REVISED RULES OF APPELLATE PROCEDURE

FINAL VERSION

(EFFECTIVE DECEMBER 1, 2010)

[The Clerk's Comments are provided only to assist the reader in evaluating the rules and do not constitute a substantive component of the rules.]

Approved by Order: October 19, 2010

Prepared by: Rory L. Perry II, Clerk of Court

AUTHORITY TO PROMULGATE RULES

The judicial branch of government, which is administered by the Supreme Court of Appeals, is an independent branch separate and distinct from the legislative and executive branches. The West Virginia Constitution grants to the Court broad authority to administer the judicial branch, and specifically states: "The court shall have power to promulgate rules for all cases and proceedings, civil and criminal, for all of the courts of the state relating to writs, warrants, process, practice and procedure, which shall have the force and effect of law." W. Va. Const. Art. VIII § 3. The Legislature has recognized this constitutional authority by enacting statutes that defer to the Court's rules in several areas, including the filing and processing of appeals, original jurisdiction petitions, and certified questions. W. Va. Code §§ 58-5-3 and 58-5-6. Pursuant to this authority, the Court has promulgated twenty-three sets of court rules on various topics that are currently in active use in the courts of this State.

Pursuant to a general order, all proposed court rules are placed for public comment for a minimum of thirty days. At the conclusion of the comment period, the Court will carefully consider the comments received and may, in its discretion, revise the proposed rules in light of the comments, seek additional public comment, or approve the rules for use in such manner as the Court may provide.

HISTORICAL NOTE

The first set of rules issued by the Court governed appellate practice and procedure. *Rules of Court*, 1 W. Va. Reports xiii-xviii (Jan. 21, 1864). Since that time, the Court's rules governing appellate practice have been amended numerous times, but no wide-ranging review has been made for over thirty years.

The Revised Rules of Appellate Procedure become effective December 1, 2010, and constitute a comprehensive revision of the rules in order to conform to modern practice, which will continue to ensure that each properly filed appeal is completely and carefully reviewed and results in a decision on the merits.

TABLE OF CONTENTS

THE CLERK'S COMMENTS ARE FURNISHED FOR THE CONVENIENCE OF THE READER, AND ARE NOT A SUBSTANTIVE PART OF THE RULES.

PART I. APPLICABILITY OF RULES

Rule 1. Scope of rules

(a) *Scope of rules.* These rules shall govern procedure: (1) in appeals and certified questions from lower courts and other tribunals to the Supreme Court of Appeals of West Virginia; (2) in proceedings in the Supreme Court of Appeals for review of orders of administrative agencies, boards, commissions, and officers of the State of West Virginia; and (3) in applications for writs or other relief, over which the Supreme Court of Appeals has jurisdiction.

(b) *Purpose of rules*. These rules are intended to provide a complete, expeditious, and effective method of review in all cases where a party is permitted by law to seek an appeal, review of an order, or original jurisdiction writ, in conformity with Article VIII of the West Virginia Constitution.

(c) *Rules Not to Affect Jurisdiction*. These rules shall not be construed to extend or limit the jurisdiction of the Supreme Court of Appeals as established by law.

(d) *Effective Date*. These rules shall be applicable to all certified questions and appeals arising from rulings, orders or judgments entered on or after December 1, 2010, and to original jurisdiction proceedings in the Supreme Court of Appeals filed on or after December 1, 2010. In cases arising from orders entered prior to the effective date, the Court may on its own motion direct the parties to comply with the revised rules in whole or in part by entering an appropriate order.

[CLERK'S COMMENTS: The revised rule made minor changes to previous Rule 1. The definitions section was moved to Rule 43 for organizational purposes. Subsection (b) is new. Subsection (d) provides that the revised rules are applicable in their entirety to all appeals and certified questions arising from orders entered on or after December 1, 2010. For original jurisdiction cases, the revised rules are fully applicable to all *filings* made on or after December 1,

2010. For cases arising from orders entered prior to the effective date, the Court may enter an appropriate order directing the parties to comply with the revised rules in whole or in part. For example, if a petition for appeal is filed under prior practice, the Court may enter an order directing that a response be filed and thereafter that the case be considered under the revised rules. The petition for appeal, designation of record, responses, and other papers in appeals from orders entered before the effective date should be prepared according to the prior version of the Rules of Appellate Procedure unless otherwise ordered.]

Rule 2. Suspension of rules

In the interest of expediting decision, or for other good cause shown, the Supreme Court may suspend the requirements or provisions of any of these Rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction. These Rules shall be construed to allow the Supreme Court to do substantial justice.

[CLERK'S COMMENTS: There are no changes to Rule 2, which articulates the Court's ability to construe the rules in a manner that will accomplish substantial justice.]

PART II. ATTORNEYS AND UNREPRESENTED PARTIES

Rule 3. Attorneys

(a) *Counsel of record*. If more than one attorney is identified as counsel for a party on a document filed in connection with a case pending in this Court, the cover page of the document must clearly identify one attorney who is designated counsel of record for the represented party or parties. Unless otherwise ordered, counsel of record is required to be present at any oral argument scheduled by the Court. Unless otherwise ordered, service of documents upon counsel of record is deemed sufficient service upon other counsel listed on a brief or other paper filed on behalf of a party.

(b) *Substitution of counsel of record*. If, during the pendency of an action in this Court, the identity of counsel of record for a party changes, substituted counsel of record must file a notice of appearance, with copies to all other counsel of record or unrepresented parties, setting forth the circumstances requiring a substitution of counsel. Substitution of counsel less than ten days prior to a scheduled argument is permitted only by leave of Court in extraordinary circumstances.

(c) *Appearance by attorneys not admitted to practice in West Virginia*. Attorneys from other jurisdictions who are not members in good standing of the West Virginia Bar may not appear in a proceeding in this Court without first being admitted pro hac vice. Because an action in this Court is a separate proceeding, pro hac vice admission is necessary, including payment of the requisite fee under Rule 8 of the Rules for Admission to the Practice of Law, even if counsel has previously been admitted pro hac vice in the same case in a lower tribunal. A prospective filing may be lodged with the Clerk prior to the time that leave to practice pro hac vice has been granted only if a complete motion for admission pro hac vice is filed at the same time the prospective filing is lodged.

(d) *Withdrawal of counsel*. In order to withdraw as counsel in an action pending in this Court in which counsel has previously appeared, counsel must provide the Court with documentation that counsel has fully complied with the requirements of Trial Court Rule 4.03. Counsel is not relieved of the obligation to comply with all applicable deadlines and obligations in the case until such time as the Court enters an order permitting counsel to withdraw.

(e) *Admission ceremony*. Prospective attorneys who are eligible for admission must appear in person before the Court at a regularly scheduled admission ceremony as required by Rule 7(b) of the Rules for Admission to the Practice of Law. Upon a showing of extraordinary circumstances (e.g. military service) set forth in writing to the Clerk, the Court may permit a prospective attorney—who is eligible for admission to practice but is unable to attend a regularly scheduled admission ceremony—to appear for admission at such time and manner as the Court may decide. Admission ceremonies may be set by the Court on any day the Court is in session, or on such other day during the term as the Court may provide.

[CLERK'S COMMENTS: See comments to Rule 4. Following public comment, the time limit for substitution of counsel prior to a scheduled argument was changed from thirty days to ten days.]

Rule 4. Unrepresented parties

(a) *Unrepresented parties*. A party who elects to proceed without counsel must comply with the Rules of Appellate Procedure to the fullest extent possible. While the submission of handwritten papers is not encouraged, unrepresented parties may serve and file handwritten documents, which should be neatly prepared in cursive script or hand printing in ink. Pages of handwritten documents must be numbered consecutively in the center of the bottom margin of each page. If illegible or unreasonably long,

handwritten documents may be rejected for filing by the Clerk.

(b) *Pro se appearance by a represented party*. A party to an action before this Court who is represented by counsel, and where counsel has made a filing or an appearance before this Court, may not file any pro se documents with the Court or make an oral argument before the Court, unless specifically permitted to do so by order.

[CLERK'S COMMENTS: Rules 3 and 4 are new rules that outline a variety of the Court's practices regarding counsel and unrepresented parties. In a shift from prior procedure, the rule requires a single counsel of record to be identified on all documents filed with the Court, which will greatly improve the efficiency of the notice process, preparation of the argument docket and opinions, and will reinforce the importance of the appellate process. If oral argument is held, counsel of record are required to attend. Clear requirements are set forth with regard to substitution and withdrawal of counsel. Rule 3(e) provides direction to prospective admittees and to the Board of Law Examiners regarding the timing and scheduling associated with an admission ceremony. Rule 4(a) provides some direction to pro se litigants, which was not a component of the previous rules. Rule 4(b) clarifies that pro se filings will not be accepted where the litigant has an attorney who has appeared in this Court and made a filing in the case.]

PART III. APPEALS

Rule 5. Appeals from circuit court

(a) *Applicability*. This rule governs all appeals from a circuit court final judgment or other appealable order in a civil or criminal case as set forth in West Virginia Code § 58-5-1, except: (1) appeals from orders in abuse and neglect proceedings under West Virginia Code § 49-6-1, et seq., which are governed by Rule 11; (2) certain appeals from orders in proceedings in the family courts, which are governed by Rule 13; (3) appeals from orders in administrative proceedings arising under the Human Rights Act, which are governed by Rule 15; and (4) certified questions from the circuit court, which are governed by Rule 17.

(b) *Docketing the appeal.* Within thirty days of entry of the judgment being appealed, the party appealing shall file the notice of appeal and the attachments required in the notice of appeal form contained in Appendix A of these Rules. The notice of appeal shall be filed in the Office of the Clerk of the Supreme Court. The petitioner must file the number of copies required by Rule 38. In addition to serving the notice of appeal in accordance with Rule 37, the party appealing shall serve the notice of appeal, including attachments, on all parties to the action in circuit court, on the clerk of the circuit court from which the appeal is taken—which shall be made a part of the record in the circuit court—and on each court reporter from whom a transcript is requested. Upon motion filed in accordance with Rule 39(b), the Court may extend the time period for filing a notice of appeal for good cause shown.

(c) *Parties to the appeal.* All parties to the proceeding in the court from which the appeal is taken shall be deemed parties in this Court, unless the appealing party shall indicate on the notice of appeal that one or more of the parties below—who has been provided a copy of the notice of appeal—has no interest in the outcome of the matter. A party mistakenly designated as no longer interested may remain a party in this Court by notifying the Clerk of this Court, with

notice given to the other parties, that the party has an interest in the appeal. Such notice shall be filed with the Clerk within twenty days of the filing of the notice of appeal.

(d) *Scheduling order*. As soon as practicable after the proper filing of the notice of appeal, the Court will issue a scheduling order. As appropriate to the circumstances, the scheduling order will contain the dates on which the petitioner's brief, the response brief, the reply brief, and the designated record or appendix shall be filed; will set forth whether a transcript will be prepared, the extent of any transcript, and the date the transcript is due; will set forth deadlines for filing motions; and may set forth such other matters as deemed beneficial or necessary. The scheduling order will set forth the official caption of the case on appeal that should be used on the cover page of all documents filed with the Court.

(e) *Failure to comply with scheduling order*. If a party fails to comply with a scheduling order the Court may impose sanctions, or dismiss the appeal, or both.

(f) *Perfecting the appeal—timing*. Unless otherwise provided by law, an appeal must be perfected within four months of the date the judgment being appealed was entered in the office of the circuit clerk; provided, however, that the circuit court from which the appeal is taken or the Supreme Court may, for good cause shown, by order entered of record, extend such period, not to exceed a total extension of two months, if a complete notice of appeal was timely and properly filed by the party seeking the appeal. If a motion for leave to extend the time for perfecting an appeal is filed with the circuit court, a copy of the motion must be filed with the Clerk of the Supreme Court, and the order of the circuit court ruling on the motion must also be provided to the Clerk of the Supreme Court. A motion that is filed with this Court to extend time to perfect an appeal must comply with Rule 29 and must state with particularity the reasons why an extension is necessary. In order to permit adequate time to perfect the appeal following the completion of transcripts, the Court may, on its own motion, extend the time period for appeal in a scheduling order. Upon motion filed on or before

the deadline for perfecting an appeal, the Court may grant leave to the petitioner to perfect an appeal where a notice of appeal has not been filed and a scheduling order has not been entered. Such relief will only be granted in extraordinary circumstances, and if the motion is granted, the Court may, in its discretion, deny oral argument or impose other sanctions for failure to comply with the Rules.

(g) *Perfecting the appeal—method*. An appeal is perfected by timely and properly filing, in the Office of the Clerk of the Supreme Court, an original and the number of copies required by Rule 38 of: (1) the petitioner's brief prepared in accordance with Rule 10 and (2) the appendix record prepared in accordance with Rule 7, unless the Court has specifically provided by order that an appendix record is not required. Failure by the petitioner to perfect an appeal will result in the case being dismissed from the docket of the Court.

(h) *Consideration of the appeal*. After the response brief or summary response has been filed in accordance with Rule 10, and any reply brief deemed necessary has been filed (or the time for filing a reply has expired), the appeal will be deemed to be mature, and the Court will fully consider the written arguments of all parties to the appeal. Thereafter, the Court will: (1) decide the case on the merits without oral argument; or (2) set the case for oral argument and then decide the case on the merits; or (3) issue an appropriate order after considering any written and oral arguments made by the parties (e.g. the appeal is premature because it is an appeal from an interlocutory ruling, or the appeal is dismissed because the case has been settled).

[CLERK'S COMMENTS: No court of last resort in the country allows full oral argument in every case on appeal, and no court of last resort in the country issues a full published decision in every appeal. Instead, some cases are decided on the briefs without oral argument. This rule establishes a framework that is consistent with this general national practice.

Rule 5 is an entirely new rule that succinctly describes the basic elements of the unified briefing process, using terminology appropriate to the new methods. The rule requires a notice of appeal to be filed within thirty days, which will be followed by a scheduling order issued by the Court. These two requirements will permit more up-front involvement by this Court, in close coordination with the circuit court, and will allow better case management and better statewide management of the transcript production process. The scheduling order will contain deadlines for transcripts, and will endeavor to give counsel adequate time after the transcripts are complete to complete the brief. Subsection (c) provides a clear mechanism for identifying the proper parties to the appeal. By aligning the statutory timelines for appeal—which cannot be changed by court rule—with the act of perfecting the appeal, the rules remain consistent with West Virginia Code § 58-5-4. Establishing a theme consistent throughout the Rules, subsection (h) provides transparency regarding when an appeal is mature for full consideration by the Court, and what the options are when the Court considers the case. In response to public comment, a sentence providing that the issues on appeal could be limited in the scheduling order was eliminated.]

Rule 6. Record on appeal

(a) *Contents of the record*. The record consists of the papers and exhibits filed in the proceedings in the lower tribunal, the official transcript or recording of proceedings, if any, and the docket entries of the lower tribunal.

(b) *Scope of the record on appeal*. Parties on appeal are discouraged from including the entire record of the case in the lower tribunal in an appendix record or a designated record. The record on appeal should be selectively abridged by the parties in order to permit the Court to easily refer to relevant parts of the record and to save the parties the expense of reproducing the entire record. The Court, upon its own motion, may consider portions of the record other than those provided by the parties. Although the entire record is

available to the Court should it believe that additional portions are important to a full understanding of the issues, citations to portions of the record not included in the record on appeal are greatly disfavored. Anything not filed with the lower tribunal shall not be included in the record on appeal unless the Court grants a motion for leave to supplement the record on appeal for good cause shown.

(c) *Responsibility to provide the record on appeal*. Unless otherwise provided by statute or rule, the record on appeal is not automatically transmitted to the Court. All parties to the case are responsible for determining the contents of the appendix, and the petitioner is responsible for preparing and filing the appendix as set forth in Rule 7. If a designated record is permitted, all parties to the case are responsible for determining the contents of the designated record, and the circuit clerk is responsible for preparing and transmitting the record as set forth in Rule 8.

(d) *Method of providing the record*. An appendix is required unless the Court grants permission by order to proceed on a designated record. If a party believes that the appendix method would be impractical or inadequate for appellate review, the party shall file a motion with the Court on or before the date established for such motions in the scheduling order, requesting the Court to order the circuit clerk to transmit designated papers or exhibits to the Supreme Court. The motion shall designate the papers and exhibits in question, and shall show good cause why providing a copy in an appendix would be impractical or inadequate for appellate review. If the motion to proceed on a designated record is granted, in whole or in part, the circuit clerk shall transmit the designated record as set forth in Rule 8.

(e) *Correction of errors*. Any omission, misstatement, or error in the record, either clerical or otherwise, may be corrected at any time by stipulation filed with the Supreme Court. The Court, upon motion of a party or its own motion, may direct that an omission, misstatement, or error be corrected, and, if necessary, that a supplemental record be provided or transmitted.

(f) *Sanctions*. The Court, on its own motion or on motion of any party, may impose sanctions against attorneys who unreasonably and vexatiously increase the costs of litigation through the inclusion of unnecessary material in the appendix or designated record. Attorneys shall receive reasonable notice and an opportunity to respond before the imposition of any sanctions. A party's motion for imposition of sanctions will be considered by the Court only if filed within fourteen days after the issuance of the opinion or memorandum decision and only if counsel for the moving party previously objected to including the allegedly unnecessary material in writing to opposing counsel within ten days of receiving the list of materials required by Rule 7(e) or 8(c).

[CLERK'S COMMENTS: Rule 6 sets forth the governing principles that apply to the important step of assembling the record on appeal, and represents a major change to the current method. Under current practice in all cases, the petitioner *alone* designates the record (usually the entire record as a matter of expedience), which is then assembled and indexed by the circuit clerk's office and transmitted to this Court. Over time, this practice has encouraged a lack of oversight by petitioner's counsel in some cases, and has created difficulty for all parties in being able to prepare documents that cite to a specific page in the record. The records as currently transmitted to the record are nearly always over-inclusive. In addition, index and record preparation in some counties is impeded by personnel turnover and other factors.

Requiring petitioners to prepare a paginated and indexed record is a return to the practice that prevailed in this state until the 1970's. The rule change underscores the importance of the record review requirement of the Constitution, and will make it easier for counsel to prepare briefs that specifically cite the page in the record, which is another reform the Court wished to implement. It will also provide a record that that is usable without the expense and other concerns associated with handling original records. Although

the petitioner is required to assemble and file an appendix record, both side are required to participate in determining the content of the appendix. The rule does contain a safety valve wherein counsel or a pro se litigant may file a motion to have the case reviewed, in whole or in part, on the designated record. Such a motion may be appropriate in cases where the petitioner is pro se, or where other extraordinary circumstances exist that prevent the preparation of an appendix.

In response to public comment, the rules now require *all* parties to the appeal to coordinate determining the contents of the record on appeal, and emphasize that the record on appeal should be abridged. The fact that the record of the lower tribunal is always available to the Court to review was clarified. By virtue of Rule 24(c), the costs of the appendix are taxable in the discretion of the Court. While the petitioner is still responsible for assembling and filing an appendix record, the costs of assembling and filing the appendix may be divided at the conclusion of the case. Subsection (f) was added in order to strongly discourage the parties from needlessly increasing the costs of litigation by including unnecessary material in an appendix or designated record. The rule continues to express the Court's preference for using the appendix record method rather than the designated record method, and leaves the specifics for each method to be set forth in Rules 7 and 8.]

Rule 7. Appendix record

(a) *Format*. An appendix must contain accurate reproductions of the papers and exhibits submitted to the lower court, administrative agency or other tribunal, and may be reproduced using any method that produces a permanent, legible black image on white paper measuring eight and one-half inches by eleven inches. Reproductions may be slightly reduced in size to accommodate the page numbers required by subparagraph (b), provided, however, that legibility of the appendix is not significantly impaired. To the extent practicable, reproduction on both sides of the paper is encouraged. Appendices must be fastened on the left

side in a manner that will keep all the pages securely together and permit the Court to easily disassemble for copying. Use of binding methods that result in bulky protrusions or sharp edges, such as three-ring binders or spiral binders, is prohibited. An appendix of excessive length must be divided into volumes not to exceed three inches in thickness.

(b) *Page numbering*. Each page of an appendix must be clearly numbered in a sequential fashion so as to permit each page to be located by reference to a single page number. Page numbers must be legible and distinct from any other numbers that appear on the documents. If a volume is comprised solely of official transcripts in their entirety, additional page numbering is not required.

