West Virginia Rules of Civil Procedure

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Rule 1. Scope and purpose.

These rules govern the procedure in all civil actions and proceedings in West Virginia trial courts of record, except as stated in Rule 81. They should be construed, administered and employed by the court and the parties to secure the just, speedy and inexpensive determination of every action and proceeding.

Rule 2. One form of action.

There is one form of action—the civil action.

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

Rule 3. Commencing an action.

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

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

Rule 4. Summons.

(a) Contents and amendments.

(1) *Contents***.** A summons shall:

(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, of the plaintiff;

(D) state the time within which the defendant shall appear and defend;

(E) notify the defendant that a failure to appear and defend may result in a default judgment against the defendant for the relief demanded in the complaint;

(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. On or after filing the complaint, the plaintiff shall present a summons to the clerk for signature and seal. If the summons is properly completed, the clerk shall sign, seal and issue it to the plaintiff for service on the defendant. A summons, or a copy that is addressed to multiple defendants, shall be issued for each defendant to be served.

(c) Service.

(1) *In general*. A summons shall be served with a copy of the complaint. The plaintiff is responsible for having the summons and complaint served within the time allowed by Rule 4(i) and shall furnish the necessary copies to the person who makes service.

(2) *By whom.*

(A) A person who is at least 18 years old and not a party may serve a summons and complaint.

(B) At the plaintiff's request and upon payment of applicable fees and costs, service may be made by the sheriff.

(C). At the request of the plaintiff and upon payment of applicable fees and costs by the plaintiff, the clerk shall serve the West Virginia Secretary of State as statutory attorney-in-fact for service as specified by any applicable statute.

(D) 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) 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 substituted service and shall be made upon:

(1) *Individuals.* An individual other than a minor, incompetent person or incarcerated person within the State of West Virginia by:

(A) Personal delivery;

(B) Leaving a copy of the summons and complaint at the individual's dwelling or usual place of abode with someone the age of 18 or above who resides there;

(C) Delivering a copy to an agent or attorney-in-fact authorized by appointment or statute to receive service of process for the individual;

(D) Sheriff;

(E) Secretary of State;

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

(G) First class mail from the clerk. The clerk may send a copy of the summons and complaint by first class mail, postage pre-paid, together with two copies of a notice and acknowledgement conforming substantially to Form 11 with a return envelope, postage pre-paid and addressed to the clerk, to the individual to be served.

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

Service pursuant to Rule 4(d)(1)(F) or (G) shall 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 certified mail by the defendant. If delivery of the summons and complaint pursuant to Rule 4(d)(1)(F) or (G) is refused, the clerk, promptly upon receipt of the notice of such refusal, shall 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 may be rendered against the defendant unless the defendant appears to defend the suit. Any such default or judgment by default shall 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 acknowledgement of receipt of the summons and complaint pursuant to Rule 4(d)(1)(G) shall be executed in the manner prescribed on Form 11. Unless good cause is shown for failure to complete and return the notice and acknowledgement of receipt of the summons and complaint

pursuant to Rule 4(d)(1)(G) within 21 days after mailing, the court may order the payment of the cost of personal service by the individual to be served.

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

(2) *A minor or incompetent person.* A minor or an incompetent person in West Virginia shall be served by delivering a copy of the summons and complaint to the infant's or incompetent person's guardian or conservator who is resident in the State. If there be no such guardian or conservator, then to either the 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 shall 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 be upon the person who stands first in the order named in this paragraph who is not a plaintiff.

(3) *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 committee, guardian, or like fiduciary resident in the State. If there be no such committee, guardian, or like fiduciary, or if the committee, guardian, or like fiduciary is a plaintiff, then service shall be made upon a guardian *ad litem* appointed under Rule 17(c).

(4) *Corporations, partnerships, or associations.*

(A) Domestic private corporations. Service upon a domestic private corporation by:

(1) delivering or mailing in accordance with Rule 4(c)(2) a copy of the summons and complaint to an officer, director, or trustee thereof. 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

(2) delivering or mailing in accordance with Rule 4(c)(2) a copy of the summons and complaint to any agent or attorney-in-fact authorized by appointment or by statute to receive or accept service of process on its

behalf.

(B) Domestic public corporations.

(1) City, town, or village, by delivering or mailing in accordance with Rule 4(c)(2) a copy of the summons and complaint to its mayor, city manager, recorder, clerk, treasurer, or any member of its council or board of commissioners.

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

(3) Board of education, by delivering or mailing in accordance with Rule 4(c)(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.

(4) Other domestic public corporations, including state agencies by delivering or mailing 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 Rule 4(c)(2) a copy of the summons and complaint to an agent or attorney-in-fact authorized by appointment or by statute to receive or accept service on its behalf.

(C) Foreign corporations and business trusts qualified to do business in the State by delivering or mailing in accordance with Rule 4(c)(2) a copy of the summons and complaint in the same manner as service upon a domestic private corporation as set forth in Rule 4(d)(4)(A).

(D) Foreign corporations and business trusts not qualified to do business in the State by delivering or mailing in accordance with Rule 4(c)(2) a copy of the summons and complaint to any officer, director, trustee, or agent of such corporation or by delivering or mailing in accordance with Rule 4(c)(2) a copy of the summons and complaint to any agent or attorney-in-fact authorized by appointment or by statute to receive or accept service on its behalf.

(E) Unincorporated associations subject to suit under a common name, but delivering in accordance with Rule 4(c)(2) a copy of the summons and complaint to any officer, director, or governor thereof, or to any agent or attorney-in-fact authorized by appointment or by statute to receive or accept service on its behalf. If no such officer, director, governor, or appointed or statutory agent or attorney-in-fact be found in the State, then by delivering or mailing in accordance with Rule 4(c)(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 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 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 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 enter an order of publication against such named and/or unknown defendants. Every order of publication shall state the caption of the action; the object thereof; the name and address of the 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 shall appear and defend on or before a date set forth in the order, which shall be not fewer than 30 days after the first publication thereof; otherwise, judgment by default may be rendered against the defendants at any time thereafter. Every such order of publication shall be published once a week for two successive weeks (or such period as may be prescribed by statute, whichever period is longer) in a newspaper of general circulation in the county where such action is pending. Proof of service by publication is made by filing the 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 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 notify the defendant that the defendant shall appear and defend within 30 days of the date of mailing pursuant to Rule 4(d)(1)(D); otherwise, that judgment by default may be rendered against the defendant at any time thereafter. However, service pursuant to Rule 4(d)(1)(D) shall 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 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 issue an order of publication, and the procedures described in subdivision (e)(1) shall 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, 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 have the same effect as personal service within this State and within the county of the defendant's residence; otherwise, such service shall have the same effect as constructive service. In either case, the summons shall notify the defendant that the defendant shall appear and defend within 30 days after service, otherwise judgment by default 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 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 proceed as in other cases of personal or constructive service.

(h) Proving service.

(1) *Affidavit required.* Proof of service shall be made to the court. Except for service by a deputy sheriff, proof shall be by the server’s affidavit.

(2) *Validity of service;* amending proof. Failure to prove service does not affect

the validity of service. The court may permit proof of service to be amended.

(i) Time limit for service. If a defendant is not served within 120 days after the complaint is filed, the court on motion or on its own after notice to the plaintiff shall dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period.

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 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 documents filed in relation to such process, orders, and notices, are a part of the record of an action for all purposes.

Rule 5. Serving and filing pleadings and other documents.

(a) Service: when required.

(1) *In general.* Unless these rules provide otherwise, each of the following documents shall be served on every party:

(A) an order stating that service is required;

(B) a pleading filed after the original complaint, unless the court orders otherwise under Rule 5(c) because there are numerous defendants;

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

(D) a written motion, except one that may be heard ex parte and

(E) a written notice, appearance, demand, offer of judgment, designation of record on appeal, or any similar document.

(2) *If a party fails to appear.* No service is required on a party who is in default for failing to appear except as provided in Rule 55(b)(2). However a pleading that asserts a new claim for relief against such a party shall be served on that party under Rule 4.

(b) Service: How made.

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

(2) *Service in general.* A document 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 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) *In general.* If an action involves an unusually large numbers of defendants, the court may, on motion or on its own order that:

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

(B) any crossclaim, counterclaim, avoidance or affirmative defense in those pleadings and replies to them will be treated as denied or avoided by all

other parties and

(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 be served on the parties as the court directs.

(d) Filing; certificate of service.

(1) Any document after the complaint that is required to be served upon a party, together with a certificate of service, shall be filed within a reasonable time after service.

But disclosures under Rule 26(a)(1) or (2), and the following discovery requests and responses, shall not be filed until they are used in the proceeding or the court orders filing: depositions, interrogatories, requests for documents or tangible things or to permit entry onto land, and requests for admission. Certificates of service of discovery materials shall be filed.

Unless otherwise stipulated or ordered, the party taking 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) *Electronic filing, signing or verification.* A court may allow documents to be filed, signed or verified by electronic means. A document filed electronically is a written document for purposes of these rules. Filing by facsimile is permitted pursuant to the Supreme Court of Appeals Rules for Filing and Service by Facsimile Transmission. Electronic filing and service may be permitted pursuant to the West Virginia Trial Court Rules.

(3) *Non-electronic filing.* A document 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 shall then note the filing date on the document and promptly send it to the clerk.

Rule 5.1 Reserved.

Rule 5.2. Privacy protection for filings made with the court.

