(ii) and (b)(4)(B) of this rule; and

(ii) With respect to discovery obtained under subdivision (b)(4)(A)(ii) of this rule the court may require, and with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(c) Protective orders. – Upon motion by a party or by the person from whom discovery is sought, including a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the circuit where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) That the discovery not be had;

(2) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) That the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) That certain matters not be inquired into or that the scope of the discovery be limited to certain matters;

(5) That discovery be conducted with no one present except persons designated by the court;

(6) That a deposition after being sealed be opened only by order of the court;

(7) That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;

(8) That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be open as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) Timing and sequence of discovery. – Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) Supplementation of responses. – A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement that party's response with respect to any question directly addressed to:

(A) The identity and location of persons having knowledge of discoverable matters, and

(B) The identity of each person expected to be called as an expert witness at trial, the subject matter on which the expert is expected to testify, and the substance of the expert's testimony.

(2) A party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which:

(A) The party knows that the response was incorrect when made, or,

(B) The party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

If supplementation is not made as required by this Rule, the court, upon motion or upon its own initiative, may impose upon the person who failed to make the supplementation an appropriate sanction as provided for under Rule 37.

(f) Discovery conference. – At any time after commencement of an action the court may direct the attorneys for the parties to appear before it personally or by telephone for a conference on the subject of discovery. The court shall do so upon motion by the attorney for any party if the motion includes:

(1) A statement of the issues as they then appear;

(2) A proposed plan and schedule of discovery;

(3) Any limitations proposed to be placed on discovery;

(4) Any other proposed orders with respect to discovery; and

(5) A statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on the matters set forth in the motion. Each party and the party's attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed by the attorney for any party. Notice of the motion shall be served on all parties. Objections or additions to matters set forth in the motion shall be served not later than 10 days after service of the motion.

Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes; establishing a plan and schedule for discovery; setting limitations on discovery, if any; and, determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action. An order may be altered or amended whenever justice so requires.

Subject to the right of a party who properly moves for a discovery conference

to prompt convening of the conference, the court may combine the discovery conference with a pretrial conference authorized by Rule 16.

(g) Signing of discovery requests, responses, and objections. – Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification that the attorney or party has read the request, response, or objection, and that to the best of the attorney's or party's knowledge, information, and belief formed after a reasonable inquiry it is:

(1) Consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(2) Not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

(3) Not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response or objection and a party shall not be obligated to take any action with respect to it until it is signed.

If without substantial justification a certification is made in violation of the rule, the court, upon motion or upon its own initiative, may impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

Rule 26. Duty to Disclose; General Provisions Governing Discovery.

(a) Required Disclosures

(1) *Initial Disclosure.*

(A) *In General.* Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(iii) a computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(B) *Proceedings Exempt from Mandatory Disclosures:*

(i) eminent domain actions brought pursuant to Chapter 54 of the West Virginia Code;

(ii) actions where the circuit court is acting as an appellate review of decisions from a Board of Equalization and Review;

(iii) an action to enforce or quash an administrative summons or subpoena;

(iv) a proceeding ancillary to a proceeding in another court;

(v) any matter where the agreed amount in controversy is less than $25,000;

(vi) any action to enforce an arbitration award;

(vii) any action for review of an administrative record; and

(viii) any matter where the circuit court is acting as a court of appellate review from a decision of an inferior body.

(C) *Time for Initial Disclosures—In General.* A party must make the initial disclosures at or within 30 days after the filing of the written report as required by Rule 26(f)(2), unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in this action and states the objection in the proposed discovery plan. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure.

(D) *Time for Initial Disclosures—For Parties Served or Joined Later.* A party that is first served or otherwise joined after the Rule 26(f) conference must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or court order.

(E) *Basis for Initial Disclosure; Unacceptable Excuses.* A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) *Disclosure of Expert Testimony.*

(A) *In General.* In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under West Virginia Rule of Evidence 702, 703, or 705.

(B) *Witnesses Who Must Provide a Written Report.* Unless otherwise stipulated or ordered by the court, this disclosure must be

accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the facts or data considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous four years;

(v) a list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

(C) *Witnesses Who Do Not Provide a Written Report.* Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:

(i) the subject matter on which the witness is expected to present evidence under West Virginia Rule of Evidence 702, 703, or 705; and

(ii) a summary of the facts and opinions to which the witness is expected to testify.

(D) ***Time to Disclose Expert Testimony.*** A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

(i) At least 90 days before the date set for trial or for the case to be ready for trial; or,

(ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.

(E) ***Supplementing the Disclosure.*** The parties must supplement these disclosures when required under Rule 26(e).

(3) ***Pretrial Disclosures.***

(A) ***In General.*** In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:

(i) the name and, if not previously provided, the address and telephone number of each witness—separately identifying those the party expects to present and those it may call if the need arises;

(ii) the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and

(iii) an identification of each document or other exhibit, including summaries of other evidence—separately identifying those items the party expects to offer and those it may offer if the need arises.

(B)*Time for Pretrial Disclosures; Objections*. Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(A)(ii); and any objection, together with the grounds for it, that may be made to admissibility of materials identified under Rule 26(a)(3)(A)(iii). An objection not so made—except for one under West Virginia Rule of Evidence 402 or 403—is waived unless excused by the court for good cause.

(4) *Form of Disclosures.* Unless the court orders otherwise, all disclosures under Rule 26(a) must be in writing, signed, and served.

(b) Discovery Methods, Scope, and Limits.

(1) *Scope in General*. Unless otherwise limited by court order issued pursuant to Rule 26(b)(3)(A), the scope of discovery is as follows: Parties

may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter. Information within this scope of discovery need not be admissible in evidence to be discoverable.

(2) *Limitations on Frequency and Extent.*

(A) *When Permitted.* By order, the court may alter the limits in these rules on the number of depositions, interrogatories, requests for production, requests for admissions or on the length of depositions under Rule 30.

(B) *Specific Limitations on Electronically Stored Information.* A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(3)(C). The court may specify conditions for the discovery.

(C) *When Required.* On motion or on its own, the court must limit the frequency, scope or extent of discovery otherwise allowed by these rules if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(iii) the burden or expense of the proposed discovery outweighs its likely benefits, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues in the case.

(3) *Trial Preparation: Materials.*

(A) *Documents and Tangible Things*. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(2); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(A) *Protection Against Disclosure*. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

(B) *Previous Statement*. Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either:

(i) a written statement that the person has signed or otherwise adopted or approved; or

(ii) a contemporaneous stenographic, mechanical, electrical, or other recording—or a transcription of it—that recites substantially verbatim the person's oral statement.

(4) *Trial Preparation: Experts.*

(A) *Deposition of an Expert Who May Testify*. A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

(B) *Trial-Preparation Protection for Draft Reports or Disclosures*. Rules 26(b)(4)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(1), regardless of the form in which the draft is recorded.

(C) *Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses.* Rules 26(b)(4)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2), regardless of the form of the communications, except to the extent that the communications:

(i) relate to compensation for the expert's study or testimony;

(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(D) *Expert Employed Only for Trial Preparation.* Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

(i) as provided in Rule 35(b); or

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(E) *Payment.* Unless manifest injustice would result, the court must require that the party seeking discovery:

(i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(5)(A) or (D); and

(ii) for discovery under (D), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

(5) *Claiming Privilege or Protecting Trial-Preparation Materials.*

(A) *Information Withheld.* When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

(i) expressly make the claim; and

(ii) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(B) *Information Produced.* If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

(c) Protective Orders.

(1) *In General.* A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(A) forbidding the disclosure or discovery;

(B) specifying terms, including time and place, for the disclosure or discovery;

(C) prescribing a discovery method other than the one selected by the party seeking discovery;

(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

(E) designating the persons who may be present while the discovery is conducted;

(F) requiring that a deposition be sealed and opened only on

court order;

(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and

(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

(2) *Ordering Discovery.* If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery.

(3) *Awarding Expenses.* Rule 37(a)(5) applies to the award of expenses.

(d) Timing and Sequence of Discovery.

(1) *Timing.* A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order.

(2) Early Rule 34 Requests.

(A) Time to Deliver. More than 21 days after the summons and complaint are served on a party, a request under Rule 34 may be delivered:

(i) to that party by any other party, and

(ii) by that party to any plaintiff or to any other party that has been served.

(B) When Considered Served. The request is considered to have been served at the first Rule 26(f) conference.

(3) *Sequence.* Unless the parties stipulate or the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

(A) methods of discovery may be used in any sequence; and

(B) discovery by one party does not require any other party to delay its discovery.

(e) Supplementing Disclosures and Responses.

(1) *In General.* A party who has made a disclosure under Rule 26(a) — or who has responded to an interrogatory, request for production, or request for admission—must supplement or correct its disclosure or response:

(A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or

(B) as ordered by the court.

(2) *Expert Witness.* For an expert whose report must be disclosed under Rule 26(a)(2), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed at least 30 days before trial.

(f) Conference of the Parties; Planning for Discovery.

(1) *Conference Timing.* Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or when the court orders otherwise, the parties must confer as soon as practicable—and in any event at least 30 days after filing of a responsive pleading or motion under Rule 12.

(2) *Conference Content; Parties' Responsibilities.* In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person.

(3) *Discovery Plan.* A discovery plan must state the parties' views and proposals on:

(A) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made;

(B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;

(C) any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced;

(D) any issues about claims of privilege or of protection as trial-preparation materials, including—if the parties agree on a procedure to assert these claims after production—whether to ask the court to include their agreement in an order under West Virginia Rule of Evidence 502;

(E) what changes should be made in the limitations on discovery imposed under these rules, and what other limitations should be imposed; and

(F) any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).

(g) Signing Disclosures and Discovery Requests, Responses, and Objections.

(1) *Signature Required; Effect of Signature.* Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name—or by the party personally, if unrepresented—and must state the signer's address, e-mail address, and telephone number. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

(A) with respect to a disclosure, it is complete and correct as of the time it is made; and

(B) with respect to a discovery request, response, or objection, it is:

(i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

(ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of

litigation; and

(iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

(C) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

(2) *Failure to Sign.* Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.

(3) *Sanction for Improper Certification.* If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.

COMMITTEE COMMENT ON RULE 26

Rule 26 is changed to be substantially consistent with the corresponding federal rule of civil procedure. Substantive changes:

- Motions for parties are filed at court of origin.
- The addition of a duty to disclose expert information.
- The addition of provisions having to do with the discovery of electronically-stored information.
- The prohibition of depositions of an expert until the expert's 26(a)(1) disclosure has been made.
- The addition of protections against the discovery of certain preliminary expert work and expert-lawyer communications.
- The addition of a claw-back provision for information protected by privilege or of protection as trial-preparation material.
- Section(b)(3)(C)(iii) includes proportionality as a basis of opposing discovery.

While the revised rule is largely consistent with the corresponding federal rule, some provisions of the federal rule were not incorporated as noted below.

The rule adopts the mandatory disclosure requirements in Rule 26(a)(1). The disclosures are identical to the FRCP counterpart. Rule 26(a)(1)(B) is unique to West Virginia practice by designating those actions that are exempt from the requirements of mandatory disclosure. Not only are certain actions exempted from the requirements of mandatory disclosure, but also those actions where the amount in controversy is less than $25,000.

The rule adopts the FRCP requirements for expert disclosure under Rule 26(a)(2), including adopting the requirements for preparation of expert reports for most witnesses, subject to the limitations contained in Rule 26(a)(2)(C). Discovery regarding experts adopts the federal standards of requiring expert reports and depositions of disclosed experts under rule 26(b)(5).

Rule 26(b)(3)(B) is designed to address issues raised by difficulties in locating, retrieving, and providing discovery of some electronically stored information.
The rule adopts the FRCP requirements for pretrial disclosures under rule 26(a)(3).

The scope of discovery under 26(b) is slightly different than the federal counterpart. The revised rule removes the reference to "likely to lead to the discovery of admissible evidence" and replaces it with a more specific provision that makes clear that information need not be admissible to be discoverable. The provision regarding "likely to lead to the discovery of admissible evidence" was widely misconstrued to expand the scope of discovery. This revision follows the federal counterpart by removing this confusing language and replacing it with a simpler statement regarding the relationship between admissibility and discoverability. The revised rule does not include the proportionality provision added to FRCP 26 in December 2015. Instead, the revised rule expands on the existing opportunity for a proportionality analysis by the court under rule 26(b)(3)(C).

The rule adopts the FRCP provisions regarding trial preparation materials under Rule 26(b)(4).

The rule adopts the requirements of a pre-discovery planning conference under rule 26(f), along with a report of counsel regarding that meeting. The revised rule is designed to require a case-specific analysis by counsel of the needed discovery, motion practice and schedule. It is anticipated that an objective analysis of the work needed to prepare the case for trial or resolution will be developed in the report of the rule 26(f) meeting of counsel. Unlike the federal rule, this provision of Rule 26(f) requires counsel for the parties to initiate the planning conference, rather than to wait on an order from the court.

The Committee notes that while there is no mandatory sequence of discovery that a party may engage in pursuant to Rule 26, 27, 30, 31, 33, 34 or 36, such

methods of discovery should not be combined into a single discovery document to another party.

~~Rule 27. Depositions before action or pending appeal.~~ ***Rule 27. Depositions to Perpetuate Testimony.***

(a) Before an ~~a~~Action is Filed. –

(1) *Petition.* – A person who ~~desires~~ wants to perpetuate ~~his own~~ testimony ~~or that of another person regarding any matter~~ about any matter cognizable in a West Virginia court may file a verified petition in ~~any court wherein a complaint might be filed as to such matter or in any court having general civil jurisdiction in the county~~ in the circuit court for the circuit where any expected adverse party resides. The petition must ask for an order authorizing the petitioner to depose the named persons in order to perpetuate their testimony. The petition ~~shall~~ must be ~~en~~titled in the petitioner's name ~~of the petitioner~~ and ~~shall~~ must show: ~~1, That the petitioner expects that the petitioner, or the petitioner's personal representative, distributees, heirs, legatees, or devisees will be a party to an action cognizable in any court but is presently unable to bring it or cause it to be brought, 2, the subject matter of the expected action and the petitioner's interest therein, 3, the facts which the petitioner desires to establish by the proposed testimony and the reasons for desiring to perpetuate it, 4, the names or a description of the persons the petitioner expects will be adverse parties and their addresses so far as known, and 5, the names and addresses of the persons to be examined and the substance of the testimony which the petitioner expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.~~

(A) that the petitioner expects to be a party to an action cognizable in a West Virginia court but cannot presently bring it or cause it to be brought;

(B) the subject matter of the expected action and the petitioner's interest;

(C) the facts that the petitioner wants to establish by the proposed testimony and the reasons to perpetuate it;

(D) the names or a description of the persons whom the petitioner expects to be adverse parties and their addresses, so far as known; and

(E) the name, address, and expected substance of the testimony of each deponent.

(2) *Notice and Service.* ~~– The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. At least 20 days before the date of hearing the notice shall be served in the manner provided in Rule 4 for service of process; but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served in the manner provided in Rule 4(d), an attorney who shall represent them, and, in case they are not otherwise represented, shall cross-examine the deponent.~~ At least 21 days before the hearing date, or such other time as agreed by the parties or ordered by the court, the petitioner must serve in the manner provided in Rule 4 for service of process each expected adverse party with a copy of the petition and a notice stating the time and place of the hearing. If that service cannot be made with reasonable diligence on an expected adverse party, the court may order service by publication or otherwise. The court must appoint an attorney to represent persons not served in the manner provided in Rule 4 and to cross-examine the deponent if an unserved person is not otherwise represented. If any expected adverse party is a minor~~, incompetent, or convict~~ or is incompetent, ~~the provisions of~~ Rule 17(c) appl~~y~~ies.

(3) *Order and Examination.* ~~– If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories.~~ If satisfied that perpetuating the testimony may prevent a failure or delay of justice, the court must issue an order that designates or describes the persons whose depositions may be taken, specifies the subject matter of the examinations, and states whether the depositions will be taken orally or by written interrogatories. The depositions may then be taken ~~in accordance with~~ under these rules~~;~~, and the court may ~~make~~ issue orders ~~of the character provided for~~ like those authorized by Rules 34 and 35. ~~For the purpose of applying these rules to depositions for perpetuating testimony, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such deposition was filed.~~ A reference in these rules to the court where an action is pending means, for purposes of this rule, the court where the petition for the deposition was filed.

(4) ~~*Use of*~~ *Using the Deposition.* **–** If a deposition to perpetuate testimony is taken under these rules, or if, although not so taken, it would be admissible in a ~~circuit~~ federal district court, it may be used in any action

involving the same subject matter subsequently brought in any court of this State, in accordance with the provisions of Rule 32(a).

(b) Pending Appeal. ~~If an appeal has been granted from a judgment of any court or before the granting of an appeal if the time for filing a petition for an appeal has not expired, the court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in such court. In such case the party who desires to perpetuate the testimony may make a motion for leave to take the depositions, upon the same notice and service thereof as if the action were pending. The motion shall show (1) the names and addresses of persons to be examined and the substance of the testimony which the party expects to elicit from each; (2) the reasons for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken and may make orders of the character provided for by Rules 34 and 35, and thereupon the depositions may be taken and used in further proceedings in the action in the same manner and under the same conditions as are prescribed in these rules for depositions taken in actions pending in the court.~~

(1) *In General.* The court where a judgment has been rendered may, if an appeal has been taken or may still be taken, permit a party to depose witnesses to perpetuate their testimony for use in the event of further proceedings in that court.

(2) *Motion.* The party who wants to perpetuate testimony may move for leave to take the depositions, on the same notice and service as if the action were pending. The motion must show:

(A) the name, address, and expected substance of the testimony of each deponent; and

(B) the reasons for perpetuating the testimony.

(3) *Court Order.* If the court finds that perpetuating the testimony may prevent a failure or delay of justice, the court may permit the depositions to be taken and may issue orders like those authorized by Rules 34 and 35. The depositions may be taken and used as any other deposition taken in a pending action.

(c) Perpetuation by Action. This rule does not limit ~~the~~ a court's power ~~of a court~~ to entertain an action to perpetuate testimony.

COMMITTEE COMMENT ON RULE 27

Rule 27 is changed to be consistent with the corresponding federal rule of civil procedure, including two substantive changes.

The cross-reference to former Rule 4(d) is corrected to incorporate all Rule 4 methods of service as former Rule 4(d) has been allocated to more than one subdivision of Rule 4.

The time period in section (a)(2) has been changed from 20 days to 21 days to be uniform with the corresponding federal rule.

The remaining proposed changes are to the style and organization of the rule. These changes make the rule consistent with the corresponding federal rule of civil procedure.

~~Rule 28. Persons before whom depositions may be taken~~ ***Rule 28. Persons Before Whom Depositions May Be Taken.***

(a) Within the United States. –

(1) ***In General.*** Within the United States or ~~within~~ a territory or insular possession subject to ~~the dominion of the~~ United States jurisdiction, a depositions ~~shall~~ must be taken before:

(A) an officer authorized to administer oaths either by ~~the laws of the United States~~ federal law or ~~by the law~~ of this State or ~~of~~ by the law in the place ~~where the~~ of examination ~~is held,~~; or

(B) ~~before~~ a person appointed by the court ~~in which~~ where the action is pending ~~A person so appointed has power~~ to administer oaths and take testimony.

(2) ***Definition of "Officer".*** The term "officer" ~~as used~~ in Rules 30, 31, and 32 includes a person appointed by the court under this rule or designated by the parties under Rule 29(a).

~~(b) In foreign countries.~~ ~~Depositions may be taken in a foreign country (1) pursuant to any applicable treaty or convention, or (2) pursuant to a letter of request (whether or not captioned a letter rogatory), or (3) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States or of this State, or (4) before a person commissioned by the court, and a person so commissioned shall have the power by virtue of the commission to administer any necessary oath and take testimony. A commission or a letter of request shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter of request that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter of request may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter of request may be addressed "To the Appropriate Authority in [here name the country]." When a letter of request or any other device is used pursuant to any applicable treaty or convention, it shall be captioned in the form prescribed by that treaty or convention. Evidence obtained in response to a letter of request need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the State under these rules.~~

(b) In a Foreign Country.

(1) ***In General.*** A deposition may be taken in a foreign country:

(A) under an applicable treaty or convention;

(B) under a letter of request, whether or not captioned a "letter rogatory";

(C) on notice, before a person authorized to administer oaths either by federal law or by the law of this State or by the law in the place of examination; or

(D) before a person commissioned by the court to administer any necessary oath and take testimony.

(2) ***Issuing a Letter of Request or a Commission.*** A letter of request, a commission, or both may be issued:

(A) on appropriate terms after an application and notice of it; and

(B) without a showing that taking the deposition in another manner is impracticable or inconvenient.

(3) ***Form of a Request, Notice, or Commission.*** When a letter of request or any other device is used according to a treaty or convention, it must be captioned in the form prescribed by that treaty or convention. A letter of request may be addressed "To the Appropriate Authority in [name of country]." A deposition notice or a commission must designate by name or descriptive title the person before whom the deposition is to be taken.

(4) ***Letter of Request—Admitting Evidence.*** Evidence obtained in response to a letter of request need not be excluded merely because it is not a verbatim transcript, because the testimony was not taken under oath, or because of any similar departure from the requirements for depositions taken within the United States.

(c) Disqualification ~~for interest.~~ ~~—No~~ A deposition ~~shall~~ must not be taken before a person who is ~~a~~ any party's relative, ~~or~~ employee, or attorney; ~~or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or~~ who is related to or employed by any party's attorney; or who is financially interested in the action.

~~**(d) Depositions for use in foreign jurisdictions.** – Whenever the deposition of any person is to be taken in this State pursuant to the laws of another state or of the United States or of another country for use in proceedings there, any~~

~~court having general civil jurisdiction in the county wherein the deponent resides or is employed or transacts his business in person may, upon petition, make an order directing issuance of a subpoena as provided in Rule 45, in aid of the taking of the deposition.~~

COMMITTEE COMMENT ON RULE 28

Rule 28 is changed to be consistent with the corresponding federal rule of civil procedure.

Rule 28(c), is consistent with precedent requiring an independent person authorized by law or appointed by the court to administer the oath to the deponent. *State ex rel Bennett v. Keadle*, 334 S.E.2d 643 (1985).

Rule 28(d), governing depositions for use in foreign jurisdictions, is deleted. Proposed Rule 45.01, incorporating the Uniform Interstate Depositions and Discovery Act, takes its place.

~~Rule 29. Stipulations regarding discovery procedure.~~ ***Rule 29. Stipulations About Discovery Procedure.***

~~(a) Deposition procedure.~~ ~~—~~Unless the court orders otherwise, the parties may ~~agree~~ stipulate that:

(a) a deposition~~s~~ may be taken before any person, at any time or place, ~~up~~on any notice, and in any manner ~~and when so taken may be used like other depositions.~~ specified—in which event it may be used in the same way as any other deposition; and

~~(b) Modification of scheduling order and discovery procedures or limitations. –~~ ~~Unless the Court orders otherwise, a scheduling order may be modified only as follows:~~

> **~~(1)~~** ~~Time limits set forth in a scheduling order for the joinder of other parties, amendment of pleadings, filing of motions, and completion of discovery, and any date or dates set forth therein for conferences before trial, a final pretrial conference, and for trial may be modified for cause by order of the court.~~
>
> **~~(2)~~** ~~Subject to paragraph (3), stipulations to modify discovery procedures or limitations will be valid and will be enforced as if established by order of the court, provided the stipulations are in writing, signed by the parties making them or their counsel, timely filed with the clerk of the court, and do not affect the time limits specified in subparagraph (1).~~
>
> **~~(3)~~** ~~A private agreement to extend discovery beyond the discovery completion date as set in a scheduling order will be respected by the court if the extension does not affect the other time limits specified in subparagraph (1). A discovery dispute which arises from such a private agreement to extend discovery beyond a discovery completion date need not, however, be resolved by the court.~~

(b) other procedures governing or limiting discovery be modified—but a stipulation extending the time for any form of discovery must have court approval if it would interfere with the time set for completing discovery, for hearing a motion, or for trial.