(c) *General requirements*. Any appendix filed by any party must contain the following sections, as described and in the order indicated.

(1) The upper portion of the cover page of an appendix must contain the caption of the case, (noting in parentheses the case number of the lower court or agency), and the title and volume number of the appendix, if applicable. If the case is confidential, the upper portion of the cover page must prominently state: "Confidential Case." If the appendix contains confidential or sealed material or personal identifiers restricted by Rule 40, the appendix need not be redacted, but the upper portion of the cover page must prominently state: "Contains Confidential Materials." The lower portion of the cover page must contain the name, address, telephone number, e-mail address, and West Virginia Bar Identification Number of counsel, if the petitioner is represented by counsel.

(2) Immediately following the cover page, an appendix must contain a certification page signed by counsel or unrepresented party certifying that: (a) the contents of the appendix are true and accurate copies of items contained in the record of the lower tribunal; and (b) the petitioner has conferred in good faith with all parties to the appeal in order to determine the contents of the appendix.

(3) Immediately following the certification page, an appendix must contain a table of contents that lists and

briefly describes each item included in the appendix by reference to its page number and volume number, if applicable.

(d) *Preparing the Appendix*. The petitioner shall prepare and file an appendix containing:

(1) The judgment or order appealed from, and all other orders applicable to the assignments of error on appeal;

(2) Pleadings, motions, and other filings, if their sufficiency, content, or form is in issue or material;

(3) In a criminal case, the indictment or information and the sentencing order;

(4) In an abuse and neglect case, a copy of the abuse and neglect petition;

(5) Material excerpts from official transcripts of testimony or from papers in connection with a motion. Such excerpts must contain all the testimony or averments upon which the petitioner relies and upon which it may be reasonably assumed the respondent will rely. If transcript excerpts are misleading or unintelligible by reason of incompleteness or lack of surrounding context, the entire transcript must be provided;

(6) Copies of critical exhibits, including photographs and maps, to the extent practicable;

(7) A certified copy of the complete docket sheet in the case obtained from the clerk of the circuit court;

(8) Other parts of the record to which the parties wish to direct the Court's attention.

(e) *Determining the contents of the appendix.* The parties are encouraged to agree on the contents of the appendix. In the absence of an agreement, the petitioner must, within the time period set forth in the scheduling order, serve on the respondent a list of the parts of the record that the petitioner intends to include in the appendix, along with a list of any issues intended to be presented to the Court that were not contained in the notice of appeal. The respondent may, within ten days after receiving the petitioner's list, serve on the petitioner a list of additional parts of the record to which it wishes to direct the Court's attention. The petitioner must include the listed parts of the record in the appendix. The parties must not list unnecessary parts of the record for

inclusion in the appendix, because the entire record is available to the Court.

(f) *Costs of the appendix*. Unless the parties agree otherwise, the petitioner must pay the cost of the appendix. If the petitioner considers parts of the record designated by the respondent to be unnecessary, the petitioner may advise the respondent, who must then advance the cost of including those parts. The cost of the appendix is a taxable cost. If any party causes unnecessary parts of the record to be included in the appendix, the Court may impose the cost of those parts on that party.

(g) *Supplemental appendix*. A party may file a motion for leave to file a supplemental appendix that includes such matters from the record not previously submitted. The motion shall set forth good cause why the material was not previously included. If the respondent's brief contains cross-assignments of error, the respondent may file a supplemental appendix that does not contain materials duplicative to the appendix already filed in the case. A supplemental appendix must comply with the format, page numbering, and general requirements of this Rule.

(h) *Transcripts*. If entire transcript volumes are included as part of an appendix, the volumes must comply with the format requirements in subsection (a) of this Rule and must contain a cover page as required by subdivision (c)(1) of this Rule. Pursuant to Rule 7(b), the page numbers of transcript volumes do not have to be re-numbered.

[CLERK'S COMMENTS: Rule 7 combines new requirements with existing provisions of the former rules. The rule includes specific formatting and assembly requirements that are intended to assist the Court in exercising its critical record-review function, and to allow briefs to precisely cite the record. By providing specific guidance to counsel, use of the appendix method will improve the quality of the appellate review process. The certification required by subdivision (c)(2) is of critical importance to maintain the integrity of the record on appeal. Although transcript

excerpts are permissible, the entire transcript should be provided if there is a possibility that the excerpts will be misleading.

Several adjustments were made to this rule as a result of the public comment process. In order to cut costs, avoid unnecessary material in the record, and avoid increasing litigation, the contents of the appendix are to be determined jointly by the parties in a manner similar to that used in the federal courts under F.R.A.P 30. The respondent's appendix is eliminated except in cases where cross-assignments of error are asserted. By requiring the parties to coordinate when determining the contents of the appendix, it is not necessary for the petitioner to bear the sole responsibility of certifying that the appendix is sufficient to permit the Court to fairly consider the assignments of error, so the certification requirement in Subsection (c)(2) was modified accordingly. The rule also adopts the federal court method for taxing the cost of the appendix. Subsection (f) addresses costs, and is intended to prevent petitioners from bearing the burden of opposing parties including materials in the appendix that are not relevant to the issues on appeal. The rule placed for comment required the parties to include copies of statutes, ordinances or rules at issue in the appendix. That requirement was eliminated, because those materials are readily available to the Court. New language was added to subsection (c)(1) that clarifies a point raised by several commenters regarding confidential material. The required number of copies to be filed was reduced from five to one. *See* Rule 38. All of these changes are intended to clarify the way in which an appendix should be prepared and minimize the impact on the parties.]

Rule 8. Alternative method—designated record

(a) *When permitted*. The Court may consider a case without an appendix record, or upon a partially designated record, when: (1) a motion to proceed on the designated record has been granted by the Court; or (2) a scheduling order allows designation; or (3) an order permitting designation is entered by the Court on its own motion.

(b) *Petitioner's designation*. Within the time frame set forth by order, the petitioner shall file with the clerk of the circuit court an itemized designation of such pleadings, orders, exhibits, and transcripts to enable the Supreme Court to decide the matters arising in the petition, along with the appropriate bond for costs as required by subsection (g).

(c) *Respondent's designation*. Within the time frame set forth by order of the Court, the respondent shall file with the circuit clerk a designation of such additional parts of the record as he considers necessary in view of the petitioner's designation.

(d) *Joint designation*. The Court may, in its discretion, and by order entered of record, require the parties to confer and submit a joint designation.

(e) *Form of Designation*. Designations shall be in such form as to guide the person assembling the record. Counsel may mark the docket sheet with appropriate notations. Asterisks or ellipses should be used to indicate omissions in testimony of witnesses or other parts of the record.

(f) *Assembling the designated record*. The circuit clerk, before transmitting the designated record to the Supreme Court, shall arrange the designated papers, as nearly as possible, in chronological order of filing, number the pages as described in Rule 7(b), and prepare a table of contents as described in Rule 7(c)(3). Physical evidence or bulky items that have been designated by the parties may be omitted from the record transmitted to this Court, provided that the table of contents describes the omitted exhibits and makes a notation that the exhibits are available to the Court upon request. Original documents are not required to be transmitted unless the Court specifically directs.

(g) *Bond for Costs*. Before the designated record is transmitted, the petitioner shall deposit with the clerk of the circuit court sufficient money, or a bond conditioned to pay the same, in a penalty and with sureties to be fixed and approved by such clerk, to pay: (1) the expenses of preparing

and indexing the record; (2) fees for certifying necessary copies of orders; (3) costs of transmission and return of the record; and (4) costs of the making of the transcript. The clerk shall endorse on the record that such deposit has been made or such bond fixed.

[CLERK'S COMMENTS: Rule 8 is a modified version of portions of former Rule 4 and Rule 8. It sets forth the method for designating the record on appeal. Proceeding on a designated record is not the preferred method, but may be permitted by the Court in certain instances, such as cases where the petitioner is not represented by counsel. A partial designated record would be appropriate, for example, where bulky exhibits that are not easily included in an appendix record need to be transmitted to the Court for review. A party who wishes to proceed on a designated record, either in whole or in part, should file a proper motion as early in the process as possible, and preferably at the same time the notice of appeal is filed.]

Rule 9. Transcripts

(a) *When transcripts are necessary*. In preparing the notice of appeal, the petitioner is responsible for making the initial determination as to whether a written transcript of a proceeding in the lower tribunal will assist the Court in deciding the issues presented on appeal. Because the parties are encouraged to agree on the contents of the appendix pursuant to Rule 7(e), the petitioner is encouraged to confer with the other parties to the case as to whether transcripts are necessary.

(b) *Requesting transcripts—preliminary matters.* Before a transcript of proceedings may be requested for purposes of an appeal, the requesting party must obtain—from each court reporter who will be involved in preparing any portion of the transcript—an estimate of the length of the transcript, and must make appropriate financial arrangements with each court reporter either by: (1) immediate payment in full

or by another payment arrangement that is acceptable to the court reporter pursuant to subsection (e) of this Rule; or (2) filing, in appropriate cases, an affidavit of indigency or order appointing counsel in the circuit clerk's office, in which case payment for the transcript will be made by the Supreme Court.

(c) *Transcript requests by the petitioner*. The petitioner's transcript request is made by filing a notice of appeal and appellate transcript request form as required by Rule 5 and in the format provided in Appendix A of these Rules. If a petitioner fails to properly request a transcript within the time specified, fails to make satisfactory financial arrangements with the court reporter, or fails to specify in adequate detail those proceedings to be transcribed, the Court may deny motions for an extension of the appeal period or subject the appeal to dismissal by the Court for failure to perfect.

(d) *Transcript requests by the respondent*. If the respondent, upon review of the petitioner's notice of appeal, is of the opinion that the transcripts listed by the petitioner, if any, are not adequate to permit the Court to fairly consider the assignments of error presented, the respondent shall, within fourteen days of receipt of the notice of appeal, request that additional transcripts be prepared by completing and filing an appellate transcript request contained in Appendix A of these Rules. The respondent's transcript request shall be served upon opposing counsel, on each court reporter from whom a transcript is requested, and be filed with the Clerk of the Supreme Court. As appropriate to the circumstances, the Court will issue an amended scheduling order. The respondent shall provide a statement of costs to the Court if transcripts produced under this subsection are included in a supplemental appendix under Rule 7.

(e) *Payment for transcripts*. In cases where transcripts are not paid for by the Supreme Court, the court reporter may, for good cause shown by the requesting party, defer payment at the time the transcript is requested. If payment is deferred in whole or in part, the requesting party must make full

payment upon receipt of the court reporter's invoice. If payment is not received by the court reporter within a reasonable amount of time, the Court may deny motions for extension of the appeal period or dismiss the appeal for failure to perfect. When a transcript has been properly requested, but the appeal is later dismissed or withdrawn, the requesting party is nevertheless obligated to pay the court reporter for the cost of the transcript prepared prior to the court reporter's receipt of notification from the requesting party that the appeal has been dismissed or withdrawn. If a party has made an informal request for a transcript but fails to properly complete and file a notice of appeal containing the appropriate transcript request, the court reporter is not obligated to perform any work to complete the transcript unless otherwise provided by order.

(f) *Duties of the court reporter*. Unless otherwise provided in a scheduling order or other order issued by the Court, a completed transcript is due forty-five days from the court reporter's receipt of the appellate transcript request; provided, however, that transcripts in abuse and neglect appeals under Rule 11 are not prepared for purposes of appeal unless specifically approved in advance by the Court. The court reporter shall promptly notify the Clerk of the Supreme Court of any problem with the appellate transcript request or the financial arrangements. Upon completion of the transcript, the court reporter must promptly provide a copy to the requesting party, file the original transcript in the circuit clerk's office, and provide a completed certification—setting forth the date the transcript was filed—to the Clerk of the Supreme Court. Additional duties and responsibilities applicable to court reporters are set forth in the Official Manual for West Virginia Court Reporters.

(g) *Extensions of time to complete transcripts*. The Clerk may grant an extension of time for the court reporter to complete a transcript. All requests for extensions of time must be specific and in writing.

[CLERK'S COMMENTS: Rule 9 is a new rule that contains the major responsibilities and procedures that were formerly set forth as part of Appendix B of the former rules: "Guidelines for Preparation of Appellate Transcripts in West Virginia Courts." Apart from Appendix B, the former rules did not contain much direction at all with regard to transcripts, and many difficulties have arisen—both for court reporters and for the Clerk's Office—over the fact that appellate counsel misunderstood or did not follow the proper procedures. By moving the major responsibilities into the body of the rules, and eliminating Appendix B, the administration of transcript preparation should improve.

Revisions to the former process were necessary because the transcript request, which was previously made on a separate appellate transcript request form, will now be incorporated into the notice of appeal document. The scheduling order issued by the Clerk's Office will contain the deadlines for preparation of the appellate transcript. Because transcripts in abuse and neglect cases are reviewed by the Court, a court reporter is not required to begin work on such transcripts for purpose of appeal until the request is approved in a scheduling order. As a result of changes made following public comment, the appendix process in Rule 6 and 7 is a joint effort, therefore subsection (a) was amended in order to harmonize with that process. The petitioner is responsible for ordering transcripts, but is encouraged to confer with the other parties to the appeal in order to avoid piecemeal assembly of the record on appeal. In total, the revisions seek to clarify the process, and provide more up-front administration of the transcript production process.]

Rule 10. Briefs

(a) *Format*. In addition to the specific requirements in this Rule, all briefs and summary responses are required to: (1) comply with the general format requirements and page limitations set forth in Rule 38; and (2) avoid unnecessary use of personal identifiers as required by Rule 40(e).

(b) *Time for filing, number of copies, method of filing*. Unless otherwise provided, briefs are due within the time frame set forth in the scheduling order. Typically, the petitioner's brief must be filed four months from entry of the final order being appealed, the respondent's brief must be filed forty-five days after the petitioner's brief, and any reply brief deemed necessary must be filed twenty days after the respondent's brief. The number of copies and page limitations for briefs and summary responses are set forth in Rule 38. Briefs and summary responses are deemed filed when the requisite number of documents are received in the Clerk's Office, not when mailed.

(c) *Petitioner's brief*. The petition for appeal and note of argument shall be consolidated into a single document called the petitioner's brief. To the fullest extent possible, the petitioner's brief shall contain the following sections in the order indicated, immediately following the cover page required by Rule 38(b).

(1) Table of Contents: If the brief exceeds five pages it must include a table of contents, with page references to the sections of the brief and the argument headings. The table of contents does not count toward the page limit for briefs.

(2) Table of Authorities: If the brief exceeds five pages it must include a table of authorities with an alphabetical list of cases, statutes, and other authorities cited, and references to the pages of the brief where they are cited. The table of authorities does not count toward the page limit for briefs.

(3) Assignments of Error: The brief opens with a list of the assignments of error that are presented for review, expressed in terms and circumstances of the case but without unnecessary detail. The assignments of error need not be identical to those contained in the notice of appeal. The statement of the assignments of error will be deemed to

include every subsidiary question fairly comprised therein. If the issue was not presented to the lower tribunal, the assignment of error must be phrased in such a fashion as to alert the Court to the fact that plain error is asserted. In its discretion, the Court may consider a plain error not among the assignments of error but evident from the record and otherwise within its jurisdiction to decide.

(4) Statement of the Case: Supported by appropriate and specific references to the appendix or designated record, the statement of the case must contain a concise account of the procedural history of the case and a statement of the facts of the case that are relevant to the assignments of error.

(5) Summary of Argument: The summary of argument should be a concise, accurate, and clear condensation of the argument made in the body of the brief, and need not contain extensive citation to legal authorities. The summary may not be a mere repetition of the headings under which the argument is arranged.

(6) Statement Regarding Oral Argument and Decision: The brief must contain a statement as to whether oral argument is necessary pursuant to the criteria in Rule 18(a). If the party deems oral argument to be necessary, the party must indicate whether the case should be set for a Rule 19 argument or a Rule 20 argument, and why. If the party requests a Rule 19 argument, the party must state whether the case is appropriate for a memorandum decision. If the party requests that the case be set for oral argument and believes that the minimum time for argument set forth in Rule 19 or Rule 20 will not be sufficient, the party may request a specific amount of additional time for argument and explain why the party believes that good cause exists for granting additional time.

(7) Argument: The brief must contain an argument exhibiting clearly the points of fact and law presented, the standard of review applicable, and citing the authorities relied on, under headings that correspond with the assignments of error. The argument must contain appropriate and specific citations to the record on appeal, including citations that pinpoint when and how the issues in the assignments of error were presented to the lower tribunal. The Court may disregard errors that are not

adequately supported by specific references to the record on appeal.

(8) Conclusion: The brief must end with a conclusion, specifying the relief to which the party believes himself to be entitled.

(9) Certificate of Service: A certificate of service as required by Rule 37 must be attached to the end of the brief. The certificate of service does not need a page number and does not count toward the page limit for briefs.

(d) *Respondent's brief*. The respondent must file a brief in accordance with this subsection, or a summary response in accordance with subsection (e) of this Rule. The respondent's brief must conform to the requirements in subsection (c) of this Rule, except that no statement of the case need be made beyond what may be deemed necessary in correcting any inaccuracy or omission in the petitioner's brief, and except that the respondent need not specifically restate the assignments of error. Unless otherwise provided by the Court, the argument section of the respondent's brief must specifically respond to each assignment of error, to the fullest extent possible. If the respondent's brief fails to respond to an assignment of error, the Court will assume that the respondent agrees with the petitioner's view of the issue.

(e) *Summary response*. Instead of a brief, the respondent may file a summary response. A summary response need not comply with all the requirements for a brief set forth in this rule but must contain an argument responsive to the assignments of error with appropriate citations to the record on appeal, exhibiting clearly the points of fact and law being presented and the authorities relied on; a conclusion, specifying the relief to which the party believes himself entitled; and a certificate of service as required by Rule 37. A party who files a summary response is deemed to have consented to the waiver of oral argument.

(f) *Cross-assignments of error*. The respondent, if he is of the opinion that there is error in the record to his prejudice, may assign such error in a separate portion of his brief and set out authority and argument in support thereof in the

manner provided in subsection (c) of this Rule. Such cross-assignment may be made notwithstanding the fact that the respondent did not perfect a separate appeal within the statutory period for taking an appeal. If the respondent's brief contains cross-assignments of error, the cover page of the brief must clearly so reflect. The petitioner may respond to the cross-assignment of errors in the reply brief.

(g) *Reply brief*. The petitioner may file a reply brief, which must comply with such parts of this rule applicable to the respondent, but need not contain a summary of argument, if appropriately divided by topical headings. If a timely-filed respondent's brief asserts cross-assignments of error, the applicable page limitation for a reply brief set forth in Rule 38 is extended to forty pages, and the time for filing a reply brief is automatically extended, without need for further order, until thirty days after the date the respondent's brief containing cross-assignments of error was filed.

(h) *Supplemental brief*. The Court may, on its own motion or upon motion of a party, direct that supplemental briefs be filed addressing a particular issue or circumstance. Unless otherwise provided, supplemental briefs need only comply with such parts of this rule applicable that are appropriate under the circumstances.

(i) *Notice of additional authorities*. Whenever a party desires to present late authorities, newly enacted legislation, or other intervening matters that were not available in time to have been included in the party's brief, the party may briefly inform the Court by letter, with copy provided to opposing parties. If the Court desires any further briefing or argument, it will so instruct by order.

(j) *Failure to file brief*. The failure to file a brief in accordance with this rule may result in the Supreme Court refusing to consider the case, denying oral argument to the derelict party, dismissing the case from the docket, or imposing such other sanctions as the Court may deem appropriate.

[CLERK'S COMMENTS: Rule 10 is partly new and partly derived from former Rule 10, and is adapted in part from appellate rules in other jurisdictions. It sets forth the mechanics of the unified briefing process, with improved specific requirements for briefs, some of which were clarified as a result of the public comment process. The most important change made in response to the public comments is that assignments of error in the petitioner's brief **do not** have to correspond precisely to the assignments of error set forth in the notice of appeal. Briefs must carefully cite to the record, and must specifically set forth where in the record each assignment of error was preserved. Briefs now must contain a summary of argument. The briefs themselves must state which type of oral argument is requested, if any, including a statement as to whether a memorandum decision is appropriate. Unlike the former process, briefing by respondents is now *required*, although an alternative process is set forth so that respondents can file a summary response in an appropriate case. The respondent's brief must specifically respond to each assignment of error. Although the respondent's brief does not need to follow the same order that the errors are set forth in the petitioner's brief, to the extent practicable, following the same order will assist the Court. The rule preserves the cross-assignment of error process that was contained in the former rules. The rule also provides direction regarding the method for filing supplemental authorities.]