(a) Confidential filings. Whenever a party files a pleading or other document that is confidential in part or in its entirety, the party shall identify, by cover letter or otherwise, in a conspicuous manner, the portion of the filing that is confidential. A pleading or other document that is confidential in part or in its entirety shall be filed conventionally with the clerk. 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 shall 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 shall 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 shall comply with the following standards.

(1) Initials or a descriptive term shall 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; or

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

(d) Filings made under seal for good cause shown. The court may, for good cause shown, order that a filing be made under seal without redaction. The court may later for good cause shown, 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 non-party'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 shall 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 shall 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.

Rule 6. Computing and extending time.

(a) Computing time. The following rules apply in computing any time period specified in these rules, in any local rule or court, or in any 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, exclude the day of the event that triggers the period;

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

(B) include the last day of the period but if the last day is a Saturday, a Sunday or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

(2) *Period stated in hours.* When the period is stated in hours begin counting immediately on the occurrence of the event that triggers the period; count every hour, including hours during intermediate Saturdays, Sundays and legal holidays; and 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 Day, Martin Luther King Jr.'s Birthday, Lincoln's Birthday, Washington's Birthday, Memorial Day, West Virginia Day, Independence Day, Labor Day, Columbus Day, Veteran's 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; or

(C) any day declared a holiday by the Governor or President of the United

States or any other legal holiday so designated by the West Virginia Legislature.

(b) Extending time.

(1) *In general.* When an act may or shall be done 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, 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 shall not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d) and (e), and 60(c).

(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.

(d) Motions, notices of hearing, and affidavits.

(1) *In general.* Once the parties have completed filing memoranda and responses as provided in subsection (d)(3), the circuit court shall either schedule argument or decide the motion based on the materials submitted. A written motion and notice of the hearing shall be served at least 14 days before the time specified for the hearing, with the following exceptions:

(A) When the motion may be heard ex parte;

(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) *Supporting affidavit.* Any affidavit supporting a motion shall be served with the motion. Except as Rule 59(c) provides otherwise, any opposing affidavit shall be served at least 7 days before the hearing, unless the court permits service at another time.

(3) *Response and reply memoranda.* Memoranda and other materials in response to motions shall be filed and served on opposing counsel and unrepresented parties within 21 days of service of the motion. Any reply memoranda shall 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.

(e) Additional time after certain kinds of service. When a party may or shall 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).

III. Pleadings and Motions.

Rule 7. Pleadings allowed; form of motions and other documents.

(a) Pleadings – 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 documents.

(1) *In general.* A request for a court order shall be made by motion. The motion shall:

(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 governing captions and other matters of form in pleadings apply to motions and other documents.

Rule 8. General rules of pleading.

(a) Claims for relief. A pleading that states a claim for relief shall contain:

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

(2) a demand for the relief sought, which may include relief in the alternative or different types of relief.

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

(b) Defenses; admissions and denials.

(1) *In general.* In responding to a pleading, a party shall:

(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 shall fairly respond to the substance of the allegation.

(3) *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 shall 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 shall 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 about the truth of an allegation shall so state, and the statement has the effect of a denial.

(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.

(1) *In general.* In responding to a pleading, a party shall 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;
- statute of frauds;
- statute of limitations; and
- waiver.

(2) *Mistaken designation.* If a party mistakenly designates a defense as a counterclaim, or a counterclaim as a defense, the court shall, if justice requires, treat the pleading as though it was correctly designated, and may impose terms for doing so.

(d) Pleading to be concise and direct; alternative statements; inconsistency.

(1) *In general.* Each allegation shall be simple, concise and direct. No technical form is required.

(2) *Alternative statements of a claim or defense.* A party may set out two or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient.

(3) *Inconsistent claims or defenses.* A party may state as many separate claims or defenses as it has, regardless of consistency.

(e) Construing pleadings. Pleadings shall be construed so as to do justice.

Rule 9. Pleading special matters.

(a) Capacity or authority to sue; legal existence.

(1) 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 party's authority 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.

(2) To raise any of the issues in 9(a)(1), a party shall do so by a specific denial, which shall state any supporting facts that are peculiarly within the party's knowledge.

(b) Fraud or mistake; Conditions of Mind. In alleging fraud or mistake, a party shall state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge and other conditions of a person's mind may be alleged generally.

(c) Conditions precedent. In pleading conditions precedent, it suffices to allege generally that all conditions precedent have occurred or been performed. But when denying that a condition precedent has occurred or been performed, a party shall do so with particularity.

(d) Official document or act. In pleading an official document or official act, it suffices to allege that the document was legally issued or the act legally done.

(e) Judgment. In pleading a judgment or decision of a domestic or foreign court, a judicial or quasi-judicial tribunal, or a board or officer, it suffices to plead the judgment or decision without showing jurisdiction to render it.

(f) Time and place. An allegation of time or place is material when testing the sufficiency of a pleading.

(g) Special damages. If an item of special damage is claimed, it shall be specifically stated.

(h) Eminent domain. In proceedings to condemn real or personal property pursuant to Rule 71a, pleadings shall 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 shall be attached as an exhibit to the complaint as a condition of maintaining the eminent

domain action.

Rule 10. Form of pleadings.

(a) Caption; names of parties. Every pleading shall have a caption with the court's name, a title, a civil action number, and a Rule 7(a) designation. The title of the complaint shall name all the parties; the title of other pleadings, after naming the first party on each side, may refer generally to other parties.

(b) Paragraphs; separate statements. A party shall state its claims or defenses in numbered paragraphs, each limited as far as practicable to a single set of circumstances. A later pleading may refer by number to a paragraph in an earlier pleading. If doing so would promote clarity, each claim founded on a separate transaction or occurrence—and each defense other than a denial—shall be stated in a separate count or defense.

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

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

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

(b) Representations to court. By presenting to the court a pleading, motion or other paper—whether by signing, filing, submitting, or later advocating an attorney or unrepresented party 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, cause unnecessary delay, or needlessly increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying or reversing existing law or establishing new law;

(3) factual contentions have evidentiary support or, if specifically so identified, are will likely 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 belief or lack of information.

(c) Sanctions.

(1) *In general.* If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may impose an appropriate sanction upon any attorney, law firm or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates and employees.

(2) *Motion for sanctions.* A motion for sanctions shall be made separately from other motions and shall describe the specific conduct alleged to violate Rule 11(b). The motion shall be served under Rule 5, but it shall not be filed with the clerk or be presented to the court if the challenged document, claim, defense, contention, allegation or denial is 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 reasonable expenses and attorney fees, and other expenses.

(3) *On the court's initiative.* On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b).

(4) *Nature of a sanction.* A sanction imposed under this rule shall be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; 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 part or all of the reasonable expenses and attorney fees directly resulting from the violation.

(5) *Limitations on monetary sanctions.* The court shall not impose a monetary sanction:

(A) against a represented party for violating Rule 11(b)(2); or

(B) on 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 that is, or whose attorneys are, to be sanctioned.

(6) *Requirements for an order.* An order imposing sanctions shall describe the sanctioned conduct and explain the basis for the sanctions imposed.

(d) Inapplicability to discovery. This rule does not apply to disclosures, discovery requests, responses, objections and motions under Rules 26 through 37.

Rule 12. Defenses and objections: When and how presented; motion for judgment on the pleadings; consolidating motions; waiving defenses; pretrial hearing.

(a) Time to serve a responsive pleading.

(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 shall serve an answer within 30 days after being served with the summons and complaint. Every answer shall 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 shall serve an answer to a counterclaim or crossclaim within 30 days after being served with the pleading that states the counterclaim or crossclaim.

(C) A party shall serve a reply to an answer or third-party answer within 30 days after being served with an order to reply, unless the order specifies a different time.

(2) *Effect of a motion.* Unless the court sets a different time, serving a motion under this rule alters these periods as follows:

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

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

(b) How to present defenses. Every defense to a claim for relief in any pleading shall be asserted in the responsive pleading if one is required. But a party may assert the following defenses 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.

A motion making any of these defenses shall be made before pleading if a responsive

pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at 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.

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

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

(e) Motion for more definite statement. A party may move for a more definite statement 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 be made before filing a responsive pleading and shall point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within 14 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order.

(f) Motion to strike. The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:

(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 shall 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) Waiving or preserving 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.

(2) *When to Raise Others.* Failure to state a claim upon which relief can be granted, to join a person required by Rule 19(b), or to state a legal defense to a claim may be raised:

(A) in any pleading allowed or ordered under Rule 7(a);

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

(C) at trial.

(3) *Lack of subject-matter jurisdiction.* If the court determines at any time that it lacks subject-matter jurisdiction, the court shall dismiss the action. 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) shall be heard and decided before trial unless the court orders a deferral until trial.

Rule 13. Counterclaim and crossclaim.

(a) Compulsory counterclaims.

(1) *In general.* A pleading shall state as a counterclaim any claim that—at the time of its service—the pleader has against an opposing party, if the claim:

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

(B) does not require adding another party over whom the court cannot acquire jurisdiction.

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

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

(B) the opposing party sued on its claim by attachment or other process that did not establish personal jurisdiction over the pleader on that claim, and the pleader does not assert any counterclaim under this Rule.

(b) Permissive counterclaims. A pleading may state as a counterclaim against an opposing party any claim that is not compulsory.

(c) Relief sought in a counterclaim. A counterclaim need not diminish or defeat the recovery sought by the opposing party. It may request relief that exceeds in amount or differs in kind from the relief sought by the opposing party.

(d) Counterclaim against the State. These rules do not expand the right to assert a

counterclaim—or to claim a credit—against the State or a State official or agency.

(e) Counterclaim maturing or acquired after pleading. The court may permit a party to file a supplemental pleading asserting a counterclaim that matured or was acquired by the party after serving an earlier pleading.