COMMITTEE COMMENT ON RULE 29

Rule 29 is changed to be consistent with the corresponding federal rule of civil procedure. The changes simplify the circumstances under which a stipulation must have court approval. The rule also eliminates the prior provision indicating that the court will not necessarily resolve all disputes arising from certain stipulations.

Rule 30. Depositions upon oral examination.

(a) When depositions may be taken; when leave required. – After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service made under Rule 4(e), except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) if special notice is given as provided in subdivision (b)(2) of this rule. The attendance of witnesses may be compelled by subpoena as provided in Rule 45. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

(b) Notice of examination: general requirements; special notice; method of recording; production of documents and things; deposition of organization; deposition by telephone.

(1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

(2) Leave of court is not required for the taking of a deposition by plaintiff if the notice (A) states that the person to be examined is expected to leave the State and be unavailable for examination in this State unless deposed before expiration of the 30 day period, and (B) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and the attorney's signature constitutes a certification by the attorney that to the best of the attorney's knowledge, information, and belief the statement and supporting facts are true. The sanctions provided by Rule 11 are applicable to the certification.

If a party shows that when the party was served with notice under this subdivision (b)(2) the party was unable through the exercise of diligence to obtain counsel to represent the party at the taking of the deposition, the deposition may not be used against the party.

(3) The party taking the deposition shall state in the notice the method by which the testimony shall be recorded. Unless the court orders

otherwise, it may be recorded by sound, sound-and-visual, or stenographic means, and the party taking the deposition shall bear the cost of the recording. Any party may arrange for a transcription to be made from the recording of a deposition taken by nonstenographic means.

(4) With prior notice to the deponent and other parties, any party may designate another method to record the deponent's testimony in addition to the method specified by the person taking the deposition. The additional record or transcript shall be made at that party's expense unless the court otherwise orders.

(5) Unless otherwise agreed by the parties, a deposition shall be conducted before an officer appointed or designated under Rule 28 and shall begin with a statement on the record by the officer that includes (A) the officer's name and business address; (B) the date, time, and place of the deposition; (C) the name of the deponent; (D) the administration of the oath or affirmation to the deponent; and (E) an identification of all persons present. If the deposition is recorded other than stenographically, the officer shall repeat items (A) through (C) at the beginning to each unit of recorded tape or other recording medium. The appearance or demeanor of the deponents or attorneys shall not be distorted through camera or sound recording techniques. At the end of the deposition, the officer shall state on the record that the deposition is complete and shall set forth any stipulations made by counsel concerning the custody of the transcript or recording and the exhibits, or concerning other pertinent matters.

(6) The notice to a party deponent may be accompanied by a request made in compliance with Rule 34 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 34 shall apply to the request.

(7) A party may in a notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a non party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision does not preclude taking a deposition by any other procedure authorized in these rules.

(8) The parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone or other remote electronic

means. For the purposes of this rule and Rules 28(a), 37(a)(1), 37(b)(1) and 45(d), a deposition taken by telephone is taken in the state and at the place where the deponent is to answer questions propounded to the deponent.

(c) Examination and cross-examination; record of examination; oath; objections. – Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the West Virginia Rules of Evidence. The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under the officer's direction and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other means ordered in accordance with subdivision (b)(3) of this rule.

(d) Schedule and duration; motion to terminate or limit examination.

(1) Any objection to evidence during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. A party may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion under paragraph (3).

(2) By order or local rule, the court may limit the time permitted for the conduct of a deposition, but shall allow additional time consistent with Rule 26(b)(1) if needed for a fair examination of the deponent or if the deponent to another party impedes or delays the examination. If the court finds such an impediment, delay, or other conduct that has frustrated the fair examination of the deponent, it may impose upon the persons responsible an appropriate sanction, including the reasonable costs and attorney's fees incurred by any parties as a result thereof.

(3) At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the circuit court of the county where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(e) Review by witness; changes; signing. If requested by the deponent or a

party before completion of the deposition, the deponent shall have 30 days after being notified by the officer that the transcript or recording is available in which to review the transcript or recording and, if there are changes in form or substance, to sign a statement reciting such changes and the reasons given by the deponent for making them. The officer shall indicate in the certificate prescribed by subdivision (f)(1) whether any review was requested and, if so, shall append any changes made by the deponent during the period allowed.

(f) Certification and filing by officer; exhibits; copies; notice of filing.

(1) The officer shall certify that the witness was duly sworn by the officer and that the deposition is a true record of the testimony given by the witness. This certificate shall be in writing and accompany the record of the deposition. Unless otherwise ordered by the court, the officer shall securely seal the deposition in an envelope or package endorsed with the title of the action and marked "Deposition of [here insert name of witness]" and shall promptly file it with the court in which the action is pending or send it to the attorney who arranged for the transcript or recording, who shall store it under conditions that will protect it against loss, destruction, tampering, or deterioration.

Documents and things produced for inspection during the examination of the witness shall, upon the request of a party, be marked for identification and annexed to the deposition and may be inspected and copied by any party, except that if the person producing the materials desires to retain them that person may:

(A) Offer copies to be marked for identification and annexed to the depositions and to serve thereafter as originals if the person affords to all parties fair opportunity to verify the copies by comparison with the originals, or,

(B) Offer the originals to be marked for identification, after giving to each party an opportunity to inspect and copy them, in which event the materials may then be used in the same manner as if annexed to the deposition.

Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

(2) Unless ordered otherwise by the court or agreed by the parties, the officer shall retain stenographic notes of any deposition taken stenographically or a copy of the recording of any deposition taken by another method. Upon payment of reasonable charges therefor, the officer

~~shall furnish a copy of the deposition to any party or to the deponent.~~

~~**(3)** The party taking the deposition shall give prompt notice of its filing to all other parties.~~

~~**(g) Failure to attend or to serve subpoena; expenses.**~~

~~**(1)** If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by that party and that party's attorney in attending, including reasonable attorney's fees.~~

~~**(2)** If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon the witness and the witness because of such failure does not attend, and if another party attends in person or by attorney because the party expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by that party and that party attorney in attending, including reasonable attorney's fees.~~

Rule 30. Depositions by Oral Examination.

(a) When a Deposition May Be Taken.

(1) Without Leave. A party may, by oral questions, depose any person, including a party, without leave of court except as provided in Rule 30(a)(2). The deponent's attendance may be compelled by subpoena under Rule 45.

(2) With Leave. Taking a deposition before the time specified under Rule 26(d), or taking a deposition of an incarcerated person, requires leave of court.

(b) Notice of the Deposition; Other Formal Requirements.

(1) Notice in General. A party who wants to depose a person by oral questions must give reasonable written notice to every other party. The notice must state the time and place of the deposition and, if known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs.

(2) Producing Documents. If a subpoena duces tecum is to be served on the deponent, the materials designated for production, as set out in the

subpoena, must be listed in the notice or in an attachment. The notice to a party deponent may be accompanied by a request under Rule 34 to produce documents and tangible things at the deposition.

(3) Method of Recording.

(A) Method Stated in the Notice. The party who notices the deposition must state in the notice the method for recording the testimony. Unless the court orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means. The noticing party bears the recording costs. Any party may arrange to transcribe a deposition.

(B) Additional Method. With prior notice to the deponent and other parties, any party may designate another method for recording the testimony in addition to that specified in the original notice. That party bears the expense of the additional record or transcript unless the court orders otherwise.

(4) By Remote Means. Any deposition may be taken by telephone, videoconference, or other remote means. For the purpose of this rule and Rules 28(a), 37(a)(2), and 37(b)(1), the deposition takes place where the deponent answers the questions. The party taking a deposition by remote means is responsible for assuring that the witness has the appropriate technology to participate. If the witness is a non-party, the party taking the deposition bears the cost of providing the appropriate technology.

(5) Officer's Duties.

(A) (A) Before the Deposition. Unless the parties stipulate otherwise, a deposition must be conducted before an officer appointed or designated under Rule 28. The officer must begin the deposition with an on-the-record statement that includes:

(i) the officer's name and business address;

(ii) the date, time, and place of the deposition;

(iii) the deponent's name;

(iv) the officer's administration of the oath or affirmation to the deponent; and

(v) the identity of all persons present.

(B) Conducting the Deposition; Avoiding Distortion. If the

deposition is recorded non-stenographically, the officer must repeat the items in Rule 30(b)(5)(A)(i)-(iii) at the beginning of each unit of the recording medium. The deponent's and attorneys' appearance or demeanor must not be distorted through recording techniques.

(C) After the Deposition. At the end of a deposition, the officer must state on the record that the deposition is complete and must set out any stipulations made by the attorneys about custody of the transcript or recording and of the exhibits, or about any other pertinent matters.

(6) Notice or Subpoena Directed to an Organization. In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. Before or promptly after the notice or subpoena is served, the serving party and the organization must confer in good faith about the matters for examination. A subpoena must advise a nonparty organization of its duty to make this designation and to confer with the serving party. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

(c) Examination and Cross-Examination; Record of the Examination; Objections; Written Questions.

(1) Examination and Cross-Examination. The examination and cross-examination of a deponent proceed as they would at trial under the West Virginia Rules of Evidence, except Rules 103 and 615. After putting the deponent under oath or affirmation, the officer must record the testimony by the method designated under Rule 30(b)(3)(A). The testimony must be recorded by the officer personally or by a person acting in the presence and under the direction of the officer.

(2) Objections. An objection at the time of the examination—whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition—must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection. An objection must be stated concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under

Rule 30(d)(3).

(3) Participating Through Written Questions. Instead of participating in the oral examination, a party may serve written questions in a sealed envelope on the party noticing the deposition, who must deliver them to the officer. The officer must ask the deponent those questions and record the answers verbatim.

(d) Duration; Sanction; Motion to Terminate or Limit.

(1) Duration. Unless otherwise stipulated or ordered by the court, a deposition is limited to 1 day of 7 hours. The court must allow additional time consistent with Rule 26(b)(2) if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination.

(2) Sanction. The court may impose an appropriate sanction—including the reasonable expenses and attorney's fees incurred by any party—on a person who impedes, delays, or frustrates the fair examination of the deponent.

(3) Motion to Terminate or Limit.

(A) Grounds. At any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party. The motion may be filed in the court where the action is pending or the deposition is being taken. If the objecting deponent or party so demands, the deposition must be suspended for the time necessary to obtain an order.

(B) Order. The court may order that the deposition be terminated or may limit its scope and manner as provided in Rule 26(c). If terminated, the deposition may be resumed only by order of the court where the action is pending.

(C) Award of Expenses. Rule 37(a)(5) applies to the award of expenses.

(e) Review by the Witness; Changes.

(1) Review; Statement of Changes. On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:

(A) to review the transcript or recording; and

(B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

(2) Changes Indicated in the Officer's Certificate. The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.

(f) Certification and Delivery; Exhibits; Copies of the Transcript or Recording; Filing.

(1) Certification and Delivery. The officer must certify in writing that the witness was duly sworn and that the deposition accurately records the witness's testimony. The certificate must accompany the record of the deposition. Unless the court orders otherwise, the officer must seal the deposition in an envelope or package bearing the title of the action and marked "Deposition of [witness's name]" and must promptly send it to the attorney who arranged for the transcript or recording. The attorney must store it under conditions that will protect it against loss, destruction, tampering, or deterioration.

(2) Documents and Tangible Things.

(A) Originals and Copies. Documents and tangible things produced for inspection during a deposition must, on a party's request, be marked for identification and attached to the deposition. Any party may inspect and copy them. But if the person who produced them wants to keep the originals, the person may:

(i) offer copies to be marked, attached to the deposition, and then used as originals—after giving all parties a fair opportunity to verify the copies by comparing them with the originals; or

(ii) give all parties a fair opportunity to inspect and copy the originals after they are marked—in which event the originals may be used as if attached to the deposition.

(B) Order Regarding the Originals. Any party may move for an order that the originals be attached to the deposition pending final disposition of the case.

(3) Copies of the Transcript or Recording. Unless otherwise stipulated or ordered by the court, the officer must retain the stenographic notes of a

deposition taken stenographically or a copy of the recording of a deposition taken by another method. When paid reasonable charges, the officer must furnish a copy of the transcript or recording to any party or the deponent.

(4) Notice of Filing. A party who files the deposition must promptly notify all other parties of the filing.

(g) Failure to Attend a Deposition or Serve a Subpoena; Expenses. A party who, expecting a deposition to be taken, attends in person or by an attorney may recover reasonable expenses for attending, including attorney's fees, if the noticing party failed to:

(1) attend and proceed with the deposition; or

(2) serve a subpoena on a nonparty deponent, who consequently did not attend.

COMMITTEE COMMENT ON RULE 30

Rule 30 is changed to be consistent with the corresponding federal rule of civil procedure.

The revised rule rewords 30(a), modifying and simplifying the articulation of the circumstances for obtaining court permission to take a deposition.

Rule 30(b)(1) adds the requirement that a notice of deposition specify whether the deposition is to be taken by telephone, videoconference, or other remote means as permitted under Rule 30(b)(4) and provide information allowing the parties to appear and participate.

Rule 30(b)(3) is consistent with precedent allowing other methods of recording the deponents. Absent agreement of the parties, an independent person authorized under Rule 23(a) must issue the oath to the witness. *State ex rel Bennett v. Keadle*, 334 S.E.2d 643 (1985).

Rule 30(b)(4) allows any deposition to be taken by telephone, videoconference, or other remote means. The intent of the revision is that remote depositions proceed by notice, subject to discovery rules, and does not adopt the language from the corresponding federal rule 30(b) that "[t]he parties may stipulate — or the court may on motion order" to allow remote depositions to be taken upon adequate notice. The Rule further places on the party taking a deposition by remote means the responsibility to provide the witness with the technology necessary to participate and if the witness is a non-party to bear the cost.

Rule 30(b)(7) is eliminated to make the rule consistent with the corresponding federal rule 30(b)(6). And Rule 30(b)(6) adopts the language of federal rule

30(b)(6), including the 2020 amendment requiring that "[b]efore or promptly after the notice or subpoena is served, and continuing as necessary, the serving party and the organization must confer in good faith about the matters for examination."

The Rule does not include the limitation of ten depositions in the corresponding federal rule 30(a)(2)(A)(i), leaving the number of depositions to the parties, subject to motion under Rule 26(b)(3)(C).

The rule adopts the time limitation of one day of seven hours in the corresponding federal rule 30(d)(1). The time limitation of seven hours is intended to be exclusive of breaks.

Rule 31. Depositions upon written questions.

(a) Serving questions; notice. —

(1) A party may take the testimony of any person, including a party, by deposition upon written questions without leave of court except as provided in paragraph (2). The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45.

(2) A party must obtain leave of court if the person to be examined is confined in prison or if, without the agreement or written stipulation of the parties, the person to be examined has already been deposed in the case under Rule 30.

(3) A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating (1) the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs, and (2) the name or descriptive title and address of the officer before whom the deposition is to be taken. A deposition upon written questions may be taken of a public or private corporation or a partnership or association or governmental agency in accordance with the provisions of Rule 30(b)(6).

(4) Within 14 days after the notice and written questions are served, a party may serve cross questions upon all other parties. Within 7 days after being served with cross questions, a party may serve redirect questions upon all other parties. Within 7 days after being served with redirect questions, a party may serve recross questions upon all other parties. The court may for cause shown enlarge or shorten the time.

(b) Officer to take responses and prepare record. — A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Rule 30(c), (e), and (f), to take the testimony of the witness in response to the questions and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the questions received by the officer.

(c) Notice of filing. – When the deposition is filed the party taking it shall promptly give notice thereof to all other parties.

Rule 31. Depositions by Written Questions.

(a) When a Deposition May Be Taken.

(1) *Without Leave.* A party may, by written questions, depose any person, including a party, without leave of court except as provided in Rule 31(a)(2). The deponent's attendance may be compelled by subpoena under Rule 45.

(2) *With Leave.* A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(2) if the deponent is confined in prison.

(3) *Service; Required Notice.* A party who wants to depose a person by written questions must serve them on every other party, with a notice stating, if known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs. The notice must also state the name or descriptive title and the address of the officer before whom the deposition will be taken.

(4) *Questions Directed to an Organization.* A public or private corporation, a partnership, an association, or a governmental agency may be deposed by written questions in accordance with Rule 30(b)(6).

(5) *Questions from Other Parties.* Any questions to the deponent from other parties must be served on all parties as follows: cross-questions, within 14 days after being served with the notice and direct questions; redirect questions, within 7 days after being served with cross-questions; and recross-questions, within 7 days after being served with redirect questions. The court may, for good cause, extend or shorten these times.

(b) Delivery to the Officer; Officer's Duties. The party who noticed the deposition must deliver to the officer a copy of all the questions served and of the notice. The officer must promptly proceed in the manner provided in Rule 30(c), (e), and (f) to:

(1) take the deponent's testimony in response to the questions;

(2) prepare and certify the deposition; and

(3) send it to the party, attaching a copy of the questions and of the notice.

(b) Notice of Completion or Filing.

(1) *Completion.* The party who noticed the deposition must notify all other parties when it is completed.

(2) *Filing.* A party who files the deposition must promptly notify all other parties of the filing.

COMMITTEE COMMENT ON RULE 31

Rule 31 is changed to be consistent with the corresponding federal rule of civil procedure.

Under the revised rule, the party who notices a deposition on written questions must notify all other parties when the deposition is completed, so that they may make use of the deposition. A deposition is completed when it is recorded and the deponent has either waived or exercised the right of review under Rule 30(e)(1).

Rule 31(a)(4) makes it clear that a public or private corporation, a partnership, an association, or a governmental agency may be deposed by written questions in accordance with Rule 30(b)(6).

Rule 32. Use of depositions in court proceedings.

(a) Use of depositions. – At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness, or for any other purpose permitted by the West Virginia Rules of Evidence.

(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds:

(A) that the witness is dead; or

(B) that the witness is out of the state, unless it appears that the absence of the witness was procured by the party offering the deposition; or

(C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or

(D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or

(E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

A deposition shall not be used against a party if the party, having received fewer than 11 days notice of a deposition, has promptly upon receiving such notice filed a motion for a protective order under Rule 26(c)(2) requesting that the deposition not be held or be held at a different time or place and such motion is pending at the time the deposition is held.

(4) If only part of a deposition is offered in evidence by a party, an

adverse party may require the offeror to introduce any other parts which ought in fairness to be considered with the part introduced, and any party may introduce any other parts.

Substitution of parties pursuant to Rule 25 does not affect the right to use depositions previously taken; and, when an action has been brought in any court of the United States or of this State and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor. A deposition previously taken may also be used as permitted by the West Virginia Rules of Evidence.

(b) Objections to admissibility. – Subject to the provisions of Rule 28(b) and subdivision (d)(3) of this rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(c) Form of presentation. – Except as otherwise directed by the court, a party offering deposition testimony pursuant to this rule may offer it in stenographic or nonstenographic form, but, if in nonstenographic form, the party shall also provide the court with a transcript of the portions so offered. On request of any party in a case tried before a jury, deposition testimony offered other than for impeachment purposes shall be presented in nonstenographic form, if available, unless the court for good cause orders otherwise.

(d) Effect of errors and irregularities in depositions.

(1) *As to notice.* – All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(2) *As to disqualification of officer.* – Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(3) *As to taking of deposition.* –

(A) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been

~~obviated or removed if presented at that time.~~

~~**(B)** Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.~~

~~**(C)** Objections to the form of written questions submitted under Rule 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within 5 days after service of the last questions authorized.~~

~~**(4)** *As to completion and return of deposition.* – Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer under Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.~~

Rule 32. Using Depositions in Court Proceedings.

(a) Using Depositions.

(1) *In General.* At a hearing or trial, all or part of a deposition may be used against a party on these conditions:

(A) the party was present or represented at the taking of the deposition or had reasonable notice of it;

(B) it is used to the extent it would be admissible under the West Virginia Rules of Evidence if the deponent were present and testifying; and

(C) the use is allowed by Rule 32(a)(2) through (8).

(1) *Impeachment and Other Uses.* Any party may use a deposition to contradict or impeach the testimony given by the deponent as a witness, or for any other purpose allowed by the West Virginia Rules of Evidence.

(2) *Deposition of Party, Agent, or Designee.* An adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party's officer, director, managing agent, or designee under Rule

30(b)(6) or 31(a)(4).

(3) *Unavailable Witness.* A party may use for any purpose the deposition of a witness, whether or not a party, if the court finds:

(A) that the witness is dead;

(B) that the witness is out of the state, unless it appears that the witness's absence was procured by the party offering the deposition;

(C) that the witness cannot attend or testify because of age, illness, infirmity, or imprisonment;

(D) that the party offering the deposition could not procure the witness's attendance by subpoena; or

(E) on motion and notice, that exceptional circumstances make it desirable—in the interest of justice and with due regard to the importance of live testimony in open court—to permit the deposition to be used.

(5) *Limitations on Use.*

(A) *Deposition Taken on Short Notice.* A deposition must not be used against a party who, having received less than 14 days' notice of the deposition, promptly moved for a protective order under Rule 26(c)(1)(B) requesting that it not be taken or be taken at a different time or place—and this motion was still pending when the deposition was taken.

(B) *Unavailable Deponent; Party Could Not Obtain an Attorney.* A deposition taken without leave of court under the unavailability provision of Rule 30(a)(2)(A)(iii) must not be used against a party who shows that, when served with the notice, it could not, despite diligent efforts, obtain an attorney to represent it at the deposition.

(6) *Using Part of a Deposition.* If a party offers in evidence only part of a deposition, an adverse party may require the offeror to introduce other parts that in fairness should be considered with the part introduced, and any party may itself introduce any other parts.

(7) *Substituting a Party.* Substituting a party under Rule 25 does not affect the right to use a deposition previously taken.

(8) *Deposition Taken in an Earlier Action.* A deposition lawfully taken

and, if required, filed in any federal-or state-court action may be used in a later action involving the same subject matter between the same parties, or their representatives or successors in interest, to the same extent as if taken in the later action. A deposition previously taken may also be used as allowed by the West Virginia Rules of Evidence.

(b) Objections to Admissibility. Subject to Rules 28(b) and 32(d)(3), an objection may be made at a hearing or trial to the admission of any deposition testimony that would be inadmissible if the witness were present and testifying.

(c) Form of Presentation. Unless the court orders otherwise, a party must provide a transcript of any deposition testimony the party offers, but may provide the court with the testimony in nontranscript form as well. On any party's request, deposition testimony offered in a jury trial for any purpose other than impeachment must be presented in nontranscript form, if available, unless the court for good cause orders otherwise.

(d) Waiver of Objections.

(1) *To the Notice.* An objection to an error or irregularity in a deposition notice is waived unless promptly served in writing on the party giving the notice.

(2) *To the Officer's Qualification.* An objection based on disqualification of the officer before whom a deposition is to be taken is waived if not made:

(A) before the deposition begins; or

(B) promptly after the basis for disqualification becomes known or, with reasonable diligence, could have been known.

