WEST VIRGINIA APPELLATE PROCEDURE

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I. INTRODUCTION.[1]

Although most of our law school course work was focused on the scrutiny of appellate opinions, appellate practice and procedure is still a mystery to many practicing lawyers. This chapter is designed to provide an examination of the steps in the appellate process in West Virginia. It includes a discussion of the rules of civil procedure, rules of criminal procedure, rules of appellate procedure and relevant statutes that provide the blueprint for appellate practice and procedure in the state. Additionally, it provides a brief overview of the appeal process under the Administrative Procedures Act and includes a discussion of original jurisdiction procedure. Procedures to certify a question are excluded from this chapter.[2]

The scope of this chapter is generally limited to a discussion of appellate procedure in an ordinary civil or criminal action. Because the chapter is abbreviated, and further because pertinent rules and statutes may have been amended after these materials were prepared, counsel is advised in all instances to consult the West Virginia Rules of Appellate Procedure, the state rules of civil and criminal procedure, and relevant state statutory and constitutional provisions.[3]

A. JURISDICTION OF SUPREME COURT OF APPEALS.

The Supreme Court of Appeal's jurisdiction is defined in Article VIII, § 3 of the Constitution of West Virginia as well as recognized in the West Virginia Rules of Appellate Procedure and statutory provisions such as W. Va. Code § 51-1-3 and W. Va. Code § 58-5-1. The constitutional provision confers original jurisdiction for common-law writs of habeas corpus, mandamus, prohibition, and certiorari and appellate jurisdiction in civil and criminal case. It also confers appellate jurisdiction in proceedings in quo warranto, habeas corpus, mandamus, prohibition and certiorari. Any other jurisdiction exercised by the

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[1]The authors gratefully acknowledge the assistance of Ancil G. Ramey, Esquire, former Clerk of the Supreme Court of Appeals, in preparation of this chapter.

[2]*See* Rule 13 of the West Virginia Rules of Appellate Procedure and W. Va. Code § 58-5-2.

[3]"Under Article VIII, [and Section 3] of the Constitution of West Virginia (commonly known as the Judicial Reorganization Amendment), administrative rules promulgated by the Supreme Court of Appeals of West Virginia have the force and effect of statutory law and operate to supersede any law that is in conflict with them." *Bennett v. Warner*, 179 W. Va. 742, 745, 372 S.E.2d 920, 923 (1988) (citations omitted). *See, e.g., Cable v. Hatfield*, 202 W. Va. 638, 643, 505 S.E.2d 701, 706 (1998) ("We therefore hold that, W. Va. Code § 56-4-36 (1923) (Repl. Vol. 1997) is superseded by Rule 7(c) and Rule 71 B(a) of the West Virginia Rules of Civil Procedure insofar as that statute relates to extraordinary remedies.").

Supreme Court of Appeals is done pursuant to statutory enactment. There can be no writ of error or appeal except in those cases warranted by the Constitution or statutes.[4]

There is no constitutional right of appellate review in West Virginia. The Supreme Court of Appeals has recognized that appellate review is not essential as long as due process has been accorded at the trial level.[5] More recently, the Supreme Court of Appeals held that "West Virginia does not grant a criminal defendant a first appeal of right, either statutorily or constitutionally. However, our discretionary procedure of either granting or denying a final full appellate review of a conviction does not violate a criminal defendant's guarantee of due process and equal protection of the law."[6] Because appellate review in West Virginia is not absolute, exercise of appellate jurisdiction by the Supreme Court of Appeals is completely discretionary.[7] Additionally, the exercise of the Supreme Court of Appeals' original jurisdiction, consisting of writs of mandamus, prohibition, habeas corpus, and certiorari, is completely discretionary.[8]

Given the discretionary nature of the Supreme Court of Appeals' jurisdiction, both appellate and original jurisdiction cases follow a two-step process. First, a petition for appeal or writ, which is filed and presented *ex parte*, must be granted by at least a tie vote (2-2 of the five Justices of the Supreme Court of Appeals). If the petition for appeal or writ is refused, the case is concluded. However, if the petition for appeal or writ is granted, the case goes to step two. In the second step, the case is set for oral argument or submission on the briefs following the filing of briefs or memorandum of law. The second stage of the procedure will be discussed more fully later in this chapter.

B. APPELLATE REVIEW OF ADMINISTRATIVE TRIBUNAL DECISIONS.

The Supreme Court of Appeals' review of final decisions of administrative agencies is purely statutory.[9] Some administrative agencies have internal appellate mechanisms; however, direct appellate review of administrative decisions may also be performed by (1)

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[4]*State v. Bailey*, 154 W. Va. 25, 173 S.E.2d 173 (1970), *overruled on other grounds*, *State v. Walters*, 186 W. Va. 169, 411 S.E.2d 688 (1991).

[5]*State v. Legg*, 151 W. Va. 401, 151 S.E.2d 215 (1966).

[6]Syl. pt. 4, *Billotti v. Dodrill*, 183 W. Va. 48, 394 S.E.2d 32 (1990); *see also Billotti v. Legursky*, 975 F.2d 113 (4th Cir. 1992), *cert. denied*, ____ U.S. _____, 113 S. Ct 1578, 123 L. Ed.2d 146 (1993).

[7]W. Va. Code § 58-5-1; *Pettry v. Boles*, 275 F. Supp. 744 (N.D. W. Va. 1967).

[8]*State ex rel. McGraw v. Telecheck* 213 W. Va. 438, 443 n.3, 582 S.E.2d 885, 890 n.3 (2003); *State ex rel. Doe v. Troisi*, 194 W. Va. 28, 32, 459 S.E.2d 139, 143 (1995). *See also State ex rel. Richey v. Hill*, 216 W. Va. 155, 175, 603 S.E.2d 177, 197 (2004) (Maynard, J., concurring).

[9]*See e.g. Howell v. Public Service Commission*, 78 W. Va. 664, 90 S. E. 105 (1916) (authority of Supreme Court of Appeals to review proceedings of Public Service Commission is purely statutory).

circuit courts in the county in which a party or the administrative agency is located; (2) the Circuit Court of Kanawha County by virtue of its location in the county in which the state capitol is situated; or (3) the Supreme Court of Appeals. Counsel should be cautioned that appeal periods vary from agency to agency and may be anywhere from thirty days to four months. Therefore, counsel is advised to refer to the specific enabling statutes of the pertinent agency as well as the West Virginia Code of State Rules and regulations pertaining to the agency.

Appeal lies to the Circuit Court of Kanawha County or other circuit courts from various types of administrative tribunals such as the Board of Review of Employment Security Commission, which reviews decisions of administrative law judges on claimant eligibility or qualification for unemployment compensation benefits;[10] the Commissioner of the Division of Motor Vehicles, who handles license suspensions and revocations;[11] and the Tax Commissioner, who hears appeals of tax assessments.[12]

Additionally, there are administrative tribunals from which a direct appeal lies to the Supreme Court of Appeals. These include the Workers' Compensation Board of Review, which reviews decisions of administrative law judges on claims for workers' compensation benefits;[13] the Public Service Commission, which reviews decisions of hearing examiners in proceedings involving the regulation of public utilities, common carriers and related industries;[14] and the Human Rights Commission, which reviews decisions of hearing examiners in proceedings involving charges of discrimination.[15] Appeal from these administrative tribunals must be taken within thirty days.

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[10]*See* W. Va. Code § 21A-7-17 (judicial review by circuit court of Kanawha county); W. Va. Code § 21A-7-27 ("The judgment of the circuit court shall be final unless reversed, vacated or modified on appeal to the supreme court of appeals in accordance with the provisions of section one, article six, chapter twenty-nine-a of this code.").

[11]*See* W. Va. Code, § 17C-5A-2 (providing for "judicial review as set forth in [the Administrative Procedures Act,] chapter twenty-nine-a of this code."); W. Va. Code, § 29A-5-4 (judicial review of contested cases); W. Va. Code § 29A-6-1 ("Any party adversely affected by the final judgment of the circuit court under this chapter may seek review thereof by appeal to the supreme court of appeals of this state, and jurisdiction is hereby conferred upon such court to hear and entertain such appeals upon application made therefor in the manner and within the time provided by law for civil appeals generally.").

[12]*See* W. Va. Code § 11-10-10 (governing appeals of administrative decisions of tax commissioner).

[13]*See* W. Va. 23-5-15 and W. Va. R. App. P. 13A.

[14]*See* W. Va. Code § 24-5-1.

[15]*See* W. Va. Code 5-11-11.

C. APPELLATE REVIEW OF FAMILY COURT DECISIONS.

Rule 13B of the Rules of Appellate Procedure provides the process for appealing a final order of a family court directly to the Supreme Court of Appeals and for transferring a family court appeal in the circuit court to the Supreme Court of Appeals. For a direct appeal under subsection (a), the parties have only 14 days after entry of a final order to file with the circuit clerk a notice of intent to appeal directly to the Supreme Court of Appeals and waiver of their right to appeal to the circuit court. The notice and waiver can be jointly or separately filed, but it must be the same or substantially similar to the form contained in Appendix A of the Rules of Practice and Procedure for Family Court. Subsection (b) addresses the procedure for transferring a family court appeal from a circuit court that has failed to timely enter an order. For the specific requirements in both cases, counsel is advised to refer to Rule 13B of the Rules of Appellate Procedure, the Rules of Practice and Procedure for Family Court, and any applicable statutory provisions.