(f) [Abrogated]

(g) Crossclaim against a co-party. A pleading may state as a crossclaim any claim by one party against a co-party if the claim arises out of the transaction or occurrence that is the subject matter of the original action or of a counterclaim, or if the claim relates to any property that is the subject matter of the original action. The crossclaim may include a claim that the 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) Joining additional parties. 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 under Rule 42(b), it may enter judgment on a counterclaim or crossclaim under Rule 54(b) when it has jurisdiction to do so, even if the opposing party's claims have been dismissed or otherwise resolved.

Rule 14. Third-party practice.

(a) When a defending party may bring in a third party.

(1) *Timing of the summons and complaint.* A defending party may, as a third-party plaintiff, serve a summons and complaint on a nonparty who is or may be liable to it for all or part of the claim against it. But the third-party plaintiff shall, by motion, obtain the court's leave if it files the third-party complaint more than 14 days after serving its original answer unless otherwise provided by order entered under Rule 16(b)(3)(A).

(2) *Third-party defendant's claims and defenses.* The person served with the summons and third-party complaint,—the "third-party defendant":

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

(B) shall 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 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 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. The third-party defendant shall then assert any defense under Rule 12 and any 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 a nonparty who is or may be liable to the third-party defendant for all or part of any claim it.

(b) When a claim is asserted against a plaintiff, the plaintiff may bring in a third party if this rule would allow a defendant to do so.

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) *Other amendments.* In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

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

(b) Amendments during and after trial.

(1) *Based on an objection at trial.* If, at trial, a party objects that evidence is not within the issues raised in the pleadings, the court may permit the pleadings to be. 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 evidence would prejudice that party's action or defense on the merits. The court may grant a continuance to enable the objecting party to meet 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 shall 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. *When an amendment relates back.* An amendment to a pleading relates back to the date of the original pleading when:

(1) the law that provides the applicable statute of limitations allows relation back;

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

(3) the amendment changes the party or the naming of the party against whom a claim is asserted, Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(l) for serving the summons and complaint, the party to be brought in by amendment:

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

(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.

(d) Supplemental pleadings. On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. The court may permit supplementation even though the original pleading is defective in stating a claim or defense. The court may order that the opposing party plead to the supplemental pleading within a specified time.

Rule 16. Pretrial conferences; scheduling; management.

(a) Purposes of pretrial conferences. In any action, the court may order the attorneys and any unrepresented parties to appear for one or more pretrial conferences 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 settlement.

(b) Scheduling.

(1) *Scheduling order.* Except in categories of actions exempted by the Supreme Court of Appeals, the trial court shall issue a scheduling order:

(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 shall issue the scheduling order as soon as practicable, but unless the judge finds good cause for delay, the judge shall 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) Required contents of the order. The scheduling order shall: (i) limit the time to join other parties, (ii) limit the time to amend the pleadings, (iii) limit the time to complete discovery, and (iv) limit the time to file motions.

(A) *Permitted contents.* The scheduling order also may:

(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 shall 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) set dates for pretrial conferences and for trial; and

(vii) include other appropriate.

(4) *Modifying a schedule*. A schedule may be modified 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 shall 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) *Matters for consideration*. At any pretrial the court may consider and take appropriate action on the following matters:

(A) formulating and simplifying the issues, and eliminating frivolous claims or defenses;

(B) amending the pleadings if necessary or desirable;

(C) obtaining admissions and stipulations about facts and documents to avoid unnecessary proof, and ruling in advance on the admissibility of evidence;

(D) avoiding unnecessary proof and of cumulative evidence;, and limiting the use of testimony under West Virginia Rules of Evidence 702;

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

(F) controlling and scheduling discovery, including orders affecting disclosures and discovery under Rule 26 and Rules 29 through 37;

(G) identifying witnesses and documents, scheduling the filing and exchange of any pretrial briefs, and setting dates for further conferences and for trial;

(H) referring matters to a commissioner under Rule 53 or 53.1;

(I) settling the case and using special procedures to assist in resolving the dispute when authorized by statute or rule;

(J) determining the form and content of the pretrial order;

(K) disposing of pending motions;

(L) 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) ordering a separate trial under Rule 42(b) of a claim, counterclaim, crossclaim, third-party claim;

(N) ordering the presentation of evidence early in the trial on a manageable issue that 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) establishing a reasonable limit on the time allowed to present evidence; and

(P) facilitating in other ways the just, speedy and inexpensive disposition of the action.

(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) Final pretrial conference and orders. The court may hold a final pretrial conference to formulate a trial plan, including a plan to facilitate the admission of evidence. The conference shall be held as close to the start of trial as is reasonable, and shall be attended by at least one attorney who will conduct the trial for each party and by any unrepresented party.

The court may modify the order issued after a final pretrial conference 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) is substantially unprepared to participate—or does not participate in good faith—in the conference; or

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

(2) *Imposing fees and costs*. Instead of or in addition to any other sanction, the judge may require the party, its attorney, or both to pay the reasonable expenses—including attorney fees—incurred because of any noncompliance with this rule, unless the noncompliance was substantially justified or other circumstances make an award of expenses unjust.

IV. Parties.

Rule 17. Plaintiff and defendants; capacity; public officers.

(a) Real party in interest.

(1) *Designation in general.* An action shall 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 law.

(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 shall be brought in the name of the state or any political subdivision thereof.

(3) *Joinder of the real party in interest.* 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 for the real party in interest to ratify, join, or be substituted into the action. After ratification, joinder, or substitution, the action proceeds as if it had been originally commenced by the real party in interest.

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

(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 may 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.

Rule 18. Joinder of claims.

(a) In general. A party asserting a claim, counterclaim, cross-claim, or third-party claim, may join, as independent or alternative claims, as many claims, legal or equitable, as the party has against an opposing party.

(b) Joinder of Contingent claims. 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.

Rule 19. Required joinder of parties.

(a) Persons required to be joined if feasible.

(1) *Required party.* A person who is subject to service of process shall 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 shall 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 shall dismiss that party.

(b) When joinder is not feasible. If a person who is required to be joined if feasible cannot be joined, the court shall 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 the reasons for nonjoinder. When asserting a claim for relief, a party shall 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 for class actions. – This rule is subject to the provisions of Rule 23.

Rule 20. Permissive joinder of parties.

(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 or in rem 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) 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.

Rule 21. Misjoinder and nonjoinder of parties.

Misjoinder of parties is not ground for dismissal of an action. 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.

Rule 22. Interpleader.

(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.

Rule 23. Class actions.

(a) Prerequisites. 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.

(b) Types of class actions. A class action may be maintained if Rule 23(a) is satisfied and if:

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

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

(B) adjudications with respect to individual class members that 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) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to the class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

(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) 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 shall 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 shall define the class and the class claims, issues, or defenses, and shall 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 shall 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 shall 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 shall:

(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 shall provide to the court. The parties shall 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 shall 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 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 shall 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 to afford 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 a proposal under this subdivision (e). The objection shall 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) Class counsel.

(1) *Appointing class counsel*. Unless a statute provides otherwise, a court that certifies a class shall appoint class counsel. In appointing class counsel, the court:

(A) shall 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 fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney 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 shall 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 shall fairly and adequately represent the interests of the class.

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

(1) A claim for an award shall 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 shall 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 shall find the facts and state its legal conclusions.

(4) The court may refer issues related to the amount of the award to a special commissioner.

(h) Residual funds. When the claims process has been exhausted in class actions and residual funds remain, not less than twenty-five percent (25%) of the amount of the residual funds shall be distributed to Legal Aid of West Virginia. The court may, after notice to counsel of record and a hearing, distribute the remaining seventy-five percent (75%) to one or more West Virginia nonprofit organizations, schools within West Virginia universities, 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, or Legal Aid of West Virginia.

Rule 23.1. Derivative actions.

(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 shall be verified and shall:

(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 shall be given to shareholders or members in the manner that the court orders.

Rule 23.2. Actions relating to unincorporated associations.

This rule applies to 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 those parties will fairly and adequately protect the interests of the association and its members. In conducting the action, the court may issue any appropriate orders corresponding with those in Rule 23(d), and the procedure for settlement, voluntary dismissal, or compromise shall correspond with the procedure in Rule 23(e).

Rule 24. Intervention.

(a) Intervention of right.

On timely motion, the court shall 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 shall 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 shall be served on the parties as provided in Rule 5. The motion shall state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought.

(d) Procedure. 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.

Rule 25. Substitution of parties.

(a) Death.

(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 shall 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, shall be served on the parties as provided in Rule 5 and on nonparties as provided in Rule 4. A statement noting death shall be served in the same manner. Service may be made in any judicial circuit.

(b) Incompetency or incarceration. If a party becomes incompetent or becomes incarcerated, the court may, on motion, permit the action to be continued by or against the party's representative. The motion shall be served as provided in Rule 25(a)(3).

(c) Transfer of interest. If an interest is transferred, the action may be continued by or against the original party unless the court, on motion, orders the transferee to be substituted in the action or joined with the original party. The motion shall be served as provided in Rule 25(a)(3).

(d) Public officers; death or separation from office.

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 shall be disregarded. The court may order substitution at any time, but the absence of such an order does not affect the substitution.

V. Depositions and Discovery.

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 shall, 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 shall 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 shall 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 shall determine what disclosures, if any, are to be made and shall 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 shall 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 shall 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 shall 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 shall provide a written report.* Unless otherwise stipulated or ordered by the court, this disclosure shall 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 shall 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 shall 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 shall make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures shall be made:

(i) At least 90 days before the date set 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 shall 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 shall 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 steno graphically, 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 shall 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) shall 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)(B), 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 shall 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)(B). The court may specify conditions for the discovery.