(3) *To the Taking of the Deposition.*

(A) *Objection to Competence, Relevance, or Materiality.* An objection to a deponent's competence—or to the competence, relevance, or materiality of testimony—is not waived by a failure to make the objection before or during the deposition, unless the ground for it might have been corrected at that time.

(B) *Objection to an Error or Irregularity.* An objection to an error or irregularity at an oral examination is waived if:

(i) it relates to the manner of taking the deposition, the form of a question or answer, the oath or affirmation, a party's conduct, or

other matters that might have been corrected at that time; and

(ii) it is not timely made during the deposition.

(C) *Objection to a Written Question.* An objection to the form of a written question under Rule 31 is waived if not served in writing on the party submitting the question within the time for serving responsive questions or, if the question is a recross-question, within 7 days after being served with it.

(4) *To Completing and Returning the Deposition.* An objection to how the officer transcribed the testimony—or prepared, signed, certified, sealed, endorsed, sent, or otherwise dealt with the deposition—is waived unless a motion to suppress is made promptly after the error or irregularity becomes known or, with reasonable diligence, could have been known.

COMMITTEE COMMENT ON RULE 32

Rule 32 is changed to be consistent with the corresponding federal rule of civil procedure.

The final paragraph of former Rule 32(a) allowed use in a later action of a deposition "lawfully taken and duly filed in the former action." Under Rule 5(d), depositions are not filed. Amended Rule 32(a)(8) reflects this practice by excluding use of an unfiled deposition only if filing was required in the former action.

The times set in the former rule at less than 11 days and within 5 days have been revised to 14 days and 7 days to bring these time period into alignment with the Federal Rules of Civil Procedure.

Rule 33. Interrogatories to parties.

(a) Availability. – Without leave of court or written stipulation, any party may serve upon any other party written interrogatories, not exceeding 40 in number including all discrete subparts, to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Leave to serve additional interrogatories shall be granted to the extent consistent with the principles of Rules 26(b).

Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

(b) Answers and objections. –

(1) Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the objecting party shall state the reasons for objection and shall answer to the extent the interrogatory is not objectionable.

(2) The answers are to be signed by the person making them, and the objections signed by the attorney making them.

(3) The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories, except that a defendant may serve answers or objections within 45 days after the service of the summons and complaint upon that defendant. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties subject to Rule 29.

(4) All grounds for an objection to an interrogatory shall be stated with specificity. Any ground not stated in a timely objection is waived unless the party's failure to object is excused by the court for good cause shown.

(5) The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer an interrogatory.

(c) Scope; use at trial. – Interrogatories may relate to any matters which can be inquired into under Rule 26(b)(1), and the answers may be used to the extent permitted by the rules of evidence.

~~An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pre-trial conference or other later time.~~

~~**(d) Option to produce business records.** – Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, including a compilation, abstract or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.~~

Rule 33. Interrogatories to Parties.

(a) In General.

(1) *Number.* Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts. Leave to serve additional interrogatories may be granted to the extent consistent with Rule 26(b)(1) through

(2) *Scope.* An interrogatory may relate to any matter that may be inquired into under Rule 26(b). An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the court may order that the interrogatory need not be answered until designated discovery is complete, or until a pretrial conference or some other time.

(b) Answers and Objections.

(1) *Responding Party.* The interrogatories must be answered:

(A) by the party to whom they are directed; or

(B) if that party is a public or private corporation, a partnership, an association, or a governmental agency, by any officer or agent, who must furnish the information available to the party.

(2) *Time to Respond.* The responding party must serve its answers and any objections within 30 days after being served with the interrogatories. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

(3) *Answering Each Interrogatory.* Each interrogatory must, to the extent it is not objected to, be answered separately and fully in writing under oath.

(4) *Objections.* The grounds for objecting to an interrogatory must be stated with specificity. Any ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure.

(5) *Signature.* The person who makes the answers must sign them, and the attorney who objects must sign any objections.

(c) Use. An answer to an interrogatory may be used to the extent allowed by the West Virginia Rules of Evidence.

(d) Option to Produce Business Records. If the answer to an interrogatory may be determined by examining, auditing, compiling, abstracting, or summarizing a party's business records (including electronically stored information), and if the burden of deriving or ascertaining the answer will be substantially the same for either party, the responding party may answer by:

(1) specifying the records that must be reviewed, in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could; and

(2) giving the interrogating party a reasonable opportunity to examine and audit the records and to make copies, compilations, abstracts, or summaries.

COMMITTEE COMMENT ON RULE 33

Rule 33 is changed to be consistent with the corresponding federal rule of civil procedure.

The number of interrogatories specified by Rule 30(a) is reduced to 25 because of initial disclosures in Rule 26(a)(1).

The time for answering interrogatories is made a uniform 30 days, consistent with Federal Rule of Civil Procedure 33. (The rule continues to provide that a longer time may be stipulated to under Rule 29 or be ordered by the court.)

The last sentence of former rule 33(a) is eliminated. The timing of initial discovery, including the posing of interrogatories, is now regulated by Rule 26(b)(7).

Rule 33(a)(2) is consistent with existing case law. *Shreve v. Warren Assoc., Inc.*, 355 S.E.2d 389 (W.Va. 1987)(Circuit courts may delay responses to contention interrogatories until discovery is completed).

Rule 33(d) addresses discovery of electronically stored information.

Language allowing interrogatories to be served with the complaint is omitted in light of the mandatory disclosure requirements of Rule 26.

Rule 34. Production of documents and things and entry upon land for inspection and other purposes.

(a) Scope. – Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

(b) Procedure. – The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth, either by individual item or by category, the items to be inspected, and describe each with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties, subject to Rule 29. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.
A party who produces documents for inspections shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

(c) Persons not parties. – A person not a party to the action may be compelled to produce documents and things or to submit to an inspection provided in Rule 45.

Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering Onto Land, for Inspection and Other Purposes.

(a) In General. A party may serve on any other party a request within the scope of Rule 26(b):

(1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control:

(A) any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or

(B) any designated tangible things; or

(2) to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

(b) Procedure.

(1) *Contents of the Request.* The request:

(A) must describe with reasonable particularity each item or category of items to be inspected;

(B) must specify a reasonable time, place, and manner for the inspection and for performing the related acts; and

(C) may specify the form or forms in which electronically stored information is to be produced.

(2) *Responses and Objections.*

(A) *Time to Respond.* The party to whom the request is directed must respond in writing within 30 days after being served of – if the request was delivered under Rule 26(d)(2) – within 30 days after the parties' first Rule 26(f) conference. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

(B) *Responding to Each Item.* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state with specificity the grounds for objection to the request, including the reasons. The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response.

(C) *Objections.* An objection must state whether any responsive materials are being withheld on the basis of that objection. An objection to part of a request must specify the part and permit inspection of the rest.

(D) *Responding to a Request for Production of Electronically Stored Information.* The response may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form—or if no form was specified in the request—the party must state the form or forms it intends to use.

(E) *Producing the Documents or Electronically Stored Information.* Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:

(i) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;

(ii) If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and

(iii) A party need not produce the same electronically stored information in more than one form.

(c)Nonparties. As provided in Rule 45, a nonparty may be compelled to produce documents and tangible things or to permit an inspection.

COMMITTEE COMMENT ON RULE 34

Rule 34 is changed to be consistent with the corresponding federal rule of civil procedure.

Language allowing requests for production to be served with the complaint is omitted because of the inclusion of mandatory disclosures in Rule 26.

~~***Rule 35. Physical and mental examination of persons.***~~

~~**(a) Order for Examination.** – When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.~~

~~**(b) Report of Examiner.** –~~

~~**(1)** If requested by the party against whom an order is made under Rule 35(a) or the person examined, the party causing the examination to be made shall deliver to the requesting party a copy of a detailed written report of the examining physician or other qualified expert setting out the examiner's findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery, the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that such party is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if the physician or other qualified expert fails or refuses to make a report the court may exclude the examiner's testimony if offered at the trial.~~

~~**(2)** By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege the party may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine the party in respect of the same mental or physical condition.~~

~~**(3)** This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of an examiner or the taking of a deposition of the examiner in accordance with the provisions of any other rule.~~

Rule 35. Physical and Mental Examinations.

(a) Order for an Examination.

(1) *In General.* The court where the action is pending may order a party whose mental or physical condition—including blood group—is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner. The court has the same authority to order a party to produce for examination a person who is in its custody or under its legal control.

(2) *Motion and Notice; Contents of the Order.* The order:

(A) may be made only on motion for good cause and on notice to all parties and the person to be examined; and

(B) must specify the time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it.

(b) Examiner's Report.

(1) *Request by the Party or Person Examined.* The party who moved for the examination must, on request, deliver to the requester a copy of the examiner's report, together with like reports of all earlier examinations of the same condition. The request may be made by the party against whom the examination order was issued or by the person examined.

(2) *Contents.* The examiner's report must be in writing and must set out in detail the examiner's findings, including diagnoses, conclusions, and the results of any tests.

(3) *Request by the Moving Party.* After delivering the reports, the party who moved for the examination may request—and is entitled to receive—from the party against whom the examination order was issued like reports of all earlier or later examinations of the same condition. But those reports need not be delivered by the party with custody or control of the person examined if the party shows that it could not obtain them.

(4) *Waiver of Privilege.* By requesting and obtaining the examiner's report, or by deposing the examiner, the party examined waives any privilege it may have—in that action or any other action involving the same controversy—concerning testimony about all examinations of the same condition.

(5) *Failure to Deliver a Report.* The court on motion may order—on just terms—that a party deliver the report of an examination. If the report is not provided, the court may exclude the examiner's testimony at trial.

(6) *Scope.* This subdivision (b) applies also to an examination made by the parties' agreement, unless the agreement states otherwise. This subdivision does not preclude obtaining an examiner's report or deposing an examiner under other rules.

COMMITTEE COMMENT ON RULE 35

Rule 35 is changed to be consistent with the corresponding federal rule of civil procedure.

Rule 36. Requests for admission.

(a) Request for admission. – A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow or as the parties may agree to in writing, subject to Rule 29, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons and complaint upon him. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify an answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that the party has made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; the party may, subject to the provisions of Rule 37(c), deny the matter or set forth reasons why the party cannot admit or deny it.

The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pre-trial conference or at a designated time prior to trial. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(b) Effect of Admission. Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing amendment of a pre-trial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining that party's action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission for any other purpose nor may it be used against the party in any other proceeding.

Rule 36. Requests for Admission.

(a) Scope and Procedure.

(1) *Scope.* A party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of Rule 26(b)(2) relating to:

(A) facts, the application of law to fact, or opinions about either; and;

(B) the genuineness of any described documents.

(2) *Form; Copy of a Document.* Each matter must be separately stated. A request to admit the genuineness of a document must be accompanied by a copy of the document unless it is, or has been, otherwise furnished or made available for inspection and copying.

(3) *Time to Respond; Effect of Not Responding.* A matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney. A shorter or longer time for responding may be stipulated to under Rule 29 or be ordered by the court.

(4) *Answer.* If a matter is not admitted, the answer must specifically deny it or state in detail why the answering party cannot truthfully admit or deny it. A denial must fairly respond to the substance of the matter; and when good faith requires that a party qualify an answer or deny only a part of a matter, the answer must specify the part admitted and qualify or deny the rest. The answering party may assert lack of knowledge or information as a reason for failing to admit or deny only if the party states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny.

(5) *Objections.* The grounds for objecting to a request must be stated. A party must not object solely on the ground that the request presents a genuine issue for trial.

(6) *Motion Regarding the Sufficiency of an Answer or Objection.* The requesting party may move to determine the sufficiency of an answer or objection. Unless the court finds an objection justified, it must order that an answer be served. On finding that an answer does not comply with this rule, the court may order either that the matter is admitted or that an amended answer be served. The court may defer its final decision until a pretrial conference or a specified time before trial. Rule 37(a)(5) applies to an award of expenses.

(b) Effect of an Admission; Withdrawing or Amending It. A matter admitted under this rule is conclusively established unless the court, on motion, permits the admission to be withdrawn or amended. Subject to Rule 16(e), the court may permit withdrawal or amendment if it would promote the presentation of the merits of the action and if the court is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits. An admission under this rule is not an admission for any other purpose and cannot be used against the party in any other proceeding.

COMMITTEE COMMENT ON RULE 36

Rule 36 is changed to be consistent with the corresponding federal rule of civil procedure.

Language allowing requests for admission to be served with the complaint in the prior rule is omitted.

The time for responding is made a uniform 30 days. The rule continues to provide that a longer time may be stipulated to under Rule 29 or be ordered by the court.

~~Rule 37.~~ Rule 37. Failure to ~~cooperate~~Make Disclosures or to Cooperate in ~~discovery; sanctions~~Discovery; Sanctions.

(a) Motion for ~~order compelling discovery.~~ ~~– A party, upon reasonable~~**an Order Compelling Disclosure or Discovery.**

(1) *In General.* On notice to other parties and all ~~persons~~ affected ~~thereby, may apply for an order compelling discovery as follows:~~persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.

~~(1)~~(2) *Appropriate ~~court.~~ Court.* ~~– An application~~ A motion for an order to a party ~~may~~must be made ~~to~~in the court ~~in which~~where the action is pending~~, or, on matters relating to a deposition, to the circuit court of the county where the deposition is being taken. An application~~. A motion for an order to a ~~person who is not a party shall~~nonparty must be made ~~to~~in the circuit court ~~of the county~~ where the discovery is ~~being,~~ or ~~is to~~will be, taken.

(3) ~~*Motion.* – If a~~ *Specific Motions.*

(A) *To Compel Disclosure.* If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions.

(B) *To Compel a Discovery Response.* A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:

(i) a deponent fails to answer a question ~~propounded or submitted~~asked under Rule 30 or 31~~, or~~ ;

(ii) a corporation or other entity fails to make a designation under Rule 30(b)(~~7~~6) or 31(a~~), or~~)(4);

(iii) a party fails to answer an interrogatory submitted under Rule 33~~, or if a party, in response to a request for inspection submitted under Rule 34,~~ ; or

(iv) a party fails to respond that inspection will be permitted ~~as requested~~ , or fails to permit inspection~~ as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance~~

~~with the request. The motion must include a certification that the movant in good faith has conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or action without court action.~~, or fails to produce documents or tangible things, as requested under Rule 34.

~~**(2)**~~**(C)** *Related to a Deposition.* When taking ~~a~~an oral deposition ~~on oral examination~~, the ~~proponent of the~~party asking a question may complete or adjourn the examination before ~~applying~~moving for an order.

~~**(4)** If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).~~

~~**(5)**~~

~~**(0)**~~**(4)** ~~*Evasive or incomplete answer or response. –*~~*Incomplete Disclosure, Answer, or Response.* For purposes of this subdivision~~, (a), an evasive or incomplete disclosure, answer, or response ~~is to~~must be treated as a failure to disclose, answer, or respond.

~~**(0)**~~**(5)** *Payment of Expenses ~~and sanctions~~; Protective Orders*.

(A) *If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing).* If the motion is granted~~, the court shall, —~~or if the disclosure or requested discovery is provided after ~~affording~~the motion was filed—the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion ~~or~~, the party or attorney advising ~~such~~that conduct, or both ~~of them~~ to pay ~~to~~ the ~~moving party the~~movant's reasonable expenses incurred in ~~obtaining~~making the ~~order~~motion, including attorney's fees~~, unless~~. But the court ~~finds that~~ must not order this payment if:

(i) the movant filed the motion ~~was filed without the movant's first making a~~before attempting in good faith ~~effort~~ to obtain the disclosure or discovery without court action~~, or that~~ ;

(ii) the opposing party's answernondisclosure, response, or objection was substantially justified,; or that

~~**1.**~~**(iii)** other circumstances make an award of expenses unjust.

~~**2.**~~**(B)** *If the Motion Is Denied.* If the motion is denied, the court may

~~enter~~issue any protective order authorized under Rule 26(c) and ~~shall~~must, after ~~affording~~giving an opportunity to be heard, require the ~~moving party or~~movant, the attorney ~~advising~~filing the motion, or both ~~of them~~ to pay ~~to~~ the party or deponent who opposed the motion ~~the~~its reasonable expenses incurred in opposing the motion, including attorney's fees~~, unless~~. But the court ~~finds that the making of~~must not order this payment if the motion was substantially justified or ~~that~~ other circumstances make an award of expenses unjust.

~~**3.**~~**(C)** *If the Motion Is Granted in Part and Denied in Part.* If the motion is granted in part and denied in part, the court may ~~enter~~issue any protective order authorized under Rule 26(c) and may, after ~~affording~~giving an opportunity to be heard, apportion the reasonable expenses ~~incurred in relation to the motion among the parties and persons in a just manner~~for the motion.

(b) Failure to ~~comply~~Comply with ~~order~~a Court Order.

~~**(a)**~~**(1)** *Sanctions ~~by~~in the Circuit Where the Deposition Is Taken.* If the court where ~~deposition~~the discovery is taken~~. If~~ orders a deponent ~~fails~~ to be sworn or to answer a question ~~after being directed to do so by the circuit court of the county in which the deposition is being taken~~and the deponent fails to obey, the failure may be ~~considered a~~treated as contempt of ~~that~~ court.

(2) *Sanctions ~~by court~~ in ~~which action is pending.~~ the Circuit Where the Action Is Pending.*

~~**(b)**~~**(A)** *For Not Obeying a Discovery Order.* If a party or ~~an~~a party's officer, director, or managing agent ~~of a party~~ —or a ~~person~~witness designated under ~~Rules~~Rule 30(b)(6) or 31(a~~) to testify on behalf of a party~~)(4) —fails to obey an order to provide or permit discovery, including an order ~~made under subdivision (a) of this rule or Rule 35, or if a party fails to supplement as provided for under Rule 26(e), or if a party fails to obey an order entered~~ under Rule 26(f), 35, or 37(a), the court ~~in which~~where the action is pending may ~~make such orders in regard to the failure as are just, and among others~~issue further just orders. They may include the following:

~~**(d)**~~**(i)** ~~An order~~directing that the matters ~~regarding which~~embraced in the order ~~was made~~ or ~~any~~ other designated facts ~~shall~~ be taken ~~to be~~as established for ~~the~~ purposes of the action ~~in accordance with~~, as the ~~claim of the~~prevailing party ~~obtaining the order~~claims;

~~(e)~~(ii) ~~An order refusing to allow~~ prohibiting the disobedient party ~~to support~~from supporting or ~~oppose~~opposing designated claims or defenses, or ~~prohibiting that party~~ from introducing designated matters in evidence;

(iii) ~~An order~~ striking out pleadings in whole or ~~parts thereof, or~~ in part;

(iv) staying further proceedings until the order is obeyed~~, or~~ ;

(v) dismissing the action or proceeding in whole or ~~any~~in part ~~thereof, or~~ ;

~~(f)~~(vi) rendering a default judgment ~~by default~~ against the disobedient party; or

~~(g)~~(vii) ~~In lieu of any of the foregoing orders or in addition thereto, an order~~ treating as ~~a~~ contempt of court the failure to obey any ~~orders~~order except an order to submit to a physical or mental examination~~;~~.

~~(h)~~(B) ~~Where~~*For Not Producing a Person for Examination.* If a party ~~has failed~~fails to comply with an order under Rule 35(a) requiring ~~that party~~it to produce another person for examination, ~~such~~the court may issue any of the orders ~~as are~~ listed in ~~subparagraphs~~ ~~(~~Rule 37(b)(2)(A~~), (B), and (C) of this paragraph,~~)~~(i)- (vi), unless the disobedient party ~~failing to comply~~ shows that ~~that party is unable to~~it cannot produce ~~such~~the other person ~~for examination~~.

~~(A)~~(C) ~~In lieu~~*Payment of ~~any~~Expenses*. Instead of ~~the foregoing orders~~ or in addition ~~thereto~~to the orders above, the court ~~shall require~~ must order the disobedient party ~~failing to obey the order or~~, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the ~~court finds that the~~ failure was substantially justified or ~~that~~ other circumstances make an award of expenses unjust.

(c) ~~Expenses on failure to admit.~~ Failure to Disclose, to Supplement an Earlier Response, or to Admit.

(1) *Failure to Disclose or Supplement.* If a party fails to ~~admit the genuineness of any document or the truth of any matter as~~ provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially

justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:

(A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;

(B) may inform the jury of the party's failure; and

(C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi).

(2) *Failure to Admit.* If a party fails to admit what is requested under Rule 36~~,~~ and if the ~~party~~ requesting ~~the admissions thereafter~~party later proves ~~the genuineness of the~~a document to be genuine or the ~~truth of the~~ matter true, the requesting party may ~~apply to~~move that the ~~court for an order requiring the other~~ party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof~~, including reasonable attorney's fees.~~. The court ~~shall make the~~must so order unless ~~it finds that (1)~~ :

(A) the request was held objectionable ~~pursuant to~~under Rule 36(a)~~, or (2)~~);

(B) the admission sought was of no substantial importance, ~~or (3)~~ ;

(C) the party failing to admit had a reasonable ground to believe that ~~the party~~it might prevail on the matter~~,~~; or ~~(4)~~

(D) there was other good reason for the failure to admit.

(d) ~~Failure of party to attend at own~~Party's Failure to Attend Its Own Deposition, Serve Answers to Interrogatories, or Respond to a Request for Inspection.

(1) *In General.*

(A) *Motion; Grounds for Sanctions.* The court where the action is pending may, on motion, order sanctions if:

(i) a party or a party's officer, director, or managing agent—or a person designated under Rule 30(b)(6) or 31(a)(4)—fails, after being served with proper notice, to appear for that person's deposition; or ~~**serve answers to**~~

(ii) a party, after being properly served with interrogatories under

Rule 33 or **~~respond to~~**a request for inspection~~. – If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice, or (2) to serve answers or~~ under Rule 34, fails to serve its answers, objections ~~to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a~~ , or written response ~~to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule. Any motion specifying a failure under paragraphs (2) or (3) of this subdivision shall~~.

(B) *Certification.* A motion for sanctions for failing to answer or respond must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to ~~answer or respond~~ act in an effort to obtain ~~such~~the answer or response without court action. ~~In lieu of any order or~~

(2) *Unacceptable Excuse for Failing to Act.* A failure described in Rule 37(d)(1)(A) is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under Rule 26(c).

~~(2)~~(3) *Types of Sanctions.* Sanctions may include any of the orders listed in ~~addition thereto~~Rule 37(b)(2)(A)(i)-(vi). Instead of or in addition to these sanctions, the court ~~shall~~must require the party failing to act ~~or~~, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the ~~court finds that the~~ failure was substantially justified or ~~that~~ other circumstances make an award of expenses unjust.

~~**(c)** The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).~~

~~**(d)**~~

(e) ~~Failure to participate in the framing of a~~Failure to Provide Electronically Stored Information. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery **~~plan.~~** ~~– If a~~, the court:

(1) upon finding prejudice to another party ~~or a party's~~ from loss of the

information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon finding the party acted with the intent to deprive another party of the information's use in the litigation may:

(A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.

~~**(e)**~~**(f)** Failure to Participate in Framing a Discovery Plan. If a party or its attorney fails to participate in good faith in ~~the framing of a~~developing and submitting a proposed discovery plan ~~by agreement as is~~ required by Rule 26(f), the court may, after giving an opportunity ~~for hearing, require such~~to be heard, required that party or attorney ~~to~~ pay to any other party the reasonable expenses, including ~~attorney's~~attorney's fees, caused by the failure.

