



GUIDE TO PREPARING
AN APPEAL
from a
Circuit Court Decision
using the
REVISED RULES OF
APPELLATE PROCEDURE

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INTRODUCTION

In 2010, the Supreme Court of Appeals of West Virginia finalized comprehensive revisions to the rules governing practice and procedure before the Court. The REVISED RULES OF APPELLATE PROCEDURE (the "Revised Rules") became effective on December 1, 2010. The Revised Rules govern appeals from final judgments entered by a circuit court on or after December 1, 2010, and petitions for extraordinary relief filed with the Supreme Court on or after December 1, 2010. This guide will discuss filing an appeal from a circuit court judgment; it does not apply to petitions for extraordinary relief.

The Revised Rules contain a number of procedural changes and require actions that differ from what the former rules required. This guide is intended to help filers, court staff, and interested parties to understand and comply with the new process. **This guide is not legal authority or a substitute for the requirements found in the Revised Rules.**

ONLINE — Download the Revised Rules, get sample documents, use fill-and-print forms and other resources online at the *Appellate Revisions* page of the Court's website:

<http://www.state.wv.us/wvsca/rules/appellate-revisions.htm>

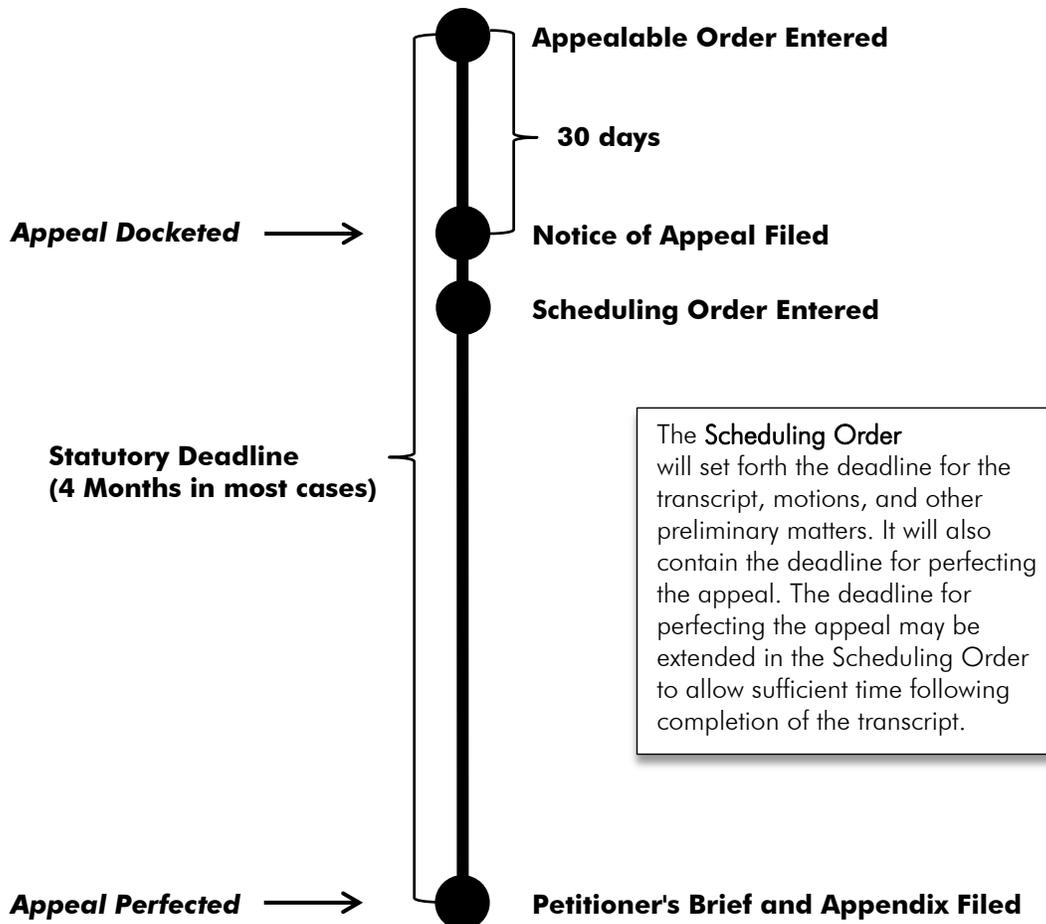
INITIATING AN APPEAL – HIGHLIGHTS OF THE NEW PROCESS

The Revised Rules create two distinct milestones in a new process for initiating an appeal: **docketing** the appeal and **perfecting** the appeal. Under the former rules, an appeal was initiated in the circuit clerk's office within four months of the date of the circuit court judgment being appealed. Prior to that deadline, however, transcripts had to be requested within thirty days, and a notice of appeal was required in all criminal cases within thirty days. The Revised Rules incorporate these preliminary matters into a first stage that applies to all appeals from circuit court.