Rule 11. Abuse & neglect appeals

(a) *Applicability*. This Rule governs all appeals from a circuit court final judgment in abuse and neglect cases under West Virginia Code § 49-6-1, et seq.

(b) *Docketing the appeal.* Within thirty days of entry of the judgment being appealed, the petitioner shall file the notice of appeal and the attachments required in the notice of appeal form contained in Appendix A of these Rules. The notice of appeal shall be filed in the Office of the Clerk of the Supreme Court. The petitioner must file an original and the

number of copies required by Rule 38. In addition to serving the notice of appeal in accordance with Rule 37, the party appealing shall serve a copy of the notice of appeal, including attachments, on all parties to the action in circuit court, on the clerk of the circuit court from which the appeal is taken—which shall be made a part of the record in the circuit court—and on each court reporter from whom a transcript is requested. The Court prefers abuse and neglect appeals to proceed initially under subsection (i) of this Rule, therefore, transcript requests may not be approved, or may be deferred. To the extent that a transcript of a particular proceeding is necessary for the Court to review a disputed evidentiary or testimonial issue, the petitioner must so indicate in the notice of appeal. Upon motion filed in accordance with Rule 39(b), the Court may extend the time period for filing a notice of appeal for good cause shown.

(c) *Parties to the appeal.* All parties to the proceeding in the court from which the appeal is taken, including the guardians ad litem for the minor children, shall be deemed parties in this Court, unless the appealing party shall indicate on the notice of appeal that one or more of the parties below has no interest in the outcome of the matter. A party mistakenly designated as no longer interested may remain a party in this Court by notifying the Clerk of this Court, with notice given to the other parties, that he has an interest in the appeal, within twenty days of the filing of the notice of appeal.

(d) *Scheduling order*. As soon as practicable after the proper filing of the notice of appeal, the Court will issue a scheduling order. As appropriate to the circumstances, the scheduling order will contain the dates on which the petitioner's brief, the response brief, the reply brief, and the designated record or appendix shall be filed; will set forth whether a transcript will be prepared, the extent of any transcript, and the date the transcript is due; will set forth deadlines for filing motions; and may set forth such other matters as deemed beneficial or necessary. The scheduling order will set forth the official caption of the case, which should be used on the cover page of all documents filed with the Court.

(e) *Failure to comply with scheduling order*. If a party fails to comply with a scheduling order the Court may impose sanctions or dismiss the appeal, or both.

(f) *Perfecting the appeal—timing*. Unless otherwise provided by law, an appeal in an abuse and neglect case must be perfected within sixty days of the date the judgment being appealed was entered in the office of the circuit clerk; provided, however, that the circuit court from which the appeal is taken or the Supreme Court may, for good cause shown, by order entered of record, extend such period, not to exceed a total extension of two months, if the notice of appeal was properly and timely filed by the party seeking the appeal. If a motion for leave to extend the time for perfecting an appeal is filed with the circuit court, a copy of the motion must be filed with the Clerk of the Supreme Court, and the order of the circuit court ruling on the motion must also be provided to the Clerk of the Supreme Court. A motion that is filed with this Court to extend time to perfect an appeal must comply with Rule 29 and must state with particularity the reasons why an extension is necessary. Upon motion filed on or before the deadline for perfecting an appeal, the Court may grant leave to the petitioner to perfect an appeal where a notice of appeal has not been filed and a scheduling order has not been entered. Such relief will be granted only in extraordinary circumstances, and if the motion is granted, the Court may, in its discretion, deny oral argument or impose other sanctions for failure to comply with the Rules.

(g) *Perfecting the appeal—method*. An appeal is perfected by the timely and proper filing in the Office of the Clerk of the Supreme Court of an original and the number of copies required by Rule 38 of: (1) the petitioner's brief prepared in accordance with Rule 10 and (2) the appendix record prepared in accordance with Rule 7, unless the Court has specifically provided that an appendix record is not required. In order to provide the most expeditious and inexpensive procedure for appeal in abuse and neglect cases, the petitioner is encouraged to perfect an appeal without presentation of a transcript of the testimony in whole or in part, provided that the petitioner complies with subsection

(i) of this Rule. Failure by the petitioner to perfect an appeal will result in the case being dismissed from the docket of the Court.

(h) *Responsibilities of guardian ad litem*. The guardian ad litem for any minor child involved in an abuse and neglect appeal must file a brief—or a summary response in an appropriate case—and if argument is held the guardian must appear and present argument unless otherwise specifically ordered by the Court.

(i) *Statement in lieu of transcript*. In order to provide an inexpensive and expeditious method of appeal, the petitioner is encouraged to perfect an appeal under this Rule without the transcript of testimony taken in the lower court. In lieu of filing all or part of the transcript of testimony, the petitioner shall set out in the petitioner's brief a statement of all facts pertinent to the assignments of error. The petitioner's brief shall include a certificate by the petitioner's counsel that the facts alleged are faithfully represented and that they are accurately presented to the best of counsel's ability. The use of this abbreviated procedure places the highest possible fiduciary duty upon a lawyer with regard to the Court and intentional misrepresentation of any sort is grounds for disciplinary action.

(j) *Briefs*. In addition to the items required by Rule 10, the briefs filed by the parties (including the guardian ad litem) must contain a section immediately following the concise summary of argument required by Rule 10(c)(5), setting forth the current status of the minor children and any plans for permanent placement, and the current status of the parental rights of all the children's parents. Within one week of any oral argument scheduled by the Court, or within such other time as may be specified by order, the parties shall provide a written statement of any change in the circumstances that were set forth in the briefs.

(k) *Consideration of the appeal.* After the response brief or summary response has been filed in accordance with Rule 10, and any reply brief deemed necessary has been filed (or the time for filing a reply has expired), the appeal will be

deemed to be mature, and thereafter the Court will fully consider the written arguments of all parties to the appeal. Thereafter, the Court will: (1) decide the case on the merits without oral argument; or (2) set the case for oral argument and decide the case on the merits; or (3) issue an appropriate order after considering any written and oral arguments made by the parties (e.g. the appeal is premature because it is an appeal from an interlocutory decision, or the appeal is dismissed because the case has been settled.)

[CLERK'S COMMENTS: Rule 11 is a modified version of the current rules applicable to abuse and neglect cases. New in this process is the requirement that a notice of appeal be filed within thirty days. The notice of appeal form will capture critical information regarding processing of the case, and will allow the Clerk's Office to require expedited work on a requested transcript only if necessary. The rule preserves the flexibility associated with filing without a transcript that was contained under the prior Rule 4A. Substantial confusion regarding the application of the rule permitting a statement in lieu of a transcript has been eliminated, by limiting its application to abuse and neglect appeals. The Court encourages petitioners in abuse and neglect cases to proceed without a transcript. Abuse and neglect cases are made subject to the unified briefing process. The expected participation of guardians ad litem is also made more apparent, and the parties are required to provide the Court with current information prior to oral argument about the children and/or the placement at issue.]

Rule 12. Workers' compensation appeals

(a) *Applicability*. This Rule governs all appeals from a final decision of the Workers' Compensation Board of Review pursuant to West Virginia Code § 23-5-15.

(b) *Time for appeal.* No appeal shall be presented from a decision of the Workers' Compensation Board of Review

which has been rendered more than thirty days before such appeal is filed with the Clerk of the Supreme Court.

(c) *Perfecting the appeal.* An appeal from a decision of the Workers' Compensation Board of Review is perfected upon the timely and proper filing of an original and the number of copies required by Rule 38 of the docketing statement, petitioner's brief, and appendix in the Office of the Clerk of the Supreme Court.

(d) *Docketing statement.* The petitioner must file an original and the number of copies required by Rule 38 of the docketing statement with the attachments mentioned in the form contained in Appendix B of these Rules.

(e) *Petitioner's brief.* The petitioner must file an original and the number of copies required by Rule 38 of a brief in the same format as provided in Rule 10, and must comply with the page limitations set forth in Rule 38. If applicable, the petitioner's brief shall name the successor to the workers' compensation commission as a respondent in addition to the adverse party.

(f) *Appendix*. The petitioner must file an original and the number of copies required by Rule 38 of a separate appendix of documents relevant to the issues on appeal. The appendix shall accurately reflect the relevant documents submitted in the administrative proceedings, and must include the decision of the Office of Judges and the Board of Review. The appendix must also include all relevant medical reports, psychological reports, vocational reports, transcripts, correspondence, orders, and other written material that is necessary for a fair consideration of the issues on appeal.

(g) *Service of papers*. All papers filed in a workers' compensation appeal shall be served on all parties to the appeal or, if represented, upon their attorneys, and upon the successor to the Workers' Compensation Commission and the Workers' Compensation Board of Review, in accordance with Rule 37.

(h) *Respondent's brief*. Within thirty days of receipt of the petitioner's brief, the respondent may file an original and the number of copies required by Rule 38 of a brief or summary response in the same format as provided in Rule 10, and must comply with the page limitations set forth in Rule 38. The respondent may file an original and the number of copies required by Rule 38 of a separate appendix of additional documents relevant to the issues on appeal not contained in the petitioner's appendix. Cross-assignments of error are not permitted.

(i) *Reply brief*. If the respondent files a brief or summary response, the petitioner may file an original and the number of copies required by Rule 38 of a reply brief, which must comply with the page limitations set forth in Rule 38, within twenty days of receipt of the respondent's brief or summary response.

(j) *Consideration of the appeal*. After the response brief or summary response has been filed, and any reply brief deemed necessary has been filed (or the time for filing a reply has expired), the appeal is deemed to be mature for full consideration by the Court. Thereafter, the Court will: (1) decide the case on the merits without oral argument; or (2) set the case for oral argument and decide the case on the merits; or (3) issue an appropriate order after considering any written and oral arguments made by the parties (e.g. the appeal is premature because it is an appeal from an interlocutory decision, or the appeal is dismissed because the case has been settled.)

(k) *Decision*. The Court shall certify its decision upon the merits of the appeal to the Workers' Compensation Board of Review and, in an appropriate case, to the successor to the workers' compensation commissioner.

[CLERK'S COMMENTS: Rule 12 was modified from former Rule 13A to align with the new unified briefing process, with one exception: the respondent's brief is optional rather than mandatory. Given the narrow scope of issues presented in workers' compensation cases, a response may not be

necessary in all cases. The certified question portion of the former rule was moved to Rule 17, which gathers all the forms of certified cases under a single rule.]

Rule 13. Family court appeals

(a) *Applicability*. This rule governs direct appeals from a family court final order pursuant to West Virginia Code § 51-2A-15(a), and appeals transferred to the Supreme Court pursuant to West Virginia Code § 51-2A-14(f). Appeals from a final circuit court order refusing a petition for appeal from family court or ruling on a family court appeal pursuant to West Virginia Code § 51-2A-15(b) are governed by Rule 5.

(b) *Direct appeals from family court*. An appeal from a final order of a family court may not be filed in the Supreme Court unless, within fourteen days after entry of a family court final order, both of the parties file a notice of intent to appeal directly to the Supreme Court and waive their right to appeal to the circuit court.

(1) The notice of intent to appeal and waiver shall be filed in the office of the circuit clerk where the final order of the family court was entered. The notice of intent to appeal and waiver shall be in the same or substantially similar form as that contained in Appendix A of the Rules of Practice and Procedure for Family Court, and may be filed jointly or separately. The circuit clerk shall forward a copy of the notice of intent to appeal and waiver, whether joint or separate, bearing a legible indication of the date of filing, together with a copy of the docket entries in the case, to the Clerk of the Supreme Court.

(2) As soon as practicable after receipt of the foregoing documents from the circuit clerk, the appeal will be docketed, the Court will issue a scheduling order, and the case will proceed in accordance with Rule 5 through Rule 10.

(c) *Transfer of appeals from circuit court*. When, under the provisions of W. Va. Code § 51-2A-14(f), a petition for appeal is transferred to the Supreme Court for review due to

the failure of the circuit court to timely enter an order, the circuit clerk shall retain one copy of the petition for appeal originally filed, and transmit by certified mail to the Clerk of the Supreme Court the original and one copy of the petition, together with a copy of the docket entries in the case. Upon receipt of the foregoing documents, the appeal will be docketed. Prior to issuing a scheduling order, the Court may, in its discretion, direct that the appeal be summarily remanded to the circuit court with directions to issue a decision in the case. If a summary remand order is not entered, the Court will, as soon as practicable, issue a scheduling order and the case will proceed in accordance with Rule 5 through Rule 10.

[CLERK'S COMMENTS: Rule 13 is a slightly modified version of previous Rule 13B. Direct appeals from family court are extremely rare, so the process for filing is the same as other appeals, except for the notice and waiver requirements. Transfer appeals in cases where the circuit court has not ruled in a timely manner are summarily remanded to the circuit court under current practice, so the rule has been revised accordingly.]

Rule 14. Public service commission appeals

(a) *Applicability*. This Rule governs all appeals from a final decision of the Public Service Commission pursuant to West Virginia Code § 24-5-1.

(b) *Time for appeal.* A party seeking review in this Court of a final order of the Public Service Commission must perfect the appeal within thirty days of entry of the final order of the Commission.

(c) *Perfecting the appeal.* An appeal under subsection (a) is perfected upon the timely and proper filing of an original and the number of copies required by Rule 38 of a petitioner's brief and appendix in the office of the Clerk of this Court.

(d) *Petitioner's brief.* The petitioner shall file an original and the number of copies required by Rule 38 of a brief in substantially the same format as provided in Rule 10.

(e) *Appendix.* The petitioner must file an original and the number of copies required by Rule 38 of an appendix of documents that comply with the format, page numbering and general requirements set forth in Rule 7. The appendix must include the relevant decisions or orders pertaining to the subject matter of the appeal, but need not contain evidence that will be provided with the Commission record.

(f) *Commission record.* Within thirty days of receipt of notice that an appeal has been perfected, the Commission shall transmit to the Clerk of this Court the record of the proceedings had before it, including all the evidence.

(g) *Scheduling order.* As soon as practicable after the appeal is perfected, the Court will issue a scheduling order. As appropriate to the circumstances, the scheduling order will set forth the date upon which a statement of reasons must be filed by the Commission, the date upon which any respondent's brief must be filed, and the date for oral argument.

(h) *Statement of reasons.* Within the time period provided in the scheduling order, the Commission shall file an original and the number of copies required by Rule 38 of a statement of reasons in the same format as the respondent's brief set forth in Rule 10.

(i) *Respondent's brief.* Within the time period provided in the scheduling order, a party to the proceedings before the Commission against whom the appeal is taken must file an original and the number of copies required by Rule 38 of a respondent's brief or summary response in the same format required for the respondent's brief set forth in Rule 10. Cross-assignments of error are not permitted.

(j) *Reply brief*. Within the time period provided in the scheduling order, the petitioner may file an original and the number of copies required by Rule 38 of a reply brief in the same format as set forth in Rule 10.

(k) *Oral argument*. The date for oral argument under Rule 19 or Rule 20 will be set forth in the scheduling order. Unless otherwise provided by order, the petitioner, the Commission and any respondent who filed a brief shall be entitled to present argument.

(l) *Consideration of the appeal*. At the conclusion of oral argument, the case will be submitted to the Court for its consideration. The Court may, in its discretion, decide the case on the briefs without further argument, issue a written decision on the merits, or issue an appropriate order.

[CLERK'S COMMENTS: Rule 14 is a new rule that applies the unified briefing process to Public Service Commission appeals under West Virginia Code § 24-5-1. Because this statute requires a "hearing on the application" the new rule essentially preserves the existing method by which PSC appeals are briefed and then automatically set for oral argument. Because of the short statutory deadline for filing an appeal, a notice of appeal is not required.]

Rule 15. Human rights commission appeals

(a) *Applicability*. This Rule governs direct appeals from a final order of the West Virginia Human Rights Commission pursuant to West Virginia Code § 5-11-11(a) and appeals from a final order of the Circuit Court of Kanawha County following an appeal from a final order of the Human Rights Commission pursuant to West Virginia Code § 5-11-11(a) and § 29A-6-1. Appeals from actions initiated in circuit court to enforce rights granted by the West Virginia Human Rights Act are governed by Rule 5.

(b) *Time for appeal.* A party seeking review in this Court of a final order of the Human Rights Commission in accordance with West Virginia Code § 5-11-11(a) must perfect the appeal within thirty days of receipt of the final order of the Commission. A party seeking review in this Court of a final order of the Circuit Court of Kanawha County ruling on an appeal from the Human Rights Commission in accordance with West Virginia Code § 5-11-11(a) must perfect the appeal within thirty days of entry of the final order of the Circuit Court of Kanawha County.

(c) *Perfecting the appeal.* An appeal under subsection (a) is perfected upon the timely and proper filing of an original and the number of copies required by Rule 38 of the petitioner's brief and appendix in the Office of the Clerk of this Court.

(d) *Petitioner's brief.* The petitioner must file an original and the number of copies required by Rule 38 of a brief in the same format as provided in Rule 10. In the case of a direct appeal from a final order of the Commission, the petitioner's brief shall name the Human Rights Commission and the adverse party as respondents, and must contain satisfactory proof of the date that the final order of the Commission was received by the petitioner.

(e) *Appendix.* The petitioner must file an original and the number of copies required by Rule 38 of an appendix of documents that complies with the format, page numbering, and general requirements set forth in Rule 7. The content of the appendix shall be determined in accordance with Rule 7(e), but need not contain evidence that will be provided with the Commission record.

(f) *Commission record.* Within thirty days of receipt of notice that an appeal has been perfected, the Commission shall transmit to the Clerk of this Court the record of the proceedings had before it, including all the evidence.

(g) *Respondent's brief.* Within forty-five days of receipt of the petitioner's brief, the respondent shall file an original and the number of copies required by Rule 38 of a brief or

summary response in substantially the same form provided in Rule 10. Filing a supplemental appendix is permitted to the extent set forth in Rule 7(g).

(h) *Cross-assignments of error*. The respondent, if of the opinion that there is prejudicial error in the record, may assign such error in a separate portion of his brief and set out authority and argument in support thereof in the manner provided in Rule 10(c). Such cross-assignment may be made notwithstanding the fact that respondent did not perfect a separate appeal within the statutory period for taking an appeal. If the respondent's brief contains cross-assignments of error, the cover page of the brief must clearly so reflect. Filing a supplemental appendix is permitted to the extent set forth in Rule 7(g). The petitioner may respond to the cross-assignment of errors in the reply brief.

(i) *Reply brief*. Within twenty days of receipt of the respondent's brief or summary response, the petitioner may file an original and the number of copies required by Rule 38 of a reply brief, which must comply with such parts of this rule and Rule 10 applicable to the respondent, but need not contain a summary of argument, if appropriately divided by topical headings. If a timely-filed respondent's brief asserts cross-assignments of error, the applicable page limitation for a reply brief set forth in Rule 38 is extended to forty pages, and the time for filing a reply brief is automatically extended, without need for further order, until thirty days after the date the respondent's brief containing cross-assignments of error was filed.

(j) *Consideration of the appeal.* After the response brief or summary response has been filed, and any reply brief deemed necessary has been filed (or the time for filing a reply has expired), the appeal is deemed to be mature for full consideration by the Court. Thereafter, the Court will: (1) decide the case on the merits without oral argument; or (2) set the case for oral argument and decide the case on the merits; or (3) issue an appropriate order after considering any written and oral arguments made by the parties (e.g. the appeal is premature because it is an appeal from an

interlocutory decision, or the appeal is dismissed because the case has been settled.)

[CLERK'S COMMENTS: Rule 15 is a new rule that applies the unified briefing process to Human Rights Commission appeals under West Virginia Code § 5-11-11. Because of the short timelines for appeal established by statute, the new rule does not require a notice of appeal, and the appeal is perfected by filing the brief and appendix. Although the Court does receive the full record from the Commission, petitioners are nevertheless required to provide an appendix record that contains material that is germane to the issues raised. This will provide consistency in citation to the record, and will follow the process established for other appeals.]