2020 COMMITTEE COMMENT ON RULE 37

Rule 37 is changed to be consistent with the corresponding federal rule of civil procedure.

VI. Trials

Rule 38. ~~Right to a jury~~ Jury trial~~; demand~~ of right.

~~(a)~~ Right preserved. ~~—~~ The right of trial by jury as declared by the Constitution or statutes of the State ~~shall~~must be preserved to the parties inviolate.

~~(b)~~ Demand. ~~— Any party may demand a trial by jury of~~ On any issue triable of right by a jury ~~by~~, a party may demand a jury trial by:

(1) serving ~~upon~~ the other parties with a written demand ~~therefor —which~~ may be included in ~~writing at any time after the commencement of the action and not~~a pleading ~~—~~no later than ~~10~~14 days after the ~~service of the~~ last pleading directed to ~~such~~the issue~~,~~ is served; and

(2) filing the demand ~~as required by Rule 5(d). Such demand may be indorsed upon a pleading of the party.~~ in accordance with Rule 5(d).

~~(6) Same: Specification of~~(c) Specifying issues. ~~—~~ In ~~the~~its demand, a party may specify the issues ~~which the party~~that it wishes ~~so~~to have tried by a jury; otherwise ~~the party shall be deemed~~, it is considered to have demanded a jury trial ~~by jury for~~on all the issues so triable. If the party has demanded a jury trial ~~by jury for~~on only some ~~of the~~ issues, any other party may ~~—~~within ~~10~~14 days after ~~service of~~being served with the demand or ~~such lesser~~within a shorter time ~~as~~ordered by the court ~~may order, may —~~serve a demand for ~~trial by~~a jury ~~of~~trial on any other or all ~~of the~~factual issues ~~of fact in the action.~~

~~**Waiver**. — Subject to the provisions of Rule 39(b), the failure of a party to serve and file a demand as required by this rule constitutes a waiver by the party of trial~~ triable by jury. ~~A demand for trial by jury made as herein provided, or a timely motion or request pursuant to Rule 39(b), may not be withdrawn without the consent of the parties.~~

~~(d)~~ Waiver; Withdrawal. A party waives a jury trial unless its demand is properly served and filed. A proper demand may be withdrawn only if the parties consent.

2020 COMMITTEE COMMENT ON RULE 38

Rule 38 is changed to be largely consistent with the corresponding federal rule of civil procedure. The rule adopts a 14 day period in place of the prior 10 day period in terms of requesting a trial by jury.

Rule 39 – Trial by ~~jury~~Jury or by the ~~court~~Court.

~~**By jury. —**~~ **(a) When a Demand Is Made**. When a jury trial ~~by jury~~ has been demanded ~~as provided in~~ under Rule 38 ~~or a timely motion or request therefor has been made under subdivision (b) of this rule~~, the action ~~shall~~must be designated ~~upon~~on the docket as a jury action. The trial ~~of~~on all issues so demanded ~~or requested shall~~must be by jury~~,~~ unless~~-~~:

(1) the parties or their attorneys ~~of record, by written~~ file a stipulation ~~filed with the court or by an oral stipulation made in open court and entered in the record, consent~~ to a nonjury trial ~~by~~or so stipulate on the ~~court sitting without a jury or~~ record; or

(2) the court ~~upon~~, on motion or ~~of~~on its own ~~initiative~~, finds that ~~a right of trial by jury of~~on some or all of those issues ~~does~~do not exist under the Constitution or statutes of the State.

~~**By the court. —**~~ **(b) When No Demand Is Made**. Issues ~~not~~ on which a jury trial is not properly demanded ~~for trial by jury as provided in Rule 38 shall~~ are to be tried by the court~~; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court upon motion or of~~. But the court may, on motion or on its own ~~initiative may at any time~~, order a jury trial ~~by~~on any issue for which a jury ~~of any or all issues~~might have been demanded.

~~**(c) Advisory jury and trial**~~**Jury; Jury Trial** ~~**by consent. —**~~ **Consent**. In ~~all actions~~an action not triable of right by a jury, the court ~~upon~~, on motion or ~~of~~on its own ~~initiative~~:

(1) may try any issue with an advisory jury ~~or, with the consent of the parties,~~; or

(2) may ~~order a trial with~~, with the parties' consent, try any issue by a jury whose verdict has the same effect as if a jury trial ~~by jury~~ had been a matter of right.

2020 COMMITTEE COMMENT ON RULE 39

Rule 39 is changed to be largely consistent with the corresponding federal rule of civil procedure.

~~RULE 40. Assignment of cases for trial.~~ RULE 40. Scheduling Cases for Trial.

Trials may be set by ~~rule for~~ the ~~placing of actions upon the trial calendar (1) without request of the parties, or (2) upon request of~~Court on its own, by issuing a ~~party and notice~~scheduling order pursuant to ~~the other parties, or (3) in such other manner as the courts deem expedient. Such rules shall be promulgated in accordance with~~ Rule ~~83. Precedence shall be given~~16, or upon motion. The court must give priority to actions entitled ~~thereto~~to priority by the Constitution or ~~statutes of the State~~by statute.

COMMITTEE COMMENT ON RULE 40

Rule 40 is revised to enumerate the ways a case is set for trial, providing for priority when required by the Constitutions or statue.

RULE 41. Dismissal of ~~actions~~Actions or Claims.

(a) Voluntary ~~dismissal; effect thereof. –~~Dismissal.

(1) By the Plaintiff~~; by Stipulation. ~~.

(A) *Without a Court Order.* Subject to ~~the provisions of Rule~~ Rules 23(e), 23.1(c), 23.2 and ~~Rule~~ 66~~,~~ and ~~of~~ any statute of the State, ~~an action may be dismissed by~~ the plaintiff may dismiss an action or claim without a court order ~~of court (i)~~ by filing ~~:~~:

(i) a notice of dismissal ~~at any time~~ before ~~service by~~ the ~~adverse~~opposing party ~~of~~serves either an answer or ~~of~~ a motion for summary judgment~~, whichever first occurs, or (ii) by filing ~~;~~ or

(ii) a stipulation of dismissal signed by all parties who have appeared ~~in the action.~~.

(B) *Effect.* Unless ~~otherwise stated in~~ the notice ~~of dismissal~~ or stipulation states otherwise, the dismissal is without prejudice~~,~~ ~~except that a notice of dismissal operates as an adjudication upon the merits when filed by a ~~. But if the plaintiff ~~who has once~~previously dismissed the same claim, or any action in any ~~court~~Court of the United States or of this or any other state ~~an action~~ based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.

(2) *By Court Order ~~of Court. ~~; Effect.* Except as provided in ~~paragraph (~~Rule 41(a)(1~~) of this subdivision of this rule,~~)~~, an action ~~shall not~~may be dismissed at the plaintiff's ~~instance save upon~~ request only by court order ~~of the court and upon such ~~, on terms ~~and conditions as~~ that the court ~~deems~~considers proper. If a defendant has pleaded a counterclaim ~~has been pleaded by a defendant prior to the service upon the defendant of~~ before being served with the plaintiff's motion to dismiss, the action ~~shall not~~may be dismissed ~~against~~over the defendant's objection ~~unless~~only if the counterclaim can remain pending for independent adjudication ~~by the court.~~. Unless the order states otherwise ~~specified in the order~~, a dismissal under this paragraph (2) is without prejudice.

(b) Involuntary ~~dismissal; effect thereof~~. ~~–~~ For failure of**Dismissal; Effect**. If the plaintiff fails to prosecute or to comply with these rules or ~~any~~a court order ~~of court, ~~ ,

~~(0)~~(1) a defendant may move ~~for dismissal of an~~ to dismiss the action or ~~of~~ any claim against ~~the defendant~~it. Unless the ~~court in its~~dismissal order

~~for dismissal~~states otherwise ~~specifies~~, a dismissal under this subdivision (b) and any dismissal not ~~provided for in~~under this ~~rule, other than a dismissal~~Rule—except one for lack of jurisdiction ~~or for,~~ improper venue, or failure to join a party under Rule 19—operates as an adjudication ~~upon~~on the merits.

(2) ~~Any~~any court in which ~~is~~ an action has been pending ~~an action wherein~~ for more than one year ~~there~~ where no action has been ~~no order or proceeding, or wherein the plaintiff is delinquent in the payment of accrued court costs, may, in its discretion, order such action to be struck from its docket; and it shall thereby be discontinued. The court may direct that such order be published in such newspaper as~~taken by the plaintiff, the court may ~~name. The court~~ , in its discretion, order such action dismissed. For good cause shown, the court may, ~~on motion,~~ reinstate ~~on its trial docket~~ any action dismissed under this ~~rule, and set aside any nonsuit that may be entered by reason of the nonappearance of the plaintiff,~~ subsection on motion filed within three terms after entry of the order of dismissal ~~or nonsuit; but an~~.

(3) If the plaintiff is delinquent in the payment of accrued court costs, the court may, in its discretion, order such action dismissed. An order of reinstatement ~~shall~~must not be entered until ~~the~~any accrued court costs are paid.

~~**(8)**~~**(4)** Before a court may dismiss an action under Rule 41(b), notice and an opportunity to be heard ~~shall~~must be given to all parties of record.

(5) ~~Dismissal of counterclaim, cross-claim, or third-party claim~~. ~~– The provisions of this rule apply~~*Dismissing a Counterclaim, Crossclaim, or Third-Party Claim.* This Rule applies to ~~the~~a dismissal of any counterclaim, ~~cross-claim~~crossclaim, or third-party claim. A claimant's voluntary dismissal ~~by the claimant alone pursuant to paragraph (~~under Rule 41(a)(1~~) of subdivision (a) of this rule shall~~)(A)(i) must be made ~~:~~:

> **(A)** before a responsive pleading is served; or~~,~~
>
> **(B)** if there is ~~none~~no responsive pleading, before ~~the introduction of~~ evidence is introduced at ~~the trial or~~a hearing or trial.

(6) ~~Cost of~~ *Costs of a Previously Dismissed Action.* If a plaintiff who previously dismissed **~~action~~**. ~~– If a plaintiff who has once dismissed~~ an action in any court ~~commences~~files an action ~~based~~on or including the same claim against the same defendant, the court ~~:~~:

> **(A)** may ~~make such~~ order ~~for~~ the ~~payment~~plaintiff to pay all or part of the costs of ~~the~~that previous action ~~previously dismissed as it may~~

~~deem proper~~; and

(B) may stay the proceedings ~~in the action~~ until the plaintiff has complied ~~with the order~~.

2020 COMMITTEE COMMENT ON RULE 41

Rule 41 is changed to be largely consistent with the corresponding federal rule of civil procedure.

Rule 41(a)(1)(A) provides for dismissal of claims or actions by plaintiff.

Rule 41(b)(2) adopts the requirement of "good cause" for reinstatement of actions dismissed for inactivity.

RULE 42. Consolidation; **~~separate trials~~Separate Trials.**

(a) ~~Consolidation of.~~ If actions **~~in same court. –~~** When actions ~~involving~~before the court, including appeals from magistrate court, involve a common question of law or fact are pending before, the court, it may ~~order a joint~~:

(1) join for hearing or trial of any or all ~~the~~ matters ~~in~~at issue in the actions;

(2) consolidate the actions; ~~it may order all the actions consolidated; and it may make such~~or

~~(a)~~**(3)** issue any other orders ~~concerning proceedings therein as may tend~~ to avoid unnecessary ~~costs~~cost or delay. ~~An action is pending before the court within the meaning of this subdivision if it is pending before the court on an appeal from a magistrate.~~

(b) ~~Consolidation of actions~~Actions in ~~different courts. – Different~~ Courts.

(1) When two or more actions arising out of the same transaction or occurrence are pending before different ~~courts~~circuit judges, or before a ~~court~~circuit judge and a magistrate court, the circuit court in which the first such action was commenced ~~shall~~must order all the actions transferred to it or any other court in which any such action is pending.

~~(b)~~**(2)** The circuit court to which the actions are transferred may order a joint hearing or trial of any or all of the matters in issue in any of the actions; it may order all the actions consolidated; and it may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay. ~~Whenever one of the actions is pending before a magistrate and a judgment is rendered by the magistrate for $15.00 or less, such judgment of the magistrate shall in no manner affect the other action pending in the court; the doctrine of res judicata shall not apply to such judgment, nor shall any such judgment of the magistrate be admissible in evidence in the trial of the other action pending in the court.~~

~~**(1) Separate trials**. – The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross claims, counterclaims, third party claims, or issues, always preserving inviolate the right of trial by jury as declared by Article III, Section 13 of the West Virginia Constitution or as given by a statute of this State.~~

(3) Whenever one of the actions is pending before a magistrate court and a judgment is rendered by the magistrate court for $15.00 or less, such judgment of the magistrate court must in no manner affect the other action pending in the circuit court; the doctrine of res judicata must not apply to such judgment, nor must any such judgment of the magistrate court be admissible in evidence in the trial of the other action pending in the circuit court.

(c) Separate Trials. For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims. When ordering a separate trial, the court must preserve any right to a jury trial.

2020 COMMITTEE COMMENT ON RULE 42

Rule 42 adopts the current federal rule with respect to subparts (a) and (b) of the federal rule. Subpart (b) of the federal rule is designated as subpart (c) under the rule. The rule keeps subpart (b) from the original West Virginia rule relating to consolidation of actions in different courts. Subpart (b) is amended to make clear that consolidation applies to actions in different circuit courts or within a circuit that has multiple judges.

~~*Rule*~~***RULE 43. Taking*** ~~***of***~~***Testimony.***

(a) In Open Court. At trial, the witnesses' testimony.

~~**(b)**~~

~~**(c)**~~ **(a) Form.** ~~–~~ In all trials the testimony of witnesses shall must be taken in open court, unless ~~otherwise provided by~~ a statute ~~or by these rules~~, the West Virginia Rules of Evidence, these Rules, or other rules adopted by the West Virginia Supreme Court of Appeals.

~~**(d)**~~

~~**(e)**~~ **(b) [Abrogated].**

~~**(f)**~~

~~**(g)**~~ **(c) [Abrogated].**

~~**(h)**~~

(a) ~~**(d) Affirmation in lieu of oath.** Whenever under these rules an oath is required~~ provide otherwise. For good cause, the court may permit testimony to be ~~taken~~presented by telephone, video conference, or other remote means.

(b) Affirmation Instead of an Oath. When these rules require an oath, a solemn affirmation ~~may be accepted in lieu thereof~~suffices.

(c) ~~**(e)**~~ **Evidence on** ~~**motions.**~~ **a Motion.** When a motion ~~is based~~relies on facts ~~not appearing of~~ outside the record, the court may hear the matter on affidavits ~~presented by the respective parties, but the court~~or may ~~direct that the matter be heard~~hear it wholly or partly on oral testimony or ~~deposition~~on depositions.

(d) ~~**(f) Interpreters.**~~ **Interpreter.** The court may appoint an interpreter of its ~~own selection and may~~choosing; fix ~~the interpreter~~'s reasonable compensation~~. The compensation shall~~ to be paid ~~out of~~from funds provided by law or by one or more parties; and tax the compensation as costs.

2020 COMMITTEE COMMENT ON RULE 43

Rule 43 is changed to be largely consistent with the corresponding federal rule of civil procedure. Subsection (a), upon a showing of good cause permits testimony in open court by contemporaneous transmission from a different location.

Rule 44. Proof of official record.

(a) Authentication.

(1) *Domestic.* – An official record kept within the United States, or any state, district, commonwealth, or within a territory subject to the administrative or judicial jurisdiction of the United States, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by the officer's deputy, and accompanied by a certificate that such officer has the custody. The certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of the officer's office.

(2) *Foreign.* – A foreign official record, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof; or a copy thereof, attested by a person authorized to make the attestation, and accompanied by a final certification as to the genuineness of the signature and official position (i) of the attesting person, or (ii) of any foreign official whose certificate of genuineness of signature and official position relates to the attestation or is in a chain of certificates of genuineness of signature and official position relating to the attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown, (i) admit an attested copy without final certification, or (ii) permit the foreign official record to be evidenced by an attested summary with or without a final certification. The final certification is unnecessary if the record and the attestation are certified as provided in a treaty or convention to which the United States and the foreign country in which the official record is located are parties.

(b) Lack of record. – A written statement that after diligent search no record or entry of a specified tenor is found to exist in the records designated by the statement, authenticated as provided in subdivision (a)(1) of this rule in the case of a domestic record, or complying with the requirements of subdivision (a)(2) of this rule for a summary in the case of a foreign record, is admissible as evidence that the records contain no such record or entry.

(c) Other proof. – This rule does not prevent the proof of official records or of entry or lack of entry therein by any other method authorized by law.

RULE 44. Proving an Official Record.

(a) Means of Proving.

(1) *Domestic Record.* Each of the following evidences an official record—or an entry in it—that is otherwise admissible and is kept within the United States, any state, district, or commonwealth, or any territory subject to the administrative or judicial jurisdiction of the United States:

(A) an official publication of the record; or

(B) a copy attested by the officer with legal custody of the record—or by the officer's deputy—and accompanied by a certificate that the officer has custody. The certificate must be made under seal:

(i) by a judge of a court of record in the district or political subdivision where the record is kept; or

(ii) by any public officer with a seal of office and with official duties in the district or political subdivision where the record is kept.

(2) *Foreign Record.*

(C) *In General.* Each of the following evidences a foreign official record—or an entry in it—that is otherwise admissible:

(i) an official publication of the record; or

(ii) the record—or a copy—that is attested by an authorized person and is accompanied either by a final certification of genuineness or by a certification under a treaty or convention to which the United States and the country where the record is located are parties.

(D) *Final Certification of Genuineness.* A final certification must certify the genuineness of the signature and official position of the attester or of any foreign official whose certificate of genuineness relates to the attestation or is in a chain of certificates of genuineness relating to the attestation. A final certification may be made by a secretary of a United States embassy or legation; by a consul general, vice consul, or consular agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States.

(E) *Other Means of Proof.* If all parties have had a reasonable opportunity to investigate a foreign record's authenticity and accuracy, the court may, for good cause, either:

(i) admit an attested copy without final certification; or

(ii) permit the record to be evidenced by an attested summary with or without a final certification.

(b) Lack of a Record. A written statement that a diligent search of designated records revealed no record or entry of a specified tenor is admissible as evidence that the records contain no such record or entry. For domestic records, the statement must be authenticated under Rule 44(a)(1). For foreign records, the statement must comply with Rule 44(a)(2)(C)(ii).

(c) Other Proof. A party may prove an official record—or an entry or lack of an entry in it—by any other method authorized by law.

2020 COMMITTEE COMMENT ON RULE 44

Rule 44 is changed to be largely consistent with the corresponding federal rule of civil procedure. The only substantive change in Rule 44 is in section (a)(1)(B), which requires that an official record must be made under the manner set forth in the rule as opposed to the current rule which uses the term “may”, suggesting discretion in the court regarding authentication.

~~***Rule 44.1 Determination of foreign law.***~~

RULE 44.1. Determining Foreign Law.

A party who intends to raise an issue ~~concerning the law of~~about a foreign ~~country shall~~country's law must give notice by ~~pleadings~~a pleading or other ~~reasonable written notice. The court, in~~writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the West Virginia Rules of Evidence. The court's determination ~~shall~~must be treated as a ruling on a question of law.

2020 COMMITTEE COMMENT ON RULE 44.1

Rule 44.1 is changed to be consistent with the corresponding federal rule of civil procedure.

Rule 45. Subpoena.

(a) In General.

(1) *Form*~~**; issuance. –**~~ *and Contents.*

(A) Requirements—In General. Every subpoena must:

(i) ~~**(1)** Every subpoena shall be in a form which substantially complies with Form 33. Civil Case Subpoena, as set forth in the Appendix of Forms of the Rules of Civil Procedure. Every subpoena shall run in the name of the State, and shall~~

(i) state the ~~name of the~~ court from which it ~~is~~ issued;

(ii) state the title of the action, ~~the name of the court in which it is pending,~~ and its civil ~~-~~action number;

(iii) command each person to whom it is directed to do the following at a specified time and place: attend and ~~give testimony or to~~testify; produce ~~and permit inspection and copying of~~ designated ~~books,~~ documents, electronically stored information, or tangible things in ~~the~~ that person's possession, custody, or control ~~of that person,~~; or ~~to~~ permit the inspection of premises~~, at a time~~; and ~~place therein specified; and~~

(iv) set ~~forth~~out the text of ~~subdivisions (c),~~ Rule 45(d) and (e~~) of this rule. A command~~).

4. ~~**(B)** *Command to* produce evidence or to permit inspection may be joined with~~*Attend a* ~~command to appear at trial or hearing or at deposition, or may be issued separately.~~

Deposition—Notice of the Recording Method.

~~**(2)**~~ A subpoena commanding attendance at a ~~trial or hearing shall issue from~~deposition must state the ~~court~~method for recording the ~~circuit in which the hearing~~testimony.

(C) *Combining or* ~~trial is~~*Separating a Command to* ~~be held. A subpoena~~*Produce or to Permit Inspection; Specifying the Form for Electronically Stored Information.* A command to produce documents, electronically stored information, or tangible things or to permit the inspection of premises may be included in a subpoena commanding attendance at a deposition ~~shall issue from the court for the circuit designated by the notice of deposition as the circuit in which the deposition is to be taken. If~~ , hearing, or trial, or may

be set out in a separate ~~from a subpoena commanding the attendance of a person,~~ subpoena. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(D) *Command to Produce; Included Obligations.* A command in a subpoena ~~for production~~ to produce documents, electronically stored information, or ~~inspection shall issue from the court for the circuit in which the production~~tangible things requires the responding person to permit inspection, copying, testing, or ~~inspection is to be made~~sampling of the materials.

(2) *Issuing Court.* A subpoena must issue from the court where the action is pending.

(3) Issued by Whom. The clerk shallmust issue a subpoena, signed but otherwise in blank, to a party requesting it, who shallrequests it. That party must complete it before service. An attorney as officer of the court may also may issue and sign a subpoena. if the attorney is authorized to practice in the issuing court.

(4) Notice to Other Parties Before Service. If the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, then before it is served on the person to whom it is directed, a notice and a copy of the subpoena must be served on each party.

(b) Service. –

(1) *By Whom and How; Tendering Fees*. A subpoena may be served by any person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein ~~shall~~must be made in the same manner provided for service of process under Rule 4(d)(1)(A) and by tendering to that person if demanded the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the State or an officer or agency thereof, fees and mileage need not be tendered. ~~–~~Prior notice of any commanded production of documents and things or inspection of premises before trial ~~shall~~must be served on each party in the manner prescribed by Rule 5(b).

(2) *Service in the United States.* A subpoena may be served at any place within ~~the State.~~this state.

(3) *Proof of Service.* Proving service, when necessary ~~shall be made by,~~ requires filing with the ~~clerk of the~~issuing court ~~by which the subpoena is~~

~~issued~~ a statement ~~of~~showing the date and manner of service and ~~of~~ the names of the persons served~~,~~. The statement must be certified by the ~~person who made the service.~~server.

(c) Place of ~~the examination.~~ ~~–~~Compliance. A deponent may be required to attend an examination only in the county in which the deponent resides or is employed or transacts business in person, or at such other convenient place as is fixed by an order of court.

~~(d) Protection of persons subject to subpoenas.~~

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) *Avoiding Undue Burden or Expense; Sanctions*. A party or ~~an~~ attorney responsible for ~~the issuance~~issuing and ~~service of~~serving a subpoena ~~shall~~must take reasonable steps to avoid imposing undue burden or expense on a person subject to ~~that~~the subpoena. The court on behalf of which the subpoena was issued may enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable ~~attorney's~~attorney's fee.