Under the Revised Rules, an appeal is **docketed** by the timely and proper filing of a Notice of Appeal with the Clerk of the Supreme Court within thirty days of the entry of the judgment that is being appealed. The Notice of Appeal contains basic information about the case and the issues to be presented, along with a listing of the transcripts requested. When the Notice of Appeal is timely and properly filed, the Clerk will assign a case number and the case will be docketed. Shortly thereafter, the Court will issue a Scheduling Order that will contain all the necessary deadlines that apply to the next stage: perfecting the appeal. *See* Revised Rule 5(d).

The Revised Rules require an appeal to be **perfected** according to the date set forth in the Scheduling Order. This date will normally coincide with the statutory deadline for appeals, unless the deadline has been extended by order. In order to perfect an appeal, the petitioner must file a brief with the Clerk of the Supreme Court, and must file an appendix record, unless the Court has entered an order that allows the petitioner to proceed on a designated record.

The process for docketing and perfecting an appeal is summarized in the diagram below.



The Revised Rules change several aspects of the filing process itself. Those changes are covered in detail throughout this guide. The following points about filing generally and filing by facsimile are worth noting carefully.

IMPORTANT POINTS ABOUT FILING

- All filings are made with the Clerk of the Supreme Court, *not* with the Clerk of the Circuit Court.
- In order to meet deadlines, filings must be *received* by the Clerk of the Supreme Court on or before the date they are due.
- File your documents in person, by mail, or by commercial courier with:

Office of the Clerk
Supreme Court of Appeals of West Virginia
State Capitol Building, Room E-317
1900 Kanawha Blvd. East
Charleston, WV 25305

Filing by facsimile is limited

Revised Rule 38(e) limits the instances in which filing by facsimile is allowed:

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.

(Emphasis added). Facsimile filings should be limited to routine motions and brief correspondence. The **fax number** is (304) 558-3815. The **phone number** is (304) 558-2601.

Use these charts to assist with filing and serving the correct number of documents.

DOCKETING THE APPEAL

Notice of Appeal

Completed
Forms

+

All Required
Attachments

FILE the Original and 5 Copies
with the Supreme Court Clerk

SERVE 1 Copy on each party, each
court reporter, and the circuit clerk

PERFECTING THE APPEAL

Petitioner's
Brief

40 PAGE
LIMIT

FILE the Original and 10 Copies
with the Supreme Court Clerk

SERVE 1 Copy on each party to the appeal

+

Appendix

NO PAGE
LIMIT

FILE the Original and 1 Copy
with the Supreme Court Clerk

SERVE 1 Copy on each party to the appeal

RESPONSIVE BRIEFS

Respondent's
Brief

40 PAGE
LIMIT

FILE the Original and 10 Copies
with the Supreme Court Clerk

SERVE 1 Copy on each party to the appeal

Reply Brief

25 PAGE
LIMIT

FILE the Original and 10 Copies
with the Supreme Court Clerk

SERVE 1 Copy on each party to the appeal

PREPARING and FILING THE NOTICE OF APPEAL

Is a Notice of Appeal Required?

In order to appeal a circuit court final order **entered on or after December 1, 2010**, a Notice of Appeal must be filed with the Supreme Court Clerk. The Notice of Appeal contains basic information about the case and informs the Court and the other parties about the nature of the issues on appeal and whether transcripts have been requested.

The Notice of Appeal is required in civil and criminal cases, as well as appeals in abuse and neglect proceedings. *See* Revised Rule 5(a)-(b) and Rule 11(a)-(b).

When Is The Notice Of Appeal Due And Where Is It Filed?

The Notice of Appeal is due within **thirty days** of the date that the judgment being appealed was *entered* in the circuit clerk's office, which is sometimes different than the date the order was signed by the judge. A signed original and five copies of the Notice of Appeal— together with all the necessary attachments— must be filed with the Clerk of the Supreme Court by the deadline. This is a change from prior practice, in which documents to initiate an appeal were generally filed in the circuit clerk's office of the county where the final order was entered.

In order to be timely, documents must be received by the Clerk on or before the due date. Under Revised Rule 38(g), 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.