II. APPELLATE PROCEDURE IN WEST VIRGINIA.

Because there is no intermediate appellate court in West Virginia, appellate procedure in this State is relatively straightforward. This section of the chapter will focus on the West Virginia Rules of Civil Procedure, West Virginia Rules of Criminal Procedure, the West Virginia Administrative Procedures Act, and the West Virginia Rules of Appellate Procedure, and will also provide a discussion of original jurisdiction procedure before the Supreme Court of Appeals.

A. RULES OF CIVIL PROCEDURE.

1. Final Judgment.

Pursuant to Rule 72 of the West Virginia Rules of Civil Procedure, "[t]he full time for filing a petition for 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 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." When none of these motions is made or timely made, the time for appeal is computed from the entry of judgment.[16]

Rule 54(a) of the West Virginia Rules of Civil Procedure defines the term "judgment" as a "decree and any order from which an appeal lies." Rule 58 of the West Virginia Rules of Civil Procedure directs circuit courts to "promptly settle or approve the form of the judgment and sign it as authority for entry by the clerk." The signature does not constitute

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[16] *See Sothen v. Continental Assurance Co.*, 147 W. Va. 458, 128 S.E.2d 458 (1962); *West Virginia Department of Energy v. Hobet Mining & Construction Co.*, 178 W. Va. 262, 358 S.E.2d 823 (1987).

entry of judgment. Instead, Rule 58 provides that "[t]he clerk, forthwith upon receipt of the signed judgment, shall enter it in the civil docket.... The notation of a judgment in the civil docket . . . constitutes the entry of the judgment; and the judgment is not effective before such entry." The failure of a circuit clerk to notify the parties of entry of judgment does not extend the time for appeal.[17]

2. Interlocutory Orders.

Interlocutory orders cannot be appealed to the Supreme Court of Appeals except in those cases warranted by W. Va. Code § 58-5-1 which has been incorporated into Rule 54(b) of the West Virginia Rules of Civil Procedure.[18] This code section provides that "[a] party to a civil action may appeal to the Supreme Court of Appeals... from an order of any circuit court constituting a final judgment as to one or more but fewer than all claims or parties upon an express determination by the circuit court that there is no just reason for delay and upon an express direction for the entry of judgment as to such claims or parties." Whether an order is interlocutory or final in nature or appealable is a legal issue that must be researched and determined by counsel. Generally speaking, however, it is an appeal from a final order that brings up for review all interlocutory orders in an action.[19]

3. Post-Verdict Motions.

a. Motion for Judgment Notwithstanding the Verdict. Following entry of judgment by the circuit clerk under Rule 58 of the West Virginia Rules of Civil Procedure, a party wishing to challenge the judgment may file a motion for judgment as a matter of law under Rule 50(b) of the West Virginia Rules of Civil Procedure. This motion must be filed within 10 days. In order to request the Rule 50(b) motion, the party must have moved for a directed verdict at the close of all evidence. In ruling on a renewed motion when a verdict was returned, Rule 50(b)(1) provides that the trial court may allow the judgment to stand, order a new trial, or direct entry of judgment as a matter of law. In ruling on a renewed motion when no verdict was returned, Rule 50(b)(2) provides that the trial court may order a new trial or direct entry of judgment as a matter of law.

Additionally, under Rule 50(b), a party may alternatively request a new trial or join a motion for new trial under Rule 59 of the West Virginia Rules of Civil Procedure. If a trial court grants a renewed motion for judgment as a matter of law that was joined with an alternative request or motion for new trial, Rule 50(c)(1) provides that the trial court must also conditionally rule on the motion for new trial in the event its grant of judgment as a matter of law is subsequently vacated or reversed on appeal. Otherwise, if entry of judgment as a matter of law is reversed, the Supreme Court of Appeals may reinstate the

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[17]*See Sothen v. Continental Assurance Co.*, 147 W. Va. 458, 128 S.E.2d 458 (1962).

[18]*See Kanawha Lodge v. Swann*, 37 W. Va. 176, 16 S. E. 462 (1892).

[19]See *Watson v. Wigginton*, 28 W. Va. 533, 1886 WL 1837 (1886).

jury's verdict and enter judgment, order a new trial, or remand the case to the trial court to consider the motion for new trial.[20]

b. Motion for Amendment of Judgment. A judgment may also be challenged under Rule 52(b) of the West Virginia Rules of Civil Procedure which allows amendment of judgment. Under Rule 52(b), "[u]pon a party's motion filed not later than 10 days after entry of judgment the court may amend its finding or make additional findings and may amend the judgment accordingly." Rule 52(b) further provides that this motion may be made independently or may be made with a motion for new trial pursuant to Rule 59 of the West Virginia Rules of Civil Procedure. The purpose of Rule 52(b) is to give the trial court "an opportunity to correct manifest errors of law or fact at trial, or in some limited situations, to present newly discovered evidence."[21] The purpose of the rule is not "to allow the parties to relitigate old issues, to advance new theories, or to rehear the merits of a case."[22]

c. Motion to Alter/Amend Judgment or for New Trial. Judgments may also be challenged under Rule 59 of the West Virginia Rules of Civil Procedure on a motion to alter or amend a judgment or a motion for a new trial. The rule covers grounds for new trial, time for motion, time for filing affidavits, on initiative of court, motion to alter or amend judgment, and the effect of failure to move for new trial.[23] Consistent with motions under Rules 50(b) and 52(b), a motion for new trial under Rule 59(b) or to alter or amend judgment under Rule 59(e) must be filed within 10 days after entry of judgment.

A motion for new trial may be joined with a motion under Rules 50(b) or 52(b), or can be filed independently of either motion. Failure to file a motion for new trial does not automatically preclude appeal. Counsel should be cautioned, however, that Rule 59(f) provides, in pertinent part: "If a party fails to make a timely motion for a new trial . . . the party is deemed to have waived all errors occurring during the trial which the party might have assigned as grounds in support of such motion . . . ." An important exception to this presumption is that "if a party has made a motion under Rule 50(b) for judgment in accordance with the party's motion for judgment as a matter of law and such motion is denied, the party's failure to move for a new trial is not a waiver of error in the court's denying or failure to grant such motion for judgment as a matter of law." W. Va. R. Civ. P. 59(f). Clearly, it is advisable to file a joint motion under all three rules, 50(b), 52(b) and 59,

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[20] *See McClung v. Marion County Comm'n*, 178 W. Va. 444, 360 S.E.2d 221 (1987).

[21] *United States v. Local 1804-1, Int'l Longshoremen's Ass'n*, 831 F. Supp. 167 (S. D. N. Y. 1993).

[22] *Diebitz v. Arreola*, 834 F. Supp. 298 (E. D. Wis. 1993).

[23] *See also* W. Va. Code § 56-6-28 as to new trials.

in order to avoid any question regarding waiver. Rule 59(f) has no application, however, to actions tried by a court without a jury.[24]

A motion to alter or amend judgment should not be designated as a motion to "reconsider", "vacate", "set aside", or any other label other than a Rule 59(e) motion to alter or amend judgment. Otherwise, the motion may be treated as either a Rule 59(e) motion to alter or amend judgment, which tolls the appeal period, or a Rule 60(b) motion for relief from judgment, which does not toll the appeal period. If the motion is filed within 10 days after entry of judgment, the motion should be treated as a Rule 59(e) motion to alter or amend judgment. If the motion is filed outside the 10 day limit, it can only be addressed as a Rule 60(b) motion for relief from judgment.[25] Additionally, a motion to alter or amend judgment as to fewer than all of the claims adjudicated tolls the appeal period only for the claims contained in the Rule 59(e) motion.[26]

d. Motion for Relief from Judgment. In addition to the motions described more particularly above, a party may seek relief from judgment under Rule 60(b) of the West Virginia Rules of Civil Procedure. Under Rule 60(b), relief from judgment may be obtained if "made within a reasonable time" and "not more than one year after the judgment, order, or proceeding was entered or taken" if relief from judgment is for mistake, inadvertence, surprise, excusable neglect, unavoidable cause, newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b), fraud, misrepresentation, or misconduct. Counsel should be cautioned that a Rule 60(b) motion does not toll the appeal period.[27] The purpose of Rule 60(b) is not to allow the parties to reargue facts and theories upon which a court has already ruled.[28] Additionally, an appeal from a denial of a Rule 60(b) motion raises only the issue of the propriety of such denial, and does not question the underlying judgment.[29]

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[24]*Mahoney v. Walter*, 157 W. Va. 882, 205 S.E.2d 692 (1974).

[25]*See Powderidge Unit Owners Ass'n v. Highland Properties, Ltd.*, 196 W. Va. 692, 474 S.E.2d 872 (1996); *Savage v. Booth*, 196 W. Va. 64, 468 S.E.2d 318 (1996).

[26]*See Kentucky Fried Chicken of Morgantown, Inc. v. Sellaro*, 158 W. Va. 708, 214 S.E.2d 823 (1975); *Dixon v. American Industrial Leasing Co.*, 157 W. Va. 735, 205 S.E.2d 4 (1974).

[27]*See Riffe v. Armstrong*, 197 W. Va. 626, 477 S.E.2d 535 (1996).

[28]*Powderidge Unit Owners Ass'n v. Highland Properties, Ltd.*, 196 W. Va. 692, 474 S. E. 2d 872 (1996).

[29]*Toler v. Shelton*, 157 W. Va. 778, 204 S.E.2d 85 (1974).

4. Extraordinary Remedies.

The Supreme Court of Appeals exercises its appellate jurisdiction over circuit court extraordinary remedy rulings in the same manner as any other appellate review of circuit court action.