(2) *Command to Produce Materials or Permit Inspection.*

(A) *Appearance Not Required*. A person commanded to produce ~~and permit inspection and copying of designated books, papers,~~ documents ~~or~~, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) ~~Subject to paragraph (c)(2) of this rule, a~~*Objections.* A person commanded to produce ~~and~~documents or tangible things or to permit inspection ~~and copying~~ may~~, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service,~~ serve ~~upon~~on the party or attorney designated in the subpoena a written objection to ~~inspection or~~ inspecting, copying ~~of~~, testing, or sampling any or all of the ~~designated~~ materials or ~~of~~to inspecting the premises~~. If~~ or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the party serving the subpoena ~~shall~~must not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. ~~If objection has been made, the party serving the subpoena~~

~~may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.~~ and the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the court for the court on behalf of which the subpoena was issued is required for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) *Quashing or Modifying a Subpoena.*

(A) *When Required*. On timely motion, the court ~~by~~on behalf of which ~~a~~the subpoena was issued ~~shall~~must quash or modify ~~the~~a subpoena ~~if it~~that:

(i) fails to allow a reasonable time ~~for compliance~~to comply;

(ii) requires a person to travel for a deposition to a place other than the county in which that person resides or is employed or transacts business in person or at a ~~place~~placed fixed by order of the court;

(iii) requires disclosure of privileged or other protected matter ~~and~~, if no exception or waiver applies~~,~~; or

(iv) subjects a person to undue burden.

~~**(B)** If a subpoena~~**(B)** When Permitted. To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing~~:~~

~~**(i)** requires disclosure of~~ a trade secret or other confidential research, development, or commercial information~~,~~; or

(ii) ~~requires disclosure of~~disclosing an unretained expert's opinion or information that does not ~~describing~~describe specific

~~events or~~ occurrences in dispute and ~~resulting~~results from the expert's study ~~made~~that was not ~~at the request of any~~requested by a party. ~~The court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if~~

(C) *Specifying Conditions as an Alternative.* In the ~~party~~circumstances described in ~~whose behalf~~Rule 45(d)(3)(B), the ~~subpoena is issued~~court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship ~~and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.~~; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in ~~responding~~Responding to ~~subpoena~~a Subpoena.

(1) *Producing Documents or Electronically Stored Information.* These procedures apply to producing documents or electronically stored information:

(A) Documents. A person responding to a subpoena to produce documents ~~shall~~must produce them as they are kept in the ~~usual~~ordinary course of business or ~~shall~~must organize and label them to correspond ~~with~~to the categories in the demand.

~~When information subject to a subpoena is withheld on~~**(B)** *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not

reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation ~~materials, the claim shall be made~~material must:

(i) expressly make the claim; and ~~shall be supported by a description of~~

(ii) describe the nature of the withheld documents, communications, or tangible things ~~not produced that is sufficient to~~ in a manner that, without revealing information itself privileged or protected, will enable the ~~demanding party~~parties to ~~contest~~assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(f) Reserved.

(g) Contempt. ~~— Failure by any person~~ The circuit court may hold in contempt a person who, having been served, fails without adequate excuse to obey ~~a subpoena served upon that person may be deemed a contempt of the court from which the~~ the subpoena ~~issued. An adequate cause for failure to obey exists when a subpoena purports to require a non party deponent to attend at a place not within the limits provided by subdivision (c) of this rule~~or an order related to

it.

2020 COMMITTEE COMMENT ON RULE 45

Rule 45 is changed to be largely consistent with the corresponding federal rule of civil procedure. The rule now includes electronically stored information. The rule now makes this section clearer as to what a subpoena may be utilized for. Rule 45(a)(1)(D) has been revised to comply with Federal Rule 45(a)(1)(D) to allow testing and sampling in addition to inspection and copying. Rule 45(a)(4) requires that a party must provide notice of a subpoena for production of documents, electronically stored information, or tangible things or inspection of premises or testing or sampling to other parties before it is served. Rule 45(d)(1) and (d)(2)(B)(ii) provide the court on whose behalf the subpoena was issued discretion to enforce the requirement that a party "issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena." Rule 45(d)(2)(B) provides that where an objection to a subpoena is made, the party serving the subpoena must not be entitled to enforce it until the party obtains a ruling from the court. The Rule provides that motions to quash are to be filed in the circuit court on behalf of which the subpoena was issued and not, as in the prior rule, where compliance was required. Rule 45(e)(2)(B) incorporates a "clawback" provision for privileged information. When the rule governing subpoenas is used as a discovery device, the rule is subject to all discovery provisions. See, *Keplinger v. Virginia Electric & Power Company*, 208 W.Va. 11, 537 S.E.2d 632 (2000). Notice of intent to serve a subpoena for medical records must be provided "sufficiently in advance of service" to allow objections Id., Syll. Pt. 5. Although Rule 45(b)(1) refers to Rule 4(d)(1)(A), this provision does not constitute the exclusive manner of service upon a corporation. See, *State of West Virginia ex rel. Progressive Classic Insurance Company v. Bedell*, 224 W.Va. 453, 686 S.E.2d 593 (2009)(providing for service through the Secretary of State).

Interstate depositions are governed by Uniform Interstate Depositions and Discovery Act, W.Va. Code §66-12-1, et seq.

~~Rule~~RULE 46. ~~Exceptions unnecessary.~~ ~~Formal exceptions~~***Objecting to*** ~~rulings~~***a Ruling or*** ~~orders of the court are unnecessary; but for all purposes for which an~~***Order.***

A formal exception ~~has heretofore been necessary it is sufficient that a party, at the time the~~ to a ruling or order ~~of~~is unnecessary. When the ~~court~~ruling or order is requested or made ~~or sought, makes known to the court~~, a party need only state the action ~~which the party desires~~that it wants the court to take or ~~the party's objection~~objects to ~~the action of the court and~~, along with the grounds ~~therefor; and, if a party has no opportunity to~~ for the request or objection. Failing to object ~~to a ruling or order at the time it is made, the absence of an objection~~ does not ~~thereafter~~ prejudice ~~the party~~a party who had no opportunity to do so when the ruling or order was made.

2020 COMMITTEE COMMENT ON RULE 46

Rule 46 is changed to be largely consistent with the corresponding federal rule of civil procedure.

RULE 47. ~~*Selection of*~~ ***Selecting jurors.***

~~**(a) Examination of Jurors.** The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper.~~

~~(b)~~

(a) Examining jurors. – The attorneys conducting the case must be permitted to ask voir dire questions of the prospective jury panel members unless the presiding judicial officer finds that there are justifiable reasons to deny such attorney voir dire. The attorneys shall advise the judicial officer of the subject matter of the voir dire questions at such time prior to the actual questioning of the prospective jury panel as the judicial officer may designate. The court may allow individual voir dire in open court by the attorneys upon a showing of good cause or in camera where questioning such juror in open court in the presence of other jury members would be prejudicial or cause undue embarrassment to the prospective juror.

~~**(c)**~~**(b) Jury ~~Selection~~.selection. –** Unless the court directs that a jury ~~shall~~ consist of a greater number, a jury ~~shall~~must consist of six persons. The plaintiff and the defendant ~~shall~~must each have two ~~peremptory~~preemptory challenges which ~~shall~~must be exercised one at a time, alternately, beginning with the plaintiff. Several defendants or several plaintiffs may be considered as a single party for the purpose of exercising challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly.

~~**(d)**~~**(c) Alternate ~~Jurors.~~jurors. –** The court may direct that not more than six jurors in addition to the regular jury be called and ~~impanelled~~impaneled to sit as alternate jurors. Alternate jurors in the order in which they are called ~~shall~~must replace jurors who become or are found to be unable or disqualified to perform their duties. Alternate jurors ~~shall~~must be drawn in the same manner, ~~shall~~must have the same qualifications, ~~shall~~must be subject to the same examination and challenges, ~~shall~~must take the same oath, and ~~shall~~must have the same functions, powers, facilities, and privileges as the regular jurors. Each side is entitled to 1 additional peremptory challenge if 1 to 3 alternate jurors are to be ~~impanelled~~impaneled and 2 additional peremptory challenges if 4 to 6 alternate jurors are to be ~~impanelled~~impaneled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by law ~~shall~~must not be used against an alternate juror.

~~**(e)**~~**(d) Excuse.** – The court may for good cause excuse a juror from service during trial or deliberation.

2020 COMMITTEE COMMENT ON RULE 47

Rule 47 is largely adapted from the prior West Virginian Rule. Rule 47(a) is redrafted to be consistent with Trial Court Rule 23.03(a) which provides that the attorneys conducting the case shall be permitted to ask voir dire questions of the prospective jury panel members unless the presiding judicial officer finds justifiable reasons to deny such attorney voir dire. Current Rule 47(a) provides that the court "may" permit the parties to examine prospective jurors or that the court may do so itself. The current rule does not require the court to make a finding of good cause for denying attorneys the right to conduct voir dire questions.

~~RULE 48.~~ ***RULE 48. Juries; Verdict; Polling.***

~~(a)~~ Juries of ~~less than six; majority verdict.~~
~~(b)~~
(a) Fewer Than Six. The parties may stipulate that the jury ~~shall~~ consist of any number fewer than six ~~or that~~ .

(b) Verdict. Unless the parties stipulate otherwise, the verdict must be unanimous and must be returned by a jury of six members.

(c) Polling. After a verdict ~~or a finding of a stated majority of~~ is returned, but before the jury is discharged, the court must on a party's request, or may on its own, poll the jurors ~~shall be taken as the verdict~~ individually. If the poll reveals a lack of unanimity or lack of assent by the number of jurors that the parties stipulated to, the court may direct the jury to deliberate further or ~~finding of the jury~~may order a new trial.

2020 COMMITTEE COMMENT ON RULE 48

Rule 48 adopts the style and format of the corresponding federal rule. Rule 48(a) retains the requirement of six jurors as set forth in W.Va. Code 56-6-11(a) and does not adopt the larger juries allowed in corresponding federal rule. Subsections (b) and (c) are new and permit the parties to stipulate to a non-unanimous verdict and also permit the court to poll the jurors either on its own or at the request of a party.

RULE 49. Special ~~*verdicts*~~ *Verdict; General Verdict and* ~~*interrogatories*~~***Questions.***

(a) Special ~~verdicts.~~ –Verdict.

(1) *In General.* The court may require a jury to return only a special verdict in the form of a special written finding ~~upon~~on each issue of fact. ~~In that event the~~The court may ~~submit to the jury~~do so by:

(A) submitting written questions susceptible of a categorical or other brief answer ~~or may submit~~;

(B) submitting written forms of the ~~several~~ special findings ~~which~~that might properly be made under the pleadings and evidence; ~~or it may use such~~

(C) using any ~~other method of submitting the issues and requiring the written findings thereon as it deems most~~that the court considers appropriate.

(2) *Instructions.* The court ~~shall~~must give ~~to~~ the ~~jury such explanation~~instructions and ~~instruction concerning the matter thus submitted as may be~~explanations necessary to enable the jury to make its findings ~~upon~~on each submitted issue. ~~If in so doing the court omits~~

~~(1)~~(3) *Issues Not Submitted.* A party waives the right to a jury trial on any issue of fact raised by the pleadings or ~~by the~~ evidence, ~~each party waives the right to a trial by jury of the issue so omitted~~ but not submitted to the jury unless, before the jury retires, the party demands its submission to the jury. ~~As to an issue omitted without such~~If the party does not demand submission, the court may make a finding~~; or, if it fails to do so, it shall be deemed~~ on the issue. If the court makes no finding, it is considered to have made a finding ~~in accord~~consistent with ~~the~~its judgment on the special verdict.

(b) General ~~verdict accompanied by answer~~Verdict with Answers to ~~interrogatories.~~ –Written Questions.

(1) *In General.* The court may submit to the jury~~, together with appropriate~~ forms for a general verdict, together with written ~~interrogatories upon~~questions on one or more issues of fact that the ~~decision of which is necessary to a verdict.~~jury must decide. The court ~~shall~~must give ~~such explanation or instruction as may be~~ the instructions and explanations necessary to enable the jury ~~both to make answers to the interrogatories and~~ to render a general verdict and answer the

questions in writing, and ~~the court shall~~must direct the jury to do both ~~to make written answers~~.

(2) *Verdict and* ~~to render a general verdict.~~*Answers Consistent.* When the general verdict and the answers are ~~harmonious~~consistent, the court ~~shall direct the~~ must approve, for entry ~~of the~~under Rule 58, an appropriate judgment ~~upon~~on the verdict and answers.

(3) *Answers Inconsistent with the Verdict.* When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may ~~direct the~~:

(A) approve, for entry ~~of~~under Rule 58, an appropriate judgment ~~in accordance with~~according to the answers, notwithstanding the general verdict ~~or may return~~;

(B) direct the jury ~~for~~to further ~~consideration of~~consider its answers and verdict; or ~~may~~

(C) order a new trial.

~~**(2)**~~**(4)** *Answers Inconsistent with Each Other and the Verdict.* When the answers are inconsistent with each other and one or more is ~~likewise~~also inconsistent with the general verdict, judgment must not be entered; instead, the court ~~shall not~~must direct the ~~entry of judgment but may return the~~ jury ~~for~~to further ~~consideration of~~consider its answers and verdict, or ~~may~~must order a new trial.

2020 COMMITTEE COMMENT ON RULE 49

Rule 49 is changed to be consistent with the corresponding federal rule of civil procedure.

RULE 50. Judgment as a ~~matter~~ Matter of ~~law~~ Law in ~~jury trials; alternative motion~~ Jury Trials; Alternative Motion for ~~new trial; conditional rulings~~New Trial; Conditional Rulings.

(a) Judgment as a ~~matter~~Matter of ~~law. –~~Law

(1) ~~If during a trial by jury~~ *In General.* If a party has been fully heard on an issue during a jury trial and ~~there is no~~the court finds that a reasonable jury would not have a legally sufficient evidentiary basis ~~for a reasonable jury~~ to find for ~~that~~the party on that issue, the court may ~~determine~~:

(A) resolve the issue against ~~that~~the party; and ~~may~~

(A)(B) grant a motion for judgment as a matter of law against ~~that~~the party ~~with respect to~~ on a claim or defense that ~~cannot~~, under the controlling law, can be maintained or defeated ~~without~~only with a favorable finding on that issue.

(2) ~~Motions~~Motion. A motion for judgment as a matter of law may be made at any time before ~~submission of~~ the case is submitted to the jury. ~~Such a~~The motion ~~shall~~must specify the judgment sought and the law and ~~the~~ facts ~~on which~~that entitle the ~~moving party is entitled~~movant to the judgment.

(b) ~~Renewal of motion for judgment after trial; alternative motion for new trial. –~~Renewing the Motion After Trial; Alternative Motion for a New Trial. If~~, for any reason,~~ the court does not grant a motion for judgment as a matter of law made ~~at the close of all the evidence,~~under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. ~~The movant may renew the request for judgment as a matter of law by filing a motion no later than 10~~No later than 28 days after the entry of judgment ~~and may alternatively request~~ —or if the motion addresses a jury issue not decided by a verdict, no later than 28 days after the jury was discharged—the movant may file a ~~new trial or join a~~renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59. In ruling on ~~a~~the renewed motion, the court may:

~~**(1)** *If a verdict was returned:*~~
~~**(2)**~~
~~**(3)**~~**(1)** allow ~~the~~ judgment ~~to stand~~,on the verdict, if the jury returned a verdict;

(4)(2) order a new trial~~,~~; or

(5)(3) direct the entry of judgment as a matter of law~~; or~~.

~~*1. if no verdict was returned:*~~

~~1. order a new trial, or~~

~~2. direct entry of judgment as a matter of law.~~

(c) Granting the Renewed Motion; Conditional Ruling on a Motion for a New Trial.

~~**(6)**~~ *In General.* If the court grants a renewed motion for judgment as a matter of law~~; conditional rulings; new trial motion. –~~

~~**(7)**~~

~~**(1)**~~ ~~If the renewed motion for judgment, as a matter of law is granted, the court shall~~, it must also conditionally rule on ~~the~~any motion for a new trial~~, if any,~~ by determining whether ~~it~~a new trial should be granted if the judgment is ~~thereafter~~later vacated or reversed~~, and shall specify~~. The court must state the grounds for conditionally granting or denying the motion for ~~the~~a new trial. ~~If~~

~~**(8)**~~**(2)** *Effect of a Conditional Ruling. Conditionally granting* the motion for a new trial ~~is thus conditionally granted, the order thereon~~ does not affect the judgment's finality ~~of the judgment. In case the motion for a new trial has been conditionally granted and~~; if the judgment is reversed ~~on appeal~~, the new trial ~~shall~~must proceed unless the appellate court ~~has~~orders otherwise ~~ordered. In case~~. If the motion for a new trial ~~has been~~is conditionally denied, the appellee ~~on appeal~~ may assert error in that denial; ~~and~~ if the judgment is reversed ~~on appeal, subsequent proceedings shall be in accordance with~~, the ~~order of~~ case must proceed as the appellate court orders.

~~**(e)**~~**(d) ~~The~~Time for a Losing Party's New-Trial Motion.** Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law ~~has been~~is rendered ~~may file a motion for a new trial pursuant to Rule 59 not~~ must be filed no later than ~~10~~28 days after the entry of the judgment.

~~**(d)**~~**(e**) ~~**Same: denial of motion**~~**Denying the Motion for ~~judgment~~ Judgment as a ~~matter~~Matter of ~~law. –~~Law; Reversal on Appeal.** If the court denies the motion for judgment as a matter of law ~~is denied~~, the prevailing party ~~who prevailed on that motion~~ may, as appellee, assert grounds entitling ~~the party~~it to a new trial ~~in the event~~should the appellate court ~~concludes~~ conclude that the trial court erred in denying the motion ~~for judgment~~.. If the appellate court reverses the judgment, ~~nothing in this rule precludes~~ it ~~from determining that the appellee is entitled to~~may order a new trial, ~~or from directing~~direct the trial court to determine whether a new trial ~~shall~~should be

granted, or direct the entry of judgment.

2020 COMMITTEE COMMENT ON RULE 50

Rule 50 is changed to be consistent with the corresponding federal rule of civil procedure. The rule changes the time period for the filing of a motion for a new trial subsequent to the entry of judgment from a 10-day time period to a 28-day time period.

RULE 51. Instructions to ~~jury; objections~~the Jury; Objections; Preserving a Claim of Error.

(a) ~~Either before~~ **Requests.**

(1) *Before or at the Close of the Evidence.* At the close of the evidence~~,~~ or at any earlier reasonable time that the court orders, a party may file and furnish to every other party written requests ~~that the court instruct~~for the jury ~~on the law as set forth in the requests, and~~ instructions it wants the court ~~shall~~to give.

(2) *After the Close of the Evidence.* After the close of the evidence, a party may:

(A) file requests for instructions on issues that could not reasonably have been anticipated by an earlier time that the court set for requests; and

(B) with the court's permission, file untimely requests for instructions on any issue.

(b) Instructions. The court:

(1) must inform ~~counsel~~the parties of its proposed instructions and proposed action ~~upon~~on the requests before instructing the jury and before ~~it instructs the~~ final jury. ~~The court shall instruct the jury before the arguments to the jury are begun, and the instructions given by the court, whether in the form of a connected charge or otherwise, shall be in writing and shall not comment upon the evidence; except that supplemental written instructions may be given later, after ;~~

(2) must give the parties an opportunity to object ~~thereto has been accorded to the parties. The court~~on the record and out of the jury's hearing before the instructions and arguments are delivered; and may show the written instructions to the jury and permit the jury to take the written instructions to the jury room~~. No~~; and

(3) may instruct the jury at any time before the jury is discharged.

(c) Objections.

(1) *How to Make.* A party who objects to an instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds for the objection.

(2) *When to Make.* An objection is timely if:

(A) a party objects at the opportunity provided under Rule 51(b)(2); or

(B) a party was not informed of an instruction or action on a request before that opportunity to object, and the party objects promptly after learning that the instruction or request will be, or has been, given or refused.

(d) Assigning Error; Plain Error.

(1) *Assigning Error.* A party may assign as error ~~the giving:~~

(A) an error in an instruction actually given, if that party properly objected; or ~~the refusal~~

(B) a failure to give an instruction—, if that party properly requested it and—unless the ~~party objects thereto before the arguments to the jury are begun, stating distinctly, as to any given instruction, the matter to which the party objects and the grounds of the party's objection; but the~~ court rejected the request in a definitive ruling on the record—also properly objected.

(1)(2) *Plain Error.* A court ~~or any appellate court, may, in the interest of justice, notice~~may consider a plain error in the ~~giving or refusal to give an instruction, whether or not it~~ instructions that has ~~been made the subject of objection. Opportunity shall be given to make objection to the giving or refusal to give an instruction out of the hearing of the jury~~not been preserved as required by Rule 51(d)(1) if the error affects substantial rights.

2020 COMMITTEE COMMENT ON RULE 51

Rule 51 is changed to be consistent with the corresponding federal rule of civil procedure.

RULE 52. ~~–~~Findings and Conclusions by the Court; Judgment on Partial Findings.

(a) ~~Effect. –~~ Findings and Conclusions.

(1) *In ~~all actions~~General.* In an action tried ~~upon~~on the facts without a jury or with an advisory jury, the court ~~shall~~must find the facts specially and state ~~separately~~ its conclusions of law ~~thereon, and judgment shall~~separately. The findings and conclusions may be stated on the record after the close of the evidence or may appear in an opinion or a memorandum of decision filed by the court. Judgment must be entered ~~pursuant to~~under Rule 58~~; and in~~.

(2) *For an Interlocutory Injunction.* In granting or refusing ~~preliminary injunctions~~an interlocutory injunction, the court ~~shall~~must similarly ~~set forth~~state the findings ~~of fact~~ and conclusions ~~of law which constitute the grounds of~~that support its action. ~~Requests~~

(3) *For a Motion.* The court must state findings and conclusions when granting motion under Rule 12, 23(c)(1), or 56.

(4) *Effect of a Commissioner's Findings.* A Commissioner's findings, to the extent adopted by the court, must be considered the court's findings.

(5) *Questioning the Evidentiary Support.* A party may later question the sufficiency of the evidence supporting the findings, whether or not the party requested findings, objected to them, moved to amend them, or moved for partial findings~~ are not necessary for purposes of review~~.

~~**(0)**~~**(6)** *Setting Aside the Findings.* Findings of fact, whether based on oral or ~~documentary~~other evidence, ~~shall~~must not be set aside unless clearly erroneous, and the reviewing court must give due regard ~~shall be given~~ to the trial court's opportunity ~~of the trial court~~ to judge the witnesses' credibility~~ of the witnesses. The findings of a commissioner, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in subdivision (c) of this rule~~.

(b) ~~Amendment~~. ~~–~~ Upon**Amended or Additional Findings**. On a party's motion filed ~~not~~no later than ~~10~~28 days after the entry of judgment, the court may amend its findings ~~–~~or make additional findings ~~–~~and may amend the

judgment accordingly. The motion ~~may be made with~~accompany a motion for a new trial ~~pursuant to~~under Rule 59. ~~When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the trial court an objection to such findings or has made a motion to amend them or a motion for judgment.~~

(c) Judgment on ~~partial findings. –~~Partial Findings. If ~~during a trial without a jury~~ a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment ~~as a matter of law~~ against ~~that~~the party ~~with respect to~~on a claim or defense that ~~cannot~~, under the controlling law, can be maintained or defeated ~~without~~only with a favorable finding on that issue~~, or the~~. The court may, however, decline to render any judgment until the close of ~~all~~ the evidence. ~~Such a~~A judgment ~~shall~~on partial findings must be supported by findings of fact and conclusions of law as required by ~~subdivision (a) of this rule.~~ Rule 52(a).