An appeal is docketed by filing a **Notice of Appeal** with the Clerk of the Supreme Court, within **30 days of entry of the circuit court judgment being appealed**.

If it is necessary to seek an extension of time to file a Notice of Appeal, the Revised Rules require that a motion for leave be filed, showing good cause. *See* Revised Rule 5(b) and 11(b). If a Notice of Appeal is filed late, the petitioner must file a motion for leave to file out of time.

Facsimile filing of a Notice of Appeal is not permitted under Revised Rule 38(e), unless the facsimile filing is accompanied by a

motion for leave to file by facsimile, setting forth good cause. If the motion is granted, the Clerk will provide by return facsimile a notice the filing was accepted, and a statement of the photocopying charges that apply. If the facsimile filing exceeds twenty pages, the Clerk may grant prior consent to file by facsimile only if extraordinary circumstances exist.

How Do I Prepare To File The Notice Of Appeal?

If you have not filed an appeal using the new process, you should review the Notice of Appeal form in order to become familiar with its requirements. The Notice of Appeal form is contained in Appendix A of the revised Rules, and is also available on the Appellate Revisions page of the Court's website. You can review the form even before the final order is entered, so that you can assemble the necessary documents as the case progresses.

Identify the assignments of error. The Notice of Appeal requires the petitioner to attach a numbered list of the assignments of error expressed in the terms and circumstances of the case but without unnecessary detail. For each assignment the petitioner must: (a) state the issue; and (b) provide a succinct statement as to why the Court should review the issue. Although the assignments listed in the Notice of Appeal are not binding on the petitioner when the brief is filed and the appeal is perfected, the assignments set forth at the docketing stage must nevertheless reflect that the petitioner has performed a review of the case and has a good faith belief that the appeal is warranted.

Obtain all the necessary court documents. The Notice of Appeal requires that copies of certain orders be attached when it is filed with the Court. These orders will also be necessary to complete the Notice of Appeal itself, so it is useful to obtain copies of them as soon as possible. These documents include:

- The order that sets forth the lower court's decision from which you are appealing, *including* any prior orders that are fairly comprised therein, such as the family court's order in cases where the circuit court refused an appeal
- Any order deciding a timely post-trial motion

- Any order extending the time period for appeal, or, in a criminal case, re-sentencing a defendant for purposes of extending the appeal period
- A copy of the order appointing counsel, or the order determining that the petitioner is eligible for a fee waiver, if waiver of transcript costs are sought

Although it is not required to be attached to the Notice of Appeal, it is very useful to have a copy of the circuit clerk's docket sheet. The docket sheet will be useful when making document requests and will also be useful when it is time to begin selecting items to include in the record on appeal.

Determine whether a transcript is required and make the necessary arrangements. Very soon after the final order is entered, the petitioner should determine whether a transcript will assist the Court in deciding the issues on 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. The petitioner is encouraged to confer with the other parties to the case, however, because all the parties to the case should agree on the contents of the record on appeal. *See* Revised Rule 9(a).

Before completing the formal transcript request, the petitioner must handle two preliminary matters. First, the petitioner must contact each court reporter who will be involved in preparing any portion of the transcript and obtain an estimate of the length of the transcript. The petitioner should be prepared to give each court reporter the date of the proceeding and the type of proceeding. If the petitioner does not already have this information, it is useful to review the circuit clerk's docket sheet and/or the actual case file. The official court reporter may be able to assist. Second, the requesting party must make appropriate financial arrangements with each court reporter either by: (1) immediate payment in full or by another payment method that is acceptable to the court reporter; or (2) filing, in appropriate cases, an affidavit of indigency or order appointing counsel. *See* Revised Rule 9(b).

Special requirements for appeals in abuse & neglect cases. Appeals from a circuit court judgment in an abuse and neglect case are expedited, and the Court prefers those appeals to proceed initially

without a transcript of testimony. See Revised Rule 11(b) and 11(i). Accordingly, transcript requests may not be approved, or may be deferred. If a transcript of a particular proceeding is necessary for the Court to review a disputed evidentiary or testimonial issue, then the petitioner must indicate why the transcript is necessary as part of the Notice of Appeal.

How Do I Complete The Notice Of Appeal?

The Notice of Appeal form is contained in Appendix A of the Revised Rules, and is also available on the Appellate Revisions page of the Court's website. The Notice of Appeal contains nineteen sections. Some of the sections can be completed on the form, and others will require an extra sheet to be attached. The following tips are numbered to correspond to each section, and are intended to assist petitioners when preparing the Notice of Appeal.