5. Notice of Appeal.

In civil cases, there is no requirement for filing of a notice of appeal. The actual filing of a petition for appeal, not a notice of appeal, tolls the running of the appeal period. An exception is family court cases under Rule 26 of the Rules of Practice and Procedure for Family Court. Within fourteen days after entry of a final order, both parties must either jointly or separately file a notice of intent to appeal and waiver of right to appeal to the circuit court if they wish to appeal directly to the Supreme Court of Appeals. If only one of the parties files a notice and waiver, any petition for appeal filed will be treated as a petition for appeal to the circuit court.

6. Designation of Record.

Rule 73(a) of the West Virginia Rules of Civil Procedure was adopted on June 26, 1990, in order to expedite the appellate process. Prior to that time, the designation of record was not filed with the circuit clerk until the petition for appeal was filed, frequently delaying preparation of the record for transmittal. Under Rule 73(a), the petitioner must, at the time of filing a petition for appeal, "designate by itemization to the clerk of the circuit court such pleadings, orders and exhibits . . . to enable the Supreme Court of Appeals to decide the matters arising in the petition." Although common practice is to designate the entire record, counsel is advised to limit designation of the record to those portions relevant to the issues to be presented on appeal.

7. Preparation of the Transcript.

Under Appendix B (II)(B) of the West Virginia Rules of Appellate Procedure, the petitioner must, within 30 days of judgment or order, "request from the court reporter such transcript of the proceedings as he or she deems necessary using the Appellate Transcript Request form approved by the Supreme Court of Appeals." The petitioner must obtain from the court reporter an estimate of the length of transcripts and make appropriate financial arrangements with the court reporter. The petitioner may satisfy this requirement "(1) by immediate payment in full or by another payment arrangement acceptable to the court reporter; [or] (2) by filing, in appropriate cases, an affidavit of indigency with the circuit clerk's office." Once the arrangements have been made, "[p]ayment or acknowledgment of financial arrangements satisfactory to the court reporter must accompany the court reporter's copy of the Appellate Transcript Request." For each court reporter from whom a transcript is requested, a petitioner is obligated to complete an Appellate Transcript Request, retain a copy, and send copies to the Clerk of the Supreme Court of Appeals, the respondent, the circuit clerk, and the court reporter.

Under Appendix B (II)(C), if a transcript or parts of a proceeding are not designated by the petitioner but deemed necessary, the respondent may ask the court reporter to prepare the transcript in the same manner as required of the petitioner. If the respondent wants a copy of a transcript which has been requested by the petitioner, he or she should ask the court reporter for a copy and satisfy the necessary financial arrangements before obtaining the copy. The petitioner has no obligation to request or pay for a copy of a transcript for respondent.

Upon receipt of the Appellate Transcript Request form by the Supreme Court of Appeals, the due date is calculated at 45 days from the court reporter's receipt of the order, and the information is placed in a computer program for tracking the production of transcripts. If the transcript cannot be completed within 45 days of the receipt of the order, the court reporter shall request an extension of time from the Clerk, and the action of the Clerk is entered on the docket and the parties notified.

B. RULES OF CRIMINAL PROCEDURE.

1. Post-Verdict Motions.

a. Motion for Judgment of Acquittal. Judgments in criminal cases may be challenged by post-trial motions similar to civil judgments. Rule 29(c) of the West Virginia Rules of Criminal Procedure provides that "[i]f the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within ten days after the jury is discharged or within such further time as the court may fix during the ten-day period." If a verdict of guilty is returned, the court may set aside the verdict or enter judgment of acquittal. If no verdict is returned, the court may enter judgment of acquittal. The rule further provides that "[i]t shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury."

b. Motion for New Trial. Rule 33 of the West Virginia Rules of Criminal Procedure provides another way of challenging a criminal conviction by filing a motion for a new trial. The rule provides that "[t]he court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice." A motion for new trial under Rule 33 may "be made only after final judgment" if it is based upon newly discovered evidence. If, however, the "appeal is pending the court may grant the motion only on remand on the case." Under Rule 33, a motion for new trial based upon any other ground "shall be made within ten days after verdict or finding of guilt or within such further time as the court may fix during the ten-day period."

2. Sentence and Judgment.

Before entering a judgment in a criminal case, the trial court must impose a sentence upon the defendant. Although Rule 32(a) of the West Virginia Rules of Criminal Procedure states that "[s]entence shall be imposed without unreasonable delay," there is no specific

time limitation provided in the rule. Pursuant to Rules 32(b)(1)(A), (B), and (C), a presentence report must be prepared, unless it is waived by the defendant, or unless there is a determination by the court that it is unnecessary in light of sufficient information in the existing record. Under Rule 32(b)(6)(A), the defendant and his counsel must be furnished copies of the presentence report prior to the sentencing hearing. Under Rule 32(c)(3)(B), counsel must be given an opportunity to speak on behalf of the defendant. Further, under Rule 32(c)(3)(C), the defendant must be given an opportunity to make a statement in his or her own behalf and to present any information in mitigation of punishment. Of course, all of these events may operate to delay the imposition of sentencing. When sentence is finally imposed, however, Rule 32(d)(1) provides that "[a] judgment of conviction," setting forth the plea, verdict or findings, and the adjudication and sentence, must be signed by the judge and entered by the clerk.

3. Notice of Intent to Appeal.

After post-trial motions have been denied and a sentence has been imposed, the appeal process begins. Unlike appellate practice in civil cases, a "notice of appeal" is required in criminal cases. Rule 37(b)(1) of the West Virginia Rules of Criminal Procedure requires that a notice of intent to appeal must be filed within 30 days after the entry of the judgment, decree or other order appealed from.[30]

The notice of intent to appeal must contain information concerning: (1) the party or parties taking the petition; (2) the judgment, decree or order or part thereof appealed from; (3) the name of the court from which the petition is taken; (4) the pleadings, orders and exhibits designated to enable the appellate court to decide the matters raised; and, (5) the grounds for appeal.

4. Designation of Record.

Designating the record on appeal in criminal cases is almost identical to the process in civil cases. Under Rule 37(a) of the West Virginia Rules of Criminal Procedure, the petitioner must, in his notice of appeal filed within 30 days of judgment, "designate by itemization such pleadings, orders and exhibits to enable the Supreme Court of Appeals to decide the matters raised . . . ." This earlier designation allows the circuit court to prepare the record in advance of the petition for appeal in order to expedite its transmittal of the Supreme Court of Appeals. Petitioners often designate the entire record as a common practice; however, counsel should be advised that the petitioner should ordinarily limit designation to portions of the record that are relevant to the issues presented on appeal.

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[30] *See also* W. Va. R. Civ. P. 3(b) ("No petition from a criminal case shall be presented unless a notice of intent to appeal shall have been filed with the clerk of the court in which the judgment or order was entered within thirty days from the entry of such judgment or order. The notice of intent to appeal shall concisely state the grounds for appeal.")

5. Preparation of the Transcript.

As set forth more particularly above, the petitioner in a criminal case must include a designation of the record in the notice of intent to appeal, which is to be filed within 30 days of judgment. Similarly, the notice of intent to appeal must be accompanied by an Appellate Transcript Request which contains a certification that satisfactory financial arrangements have been made with the reporter for payment of the cost of transcript. The procedure for requesting, preparing and filing transcripts is the same as in civil appeals under Appendix B of the West Virginia Rules of Appellate Procedure. Pursuant to Appendix B (II)(B)(3), the petitioner must distribute copies of the Appellate Transcript Request form to the Clerk of the Supreme Court of Appeals, to the respondent, to the circuit clerk, to the court reporter, and retain possession of the final copy. It is necessary to prepare a separate Appellate Transcript Request form for each court reporter from whom a transcript is requested.

6. Time for Presentation of Petition for Appeal.

Rule 37(b)(3) of the West Virginia Rules of Criminal Procedure provides that "[a] petition for appeal must be filed with the clerk of the circuit court where the judgment . . . was entered within four months of the entry of the circuit court order."

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 37(b)(3) further provides that "[t]he 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."

C. ADMINISTRATIVE PROCEDURES ACT.

1. Appellate Review by Circuit Courts.

In the absence of specific statutory language to the contrary, appellate review of decisions by administrative agencies under the Administrative Procedures Act (APA) is controlled by W. Va. Code § 29A-5-4(b). The statute provides:

> Proceedings for review shall be instituted by filing a petition, at the election of the petitioner, in either the Circuit Court of Kanawha County, West Virginia or in the circuit court of the county in which the petitioner or any one of the petitioners resides or does business, or with judge thereof in vacation, within thirty days after the date upon which such party received notice of the final order or decision of the agency.

A copy of the petition must be served by registered or certified mail upon the agency and all other parties of record. The statute further provides that, after receipt of the copy of the petition, the agency shall transmit the entire record of the proceeding under review to the circuit court within 15 days, or within such further time as the court may allow. Although judicial review of administrative proceedings under the APA are generally limited to the record made before the agency, W. Va. Code § 29A-5-4(f) provides that additional testimony may be taken "in cases of alleged irregularities in procedure before the agency." This code section further provides that "[t]he court may hear oral arguments and require written briefs."

There are no requirements regarding the time within which appellate review of administrative decisions must be completed. There are no time requirements, other than the 30 day period to file a petition for appeal after a party receives notice of a final agency decision and the 15 day period within which an agency must transmit a record to a circuit court. The expense of preparing a record is to be made part of the costs of an appeal, for which an appellant must provide security for costs satisfactory to the court. In circuit courts with already crowded civil and criminal dockets, there is a potential for substantial delay in reviewing administrative decisions. Following the conclusion of proceedings in circuit court, an appeal lies in the Supreme Court of Appeals.