2020 COMMITTEE COMMENT ON RULE 52

Rule 52 is changed to be largely consistent with the corresponding federal rule of civil procedure. Paragraph (a)(3) differs from the corresponding federal rule and reflects current West Virginia law regarding Rules 12, 23(c)(1) and 56. Paragraph (b) has been changed from the current rule, which requires a motion to be filed not later than 10 days after entry of judgment by the court, to 28 days. Additionally, the rule uses the term commissioner instead of “Masters” in paragraph (a)(4) to be consistent with West Virginia practice and other rules.

RULE 53. Commissioners.

~~Commissioners in Chancery shall henceforth be known as "Commissioners." The practice respecting the appointment of such commissioners and references to them, and respecting their powers and duties, and the powers and duties of courts to hold hearings upon their reports, shall be in accordance with the practice heretofore followed in this State. In all other respects, the action in which a commissioner is appointed, is governed by these rules.~~

Commissioners may be appointed by the court, pursuant to West Virginia statute, applicable Rules of Civil Procedure or Trial Court Rules.

2020 COMMITTEE COMMENT ON RULE 53

Rule 53 has been changed to be more easily understood and to continue the long-standing use of "Commissioner" by trial courts in West Virginia instead of "Masters" as used in the corresponding federal rule of civil procedure.

Note to the Court: The Committee is informed that commissioners are used frequently by some circuit court judges to resolve discovery disputes. The Committee questions whether the practice is authorized under West Virginia law. The Committee is also informed that this practice results in the litigants incurring substantial additional expenses to resolve discovery disputes.

Rule 53.1 – Discovery Commissioners.

(a) Appointment; Objections. In complex cases or for other good cause, a court may upon motion or on its own appoint one or more discovery commissioners to serve at the pleasure of the court. A party may file objections to an order regarding the appointment, compensation, or powers of a discovery commissioner within 14 days of entry of such an order.

(b) Compensation. The compensation of a discovery commissioner may be assessed to the parties**.**

(c) Powers.

(1) A discovery commissioner may administer oaths and affirmations.

(2) As directed by the court or as otherwise authorized by law, a discovery commissioner may:

(A) preside at discovery resolution conferences;

(B) preside over discovery motions;

(C) preside at any other proceeding or conference in furtherance of the discovery commissioner's duties;

(D) regulate all proceedings before the discovery commissioner; and

(E) take any other action necessary or proper for the efficient performance of the discovery commissioner's duties.

(d) Report and Recommendation; Objections.

(1) Report and Recommendation. After a discovery motion or other contested matter is submitted to a discovery commissioner, the discovery commissioner must prepare a written report containing recommendations for a resolution of each unresolved dispute. The discovery commissioner may direct counsel to prepare the report. The discovery commissioner must file the report with the court and serve a copy of it on each party. The parties and the court are not bound by the report of the discovery commissioner but, instead, the court retains responsibility for the final determination.

(2) Objections. Any party aggrieved by the report must file and serve objections within 7 days of service. If objections are filed, any other party may file and serve a response, including objections, within 5 days after

being served with the objections. Any other party may file and serve a reply within 5 days after being served with objections.

(A) Objections not timely raised are waived.

(B) Discovery as to the matters in dispute may not proceed until the court's adoption of the order or resolution of objections.

(e) Review. Upon receipt of a discovery commissioner's report and any objections or replies, or when the period to serve objections or replies has elapsed, the court must:

(A) adopt or reverse, in full or in part, or otherwise modify the discovery commissioner's report by written order, with or without a hearing;

(B) set the matter for hearing if requested by a party or on the court's own initiative; or,

(C) remand the matter to the discovery commissioner with instructions for reconsideration or other further action.

ADVISORY COMMITTEE NOTES 2020 AMENDMENT.

This is a new rule intended to regulate the appointment, compensation, and authority of discovery commissioners. A discovery commissioner is a type of special master, also referred to interchangeably as a master or special commissioner, who serves as an adjunct to the court. Any party may object to the appointment, compensation, or authority of a discovery commissioner.

The rule makes clear that the use of a discovery commissioner should be reserved for complex matters.

Discovery commissioners may hear and recommend resolution of discovery disputes, but that only the court can enter final determinations that are binding on the parties. The court reviews a discovery commissioner's report and recommendation de novo. However, an objecting party may not raise new objections before the court that could have been raised before the discovery commissioner but were not.

Hearings are not required.

Discovery commissioners are subject to the Code of Judicial Conduct. See *State ex rel. Mantz v. Zakaib*, 216 W.Va. 609, 609 S.E.2d 870 (2004).

The rule is not intended to deprive courts of any preexisting authority to appoint commissioners for other purposes as provided by law.

The rule is taken in substantial part from Nevada Rule of Civil Procedure 16.3.

VII. Judgment

~~Rule~~RULE 54. Judgments; ~~costs~~Costs.

(a) Definition; ~~form. –~~Form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment ~~shall~~must not ~~contain a recital~~include recitals of pleadings, ~~the~~a commissioner's report ~~of a commissioner~~, or ~~the~~a record of prior proceedings.

(b) Judgment ~~upon multiple claims~~on Multiple Claims or ~~involving multiple parties. –~~Involving Multiple Parties. When an action presents more than one claim for relief ~~is presented in an action, —~~whether as a claim, counterclaim, ~~cross claim~~crossclaim, or third-party claim~~, —~~or when multiple parties are involved, the court may direct ~~the~~ entry of a final judgment as to one or more, but fewer than all ~~of the~~, claims or parties only ~~upon an express determination~~if the court expressly determines that there is no just reason for delay ~~and upon an express direction for the entry of judgment. In the absence of such determination and direction~~. Otherwise, any order or other ~~form of~~ decision, however designated, ~~which~~that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties ~~shall not terminate~~, including in a multiparty case the dismissal of all of the claims against fewer than all of the parties, does not end the action as to any of the claims or parties~~, and the order or other form of decision is subject to revision~~ and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities ~~of all the parties~~.

(c) Demand for ~~judgment. –~~Judgment; Relief to Be Granted. A ~~judgment by~~ default ~~shall~~judgment must not ~~be different~~differ in kind from, or exceed in amount ~~that prayed for~~, what is demanded in the ~~demand for judgment. Except as to a party against whom a judgment is entered by default, every~~ pleadings. Every other final judgment ~~shall~~must grant the relief to which ~~the~~each party ~~in whose favor it is rendered~~ is entitled, even if the party has not demanded ~~such~~that relief in ~~the party's~~its pleadings.

~~**(d) Cost; Attorney's Fees.**~~

(d) Costs ~~*other than attorney's fees.*~~. Except when express provision ~~therefor~~therefore is made either in a statute of this State or in these rules, costs ~~shall~~must be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the State, its officers, and agencies ~~shall~~must be imposed only to the extent permitted by law. The clerk ~~shall~~must tax the costs within ~~10~~14 days after judgment is entered, and ~~shall~~must send a copy of the bill of costs to each party affected thereby. On motion by any party served within ~~10~~14 days after receipt of the bill of costs, the action of the clerk may be reviewed by the court.

~~**(1)** *Attorney's Fees.*~~

~~**(A)** Claim to Be by Motion. A claim for attorney's fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages.~~

~~**(B)** Timing and Contents of the Motion. Unless a statute or a court order provides otherwise, the motion must:~~

~~**(i)** be filed no later than 14 days after the entry of judgment;~~

~~**(ii)** specify the judgment and the statute, rule, or other grounds entitling the movant to the award;~~
~~**(iii)** state the amount sought or provide a fair estimate of it; and~~

~~**(iv)** disclose, if the court so orders, the terms of any agreement about fees for the services for which the claim is made.~~

~~**(C)** Proceedings. Subject to Rule 23(h), the court must, on a party's request, give an opportunity for adversary submissions on the motion in accordance with Rule 43© or 78. The court may decide issues of liability for fees before receiving submissions on the value of services. The court must find the facts and state its conclusions of law as provided in Rule 52(a).~~

COMMITTEE COMMENT ON RULE 54

This rule is changed to be consistent with the corresponding federal rule of civil procedure. New language related to multi party cases in subsection (b) conforms the West Virginia rule to practice under the corresponding federal rule. This overrules *Durm v. Heck's*, 401 S.E.2d 908 (1991) ("With the enactment of Rule 54(b), an order may be final prior to the ending of the entire litigation on its merits if the order resolves the litigation as to a claim or a party.")
A corresponding change is made to Rule 72.

The proposed changes include a change from a ten to a fourteen day time frame in 54(d) regarding the taxing of costs.

~~Rule~~RULE 55. Default.

(a) ~~Entry. –~~Entering a Default. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend~~ as provided by these rules~~, and that ~~fact~~failure is ~~made to appear~~shown by affidavit or otherwise, the clerk ~~shall~~must enter the party's default.

(b) Entering a Default Judgment. ~~– Judgment by Default May be Entered as Follows:~~

(1) *By the Clerk.* ~~When~~If the plaintiff's claim ~~against a defendant~~ is for a sum certain or for a sum ~~which~~that can ~~by computation~~ be made certain by computation, the ~~court upon~~clerk—on the plaintiff's request ~~of the plaintiff and upon~~ , with an affidavit ~~of~~showing the amount due ~~shall direct the entry of~~—must enter judgment ~~by the clerk~~ for that amount and costs against ~~the~~a defendant~~, if the defendant~~ who has been defaulted for ~~failure to appear and is~~ not ~~an infant,~~ appearing and who is neither a minor nor an incompetent person~~, or convict~~.

(2) *By the Court.* In all other cases, the party ~~entitled to a judgment by default shall~~must apply to the court ~~therefor; but no~~ for a default judgment. A default judgment ~~by default shall~~ may be entered against ~~an infant~~,a minor or incompetent person~~, or convict unless~~ only if represented ~~in the action~~ by a general guardian, ~~guardian ad litem, committee,~~ conservator, ~~curator,~~ or other ~~representative~~like fiduciary who has appeared ~~therein~~. If the party against whom a default judgment ~~by default~~ is sought has appeared ~~in the action, the~~personally or by a representative, that party ~~(~~or~~, if appearing by~~ its representative~~, the party's representative) shall~~ must be served with written notice of the application ~~for judgment~~ at least ~~3~~7 days ~~prior to~~before the hearing ~~on such application. If, in order to enable the~~. The court may conduct hearings or make referrals—preserving any right to a jury trial—when, to enter or effectuate judgment ~~or to carry~~, it ~~into effect, it is necessary to take~~needs to:

(A) conduct an ~~account or to~~ accounting;

(B) determine the amount of damages ~~or to~~ ;

(C) establish the truth of any ~~averment~~allegation by evidence ~~or to make an investigation of~~; or

~~**(2)**~~**(D)** investigate any other matter~~, the court may conduct such hearings or order such references as it deems necessary~~.

(c) Setting ~~aside default. – For good cause shown the~~ **Aside a Default or a**

Default Judgment. The court may set aside an entry of default for good cause, and~~, if a judgment by default has been entered,~~ it may ~~likewise~~ set ~~it~~ aside ~~in accordance with~~a final default judgment under Rule 60(b).

~~**(d)** Plaintiffs, counterclaimants, cross-claimants. – The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c).~~

(d)~~(e)~~ Entry of ~~judgment~~Judgment. The provisions of Rule 58 apply to default judgments.

COMMITTEE COMMENT ON RULE 55

This rule is changed to be consistent with the corresponding federal rule of civil procedure.

RULE 56. Summary ~~judgment~~Judgment.

(a) ~~For claimant. –~~Motion for Summary Judgment or Partial Summary Judgment. A party ~~seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment~~ may~~, at any time after the expiration of 30 days from the commencement of the action or after service of a motion for summary judgment by the adverse party,~~ move ~~with or without supporting affidavits for a~~ for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment ~~in the party's favor upon all or any part thereof.~~

~~(b) For defending party. –~~ ~~A party against whom a claim, counterclaim, or cross claim is asserted or a declaratory judgment~~ is sought ~~may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.~~.

~~(c) Motion and proceedings thereon. –~~ The ~~motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that~~ court must grant summary judgment if the movant shows that there is no genuine issue as to any material fact and ~~that~~ the ~~moving party~~movant is entitled to ~~a~~ judgment as a matter of law. ~~A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.~~

(b) Time to File a Motion. Unless a different time is set by court order, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

(c) ~~(d) Case not fully adjudicated on motion.~~ ~~If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly~~**Procedures.**

(1) *Supporting Factual Positions.* A party asserting that a material fact cannot be or is genuinely in issue must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine issue, or that an adverse party cannot produce admissible evidence to support the fact.

(2) *Objection That a Fact Is Not Supported by Admissible Evidence.* A party may object~~.~~

~~**(e) Form of affidavits; further testimony; defense required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.~~

~~**(f)** When affidavits are unavailable. – Should it appear from the affidavits of a party opposing the motion~~ that the ~~party~~material cited to support or dispute a fact cannot ~~for reasons~~be presented in a form that would be admissible in evidence.

(3) *Materials Not Cited.* The court need consider only the cited materials, but it may consider other materials in the record.

(4) *Affidavits or Declarations.* An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated~~ present~~.

(d) When Facts Are Unavailable to the Nonmovant. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify ~~the party's~~its opposition, the court may~~ refuse the application for judgment or may order a continuance to permit affidavits to~~

~~be obtained or depositions to be taken or discovery to be had~~ :

(1) defer considering the motion or ~~may make such other order as is just.~~deny it;

~~**(g) Affidavits made in bad faith.** – Should it appear~~ **(2)** allow time to obtain affidavits or declarations or to take discovery; or

(3) issue any other appropriate order.

(e) ~~the satisfaction~~**Failing to Properly Support or Address a Fact.** If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court ~~at any time~~ may:

(1) give an opportunity to properly support or address the fact;

(2) consider the fact undisputed for purposes of the motion;

(3) grant summary judgment if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it; or

(4) issue any other appropriate order.

(f) ~~of the affidavits presented pursuant to~~ **Judgment Independent of the Motion.** After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmovant;

(2) grant the motion on grounds not raised by a party; or

(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) Failing to Grant All the Requested Relief. If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact—including an item of damages or other relief—that is not genuinely in issue and treating the fact as established in the case.

(h) Affidavit or Declaration Submitted in Bad Faith. If satisfied that an affidavit or declaration under this rule ~~are presented~~is submitted in bad faith or solely for ~~the purpose of~~ delay, the court ~~shall forthwith~~—after notice and a reasonable time to respond—may order the submitting party ~~employing them~~ to pay ~~to~~ the other party ~~the amount of~~ the reasonable expenses ~~which the filing of the affidavits caused the other party to incur, including~~

~~reasonable~~ , including attorney's fees, ~~and any~~it incurred as a result. An offending party or attorney may also be ~~adjudged guilty of~~held in contempt~~.~~ or subjected to other appropriate sanctions.

COMMITTEE COMMENT ON RULE 56

This rule is changed to be consistent with the corresponding federal rule of civil procedure. The Rule adopts Rule 56(f) which is consistent with West Virginia case law. See, Syll. Pt. 3, *State ex rel Nat. Fire Ins. v. Hummel*, 850 S.E.2d 680 (W.Va. 2020)("As a general rule, a trial court may not grant summary judgment sua sponte on grounds not requested by the moving party. An exception to this general rule exists when a trial court provides the adverse party reasonable notice and an opportunity to address the grounds for which the court is sua sponte considering granting summary judgment."); *Gavitt v. Swiger*, 248 S.E.2d 849 (1978)(Trial court may not grant summary judgment on grounds not requested by the moving party).

[No recommended changes to Rules 57 and 58.]

~~RULE 59. New trials; amendment of judgments.~~ ***RULE 59. New Trials; Amendment of Judgments.***

~~(a)~~ In General.

(1) *~~Grounds.~~ for New Trial.* The court may, on motion, grant a new trial ~~may be granted to~~ on all or ~~any of the parties and on all or part~~some of the issues ~~(1) in an action in which there has been a~~ and to any party as follows:

(A) after a jury trial ~~by jury~~, for any ~~of the reasons~~reason for which a new trial has heretofore been granted in an action at law; or

(B) after a nonjury trial, for any reason for which ~~new trials have~~a rehearing has heretofore been granted in ~~actions at law; and in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits~~a suit in equity~~. On a~~ in federal court.

~~(a)~~(2) *Further Action After a Nonjury Trial.* After a nonjury trial, the court may, on motion for a new trial ~~in an action tried without a jury, the court may~~, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ~~findings and conclusions~~ones, and direct the entry of a new judgment.

~~(b)~~(h) Time to File a Motion for ~~motion.~~ Any**a New Trial.** A motion for a new trial ~~shall~~must be filed ~~not~~no later than ~~10~~28 days after the entry of ~~the~~ judgment.

~~(c)~~(i) ~~Time for serving affidavits.~~to Serve Affidavits. When a motion for a new trial is based ~~upon~~on affidavits, they ~~shall~~must be filed with the motion. The opposing party has ~~10~~14 days after ~~service~~being served to file opposing affidavits~~, but that period may be extended for up to 20 days, either by the court for good cause or by the parties' written stipulation.~~. The court may permit reply affidavits.

~~(d)~~(j) ~~On court's initiative; notice; specifying grounds.~~New Trial on the Court's Initiative or for Reasons Not in the Motion. No later than ~~10~~28 days after the entry of judgment, the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. ~~When granting a new trial on its own initiative or for a reason not stated in a motion~~In either event, the court ~~shall~~must specify the ~~grounds~~reasons in its order.

~~(e)~~(k) ~~-~~**Motion to ~~alter~~Alter or ~~amend~~Amend a ~~judgment.~~** ~~Any~~**Judgment.** A motion to alter or amend ~~the~~a judgment ~~shall~~must be filed ~~not~~no later than ~~10~~28 days after the entry of the judgment.

~~**(g) Effect of failure to move for new trial.** If a party fails to make a timely motion for a new trial, after a trial by jury in which judgment as a matter of law has not been rendered by the court, the party is deemed to have waived all errors occurring during the trial which the party might have assigned as grounds in support of such motion; provided that if a party has made a motion under Rule 50(b) for judgment in accordance with the party's motion for judgment as a matter of law and such motion is denied, the party's failure to move for a new trial is not a waiver of error in the court's denying or failing to grant such motion for judgment as a matter of law.~~

(f) Abrogated.

COMMITTEE COMMENT ON RULE 59

This rule is changed to be consistent with the corresponding federal rule of civil procedure.

Substantively, the time period for the filing of a motion for a new trial or to amend or alter the judgment is expanded from 10 days to 28 days in accord with changes made in 2009 to the corresponding federal rule.

Proposed Rule 59 (c) also changes the time period for filing opposing affidavits. Previously, the time period was 10 days which could be extended to 20 days for good cause or by stipulation. The underlying 10-day period was extended to 14 days in accord with the federal rule.

Subdivision (f) of the current West Virginia Rule is abrogated. Under subdivision (f), a party was required after a jury trial to file a Motion for New Trial or waive all trial-related issues for appeal. See, *Martin v. Lovelace*, No. 19-0745 (W.Va. May 28, 2021)(quoting *Miller v. Triplett*, 203 W. Va. 351, 507 S.E.2d 714 (1998)("[I]f a party fails to make a timely motion for a new trial, Rule 59(f) . . . bars consideration on appeal of alleged errors which occurred during the trial which a party might have assigned as grounds in support of a motion for a new trial.")). This only applied to jury trials. This change makes the West Virginia rule consistent with the federal rule. The Committee believes that it is more efficient to allow a party to seek appellate review immediately after judgment is rendered, if it so chooses.

RULE 60. Relief from ~~judgment~~Judgment or ~~order~~Order.

~~(f)~~(a) ~~Corrections Based on~~ Clerical ~~mistakes.~~ ~~– Clerical mistakes in judgments, orders or other parts of the record and errors therein~~**Mistakes; Oversights and Omissions.** The court may correct a clerical mistake or a mistake arising from oversight or omission ~~may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the~~whenever one is found in a judgment, order, or other part of the record. The court ~~orders. During the pendency of an appeal, such mistakes~~ may ~~be~~do so ~~corrected before the appeal is~~ on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court~~,~~ and ~~thereafter~~ while the ~~appeal~~it is pending, such a mistake may be ~~so~~ corrected only with ~~leave of~~ the appellate ~~court~~court's leave.

~~(b) Mistakes; inadvertence; excusable neglect; unavoidable cause; newly discovered evidence; fraud, etc. –~~Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and ~~upon such~~just terms ~~as are just~~, the court may relieve a party or ~~a party's~~its legal representative from a final judgment, order, or proceeding for the following reasons: ~~(1) Mistake~~

(1) mistake, inadvertence, surprise, unavoidable cause, or excusable neglect~~, or unavoidable cause; (2)~~ ;

(2) newly discovered evidence ~~which by due~~that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); ~~(3)~~

(3) fraud (whether ~~heretofore denominated~~previously called intrinsic or extrinsic), misrepresentation, or ~~other~~ misconduct ~~of~~by an ~~adverse~~opposing party; ~~(4)~~

(4) the judgment is void; ~~(5)~~

(5) the judgment has been satisfied, released, or discharged~~, or a prior judgment upon which~~; it is based on an earlier judgment that has been reversed or ~~otherwise~~ vacated~~,~~; or applying it prospectively is no longer equitable ~~that the judgment should have prospective application; or (6)~~ ; or

(6) any other reason ~~justifying~~that justifies relief ~~from the operation~~.

(c) Timing and Effect of the ~~judgment. The~~Motion.

(1) *Timing.* A motion ~~shall~~under Rule 60(b) must be made within a reasonable time~~,~~ and for reasons (1), (2), and (3) ~~not~~no more than ~~one~~a year after the entry of the judgment~~,~~ or order~~,~~ or the date of the proceeding

~~was entered or taken. A~~.

(2) *Effect on Finality*. The motion ~~under this subdivision (b)~~ does not affect the judgment's finality ~~of a judgment~~ or suspend its operation.

(d) Other Powers to Grant Relief. This rule does not limit ~~the~~a court's power ~~of a court~~ to~~-~~:

(1) entertain an independent action to relieve a party from a judgment, order, or proceeding~~, or to -~~;

(2) grant ~~statutory~~ relief ~~in the same action~~ to a defendant who was not ~~served with a summons in that~~personally notified of the action~~,~~; or ~~to~~

(3) set aside a judgment for fraud ~~upon~~on the court.

~~**(g)**~~**(e) Bills and Writs** ~~of coram nobis, coram vobis, petitions for rehearing,~~**Abolished.** The following are abolished: bills of review ~~and~~, bills in the nature of ~~a bill~~bills of review, ~~are abolished,~~ and ~~the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action~~writs of coram nobis, coram vobis, and audita querela.

COMMITTEE COMMENT ON RULE 60

This rule is changed to be consistent with the corresponding federal rule of civil procedure. “Unavoidable cause” is retained as a ground for relief from the former rule. The term is not in the federal rule.

RULE 61. Harmless ~~error~~Error.