ONLINE — The Notice of Appeal form is available on the *Appellate Revisions* page of the Court's website as a fill-and-print form.

Section 1: Provide the complete title of the case, including all of the party designations (i.e. plaintiff, intervenor, third-party defendant). The best source for the case title is the final order being appealed. Include the case number used in the circuit court. If the case title is lengthy, use an extra sheet.

Section 2: Provide the name of the county where the case was decided, and provide the name of the circuit court judge who issued the final decision. If the circuit court judge was sitting by special assignment, or if the case originated in one county but was transferred to another county, include an explanation of the circumstances on an extra sheet.

Sections 3, 4 & 5: These sections will be used to determine which of the parties in the lower tribunal will participate in the appeal. If represented by counsel, provide the name, law firm, address, phone number and e-mail address of counsel of record for each party. Self-represented parties must provide an address and telephone number. Non-participants to the appeal must be listed in Section 5 and be served with a copy of the Notice of Appeal.

Section 6: The date of entry of the final order being appealed is used to determine whether the Notice of Appeal is timely filed. Use the date that the order was entered in the circuit clerk's office, which is sometimes different from the date the order was signed by the judge.

If post-trial motions were filed, provide the entry dates of those orders as well. Copies of all orders listed in Section 6 must be attached to the Notice of Appeal.

Section 7: For criminal appeals, provide the sentence imposed by the circuit court and the defendant's bail status.

Section 8: For abuse and neglect appeals, use an extra sheet to provide a 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. This information should always include who has current physical custody of each child involved in the case.

Section 9: In general, orders entered prior to the time a case is final cannot be appealed. If the final order being appealed is a final order as to all issues and all parties, then check "yes." If the answer is "no," then indicate whether the order was certified as a final order pursuant to Rule of Civil Procedure 54(b). If the order was not certified under R. Civ. P. 54(b), then the petitioner must attach an explanation as to why the order or judgment being appealed is proper for the Court to consider.

Section 10: If the circuit court case was previously appealed, provide the case name, docket number, and disposition of each prior appeal. Use an extra sheet if necessary.

Section 11: If there are related cases pending in lower tribunals or the Supreme Court, provide the case name, status, and a description of how the cases are related. If you are not aware of any related cases, then answer this section "no."

Section 12: The petitioner is responsible for identifying whether a case is confidential in whole or in part. For additional guidance, review Revised Rule 40. If the entire case is confidential by statute, then cite the appropriate statute. If all or a portion of the case is confidential due to a court order, then provide the date of the order and identify the portion of the case that is confidential. If a case record or a portion of a case record was not confidential in the lower tribunal, then a motion to seal under Revised Rule 40(d) is required.

Section 13: If the petitioner is a corporation, then the corporate disclosure statement in this section is required. Use an extra sheet to 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, check the box to indicate that to the Court.

Section 14: If you are aware of any basis for disqualification of one of the Justices under Canon 3E of the Code of Judicial Conduct, then check "yes" and provide an explanation on an additional sheet. This section is intended for use in routine disqualifications, such as instances where a member of the Justice's family is counsel of record. If necessary, a Motion for Disqualification under Revised Rule 33 may be filed after the appeal is perfected.

Section 15: Check the appropriate box to indicate whether a transcript of proceedings is necessary for the Court to fairly consider the assignments of error presented in the case. If a transcript is necessary, then the appellate transcript request form must be completed in full. If the case is an abuse and neglect appeal and the petitioner believes that a transcript is necessary, attach an explanation pursuant to Revised Rule 11(b) as to why the transcript is necessary for the Court to review a disputed evidentiary or testimonial issue.

Section 16: Attach a statement not to exceed two pages that briefly explains the nature of the case, the relief sought, and the outcome below.

Section 17: Attach a statement not to exceed eight pages of the assignments of error that you intend to assert in the appeal. Express the assignments of error in the terms and circumstances of the case, without unnecessary detail. Number the assignments of error separately, and for each assignment state the issue and provide a succinct statement as to why the Court should review the issue. The assignments of error at this stage do not have to be the finalized assignments of error that you will eventually include in your brief when the case is perfected. However, the assignments of error must reflect that the case has been reviewed in a manner that is reasonable under the circumstances and that the petitioner has a good faith belief that an appeal is warranted.

Section 18: Make sure that all the items listed that apply to your case are attached to the Notice of Appeal. The Clerk's Office will send you

a deficiency notice if the attachments are not provided, which will delay the processing of your case and subject your case to the possibility of dismissal.