2. Appellate Review by Supreme Court of Appeals.

Pursuant to W. Va. Code § 29A-6-1, "[a]ny party adversely affected by the final judgment of a circuit court under this chapter may seek review thereof by appeal to the supreme court of appeals of this state . . . . " The statute further provides that "jurisdiction is hereby conferred upon such court to hear and entertain such appeals upon application made therefor in the manner and within the time periods provided by law for civil appeals generally." Thus, the policy served by the relative short 30 day appeal period to circuit court seems to be somewhat defeated by the 4 month appeal period to the Supreme Court of Appeals. Circuit court review of administrative decisions is generally limited to the record made before the agency; therefore, there is no need to allow for preparation of a lengthy transcript.

D. RULES OF APPELLATE PROCEDURE.

1. Introduction.

After post-trial motions and preparation of the transcript, the procedure for petitioning for appeal in both civil and criminal cases is virtually identical. As noted more particularly in previous sections of this chapter, there is no right of appeal in the Supreme Court of Appeals. The Supreme Court of Appeals' jurisdiction, both original and appellate, is entirely discretionary. Therefore, a petition for appeal must be granted prior to full appellate review.

Again, the chapter is abbreviated, so counsel is advised in all instances to consult the West Virginia Rules of Appellate Procedure, the state rules of civil and criminal procedure, and relevant state statutory and constitutional provisions.

2. Time for Filing.

The time for filing a petition for appeal in both civil and criminal actions is governed by W. Va. Code § 58-5-4 which is incorporated into Rule 3 of the West Virginia Rules Appellate Procedure. Rule 3(a) provides that "[n]o petition shall be presented for an appeal from, or a writ of supersedeas to, any judgment, decree or order, which shall have been rendered more than four months before such petition is filed in the clerk of the circuit court where the judgment, decree or order being appealed was entered . . . ." Failure to file a timely petition for appeal presents a jurisdictional infirmity that has been consistently held to preclude the Supreme Court of Appeals from accepting the appeal.[31]

Rule 3(a) further provides that the judge of the circuit court may extend and re-extend the appeal period, not to exceed a total extension of two months. Counsel should be cautioned, however, that the authority of the trial judge to grant a two-month extension under Rule 3(a) is conditioned upon a request for the transcript within thirty days of the judgment, decree, or order from which the appeal is sought.

Additionally, Rule 16(b) of the West Virginia Rules of Appellate Procedure provides that the Supreme Court of Appeals may, for good cause shown, suspend or enlarge the time within which a party may file a petition for appeal.[32] Where the Legislature has prescribed time limitations for appealing specific statutory claims, however, those limitations are exclusive and cannot be enlarged by the Supreme Court of Appeals.[33]

3. Petition for Appeal.

The form for the petition for appeal is set forth in Rule 3(c) of the West Virginia Rules of Appellate Procedure,[34] which provides that the petition must state the following in the order indicated: (1) the kind of proceeding and nature of the ruling in the lower tribunal; (2) a statement of the facts of the case; (3) the assignments of error relied upon

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[31]*See Roberts v. Consolidation Coal Co.*, 208 W. Va. 218, 539 S.E.2d 478 (2000); *Riffe v. Armstrong*, 197 W. Va. 626, 477 S.E.2d 535 (1996); *Coonrod v. Clark*, 189 W. Va. 669, 434 S.E.2d 29 (1993).

[32]*See First Nat. Bank of Bluefield v. Clark*, 181 W. Va. 494, 383 S.E.2d 298 (1989), *overruled on other grounds, Coonrod v. Clark*, 189 W. Va. 669, 434 S.E.2d 29 (1993).

[33]*See West Virginia Dept. Of Energy v. Hobet Min. and Const. Co.*, 178 W. Va. 262, 358 S.E.2d 823 (1987).

[34]W. Va. Code § 58-5-3 ("A party desiring to appeal . . . may file a petition in accordance with Rules of Appellate Procedure promulgated by the Supreme Court of Appeals.").

on appeal and the manner in which they were decided in the lower tribunal; and (4) points and authorities relied upon, a discussion of law, and the relief prayed for. The petition cannot exceed 50 pages, including any addendum, but excluding the docketing statement (Appendix A), and Rule 28 of the West Virginia Rules of Appellate Procedure governs requirements such as paper size, format, spacing, cover page, and caption.

The Supreme Court of Appeals has determined that failure to assign non-jurisdictional error constitutes waiver.[35] An assignment of error contained in the petition, but not argued in a subsequent brief, also constitutes waiver.[36]

4. Filing of Petition.[37]

a. Filing With Transcript.[38] Petitions for appeal in civil and criminal cases are not filed directly with the Supreme Court of Appeals. Rule 4 of the West Virginia Rules of Appellate Procedure requires that an original and 9 copies of the petition for appeal, a memorandum of parties and counsel, and designation of items in the trial court record, be filed with the clerk of the circuit court in which judgment was entered. Rule 4(a) now requires that "a docketing statement (Appendix A) shall be attached to the face of the original petition and each of the copies." Appendix B provides guidelines for the preparation of appellate transcripts in West Virginia courts.

Although there is no filing fee required, under Rule 4(d) of the West Virginia Rules of Appellate Procedure, the clerk of the circuit court may require the payment of costs associated with (1) preparing and indexing the record; (2) statutory fees for the filing of the petition and certifying orders; (3) postage costs for transmission and return of the record; and, (4) transcription costs. But fees for transcription of testimony are almost always handled directly through the court reporter. Once the record has been completed and costs have been paid, the circuit clerk transmits the original and eight copies of the petition for appeal in the trial court record to the Supreme Court of Appeals.

b. Filing Without Transcript. Although the West Virginia Rules of Appellate Procedure clearly favor preparation of the trial transcript, Rule 4A provides that "[i]n order to provide an inexpensive and expeditious method of appeal, a petitioner may file his petition without the transcript of testimony taken in the lower court." The

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[35]*Lilly v. Taylor*, 151 W. Va. 730, 155 S.E.2d 579 (1967).

[36]*Higginbotham v. City of Charleston*, 157 W. Va. 724, 204 S.E.2d 1 (1974) *overruled on other grounds, O'Neil v. City of Parkersburg*, 160 W. Va. 694, 237 S.E.2d 504 (1977).

[37]W. Va. Code § 58-5-6 ("Petitions for appeal shall be filed and processed in accordance with rules of appellate procedure promulgated by the Supreme Court of Appeals.").

[38]W. Va. Code § 58-5-7 ("The contents of the transcript of record shall be governed in accordance with rules of appellate procedure promulgated by the Supreme Court of Appeals.").

procedure under Rule 4A, however, is different in some respects. The appeal period under Rule 4A is only 60 days from judgment. Moreover, the petition must include a certification by the petitioner's attorney that the facts alleged are "faithfully represented and that they are accurately presented to the best of his ability." Intentional misrepresentation is grounds for disciplinary action. As with any other petition for appeal, a petition under Rule 4A must be served upon opposing parties to afford them an opportunity to file a written response, but they are not permitted to appear at any oral presentation.

5. Service of Petition.

Rule 3(e) of the West Virginia Rules of Appellate Procedure provides: "The petition for appeal shall be served in accordance with Rule 15." Accordingly, all petitions for appeal, including those from administrative bodies, must be served by hand delivery or mail upon the opposing counsel or party, depending on whether the party is represented by an attorney, and must contain a certificate of service. If no appearance has been made by a party, either in the appeal or in the underlying action from which the appeal is taken, no service is necessary.

6. Response to Petition.

If the appeal is from a judgment, order, or decree of a circuit court, a respondent has the opportunity to file, pursuant to Rule 3(f) of the West Virginia Rules of Appellate Procedure, an original and 9 copies of a response with the Clerk of the Supreme Court of Appeals. The response must be filed within 30 days of the filing of the petition, a copy served on each party to the appeal, and cannot exceed 50 pages, including any addendum.

7. Reply to Response to Petition.

Rule 3(g) of the West Virginia Rules of Appellate Procedure expressly provides: "**No** reply to a response to a petition for appeal shall be filed." (emphasis added).

8. Oral Presentation of Petition.

Under Rule 5(a) of the West Virginia Rules of Appellate Procedure "[i]f desired, counsel for the petitioner or a petitioner unrepresented by counsel shall request oral presentation of the petition in the docketing statement filed with the petition." Unless otherwise provided by law, oral presentations are allowed only at the Supreme Court of Appeals' discretion. Once a request for oral presentation is granted, the Clerk's office schedules a date for oral presentation. Pursuant to Rule 5(d), "[u]pon receipt of notice from the Clerk's office as to the date set for oral presentation, counsel for the petitioner or a petitioner unrepresented by counsel shall provide written notice of such date to all counsel of record and to all parties unrepresented by counsel."

On December 31, 1990, the Supreme Court of Appeals amended Rule 5(a) of the West Virginia Rules of Appellate Procedure to provide that "[o]ral presentation will not be

heard, except upon motion for good cause shown, prior to expiration of the period allowed for filing a response as provided in Rule 3(f)." Under Rule 3(f), the respondent has 30 days after a petition is filed with the circuit clerk to file a response with the Clerk of the Supreme Court of Appeals. Accordingly, oral presentation may not be scheduled on a date earlier than 30 days after the filing of the petition. For example, if a petition for appeal is filed in the circuit clerk's office on January 1, oral presentation may be scheduled on a motion docket on or after January 31st.