(C) *When required.* On motion or on its own, the court shall 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.

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

(C) *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 shall require that the party seeking discovery:

(i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (B); 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 shall:

(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 shall promptly return, sequester, or destroy the specified information and any copies it has; shall not use or disclose the information until the claim is resolved; shall 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 shall 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 shall 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— shall 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 shall 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 shall 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 shall 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 shall 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 shall 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 shall be signed by at least one attorney of record in the attorney's own name—or by the party personally, if unrepresented—and shall 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 shall 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, shall 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 fees, caused by the violation.

Rule 27. Depositions to perpetuate testimony.

(a) Before an action is filed.

(1) *Petition.* A person who wants to perpetuate testimony about any matter cognizable in a West Virginia court may file a verified petition in in the circuit court for the circuit where any expected adverse party resides. The petition shall ask for an order authorizing the petitioner to depose the named persons in order to perpetuate their testimony. The petition shall be titled in the petitioner's name and shall show:

(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.* At least 21 days before the hearing date, or such other time as agreed by the parties or ordered by the court, the petitioner shall 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 shall 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 or is incompetent, Rule 17(c) applies.

(3) *Order and examination.* If satisfied that perpetuating the testimony may prevent a failure or delay of justice, the court shall 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 under these rules, and the court may issue orders like those authorized by Rules 34 and 35. 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) *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 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.

(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 shall 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 a court's power to entertain an action to perpetuate testimony.

Rule 28. Persons before whom deposition may be taken.

(a) Within the United States. –

(1) *In general.* Within the United States or a territory or insular possession subject to United States jurisdiction, a depositions shall be taken before:

(A) an officer authorized to administer oaths either by federal law or of this State or by the law in the place of examination; or

(B) a person appointed by the court where the action is pending to administer oaths and take testimony.

(2) *Definition of "officer".* The term "officer" 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 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 shall 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 shall 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. A deposition shall not be taken before a person who is any party's relative, employee, or attorney; who is related to or employed by any party's attorney; or who is financially interested in the action.

Rule 29. Stipulations about discovery procedure.

Unless the court orders otherwise, the parties may stipulate that:

(a) a deposition may be taken before any person, at any time or place, on any notice, and in any manner specified—in which event it may be used in the same way as any other deposition; and

(b) other procedures governing or limiting discovery be modified—but a stipulation extending the time for any form of discovery shall have court approval if it would interfere with the time set for completing discovery, for hearing a motion, or for trial.

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.

(3) 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.

If a party shows that when the party was served with notice under Rule 30 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.

(b) Notice of the deposition; other formal requirements.

(1) *Notice in general.* A party who wants to depose a person by oral questions shall give reasonable written notice to every other party. The notice shall state the time and place of the deposition and, if known, the deponent's name and address. If the

name is unknown, the notice shall 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, shall 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 shall 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 ensuring 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) Before the deposition. Unless the parties stipulate otherwise, a deposition shall be conducted before an officer appointed or designated under Rule 28. The officer shall 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-steno graphically, the officer shall 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 shall not be distorted through recording techniques.

(C) After the deposition. At the end of a deposition, the officer shall state on the record that the deposition is complete and shall 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 shall describe with reasonable particularity the matters for examination. The named organization shall 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 shall confer in good faith about the matters for examination. A subpoena shall advise a nonparty organization of its duty to make this designation and to confer with the serving party. The persons designated shall 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 shall record the testimony by the method designated under Rule 30(b)(3)(A). The testimony shall 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—shall be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection. An objection shall 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 shall deliver them to the officer. The officer shall 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 shall 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 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 shall 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 shall 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 shall note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, shall 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 shall certify in writing that the witness was duly sworn and that the deposition accurately records the witness's testimony.

The certificate shall accompany the record of the deposition. Unless the court orders otherwise, the officer shall seal the deposition in an envelope or package bearing the title of the action and marked "Deposition of [witness's name]" and shall promptly send it to the attorney who arranged for the transcript or recording. The attorney shall 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 shall, 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 shall retain the stenographic notes of a deposition taken steno graphically or a copy of the recording of a deposition taken by another method. When paid reasonable charges, the officer shall furnish a copy of the transcript or recording to any party or the deponent.

(4) *Notice of filing.* A party who files the deposition shall 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 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.

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 shall obtain leave of court, and the court shall 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 shall 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 shall provide a general description sufficient to identify the person or the particular class or group to which the person belongs. The notice shall 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 shall 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 shall deliver to the officer a copy of all the questions served and of the notice. The officer shall 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.

(c) Notice of completion or filing.

(1) *Completion.* The party who noticed the deposition shall notify all other parties when it is completed.

(2) *Filing.* A party who files the deposition shall promptly notify all other parties of the filing.

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).

(2) *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.

(3) *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).

(4) *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 shall 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)(3) shall 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 shall 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 shall 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.

(1) *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.

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).

(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 shall 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 shall furnish the information available to the party.

(2) *Time to respond.* The responding party shall 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 shall, 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 shall 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 shall sign them, and the attorney who objects shall 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 shall 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.

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) shall describe with reasonable particularity each item or category of items to be inspected;

(B) shall 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 shall respond in writing within 30 days after being served or – 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 shall 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 shall 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 shall state whether any responsive materials are being withheld on the basis of that objection. An objection to part of a request shall 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 shall 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 shall produce documents as they are kept in the usual course of business or shall 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 shall 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.

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) shall 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 shall, 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 shall be in writing and ‘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.

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)(1) 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 shall be separately stated. A request to admit the genuineness of a document shall 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 shall specifically deny it or state in detail why the answering party cannot truthfully admit or deny it. A denial shall 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 shall 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 shall be stated. A party shall 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 shall 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.

Rule 37. Failure to make disclosures or to cooperate in discovery; sanctions.

(a) Motion for an order compelling disclosure or discovery.

(1) *In general*. On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion shall 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.

(2) *Appropriate court*. A motion for an order to a party shall be made in the court the action is pending. A motion for an order to a nonparty shall be made in the circuit court where the discovery is or will be, taken.

(3) *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 asked under Rule 30 or 31;

(ii) a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a)(4);

(iii) a party fails to answer an interrogatory submitted under Rule 33; or

(iv) a party fails to respond that inspection will be permitted, or fails to permit inspection, or fails to produce documents or tangible things, as requested under Rule 34.

(C) *Related to a deposition*. When taking an oral deposition, the party asking a question may complete or adjourn the examination before moving for an order.

(4) *Incomplete disclosure, answer, or response*. For purposes of this subdivision (a), an evasive or incomplete disclosure, answer, or response shall be treated as a failure to disclose, answer, or respond.

(5) *Payment of expenses; protective orders*.

(A) *If the motion is granted (or disclosure or discovery is provided after filing)*. If the motion is granted —or if the disclosure or requested discovery is provided after the motion was filed—the court shall, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney fees. But the court shall not order this payment if:

(i) the movant filed the motion good faith to obtain the disclosure or discovery without court action;

(ii) the opposing party's answer, nondisclosure, response, or objection was substantially justified; or that

(iii) other circumstances make an award of expenses unjust.

(B) *If the motion is denied*. If the motion is denied, the court may issue any protective order authorized under Rule 26(c) and shall, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both pay the party or deponent who opposed the motion its reasonable

expenses incurred in opposing the motion, including attorney fees. But the court shall not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust.

(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 issue any protective order authorized under Rule 26(c) and may, after giving an opportunity to be heard, apportion the reasonable expenses for the motion.

(b) Failure to comply with a court order.

(1) *Sanctions in the circuit where the deposition is taken*. If the court where the discovery is taken a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of court.

(2) *Sanctions in the circuit where the action is pending.*

(A) *For not obeying a discovery order*. If a party or a party's officer, director, or managing agent —or a witness designated under Rule 30(b)(6) or 31(a)(4) —fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following:

(i) directing that the matters embraced in the order or other designated facts shall be taken as established for purposes of the action, as the prevailing party claims;

(ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

(iii) striking out pleadings or in part;

(iv)staying further proceedings until the order is obeyed;

(v) dismissing the action or proceeding in whole or in part;

(vi)rendering a default judgment against the disobedient party; or

(vii) treating as contempt of court the failure to obey any orders except an order to submit to a physical or mental examination.

(B) *For not producing a person for examination*. If a party fails to comply with an order under Rule 35(a) requiring it to produce another person for examination, the court may issue any of the orders listed in Rule 37(b)(2)(A)(i)-(vi), unless the disobedient party shows that it cannot produce the other person.

(C) *Payment of expenses*. Instead of or in addition to the orders above, the court shall order the disobedient party, the attorney advising that party, or

both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) Failure to disclose, to supplement an earlier response, or to admit.

(1) *Failure to disclose or supplement*. If a party fails to 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 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 requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney fees, incurred in making that proof. The court shall so order unless:

(A) the request was held objectionable under Rule 36(a);

(B) the admission sought was of no substantial importance;

(C) the party failing to admit had a reasonable ground to believe that it might prevail on the matter; or

(D) there was other good reason for the failure to admit.

(d) 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

(ii) a party, after being properly served with interrogatories under Rule 33 or a request for inspection under Rule 34, fails to serve its answers,

objections, or written response.

(B) *Certification*. A motion for sanctions for failing to answer or respond shall include a certification that the movant has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without court action.

(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).