Section 19: Both certifications must be signed by counsel of record for the petitioner, or by the petitioner, if unrepresented by counsel. It is important that all parties to the case below, even if those parties are not involved in the appeal, be provided with a complete copy of the Notice of Appeal with the attachments. It is also important that each court reporter from whom a transcript is requested receive a complete copy of the Notice of Appeal with the attachments.

Appellate transcript request form: If the petitioner believes that a transcript is necessary for a fair consideration of the assignments of error in the appeal, the petitioner must complete this form and make appropriate financial arrangements with each court reporter from whom a transcript is requested. If multiple court reporters are involved, a separate form must be completed for each court reporter. Because each transcript request must be carefully evaluated, it is important to provide complete and accurate information. It is the duty of the petitioner to complete the transcript request, not the court reporter. A request that simply lists "all transcripts" is not acceptable. Completing this form should not wait until the last minute. Pay careful attention to the certification section of the form and be sure to include the attachments that are required.

It is the duty of the petitioner to complete the transcript request, <u>not</u> the court reporter. A request that simply lists "all transcripts" is not acceptable.

How Do I File and Serve the Notice of Appeal?

Once the form is complete and all the attachments have been assembled, an original and five copies must be filed with the Clerk of the Supreme Court **within thirty days of the date of entry of the order being appealed**. On the same date, the petitioner must serve copies on all other parties to the case, on the circuit clerk, and on each court reporter from whom a transcript is requested. Because the petitioner is required to certify service in Section 19, a separate certificate of service is not required.

SCHEDULING ORDERS

As soon as practicable after a timely and complete Notice of Appeal is filed, the Court will enter a Scheduling Order. The Scheduling Order will be mailed to counsel of record for all parties to the appeal. **Do not contact the Clerk's Office for a copy of the Scheduling Order unless more than ten business days have elapsed from the date the Notice of Appeal was filed.**

Depending on the circumstances and the type of case, a Scheduling Order will contain a variety of deadlines and other items that will be critical to perfecting the appeal. These items are described below.

Case caption and docket number: The Scheduling Order will contain a case caption and Supreme Court docket number. Both the caption and the docket number must be used on all subsequent filings in the case. Please note that the case caption may be different than the one that appears on the final order being appealed.

Type of record on appeal, associated deadlines: The Scheduling Order will state whether the record on appeal must be prepared using the appendix method in Revised Rule 7 or the designated record method in Revised Rule 8. If the petitioner is directed to proceed using the appendix method, the Scheduling Order will contain a deadline for filing motions to proceed on the original record under Revised Rule 6(d). Typically, this deadline will be approximately two weeks from the date of the Scheduling Order.

Transcript deadline: If the petitioner requested a transcript, the Scheduling Order will set forth whether a transcript will be prepared and the extent of the transcript, along with a deadline for the court reporter to file the transcript in the circuit clerk's office and mail the transcript to the petitioner. If the court reporter is granted an extension of time to prepare the transcript subsequent to the Scheduling Order, then an Amended Scheduling Order will be entered and all necessary deadlines will be adjusted.

Deadline for petitioner's list of record materials: If the petitioner is required to proceed using the appendix method, the Scheduling Order will set forth the deadline for the petitioner to prepare a list of the parts of the record that the petitioner intends to include in the record on appeal, and serve the list on the respondent under Revised

Rule 7(e). Typically, this deadline will be approximately ten days from the day the transcript is due. This deadline only applies if the parties do not agree on the contents of the record.

Deadline for perfecting the appeal: The deadline for perfecting the appeal will be set forth in the Scheduling Order. By default, all appeals are due within the time period set forth by statute. The statutory deadline is four months for civil and criminal appeals, and sixty days for appeals in abuse and neglect cases.¹ The deadline for perfecting an appeal may be extended by the circuit court or the Supreme Court in certain circumstances. *See* Revised Rule 5(f) and 11(f). In order to permit adequate time to perfect the appeal following the completion of transcripts, the Court may extend the time period for appeal in a Scheduling Order. In most cases, the deadline for perfecting an appeal will be approximately forty-five days from the day the transcript is due.

Briefing deadlines: The Scheduling Order will contain deadlines for filing the respondent's brief and the reply brief. In most cases, the deadline for filing the respondent's brief will be forty-five days from the day the petitioner's brief is due. The reply brief, if one is deemed necessary by the petitioner, will typically be due twenty days from the day the respondent's brief is due.