Generally, motion dockets are scheduled for six to seven days in January and September, three to four days in May, and one day in each of the remaining nine months, usually the first Tuesday, except in August when the Supreme Court of Appeals is in recess. Although a written response to a petition for appeal may be filed under Rule 3(f), opposing counsel is not permitted oral presentation in response to the petition for appeal.

Rule 5(b) provides that "[o]ral presentation shall be limited to ten minutes, unless additional time is granted by the court." Generally, oral presentation of a petition on the motion docket averages about six minutes, almost never exceeding the allotted ten minutes. Petitions are circulated to the justices for review approximately one week prior to argument on the motion docket. Ordinarily, the record and transcript are not reviewed, rather reliance is made upon the factual representations of counsel. Review by the justices of the facts and issues presented in the petition reduces the need for detailed oral presentation. The primary purpose of oral presentation on the motion docket is to afford the Supreme Court of Appeals an opportunity to inquire regarding any matters which may not be discerned from a reading of the petition. Usually, if there are no questions, the statement by the Chief Justice or one of the other Justices that "[w]e understand your case," signals the end of the oral presentation. The Supreme Court of Appeals will usually render decisions on petitions presented orally on either the same or the next day. At times, independent analysis by one of the Court's staff attorneys called "writ clerks," may be desired. In such a case, the petition and record are forwarded for review and presented at a conference at a later date.

Under Rule 5(c), counsel may elect to waive oral presentation. This may be done in writing, by telephone, or by failing to request oral presentation within 30 days. Once oral presentation is waived, the petition and record are forwarded to one of the writ clerks, whose function is to review petitions and to make oral presentations to the entire Supreme Court of Appeals in chambers.

In addition to cases which are referred to the writ clerks from the motion docket or due to waiver of oral presentation, all *pro se* cases, including habeas corpus petitions filed by prisoners, and all workers' compensation appeals, for which oral presentation is precluded except upon a showing of good cause, are referred directly to writ clerks. The writ clerks conduct a thorough review of the petition, record, and transcript prior to presentation of periodic conferences. These "writ conferences" at which presentations are made, generally occur on a bi-weekly basis.

9. Rejection or Allowance of Appeal.

a. Reapplication Upon Rejection. If the Supreme Court of Appeals initially rejects a petition for appeal, all may not necessarily be lost. Rule 7 of the West Virginia Rules of Appellate Procedure allows reapplication if two criteria are met: (1) that the respective petitions be filed during the period prescribed by law for presentation of petitions (the second application can only be made if the appeal period has not expired); and (2) a petitioner desiring to renew his petition should notify the clerk of his intention in writing within 30 days after the entry of the order denying his original application. Although the rule requires request for reapplication, oral requests within the period are allowed. Rule 7(b) allows the petitioner to file "an amended petition or supplemental argument." Generally, reapplications are made on the original petition.

b. Allowance of Appeal. If a petition for appeal is granted, a copy of the Supreme Court of Appeals' order is mailed to petitioner's counsel, the clerk of the circuit court, and counsel of record to all parties to the underlying proceeding. Under Rule 7(c)(2) of the West Virginia Rules of Appellate Procedure, the record is returned to the circuit clerk for designation of the record on appeal.

10. Stay of Proceedings Pending Appeal.

Rule 6 of the West Virginia Rules of Appellate Procedure allows the Supreme Court of Appeals to enter stays of execution of judgment pending appeal.[39] Rule 6(a) presumes that the applicant will initially apply for this stay to the "circuit court in which the judgment or order desired to be appealed was entered."[40] Under Rule 6(b), a circuit court is required to grant a stay in a criminal case.[41] Otherwise, a motion for stay of judgment pending appeal in a civil case is addressed to the sound discretion of the circuit court. A circuit court may grant a stay of execution for less than the statutory four-month appeal period. Such authority is used by circuit judges occasionally to shorten the appeal period in order to expedite final case disposition. Unless modified by the circuit court or the Supreme Court

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[39]W. Va. Code § 58-5-5 ("A petition for stay of proceedings pending appeal . . . shall be filed and processed in accordance with rules of appellate procedure promulgated by the Supreme Court of Appeals.").

[40]*See also* W. Va. R. Civ. P. 62(a) ("Except as stated herein, no writ of execution shall issue upon a judgment nor shall other proceedings be taken for its enforcement until the expiration of 10 days after its entry, unless otherwise ordered by the court, nor after that time pending the disposition of a motion for judgment as a matter of law made pursuant to Rule 50 or of a motion for a new trial made pursuant to Rule 59(a)."); W. Va. R. Civ. P. 62(i) ("On motion and on such conditions for the security of the adverse party as are proper, the court may stay the issuance of execution upon a judgment and any other proceedings for its enforcement for such reasonable time, to be specified by the court in the stay order, as will enable the moving party to present to an appellate court a petition for appeal from the judgment.").

[41]*See also* W. Va. Code § 62-7-1.

of Appeals, however, the stay is effective "for the period prescribed by law for presentation of the petition for appeal" and "for any additional period after an appeal has been allowed pending final disposition of the appeal."

Under Rule 6(c), "[i]f 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." The applicant is required "to show the reasons assigned by the circuit court for denying a stay or other relief, and further show the reason for the relief requested and the grounds for the underlying appeal." The application must be supported by affidavits or other sworn statements if the facts are disputed as well as filed with such parts of the record that are relevant.

11. Bonds or Other Security Preserving Rights Pending Appeal.

In order to secure a judgment rendered in circuit court, Rule 6(d) provides that the award of a stay pending appeal "**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"[42] and that "[t]he provisions of W. Va. Code § 58-5-14, are applicable." Until 2007, W. Va. Code § 58-5-14(a) provided, "When required by the court, an appeal ***shall*** not take effect until bond is given...."[43] This statute now provides, "When required by the court, an appeal ***may*** not take effect until bond is given by the appellants or petitioners...."[44]

One of the goals of the amendment to W. Va. Code § 58-5-14 was to make clear that a supersedeas or appeal bond is discretionary, not mandatory.[45] For example, where a judgment debtor has sufficient assets to satisfy a judgment, a circuit court may exercise its discretion to grant a stay of such judgment without requiring any security.[46] A circuit court

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[42](emphasis added).

[43](emphasis added).

[44](emphasis added).

[45]*See also* Fed. R. App. P. 7 ("In a civil case, the district court may require an appellant to file a bond or provide other security in any form and amount necessary to ensure payment of costs on appeal. Rule 8(b) applies to a surety on a bond given under this rule."); *Lundy v. Union Carbide Corp.*, 598 F. Supp. 451, 452 (D. Or. 1984)("The requirement of an appeal bond under Appellate Rule 7 is left to the discretion of the district court.").

[46]*See* 5 Am. Jur. 2d *Appellate Review* § 429 (2007)("A district court does not abuse its discretion in granting a party's motion for stay of execution of judgment, pending disposition of post-trial motions and appeal, without requiring a supersedeas bond, where the party's annual revenue indicates that it has the ability to pay the judgment, such that the cost of the bond would be a waste of money.")(footnote omitted); *Northern Indiana Public Service v. Carbon County Coal*, 799 F.2d 265 (7th Cir. 1986)(waiving the requirement of bond pending appeal where the appellant was a

may also permit "other appropriate security" in the form of a letter of credit which is an acceptable form of security for a stay of judgment pending appeal.[47] A letter of credit is the functional equivalent of a supercedeas bond[48] but usually costs much less to maintain than paying a supersedeas bond premium. And counsel should be cautioned that this is an issue that not only affects a judgment debtor, but also a judgment creditor who subsequently loses on appeal. Like most jurisdictions, the costs of appeal are taxed against the losing party and such costs include, under Rule 23(e), "the premiums paid for the cost of supersedeas bonds or other bonds to preserve rights pending appeal[.]"

If a circuit court requires an appeal bond, the bond is ordinarily the amount of the judgment and any projected post-judgment interest. Although a circuit court has the authority to stay the execution of judgment pending appeal requiring no or only limited security,[49] a circuit court has no jurisdiction to prescribe the terms of any supersedeas or appeal bond except as provided by W. Va. Code § 58-5-14.[50] W. Va. Code § 58-5-14(b) provides,"Except for bonds required under section four, article eleven-a, chapter four of this

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solvent public utility, with net worth well in excess of the judgment).

[47]*See State ex rel. A.T. Massey Coal Co., Inc. v. Hoke*, No. 060936 (W. Va. April 10, 2006)(staying trial court order increasing irrevocable letter of credit securing judgment pending appeal from $55 million to $72 million); *Federal Trade Commission v. Kuykendall*, 466 F.3d 1149 (10th Cir. 2006)(letter of credit used to secure judgment pending appeal); *Swope v. Siegel-Robert, Inc.*, 270 F.3d 742 (8th Cir. 2001)(letter of credit used to secure judgment pending appeal); *Liqurotis v. Whyte*, 951 F.2d 818 (7th Cir. 1992)(letter of credit used to secure judgment pending appeal). *See also Kocher v. Getz*, 844 N.E.2d 1026, 1032 (Ind. Ct. App. 2006)("the trial court ordered Kocher to either: 1. Submit to the Court for its examination a properly authorized and executed surety bond in the amount of $266,517.28 to guarantee payment of the Plaintiff's judgment herein, or 2. File an irrevocable letter of credit from a financial institution in the amount of $266,517.28 to guarantee payment of Plaintiff's judgment herein, or 3. Post money in the amount of $266,517.28 to guarantee payment of Plaintiff's judgment herein.")