(3) *Types of sanctions*. Sanctions may include any of the orders listed in Rule 37(b)(2)(A)(i)-(vi). Instead of or in addition to these sanctions, the court shall 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 failure was substantially justified or other circumstances make an award of expenses unjust.

(e) 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, the court:

(1) upon finding prejudice to another party 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 shall presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.

(f) Failure to participate in framing a discovery plan. If a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26(f), the court may, after giving an opportunity to be heard, require that party or attorney pay to any other party the reasonable expenses, including attorney fees, caused by the failure.

VI. Trials

Rule 38. Jury trial of right.

(a) Right preserved. The right of trial by jury as declared by the Constitution or statutes of the State shall be preserved to the parties inviolate.

(b) Demand. On any issue triable of right by a jury, a party may demand a jury trial by:

(1) serving the other parties with a written demand—which may be included in a pleading—no later than 14 days after the last pleading directed to the issue is served; and

(2) filing the demand in accordance with Rule 5(d).

(c) Specifying issues. In its demand a party may specify the issues that it wishes to have tried by a jury; otherwise, it is considered to have demanded a jury trial on all the issues so triable. If the party has demanded a jury trial on only some issues, any other party may—within 14 days after being served with the demand or within a shorter time as ordered by the court serve a demand for a jury trial on any other or all factual issues.

(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.

Rule 39. Trial by jury or by the court.

(a) When a demand is made. When a jury trial has been demanded under Rule 38, the action shall be designated on the docket as a jury action. The trial on all issues so demanded shall be by jury unless:

(1) the parties or their attorneys file a stipulation to a nonjury trial or so stipulate on the record; or

(2) the court, on motion or on its own, finds that a right of trial by jury on some or all of those issues does not exist under the Constitution or statutes of the State.

(b) By the court. Issues on which a jury trial is not properly demanded are to be tried by the court. But the court may, on motion or on its own, order a jury trial on any issue for which a jury might have been demanded.

(c) Advisory jury and trial by consent. In an action not triable of right by a jury the court, on motion or on its own

(1) may try any issue with an advisory jury; or

(2) may, with the parties' consent, try any issue by a jury whose verdict has the same effect as if a jury trial had been a matter of right.

Rule 40. Scheduling cases for trial.

Trials may be set by the court on its own, by issuing a scheduling order pursuant to Rule 16, or upon motion. The court shall give priority to actions entitled to priority by

the Constitution by statute or by rule.

Rule 41. Dismissal of actions or claims.

(a) Voluntary dismissal.

(1) By the plaintiff.

(A) *Without a court order*. Subject to Rules 23(e), 23.1(c), 23.2 and any statute of the State, the plaintiff may dismiss an action or claim without a court order by filing:

(i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or

(ii) a stipulation of dismissal signed by all parties who have appeared.

(B) *Effect*. Unless the notice or stipulation states otherwise, the dismissal is without prejudice. But if the plaintiff previously dismissed the same claim, or any action in any Court of the United States or of this or any other state based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.

(2) *By court order; effect.* Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

(b) Involuntary dismissal; effect. If the plaintiff fails to prosecute or to comply with these rules or a court order:

(1) a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this Rule—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits.

(2) any court in which an action has been pending for more than one year where no action has been taken by the plaintiff, the court may, in its discretion, order such action dismissed. For good cause shown, the court may, reinstate any action dismissed under this subsection on motion filed within three terms after entry of the order of dismissal.

(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 not be entered until any accrued court costs are paid.

(4) Before a court may dismiss an action under Rule 41(b), notice and an opportunity to be heard shall be given to all parties of record.

(5) *Dismissing a Counterclaim, Crossclaim, or Third-Party Claim*. This Rule applies to a dismissal of any counterclaim, crossclaim, or third-party claim. A claimant's voluntary dismissal under Rule 41(a)(1) shall be made:

(A) before a responsive pleading is served; or,

(B) if there is no responsive pleading, before evidence is introduced at a hearing or trial.

(6) If a plaintiff who previously dismissed an action in any court files an action on or including the same claim against the same defendant, the court:

(A) may order the plaintiff to pay all or part of costs of that previous action; and

(B) may stay the proceedings until the plaintiff has complied.

Rule 42. Consolidation; separate trials.

(a) Consolidation. If actions including appeals from magistrate court, involve a common question of law or fact, the court:

(1) join for hearing or trial of any or all matters at issue in the actions;

(2) consolidate the actions; or

(3) issue any other orders to avoid unnecessary cost or delay.

(b) Consolidation of actions in different courts.

(1) When two or more actions arising out of the same transaction or occurrence are pending before different circuit judges, or before a circuit judge and a magistrate court, the circuit judge before which the first such action was commenced shall order all the actions transferred to it or any other court before which any such action is pending.

(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.

(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 shall in no manner affect the other action pending in the circuit court; the doctrine of res judicata shall not apply to such judgment, nor shall 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 shall preserve any right to a jury trial.

Rule 43. Taking testimony.

(a) In open court. At trial, the witnesses' testimony shall be taken in open court, unless a statute, the West Virginia Rules of Evidence, these Rules, or other rules adopted by the Supreme Court of Appeals of West Virginia provide otherwise.

(b) **Affirmation instead of an oath contemporaneously or otherwise.** When these rules require an oath, a solemn affirmation may be accepted in lieu thereof.

(c) Evidence on motions. When a motion relies on facts outside the record, the court may hear the matter on affidavits or may hear it wholly or partly on oral testimony or on depositions.

(d) **Interpreter.** The court may appoint an interpreter of its choosing; fix reasonable compensation to be paid from funds provided by law or by one or more parties; and tax the compensation as costs.

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 shall be made under seal:

(i) by a judge of a court of record in the circuit 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.*

(A) *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.

(B) *Final certification of genuineness.* A final certification shall 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.

(C) *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 shall be authenticated under Rule 44(a)(1). For foreign records, the statement shall 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.

Rule 44.1 Determination of foreign law.

A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other 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 be treated as a ruling on a question of law.

Rule 45. Subpoena.

(a) In general.

(1) *Form and contents.*

(A) Requirements—in general. Every subpoena shall:

(i) state the court from which it is issued;

(ii) state the title of the action, 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 testify; produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control; or permit the inspection of premises; and

(iv) set out the text of Rule 45(d) and (e).

(B) *Command to attend a deposition—notice of the recording method.* A subpoena commanding attendance at a deposition shall state the method for recording the testimony.

(C) *Combining or separating a command to 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, hearing, or trial, or may be set out in a separate 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 to produce documents, electronically stored information, or tangible things requires the responding person to permit inspection, copying, testing, or sampling of the materials.

(2) *Issuing court.* A subpoena shall issue from the court where the action is pending.

(3) *Issued by whom.* The clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it. That party shall complete it before service. An attorney as officer of the court may also 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 shall 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 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 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 of West Virginia.

(3) *Proof of service*. Proving service, when necessary, requires filing with the issuing court a statement of showing the date and manner of service and the names of the persons served. The statement shall be certified by the server.

(c) Place of 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) Protecting a person subject to a subpoena; enforcement.

(1) *Avoiding undue burden or expense; sanctions*. A party or attorney responsible for issuing and serving a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to 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 fees.

(2) *Command to produce materials or permit inspection.*

(A) *Appearance not required*. A person commanded to produce documents, 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) *Objections.* A person commanded to produce documents, electronically stored information, or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises or to producing electronically stored information in the form or forms requested. The objection shall 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 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, and the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the court on behalf of which the subpoena was issued for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order shall 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 on behalf of which a the subpoena was issued shall quash or modify a subpoena that:

(i) fails to allow a reasonable time 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 fixed by order of the court;

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When permitted*. To protect a person subject to or affected by a subpoena, the court where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying conditions as an alternative*. In the circumstances described in Rule 45(d)(3)(B), the 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

(ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in responding to 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 produce them as they are kept in the ordinary course of business or shall organize and label them to correspond to the categories in the demand.

(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 shall 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 shall 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 material shall:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, electronically stored information, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to 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 shall promptly return, sequester, or destroy the specified information and any copies it has; shall not use or disclose the information until the claim is resolved; shall 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 circuit where compliance is required for a determination of the claim. The person who produced the information shall preserve the information until the claim is resolved.

(f) Contempt. The circuit court may hold in contempt a person who, having been served, fails without adequate excuse to obey or an order related to it.

Rule 46. Objecting to a ruling or order.

A formal exceptions to rulings or orders of the court is unnecessary. When the order is requested or made, a party need only state the action that it wants the court to take or objects to, along with the grounds for the request or objection. Failing to object does not prejudice a party who had no opportunity to do so when the ruling or order was made.

Rule 47. 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) Jury selection. Unless the court directs that a jury shall consist of a greater number, a jury shall consist of six persons. The plaintiff and the defendant shall each

have two preemptory challenges which shall 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.

(c) Alternate jurors. The court may direct that not more than six jurors in addition to the regular jury be called and impaneled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall 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 impaneled and 2 additional peremptory challenges if 4 to 6 alternate jurors are to be impaneled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by law shall not be used against an alternate juror.

(d) Excuse. – The court may for good cause excuse a juror from service during trial or deliberation.

Rule 48. Juries; verdict; polling.

(a) Fewer than six. The parties may stipulate that the jury shall consist of any number fewer than six

(b) Verdict. Unless the parties stipulate otherwise, the verdict shall be unanimous and shall be returned by a jury of six members.

(c) Polling. After a verdict is returned, but before the jury is discharged, the court shall on a party's request, or may on its own, poll the jurors 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 may order a new trial.

Rule 49. Special verdicts; general verdict and questions.