Mature date: An appeal becomes "mature" for consideration by the Court after the reply brief is filed, or the time for filing the reply has passed. Mature cases will be distributed to the Court for consideration in due course. Counsel will be informed in writing of any decision in the case. Do not contact the Clerk's Office for information about the decision in your case unless more than four months have passed after the case becomes mature.

¹ Certain appeals from a final order of the Circuit Court of Kanawha County ruling on an appeal from the Human Rights Commission are due within thirty days. The Notice of Appeal and Scheduling Order requirements do not apply to those cases. Refer to Revised Rule 15 for more information. The appeal deadline is also shorter in certain juvenile cases.

ASSEMBLING THE RECORD ON APPEAL

The Record On Appeal Is A Subset Of The Circuit Court Record

One of the key components of the Revised Rules is that a much greater emphasis is placed upon careful preparation of the record on appeal. "The record" consists of all the papers and exhibits filed in the proceedings in the circuit court, including the official transcript and the docket entries. The "record on appeal" is a subset of the record made in the lower court. 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.

All the parties to the appeal share a joint responsibility for determining the contents of the record on appeal.

Under former practice in all circuit court appeals, the petitioner alone designated the record (usually the entire record as a matter of expedience), which was then assembled and indexed by the circuit clerk's office and transmitted to this Court. Over time, this practice encouraged a lack of oversight by petitioner's counsel in some cases, and created difficulty for all parties in being able to prepare briefs that accurately cite to a specific page in the record. The records transmitted to the Court were nearly always over-inclusive, resulting in a waste of resources. In addition, index and record preparation in some counties was impeded by personnel turnover and other factors, resulting in a lack of uniformity and delay in some cases.

What Are The Methods Of Providing The Record On Appeal?

The Revised Rules set forth two methods for providing the record on appeal: the **appendix** method in Revised Rule 7 and the **designated record** method in Revised Rule 8. Under the appendix method, the record on appeal is assembled and filed by the petitioner. Under the designated record method, the record on appeal is assembled and filed by the circuit clerk using items designated by the parties. An appendix is required unless the Court grants permission by order to proceed on a designated record. *See* Revised Rule 6(d).

Who Has Responsibility To Provide The Record On Appeal?

No matter which method is used, the parties share a joint responsibility for determining the *contents* of the record on appeal. All parties to the appeal are responsible for determining the contents of the appendix, and the petitioner is responsible for preparing and filing the appendix as set forth in Revised 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 transmitting the record as set forth in revised Rule 8.

Parties to the appeal are encouraged to confer and agree on the contents of the record on appeal. Agreement on the contents of the record will streamline the appeal, reduce the cost of litigation for everyone involved, and will assure that the Court has an adequate basis to review and decide the issues in the appeal.

Parties are strongly discouraged from including unnecessary material in the record on appeal. 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. *See* Revised Rule 6(f).

How Do I Obtain The Documents For An Appendix?

Because the record on appeal is a subset of the record made in the circuit court, the process for assembling an appendix should begin by maintaining a complete litigation file while the case is pending in circuit court. If you were not counsel in the circuit court action, you should request a copy of the litigation file from trial counsel. You can also obtain copies directly from the circuit clerk, but the request should be specific and be made as soon as possible. It is also important to review the circuit clerk's docket sheet to verify that items in the litigation file are *actually included* in the circuit court record.

Anything not filed with the circuit court may 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. *See* Revised Rule 6(b). This is especially

Unless filed with the circuit court, discovery materials are not considered part of the record and cannot be included in the record on appeal.

important with regard to discovery materials, which are not filed in the circuit court unless necessary to resolve a disputed motion. Unless filed with the circuit court, discovery materials are not considered part of the record and cannot be included in the record on appeal. If transcripts are to be made a part of the record on appeal, the transcript request must be made as part of the Notice of Appeal, and the petitioner will be provided a copy of the transcript once it is complete. If previously-prepared transcripts are to be included in the record on appeal and copies are not available in the litigation file, then obtain copies from the court reporter or the circuit clerk.

What If The Parties Don't Agree On The Contents Of The Appendix?

The parties are encouraged to confer and agree on the contents of the appendix. If agreement is not reached, however, the parties must follow the process set forth in Revised Rule 7(e) and 7(f). The Scheduling Order will contain a date that the petitioner must serve on the respondent a list of all 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 included in the Notice of Appeal. Within ten days, the respondent may 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 parts of the record listed by the respondent in the appendix. The parties must not list unnecessary parts of the record for inclusion in the appendix, because the entire record is always available to the Court. If the petitioner considers parts of the record listed by the respondent to be unnecessary, the petitioner may advise the respondent, who must then advance the cost of including those parts. 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.