PART IV. ORIGINAL JURISDICTION AND CERTIFIED QUESTIONS

Rule 16. Original jurisdiction

(a) *Applicability*. This rule governs all cases seeking a writ of mandamus, prohibition, habeas corpus, or certiorari under the original jurisdiction of the Supreme Court. Issuance by the Court of an extraordinary writ is not a matter of right, but of discretion sparingly exercised.

(b) *Docketing the petition*. An original jurisdiction action will be docketed upon the timely and proper filing with the Clerk of the Supreme Court of an original and the number of copies required by Rule 38 of: (1) a petition in the format set forth in subsection (d) of this Rule; and (2) an appendix prepared in accordance with subsection (e) of this Rule.

(c) *Service*. One copy of the petition and appendix shall be served, in accordance with Rule 37, on each of the respondents. If one or more of the respondents is an elected or appointed judicial officer, one copy of the petition and appendix shall be mailed or otherwise provided to the office

of the elected or appointed judicial officer. If one or more of the respondents is an official of the State, or if the petition seeks relief based upon an argument that a statute, rule or other practice is unconstitutional under the state or federal constitution, the petitioner shall, in addition to service under Rule 37, serve a copy of the petition and appendix upon the Attorney General of the State of West Virginia at: State Capitol, Room E-26, 1900 Kanawha Blvd. East, Charleston WV 25305. If one or more of the respondents is a county official, the petitioner shall serve one copy of the petition and appendix upon the prosecuting attorney of such county. A petition seeking expedited or emergency relief must be served upon all respondents contemporaneously with the filing of such petition with the Clerk, and the petitioner must provide adequate proof of such contemporaneous service.

(d) *Contents of petition*. The petition shall be captioned: "State of West Virginia ex rel. [name of petitioner] v. [name of respondent(s)]". In the case of a petition for mandamus or prohibition involving an action pending in a lower tribunal, the petition shall name the presiding judicial officer of the lower tribunal as a respondent in the action. In the case of a petition for writ of habeas corpus, the petition shall name the person having custody of the body of the petitioner as the respondent. An original jurisdiction petition shall, insofar as applicable, follow the format requirements prescribed by Rule 10 and Rule 40(e), and contain the following sections in the order listed, immediately following the cover page required by Rule 38(b).

(1) Table of contents. If the petition exceeds five pages it must contain a table of contents, with page references to the sections of the petition and the argument headings. The table of contents does not need a page number and does not count toward the page limit.

(2) Table of authorities. If the petition exceeds five pages, it must contain a table of authorities containing an alphabetical list of cases, statutes and other authorities cited, with references to the pages of the petition where they are cited. The table of authorities does not need a page number and does not count toward the page limit.

(3) Questions Presented. The petition opens with a list of the questions that are presented for review, expressed in

terms and circumstances of the case but without unnecessary detail. The statement of a question will be deemed to include every subsidiary question fairly comprised therein.

(4) Statement of the case. Supported by appropriate and specific references to the appendix, the statement of the case must contain a concise account of the procedural history of the case and a statement of the facts of the case that are relevant to the questions presented. The statement of the case must clearly set forth any deadlines or upcoming events that are relevant to the questions presented and relief requested.

(5) Summary of Argument. The summary of argument should be a concise, accurate, and clear condensation of the argument made in the body of the petition, and need not contain extensive citation to legal authorities. The summary may not be a mere repetition of the headings under which the argument is arranged.

(6) Statement Regarding Oral Argument and Decision. The petition must contain a statement as to whether oral argument is necessary pursuant to the criteria in Rule 18(a). If the party deems oral argument to be necessary, the party must indicate whether the case should be set for a Rule 19 argument or a Rule 20 argument, and why. If the party requests a Rule 19 argument, the party must state whether the case is appropriate for a memorandum decision. If the party requests that the minimum time for argument set forth in Rule 19 or Rule 20 will not be sufficient, the party may request a specific amount of additional time for argument and explain why the party believes that good cause exists for granting additional time;

(7) Argument. The petition must contain an argument, exhibiting clearly the points of fact and law presented, the standard of review applicable, with citations to the authorities relied upon, all arranged under headings that correspond with the questions presented. The argument must explain why the original jurisdiction relief sought is not available in any other court or cannot be had through any other process. The argument must contain appropriate and specific citations to the appendix, including citations that pinpoint when and how the issues were presented to the lower tribunal. The Court may disregard questions presented

that are not adequately supported by specific references to the appendix.

(8) Conclusion. The petition must end with a conclusion, specifying the relief to which the party believes himself to be entitled.

(9) Verification. In the case of a petition for mandamus or prohibition, the petition must contain a verification as required by West Virginia Code § 53-1-3. The verification does not count toward the page limit.

(10) Certificate of Service. A certificate of service as required by Rule 37, and further indicating that all persons upon whom a rule to show cause should be served, if granted, have been timely provided a copy of the petition and appendix, and indicating the name, address, and telephone number of all such persons, must be attached to the end of the petition. The certificate of service does not count toward the page limit.

(e) *Appendix*. Insofar as applicable, an appendix must follow the format, page numbering, and general requirements prescribed by Rule 7, and contain the following items in the order listed:

(1) A copy of the decision sought to be reviewed, and all other orders that are necessary for a fair review of the questions presented. If a written decision has not been issued, a copy of the portion of the transcript where the decision is set forth is sufficient;

(2) Pleadings, motions and other filings, if their sufficiency, content or form is in issue or material;

(3) In a criminal case, the indictment or information;

(4) In an abuse and neglect case, the abuse and neglect petition;

(5) Documents relevant to the case that are contained in the record of the lower tribunal. Documents that are relevant and material to the case but not contained in the record of the lower tribunal may be provisionally included in an appendix only if the documents are clearly identified in the table of contents to the appendix and if the petitioner files a motion for leave to include documents not contained in the record, setting forth good cause why the documents should be considered. An opposing party may respond to the motion within ten days of the date the motion if filed;

(6) Material excerpts from official transcripts of testimony or from papers in connection with a motion. Such excerpts must contain all the testimony or averments upon which the petitioner relies and upon which it may be reasonably assumed the respondent will rely. If transcript excerpts are misleading or unintelligible by reason of incompleteness or lack of surrounding context, the entire transcript must be provided;

(7) Copies of exhibits, including photographs or maps, to the extent practicable;

(8) The certification required by Rule 7(c)(2), modified to certify that the appendix as a whole is sufficient to permit the Court to fairly consider the questions presented in the petition.

(f) *Scheduling order*. As soon as practicable after the petition is filed, the Court will issue a scheduling order. The scheduling order may, as appropriate to the circumstances, set forth the date on or before which a response may be filed or prescribe other deadlines. Failure to comply with a scheduling order may result in sanctions, dismissal, or both.

(g) *Response*. If required by the Court, the respondent shall, within the time prescribed, file an original and the number of copies required by Rule 38 of a response. Unless otherwise provided, the response must comply with the page limitations set forth in Rule 38, and must conform to the requirements of subsection (d) of this Rule, except that no statement of the case or statement of facts need be made beyond what may be deemed necessary in correcting any inaccuracy or omission in the petition. If the response does not contain an argument in response to a question presented by the petition, the Court will assume that the respondent agrees with the petitioner's view of the issue. The respondent may, in accordance with the applicable portions of Rule 7(g), file and original and the number of copies of an appendix required by Rule 38 at the same time the response is filed.

(h) *Summary response*. Instead of a response, the respondent may file an original and the number of copies required by Rule 38 of a summary response. A summary

response need not comply with all the requirements for a response set forth in this Rule but must contain an argument responsive to the questions presented, exhibiting clearly the points of fact and law being presented and the authorities relied on, and a conclusion, specifying the relief to which the party believes himself entitled. A party who files a summary response is deemed to have consented to the waiver of oral argument.

(i) *Consideration of the petition*. After the response or summary response has been filed, or upon the date set forth in the scheduling order, the petition will be deemed to be mature. Thereafter the Court will fully consider the written arguments of the parties. Upon its consideration, the Court may, in its discretion, decline to issue a rule to show cause, issue a rule to show cause, or issue an order appropriate to the circumstances of the case.

(j) *Rule to show cause*. If the Supreme Court determines to issue a rule to show cause, the Clerk shall so notify the parties. Unless otherwise provided, the issuance of a rule to show cause in prohibition stays all further proceedings in the underlying action for which an award of a writ of prohibition is sought. If the Supreme Court declines to issue a rule to show cause, such determination shall be without prejudice to the right of the petitioner to present a petition to a lower court having proper jurisdiction, unless the Supreme Court specifically notes in the order denying a rule to show cause that the denial is with prejudice. An order declining to issue a rule to show cause does not prevent the petitioner from pursuing the same issues on appeal following a final order in the lower court. If a response was not required in a scheduling order, then the rule to show cause will set forth the deadline for filing a response. The rule to show cause may set forth a briefing schedule if additional briefing would assist the Court in deciding the questions presented. The rule to show cause shall set forth a date when the action will be submitted for decision, either upon the papers previously submitted without further argument, or upon oral argument under Rule 19 or Rule 20, and shall further set forth such other matters as appropriate to the circumstances of the

case. The rule to show cause may be made returnable to a lower court for further proceedings.

(k) *Discovery*. In the event that the response raises a genuine issue of material fact, the parties may advise the Clerk of the Supreme Court in writing of any proposed schedule for taking and filing depositions, which shall be subject to the approval of the Court. No other or further discovery shall be allowed, except by leave of the Supreme Court.

(l) *Reference*. In an original jurisdiction proceeding, the Supreme Court, on its own motion or upon written motion of the parties, may determine that because of the complexity of the factual issues involved, the proceeding should be referred to a special master or commissioner for the purpose of supervising the taking of depositions and to make such findings of fact as the Supreme Court may direct. Any such findings of fact made by the special master or commissioner shall be in writing and the parties shall have the right to file written objections thereto before the findings are considered by the Supreme Court.

(m) *Argument*. If permitted by the Court, argument in an original jurisdiction case shall be held in accordance with Rule 19 or Rule 20.

[CLERK'S COMMENTS: Rule 16 is a modified version of former Rule 14. The revisions incorporate many of the elements of current practice, and are intended to clarify common ambiguities and misunderstandings. The rule follows the up-front screening process using a scheduling order. In the prior rule, the respondent's brief was arranged via telephone call only to the respondent. The scheduling order will provide more transparency to the parties and to interested persons, and give the Court the flexibility to expedite or modify the briefing in a particular case as the circumstances require.

Given the nature of these common-law writs arising upon the Court's original jurisdiction, the rule retains the Court's authority to refuse to issue a rule to show cause in any case.

The consideration section of the rule sets out this option clearly. If the Court issues a rule to show cause, it can set forth: (1) that the petition will be made returnable at a date certain upon the papers previously filed, (in which case it would be expected that the Court will issue a memorandum decision); or (2) that the petition will be returnable for Rule 19 argument, (in which case it would be expected that the Court would issue a memorandum decision or an opinion); or (3) that the petition will be returnable for Rule 20 argument, (in which case it would be expected that the Court will issue an opinion).

In response to public comments, subsection (d) of the rule was revised to be consistent with the briefing requirements in Rule 10. Language was added to subsection (j) in order to make sure that a respondent has the ability to respond to a rule to show cause in cases where the Court did not previously require a response. In addition, language was added that would permit the Court to establish a briefing schedule in a rule to show cause. While this option may be infrequently used, it would be very useful in certain complex cases, and it is not an option available at all under the prior rules.]

Rule 17. Certified questions

(a) *Certified questions by a West Virginia circuit court or administrative tribunal.*

(1) *Certification order—contents.* In cases where questions have been certified pursuant to the provisions of West Virginia Code § 5-11-11, § 23-5-15, or § 58-5-2, the order of certification complying with statutory requirements must further contain a concise statement of each question of law, the answer to each question of law by the circuit court or administrative tribunal, a notation of the extent to which the action is stayed pending resolution of the certified questions, and a directive to the parties to prepare a joint appendix of the record sufficient to permit review of the certified questions.

(2) *Transmittal of certification order.* Upon entry of the order of certification, the clerk of the circuit court or the

administrative tribunal is directed to transmit the order certifying questions and a list of the docket entries in the case to the Clerk of this Court.

(3) *Scheduling order*. As soon as practicable after receipt of the order of certification, the Court will issue a scheduling order, and the case will proceed in accordance with Rule 5 through Rule 10. The scheduling order shall designate which party in the case is responsible for filing the petitioner's brief and which party is responsible for filing the respondent's brief.

(4) *Joint Appendix*. As directed in the order of certification or as directed by this Court, the parties to a certified question case must file an original and the number of copies required by Rule 38 of a joint appendix that complies with the format, page numbering, and general requirements in Rule 7. The joint appendix must be filed at the same time the petitioner's brief is filed, unless otherwise provided.

(5) *Briefs*. Briefs in certified question cases are subject to Rule 10 and to the page limitation and number of copies required by Rule 38; provided, however, that briefs in certified question cases need not strictly comply with the content requirements for assignments of error in Rule 10(c)(3). Instead, the petitioner's brief must assign the specific points of legal error that arise from the circuit court's answer to the certified question, with the respondent's brief to follow a similar pattern. The Court may modify the briefing schedule in order to suit the circumstances of the case.

(6) *Consideration of the question*. After the response brief or summary response has been filed, and any reply brief deemed necessary has been filed (or the time for filing a reply has expired), the certified question is deemed to be mature for full consideration by the Court. Upon its consideration, the Court may, in its discretion, schedule the case for argument under Rule 19 or Rule 20, issue an order declining to accept the certified question, or issue an otherwise appropriate order.

(b) *Certified questions by federal and other courts.*

(1) *Certification order—transmittal.* In cases where questions have been certified pursuant to the provisions of the Uniform Certification of Questions of Law Act, West

Virginia Code § 51-1A-1, et seq., the clerk of the court where the certification order was entered is required to transmit the order certifying questions and a list of the docket entries in the case to the Clerk of this Court.

(2) *Scheduling order*. As soon as practicable after receipt of the order of certification, the Court will issue a scheduling order, and the case will proceed in accordance with subsection (a) of this Rule, except that the Court may suspend briefing until after the Court has determined whether to accept the certified questions.

(3) *Consideration of the question*. At a date set forth in the scheduling order, or, if briefing has been ordered, after the response brief or summary response has been filed, and any reply brief deemed necessary has been filed (or the time for filing a reply has expired), the certified question is deemed to be mature for full consideration by the Court. Upon its consideration, the Court may, in its discretion, schedule the case for argument under Rule 19 or Rule 20, issue an order declining to accept the certified question, or issue an otherwise appropriate order.

(c) *Order declining to accept*. An order declining to accept a certified question is not subject to the rehearing procedure in Rule 25.

[CLERK'S COMMENTS: Rule 17 is a substantially modified version of prior Rule 13. The rule contains a slightly modified version of the unified briefing process and corrects several omissions and common misunderstandings about the former process. Because the deadline for perfecting the case is not set forth by statute, and the statutes defer to this Court's procedural rules, no strict deadline is set forth for perfecting a certified question. Instead, each certification order will be reviewed shortly after it is entered, and a scheduling order suitable to the circumstances can be entered in an expeditious manner. The scheduling order will set forth who is the petitioner and who is the respondent. Because of the nature of certified cases from state circuit courts, requiring a joint appendix is appropriate. In cases from federal courts, the rule preserves the current practice, in which no up-front petition or brief is required. One

difference between certified questions and appeals is that the Court must reserve the ability to decline to accept the certified question presented, which is an option contained in all of the applicable statutory provisions, including the Uniform Act. This option is therefore preserved in the consideration section of the rule.]

PART V. ORAL ARGUMENT

Rule 18. Argument calendar

(a) *Criteria for oral argument.* Oral argument is unnecessary when:

(1) all of the parties have waived oral argument; or

(2) the appeal is frivolous; or

(3) the dispositive issue or issues have been authoritatively decided; or

(4) the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument.

(b) *Clerk to prepare argument calendar.* From time to time, the Clerk will prepare a calendar of cases ready for oral argument. A case ordinarily will be scheduled for argument at least thirty days prior to the date of argument, unless circumstances otherwise require. The Clerk will advise counsel when they are required to appear for oral argument, under either Rule 19 or Rule 20, and will publish an argument docket in advance of each session for the convenience of counsel and the information of the public.

(c) *Consolidated argument.* The Court, on its own motion or that of a party, may order that two or more cases involving the same or related assignments of error or questions of law be argued together as one case or on such other terms as the Court may prescribe.

[CLERK'S COMMENTS: Rule 18 is a new rule that is intended to provide the parties and the public with clear

expectations about when oral argument is necessary and how the argument calendar is prepared. Subsection (a) was added following the public comment period, and provides criteria for when oral argument is unnecessary. These criteria will assist the parties when preparing briefs and promote better understanding of the reasons why a case is decided on the merits without oral argument. Because briefing will be completed when the Court decides whether a case should be placed on the argument calendar, the rule provides a thirty-day notice provision. This is a change from prior practice, wherein the Clerk provided seventy-five days' notice. However, the extended notice period under prior practice was based upon the need to complete briefing prior to argument. The unified briefing process set forth in the revised rules eliminates that concern.]

Rule 19. Oral argument

(a) *Selection of cases for Rule 19 argument*. If the Court, in its discretion, determines that Rule 19 oral argument shall be held in a case, the parties shall be notified by the Clerk. Cases suitable for Rule 19 argument include, but are not limited to: (1) cases involving assignments of error in the application of settled law; (2) cases claiming an unsustainable exercise of discretion where the law governing that discretion is settled; (3) cases claiming insufficient evidence or a result against the weight of the evidence; (4) cases involving a narrow issue of law; and (5) cases in which a hearing is required by law.

(b) *Notice*. The Clerk shall notify each party that a case has been scheduled for Rule 19 argument. Unless circumstances otherwise require, the notice will issue at least thirty days prior to the date scheduled.

(c) *Continuance*. A request for continuance of the argument must be made by written motion—preferably a joint motion that suggests an alternative date—stating the grounds therefore, and shall be filed within ten days of the date of the notice of argument.

(d) *Eligibility to argue*. A party who has not filed a brief may not present oral argument. A party who has filed a summary response in lieu of a brief is deemed to have waived oral argument, but shall be heard orally if the Court specifically directs in the notice of argument. Amicus curiae shall not be heard during a Rule 19 argument.

(e) *Oral argument*. Oral arguments under Rule 19 are limited to ten minutes per side, unless otherwise indicated by the Court in the notice of argument. During oral argument, the Court may direct counsel to conclude prior to the time allotted if the Court understands the issues and the Court determines that further argument is not necessary. In the event of multiple parties on the same side, the Court may determine, either upon its own motion or upon motion of a party, an appropriate amount of time for oral argument. The petitioner shall be entitled to open and close the argument.

(f) *Waiver of argument*. Within ten days of the date of a notice scheduling a case for argument under this Rule, counsel may inform the Clerk and all parties to the case in writing that oral argument is not desired, in which case argument will be conducted by the remaining parties to the case.

(g) *Consideration by the Court*. Upon conclusion of the argument, the case will be further considered by the Court in chambers. Thereafter the Court will: (1) decide the case on the merits by issuing a memorandum decision or an opinion; (2) set the case for oral argument under Rule 20; or (3) issue an appropriate order after considering the written and oral arguments made by the parties (e.g. the appeal is premature because it is an appeal from an interlocutory decision, or the appeal is dismissed because the case has been settled.)

[CLERK'S COMMENTS: Rule 19 is a new rule which brings forward elements of the existing rules and provides an expanded opportunity for oral argument. In contrast to current practice on the Court's Motion Docket, which is being eliminated, both sides of the case will be entitled to

present argument. The rule provides transparency through the criteria in subsection (a) that describe the types of cases that are suitable for argument under Rule 19. In contrast to the current rules, clear deadlines are provided for motions to continue, which will permit better docket management. In response to public comment, subsection (e) was revised to extend the default argument time to ten minutes, unless otherwise provided in the notice of argument. The petitioner is also permitted to present rebuttal argument. The Court retains its traditional ability to ask counsel to conclude argument prior to the time allotted if the Court understands the issues.]