(a) Special verdicts.

(1) *In general.* The court may require a jury to return only a special verdict in the form of a special written finding on each issue of fact. The court may do so by:

(A) submitting written questions susceptible of a categorical or other brief answer;

(B) submitting written forms of the special findings that might properly be made under the pleadings and evidence; or

(C) using any other method that the court considers appropriate.

(2) *Instructions.* The court shall give the instructions and explanations necessary to enable the jury to make its findings on each submitted issue.

(3) *Issues not submitted.* A party waives the right to a jury trial on any issue of fact raised by the pleadings or evidence, but not submitted to the jury unless, before the jury retires, the party demands its submission to the jury. If the party does not demand submission, the court may make a finding on the issue. If the court makes no finding, it is considered to have made a finding consistent with its judgment on the special verdict.

(b) General verdict with answers to written questions.

(1) *In general*. The court may submit to the jury forms for a general verdict, together with written questions on one or more issues of fact that the jury shall decide. The court shall give the instructions and explanations necessary to enable the jury to render a general verdict and answer the questions in writing, and shall direct the jury to do both.

(2) *Verdict and answers consistent.* When the general verdict and the answers are consistent, the court shall approve, for entry under Rule 58, an appropriate judgment 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:

(A) approve, for entry of under Rule 58, an appropriate judgment in according to the answers, notwithstanding the general verdict;

(B) direct the jury to further consider its answers and verdict; or

(C) order a new trial.

(4) *Answers inconsistent with each other and the verdict.* When the answers are inconsistent with each other and one or more is also inconsistent with the general verdict, judgment shall not be entered; instead, the court shall direct the jury to further consider its answers and verdict or order a new trial.

Rule 50. Judgment as a matter of law in jury trials; alternative motion for new trial; conditional rulings.

(a) Judgment as a matter of law.

(1) *In general*. If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary

basis to find for the party on that issue, the court may:

(A) resolve the issue against the party; and

(B) grant a motion for judgment as a matter of law against the party to on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

(2) *Motion.* A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion shall specify the judgment sought and the law and facts that entitle the movant to the judgment.

(b) Renewing the motion after trial; alternative motion for new trial. If the court does not grant a motion for judgment as a matter of law made 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. No later than 28 days after the entry of judgment—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 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 the renewed motion, the court may:

(1) allow judgment on the verdict, if the jury returned a verdict;

(2) order a new trial; or

(3) direct the entry of judgment as a matter of law.

(c) Granting renewed motion; conditional rulings new trial motion.

(1) *In general.* If the court grants a renewed motion for judgment as a matter of law, it shall also conditionally rule on any motion for a new trial by determining whether a new trial should be granted if the judgment is later vacated or reversed. The court shall state the grounds for conditionally granting or denying the motion for a new trial.

(2) *Effect of a conditional ruling.* Conditionally granting the motion for a new trial does not affect the judgment's finality; if the judgment is reversed, the new trial shall proceed unless the appellate court orders otherwise. If the motion for a new trial is conditionally denied, the appellee may assert error in that denial; if the judgment is reversed, the case shall proceed as the appellate court orders.

(d) 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 is rendered shall be filed no later than 28 days after the entry of the judgment.

(e) **Denying the motion for judgment as a matter of law; reversal on appeal.** If the

court denies the motion for judgment as a matter of law, the prevailing party may, assert grounds entitling it to a new trial should the appellate court conclude that the trial court erred in denying the motion. If the appellate court reverses the judgment, it may order a new trial, direct the trial court to determine whether a new trial should be granted, or direct the entry of judgment.

Rule 51. Instructions to the jury; objections; preserving a claim of error.

(a) 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 for the jury instructions it wants the court 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) shall inform the parties of its proposed instructions in writing and proposed action on the requests before instructing the jury.

(2) shall give the parties an opportunity to object 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; 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 shall 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:

(A) an error in an instruction actually given, if that party properly objected; or

(B) a failure to give an instruction , if that party properly requested it and—unless the court rejected the request in a definitive ruling on the record—also properly objected.

(2) Plain error. A court may consider a plain error in the instructions that has not been preserved as required by Rule 51(d)(1) if the error affects substantial rights.

Rule 52. Findings and conclusions by the court; judgment on partial findings.

(a) Findings and conclusions.

(1) In *general.* In an action tried on the facts without a jury or with an advisory jury, the court shall find the facts specially and state its conclusions of law shall separately. The findings and conclusions may be stated on the record after the close of the evidence or in an order. Judgment shall be entered under Rule 58.

(2) *For a preliminary injunction*. In granting or refusing preliminary injunctions the court shall similarly state the findings and conclusions that support its action.

(3) *For a motion.* The court shall state findings and conclusions when granting a 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, shall 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.

(6) *Setting aside the findings*. Findings of fact, whether based on oral or other evidence, shall not be set aside unless clearly erroneous, and the reviewing court shall give due regard to the trial court's opportunity to judge the witnesses' credibility.

(b) Amended or additional findings. On a party's motion filed no later than 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 accompany a

motion for a new trial under Rule 59.

(c) Judgment on partial findings. If 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 against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue. The court may, however, decline to render any judgment until the close of the evidence. A judgment on partial findings shall be supported by findings of fact and conclusions of law as required by Rule 52(a).

Rule 53. Commissioners; discovery commissioners.

(a) Commissioners may be appointed by the court, pursuant to West Virginia statute, applicable Rules of Civil Procedure or Trial Court Rules.

(b) Discovery Commissioners may be appointed and should only be used in complex cases. 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.

(c) Compensation. The compensation of a discovery commissioner may be assessed to the parties**.**

(d) 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.

(e) 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 shall

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 shall 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 shall 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.

(f) 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 shall:

(1) adopt or reverse, in full or in part, or otherwise modify the discovery commissioner's report by written order, with or without a hearing;

(2) set the matter for hearing if requested by a party or on the court's own initiative; or,

(3) remand the matter to the discovery commissioner with instructions for reconsideration or other further action.

VII. Judgment.

Rule 54. Judgments; costs.

(a) Definition; form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not include recitals of pleadings, a commissioner's report, or a record of prior proceedings.

(b) Judgment upon on multiple claims or involving multiple parties. When an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties, 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 may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

(c) Demand for judgment; relief to be granted. A default judgment shall not differ in kind from, or exceed in amount, what is demanded in the pleadings. Every other final judgment shall grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.

(d) Costs.

(1) *Costs other than attorney fees.* Except when express provision therefore is made either in a statute of this State or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the State, its officers, and agencies shall be imposed only to the extent permitted by law. The clerk shall tax the costs within 14 days after judgment is entered, and shall send a copy of the bill of costs to each party affected thereby. On motion by any party served within 14 days after receipt of the bill of costs, the action of the clerk may be reviewed by the court.

(2) *Attorney Fees.*

(A) Claim to be by motion. A claim for attorney fees and related nontaxable expenses shall 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 shall:

(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 shall, on a party's request, give an opportunity for adversary submissions on the motion in accordance with Rule 4(e) or 78. The court may decide issues of liability for fees before receiving submissions on the value of services. The court shall find the facts and state its conclusions of law as provided in Rule 52(a).

Rule 55. Default.

(a) Entering a default. When a party against whom a judgment for affirmative relief

is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk shall enter the party's default.

(b) Entering a default judgment.

(1) *By the clerk*. If the plaintiff's claim is for a sum certain or for a sum that can be made certain by computation, the clerk—on the plaintiff's request, with an affidavit of showing the amount due—shall enter judgment for that amount and costs against a defendant who has been defaulted for appearing and who is neither a minor nor an incompetent person.

(2) *By the court.* In all other cases, the party shall apply to the court for a default judgment. A default judgment shall be entered against, a minor or incompetent person only if represented by a general guardian, conservator, or other like fiduciary who has appeared. If the party against whom a default judgment is sought has appeared personally or by a representative, that party or its representative shall be served with written notice of the application at least 37 days before the hearing. The court may conduct hearings or make referrals—preserving any right to a jury trial—when, to enter or effectuate judgment it needs to:

(A) conduct an accounting;

(B) determine the amount of damages;

(C) establish the truth of any allegation by evidence; or

(D) investigate any other matter.

(c) Setting aside a default or a default judgment. The court may set aside an entry of default for good cause, and it may set aside a final default judgment under Rule 60(b).

(d) Entry of judgment. The provisions of Rule 58 apply to default judgments.

Rule 56. Summary judgment.

(a) Motion for summary judgment or partial summary judgment. A party for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought.

The court shall grant summary judgment if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law.
(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) 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.

(1) *Supporting factual positions.* A party asserting that a material fact cannot be disputed, or is genuinely in issue, shall 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 that the material cited to support or dispute a fact cannot 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 shall 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.

(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 its opposition, the court may:

(1) defer considering the motion or deny it;

(2) allow time to obtain affidavits or declarations or to take discovery; or

(3) issue any other appropriate order.

(e) 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 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) 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 is submitted in bad faith or solely for delay, the court—after notice and a reasonable time to respond—may order the submitting party to pay to the other party the reasonable expenses, including attorney fees, it incurred as a result. An offending party or attorney may also be held in contempt. or subjected to other appropriate sanctions.

Rule 57. Declaratory judgments.

The procedure for obtaining a declaratory judgment pursuant to the West Virginia Uniform Declaratory Judgments Act, Code chapter 55, article 13 [§ 55-13-1 et seq.], shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. A party may demand declaratory relief or coercive relief or both in one action. Further relief based on a declaratory judgment may be granted in the declaratory action or upon petition to any court in which the declaratory action might have been instituted. The

court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.