[48]A letter of credit is guaranteed by a federally-insured and regulated financial institution whereas a supercedeas or appeal bond is guaranteed by a state-regulated surety company. *See also Ligurotis v. Whyte*, 951 F.2d 818, 821 (7th Cir. 1992)("Along with the Second Circuit . . . we have noted that a letter of credit may serve as the equivalent of a supersedeas bond. *See Landau & Cleary, Ltd. v. Hribar Trucking, Inc.*, 867 F.2d 996, 998-99 (7th Cir.1989)."); *Beaupre v. Kingen*, 899 F.2d 1224 at *2 (9th Cir. 1990)("Idaho courts have found, however, that an irrevocable letter of credit is 'substantially equivalent to .. . a supersedeas bond' for purposes of Rule 13. *Whittle v. Seehusen*, 113 Idaho 852, 748 P.2d 1382, 1388 (App.1987).").

[49]*See Kessel v. Leavitt*, 204 W. Va. 95, 511 S.E.2d 720 (1998)(requiring no security for West Virginia judgment debtors and reducing security required for a California judgment debtor from $7 million to $1.1 million); *State ex rel. A.T. Massey Coal Co., Inc. v. Hoke*, No. 060936 (W. Va. April 10, 2006)(staying trial court order increasing irrevocable letter of credit securing judgment pending appeal from $55 million to $72 million).

[50]*State ex rel. Shenandoah Valley National Bank v. Hiett*, 127 W. Va. 381, 32 S.E.2d 869 (1945).

code, an appeal bond required by a court in accordance with this section may not exceed the amount of the total judgment, which includes the actual judgment, plus costs, interest and fees[.]" An exception is made "for all verdicts returned or judgments rendered on or after the first day of July, two thousand seven, in which the judgment exceeds fifty million dollars[.]" Under these circumstances, "the court shall require an appeal bond of no more than fifty million dollars." The primary purpose of these new amendments to W. Va. Code § 58-5-14 is "limiting bond amounts."[51]

If a stay is conditioned upon the filing of a bond, Rule 6(d) provides that "such bond shall be filed within thirty days of the granting of the supersedeas with the clerk of the circuit court, who shall immediately report the filing of the same to the Clerk of the Supreme Court. Failure to execute such bond may be grounds for the dismissal of the appeal."[52] Pursuant to W. Va. Code § 59-2-1, however, indigents may prosecute an appeal on their own recognizance, rather than by posting a money bond.[53]

12. Designation of Appellate Record.

Although a designation of the record is performed at the time the petition for appeal is initially filed, the possibility exists that the appellee may desire additional portions of the record be considered on appeal. Upon receipt of the record, the circuit clerk sends notice to counsel of the following designation schedule: (1) 20 days for designation by the appellant; (2) 14 days for designation by the appellee; (3) 10 days for additional designation by the appellant. W. Va. R. App. P. 8(a). Counsel should be aware that Rule 8(b) allows a joint designation and Rule 8(c) permits an agreed order, both within a 30 day time frame, but these alternatives are rarely used in practice. Designation of the appellate record generally requires anywhere from 45 to 60 days. Rule 8(d) provides that: "[t]he designation . . . should include only matter relevant to the issues presented on appeal," and provides withholding or dividing costs as a possible penalty for designation of "unnecessary matter." Notwithstanding this provision, questionable designations are quite prevalent in the court, and penalties are almost never imposed.

13. Reproduction of Filing of Appellate Record.

a. Notice of Method of Reproduction. Pursuant to Rule 9(a) of the West Virginia Rules of Appellate Procedure, circuit clerks are given 30 days within which to

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[51]*See* Enrolled Comm. Subst., Senate Bill No. 194 (2007 Regular Session).

[52]*See also Stevens v. Saunders*, 159 W. Va. 179, 183, 220 S.E.2d 887, 890 (1975) ("[T]his Court has said on numerous occasions that statutes which require the giving of bond as a prerequisite to the prosecution of an appeal are strictly construed and their requirements are mandatory and jurisdictional. An untimely filing of such a bond dictates the dismissal of a case.") (citations omitted).

[53]*Rosier v. Rosier*, 162 W. Va. 902, 253 S.E.2d 553 (1979).

"assemble, paginate, and index the record as designated or agreed." This period can be extended or re-extended for an additional 60 days by the circuit court to permit the preparation of any additional transcripts which have been designated. Once the appellant has been notified by the circuit clerk that the record is complete, the appellant is afforded a 10 day period within which to elect to reproduce the record or to have the record reproduced by the Clerk of the Supreme Court of Appeals. Although election to reproduce by the appellant is almost never requested, if such election is made, Rule 9(b)(1) requires the appellant to file 9 copies of the record with the Clerk of the Supreme Court of Appeals and to serve a copy on each party within 60 days of the clerk's notification of record completion. Failure to comply with the 60 day period may result in the dismissal of the appeal.

b. Deposit for Cost of Appellate Record. As set forth above, the appellant usually elects to have the record reproduced by the Clerk of the Supreme Court of Appeals. Once this election is made, the record is transmitted to the Clerk immediately. W. Va. R. App. P. 9(b)(2). Upon receipt, a bill for the estimated cost of reproduction is then forwarded to the appellant, and the estimated cost must be deposited within 30 days of the estimate. W. Va. R. App. P. 9(b)(2). Counsel should be cautioned that delays in securing deposit for the cost of reproducing the record can result in dismissal when a non-indigent appellant fails to make a timely deposit.

c. Preparation for Reproduction. Once the deposit is received, the deputy clerk begins to review the designated record for relevancy to the issues presented on appeal. Ordinarily, a sizable portion of the designated record is deleted as irrelevant to the issues presented on appeal. Retention of deleted portions of the designated record in the clerk's office ensures its availability, if necessary.

d. Numbers of Copies of Appellate Record. Rule 9(b)(2) of the West Virginia Rules of Appellate Procedure provides that at least 9 copies of the record be reproduced plus a copy for each of the parties.

e. Motion for Leave to Move to Reverse. Although the record is reproduced in most civil and criminal appeals, such reproduction may be dispensed with upon the court granting a "motion for leave to move to reverse" or a "motion for leave to move to affirm" under Rule 9(f) of the West Virginia Rules of Appellate Procedure. The appeal is then heard upon the original record, typewritten briefs, and oral argument of counsel.

An obvious advantage to the granting of a motion for leave to move to reverse is the significant reduction in time for processing the appeal. There are three types of cases in which the proceeding upon the original record is most favored: (1) where the appellant is indigent; (2) where the record is very brief, such as in an appeal from the award of summary judgment; or (3) where the record is extraordinarily large, such as in a complicated products liability case.

14. Briefing.

The actual briefing process begins upon receipt of the appellate record. The appellant is granted 30 days, under Rule 10(a) of the West Virginia Rules of Appellate Procedure, following receipt of the record, to file an original and 9 copies of a brief with the Clerk of the Supreme Court of Appeals and to serve a copy upon each party to the appeal. The brief should be in the same form as the petition for appeal and cannot exceed 50 pages, including any addendum. Although not provided specifically by the rules, the appellant is allowed, upon written notice to the Clerk and to all parties, to designate the petition for appeal as his or her brief. If the petition has not been previously served upon opposing counsel, it must be served along with this notice.

Under Rule 10(b), an appellee is given 30 days after receipt of the appellant's brief to file an original and 9 copies of a brief with the Clerk of the Supreme Court of Appeals and to serve a copy upon each of the parties. The brief should contain any alleged omissions or inaccuracies of the appellant's statement of the case, a concise response to alleged errors, authorities relied upon, and the appellee's argument. Also, under Rule 10(f), the appellee is permitted to cross-assign any error in this brief, even if no petition for appeal was filed within the appeal period. The brief cannot exceed 50 pages, including any addendum.

Finally, under Rule 10(c), the appellant has 15 days after receipt of the appellee's brief to file an original and 9 copies of a reply brief with the Clerk of the Supreme Court of Appeals and to serve a copy upon each of the parties. The Supreme Court of Appeals will not review any assignments of error made in a reply brief that were not made in the petition for appeal.[54] Appellees occasionally file a response brief to the appellant's reply brief, especially if new issues or authorities are raised for the first time therein. Again, the brief cannot exceed 50 pages, including any addendum.

15. Motions Practice.

Rule 17(a) of the West Virginia Rules of Appellate Procedure provides: "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 other relief with service on all other parties." Two features of motions practice in the Supreme Court of Appeals serve to minimize delay: (1) Rule 17(b) provides, "motions for procedural orders may be acted upon at any time, without awaiting a response thereto;"[55] and (2) Rule 17(d) provides, "[n]o oral argument shall be held on any motion, unless requested by the Court." Oral arguments are almost never requested by the Supreme Court of Appeals.

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[54]*Bloyd v. Scroggins*, 123 W. Va. 241, 15 S.E.2d 600 (1941).

[55]An exception this rule is W. Va. R. App. P. 18(c) which requires a 20 day period in order to respond to a motion to dismiss the appeal with sanctions.

Ordinarily, rulings on motions are rendered within approximately one week of their submission to the Supreme Court of Appeals. Many requests, such as for minor extensions of time within which to file a brief, are routinely granted by the Court without formal motion, especially if there is an agreement among the parties and no delay will result. Formal motions, however, are considered by the full Court at a weekly miscellaneous motions conference. Prior to the conference, the Clerk circulates a memorandum briefly summarizing and attaching each motion to be considered, thereby alleviating the necessity of reading each motion to be considered and allowing the individual Justices to review only matters which might cause dispute.