Rule 20. Oral argument

(a) *Selection of cases for Rule 20 argument*. If the Court, in its discretion, determines that a case presents an issue proper for consideration by oral argument under this Rule, the parties shall be notified by the Clerk. Cases suitable for Rule 20 argument include, but are not limited to: (1) cases involving issues of first impression; (2) cases involving issues of fundamental public importance; (3) cases involving constitutional questions regarding the validity of a statute, municipal ordinance, or court ruling; and (4) cases involving inconsistencies or conflicts among the decisions of lower tribunals.

(b) *Notice*. The Clerk shall notify each party that a case has been scheduled for Rule 20 argument. Unless circumstances otherwise require, the notice will issue at least thirty days prior to the date scheduled.

(c) *Continuance*. A request for continuance of Rule 20 argument must be made by written motion—preferably a joint motion that suggests an alternative date—stating the grounds therefore, and shall be filed within ten days of the date of the notice of argument.

(d) *Eligibility to argue*. A party who has not filed a brief may not present oral argument. A party who has filed a

summary response in lieu of a brief is deemed to have waived oral argument, but shall be heard orally if oral argument is held under this rule. Amicus curiae may not present oral argument unless the Court has granted permission under Rule 30.

(e) *Oral argument*. Unless otherwise provided in the notice or by order, oral argument under this Rule is limited to twenty minutes per side. During oral argument, the Court may direct counsel to conclude prior to the time allotted if the Court understands the issues and the Court determines that further argument is not necessary. In the event of multiple parties on the same side, the Court may determine, either upon its own motion or upon motion of a party, an appropriate arrangement for oral argument. The Court may, at the conclusion of the time allotted, permit further argument if necessary. The petitioner shall be entitled to open and close the argument. A party is not obliged to utilize all of the time allotted, and the Court may terminate the argument whenever in its judgment further argument is unnecessary. Oral argument shall emphasize and clarify the written argument appearing in the briefs. The Court may decline to consider issues at oral argument that were not presented in the briefs. The Court does not favor any oral argument that is read from briefs or from a prepared text.

(f) *Waiver of oral argument*. Within ten days of the date of a notice scheduling a case for the argument docket, a party may inform the Clerk and all parties to the case in writing that oral argument is not desired, in which case the oral argument will be conducted by the remaining parties to the case.

(g) *Consideration by the Court*. Upon conclusion of the oral argument, the case will be submitted for decision. Thereafter the Court will: (1) decide the case on the merits by issuing a memorandum decision which explains the reasons why the Court is not issuing an opinion; (2) decide the case on the merits by issuing an opinion; or (3) issue an appropriate order after considering the written and oral arguments made by the parties (e.g. the appeal is premature because it is an appeal from an interlocutory decision, or the

appeal is dismissed because the case has been settled.) The Court shall take all reasonable action to decide the case on the merits by issuing an opinion or other appropriate order, and shall not decide the case by issuing a memorandum decision absent exceptional or compelling circumstances.

[CLERK'S COMMENTS: Rule 20 is a new rule adapted from various sources, including former Rule 12. The new rule adapts criteria for Rule 20 argument from those contained in the Final Report of the Independent Commission on Judicial Reform. Once again, the rule provides transparency with regard to the reasons why a case will be set for Rule 20 argument. Argument under Rule 20 is not ordinarily required if the questions of law are not novel, and the briefs adequately cover the arguments; if the questions of law involve no more than an application of settled rules of law to a recurring fact situation; or if the sole question of law is the sufficiency of the evidence, the adequacy of instructions to the jury or rulings on the admissibility of evidence, and the briefs clearly refer to the record on appeal, which will determine the outcome. The rule plainly signals that cases on the Rule 20 docket are cases that the Court considers to be the most significant cases under review. In contrast, the current system makes all granted cases eligible for argument, and lets the parties decide whether oral argument is necessary, resulting in ineffective use of the Court's time and talent. Moreover, the current system of managing the argument docket dates from the origins of this State, and needs to be adapted to modern practices. Stricter time limitations, combined with the up-front screening process, will allow the Clerk's Office to schedule the argument calendar with more precision, providing check-in times and tentative times for each oral argument. By avoiding an oral argument schedule that does not provide a time to appear, the Clerk's Office can improve scheduling for all parties concerned.

In response to public comments, the default time for argument was extended to twenty minutes. Counsel should be mindful of the fact that the Court may provide for additional time in the notice of argument if necessary. If

good cause exists for additional oral argument time, the Statement Regarding Oral Argument and Decision required by Rule 10(c)(6) must set forth the amount of time requested. The Court also made two important changes to subsection (g) in response to public comments. If a memorandum decision is issued after a Rule 20 argument, the decision will explain why the Court is not issuing an opinion. The Court will make every effort to decide cases argued under Rule 20 by issuing an opinion, and will only issue memorandum decisions in exceptional or compelling circumstances.]

PART VI. DISPOSITION OF CASES

Rule 21. Memorandum decisions

(a) *Memorandum decisions*. At any time after a case is mature for consideration by the Court, the Court may issue a memorandum decision addressing the merits of the case.

(b) *Motion for disposition by memorandum decision*. A party may move that a docketed case be disposed by memorandum decision by filing an original and the number of copies required by Rule 38 of a motion for disposition by memorandum decision. No motion for disposition by memorandum decision shall be accepted for filing after twenty days from the date the appeal is perfected, except if such motion is for the purpose of bringing to the Court's attention the effect that a controlling legal authority, issued after the case was perfected, may have on the case pending in this Court. The opposing party has ten days from the date of filing of the motion to file a response and the number of copies required by Rule 38. The filing of a motion for disposition by memorandum decision shall not toll any time limitations established by law, rule or order.

(c) *Affirmance*. A memorandum decision affirming the decision of the lower tribunal may be entered under this Rule when: (1) this Court finds no substantial question of law and the Court does not disagree with the decision of the lower

tribunal as to the question of law; (2) upon consideration of the applicable standard of review and the record presented, this Court finds no prejudicial error; or (3) other just cause exists for summary affirmance. The memorandum decision shall contain a concise statement of the reason for affirmance, and a concise statement of the reason for issuing a memorandum decision instead of an opinion.

(d) *Reversal.* A memorandum decision reversing the decision of the lower tribunal shall contain a concise statement of the reason therefor and a concise statement of the reason for issuing the memorandum decision instead of an opinion. A memorandum decision reversing the decision of a circuit court should be issued in limited circumstances.

(e) *Citation of memorandum decisions*. Memorandum decisions may be cited in any court or administrative tribunal in this State; provided, however, that the citation must clearly denote that a memorandum decision is being cited, *e.g. Smith v. Jones*, No. 11-098 (W.Va. Supreme Court, January 15, 2011)(memorandum decision). Memorandum decisions are not published in the West Virginia Reports, but will be posted to the Court's website.

(f) *Rehearing*. Memorandum decisions are subject to the rehearing procedures set forth in Rule 25. Unless otherwise provided, the memorandum decision is not final until the Court has issued a mandate under Rule 26.

[CLERK'S COMMENTS: Rule 21 is a new rule indicating that mature cases can be decided by memorandum decision at any time, and providing a procedure whereby parties can request a non-precedential disposition early in the development of the case. The rule provides transparency regarding when a summary affirmance or reversal is appropriate. Memorandum decisions are abbreviated decisions on the merits that will not contain a syllabus and will not be published in the West Virginia Reports. Cases appropriate for a memorandum decision would normally include all mature cases except those cases that are selected for Rule 20 argument. Because of the increased

sophistication in selecting cases for the Rule 20 docket, it is not expected that cases on that docket will result in summary decisions, as sometimes occurs in the present system, although the rules do preserve that option. *See* Rule 20(g)(1). Because memorandum decisions are decisions on the merits, rehearing procedures apply as set forth in Rule 25. The rule also makes clear that a memorandum decision is not final until the mandate issues, which has been a source of confusion in some past instances.

The ability to enter memorandum decisions—rather than refusal orders under prior practice—is at the core of the revised process: every appeal, unless dismissed, will result in a decision on the merits. For statistical purposes, this will mean that the number of cases decided on the merits by the Court will increase substantially. It will also mean that appeals will be categorized as "appeals of right" rather than "appeals by permission" under the reporting criteria established by the Court Statistics Project of the National Center for State Courts.

In response to public comment, subsections (c) and (d) were revised in order to address a perceived gap created by the "succinct statement" requirement contained in the rules that were placed for comment. As revised, memorandum decisions must contain a concise statement not only of the basis for the Court's decision, but also of the reason why an opinion was not issued. Memorandum decisions reversing a circuit court should be issued in limited circumstances. Also in response to public comment, the prohibition on citation of memorandum decisions was removed. The rule now states what was intended all along—that memorandum decisions will be posted on the Court's website. Where practicable in cases in which a circuit court's decision is affirmed by memorandum decision, the decision of the lower tribunal will also be posted on the Court's website, if the Court directs the Clerk to do so. These changes reinforce the fact that every appeal will receive a decision on the merits that sets forth the considered judgment of the Court.]

Rule 22. Opinions of the court

(a) *Release and effect of opinions*. Opinions of the Court will be released by the Clerk at 3:00 p.m. on the day of filing, unless circumstances require otherwise. The Clerk will provide a copy of the opinion to each party in the case. Opinions of the Court do not take effect until issuance of the mandate under Rule 26, unless otherwise provided in the opinion.

(b) *Publication*. The Clerk will cause opinions of the Court to be issued in slip form. The slip opinions issued by the Clerk and appearing on the Court's website are not the final, official opinions of the Court. Slip opinions are subject to modification and petitions for rehearing pursuant to Rule 25. Opinions of the Court remain subject to clerical correction until officially published in the bound volumes of the West Virginia Reports (West Publishing Co.). Prior to issuance of the mandate, the parties may inform the Clerk of typographical or other formal errors.

[CLERK'S COMMENTS: Rule 22 is a new rule that provides clear guidance regarding the effect of opinions and the manner of correcting them prior to formal publication. Opinion release times of 10:00 a.m. and 3:00 p.m. have been reduced to 3:00 p.m. only for purposes of simplicity. Most other appellate courts have such a rule. Former Rule 20 regarding "entry of judgment" was obsolete and confusing.]

Rule 23. Interest on judgments

Unless otherwise provided by law, if a judgment for money in a civil case is affirmed, whatever interest is allowed by law shall be payable from the date the judgment was entered in the circuit court. If a judgment is modified or reversed with a direction that a judgment for money be entered in the circuit court, the mandate shall contain instructions with respect to allowance of interest.

[CLERK'S COMMENTS: Rule 23 is former Rule 21, which has not been changed.]

Rule 24. Costs

(a) *To whom allowed*. Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the petitioner unless otherwise agreed by the parties or ordered by the Court; if a judgment is affirmed, costs shall be taxed against the petitioner unless otherwise ordered; if a judgment is reversed, costs shall be taxed against the respondent unless otherwise ordered; if a judgment is affirmed or reversed in part, or is vacated, costs shall be allowed only as ordered by the Court.

(b) *Costs for or against the state*. In cases involving the State of West Virginia or an agency or officer thereof, if an award of costs against the State is authorized by law, costs shall be awarded in accordance with the provisions of subdivision (a); otherwise, costs shall not be awarded for or against the State.

(c) *Taxable costs*. Costs of assembling and filing the appendix are taxable as costs in the discretion of the Court and may be divided among the parties to the appeal. Other taxable costs include costs for the preparation and handling of the designated record. Attorney's fees and costs are not taxable unless specifically provided by law.

(d) *Costs in disciplinary actions*. If the Court directs that costs be paid in connection with a lawyer or judicial disciplinary action, disciplinary counsel shall, within twenty days of entry of the applicable order, memorandum decision, or opinion, provide the Court and the respondent in the disciplinary action with a certified statement of the costs as specified by the Court.

(e) *Clerk to insert costs in mandate*. The Clerk shall prepare and certify an itemized statement of costs taxed in the Supreme Court for insertion in the mandate. If the

mandate has been issued before final determination of costs, the statement, or any amendment thereof, may be added to such order at any time upon request of the Clerk.

(f) *Costs on appeal taxable in the circuit courts*. Costs incurred in the preparation and transmission of the record, the cost of the reporter's transcript, if necessary for the determination of the appeal, and the premiums paid for cost of appeal bonds or other bonds to preserve rights pending appeal, shall be taxed in the circuit court as costs of the appeal in favor of the party entitled to costs under this rule.

[CLERK'S COMMENTS: Rule 24 is former Rule 23, which has been changed to make costs of the respondent's appendix taxable and to address costs in disciplinary cases. For purposes of clarity, subsection (c) was renamed in order to list costs that are taxable in this Court. In modern practice, very few costs are incurred. The revised rule clarifies that attorneys' fees and costs are awarded only where provided by law.]

Rule 25. Petition for rehearing

(a) *Time for filing*. A petition for rehearing may be filed within thirty days of release of any memorandum decision or opinion of this Court that passes upon the merits of an action, unless the time for filing is shortened or enlarged by order. The requisite number of copies under Rule 38 must be filed with the Clerk. In those instances when the Court shortens the time period for issuance of the mandate and directs the Clerk to issue the mandate in accordance with that time frame, the Court shall set forth by order the deadline for filing.

(b) *Content and form of petition*. A petition for rehearing is granted only in exceptional cases. The petition shall comply with the number of copies and page limitation set forth in Rule 38 and shall state with particularity the points of law or fact which in the opinion of the petitioner the Court has overlooked or misapprehended, and shall contain such

argument as the petitioner desires to present. Repetition of argument previously presented to the Court in the case is not a proper basis for a petition for rehearing.

(c) *Response*. A response to a petition for rehearing is not required. If desired, an opposing party may file a response and the number of copies required by Rule 38 of a response within fourteen days of the filing of the petition for rehearing.

(d) *Consideration of the petition*. When the time for filing a response has passed, the petition for rehearing will be deemed mature for consideration by the Court. Upon its consideration, the Court may, in its discretion, refuse the petition for rehearing or grant the petition for rehearing and direct by order such further proceedings as are required, including issuing a modified opinion or memorandum decision, or taking such other action that is necessary to accomplish substantial justice in the case.

[CLERK'S COMMENTS: Former Rule 24 has been substantially revised for clarity and to conform to current practice. Rule 25 makes two decision criteria more transparent: (1) petitions for rehearing are not favored; and (2) mere repetition of previous argument is not a proper basis for a petition for rehearing. The former rule was silent as to a response, which was a source of numerous inquiries. This rule provides a fourteen day deadline for filing a response, if one is filed. In cases where the Court directs the mandate to issue with the opinion, subsection (a) will permit the Court to issue an order with appropriate language informing the parties whether a petition for rehearing may be filed, and, if so, what the relevant deadline is. This had been a source of confusion under prior practice. The Court's ability to consider a petition for rehearing despite issuance of the mandate is addressed in Rule 26(a).]

Rule 26. Issuance of mandate; stay of mandate

(a) *Effect of mandate.* Issuance of the mandate terminates jurisdiction of the Supreme Court in an action before this Court, unless the Court has provided by order pursuant to Rule 25(a) that a petition for rehearing may be filed after a mandate has issued. Unless otherwise provided, an opinion of the Court or memorandum decision of the Court considering the merits of a case is not final until the mandate has been issued.

(b) *Time for issuance, contents.* The timely filing of a petition for rehearing will stay issuance of the mandate. If a petition for rehearing is not timely filed, the Clerk will issue the mandate as soon as practicable after the passage of thirty days from the date the opinion or memorandum decision is released, unless the time is shortened or enlarged by order. The mandate will contain a summary description of the judgment of the Court, and any direction as to costs or other matters. The mandate must be read and construed together with the opinion or memorandum decision in the case. If a petition for rehearing is denied, the Clerk will issue the mandate within seven days of the date of the order refusing the rehearing petition, unless the time is shortened or enlarged by order.

(c) *Stay of mandate pending application for certiorari.* A stay of the mandate pending application to the Supreme Court of the United States for a writ of certiorari may be granted upon motion, reasonable notice of which shall be given to all parties. Unless the Court otherwise provides in its order, the stay shall not exceed ninety days. If during the period of the stay there is filed with the Clerk of the Supreme Court a notice from the Clerk of the Supreme Court of the United States that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until the filing of an order of the Supreme Court of the United States denying the petition for writ of certiorari, or, in the event the petition for writ of certiorari is granted, until the mandate of the Supreme Court of the United States is issued; provided, however, that if a case is remanded to this Court for further proceedings following an appeal to the

Supreme Court of the United States and the mandate of this Court has not previously issued, the mandate need not issue, and this Court may provide by order for further proceedings as are required under the circumstances of the case. A bond or other security may be required as a condition to the grant or continuance of a stay of the mandate.

[CLERK'S COMMENTS: Rule 26 is former Rule 25, which has been revised for clarity and to conform to current practice. The provision on the effect of the mandate is new, and is intended to provide guidance to parties and the lower courts on a subject which is the source of a great deal of confusion. The subsection relating to stay of the mandate pending appeal to the Supreme Court of the United States has been amended to conform to current practice, and a new clause has been added to cover cases remanded from that court. A proviso was added to subsection (a) to make clear that the Court continues to have jurisdiction to entertain a petition for rehearing after issuance of the mandate, but only if the Court permits by order.]

Rule 27. Dismissal

(a) *Voluntary dismissal.* If the parties to an appeal or other proceeding shall sign and file with the Clerk of the Supreme Court an agreement that the proceeding be dismissed, specifying the terms as to payment of any costs, the Clerk shall enter the case dismissed. An appeal may be dismissed on motion of the petitioner upon such terms as may be agreed upon by the parties or fixed by the Court.

(b) *Involuntary dismissal.* At any time after an appeal is docketed, a party to the appeal may file a motion to dismiss for failure to comply with the Rules of Appellate Procedure or for other just cause. Upon the granting of a motion to dismiss under Rule 27, the case shall be dismissed from the docket of the Supreme Court. The Court may, on its own motion, send a notice to the parties of its intent to dismiss an action for failure to comply with the Rules of Appellate

Procedure or for other just cause, and may thereafter dismiss the action if the interests of justice so require. The Court may dismiss an action that is moot on its own motion without prior notice to the parties.

[CLERK'S COMMENTS: Rule 27 is former Rule 26. Subsection (b) of the prior rule contained archaic provisions relating to dismissal of cases still on the docket after being "called" for three terms. The revised rule implements the current procedure, whereby cases are dismissed when (1) the parties jointly request, usually because of settlement; (2) one of the parties asks the Court to dismiss the case because the other side has done something wrong; (3) as a matter of case management, the Court seeks to dismiss languishing cases; and (4) the Court dismisses a case as moot without prior notice to the parties.]

PART VII. MOTIONS AND OTHER REQUESTS FOR RELIEF

Rule 28. Stays

(a) *Stay of circuit court order pending appeal.* Any person desiring to present an appeal under Rule 5 may make an application for a stay of proceedings to the circuit court in which the judgment or order desired to be appealed was entered. Such application must be made by notice in writing to the opposite party at any time after the entry of the judgment or order to be appealed. The circuit court shall grant such stay in a criminal case as provided by West Virginia Code § 62-7-1, and may grant a stay suspending the execution of a judgment or order, modifying, restoring, or granting an injunction, or staying the execution of a criminal sentence or fine beyond the time mandated by statute. Such stay shall be effective: (1) until the expiration of the time provided by law for presenting an appeal; and (2) any additional period after an appeal has been perfected pending final disposition of the appeal, unless sooner modified by such court or by the Supreme Court.

(b) *Application in Supreme Court for stay of circuit court order pending appeal.* If the circuit court should refuse to grant a stay, or if the relief afforded is not acceptable, the applicant may, upon written notice to the opposite party, apply to the Supreme Court for a stay. Such application shall show the reasons assigned by the circuit court for denying a stay or other relief, and further show the reasons for the relief requested and the grounds for the underlying appeal. If the facts are subject to dispute, the application shall be supported by affidavits or other sworn statements. Such parts of the record that are relevant shall be filed with the application. Any party may file a response to a motion for stay within ten days of the filing of the motion for stay.