Rule 58. Entry of judgments.

Subject to the provisions of Rule 54(b), the court shall promptly settle or approve the form of the judgment and sign it as authority for entry by the clerk. The clerk, forthwith upon receipt of the signed judgment, shall enter it in the civil docket as provided by Rule 79(a). The notation of a judgment in the civil docket as provided by Rule 79(a) constitutes the entry of the judgment; and the judgment is not effective before such entry. The entry of judgment shall not be delayed for the taxing of costs or to permit a motion for a new trial or any other motion permitted by these rules.

Rule 59. New trials; amendment of judgments.

(a) In general.

(1) *Grounds for new trial.* The court may, on motion, grant a new trial on all or some of the issues—and to any party—as follows:

(A) after a jury trial, for any 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 a rehearing has heretofore been granted in a suit in equity in court.

(2) *Further action after a nonjury trial.* After a nonjury trial, the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment.

(b) Time to file a motion for a new trial. A motion for a new trial shall be filed no later than 28 days after the entry of judgment.

(c) Time to serve affidavits. When a motion for a new trial is based on affidavits, they shall be filed with the motion. The opposing party has 14 days after being served to file opposing affidavits. The court may permit reply affidavits.

(d) New trial on the court's initiative or for reasons not in the motion. No later than 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. In either event, the court shall specify the reasons in its order.

(e) Motion to alter or amend a judgment. Any motion to alter or amend a judgment shall be filed no later than 28 days after the entry of the judgment.

(f) 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.

Rule 60. Relief from judgment or order.

(a) Corrections based on clerical mistakes; oversights and omissions. The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

(b) Grounds for relief from a final judgment, order, or proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, unavoidable cause or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

(c) Timing and effect of the motion.

(1) *Timing*. A motion under Rule 60(b) shall be made within a reasonable time—and for reasons (1), (2) and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

(2) *Effect on finality*. The motion does not affect the judgment's finality or suspend its operation.

(d) Other powers to grant relief. This rule does not limit a court's power to:

(1) entertain an independent action to relieve a party from a judgment, order, or proceeding;

(2) grant relief to a defendant who was not personally notified of the action; or

(3) set aside a judgment for fraud on the court.

(e) Bills and writs abolished. The following are abolished: bills of review, bills in the nature of bills of review, writs of coram nobis, coram vobis and audita querela.

Rule 61. Harmless error.

Unless justice requires otherwise, no error in admitting or excluding evidence—or any other error by the court or a party—is grounds for granting a new trial, for setting aside a verdict, or for vacating, modifying or otherwise disturbing a judgment or order. At every stage of the proceeding, the court shall disregard all errors and defects that do not affect any party's substantial rights.

Rule 62. Stay of proceedings to enforce a judgment.

(a) Automatic stay; Except as stated in this rule, execution on a judgment and proceedings to enforce it are stayed for 30 days after its entry, unless the court orders otherwise.

(b) Stay by Bond or other security. At any time after judgment is entered, a party may obtain a stay by providing a bond or other security. The stay takes effect when the court approves the bond or other security and remains in effect for the time specified in the bond or other security.

(c) 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) Stay of judgment as to multiple claims or multiple parties. A court may stay the enforcement of a final judgment entered under Rule 54(b) until it enters a later judgment or judgments, and may prescribe terms necessary to secure the benefit of the stayed judgment for the party in whose favor it was entered.

(e) Stay of judgment pending appeal. On motion and on such conditions for the security of the 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 an appeal from the judgment.

Rule 63. Judge's inability to proceed.

If a judge conducting a hearing or trial is unable to proceed, another judge may proceed upon certifying familiarity with the record and determining that the case may be completed without prejudice to the parties. In a hearing or nonjury trial, the successor judge shall, at a party's request, 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.

VIII. Provisional and Final Remedies and Special Proceedings.

Rule 64. Seizure of person or 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. The remedies available under this rule include the following, subject to the qualifications:

(1) an order for the seizure of specific personal property in an action to recover possession of such property shall be executed promptly and a return made thereon within 21 days after issuance of the order;

(2) an order of civil arrest or attachment shall be executed promptly and a return made thereon within 30 days after issuance of the order; and

(3) a garnishee shall 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 shall be obtained by an independent action.

Rule 65. Injunctions and restraining orders.

(a) Preliminary injunction.

(1) *Notice*. The court may issue a preliminary injunction 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 shall preserve any party's right to a jury trial.

(b) Temporary restraining order.

(1) *Issuing without notice*. The court may issue a temporary restraining order without written or oral notice to the adverse party or that party's attorney only if:

(A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and

(B) the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.

(2) *Contents; expiration*. Every temporary restraining order issued without notice shall state the date and hour it was issued; describe the injury and state why it is irreparable; state why the order was issued without notice; and be promptly filed in the clerk's office and entered in the record. The order expires at the time after entry—not to exceed 14 days—that the court sets, unless before that time the court, for good cause, extends it for a like period or the adverse party consents to a longer extension. The reasons for an extension shall be entered in the record.

(3) *Expediting the preliminary-injunction hearing*. If the order is issued without notice, the motion for a preliminary injunction shall be set for hearing at the earliest possible time, taking precedence over all other matters except hearings on older matters of the same character. At the hearing, the party who obtained the order shall proceed with the motion; if the party does not, the court shall dissolve order.

(4) *Motion to dissolve.* On 2 days notice to the party who obtained the order without notice —or on shorter notice set by the court—the adverse party may appear and move to dissolve or modify the order. The court shall then hear and decide the motion as promptly as justice requires.

(c) Security. The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained. No such security shall be required of the United States, the State of West Virginia and its political subdivisions, or of an officer or agency thereof.

(d) Contents and scope of every injunction and restraining order.

(1) *Contents*. Every order granting an injunction and every restraining order shall:

(A) state the reasons why it issued;

(B) state terms specifically; and

(C) describe in reasonable detail—and not by referring to the complaint or

other document—the act or acts restrained or required.

(2) *Persons bound*. The order binds only the following who receive actual notice of it by personal service or otherwise:

(A) the parties;

(B) the parties' officers, agents, servants, employees, and attorneys; and

(C) other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B).

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 documents 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 shall promptly send copies to the sureties if their addresses are known.

Rule 66. Receivers.

An action wherein a receiver has been appointed shall 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 be in accordance with the practice 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.

Rule 67. Deposit in 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 serve the order permitting deposit on the clerk of the court.

(b) Investing and withdrawing funds. Money paid into court under this rule shall be deposited and withdrawn in accordance with applicable statutes and with orders of the court entered in the action. The fund shall be deposited in a federally insured interest-bearing account or invested in an interest-bearing instrument approved by the court.

Rule 68. Offer of judgment; payment into court.

(a) Offer of judgment. At any time more than 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 offer, with costs then accrued. If within 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 direct entry of the judgment by the clerk.

(b) Payment 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 costs, (2) reject the tender, or (3) accept the tender as part payment only and proceed with the party's action on the sole issue of the amount of damages.

(c) Offer not accepted. An offer under subdivision (a) or (b) above not accepted in full satisfaction shall be deemed withdrawn, i.e., shall 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 shall 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 of 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 have the same effect as an offer made before trial if it is served within a reasonable time not less than 14 days prior to the commencement of hearings to determine the amount or extent of liability.

Rule 69. Executions and other final process; proceedings in aid thereof.

(a) In general.

(1) For payment of money. Process to enforce a judgment for the payment of money shall 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 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 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 be served

upon the plaintiff within 21 days after service of the summons; and (3) a return on a writ of suggestee execution shall be made promptly on the expiration of one year after issuance of the writ.

(2) For possession of 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 be promptly executed and a return on such writ made within 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, in addition to that provided by statute.

Rule 70. Judgment for specific acts; vesting title.

(a) Party's failure to act; ordering another to act. If a judgment requires a party to convey land, to deliver a deed or other document, or to perform any other specific act and the party fails to comply within the time specified, the court may order the act to be done –at the disobedient party's expense by another person appointed by the court. When done, the act has the same effect as if done by the party.

(b) Vesting title. If the real or personal property is within the state, the court instead of ordering a conveyance may enter a judgment divesting party's title and vesting it in others. That judgment has the effect of a legally executed conveyance.

(c) Obtaining a writ of attachment or sequestration. On application by a party entitled to performance of an act, the clerk shall 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 shall issue a writ of execution or assistance.

(e) Holding in contempt. The court may also hold the disobedient party in contempt.

Rule 71. Enforcing relief for or against a nonparty.

When an order grants relief for a nonparty or may be enforced against a nonparty, the procedure for enforcing the order is the same as for a party.

Rule 71.1. Eminent domain.

(a) Scope of rule. – Eminent domain proceedings in the circuit courts are governed by these rules of civil procedure to the extent they do not conflict with the constitution or statutes of this State.

(b) Jury trials. – A jury in an eminent domain proceeding in circuit court shall consist of twelve freeholders who shall meet the requirements of W. Va. Code §54-2-10.

Rule 71.2. Extraordinary writs in circuit court.

(a) Applicability of rules. The West Virginia Rules of Civil Procedure govern extraordinary writs in circuit court in all respects, except as otherwise provided by this rule, to the extent they do not conflict with the constitution or statutes of this State.

(b) Joinder of claims in different writs. A plaintiff may join a demand for relief which encompasses different types of writs and other types of relief.

(c) Complaint.

(1) *Caption.* The complaint shall contain a caption as provided in Rule 10(a) except that the plaintiff shall name as defendants the agencies, entities, subdivisions or individuals of the State of West Virginia to which the relief shall be directed.