Can I Use Documents From My Litigation File?

The appendix must contain accurate reproductions of the papers submitted to the lower court. With the exception of the circuit court docket sheet, the papers in the appendix do not have to be certified by the circuit clerk. For example, if you have a *signed* copy of a motion that was filed in the circuit court, and the only difference between your signed file copy and the circuit court's copy is the timestamp,

then you may include a copy of your signed motion in the appendix. In order to avoid any disputes over the accuracy of items in the appendix, the petitioner is required to certify that the contents of the appendix are true and accurate copies of items contained in the record of the lower tribunal. If there is any question as to whether your file copy is materially different from the copy in the circuit clerk's file—apart from the timestamp—then you must include the copy from the circuit clerk's file.

How Is An Appendix Formatted?

The format, page numbering and general requirements for an appendix are set forth in Revised Rule 7 and should be reviewed carefully. The following points are intended to clarify common questions about the format of an appendix.

Copying: When copying documents make sure that the copies are legible. Parties are encouraged to use double-sided copies in order to reduce the size of the appendix. If necessary, the copies may be reduced slightly in size in order to accommodate the page numbers.

Page numbers: Each page of an appendix must be clearly numbered in a sequential fashion so that each page can 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. Handwritten page numbers are permitted, but printed or stamped numbers are often more legible and are preferred. If necessary, individual volumes of an appendix may be numbered separately. If a volume is comprised solely of official transcripts in their entirety, additional page numbering of that volume is not required.

Cover page: Each volume of an appendix must contain a cover page with the case caption, the title (i.e. "Petitioner's Appendix" or "Supplemental Appendix") and the 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 Revised Rule 40, the appendix does not have to be redacted, but the upper portion of the cover page must prominently state: "Contains Confidential Materials." The lower portion of the cover page of each volume of the appendix must contain the name, address, telephone number, e-mail address, and West Virginia Bar Identification Number of counsel. If the party is not represented by

counsel, then the lower portion of the cover page must contain the party's address and telephone number. Although not required, the cover page may be printed on card stock or heavy stock paper. Do not use plastic covers or any other type of cover that will extend beyond the standard paper size of eight and one-half inches by eleven inches.

Binding: 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. Acceptable methods include staples, binder clips, prong fasteners or manuscript fasteners. Do not use binding methods that will result in bulky protrusions or sharp edges, such as three-ring binders or spiral binders. A single volume of an appendix should not exceed three inches in thickness. Perfect binding is not required, but if perfect binding is used, it should only be used for the original appendix; the extra copy of the appendix should be filed using a binding method that will allow the Court to easily disassemble for copying.

Certifications: Immediately following the cover page, each volume of an appendix must contain a certification page signed by counsel or an unrepresented party, certifying that: (1) the contents of the appendix are true and accurate copies of items contained in the record of the lower tribunal; and (2) the petitioner has conferred in good faith with all parties to the appeal in order to determine the contents of the appendix.

Table of Contents: Immediately following the certification page, the appendix must contain a table of contents that briefly describes each item included in the appendix by reference to its page number and volume number, if applicable.

What if I Need to Proceed on a Designated Record?

A designated record is an alternative method of preparing the record on appeal that may be used instead of—or in combination with—an appendix. A designated record is not permitted unless the Court specifically allows a designated record by order. The general requirements for proceeding on a designated record are set forth in Revised Rule 8. Although the appendix method is normally required as set forth in Revised Rule 7, proceeding on a designated record in whole or in part may be appropriate in certain circumstances. The designated record method can be used in instances where the petitioner is not represented by counsel or where exhibits that are not

easily included in an appendix record need to be transmitted to the Court for review. For example, if color photographs that were entered into evidence in a criminal case need to be included in the record on appeal, counsel for petitioner may request that the color photographs be transmitted as part of a designated record, but the remaining record on appeal be provided by the appendix method. A party who wishes to proceed on a designated record should file a motion as early as possible, preferably at the same time that the Notice of Appeal is filed. The motion should specifically identify the items to be included. The Court, on its own motion or in the Scheduling Order, may allow the parties to proceed on a designated record either in whole or in part.

How Is a Designated Record Assembled?