(c) *Bond*. In civil cases the relief available in the circuit court or the Supreme Court under this rule may be conditioned upon the filing of a bond or other appropriate security in the circuit court, in such amount and upon such conditions as the court granting the stay feels is proper for the protection of the adverse party. The provisions of West Virginia Code § 58-5-14, are applicable. Such bond shall be filed within such time as provided by the circuit court or this Court. Failure to execute such bond may be grounds for the dismissal of the appeal.

(d) *Bankruptcy stays—continuing status report.* When any pending action in this Court may be subject to an automatic stay pursuant to the provisions of the United States Bankruptcy Code, the affected party must file with the Court a written notice of bankruptcy, and serve a copy on all other parties to the appeal, setting forth the circumstances and providing an estimate of the time period in which it may be necessary to stay the case in this Court. Any party to the case may respond to the notice of bankruptcy within ten days of receipt of the notice. Thereafter, the Court will issue an order staying the case or directing other appropriate relief. Every six months during the pendency of the stay, counsel of record for the party who filed the notice of bankruptcy must file a continuing status report with the Clerk stating whether the case pending in this Court is ripe for dismissal or lifting the automatic stay. Counsel for parties to the bankruptcy proceeding should provide counsel of record in this Court

with sufficient information in a timely fashion to permit counsel to complete the continuing status report. Any party to the case pending in this Court may file a response or objection to the continuing status report within ten days of receipt.

(e) *Stays in original jurisdiction matters—modification*. A party to an original jurisdiction proceeding wherein the Court has issued a stay, either by rule or by order, may file a motion to modify the stay. The motion shall set forth the specific reasons for the modification. Any other party to the case may file a response to the motion within ten days of receipt. Thereafter, the Court will issue an order denying the motion, issue an order modifying the stay, or issue an otherwise appropriate order.

(f) *Abeyance of consideration by the Court*. A party to a pending case may request that the Court hold its consideration of a case in abeyance by filing a motion. A motion to hold a case in abeyance must set forth the specific circumstances supporting the request, the duration of time in which the case should be held in abeyance, and whether the opposing parties to the case consent to the request. Any party who does not consent to the request may file a response to the motion within ten days of the date the motion was filed. No deadline set forth in these rules is tolled until such time as the Court issues an order granting a motion to hold a case in abeyance. Cases held in abeyance will be placed on the inactive docket, and counsel of record must file a status report with the Clerk every six weeks. Upon termination of the abeyance as set forth in the order granting the motion, or at such other time as provided by the Court, the case will be placed on the active docket for consideration by the Court.

[CLERK'S COMMENTS: Rule 28 is a substantially modified version of former Rule 6. Language in subsections (a) through (c) has been edited to harmonize with the rules as a whole, and obsolete provisions related to supersedeas were removed. Three new subsections were added that are intended to improve case management and provide guidance to the bar. Subsection (d) is new, and imposes a

responsibility on counsel to keep the Court informed of the status of any pending bankruptcy or insolvency proceeding that impacts a pending appeal and is designed to enhance case management and prevent cases from languishing without cause. Subsection (e) is new and addresses a situation that arises in context of prohibition actions that was not addressed at all in the former rules. Subsection (f) is new and provides guidance to counsel who wish to hold a case in abeyance for a specific reason, such as potential settlement.]

Rule 29. Motions, expedited relief

(a) *Content of motions; response; reply not permitted.* Unless another form is elsewhere prescribed by these rules, an application for an order or other relief shall be made by filing a motion for such order or relief with service on all other parties. The motion shall state with particularity the grounds on which it is based, and shall set forth the relief sought. If a motion is supported by affidavits or other papers, the supporting documents shall be served and filed with the motion. Any party may file a response in opposition to a motion within ten days of the filing of the motion. A reply to a response to a motion may not be filed without leave of Court.

(b) *Determination of motions for procedural orders.* Notwithstanding the provisions of the preceding paragraph as to motions generally, motions for procedural orders may be acted upon at any time, without awaiting a response thereto. Any party adversely affected by such action may request reconsideration, vacation, or modification of such action within ten days of the date of the order.

(c) *Expedited relief.* Any request for expedited relief in connection with an action pending before this Court shall be made by filing a motion for expedited relief, which shall be separate and distinct from filings otherwise required in the action. A copy of the motion for expedited relief must be provided to all opposing parties contemporaneously with

filing, and the certificate of service must indicate the method of contemporaneous service, which may include electronic mail. The motion for expedited relief shall set forth in specific detail the reasons for the request. The mere fact that a litigation deadline is approaching is not a sufficient basis for requesting expedited relief. A motion for expedited relief from an order entered more than two weeks prior to the filing of the motion will be granted only for extraordinary reasons. Any party may file a response to the motion for expedited relief within two days of the filing of the motion. The Court may, at any time, direct that any case be expedited for consideration or decision.

(d) *Form of papers; number of copies*. All papers relating to motions must comply with the document requirements of Rule 38.

(e) *Hearing*. No oral argument shall be held on any motion, unless requested by the Supreme Court.

[CLERK'S COMMENTS: Rule 29 is a modified version of prior Rule 17. The revised rule includes a ten-day time period to respond to motions. The lack of a deadline under the prior rule was the source of numerous inquiries and confusion. The deadline will allow orderly processing and consideration of motions. The second revision to the rule is the addition of subsection (c), involving requests for expedited relief. Under current practice, such requests may be made informally, or merely set forth in passing as part of the relief requested. By requiring a request for expedited relief to be set forth in a separate motion with adequate detail, this provision is intended to give the parties clear guidance on the method for seeking expedited relief, to give court staff information necessary for case management, and to give the Court an adequate basis to decide the issue. Parties are required to provide a contemporaneous copy of such motions to all opposing parties.]

Rule 30. Amicus curiae

(a) *When permitted*. The State of West Virginia or an officer or agency thereof, or a County or Municipality of the State, may file an amicus curiae brief without the consent of parties or leave of the Court. Any other amicus curiae may file a brief only by leave of Court or if the brief states that all parties have consented to its filing.

(b) *Notice to parties*. An amicus curiae shall ensure that counsel of record for all parties receive notice of its intention to file an amicus curiae brief at least five days prior to the due date.

(c) *Motion for leave to file*. The motion for leave to file an amicus curiae brief must be accompanied by the proposed brief and appendix (if one is necessary), and must state: (1) the movant's interest; (2) the reason why an amicus curiae brief is desirable and why the matters asserted are relevant to the disposition of the case; and (3) if an appendix is provided, a statement of why the material provided in the appendix is not otherwise readily available and why the materials in the appendix are relevant and necessary to the disposition of the case. Any party opposed to the motion may respond within ten days.

(d) *Time for filing*. Unless otherwise provided by the Court, an amicus curiae brief must be filed within the time allowed the party whose position as to affirmance or reversal the brief will support unless the Court for cause shown shall grant leave for later filing, in which event the Court's order may specify a time period within which an opposing party may file a supplemental brief in response.

(e) *Contents of brief and appendix*. The amicus curiae brief need not strictly comply with Rule 10, but must include the following in the order listed:

(1) a cover page with the caption of the case and further identifying the party supported and whether the amicus curiae supports affirmance or reversal;

(2) a table of contents, with page references;
(3) a table of authorities with references to the pages of the brief where they are cited;
(4) a concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file;
(5) except for briefs presented as a matter of right on behalf of an amicus curiae listed in subdivision (a) of this Rule, a brief filed under this Rule shall indicate whether counsel for a party authored the brief in whole or in part and whether such counsel or a party made a monetary contribution specifically intended to fund the preparation or submission of the brief, and shall identify every person other than the amicus curiae, its members, or its counsel, who made such a monetary contribution. The disclosure shall be made in the first footnote on the first page of text.
(6) The argument, exhibiting clearly the points of fact and law presented and citing the authorities relied on, under suitable headings.
An appendix must comply with the format, page numbering and general requirements of Rule 7 insofar as applicable.

(f) *Oral argument.* A motion of an amicus curiae to participate in the oral argument of a case on the Rule 20 docket will be granted only for extraordinary reasons.

[CLERK'S COMMENTS: Rule 30 is a substantially modified version of former Rule 19. The timing and proper filing of amicus briefs has been the source of considerable confusion for litigants and interested persons, and the revised rule intends to provide clarity and an effective mechanism for permitting the filing of amicus briefs in an appropriate case. The revised rule preserves the ability of the State, County, or City official to participate as amicus curiae as a matter of right. The consent process referred to under the prior rule has been clarified. The consent deadline will be included as a routine part of the scheduling order. If both parties consent and the amicus brief is timely, the brief would be filed without requiring a motion or order by the Court. If one of the parties to the case does not consent, or the amicus brief is not timely, the Court will upon proper motion determine whether the amicus brief should be filed. The revised rule

also adapts a provision contained in rules of other jurisdictions requiring a certification that a party to the appeal has not contributed to the preparation of the amicus brief. The certification language was narrowed in response to public comments. The rule also permits, in an appropriate case, the filing of an appendix by an amicus. If, for example, an amicus seeks to provide a nationwide perspective not otherwise provided by the parties, the amicus may furnish the Court with a compilation of decisions, scholarly articles, news reports, or other public-domain items.]

Rule 31. Motions to dismiss the appeal

(a) *By party*. At any time after the filing of an appeal, any party to the action appealed from may move the Supreme Court to dismiss the appeal on any of the following grounds: (1) failure to properly perfect the appeal; (2) failure to obey an order of the Court; (3) failure to comply with these rules; (4) lack of an appealable order, ruling, or judgment; or (5) lack of jurisdiction. Such motion shall be filed and served in accordance with Rule 37.

(b) *By Court*. The Supreme Court may on its own motion notify any party who is in violation of the grounds set out in subsection (a) and fashion appropriate sanctions including the dismissal of the appeal.

(c) *Response*. Any party against whom sanctions are sought under subsection (a) or (b) may file a response within ten days after receipt of the motion for sanctions.

(d) *Hearing*. No oral argument shall be held on such motion, unless requested by the Court.

[CLERK'S COMMENTS: Rule 31 is former Rule 18, which has been changed only for internal consistency.]

Rule 32. Intervention

Upon timely motion, anyone shall be permitted to intervene in an original jurisdiction proceeding pending in this Court or in a case pending before this Court on a direct appeal from an administrative agency, but only when (1) a statute of this State confers an unconditional right to intervene; or (2) the representation of the applicant's interest by existing parties is or may be inadequate, and the applicant is or may be bound by judgment in the action. Intervention may be permitted in other cases in the discretion of the Supreme Court. A party to the case may respond to a motion to intervene within ten days of the date the motion was filed.

[CLERK'S COMMENTS: Rule 32 a modified version of former Rule 22, which has been changed for clarity and to add that a party to the case may respond to a motion to intervene within ten days.]

Rule 33. Disqualification of a Justice

(a) *Duty to inform*. Upon appearance in any case in this Court, counsel of record must inform the Clerk, by letter with a copy to the opposing parties, of any circumstance presented in the case in which a disqualifying interest of a Justice may arise under Canon 3(E)(1) of the Code of Judicial Conduct.

(b) *Grounds for disqualification*. A Justice shall disqualify himself or herself, upon proper motion or sua sponte, in accordance with the provisions of Canon 3(E)(1) of the Code of Judicial Conduct or, when sua sponte, for any other reason the Justice deems appropriate.

(c) *Motions for disqualification*. A party to a proceeding in this Court may file a written motion for disqualification of a Justice within thirty days after discovering the ground for disqualification and not less than seven days prior to any

scheduled proceedings in the matter. If a motion for disqualification is not timely filed, such delay may be a factor in deciding whether the motion should be granted.

(d) *Contents of motion*. The motion shall be addressed to the Justice whose disqualification is sought and shall state the facts and reasons for disqualification, including the specific provision of Canon 3(E)(1) of the Code of Judicial Conduct asserted to be applicable, and shall be accompanied by a verified certificate of counsel of record or unrepresented party that: (1) he has read the motion and that to the best of his knowledge, information, and belief formed after reasonable inquiry that it is well grounded in fact and is warranted by existing law or good faith argument for the extension, modification, or reversal of existing law; and (2) that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(e) *Sanctions for improper motion*. If a motion is signed in violation of paragraph (d) of this rule, the Court, with or without the participation of the Justice whose disqualification was sought, upon motion or upon its own initiative, may refer the matter to the appropriate disciplinary authority or may impose upon the person who signed it, an unrepresented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of reasonable expenses incurred because of the filing of the motion, including reasonable attorney fees.

(f) *Filing of motion*. The number of copies of the motion required by Rule 38 shall be filed with the Clerk with service on all parties. Upon filing of the motion, the Clerk shall examine it to determine whether it conforms with the requirements of paragraph (d) and, retaining the original for the record, shall return the copies to the movant with instructions for correction of any nonconformity. The movant thereafter shall promptly advise the Clerk in writing of the abandonment of the motion or shall file the required number of copies of a corrected motion, with service on all

parties. Once a proper motion is received, the Clerk shall promptly deliver a copy of the motion to each of the Justices.

(g) *Decision on motion*. As soon as practicable, the Justice sought to be disqualified shall notify the Clerk of his or her decision on the motion for disqualification and the Clerk shall promptly notify the other Justices and the parties of such decision.

(h) *Appointment of substitute Justice*. When any Justice is disqualified pursuant to the provisions of this Rule, the Chief Justice or Acting Chief Justice may, in his or her discretion, assign a senior justice, senior judge, or circuit judge to service for the disqualified Justice. The Chief Justice shall promptly notify the Clerk of the decision regarding the necessity of the appointment of a substitute Justice and the Clerk shall promptly notify the other Justices and the parties of such decision.

[CLERK'S COMMENTS: Rule 33 is prior Rule 29, which has not been substantially revised except to add subsection (a), which provides that upon appearance, counsel of record are required to inform the Clerk of any case in which a disqualifying interest may arise. A question will be included on the notice of appeal to capture this information, but setting forth the general duty in a rule will make it applicable to all counsel of record. The title of the rule was changed for clarification, and other slight readability changes were also made.]

Rule 34. Post-conviction bail

Summary petitions for post-conviction bail shall be filed in accordance with the provisions of West Virginia Code § 62-1C-1. The petitioner shall file an original and the number of copies required by Rule 38 of the petition with the Clerk and shall serve a copy of the petition upon the prosecuting attorney in accordance with the provisions of Rule 37. The prosecuting attorney shall file a response and the number of

copies required by Rule 38 within fourteen days of the filing of the petition with the Clerk. Upon receipt of the response, the Court may grant the petition or deny the petition. If granted, the Court may direct the circuit court to set bail.

[CLERK'S COMMENTS: Rule 34 is a slightly modified version of former Rule 6(e). A provision of the former rule providing that the Court may set the matter for hearing has been deleted. In order to conform to current practice, a provision was added indicating that the Court may direct the circuit court to set bail in an appropriate case. The time period for filing a response to a petition for bail was extended from seven days to fourteen days, which will not significantly change the Court's consideration of the matter, and conforms to modern practice.]

PART VIII. DISCIPLINARY CASES

Rule 35. Docketing and filing in disciplinary cases

(a) *Lawyer disciplinary cases*.

(1) *Governing rules*. Lawyer disciplinary cases are governed by the Rules of Lawyer Disciplinary Procedure and the Rules of Appellate Procedure to the extent provided herein. A complaint against a lawyer is filed with the Lawyer Disciplinary Board pursuant to the Rules of Lawyer Disciplinary Procedure.

(2) *Docketing*. The Rules of Lawyer Disciplinary Procedure require that certain documents be filed with the Clerk of the Supreme Court. Upon the filing of those specified documents, the Clerk will docket the action.

(3) *Filings before a hearing panel subcommittee.* When a case is pending before a Hearing Panel Subcommittee of the Lawyer Disciplinary Board, the original of all documents shall be filed with the Clerk of the Supreme Court, and shall include a cover page with the heading "Before a Hearing Panel Subcommittee." However, for any discovery requested or produced during the litigation of formal charges, only the certificate of service shall be filed with the Clerk.

(4) *Filings in the Supreme Court*. The original and ten copies of a document shall be filed with the Clerk any time action is required or requested of the Court pursuant to the Rules of Lawyer Disciplinary Procedure, and shall include a cover page with the heading "In the Supreme Court of Appeals." Examples of such documents include, but are not limited to: any briefs directed to this Court; a Hearing Panel Subcommittee's recommended disposition; a report or petition by the Office of Disciplinary Counsel pursuant to the Rules of Lawyer Disciplinary Procedure. All briefs directed to this Court shall, to the extent practicable, include the material prescribed by Rule 10 except that assignments of error need not be designated. All briefs directed to this Court shall comply with the requirements set forth in Rule 38 for a petitioner's brief, respondent's brief and reply brief.

(b) *Judicial disciplinary cases.*

(1) *Governing rules.* Judicial disciplinary cases are governed by the Rules of Judicial Disciplinary Procedure and the Rules of Appellate Procedure to the extent provided herein. A complaint against a judicial officer is filed with the Judicial Investigation Commission pursuant to the Rules of Judicial Disciplinary Procedure.

(2) *Docketing*. The Rules of Judicial Disciplinary Procedure require that certain documents be filed with the Clerk of the Supreme Court. Upon the filing of those specified documents, the Clerk will docket the action.

(3) *Filings before the judicial hearing board.* When a case is pending before the Judicial Hearing Board, the original of all documents shall be filed with the Clerk of the Supreme Court, and shall include a cover page with the heading "Before the Judicial Hearing Board." However, for any discovery requested or produced during the litigation of formal charges, only the certificate of service shall be filed with the Clerk.

(4) *Filings in the Supreme Court.* The original and ten copies of a document shall be filed with the Clerk any time action is required or requested of the Court pursuant to the Rules of Judicial Disciplinary Procedure, and shall include a cover page with the heading "In the Supreme Court of Appeals." Examples of such documents include, but are not

limited to: any briefs directed to this Court; the Judicial Hearing Board's recommended disposition; a report or petition by Judicial Disciplinary Counsel pursuant to the Rules of Judicial Disciplinary Procedure. All briefs directed to this Court shall, to the extent practicable, include the material prescribed by Rule 10 except that assignments of error need not be designated. All briefs directed to this Court shall comply with the requirements set forth in Rule 38 for a petitioner's brief, respondent's brief and reply brief.

[CLERK'S COMMENTS: See comments to Rule 36.]

Rule 36. Consideration and disposition of disciplinary cases

The Rules of Lawyer Disciplinary Procedure and the Rules of Judicial Disciplinary Procedure govern when a disciplinary case may be considered by the Court for final disposition. Disciplinary cases may be disposed by order if authorized by a rule of disciplinary procedure. In cases where a hearing is required, or when a briefing schedule is required to be set, the Court will issue a scheduling order containing information and deadlines as appropriate under the circumstances. Once the Court has issued a scheduling order, all subsequent filings in the action and the Court's final disposition of the case are controlled by the Rules of Appellate Procedure.

[CLERK'S COMMENTS: Rules 35 and 36 are new rules that address general points about the docketing, consideration and disposition of disciplinary cases involving lawyers and judicial officers, and are intended to complement the Rules of Lawyer Disciplinary Procedure and the Rules of Judicial Disciplinary Procedure.]

PART IX. GENERAL PROVISIONS

Rule 37. Service of papers

(a) *Service*. Unless otherwise provided in these rules, every pleading, brief, appendix, designation, motion, or other paper required by these rules to be filed with the Court shall be served upon other parties to the case in the following manner:

(1) If such party is represented by an attorney, service shall be made upon such attorney, unless otherwise ordered by the Court.

(2) If the party is not represented by an attorney, service shall be made upon the party.

(3) If no appearance has been made by a party, either in the appeal or in the action from which the appeal is taken, no service is necessary. Service shall be made upon an attorney or party by delivering a copy to him, or by mailing a copy to his last known address. In original jurisdiction cases, service shall be made by any method prescribed by Rule 4 of the Rules of Civil Procedure. Delivery within this rule means personally handing a copy to the party or attorney, or leaving a copy with a clerical employee or other responsible person at the office of an attorney. Service by mailing is complete upon mailing.

(4) Service by facsimile transmission is permissible in accordance with Rule 12 of the West Virginia Trial Court Rules.

(b) *Certificate of Service*. Papers presented for filing shall contain an acknowledgement of service by the person served or proof of service in the form of a statement of the date and manner of service and of the names of the persons served, certified by the person who made service. Proof of service may appear on or be affixed to the papers filed. The Clerk may permit papers to be filed without acknowledgement or proof of service, but shall require such to be filed promptly thereafter.