16. Scheduling of Oral Argument.

a. Scheduling Procedure. Rule 11(a) of the West Virginia Rules of Appellate Procedure provides: "Seventy-five days before the first day of each . . . term . . . the Clerk of the Supreme Court shall prepare a list of cases in which the record has been filed . . . . Such docket shall set a date certain for oral argument of each case." Simply put, all cases in which the briefing schedule has begun more than 75 days prior to the next term will be set for argument in that term. The combination of scheduling argument in this manner and adherence to a strict continuance policy minimizes delay of filing of briefs. About 45 days before the first day of each term, a survey of all cases set for argument is conducted to determine the existence of any delay in filing the appellant's brief, which is critical to the briefing process. If any problems are discovered, attorneys are contacted by phone with a warning regarding the possibility of a dismissal as a sanction.

b. Term of Court. There are two regular terms of the Supreme Court of Appeals of West Virginia: the January regular term, which begins on the second Tuesday of January; and the September regular term, which begins on the first Wednesday in September. In the past, extraordinary term of court was held in April or May. However, for the past few years, the January regular term which formally concluded in early April has been continued through late July. Traditionally, the Supreme Court of Appeals has adjourned from late July through the first Wednesday in September. Although technically in vacation during this period, the Court continues to hear extraordinary matters and perform various administrative functions. Argument dockets are currently held on Tuesday and Wednesday for the first three to four weeks of both the January and September regular terms and on one to two consecutive Tuesdays and Wednesdays in May.

c. Continuance of Argument. The Supreme Court of Appeals has rigidly enforced the strict continuance policy, particularly during the last several years. Cases that are rescheduled are ordinarily set on an earlier date or postponed for no more than two to three weeks. Rule 12(a) of the West Virginia Rules of Appellate Procedure provides that, "[a] request for postponement of the argument . . . shall be filed at least ten days before the date set, whenever possible," however, an even stricter policy has been implemented by the clerk's office. When counsel is notified that a case has been scheduled for argument, they are also notified that continuances are strongly disfavored by the court; that any request for continuance must be sought by written motion, preferably joint, at least one week prior to

commencement of the term; and that submission on briefs without oral argument should be considered as an alternative to continuance. Consequently, very few motions for continuance are filed and those that are filed are ordinarily accompanied by an agreement of counsel for an alternative date during that same term.

17. Assignment of Cases and Preparation for Argument.

Once an argument docket has been set by the Clerk, the assignment Justice is forwarded a bench memoranda for all the cases for the term. The assignment Justice uses this memoranda to tentatively decide whether a case should receive disposition by justice opinion, by *per curiam* opinion, or by *per curiam* order. Once this determination is made, cases are assigned to the Justices and *per curiam* clerks on a rotating basis. This process is ordinarily completed in approximately two to four weeks prior to the commencement of the term. Thus, preparation for oral argument, concentrating on cases to which a Justice has been assigned, begins early. Because all the Justices participate in every decision to grant appellant review, this process is part refreshment and part refinement.

18. Oral Argument.

Although under Rule 12(a) of the West Virginia Rules of Appellate Procedure, "[o]nly two counsel shall be heard on each side of a case," the Court will occasionally permit more than two counsel per side upon prior written request. Generally, only one attorney per side appears. Under Rule 12(b), the appellant is allowed 20 minutes to open and 10 minutes to close argument, and the appellee is permitted 20 minutes. However, in practice, the actual time allowed is far less. If counsel for the appellant presented the petition for appeal orally, opening argument is sometimes shortened, under the rational that recitation of the issues presented is redundant. Attorneys are occasionally directed to present only their strongest one or two points. Counsel should be cautioned that the Court rewards succinctness with nods of approval and verbosity is punished with scowls of disdain. Often, the statement by the Chief Justice, "We understand your case," signals the end of the argument for the attorney in question.

As set forth above, oral argument is discretionary with counsel, except in workers' compensation appeals where oral argument is permitted only upon written notice and with good cause shown. Although most cases are argued, many cases are submitted without oral argument. Cases in which issues are narrow, in which the financial aspects are minimal or in which the litigants are seeking to reduce attorneys fees are most likely the candidates for submission without oral argument. Criminal cases are the only case category most likely to be submitted without oral argument because attorneys appointed to represent indigent defendants are generally inadequately compensated for this representation and seek to minimize the financial burden on their practice.

19. Decision Conference.

On the Thursday following Tuesday and Wednesday arguments, or on the Wednesday following Tuesday arguments, conferences at which decisions are made on the cases appearing at the argument dockets are held. The cases are generally addressed in the order of presentation, with the Justice to whom the case was assigned leading the discussion. These conferences are attended only by the Justices with one of the Justices noting the tentative decisions of the Court. These tentative decisions on individual cases reached at these conferences vary from the specific to the general. On occasion, the Court may desire review and presentation of a troublesome court case by one of the *per curiam* clerks at a special conference conducted later in the term. Decision conference notes are prepared following completion of the conference and are circulated to each of the Justices for supervision of preparation of the opinion or order. These decisions are tentative in nature, and may be modified upon further research of the assigned Justice or one of his or her clerks. If the Justice to which a case has been assigned is in the minority, the case will be exchanged for another of the Justices in the majority.

20. Opinion Conference.

After opinion drafts have been completed by the assigned Justice, they are circulated to the other Justices for review and preparation for opinion conference. Sometimes, drafts of opinions or orders are exchanged informally between individual Justices prior to general circulation in order to resolve any differences. Drafts are routinely approved at opinion conference without further revision; however, minor changes may be suggested in a few cases which may require recirculation for discussion at a subsequent opinion conference.

21. Entry of Judgment and Mandate.

Pursuant to Rule 20 of West Virginia Rules of Appellate Procedure, "The Clerk of the Supreme Court shall prepare, sign and enter the judgment following receipt of the opinion of the Court . . . . " Except in original jurisdiction proceedings, however, the judgment of the court is not final until the entry of the mandate.[56] In practice, the mandate is entered upon the expiration of the 30 day rehearing period. Costs are taxed by the Clerk against the losing party and the record returned to the lower tribunal.

Practically, there are three benefits in the 30 day period between entry of judgment and entry of mandate: (1) it maintains the status quo during the pendency of the rehearing period, in order to preserve the court's ability to correct any mistakes of law or fact; (2) it allows the lower tribunal and the parties to carefully review the Court's decision in preparation for its implementation; and (3) it permits performance of certain clerical functions, such as taxation of costs, prior to return of the record to the lower court.

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[56]*Shields v. Romine*, 123 W. Va. 212, 14 S.E.2d 777 (1941).

22. Costs.

Like most jurisdictions, the costs of appeal are taxed against the losing party. Under Rule 23(c) and (e) of the West Virginia Rules of Appellate Procedure, costs of appeal taxed against the losing party include "[c]osts for reproduction of the record" and "[c]osts incurred in the preparation and transmission of the record, the cost of the reporter's transcript" as well as "the premiums paid for the cost of supersedeas bonds or other bonds to preserve rights pending appeal[.]" Under Rule 23 (d), "[t]he 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."

23. Petition for Rehearing.

Rule 24(a) of the West Virginia Rules of Appellate Procedure, provides that, "[a] petition for rehearing, together with [8] copies thereof, may be filed within [30] days after release of the entry of judgment unless the time is shortened or enlarged by order." No answer to a petition for rehearing is required, but the parties will be notified if the petition is granted and, at that time, may be asked to file a counter-petition and memorandum of authorities. Unless the Court otherwise orders, oral argument is not permitted on petitions for rehearing, and decisions are made by the Court in conference upon the petition, any response, and a memorandum prepared by the Clerk. The granting of a petition for rehearing is extremely rare. The procedure is not intended to allow reargument of points raised in the briefs previously submitted, but only to allow recitation of "points of law or fact which in the opinion of the petitioner the Court has overlooked or misapprehended . . . ." Because of the limited scope of petitions for rehearing, Rule 24(b) imposes a 15 page limitation.

E. ORIGINAL JURISDICTION PROCEDURE.

1. Introduction.

There are several distinctive features of the procedure for invoking original jurisdiction of the Supreme Court of Appeals, but there are similarities with the appellate process.

The primary differences in the original jurisdiction procedure are: (1) the petition is initially filed with the Clerk of the Supreme Court of Appeals, rather than with the circuit clerk; (2) if the petition is granted, the respondent is served with a rule to show cause, rather than with a summons; (3) the respondent is allowed 20 days following service of the rule to show cause to file a written response, rather than 30 days following receipt of the petitioner's brief; (4) the parties may be permitted to engage in further discovery, rather than limited to a record in the lower tribunal; (5) the record consists of the pleadings, attached exhibits, affidavits, depositions, and findings of fact by any special master or

commissioner appointed, rather than one developed before a lower tribunal; (6) this record is not reproduced as an appeal proceeding; and (7) a date for oral argument is established contemporaneously with the granting of a petition for original jurisdiction relief, ordinarily set on the available argument docket calendar, rather than awaiting completion of the record or submission of all pleadings. W. Va. R. App. P. 14.