(2) *Contents.* The complaint shall contain a short and plain statement of the authority for the writ demanded.

(d) Response.

(1) *Right to relief conceded.* If a defendant agency, entity, subdivision or individual of the State of West Virginia concedes the appropriateness of the writ requested, that defendant may serve notice of the concession and the court shall 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) *Right to relief contested.* If a defendant agency, entity, subdivision or individual of the State of West Virginia contests the plaintiff's or plaintiffs' right to the writ demanded, the defendant shall answer or otherwise respond to the complaint.

(3) *Default.* If a defendant agency, entity, subdivision or individual of the State of West Virginia fails to answer or otherwise appear, the court shall declare the defendant in default pursuant to Rule 55(a). The court may not enter default judgment pursuant to Rule 55(b) but shall hold a hearing or hearings on the relief demanded and award a writ or writs and find that the agency, entity, subdivision or individual of the State of West Virginia clearly intends to fail to appear, plead or otherwise defend in the action.

(4) *Jurisdiction and venue unaffected*. Jurisdiction and venue requirements for writ proceedings are unaffected by this rule.

IX. Appeals

Rule 72. Appeals.

Appeals are governed by the West Virginia Rules of Appellate Procedure.

Rule 73. [Abrogated-See Rules of Appellate Procedure].

Rules 74 through 76

[Reserved.]

X. Courts and Clerks.

Rule 77. Court and proceedings; clerk's authority; notice of an order or judgment; indigents.

(a) When court is open. Every court is considered always open for filing any document, issuing and returning process, making a motion or entering an order.

(b) Place for trial and other proceedings. Every trial on the merits shall be conducted in open court and so far as convenient in a regular courtroom. Any other act or proceeding may be done or conducted by a judge in chambers, without the attendance of the clerk or other court official, and anywhere inside or outside the circuit. But no hearing, other than one ex parte, shall be conducted outside the circuit unless all the affected parties consent.

(c) Clerk's office hours; clerk's orders.

(1) *Hours.* The clerk's office with a clerk or deputy on duty shall be open during business hours every day except Saturdays, Sundays and legal holidays. But a court 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 for good cause, 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 an order or judgment.

(1) *Service.* Immediately after entering an order or judgment, whether or not the order or judgment so directs, the clerk shall serve notice of the entry, as provided in Rule 5(b), on each party who is not in default for failing to appear. The clerk shall record the service on the docket. A party also may serve notice of the entry as provided in Rule 5.

(2) *Time to appeal not affected by lack of notice.* Lack of notice of the entry does not affect the time for appeal or relieve a party for failing to appeal within the time

allowed, except as allowed by Rule 5 of the Rules of Appellate Procedure.

(e) Waiver of fees, costs and security for indigents.

(1) *Filing of financial affidavit and application.* A person seeking waiver of fees, costs, or security, pursuant to West Virginia Code § 59-2-1, shall execute before the clerk or a deputy an affidavit and application prescribed by the Supreme Court of Appeals, which shall be kept confidential in divorce and domestic violence proceedings.

(2) *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.

(A) 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 the clerk determines that the disclosures in the application meet the financial guidelines for waiver of fees, costs, or security, then the clerk shall immediately file the civil action.

(B) *Clerk's denial of application*. If the clerk determines that the disclosures in the application do not meet the financial guidelines for waiver of fees, costs or security, or if the clerk determines that the application provides insufficient information for the clerk to make such determination, then the clerk shall deny the application.

(3) *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 shall immediately forward a copy of the affidavit and application to the court.

(C) Upon receipt of the affidavit and application, the court shall, within 7 days, either approve the application, disapprove the application, instruct the person to provide additional information or schedule an ex parte hearing to determine indigency.

(D) The sole issue to be determined by the judge reviewing the application is whether the applicant meets the financial guidelines.

(4) *Filing a new application for changed circumstances.* An additional affidavit and application of waiver shall 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.

(5) The filing of an affidavit and application of waiver shall 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.

Rule 78. Motion day; hearings; submission on briefs.

(a) Providing a regular schedule for hearings. A court may establish regular times and places for hearings on motions.

(b) Providing for submission on briefs. By rule or order, the court may provide for submitting and determining motions on briefs, without hearing.

Rule 79. Records kept by the clerk.

(a) Civil docket.

(1) *In general.* The clerk shall keep a record known as the "civil docket" in the form and manner prescribed by the Supreme Court of Appeals. The clerk shall enter each civil action in the docket. Actions shall be assigned consecutive file numbers, which shall be noted in the docket where the first entry of the action is made.

(2) *Items to be entered.* The following items shall be marked with the file number and entered chronologically in the docket:

(A) documents 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 entries.* Each entry shall briefly state 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 of each order and judgment.

(4) *Jury trial demanded.* When a jury trial has been properly demanded or ordered, the clerk shall enter the word "jury" in the docket.

(b) Civil judgments and orders. The clerk shall keep a copy of every final judgment and appealable order; every order affecting title to or a lien on real or personal property; and of any other order that the court directs to be kept. The clerk shall keep these in the form and manner prescribed by the Supreme Court of Appeals.

(c) Indexes; calendars. Under the court's direction, the clerk shall:

(1) keep indexes of the docket and of the judgments and orders described in Rule 79(b); and

(2) prepare calendars of all actions ready for trial, distinguishing jury trials from nonjury trials.

(d) Other records. The clerk shall keep any other records required by the Supreme Court of Appeals of West Virginia.

(e) 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 shall conform to the applicable policy approved by the Supreme Court of Appeals.

Rule 80. Transcript or statement of evidence made part of record.

(a) Making transcript part of record.

(1) *Trial or hearing transcript*. A certified transcript of a stenographically or mechanically reported proceeding of a trial or 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.

(2) *Transcript of hearing before a commissioner*. A certified transcript of a stenographically or mechanically reported 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) Certifying transcript. A transcript of a trial or hearing must be deemed authenticated and prima facie a correct statement of the proceedings when:

(1) it is certified by an official court or authorized reporter to be an accurate transcript of the stenographically or mechanically recorded proceedings; and

(2) it states whether it includes all or only a part of the proceedings.

(c) Notice of filing. When a transcript of the proceedings at a trial or hearing is filed with the court, the party causing it to be filed shall promptly give notice thereof to all other parties.

(d) Making corrections. Any party may file a motion to correct an error in the transcript of a trial or hearing. Upon sufficient proof of error, the court shall direct that the transcript be corrected as designated by the court.

(e) Using statement of evidence of trial or hearing.

(1) *Transcript not obtainable*. When a stenographic or mechanical report of the proceedings of a trial or hearing before the court was not made or 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.

(2) *Serving and objecting to statement*. The statement shall be served upon all parties within a reasonable time after the hearing or trial. All other parties may serve objections or amendments thereto within 14 days after service of the statement upon them.

(3) *Court to resolve objections*. The statement, with the objections or proposed amendments, shall be submitted to the court for resolution. The court must decide the accuracy of the statement based upon all of the materials submitted, and when 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 of exception abolished. Bills and certificates of exception are abolished.

(g) Stenographic transcript as evidence. If stenographically or mechanically reported testimony at a hearing or trial is admissible in evidence at a later hearing or trial, the testimony may be proved by a transcript certified by the official court reporter or other authorized person who reported it.

XI. General Provisions.

Rule 81. Applicability of the rules in general.

(a) Review of decisions of magistrates and administrative agencies.

(1) *Review of magistrate proceedings*. These rules apply to an appeal in circuit court, except that 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 court.

(2) *Review of administrative proceedings*. These rules, where applicable, apply in circuit court 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.

(A) All pleadings shall be verified. The case shall be tried and heard independently of the admissions of either party in the pleadings.

(B) Costs may be awarded to either party and the court may suspend or withhold any order or judgment until the costs are paid.

(C) A divorce or annulment action shall 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 be granted on the uncorroborated testimony of the parties or either of them.

(E) 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.

(c) Sale of forfeited and 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) Rules 13, 14, 18, 19, 20 and 23 do not apply;

(2) Rule 4 does not apply except that the order of publication must be modified to conform with the provisions of Rule 4, and judgment by default may be rendered against any defendant in such action who must fail to appear and defend by the date mentioned in the order of publication; and

(3) items, interests, parties and claims may be joined in such actions as authorized by W.Va. Code § 11A-4-1.

(d) Ex parte proceedings.

Rules 5(b), 5(d)(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.

(e) Juvenile proceedings. Rules 5(b), 5(d)(2), 5(d)(3) and 80 apply. The other rules do not apply to juvenile proceedings brought under the provisions of the West Virginia Code.

(f) These rules, to the extent they are not inconsistent with the West Virginia Rules Governing Post-Conviction Habeas Corpus Proceedings, may be applied, when appropriate, to petitions filed in West Virginia circuit courts when seeking post-conviction habeas corpus relief.

Rule 82. Jurisdiction and venue unaffected.

These rules do not extend or limit the jurisdiction of the circuit courts or the venue of actions in those courts.

Rule 83. Rules by circuit courts.

Local rules. Each circuit 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 not be effective until 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 also be recorded in a manner provided by the Supreme Court of Appeals.

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.

Rule 85. Title.

These rules shall be known as the West Virginia Rules of Civil Procedure.

Rule 86. Effective date.

These rules, and any amendments of these rules, shall take effect on the date designated by the Supreme Court of Appeals of West Virginia in the order adopting such rules or amendments. The rules govern all proceedings in cases thereafter commenced and insofar as just and practicable, all proceedings then pending.

Rule 87. [Abrogated].