[CLERK'S COMMENTS: Rule 37 is only slightly modified from prior Rule 15. Former subsection (b) was obsolete.

Although service by facsimile is permitted, it is not preferred, unless time is of the essence.]

Rule 38. General rule on form and filing of documents

(a) *Paper size, format, and spacing*. All briefs, motions, and other papers required to be filed with the Court shall be printed or typed and reproduced by any duplicating or copying process which produces a clear black image on white paper. The individual copies shall be securely bound with metal staples or fasteners at the top left corner and the page size shall be eight and one-half inches by eleven inches. The text shall be double-spaced and be no smaller than twelve-point proportionally spaced or eleven-point nonproportionally spaced type. Footnotes and indented quotations may be single-spaced and footnote text shall be no smaller than eleven-point proportionally spaced or ten-point nonproportionally spaced type. Margins shall be no less than one inch.

(b) *Cover page and caption*. The cover page of briefs, summary responses, appendices, petitions, responses and motions shall contain (1) In the Supreme Court of Appeals of West Virginia; (2) the docket number of the case, if assigned; (3) the official caption of the case as set forth in the scheduling order, if one has issued; (4) a brief descriptive title indicating the nature of the document; and (5) the name, address, telephone number, West Virginia State Bar identification number, and e-mail address of the counsel or party, if unrepresented by counsel, filing the document.

(c) *Page limits and number of copies*. Page limitations do not include the cover page, table of contents, table of authorities, or certificate of service. The page limitations and number of copies required to properly file a document under these Rules are as follows:

Type of Document	**Page Limit**	**Number Required**
Notice of appeal (Rule 5, Rule 11, Rule 13)	Form plus required attachments	Original and 5 copies
Petitioner's brief and respondent's brief (Rule 10, Rule 11, Rule 13 through 15)	40 pages	Original and 10 copies
Reply brief (Rule 10, Rule 11, Rule 13 through 15)	20 pages	Original and 10 copies
Summary response (Rule 10, Rule 11, Rule 13 through 15)	15 pages	Original and 10 copies
Appendix in appeals from circuit court (Rule 7) and appendix in original jurisdiction cases (Rule 16)	None	Original and 1 copy
Workers' compensation docketing statement (Rule 12)	Form plus required attachments	Original and 3 copies
Workers' compensation appendix (Rule 12)	None	1 Original
Workers' compensation petitioner's brief and respondent's brief (Rule 12)	20 pages	Original and 5 copies
Workers' compensation reply brief (Rule 12)	10 pages	Original and 5 copies
Original jurisdiction petition and response (Rule 16)	40 pages	Original and 10 copies
Certified question joint appendix (Rule 17)	None	Original and 1 copy
Petition for rehearing and response (Rule 25)	15 pages	Original and 10 copies
Motion and response (Rule 29 through 33, Rule 40, Rule 41)	15 pages	Original and 5 copies
Amicus curiae briefs (Rule 30)	25 pages	Original and 10 copies
Appendix by amicus curiae (Rule 30)	None	Original and 1 copy
Petition for bail and response (Rule 34)	15 pages	Original and 10 copies

(d) *Citations of authority*. Citations of authority shall be made in the body of a document, except citation in a footnote is permissible only if more than five authorities are cited

together. Citation to an opinion of this Court must use the full parallel citation and may indicate if the opinion is *per curiam*, e.g. *Fauble v. Nationwide Mutual Fire Ins. Co.,* 222 W.Va. 365, 664 S.E.2d 706 (2008)(per curiam).

(e) *Facsimile filing*. In accordance with Rule 12 of the West Virginia Trial Court Rules, the Clerk may permit certain filings required under these Rules to be made by facsimile transmission. Even with the consent of the Clerk, documents necessary to docket or perfect an action before the Court may not be filed by facsimile unless accompanied by a motion for leave to file by facsimile, setting forth good cause. In extraordinary circumstances, the Clerk may provide prior consent to exceed the twenty page limit for facsimile filings set forth in Trial Court Rule 12.03(c). If a facsimile filing is accepted by the Clerk, the Clerk will provide by return facsimile a notice of acceptance, and a statement of the photocopying charges that apply under Trial Court Rule 12.03(l). If a facsimile filing is accepted by the Clerk, the filing of the original shall not be required unless ordered by the Court or directed by the Clerk.

(f) *Filings immediately prior to argument*. No documents shall be filed less than forty-eight hours prior to a scheduled argument in a proceeding unless specifically requested by the Court.

(g) *Improper form or filing*. The Clerk may refuse to accept for filing a brief or other paper which does not comply with the Rules of Appellate Procedure and is unaccompanied by a motion for leave to file such brief or other paper despite such noncompliance. If a brief or other paper is returned to counsel or a party, if unrepresented by counsel, for correction and resubmission, a motion for leave to file out of time must accompany any resubmission out of time. To constitute a proper filing, a document must be received by the Clerk on or before the date it is due. Under this rule, the mere act of placing a brief or other paper in the mail on or before the due date does not constitute a proper filing.

[CLERK'S COMMENTS: Rule 38 is an amended version of former Rule 28. This rule is intended to provide general format requirements that will be applicable to all filings, and is referenced throughout the rules. In the interests of clarity and as a convenience to counsel, subsection (c) contains a summary table setting forth the types of documents, page limitations, and number of copies required, which is referred to throughout the rules. Subsection (c) reduces the current page limitations for principal briefs and original jurisdiction filings from fifty to forty pages. Reply briefs are limited to twenty pages. These limitations will encourage the parties to prepare briefs that are more carefully focused on the essence of the arguments. Lower page limits for briefs in workers' compensation cases are established because the issues in those cases are less complex. In an appropriate case, such as a factually complex case or a case involving lengthy proceeding below, the Court can expand the page limitations for briefs in the scheduling order.

Subsection (d) sets forth the correct method for citing opinions of this Court and other authorities. It also contains a limitation on citing cases in footnotes, because some attorneys attempt to evade the page limitations by putting all case citations in the small type in footnotes, rather than in the body of the text. Footnotes may be used for string cites of more than five cases. Subsection (e) sets forth the limitations applicable to filing by facsimile under West Virginia Trial Court 12, and is a change to current practice. As a routine practice, facsimile filing should be confined to short correspondence and motions.

In order to address some of the concerns related to the costs of filing the appendix in appeals and original jurisdiction cases, the Court reduced the required number of copies that must be filed from five to one.]

Rule 39. Computation and extension of time

(a) *Computation of time.* In computing any period of time prescribed by these rules, by an order of the Supreme Court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to

run shall not be included. The last day of the period shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period extends until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule, "legal holiday" includes New Year's Day, Martin Luther King, Jr. Day, President's Day, Memorial Day, West Virginia Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President, Congress of the United States, Governor, or Legislature of West Virginia.

(b) *Enlargement of time*. The Court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time.

(c) *Additional time after service by mail*. Whenever a party is required or permitted to do an act within a prescribed period after service of a paper upon him and the paper is served by mail, three days shall be added to the prescribed period. Provided, however, that this provision does not apply to extend the deadline provided by law or these rules for docketing or perfecting an appeal, and further does not apply to extend any deadline set forth in an order or notice of this Court.

[CLERK'S COMMENTS: Rule 39 is modified from prior Rule 16. Subsection (c) is clarified to reflect that the three-day mailing rule does not apply to extend certain deadlines. This was a source of confusion under the prior rule.]

Rule 40. Public access to case records and confidentiality

(a) *General rule*. In all cases in which relief is sought in the Supreme Court, all pleadings, docket entries, and filings related thereto (hereafter "case records") shall be available for public access unless otherwise provided by law or by a rule of this Court, or unless otherwise ordered by the Court in accordance with this Rule.

(b) *Means of public access*. Case records that are available for public access may be reviewed in person at the Clerk's Office in the State Capitol or be reviewed electronically if the records are posted to the Court's website. Case records posted to the website may include, but are not limited to: the order of the lower tribunal that is subject to the appeal, certified question, or original action; the briefs filed by the parties in cases set for argument under Rule 20, even if the case is otherwise confidential; and the orders and decisions of this Court. Case records in pending cases may be reviewed at the Clerk's Office in the State Capitol during regular business hours. Case records in disposed cases may be reviewed at the Clerk's Office during regular business hours, provided that sufficient advance notice is provided. Written requests for copies of documents must be addressed to the Clerk, be specific, and provide sufficient advance notice. Charges for copies of documents in case records provided by the Clerk's Office are set forth in an administrative order that is posted to the Court's website. There is no charge for access to case records using the Court's website.

(c) *Case records already determined to be confidential by a lower tribunal.* Either in the notice of appeal or in the petitioner's brief, whichever is filed first, the appealing party shall indicate that the case record or a portion of the case record was determined to be confidential by the lower tribunal, and shall cite the authority for the confidentiality. Unless otherwise provided by order of this Court, upon filing, the portion of the case record determined to be confidential by the lower tribunal shall remain confidential. 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. Any party or other person with standing may file a motion to unseal the case record or portion of a case record in this Court, 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, the Court may, in its discretion, issue an order unsealing all or part of the case record, or issue an order denying the motion.

(d) *Case records not previously determined to be confidential.* Any party or other person with standing may file an original and the number of copies required by Rule 38 of a motion to seal the case record or portion of a case record in this Court. The motion must state the legal authority for confidentiality. Upon filing of the motion to seal, the case record or portion of the case record that is the subject of the motion 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.

(e) *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 the Court other than an appendix must comply with the following standards.

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

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

(3) Social Security numbers may not be used under any circumstances.

(4) Sensitive financial or medical information may be used only when necessary to the disposition of the case.

(f) *Briefs in Rule 20 argument cases.* Because of the important public interest in cases set for oral argument under Rule 20, briefs in Rule 20 argument cases will be posted to the Court's website, even if the case is confidential under this Rule. A party who does not wish the brief to be posted to the Court's website must file a motion to seal the brief at the time the brief is filed, and the Court will consider the matter.

(g) *Restriction of electronic records.* Any party or other person with standing may file an original and the number of copies required by Rule 38 of a motion to restrict access to a case record or portion of a case record that has been posted to the Court's website. The motion shall be served upon all other parties to the case and any other concerned persons. The motion shall state good cause why access to the case record through the Court's website should be restricted and shall specifically state the relief requested. An opposing party may respond to the motion within ten days of the date of filing of the motion. Upon its consideration, the Court may, in its discretion, issue an order granting or denying the motion and directing such action as may be appropriate. Any case record subject to restricted electronic access shall be available for public inspection in person at the Clerk's Office in the State Capitol during regular business hours.

(h) *Oral argument open to the public.* All oral arguments under Rule 19 or Rule 20 are open to the public and broadcast live on the Court's website. In presenting oral argument, parties must be mindful not to disclose the identity of juveniles and other personal identifiers contained in subsection (e) of this Rule.

[CLERK'S COMMENTS: Rule 40 is a new rule that is necessary for modern records management and is intended to provide guidance regarding important confidentiality issues, which have been a source of confusion and misunderstanding. It also puts counsel on notice that case

records are posted to the Court's website, and gives guidance to interested parties about the means to review case records.

Under current practice all appellate case files and briefs are open to the public once a case reaches the Supreme Court, *even* family court, juvenile and abuse & neglect cases. When the circumstances require, the Court will consider a motion to seal in order to preserve the confidentiality of a file or pleading. The current practice is contrary to court rules and statutory provisions that apply to lower court cases. Subsection (c) would change that practice, which means that cases or portions of cases sealed in the lower court, either by order or by operation of a rule or statute, would continue to be confidential at this Court.

Subsection (e) is designed to establish a general rule for pleadings, similar to the Court's typical practice in writing opinions to protect the identity of juveniles in sensitive cases. It is counsel—not the Clerk's Office—who should be responsible to ensure that papers filed with the Court protect privacy when appropriate.

Around the country, the unintended consequences of search results are issues that many courts that manage websites are facing. In addition to clarifying the process for sealing material, the new rule is intended to explain the importance of protecting privacy even when a case is not itself confidential. None of these obligations are made apparent to the parties at the current time, and the new rule is intended to remedy that and make the Court's expectations clear to all persons involved. Subsection (g) of the Rule gives parties a mechanism to request that a website posting be removed from the Internet, with the record still available for public inspection at the Clerk's Office.

Overall, the rule attempts to strike a balance between the important public interest in access to proceedings in this Court, and the important public interest in protecting privacy.]

Rule 41. Substitution of parties

(a) *Death of a party*. If a party dies after an appeal is filed, the personal representative of the deceased party may be

substituted as a party on motion that complies with Rule 38 filed by the representative or by any party with the Clerk. The motion of a party shall be served upon the representative in accordance with the provisions of Rule 37. If the deceased party has no representative, any party may suggest the death on the record and proceedings shall then be had as the Court may direct. If a party against whom an appeal may be taken dies after entry of a judgment or order in the circuit court, but before an appeal is docketed, a petitioner may proceed as if death had not occurred. If the appeal is docketed, substitution shall be effected in the Supreme Court in accordance with this subdivision. If a party entitled to appeal shall die before an appeal is docketed, the notice of appeal and petitioner's brief may be filed and presented as if death had not occurred by his personal representative, or, if he has no personal representative, by his attorney of record within the time prescribed by these rules. After the notice of appeal is filed, substitution shall be effected in the Supreme Court in accordance with this subdivision.

(b) *Substitution for other causes*. If substitution of a party in the Supreme Court is necessary for any reason other than death, substitution shall be effected in accordance with the procedure prescribed in subdivision (a).

(c) *Public officers; death or separation from office*. When a public officer is a party to an appeal or other proceeding in the Supreme Court in his official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. When a public officer is a party to an appeal or other proceeding in his official capacity, he may be described as a party by his official title rather than by name, but the Court may require his name to be added.

[CLERK'S COMMENTS: Rule 41 is former Rule 27, which has been revised for internal consistency, and has undergone other minor revisions to conform to current practice.]

Rule 42. Media access

(a) *General rule.* In proceedings that are open to the public, the Court may, in its discretion, permit a member of the media to utilize cameras or equipment used for word processing in and around the courtrooms in which the Court may sit, provided that the orderly procedures of the Court are not impaired or interrupted.

(b) *Prior notice and compliance with rules required.* Members of the media who wish to cover a Court proceeding shall notify the public information officer as far in advance as is practicable. If the public information officer is not available, the Clerk must be notified. It shall be the duty of media personnel to affirm that they have read this Rule and will abide by the same and further, to demonstrate to the public information officer, or to the Clerk, sufficiently and in advance of any proceeding, that the equipment sought to be used does not produce a distracting sound or light. A failure to provide advance notice may preclude the use of such equipment in any proceeding.

(c) *Termination of coverage.* After the proceedings have commenced, the Clerk or the public information officer shall terminate coverage of any portion of the proceedings or of the remainder of the proceedings if the Clerk, or the public information officer, determines that continuing coverage is disturbing the proceeding, will impede justice, or will create unfairness for any party.

(d) *Nonjudicial meetings.* Media coverage of any nonjudicial meeting or other gathering in the courtrooms shall be determined by the concurrence of the sponsoring group and the public information officer or the Clerk, and shall be conducted in accordance with this Rule. These rules shall not limit media coverage of ceremonial proceedings conducted in court facilities under such terms and conditions as may be established by the public information officer.

(e) *Equipment and personnel.* Broadcast media should arrive at least thirty minutes prior to oral arguments to begin setting up equipment. All equipment must be in place and tested no less than fifteen minutes in advance of the time scheduled for the court proceeding. The following equipment and persons shall be the maximum equipment and broadcast personnel permitted to actively cover proceedings in the courtroom at any one time: (1) one portable television camera or film camera with not more than one person operating the same; (2) one still photographer with one camera and not more than two lenses and necessary related equipment. Only still camera equipment that does not produce distracting sound or light shall be employed in the courtroom. Only television equipment which does not produce distracting sound or light shall be employed in the courtroom. No artificial lighting (other than that normally present in the courtroom) shall be employed in the courtroom except that, with the concurrence of the public information officer or the Clerk, modifications and additions may be made to lighting in the courtroom, if such modification or additions are installed and maintained without public expense. Reporters who wish to utilize laptop computers to take notes must do so in an area provided for that purpose, and must be in place before proceedings begin. Space will provided on a first-come first-served basis.

(f) *Live audio feed must be used*. Only film and video cameras without working audio pickup shall be employed in the courtroom. Audio recording equipment of any kind is not permitted in the courtroom. Instead, members of the media must utilize the live audio feed in a designated location in the courtroom. The live audio feed is available as a microphone level or line level signal and requires a female XLR connector. Members of the media are responsible for providing their own equipment suitable to connect to the live audio feed.

(g) *Location of equipment and personnel.* Video or film camera equipment shall be positioned in such location in the courtroom as shall be designated by the Clerk. All camera equipment shall be positioned only in such area. Any additional television equipment shall be positioned in an

area outside the courtroom if that is technically possible. Cables and wiring must be placed in a safe and unobtrusive manner. A still camera photographer shall position himself or herself in such location in the courtroom as shall be designated by the Clerk. The photographer shall assume a fixed position within the designated area and shall act so as not to create a disturbance or call attention to himself or herself through further movement. The photographer shall not move about the courtroom. Unless expressly permitted by the Clerk, representatives of the media shall not move about the courtroom while a proceeding is in progress, and equipment, once positioned, shall not be moved during a proceeding.

(h) *Courtroom conduct*. Broadcast, print, or other media interviews will not be permitted inside the courtroom at any time. Broadcast, print, or other media interviews may be conducted in the hallway outside the courtroom in an area designated by the public information officer. Distribution of printed material, including pamphlets or flyers of any kind, is prohibited both in the courtroom and in the hallway outside the courtroom on days when the Court is in session. Photographers, videographers, and technical support staff covering a proceeding shall avoid activity that might distract participants or impair the dignity of the proceedings. All media personnel shall observe the customs of the Court, and appropriate dress is required.

(i) *Pooling arrangements*. Any pooling arrangements among those seeking to provide camera coverage shall be the sole responsibility of media persons. The Clerk, or the public information officer, will not resolve any dispute regarding the same unless a case has attracted nationwide interest. In those instances, the public information officer and Clerk will be in charge of pooling arrangements.

(j) *Rebroadcast of webcast prohibited*. The live webcast of oral arguments is provided by the Court as a public service and is not intended to provide an official record of proceedings. The webcast may not be rebroadcast in any manner, in whole or in part, without the prior express written permission of the Court.

(k) *Waiver of rules*. The Court may, in its discretion, modify or waive parts of this Rule when the circumstances require.

[CLERK'S COMMENTS: Rule 42 is a modified version of a stand-alone rule entitled "Media Coverage of Courtroom Proceedings in the Supreme Court of Appeals" which was approved by the Court on February 21, 2002. As a stand-alone rule, it was difficult for media personnel to locate, so it has been integrated into the general provisions of the revised rules. In addition, several changes have been made in order to conform to current practice and to resolve issues that have arisen in connection with administering this rule over the years.]

Rule 43. Definitions and rules of construction

(a) *Definitions*.

(1)"Appeal"—The procedure by which a case is brought from a lower tribunal to the Supreme Court of Appeals.

(2)"Brief"—A document filed by the parties to an action before the Court under Rule 10 that sets forth the arguments and issues that the parties wish the Court to consider.

(3)"Certificate of Service"—The statement signed by counsel or unrepresented party describing the date and manner of serving a particular filing on another party.

(4)"Docketing"—Assignment of a case number and placement of an action on the Court's docket by the Clerk upon the receipt of timely and proper filing of an action before the Court.

(5)"Lower Tribunal"—The circuit court, family court or administrative agency from which an appeal is taken or an original jurisdiction proceeding is prosecuted.

(6)"Mature"—Unless otherwise provided by order, a case is mature for consideration by the Court when the deadline for all briefs to be filed has passed.

(7)"Notice of Appeal"—The mandatory notice filed to inform the Court and the other parties that a petitioner

intends to perfect an appeal from a final judgment of a circuit court, in the form prescribed by these rules.

(8)"Party"— Where a party is represented by counsel, the term party applies to counsel; where a party is not represented by counsel, the term party applies to the self-represented litigant.