The primary similarities are: (1) oral presentation of the petition, if requested, is performed *ex parte*; (2) the decision to issue a rule to show cause is wholly discretionary; and (3) if a rule to show cause is issued, oral argument is conducted in the same manner as on appellate review. W. Va. R. App. P. 14. One important provision contained in Rule 14(c) is that "[i]f the court determines not to grant 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, unless the court specifically notes in the order denying a rule to show cause that the denial is with prejudice." The Supreme Court's exercise of its original jurisdiction, "is discretionary and is governed by the practical circumstances of the case.'"[57]

The West Virginia Rules of Civil Procedure governing extraordinary remedy proceedings in circuit court are inapplicable to original jurisdiction proceedings in the Supreme Court of Appeals.[58] Moreover, in Syllabus Point 6 of *State ex rel. Allstate Insurance Co. v. Gaughan*,[59] the Supreme Court of Appeals created an additional requirement to seeking the Court's original jurisdiction:

> A party seeking to petition this Court for an extraordinary writ based upon a non-appealable interlocutory decision of a trial court, must request the trial court set out in an order findings of fact and conclusions of law that support and form the basis of its decision. In making the request to the trial court, counsel must inform the trial court specifically that the request is being made because counsel intends to seek an extraordinary writ to challenge the court's ruling. When such a request is made, trial courts are obligated to enter an order containing findings of fact and conclusions of law. Absent a request by the complaining party, a trial court is under no duty to set out findings of fact and conclusions of law in non-appealable interlocutory orders.

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[57]*State ex rel. McGraw v. Telecheck* 213 W. Va. 438, 443 n.3, 582 S.E.2d 885, 890 n.3 (2003) (quoting *State ex rel. Doe v. Troisi*, 194 W. Va. 28, 32, 459 S.E.2d 139, 143 (1995)).

[58]*See State ex rel. Ritchie v. Tripplet*, 160 W. Va. 599, 236 S.E.2d 474, 478 (1977) (recognizing original jurisdiction proceedings in the Supreme Court of Appeals are governed by Supreme Court of Appeals Rule of Procedure.)

[59]203 W. Va. 358, 508 S.E.2d 75 (1998).

After satisfying *Gaughn*, the proper procedure for invoking the original jurisdiction of the Supreme Court of Appeals is found in Rule 14 of the West Virginia Rules of Appellate Procedure. For any additional requirements such as verification or for securing a stay of proceedings until a final decision, counsel is advised in all instances to consult the statutory provisions governing the extraordinary remedies of mandamus[60], prohibition[61], habeas corpus[62], and certiorari[63] with any conflicts being resolved in favor of the Rules of Appellate Procedure.

2. Petition for Writ.

The form for a petition for writ of mandamus, prohibition, habeas corpus, or certiorari under the original jurisdiction of the Supreme Court of Appeals is set forth in Rule 14(a) of the West Virginia Rules of Appellate Procedure,[64] and must be filed with (1) an attached addendum or separate appendix of any exhibits or affidavits, (2) a memorandum of law citing the relevant authorities, and (3) a memorandum listing the names and addresses of those persons upon whom the rule to show cause is to be served, if granted. Although counsel should strive to ensure that it is invoking the correct remedy, "[i]n appropriate situations, th[e] Court has chosen to treat petitions for extraordinary relief according to the nature of the relief sought rather than the type of writ pursued."[65]

A petition cannot exceed 50 pages in length, including any addendum (but excluding any appendix) except by permission of the Supreme Court of Appeals. An appendix cannot exceed 75 pages except by permission of the Supreme Court of Appeals. Thus, if a *single* document is filed with the Supreme Court of Appeals including the petition and appendix, the number of pages cannot exceed 50 in total. If a petition is filed accompanied by a *separate* appendix, however, the maximum available is 125 pages. Also, if the original jurisdiction proceeding involves a matter that is pending in a circuit court where the circuit court has entered a written order relating to the matters sought to be adjudicated by the Supreme Court of Appeals, a copy of such order must be filed with the petition.

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[60]*See* W. Va. Code § 53-1-1 *et seq.* (governing writs of prohibition and mandamus).

[61]*See* W. Va. Code § 53-1-1 *et seq.* (governing writs of prohibition and mandamus).

[62]*See* W. Va. Code § 53-4-1 *et seq.* (governing writs of habeas corpus); W. Va. Code § 53-4A-1 *et seq.* (governing writs of post-conviction habeas corpus).

[63]*See* W. Va. Code § 53-3-1 *et seq.* (governing writs of certiorari).

[64]W. Va. Code § 58-5-3 ("A party . . . seeking the original jurisdiction of the Supreme Court of Appeals . . . may file a petition in accordance with Rules of Appellate Procedure promulgated by the Supreme Court of Appeals.").

[65]*State ex rel. Termnet Merchant Services, Inc. v. Jordan*, 217 W. Va. 696, 619 S.E.2d 209 (2005).

3. Filing and Service of Petition.

Under Rule 14(a) of the West Virginia Rules of Appellate Procedure, an original and 9 copies of the petition, addendum, appendix, and memorandum of law must be filed with the Clerk of the Supreme Court of Appeals. In original jurisdiction cases, a copy of all documents filed with the Clerk must be served upon each respondent in accordance with Rule 15 of the West Virginia Rules of Appellate Procedure and, thus, by any method prescribed by Rule 4 of the West Virginia Rules of Civil Procedure. If any of the respondents are a state or county official, a copy of all documents filed with the Clerk's Office must be served upon either the Attorney General or the appropriate county prosecuting attorney.

4. Response to Petition.

Before deciding whether to issue a rule to show cause, the Supreme Court of Appeals may direct a respondent under Rule 14(b) of the West Virginia Rules of Appellate Procedure to file a response to the petition directing the Court's attention to the reasons why the Court should not issue a rule to show cause. The rule does not detail what the response to the petition should look like, but, in the past, these responses have ranged from simple letters to the Court to full blown brief-like answers. Because the rule provides that, if a response is requested, the Clerk will contact the affected parties by telephone as soon as possible after the petition is filed, and many such responses will be required to be filed in a short period of time, the Court's past practice also has been that issuance of a rule to show cause does not limit a respondent to what is contained in the response, but may be expanded upon and added to in the formal response to the rule to show cause under Rule 14(d) of the West Virginia Rules of Appellate Procedure.

5. Rule to Show Cause.

If the Supreme Court of Appeals agrees to take the case, Rule 14(c) of the West Virginia Rules of Appellate Procedure provides that the Court will issue a rule to show cause directed to the respondents as set out in the petitioner's memorandum of parties. The Court will also mail a copy of the rule to the petitioner or the petitioner's counsel. If the rule to show cause is issued in prohibition, the underlying proceedings are stayed unless the rule to show cause provides otherwise. If the Court refuses to issue a rule to show cause, the petitioner is not precluded from seeking an extraordinary remedy in a circuit court having jurisdiction.[66] The single exception to this is that a petitioner is precluded from proceeding in circuit court if the Supreme Court of Appeals' order refusing to issue the rule to show cause is designated as being "with prejudice."

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[66]*See State ex rel. Richey v. Hill*, 216 W. Va. 155, 175, 603 S.E.2d 177, 197 (2004) (Maynard, J., concurring) ("In declining to exercise our original jurisdiction and directing petitioners 'to a more appropriate court...we are exercising the discretion granted to us by the [state] Constitution.'") (citing *Harvard v. Singletary*, 733 So.2d 1020, 1021 (Fla.1999) (per curiam) and W. Va. R. App. P. 14(c)).

6. Response to Rule to Show Cause.

Within 20 days of service of the rule to show cause, unless lengthened or shortened by the Court, the respondents are required to file an original and 9 copies of a formal response with the Clerk of the Supreme Court of Appeals under Rule 14(d) of the West Virginia Rules of Appellate Procedure. As is the case with the petitioner, the response cannot exceed 50 pages, including any addendum (but excluding any appendix) without the Court's permission. If a separate appendix of exhibits is filed, the memorandum of law cannot exceed 50 pages and the appendix of exhibits cannot exceed 75 pages without the Court's permission. The response may raise any relevant defenses, including matters addressable by demurrer or motion to dismiss. The response shall answer each allegation in the petition.

7. Discovery.

In the event that the parties' filing raise a genuine issue of material fact, Rule 14(e) of the West Virginia Rules of Appellate Procedure provides that the parties shall advise the Clerk of the Supreme Court of Appeals in writing of any proposed schedule for taking and filing depositions. The proposed schedule shall be subject to approval by the Supreme Court of Appeals. No other or further discovery shall be permitted without the Court's approval.

8. Reference.

Under Rule 14(f) of the West Virginia Rules of Appellate Procedure, the Supreme Court of Appeals, *sua sponte* or upon written motion of the parties, may determine that the complexity of the factual issues involved requires reference of the case to a special master or commissioner. The special master or commissioner has the duty of supervising the taking of depositions and making such findings of fact as the Court may direct. The special master's or commissioner's findings of fact must be written and the parties have the right to file written objections to them before the Supreme Court of Appeals considers them.

9. Record.

Under Rule 14(g) of the West Virginia Rules of Appellate Procedure, the record in an original jurisdiction proceeding consists of the pleadings and addenda, the appendices, any depositions filed and findings of fact made by the special master.

10. Oral Argument.

Oral argument is permitted in accordance with Rule 12 of the West Virginia Rules of Appellate Procedure.

F. APPEAL TO THE UNITED STATES SUPREME COURT.

Following a final decision of the Supreme Court of Appeals, a party has a right to appeal to the United States Supreme Court pursuant to Rule 25(b) of the West Virginia Rules of Appellate Procedure. The parties desiring to appeal may request the Supreme Court of Appeals or any judge thereof to suspend the execution of the decree, judgment or order.