~~No~~Unless justice requires otherwise, no error in ~~either the admission~~admitting or ~~the exclusion of~~excluding evidence ~~and no error —~~or ~~defect in~~ any ~~ruling or order or in anything done or omitted~~ other error by the court or ~~by any of the parties~~ a party—is ground for granting a new trial ~~or~~, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order~~, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at~~. At every stage of the proceeding, the court must disregard ~~any error or defect in the proceeding which does~~all errors and defects that do not affect ~~the~~any party's substantial rights ~~of the parties~~.

COMMITTEE COMMENT ON RULE 61

This rule is changed to be consistent with the corresponding federal rule of civil procedure.

RULE 62. Stay of ~~proceedings~~Proceedings to ~~enforce~~Enforce a ~~judgment~~Judgment.

(a) Automatic ~~stay; exceptions. –~~Stay. Except as stated ~~herein, no writ of~~in this rule, execution ~~shall issue upon~~on a judgment ~~nor shall other~~ and proceedings ~~be taken for its enforcement until the expiration of 10~~to enforce it are stayed for 30 days after its entry, unless the court orders otherwise ~~ordered~~.

(b) Stay by ~~the court, nor after that time pending the disposition of a motion for~~ **Bond or Other Security**. At any time after judgment ~~as a matter of law made pursuant to Rule 50 or of a motion for a new trial made pursuant to Rule 59(a). Pending disposition of such motions and for good cause shown, the court may prescribe such conditions as are necessary to secure the benefit of the judgment to the party in whose favor it~~ is entered~~.~~ ~~Unless otherwise ordered~~, a party may obtain a stay by ~~the court, neither an interlocutory order~~providing a bond or other security. The stay takes effect when the court approves the bond or other security and remains in ~~any action nor a final judgment awarding an injunction shall be stayed after its entry.~~effect for the time specified in the bond or other security.

(c) to (g) Reserved
~~(c)~~
(h) Discretionary stay. In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion to alter or amend a judgment made pursuant to Rule 59(e), or of a motion for relief from a judgment or order made pursuant to Rule 60, or of a motion for amendment to the findings or for additional findings made pursuant to Rule 52(b).

~~(d) to (g) [Reserved].~~

~~(h)~~(i) Stay ~~of judgment as to multiple claims~~with Multiple Claims or ~~multiple parties. –~~ When a**Parties.** A court ~~has ordered~~may stay the enforcement of a final judgment entered under ~~the conditions stated in~~ Rule 54(b~~), the court may stay enforcement of that judgment~~) until ~~the entering of a subsequent~~it enters a later judgment or judgments, and may prescribe ~~such conditions as are~~terms necessary to secure the benefit ~~thereof to~~ of the stayed judgment for the party in whose favor ~~the judgment is~~it was entered.

~~(i)~~(j) Stay of ~~judgment pending application for appeal. –~~Judgment Pending Application for Appeal. On motion and on such conditions for the security of the ~~adverse~~opposing party as are proper, the court may stay the issuance of execution upon a judgment and any other proceedings for its enforcement for such reasonable time, to be specified by the court in the stay

order, as will enable the moving party to present ~~to~~ an ~~appellate court a petition for~~ appeal ~~from the judgment~~.

COMMITTEE COMMENT ON RULE 62

This rule is changed to be largely consistent with the corresponding federal rule of civil procedure.

Substantively, the timeframe set forth in Rule 62(a) regarding execution or enforcement of a judgment has been expanded from 10 days to 30 days, consistent with the corresponding federal rule.

Subsection (i) is retained from the current rule.

Language in Rule 62(b) is consistent with the current federal rule extension of the automatic stay obviates the need for the discretionary stay.

The federal rule includes 62.1 regarding "indicative ruling." The Committee does not recommend the adoption of an indicative ruling procedure.

~~***RULE 63. Disability of a judge after trial.***~~
RULE 63. Judge's Inability to Proceed.

If ~~***Disability of***~~ a judge ~~***after trial***~~conducting.

~~If at any time after~~ a ~~trial or~~ hearing ~~has been commenced the judge~~or trial is unable to proceed, any other judge may proceed ~~with the matter~~ upon certifying familiarity with the record and determining that the ~~proceedings in the~~ case may be completed without prejudice to the parties. In a hearing or ~~trial without~~ a ~~jury~~nonjury trial, the successor judge ~~shall~~must, at ~~the~~a party's request ~~of a party~~, recall any witness whose testimony is material and disputed and who is available to testify again without undue burden. The successor judge may also recall any other witness.

COMMITTEE COMMENT ON RULE 63

This rule is changed to be consistent with the corresponding federal rule of civil procedure.

VIII. Provisional and Final Remedies and Special Proceedings

RULE 64. Seizure of ~~person~~Person or ~~property~~Property.

(a) Remedies – In General. At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the State existing at the time the remedy is sought.

(b) Specific Kinds of Remedies and Qualification Thereto. The remedies available under this rule include the following, subject to the ~~following~~ qualifications~~: (1) An~~ stated:

- an order for the seizure of specific personal property in an action to recover possession of such property ~~shall~~must be executed forthwith and a return made thereon within ~~20~~21 days after issuance of the order; ~~(2)~~

- an order of civil arrest or attachment ~~shall~~must be executed forthwith and a return made thereon within 30 days after issuance of the order; and ~~(3)~~

- a garnishee ~~shall~~must serve an answer within 90 days after service of the order of attachment, unless the answer is waived. The remedies thus available include arrest, attachment, garnishment, order of seizure of specific personal property, sequestration, and other corresponding or equivalent remedies, however designated and regardless of whether the remedy is ancillary to an action or must be obtained by an independent action.

COMMITTEE COMMENT ON RULE 64

Changes to the format of the rule make it substantially consistent with the corresponding federal rule but Rule 64(b) retains substantial elements of the current West Virginia rule.

The time for execution and return of a seizure order is changed from 20-21 days.

RULE 65. Injunctions and Restraining Orders.

~~(d)~~(a) ~~–~~Preliminary **~~injunction. –~~** Injunction.

(1) *Notice.* ~~— No preliminary injunction shall be issued without notice to the adverse party.~~

~~(1)~~ ~~Consolidation of hearing with trial on merits. – Before or after the commencement of the hearing of an application for~~ The court may issue a preliminary injunction~~, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a)(2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury~~ only on notice to the adverse party.

~~–~~**(2)** *Consolidating the Hearing with the Trial on the Merits.* Before or after beginning the hearing on a motion for a preliminary injunction, the court may advance the trial on the merits and consolidate it with the hearing. Even when consolidation is not ordered, evidence that is received on the motion and that would be admissible at trial becomes part of the trial record and need not be repeated at trial. But the court must preserve any party's right to a jury trial.

(b) Temporary **~~restraining order; notice; hearing; duration.~~** ~~—~~ARestraining Order.

(1) *Issuing Without Notice.* The court may issue a temporary restraining order ~~may be granted~~ without written or oral notice to the adverse party or ~~that party's~~its attorney only if ~~(1) it clearly appears from~~:

(A) specific facts ~~shown by~~in an affidavit or ~~by the~~a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the ~~applicant~~movant before the adverse party ~~or that party's attorney~~ can be heard in opposition~~,~~; and ~~(2~~

(B) the ~~applicant's~~movant's attorney certifies ~~to the court~~ in writing ~~the~~any efforts~~, if any, which have been~~ made to give ~~the~~ notice and the reasons ~~supporting the claim that notice~~ why it should not be required.

(2) *Contents; Expiration.* Every temporary restraining order ~~granted~~issued without notice ~~shall be indorsed with~~must state the date and hour ~~of~~ ~~issuance; shall be filed forthwith in the clerk's office and entered of~~

~~record; shall define~~it was issued; describe the injury and state why it is irreparable; state why the order was issued without notice; and ~~why the order was granted without notice; and shall expire by its terms within such~~be promptly filed in the clerk's office and entered in the record. The order expires at the time after entry~~, —~~not to exceed ~~10~~14 days~~, as —~~that the court ~~fixes~~sets, unless ~~within the~~before that time ~~so fixed~~ the ~~order~~court, for good cause ~~shown, is extended~~, extends it for a like period or ~~unless~~ the adverse party ~~against whom the order is directed~~ consents ~~that it may be extended for a~~ to a longer ~~period~~extension. The reasons for ~~the~~an extension ~~shall~~must be entered ~~of~~in the record. ~~In case a temporary restraining~~

~~(3)~~ *Expediting the Preliminary-Injunction Hearing.* If the order is ~~granted~~issued without notice, the motion for a preliminary injunction ~~shall~~must be set ~~down~~ for hearing at the earliest possible time ~~and takes~~, taking precedence ~~of~~over all other matters except hearings on older matters of the same character~~; and when~~. At the ~~motion comes on for~~ hearing, the party who obtained the ~~temporary restraining~~ order ~~shall~~must proceed with the ~~application for a preliminary injunction and,~~motion; if the party does not ~~do so~~, the court ~~shall~~must dissolve the ~~temporary restraining~~ order.

~~(e)~~ ***~~(4)~~*** *Motion to Dissolve.* On 2 ~~days'~~days' notice to the party who obtained the ~~temporary restraining~~ order without notice ~~—~~or on ~~such~~ shorter notice ~~to that party as~~set by the court ~~may prescribe, —~~the adverse party may appear and move ~~its dissolution~~to dissolve or ~~modification and in that event~~modify the order. The court ~~shall proceed to~~must then hear and ~~determine such~~ decide the motion as ~~expeditiously~~promptly as ~~the ends of~~ justice ~~require~~requires.

~~(f)~~ ~~**(c)**~~ Security. ~~— No restraining order or~~ The court may issue a preliminary injunction ~~shall issue except upon~~or a temporary restraining order only if the ~~giving of~~movant gives security ~~by the applicant,~~ in ~~such sum as~~an amount that the court ~~in its discretion deems~~considers proper~~, for~~ to pay the ~~payment of such~~ costs and damages ~~as may be incurred or suffered~~sustained by any party ~~who is~~ found to have been wrongfully enjoined or restrained. No such security ~~shall~~may be required of the United States, the State of West Virginia and its political subdivisions or of an officer or agency thereof.

~~The provisions of Rule 65.1 apply to a surety upon a bond or undertaking under this rule.~~

~~**Form**~~**(d)** Contents and ~~**scope of injunction or restraining order. —**~~ Scope of Every Injunction and Restraining Order.

(1) *Contents.* Every order granting an injunction and every restraining

order ~~shall set forth~~must:

(A) state the reasons ~~for~~why it issued;

(B) state ~~its issuance; shall be specific in~~ terms~~; shall~~ specifically; and

(C) describe in reasonable detail~~, —~~and not by ~~reference~~referring to the complaint or other document~~, —~~the act or acts ~~sought to be~~ restrained~~; and is binding~~ or required.

(2) *Persons Bound*. The order binds only ~~upon~~the following who receive actual notice of it by personal service or otherwise:

(A) the parties ~~to~~;

(B) the ~~action, their~~parties' officers, agents, servants, employees, and attorneys~~,~~; and ~~upon those~~

~~**(g)**~~**(C)** other persons who are in active concert or participation with ~~them who receive actual notice of the order by personal service or otherwise.~~anyone described in Rule 65(d)(2)(A) or (B).

COMMITTEE COMMENT

The rule is changed to be consistent with the corresponding federal rule except subsections (e) and (f) which are not applicable. Subsection (c) retains the language from the current rule excepting the United States, the State of West Virginia and its political subdivisions or of an officer or agency thereof from the requirement to give security.

RULE 65.1. Security: proceedings against sureties.

Whenever these rules require or permit the giving of security by a party, and security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as the surety's agent upon whom any papers affecting the surety's liability on the bond or undertaking may be served. The surety's liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who s~~hall forthwith mail~~must promptly send copies to the sureties if their addresses are known.

COMMITTEE COMMENT ONRULE 65.1

The Rule retains language from the current rule except the word “shall” is changed to “must” for consistency with other rules and the federal rules, and the clerk is directed to promptly send notice rather than mail notice.

RULE 66. Receivers.

An action wherein a receiver has been appointed ~~shall~~may not be dismissed except by order of the court. The practice respecting the appointment of receivers and the administration of estates by them or by other similar officers appointed by the court ~~shall~~must be in accordance with the practice heretofore followed in this State. In all other respects, the action in which the appointment of a receiver is sought or which is brought by or against a receiver is governed by these rules.

2014 COMMITTEE COMMENT ON RULE 66

The rule contains no substantive changes except the word "shall" is changed for consistency with other rules and the federal rules.

RULE 67. Deposit in ~~court~~Court.

(a) Depositing Property. Except as otherwise provided in Rule 68(b), in an action in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money or the disposition of any other thing capable of delivery, a party, upon notice to every other party and by leave of court, may deposit with the court all or any part of such sum or thing, whether or not that party claims all or any part of the sum or thing. The party making the deposit ~~shall~~must serve the order permitting deposit on the clerk of the court.

(b) Investing and Withdrawing Funds. Money paid into court under this rule ~~shall~~must be deposited and withdrawn in accordance with applicable statutes and with orders of the court entered in the action. The fund ~~shall~~must be deposited in a federally insured interest-bearing account or invested in an interest-bearing instrument approved by the court.

COMMITTEE COMMENT

Changes to the format of the rule make it substantially consistent with the corresponding federal rule of civil procedure, but the rule retains language from the prior West Virginia Rule.

RULE 68. Offer of ~~judgment; payment into court~~Judgment; Payment Into Court.

(a) ~~Making an offer~~Offer of ~~judgment; judgment on an accepted offer. –~~ Judgment. At any time more than ~~10~~14 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect and on the terms specified in the defending ~~party's~~party's offer, with costs then accrued. If within ~~10~~14 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the court ~~shall~~must direct entry of the judgment by the clerk.

(b) Payment ~~into court. –~~Into Court. A party defending against a claim may pay into court by depositing with the clerk a sum of money on account of what is claimed, or by way of compensation or amends, and plead that the party is not indebted to any greater amount to the party making the claim or that the party making the claim has not suffered greater damages. The party making the claim may (1) accept the tender and have judgment for the ~~party's~~party's costs, (2) reject the tender, or (3) accept the tender as part payment only and proceed with the ~~party's~~party's action on the sole issue of the amount of damages.

(c) Offer ~~not accepted. –~~Not Accepted. An offer under subdivision (a) or (b) above not accepted in full satisfaction ~~shall~~must be deemed withdrawn, i.e., ~~shall~~must not be disclosed to the jury, and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted, or accepted only as part payment, does not preclude a subsequent offer.

(d) Amount or ~~extent~~Extent of ~~liability. –~~Liability. When the liability of one party to another has been determined by verdict or order of judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which ~~shall~~must have the same effect as an offer made before trial if it is served within a reasonable time not less than ~~10~~14 days prior to the commencement of hearings to determine the amount or extent of liability.

COMMITTEE COMMENT ON RULE 68

The rule retains language from the prior West Virginia Rule except the time limit for serving an offer of judgment is changed from ten to fourteen days.

RULE 69. Executions and ~~other final process; proceedings~~Other Final Process; Proceedings in ~~aid thereof~~Aid Thereof.

(a) In General.

(1) *For* ~~**payment**~~*Payment of* ~~**money. –**~~*Money.* Process to enforce a judgment for the payment of money ~~shall~~must be a writ of execution, a writ of suggestee execution and such other writs as are provided by law. The procedure on execution and other such final process, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution or such other final process ~~shall~~must be in accordance with the practice and procedure prescribed by the laws of the State existing at the time the remedy is sought, subject to the following qualifications: (1) A writ of execution ~~shall~~must be made returnable not less than 30 days nor more than 90 days after issuance, as directed by the person procuring issuance of the writ; and (2) an answer to a summons issued in a suggestion proceeding ~~shall~~must be served upon the plaintiff within ~~20~~21 days after service of the summons; and (3) a return on a writ of suggestee execution ~~shall~~must be made forthwith on the expiration of one year after issuance of the writ.

(~~b~~2) *For* ~~**possession**~~*Possession of* ~~**property. –**~~*Property.* When any judgment or order is for the delivery of possession of property, the party entitled to the benefit of such judgment or order may have a writ of possession upon application to the clerk, which ~~shall~~must be forthwith executed and a return on such writ made within ~~20~~21 days after issuance of the writ.

(b) Obtaining Discovery. In aid of the judgment or execution, the judgment creditor or a successor in interest whose interest appears of record may obtain discovery from any person-including the judgment debtor-as provided in these rules.

COMMITTEE COMMENT ON RULE 69

Changes to the format of the rule make it substantially consistent with the corresponding federal rule of civil procedure. The Rule adds language relating to discovery in aid of execution as well as date modifications.

RULE 70. Judgment for ~~specific acts; vesting title~~Specific Acts; Vesting Title.

(a) Party's Failure to Act; Ordering Another to Act. If a judgment ~~directs~~requires a party to ~~execute a conveyance of~~ convey land~~ or~~, to deliver ~~deeds~~a deed or other ~~documents~~document, or to perform any other specific act and the party fails to comply within the time specified, the court may ~~direct~~order the act to be done~~–~~at the ~~cost of the~~ disobedient ~~party~~ party's expense~~–~~by ~~some other~~another person appointed by the court ~~as a special commissioner and~~. When done, the act ~~when so done~~ has ~~like~~the same effect as if done by the party. ~~On application of the party entitled to performance, the clerk shall issue a writ of attachment or sequestration against the property of the disobedient party to compel obedience to the judgment. The court may also in proper cases adjudge the party in contempt. If~~

(b) Vesting Title. If the real or personal property is within the state, the court ~~in lieu~~ instead of ~~directing~~ordering a conveyance ~~thereof~~ ~~–~~may enter a judgment divesting ~~the title of~~ any ~~party~~party's title and vesting it in others ~~and such~~. That judgment has the effect of a ~~conveyance~~legally executed ~~in due form of law.~~conveyance.

(c) Obtaining a Writ of Attachment or Sequestration. On application by a party entitled to performance of an act, the clerk must issue a writ of attachment or sequestration against the disobedient party's property to compel obedience to the judgment.

(d) Obtaining a Writ of Execution or Assistance. On application by a party who obtains a judgment or order for possession, the clerk must issue a writ of execution or assistance.

(e) Holding in Contempt. The court may also hold the disobedient party in contempt.

COMMITTEE COMMENT ON RULE 70

The rule is changed to be largely consistent with the corresponding federal rule of civil procedure except relating to writs of execution or assistance, which was not provided for in the prior West Virginia rule.

RULE 71. ~~Process in behalf of and against persons not parties~~Enforcing. Relief For or Against a Non Party.

When an order ~~is made in favor of a person who is not~~ grants relief for a ~~party to the action, that person may enforce obedience to the order by the same process as if a party; and, when obedience to an order~~nonparty or may be ~~lawfully~~ enforced against a ~~person who is not a party, that person is liable to the same process~~nonparty, the procedure for enforcing ~~obedience to~~ the order is the same as ~~if~~for a party.

COMMITTEE COMMENT ON RULE 71

The rule is changed to be consistent with the corresponding federal rule of civil procedure.

RULE 71.A. Eminent domain.

(a) Scope of rule. – Eminent domain proceedings in the circuit courts are governed by these rules of civil procedure.

(b) Jury trials. – A jury in an eminent domain proceeding in circuit court ~~shall~~must consist of twelve freeholders who shall meet the requirements of W. Va. Code, 54-2-10.

COMMITTEE COMMENT ON RULE 71A

The rule retains language from the prior West Virginia Rule, but changes the word "shall" to "must."

RULE ~~71.B~~71B. Extraordinary Writs~~ .~~

(a) Applicability of ~~rules. –~~Rules. The West Virginia Rules of Civil Procedure govern ~~the procedure for the application for, and issuance of,~~ extraordinary writs in all respects, except as otherwise provided by this rule.

(b) ~~–~~Joinder of ~~claims~~Claims in ~~different writs. –~~Different Writs. A plaintiff may join a demand for relief which ~~encompassen~~compasses different types of writs and other types of relief.

(c) ~~–~~Complaint.

(1) *Caption.* ~~––~~The complaint ~~shall~~must contain a caption as provided in Rule 10(a) except that the plaintiff ~~shall~~must name as defendants the agencies, entities, or individuals of the State of West Virginia to which the relief ~~shall~~must be directed.

(2) *Contents.* – The complaint ~~shall~~must contain a short and plain statement of the authority for the writ demanded.

~~**Appearance or answer. –**~~
(d) Response.

(1) *Right to Relief Conceded.* If a defendant agency, entity, or individual concedes the appropriateness of the writ requested, that defendant may serve notice of the concession and the court ~~shall~~must enter a writ granting appropriate relief and may substitute the concession for findings of fact on the need for and the appropriateness of the relief demanded if justice requires.

(2) ~~*Answer.*~~*Right to Relief Contested.* If a defendant agency, entity, or individual contests the plaintiff's or plaintiffs' right to the writ demanded, the defendant ~~shall~~must answer ~~within~~or otherwise respond to the ~~time and in the form specified by the applicable provisions of this rule.~~complaint.

(3) *Default.* If a defendant agency, entity, or individual fails to answer or otherwise appear, the court ~~shall~~must declare the defendant in default pursuant to Rule 55(a). The court may not enter default judgment pursuant to Rule 55(b) but ~~shall~~must hold a hearing or hearings on the relief demanded and award a writ or writs as justice requires.

(4) *Jurisdiction and Venue Unaffected.* Jurisdiction and venue requirements for writ proceedings are unaffected by this rule.

COMMITTEE COMMENT ON RULE 71B

The rule retains language from the prior West Virginia Rule. Rule 71B (a) clarifies the applicability of the Rules of Civil Procedure, except where expressly modified by this rule. Changes to Rule 71B (d)(2) are to the title of the subsection for clarity, to make a responsive pleading due within the time frame provided for in the Rules of Civil Procedure and to clarify that there may be one, or more, plaintiffs.

IX. Appeals

~~***RULE 72. Running of time for appeal.***~~

~~The time for filing an appeal commences to run and is to be computed from the entry of any of the following orders: Granting or denying a motion for judgment under Rule 50(b); or granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion were granted; or granting or denying a motion under Rule 59 to alter or amend the judgment; or granting or denying a motion for a new trial under Rule 59.~~

Rule 72. [Abrogated].

COMMITTEE COMMENT ON RULE 72

Appeals are governed by the West Virginia Rules of Appellate Procedure.

RULE 73. ~~*The record on appeal.*~~[Abrogated].

~~**Composition and designation of the record on appeal.** — The procedure for composing, assembling, and filing the record on appeal shall be governed by the Rules of Appellate Procedure.~~

~~**Procedure for requesting, preparing, and filing of transcript.** — The procedure for requesting, preparing, and filing of transcripts shall be governed by the Rules of Appellate Procedure.~~

~~**Notice of appeal.** — Within thirty days of the entry of the judgment being appealed, the party appealing shall file a Notice of Appeal in accordance with Rule 5 of the Rules of Appellate Procedure.~~

COMMITTEE COMMENT ON RULE 73

Appeals are governed by the West Virginia Rules of Appellate Procedure.

RULES 74 to 76. [RESERVED]

X. Courts and Clerks

RULE –77. Courts and ~~clerks~~Proceedings; Clerk's Authority; Notice of an Order or Judgment; Indigents.

(a) ~~Courts~~When Court Is Open. Every court is considered always open~~. The courts shall be deemed always open~~ for ~~the purpose of~~ filing any ~~pleading or other proper~~ paper, ~~of~~ issuing and returning ~~mesne and final~~ process, ~~and of~~ making ~~and directing all motions, orders, and rules~~a motion, or entering an order.