(9)"Perfected"—An appeal is perfected upon the proper and timely filing of the petitioner's brief and appendix. An original jurisdiction action is perfected upon the timely and proper filing of the petition and appendix, if an appendix is required.

(10)"Petitioner"—A party who takes an appeal or prosecutes an original proceeding in the Supreme Court of Appeals.

(11)"Respondent"—A party against whom an appeal is taken or an original jurisdiction proceeding is prosecuted in the Supreme Court of Appeals.

(12)"Submitted"—At the conclusion of oral arguments, a case is submitted for final consideration by the Court.

(13)"Summary response"—A document filed in lieu of a brief by the respondent to an action before the Court under Rule 10 or Rule 16, which is deemed to be a waiver of oral argument.

(b) *Rules of Construction*. (1) Words in the singular number include the plural, and in the plural include the singular. (2) Words of the masculine gender include the feminine and the neuter. (3) The word "person" shall include corporations, societies, associations, and partnerships, if not restricted by the context. (4) References to "the Court" mean the Supreme Court of Appeals of West Virginia. (5) References to "the Rules" or "these Rules" mean the Rules of Appellate Procedure.

[CLERK'S COMMENTS: Rule 43 was extracted from former Rule 1 for organizational purposes. Definitions appropriate to the revised process were added, including case status terms.]

ADDITIONAL RULES THAT WERE AMENDED, IN LIGHT OF THE REVISIONS TO THE RULES OF APPELLATE PROCEDURE

Rules of Civil Procedure

IX. APPEALS

Rule 72. Running of time for appeal.

The ~~full~~ time for filing ~~a petition for~~ an appeal commences to run and is to be computed from the entry of any of the following orders ~~made upon a timely motion under such rules~~: Granting or denying a motion for judgment under Rule 50(b); or granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion were granted; or granting or denying a motion under Rule 59 to alter or amend the judgment; or granting or denying a motion for a new trial under Rule 59.

Rule 73. The record on ~~petition~~ appeal.

(a) *Composition and designation of the record on ~~petition~~ appeal.* — ~~At the time of the filing of the petition for appeal, the petitioner shall designate by itemization to the clerk of the circuit court such pleadings, orders and exhibits, in accordance with Rule 4(c) of the Rules of Appellate Procedure, to enable the Supreme Court of Appeals to decide the matters arising in the petition. If the petitioner desires, the petitioner may cause to be prepared, pursuant to paragraph (b) of this rule, a transcript of such part of the proceedings not already on file as the petitioner deems necessary for inclusion in the record, or in lieu of filing all or part of the transcript of testimony, the petitioner may file under Rule 4A of the Rules of Appellate Procedure, in which event the petitioner may rely on the facts stated in the~~

~~petitioner's petition~~. The procedure for composing, assembling, and filing the record on appeal shall be governed by the Rules of Appellate Procedure.

(b) *Procedure for requesting, preparing, and filing of transcript.* — The procedure for requesting, preparing, and filing of transcripts shall be governed by ~~Appendix B to~~ the Rules of Appellate Procedure.

(c) *Notice of appeal.* — Within thirty days of entry of the judgment being appealed, the party appealing shall file a Notice of Appeal in accordance with Rule 5 of the Rules of Appellate Procedure.

Rules 74 through 76. [Reserved.]

[CLERK'S COMMENTS: These rules were revised to comply with the new process. Because the filing of the Notice of Appeal is a new requirement in civil cases, subsection (c) was added to Rule 73 in order to highlight that requirement.]

Rules of Criminal Procedure

VIII. APPEAL

Rule 37. Taking Appeal

(a) *How an appeal is taken*. - (1) From a circuit court. - An appeal permitted by law from a circuit court to the Supreme Court of Appeals is taken by filing a notice of intent to appeal in the circuit court within the time provided by paragraph (b)(1) of this rule. The notice of intent to appeal shall ~~specify the parties or party taking the petition; shall indicate the judgment, decree or order or part thereof appealed from; shall name the court in which the petition is taken; shall designate by itemization such pleadings, orders and exhibits to enable the Supreme Court of Appeals to decide the matters raised; and should concisely state the grounds for appeal.~~ be filed and served in accordance with Rule 5 of the Rules of Appellate Procedure. ~~The clerk shall serve notice of the filing of a notice of intent to petition for appeal by personal service or by mailing a copy thereof to all parties. The clerk shall note on each copy to be served the date on which the notice of intent to appeal was filed, and shall note in the docket the names of the parties on whom he or she serves copies, with the date of mailing or other service. Failure of the clerk to serve notice shall not affect the validity of the appeal.~~

(2) From a magistrate court. - An appeal permitted by law from a magistrate court to a circuit court is taken by requesting an appeal in the magistrate court within the time provided by Chapter 50, Article 5, Section 13, of the West Virginia Code of 1931, as amended. The required specifications of the notice of intent to appeal ~~and the duties of the magistrate in forwarding the notice of intent to appeal to the clerk of the circuit court and serving notice on the parties~~ do not apply as provided for in paragraph (a)(1) of this rule.

(b) *Time for taking appeal*. - (1) Time for notice of intent to appeal. - The notice of intent to appeal by a defendant shall be filed within 30 days after the entry of the judgment, decree or other order appealed from. A notice of intent to

appeal filed after the announcement of a decision, sentence or order but before entry of the judgment or order shall be treated as filed after such entry and on the day thereof. A judgment or order is entered within the meaning of this paragraph when it is entered in the criminal docket.

(2) Procedure for requesting, preparing, and filing of transcript. - The procedure for requesting, preparing, and filing of transcripts shall be governed by ~~Appendix B to~~ the Rules of Appellate Procedure.

(3) Time for ~~petition for~~ appeal. - ~~A petition~~ An appeal must be ~~filed with the clerk of the circuit court where the judgment, decree or order being appealed was entered~~ perfected within four months of the entry of the circuit court order in accordance with Rule 5 of the Rules of Appellate Procedure. The appeal period may be extended~~, upon request of the appealing party, within four months of the order appealed from for the purpose of preparing a transcript or for good cause, for a period or periods not to exceed a total of two months.~~ in accordance with the Rules of Appellate Procedure. ~~When an appeal by the state is authorized by statute, the petition for appeal shall be filed with the clerk of the circuit court within 30 days after entry of judgment or order appealed from.~~

Rule 38. Stay of Execution and Relief Pending Review

(a) *Reserved*.

(b) *Imprisonment*. - A sentence of imprisonment shall be stayed, pursuant to Chapter 62, Article 7, Section 1, of the West Virginia Code of 1931, as amended, upon request of the defendant if an appeal is taken from the conviction. If stayed, but the defendant is not released pending disposition of appeal, the court shall order that the defendant be retained at a place of confinement near the place of trial for a period reasonably necessary to permit the defendant to assist in the preparation of an appeal to the Supreme Court of Appeals.

(c) *Fine*. - Upon the request of the defendant, a sentence to pay a fine or a fine and costs, if an appeal is taken, shall be stayed upon such terms as the court deems proper. The court

may require the defendant pending appeal to deposit the whole or any part of the fine and costs to the clerk of the circuit court, or to give bond for the payment thereof, or to submit to an examination of assets, and it may make any appropriate order to restrain the defendant from dissipating his or her assets.

(d) *Probation*. - An order placing the defendant on probation may be stayed if an appeal from the conviction or sentence is taken. If not stayed, the court shall specify when the term of probation shall commence. If the order is stayed, the court shall fix the terms of the stay.

Rule 39. [Reserved]

[CLERK'S COMMENTS: These provisions of the Rules of Criminal Procedure were revised to align with the new process.]

Rules of Procedure for Child Abuse and Neglect Proceedings

Rule 49. Accelerated appeal for abuse and neglect and termination of parental rights cases.

In order to provide the most inexpensive and expeditious procedure for appeal of Circuit Court orders under W. Va. Code § 49-6-1 et seq., a petitioner shall file his or her petition for appeal within sixty days of judgment ~~without presentation of a transcript using the procedure provided in Rule 4A~~ and may proceed without a transcript pursuant to Rule 11 of the Rules of Appellate Procedure. As provided therein, petitioner may submit a part of the transcript of testimony or those sections which are necessary evidence to support his or her petition. An extension of the time limitations for appeal not to exceed an additional sixty days, may be granted by the court on the grounds that no transcript of the proceedings has been prepared but only upon a showing of extraordinary circumstances, and further provided that the request for an extension of time has been filed and served prior to the expiration of the initial sixty day time period for filing the petition for appeal. ~~The bond for costs otherwise required by Rule 4A(e) of the Rules of Appellate Procedure shall be waived pursuant to this rule.~~ The Supreme Court of Appeals shall give priority to appeals of abuse and/or neglect proceedings and termination of parental rights cases and shall establish and administer an accelerated schedule in each case, to include the completion of the record, briefing, oral argument, and decision.

Rule 50. Stays on appeal.

The filing of a petition for appeal does not operate to automatically stay the proceedings or orders of the circuit court in abuse, neglect, and/or termination of parental right cases, but the circuit court or the Supreme Court of Appeals may grant a stay upon a showing of good cause. Any party seeking a stay from the Supreme Court of Appeals pursuant to Rule 28 of the Rules of Appellate Procedure pending an appeal of neglect, abuse, and/or termination of parental rights cases shall submit a written motion for the stay and a

brief statement explaining the need for the stay, discussing the effect of the stay on the ability of the circuit court to plan for the child and on the best interests of the child. This rule shall not preclude any motion to the circuit court for a stay which includes a brief statement of the issues previously set forth.

[CLERK'S COMMENTS: These provisions of the Rules of Procedure for Child Abuse and Neglect Proceedings were revised to align with the new process.]

Rules of Practice and Procedure for Family Courts

Rule 27. Stay of proceedings pending appeal.

* * *

(d) *Effect of Order Refusing Petition for Appeal.* If the circuit court enters an order refusing the petition for appeal, any stay of the family court final order is vacated. A party desiring an additional stay must make an application for stay in the supreme court of appeals as provided in Rule ~~6~~ 28 of the Rules of Appellate Procedure.

[CLERK'S COMMENTS: This provision of the Rules of Practice and Procedure for Family Court was revised to align with the new process.]

Supreme Court of Appeals of West Virginia
NOTICE OF APPEAL

INSTRUCTIONS:

1. This form should be used only for an appeal from a final judgment of a circuit court.

2. Copies of final order(s) on appeal must be attached to each notice of appeal. All final orders relevant to review of the issues on appeal must be included (i.e. family court's order in an appeal from circuit court refusing a family court appeal).

3. An original and five copies of the notice of appeal must be filed in the Office of the Clerk of the Supreme Court of Appeals within thirty days of entry of the judgment being appealed.

4. Counsel of record for petitioner is responsible for filing the notice of appeal. If the petitioner is not represented by counsel, the notice of appeal may be filed *pro se*. In the case of multiple petitioners joining in a single appeal, the appealing parties should confer and decide who will file the notice of appeal.

5. The nature of proceedings and relief sought should be stated summarily. The notice of appeal is not a brief and should not contain argument or motions. The assignments of error should be expressed in the terms and circumstances of the case but without any unnecessary detail. Conclusory statements such as "the judgment of the trial court is not supported by the law or facts" are unacceptable. Additional pages may be attached to the notice of appeal form, not to exceed the page limits set forth in the form.

6. Counsel or parties unrepresented by counsel should make every effort to include in the docketing statement a fair statement of the issues that are intended to be presented to the Supreme Court of Appeals..

7. If a transcript is necessary for the Court to consider the assignments of error, the petitioner must complete an appellate transcript request and comply with all necessary requirements.

8. If a respondent concludes that the notice of appeal is inaccurate or incomplete, such inaccuracies should be addressed in the respondent's brief.

9. This Notice of Appeal Form was revised by order dated October 19, 2010 and shall be used with appeals arising from final orders entered on or after December 1, 2010.

Supreme Court of Appeals of West Virginia

NOTICE OF APPEAL

Use this form only for an appeal from a final judgment of a circuit court.

ATTACH COPIES OF ALL ORDERS BEING APPEALED

1. COMPLETE CASE TITLE AND CASE NUMBERS IN CIRCUIT COURT
(Include all party designations, such as plaintiff, intervenor, etc. Use an extra sheet if necessary)

2. COUNTY APPEALED FROM AND NAME OF JUDGE(S) WHO ISSUED DECISION(S)
(If the presiding judge was appointed by special assignment, include an explanation of the circumstances on an extra sheet.)

3. PETITIONER(s) (list all parties who join in the petition for appeal and provide the name, firm name, address, phone number, and e-mail address of counsel of record for each party. Self-represented parties must provide an address and telephone number.)

4. RESPONDENT(s) (list all parties against whom the appeal is taken and provide the name, firm name, address, phone number, and e-mail address of counsel of record for each party. Self-represented parties must provide an address and telephone number.)

5. NON-PARTICIPANT(S) (list any parties to the lower court action that will not be involved in the appeal and provide the name, firm name, address, telephone number and e-mail address of counsel of record for each non-participant. Provide the name, address and telephone number of any self-represented litigant who was a party to the lower court action but is not participating in the appeal.)

Case Name: _____

SUPREME COURT OF APPEALS OF WEST VIRGINIA—NOTICE OF APPEAL

6. DATE OF ENTRY OF JUDGMENT _____ DATE OF ENTRY OF JUDGMENT ON POST-TRIAL MOTIONS, IF ANY _____ _____	7. CRIMINAL CASES: DEFENDANT'S SENTENCE AND BAIL STATUS

8. ABUSE AND NEGLECT CASES: On an extra sheet, provide a brief list of the names, ages and parent's names of all minor children, a description of the current status of the parental rights of each parent as of the filing of the notice of appeal, a description of the proposed permanent placement of each child, and the name of each guardian ad litem appointed in the case.

9. Is the order or judgment appealed a final decision on the merits as to all issues and all parties?
☐ YES ☐ NO

If your answer is no, was the order or judgment entered pursuant to R. Civ. P. 54(b)? ☐ YES ☐ NO If your answer is no, you must attach a brief explanation as to why the order or judgment being appealed is proper for the court to consider.

10. Has this case previously been appealed? ☐ YES ☐ NO If yes, provide the case name, docket number and disposition of each prior appeal.

11. Are there any related cases currently pending in the Supreme Court or in a lower tribunal?
☐ YES ☐ NO If yes, cite the case, provide the status, and provide a description of how it is related.

12. Is any part of the case confidential? ☐ YES ☐ NO If yes, identify which part and provide specific authority for confidentiality.

13. If an appealing party is a corporation an extra sheet must list the names of parent corporations and the name of any public company that owns more than ten percent or more of the corporation's stock. If this section is not applicable, please so indicate below.

☐ The corporation who is a party to this appeal does not have a parent corporation and no publicly held company owns ten percent or more of the corporation's stock.

14. Do you know of any reason why one or more of the Supreme Court Justices should be disqualified from this case? ☐ YES ☐ NO If yes, set forth the basis on an extra sheet. Providing the information required in this section does not relieve a party from the obligation to file a motion for disqualification in accordance with Rule 33.

Case Name: _____

SUPREME COURT OF APPEALS OF WEST VIRGINIA—NOTICE OF APPEAL

15. Is a transcript of proceedings necessary for the Court to fairly consider the assignments of error in the case? ☐ YES ☐ NO **If yes, you must complete the appellate transcript request on page 4 of this form.**

16. NATURE OF THE CASE, RELIEF SOUGHT, and OUTCOME BELOW (Limit to two double-spaced pages; please attach.)

17. ASSIGNMENTS OF ERROR (Express the assignments in the terms and circumstances of the case but without unnecessary detail. Separately number each assignment of error and for each assignment: (a) state the issue; (b) provide a succinct statement as to why the Court should review the issue. Limit to eight pages double-spaced; please attach.)

18. ATTACHMENTS

Attach to this notice of appeal the following documents in order: (1) extra sheets containing supplemental information in response to sections 1 – 14 of this form; (2) a double-spaced statement of the nature of the case, not to exceed two pages, as material required by section 16 of this form; (3) a double-spaced statement of the assignments of error not to exceed eight pages as required by section 17 of this form; (4) a copy of the lower court's decision or order from which you are appealing; (5) a copy of any order deciding a timely post-trial motion; and (6) a copy of any order extending the time period for appeal.

19. CERTIFICATIONS

I hereby certify that I have performed a review of the case that is reasonable under the circumstances and I have a good faith belief that an appeal is warranted.

_____
Counsel of record or unrepresented party

I hereby certify that on or before the date below, copies of this notice of appeal and attachments were served on all parties to the case, and copies were provided to the clerk of the circuit court from which the appeal is taken and to each court reporter from whom a transcript is requested.

_____ _____
Date Counsel of record or unrepresented party

Case Name: _____

APPELLATE TRANSCRIPT REQUEST FORM

INSTRUCTIONS:

1. If a transcript is necessary for your appeal, you must complete this form and make appropriate financial arrangements with each court reporter from whom a transcript is requested.
2. Specify each portion of the proceedings that must be transcribed for purposes of appeal. *See* Rule of Appellate Procedure 9(a).
3. A separate request form must be completed for each court reporter from whom a transcript is requested. If you are unsure of the court reporter(s) involved, contact the circuit clerk's office for that information.
4. Failure to make timely and satisfactory arrangements for transcript production, including necessary financial arrangements, may result in denial of motions for extension of the appeal period, or may result in dismissal of the appeal for failure to prosecute.

Name of Court Reporter, ERO, or Typist: _____
Address of Court Reporter: _____
Case No. _____ County: _____ Date of Final Order: _____

Date of Proceeding	Type of Proceeding	Length of Proceeding	Name of Judge(s)	Portions Previously Prepared

CERTIFICATIONS

I hereby certify that the transcripts requested herein are necessary for a fair consideration of the issues set forth in the Notice of Appeal.

I hereby further certify that I have contacted the court reporter and satisfactory financial arrangements for payment of the transcript have been made as follows:

☐ Private funds. (Deposit of $ _____ enclosed with court reporter's copy.)
☐ Criminal appeal with fee waiver (Attach order appointing counsel or order stating defendant is eligible.)
☐ Abuse & neglect or delinquency appeal with fee waiver (Attach order appointing counsel.)
☐ Advance payment waived by court reporter (Attach documentation.)

_____ _____
Date mailed to court reporter Counsel of record or unrepresented party

APPENDIX B – REVISED RULES OF APPELLATE PROCEDURE

WORKERS' COMPENSATION APPEALS DOCKETING STATEMENT

Complete Case Title: _____

Petitioner: _____ Respondent: _____

Counsel: _____ Counsel: _____

Claim No.: _____ Board of Review No.: _____

Date of Injury/Last Exposure: _____ Date Claim Filed: _____

Date and Ruling of the Office of Judges: _____

Date and Ruling of the Board of Review: _____

Issue and Relief requested on Appeal: _____

CLAIMANT INFORMATION

Claimant's Name: _____

Nature of Injury: _____

Age: _____ Is the Claimant still working? ☐Yes ☐No. If yes, where: _____

Occupation: _____ No. of Years: _____

Was the claim found to be compensable? ☐Yes ☐No If yes, order date: _____

ADDITIONAL INFORMATION FOR PTD REQUESTS

Education (highest): _____ Old Fund or New Fund (please circle one)

Date of Last Employment: _____

Total amount of prior PPD awards: _____ (add dates of orders on separate page)

Finding of the PTD Review Board: _____

List all compensable conditions under this claim number: _____
(Attach a separate sheet if necessary)

Are there any related petitions currently pending or previously considered by the Supreme Court?
☐Yes ☐No
(If yes, cite the case name, docket number and the manner in which it is related on a separate sheet.)

Are there any related petitions currently pending below? ☐Yes ☐No
(If yes, cite the case name, tribunal and the manner in which it is related on a separate sheet.)

If an appealing party is a corporation an extra sheet must list the names of parent corporations and the name of any public company that owns ten percent or more of the corporation's stock. If this section is not applicable, please so indicate below.

☐ The corporation who is a party to this appeal does not have a parent corporation and no publicly held company owns ten percent or more of the corporation's stock.

Do you know of any reason why one or more of the Supreme Court Justices should be disqualified from this case? ☐Yes ☐No
If so, set forth the basis on an extra sheet. Providing the information required in this section does not relieve a party from the obligation to file a motion for disqualification in accordance with Rule 33.