(b) ~~Trials and hearings; orders in chambers. –~~ ~~Unless otherwise provided by a statute, by these rules, or by other rules adopted by the Supreme Court of Appeals, all trials upon~~ **Place for Trial and Other Proceedings.** Every trial on the merits ~~shall~~must be conducted in open court and, so far~~,~~ as convenient, in a regular courtroom. ~~All~~Any other ~~acts~~act or ~~proceedings~~proceeding may be done or conducted by a judge in chambers, without the attendance of the clerk or other court ~~officials~~official, and ~~at any place either within~~anywhere inside or ~~without~~outside the circuit~~; but.~~ But no hearing~~,~~ ~~—~~other than one ex parte~~, shall ~~~~may be conducted outside the circuit ~~if timely objection to doing so is made by any of~~unless all the ~~parties~~ affected ~~thereby~~parties consent.

(c) Clerk's ~~office and orders by clerk. –~~Office Hours; Clerk's Orders.

(1) *Hours.* The clerk's office ~~—~~with ~~the~~a clerk or ~~a~~ deputy ~~in attendance shall~~on duty—must be open during business hours ~~on all days~~every day except Saturdays, Sundays, and legal holidays~~, as defined in Rule 6~~(. But a~~). All motions and applications in the clerk's office for issuing mesne process, for issuing final process to enforce and execute judgments, and for other proceedings which do not require allowance or order of the~~ court ~~are grantable of course by the clerk; but~~may, by an approved local rule or order, require that the office be open for specified hours on Saturday or a particular legal holiday other than one listed in Rule 6.

(2) *Orders.* Subject to the court's power to suspend, alter, or rescind the clerk's action ~~may be suspended or altered or rescinded by the court upon~~for good cause ~~shown.~~, the clerk may:

(A) issue process;

(B) enter a default;

(C) enter a default judgment under Rule 55(b)(1); and

(D) act on any other matter that does not require the court's

action.

(d) Serving Notice of ~~order~~san Order or ~~judgments~~Judgment.

(1) *Service*. Immediately ~~upon the entry of~~after entering an order or judgment, whether or not the order or judgment so directs, the clerk~~, except as to parties who appear of record to have had notice thereof, shall~~ must serve ~~by mail a~~ notice of the entry ~~in the manner~~, as provided ~~for~~ in Rule 5 ~~upon every~~(b), on each party ~~affected thereby~~ who is not in default for ~~failure~~failing to appear~~, and shall make a note of~~. The clerk must record the ~~mailing in~~service on the docket. ~~Such mailing is sufficient notice for all purposes for which~~ A party also may serve notice of the entry ~~of an order is required by these rules; but any party may in addition serve a notice of such entry in the manner~~as provided in Rule 5 ~~for the service of papers.~~ (b).

(2) *Time to Appeal Not Affected by Lack of Notice.* Lack of notice of the entry ~~by the clerk~~ does not affect the time ~~to~~for appeal or relieve ~~or authorize the court to relieve~~ a party for ~~failure~~failing to appeal within the time allowed, except as allowed by Rule 5 of the Rules of Appellate Procedure.

(e) Waiver of ~~fees~~Fees, Costs and ~~costs~~Security for ~~indigents~~Indigents.

(1) *Filing of ~~affidavit of indigency.~~Financial Affidavit and Application*. A person seeking waiver of fees, costs, or security, pursuant to Chapter 59, Article 2, Section 1 ~~[~~ 59-2-1~~]~~ of the ~~Code of~~ West Virginia~~, shall~~ Code, must execute before the clerk or a deputy an affidavit and application prescribed by the chief justice of the Supreme Court of Appeals, which ~~shall~~must be kept confidential in divorce and domestic violence proceedings. ~~An additional affidavit of indigency shall be filed whenever the financial condition of the person no longer conforms to the financial guidelines established by the chief justice of~~

Clerk's Approval of Application. In making the initial determination of eligibility for waiver of fees, costs or security pursuant to the Financial Guidelines for Determining Eligibility for Waiver of Fees, Costs, or Security in Civil Cases as promulgated by the Supreme Court ~~of Appeals for determining indigency or whenever an order has been entered directing the filing of a new affidavit.~~

(A) ~~*Review of affidavit of indigency.*~~, the clerk of the court is required to treat the financial disclosures in the application, which were made by the applicant under oath and penalty of false swearing, as true. If ~~it appears from the affidavit that the person meets the financial guidelines,~~ the clerk ~~shall perform the service~~

~~requested in conjunction with the affidavit. If it subsequently appears to the court that the person did not~~determines that the disclosures in the application meet the ~~financial guidelines, the person shall be ordered to pay the required~~ Financial Guidelines for waiver of fees, costs, or security, ~~or the court may enter an appropriate remedial order. If it appears from the affidavit that the person does not meet the financial guidelines,~~then the clerk ~~shall inform~~must immediately file the ~~person~~civil action.

(B) Clerk's Denial of Application. If the clerk determines that the ~~service will~~disclosures in the application do not ~~be performed without~~meet the ~~payment~~Financial Guidelines for waiver of ~~the appropriate~~ fees, costs or security, ~~and~~ or if the clerk determines that the ~~person may request review of the clerk's determination by the court. If the person requests review of the clerk's~~ application provides insufficient information for the clerk to make such a determination, then the clerk ~~shall immediately~~must deny the application.

(2) *Review of Eligibility for Waiver by the Court.*

(A) When a clerk denies an application of waiver, the clerk must inform the applicant of the right to request that the clerk forward a copy of the affidavit and application to a judge for review of the clerk's denial.

(B) If an applicant requests review of the clerk's denial of the application, the clerk must immediately forward a copy of the affidavit and application to the court.

(C) Upon receipt of the affidavit and application, the court ~~shall~~must, within 7 days, either approve the ~~affidavit~~application, disapprove the ~~affidavit~~application, instruct the person to provide additional information, or schedule an ex parte hearing to determine indigency.

(D) ~~*Effect of filing.* The filing of an affidavit of indigency shall~~The sole issue to be determined by the judge reviewing the application is whether the applicant meets the Financial Guidelines.

(3) Filing a New Application for Changed Circumstances. An additional affidavit and application of waiver must be filed whenever the financial condition of the applicant no longer conforms to the Financial Guidelines for determining indigency or whenever an order has been entered directing the filing of a new affidavit.

(4) The filing of an affidavit and application of waiver must be deemed to toll any applicable statute of limitations or other time requirement. This rule does not govern the appointment of counsel or the payment of attorney fees.

COMMITTEE COMMENT ON RULE 77

The rule is changed to be consistent with the corresponding federal rule. Some minor changes were made to reflect state specific matters. Rule 77(e) (there is no federal equivalent) was redrafted to reflect the interpretation of the provision by the Supreme Court in *State ex rel. Deblasio v. Jackson*, 227 W.Va. 206, 707 S.E.2d 33 (2011).

RULE 78. Motion dayHearing Motions; Submission on Briefs.

~~Unless local conditions make it impracticable, each court shall establish regular times and places, at intervals sufficiently frequent for the prompt dispatch of business, at which motions requiring notice and hearing may be heard and disposed of; but the judge at any time or place and on such notice, if any, as the judge considers reasonable may make orders for the advancement, conduct, and hearing of actions. A duly elected special judge may serve on motion day the same as at other times.~~

(a) ~~To expedite its business~~**Providing a Regular Schedule for Oral Hearings.** A court may establish regular times and places for oral hearings on motions.

(b) Providing for Submission on Briefs. By rule or order, the court may ~~make provision by rule or order~~provide for ~~the submission~~submitting and ~~determination of~~determining motions on briefs, without oral ~~hearing upon brief written statements of reasons in support and opposition~~hearings.

COMMITTEE COMMENT ON RULE 78

The rule is changed to be consistent with the corresponding federal rule. The rule reflects the change in the timing of filing memoranda, responses and replies to motions as set forth in Rule 6.

RULE 79. ~~Books and records kept~~Records Kept by the ~~clerk and entries therein~~Clerk.

(a) Civil ~~docket. –~~Docket.

(1) In General. The clerk ~~shall~~must keep a ~~book~~record known as the "civil docket" ~~of such~~in the form and ~~style as may be~~manner prescribed by the Supreme Court of Appeals~~, and shall~~. The clerk must enter ~~therein~~ each civil action ~~to which these rules are made applicable.~~in the docket. Actions ~~shall~~must be assigned consecutive file numbers~~. The file number of each action shall~~, which must be noted ~~on the folio of~~ in the docket ~~whereon~~where the first entry of the action is made~~. All papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be~~

(2) *Items to be Entered.* The following items must be marked with the file number and entered chronologically in the ~~civil~~ docket ~~on the folio assigned to the action and shall be marked with its file number. These entries shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the~~ :

(A) papers filed with the clerk;

(B) process issued, and proofs of service or other returns showing execution; and

(C) appearances, orders, verdicts, and judgments.

(3) *Contents of* ~~process. The~~*Entries*. Each entry ~~of an order or judgment shall show the date the~~ must briefly show the nature of the paper filed or writ issued, the substance of each proof of service or other return, and the substance and date of entry ~~is made.~~of each order and judgment.

(4) *Jury Trial Demanded.* When ~~in an action~~a jury trial ~~by jury~~ has been properly demanded or ordered, the clerk ~~shall note~~must enter the word "jury" ~~on~~in the ~~folio assigned to that action~~docket.

(b) Civil ~~judgments~~Judgments and ~~orders. –~~Orders. The clerk ~~shall~~must keep~~, in such form and manner as the Supreme Court of Appeals may prescribe, a correct~~ a copy of every final judgment ~~or~~and appealable order~~, or~~; every order affecting title to or a lien ~~upon~~on real or personal property~~,~~; and of any other order ~~which~~that the court ~~may direct~~directs to be kept. The clerk must keep these in the form and manner prescribed by the Supreme Court of Appeals.

(c) ~~Indices; calendars. –~~ ~~Suitable indices of the civil docket and of every civil judgment and order shall be kept by the clerk under the~~**Indexes; Calendars.** Under the court's direction, the clerk must:

(1) keep indexes of the ~~court. There shall be prepared under the direction~~docket and of the ~~court~~judgments and orders described in Rule 79(b); and

(2) prepare calendars of all actions ready for trial, ~~which shall distinguish "~~distinguishing jury ~~actions"~~trials from ~~"court actions."~~nonjury trials.

(d) Other ~~books and records of the clerk. –~~Records. The clerk ~~shall also~~must keep ~~such~~any other ~~books and~~ records ~~as may be~~ required ~~from time to time by the court or~~ by the Supreme Court of Appeals.

~~-~~Recording by Digital or Other Images. - The clerk may keep any and all records and documents, otherwise required by any provision of law to be recorded in a book as described above, in microphotographic, digital, or other format which employs a process for image-storing of documents in a reduced size. The format must conform to the applicable policy approved by the Supreme ~~Court Administrative Director~~of Appeals.

COMMITTEE COMMENT ON RULE 79

The rule is changed to be consistent with the corresponding federal rule. Paragraph (e) does not exist in the Federal Rule 79, but was added to the West Virginia Rule by the Court effective May 1, 2014.

RULE 80. ~~Making transcript~~Transcript or ~~statement~~Statement of ~~evidence part~~Evidence Made Part of ~~the record; authentication thereof, etc~~Record.

(a) ~~When transcript~~Making Transcript Part of ~~stenographically reported proceedings part of record. –~~ ~~When the proceedings had and testimony taken at a hearing~~**Record.**

(1) *Trial or* ~~trial before the court are~~*Hearing Transcript*. A certified transcript of a stenographically or mechanically reported ~~by the official court~~ proceeding of a trial or ~~other authorized reporter, a duly certified transcript thereof~~hearing becomes a part of the record of the action when it is filed with the court during the pendency of the civil action or at any time afterward. ~~When the proceedings had and testimony taken at~~

(2) *Transcript of Hearing Before a* ~~hearing before a commissioner are~~*Commissioner*. A certified transcript of a stenographically or mechanically reported ~~by the official court or other authorized reporter, a duly certified transcript thereof~~hearing before a commissioner becomes a part of the record of the action if it is filed with the court before the action is submitted to the court for disposition of the report of the commissioner.

(b) ~~How transcript certified. –~~Certifying Transcript. A transcript of ~~the proceedings had and testimony taken at a~~ a trial or hearing ~~or trial shall be~~ must be deemed authenticated and prima facie a correct statement of the proceedings when:

(1) it is certified by ~~the~~an official court or ~~other~~ authorized reporter to be an accurate transcript of the ~~official's or authorized reporter's~~ stenographically or mechanically recorded ~~report of the~~ proceedings ~~had~~; and ~~testimony taken at the hearing or trial, and shall state~~

(2) it states whether ~~the transcript~~ it includes all or only a part ~~only~~ of the proceedings ~~had and testimony taken at such a hearing or trial; no other or further authentication is necessary. A transcript so certified by the report shall be deemed prima facie a correct statement of the proceedings had and testimony taken at any hearing or trial~~.

(c) Notice of ~~filing transcript. –~~Filing. When a transcript of the proceedings ~~had and testimony taken~~ at a trial or hearing is filed with the court, the party causing it to be filed ~~shall~~must promptly give notice thereof to all other parties.

(d) ~~Correcting the transcript.~~ ~~– On motion served by any party and therein assigning error or omission in any part~~**Making Corrections**. Any party may file a motion to correct an error in the transcript of a trial or hearing. Upon sufficient proof of ~~any transcript of the proceedings had and testimony taken~~

~~at a hearing or trial~~error, the court ~~shall settle all differences arising as to whether such transcript truly discloses what occurred at the hearing or trial and shall~~must direct that the transcript be corrected and ~~revised in the respects~~as designated by the court~~, so as to make it conform to the whole truth~~.

(e) ~~Use~~Using Statement of Evidence of ~~statement of evidence in lieu of transcript. –~~ ~~In the event~~Trial or Hearing.

(1) *Transcript not Obtainable*. When a stenographic or mechanical report of the proceedings ~~had and testimony taken at~~of a trial or hearing ~~or trial~~ before the court was not made or~~ in the event a reporter's stenographic or mechanical record thereof has become lost or a transcript thereof~~ is not obtainable, any party to the action may prepare a statement of the proceedings from the best available means, including the party's recollection, for use instead of a transcript ~~thereof.~~.

(2) *Serving and Objecting to Statement*. The statement ~~shall~~must be served upon all ~~other adverse~~ parties within a reasonable time after the hearing or trial~~, and the adverse~~. All other parties may serve objections or amendments thereto within ~~10~~14 days after service of the statement upon them.~~ Thereupon the~~

(3) *Court to Resolve Objections*. The statement, with the objections or proposed amendments, ~~shall~~must be submitted to the court for ~~settlement and approval~~resolution. The court must decide the accuracy of the statement based upon all of the materials submitted, and when ~~and as settled and~~so approved with or without changes, such statement becomes a part of the record when it is signed by the judge and filed with the court.

(f) Bills and ~~certificates~~Certificates of ~~exception abolished. –~~Exception Abolished. Bills and certificates of exception are abolished.

(g) Stenographic Transcript as ~~evidence.~~ ~~– Wherever the testimony of a witness at a hearing or trial which was~~**Evidence.** If stenographically or mechanically reported testimony at a hearing or trial is admissible in evidence at a later ~~hearing or~~ trial or~~ at a hearing or trial of another action, it~~, the testimony may be proved by ~~the~~a transcript ~~thereof duly~~ certified by the ~~official court reporter or other authorized~~ person who reported ~~the testimony~~it.

COMMITTEE COMMENT ON RULE 80

Changes to Rule 80 are merely stylistic, no substantive changes were made.

XI. General Provisions

RULE 81. Applicability of the Rules in generalGeneral.

(a) Review of *decisions***Decisions of** ~~*magistrates*~~**Magistrates and** ~~administrative agencies. – When the appeal of a case has been granted or perfected, these~~**Administrative Agencies**.

(1) *Review of Magistrate Proceedings*. These rules apply to an appeal in circuit court, except that~~, in a case on appeal from a magistrate court,~~ Rules 26 through 37 may not be used and no pleadings other than those used in the case in the magistrate court may be used except by order of the ~~appellate~~ court ~~in the proceeding after the appeal has been granted or perfected. Likewise, these~~.

(2) *Review of Administrative Proceedings*. These rules, where applicable, apply in ~~a trial~~circuit court ~~of record~~ when any testimony is taken before the court in the judicial review of an order or decision rendered by an administrative agency.

(b) Divorce, Annulment, Affirmation, and Separate Maintenance.

(1) *Family Court*. These rules apply in family court divorce, annulment, affirmation, and separate maintenance.~~—~~ proceedings only to the extent expressly authorized by the Rules of Practice and Procedure for Family Court.

(2) *Circuit Court*. These rules apply to actions filed in circuit court as provided by law for divorce, annulment, affirmation, and separate maintenance, except as to the following qualifications ~~for actions of divorce, annulment, and affirmation:~~ .

(A) All pleadings ~~shall~~must be verified ~~by the party in whose name they are filed; but the complaint shall not be taken for confessed, and whether the defendant answers or not, the~~. The case ~~shall~~must be tried and heard independently of the admissions of either party in the pleadings ~~or otherwise; and costs~~.

(B) Costs may be awarded to either party ~~as equity and justice require, and in all cases~~ and the court~~, in its discretion, may require payment of costs at any time, and~~ may suspend or withhold any order or judgment until the costs are paid.

(C) A divorce or annulment action shallmust not be tried or heard prior to the expiration of the maximum period of time within which

the defendant in such action is required to file an answer as provided in Rule 12.

(D) Unless specifically authorized by statute, no judgment of divorce, annulment or affirmance of marriage ~~shall~~must be granted on the uncorroborated testimony of the parties or either of them.

(E)I Rules 26 through 37 may not be used in actions for divorce, annulment, affirmation of marriage and separate maintenance for the purpose of discovery except by order of the court in the action and only to the extent provided by the order.

(h) ~~*Proceedings for sale*~~**Sale of** ~~*forfeited*~~**Forfeited and** ~~*delinquent lands. –*~~ **Delinquent Lands.**

These rules apply to proceedings to sell land purchased by the State for nonpayment of taxes and become irredeemable, or forfeited for nonentry, or escheated, or waste and unappropriated, title to which remains in the State, subject to the following qualifications~~: (1) ~~.

(1) Rules 13, 14, 18, 19, 20 and 23 do not apply; ~~(2)~~

(2) Rule 4 does not apply except that the order of publication ~~in such actions shall~~must be modified to conform with the provisions of Rule 4I(2), and judgment by default may be rendered against any defendant in such action who ~~shall~~must fail to appear and defend by the date mentioned ~~therefor~~ in the order of publication; and ~~(3)~~

(3) items, interests, parties and claims may be joined in such actions as authorized by W.Va. Code § 11A-4-1 ~~even though such joinder would not be authorized by other provisions in these rules~~.

~~Except as provided in this paragraph, W.Va. Code § 11A-4-12, repealed, shall apply in determining the manner in which process shall be served in such actions.~~

(i) Ex ~~parte proceedings. –~~**Parte Proceedings.**

Rules 5(b), 5(ed)(2), 5(d)(3) and 80 apply to ex parte proceedings. The other rules do not apply to such proceedings except by order of the court for cause shown in the proceeding and only to the extent provided by the order. Such proceedings include, but are not limited to~~, –~~:

(1) adoption;

(2) change of name;

(3) statutory summary procedure for the sale, lease, or encumbrance of property of persons under legal disability; or

(4) statutory summary procedure for the sale, lease, or other conveyance of property subject to future interests; or

(5) statutory summary procedure for the compromise and settlement of claims by a guardian or committee for personal injuries sustained by the guardian's or committee's ward.

~~[Rescinded].~~

~~[Rescinded].~~

(j) Juvenile ~~proceedings. –~~ **Proceedings.**

Rules 5(b), 5(~~e~~d)(2), 5(d)(3) and 80 apply~~, but the~~. The other rules do not apply~~,~~ to juvenile proceedings brought under the provisions of ~~chapter 49 [§~~W.Va. Code § 49-1-1, et seq~~.] of the West Virginia Code~~.

~~[Rescinded].~~

~~[Deleted].~~

~~[Deleted].~~

COMMITTEE COMMENT ON RULE 81

Revised Rule 81 has been rewritten. The changes are primarily stylistic and are intended to make the rule more easily understood. Revised Rule 81(b)(1) now recognizes the family court's primary jurisdiction over domestic proceedings. The family court was established after the last amendment to the rule.

The Committee notes that the Annulment or Affirmation of Marriage Act of 2001, W.Va. Code § 48-3-101 et seq., expressly sets out the right to sue to annul or affirm a marriage. It is provided under W.Va. Code § 48-3-104 that "[i]f a marriage is supposed to be void, or voidable, or any doubt exists as to its validity, for any of the causes set forth in section 3-103, or for any other cause recognized in law, either party may, except as provided in section 3-105, institute an action for annulling or affirming the marriage."

RULE 82. Jurisdiction and ~~venue unaffected~~Venue Unaffected.

These rules ~~shall~~do not ~~be construed to~~ extend or limit the jurisdiction of the circuit courts or the venue of actions ~~therein~~in those courts.

COMMITTEE COMMENT ON RULE 82

The rule is changed to be consistent with the corresponding federal rule of civil procedure except provisions of the federal rule related to admissibility or maintain claims are not included.

~~Rule~~RULE 83. Rules by Circuit Courts.

Local ~~*rules*~~.

Rules. Each court may from time to time make and amend rules governing its local practice not inconsistent with these rules~~.~~ and the West Virginia Trial Court Rules. Such rules and amendments ~~shall be~~are effective only after they are filed with and approved by the Supreme Court of Appeals, which may order printing of such rules in the West Virginia Reports. Such rules ~~shall~~must also be recorded in a manner provided by the ~~civil order book~~Supreme Court of ~~the local court~~Appeals.

COMMITTEE COMMENT ON RULE 83

The rule retains language from the prior West Virginia Rule. Local rules may not conflict with those rules or the West Virginia Trial Court Rules.

~~Rule~~RULE 84. Forms.

The forms contained in the Appendix of Forms are sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate. ~~The forms of suggestee executions heretofore promulgated are approved.~~

COMMITTEE COMMENT ON RULE 84

Rule 84 is unchanged, except the reference to "The forms of suggestee executions" is deleted.

RULE 85. Title.

These rules ~~shall~~may be ~~known~~cited as the West Virginia Rules of Civil Procedure ~~and may be cited as~~ or W.Va.R.Civ.P.

COMMITTEE COMMENT ON RULE 85

The rule is changed to be largely consistent with the corresponding federal rule of civil procedure.

~~Rule~~*RULE* 86. *Effective date.*

~~(a) Effective Date of Original Rules.~~ ~~These rules shall take effect on the 1st day of July 1960. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies.~~

~~(b)~~ Effective Date of Amendments.

Any amendments of these rules ~~shall~~must take effect on the date designated by the Supreme Court of Appeals of West Virginia in the order adopting such amendments. ~~They~~The rules must govern in all proceedings in ~~actions brought after they take effect~~cases thereafter commenced and ~~also~~insofar as just and practicable, all ~~further~~ proceedings ~~in actions~~ then pending~~, except to the extent that in the opinion of the court their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies~~.

COMMITTEE COMMENT ON RULE 86

The rule is changed to be consistent with the corresponding federal rule of civil procedure.

RULE 87. Effective date of amendments (Abrogated).

COMMITTEE COMMENT ON RULE 87

The Rule number should be abolished.