If a designated record is permitted by the Court, the petitioner must file with the clerk of the circuit court, within the time frame provided by order, an itemized designation of pleadings, orders, exhibits, and transcripts that are necessary for the Supreme Court to decide the matters in the petition. The respondent must file with the clerk of the circuit court, within the time frame designated by order, an itemized designation of additional parts of the record that are necessary for the Court's consideration of the issues in light of the petitioner's designation. Both designations must also be provided to the other parties in the case. The Court may, by order, require the parties to submit a joint designation. The designation by both parties must be specific. Simply designating "the entire record" is not acceptable. In order to facilitate proper assembly, counsel should utilize the circuit court's docket sheet to make the designation.

The designations of record must be itemized and specific. **It is not acceptable to designate "the entire record."**

Once the designations are complete, the circuit clerk will assemble the record. The circuit clerk must arrange the documents in chronological order and number each of the pages in the record. The circuit clerk must also prepare a table of contents that lists each item included in the designated record by reference to its page number and volume number, if applicable. Before the designated record is transmitted to the Supreme Court, the petitioner must deposit with the clerk of the circuit court sufficient money or a bond for the costs associated with preparing and transmitting the designated record.

PERFECTING THE APPEAL AND BRIEFING

Highlights of the New Briefing Process

Under the Former Rules of Appellate Procedure, the briefing process was divided into two stages. At stage one, the petitioner filed a written argument and a response was not required, but was often filed. At stage two, if the Court granted the petition for appeal, a briefing schedule was established and the case was fully briefed before it was argued. As a result, parties often had to file two sets of written arguments before a case was argued and decided.

Under the Revised Rules, the briefing of cases is unified into a single stage. All parties to the appeal are required to file a brief *before* the Court will consider the case. Although the Court may request supplemental briefs, most

Under the Revised Rules the briefing of cases is unified into a single stage. **All parties to the appeal are required to file a brief before the Court will consider the case.**

appeals will be considered based upon a single round of three briefs: the petitioner's brief, which will be filed when the appeal is perfected; the respondent's brief (or summary response); and the reply brief, if the petitioner elects to file one. Accordingly, the preparation of good briefs is a key component to presenting a high-quality appeal.

Perfecting the Appeal

An appeal is **perfected** by filing with the Clerk of the Supreme Court the petitioner's brief and the appendix or designated record according to the date set forth in the Scheduling Order. The deadlines for perfecting an appeal are set forth by statute. The statutory deadline is four months for civil and criminal appeals, and sixty days for appeals in abuse and neglect cases. Human rights commission appeals must be perfected within thirty days from a final order of the Human Rights Commission or final order from the Circuit Court of Kanawha County. *See* Revised Rule 15(a)-(c). Abuse and neglect appeals can be perfected without presentation of the transcript. *See* Revised Rule 11(g) and 11(i).

Petitioner's Brief

Revised Rule 10(c) sets forth the requirements for the petitioner's brief. The petitioner's brief must contain the following sections: table of contents (if the brief exceeds five pages); table of authorities (if the brief exceeds five pages); assignments of error; statement of the case; summary of argument; statement regarding oral argument and decision; argument; conclusion; and certificate of service.

ONLINE—A sample petitioner's brief is available on the *Appellate Revisions* page of the Court's website.

Several changes have been made to the requirements for a petitioner's brief from prior practice, namely to the following sections: assignments of error, summary of argument, and statement regarding oral argument and decision. Under prior practice, briefs were limited to fifty pages. Under the Revised Rules, the principle briefs on the merits are limited to forty pages. These revisions, as well as the requirements for each section of the petitioner's brief, are summarized below.

The table of contents provides page references to the sections of the brief and the argument headings. The table of authorities consists of an alphabetical list of cases, statutes, and other authorities cited, and it refers to the pages where they are located in the brief. The brief must open with a list of the assignments of error presented for review. The 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. The statement of the case provides a concise account of the procedural history of the case and the statement of the facts relevant to the assignments of error. The statement of the case should contain appropriate references to page numbers in the appendix and/or designated record.

A change from prior practice is that briefs must now contain a summary of argument. The summary of argument need not be lengthy. A good way to envision the summary of argument section is to imagine how you would describe the argument of the case to someone during an elevator ride. The summary of argument provides a concise description of the arguments made in the body of the brief. It does not contain extensive legal citations and does not simply restate the argument headings in the brief.

The Revised Rules utilize a unified briefing process. In most cases, the parties will only have one opportunity to brief the issues before the Court considers the case. Although each properly prepared appeal will result in a decision on the merits, not all cases will be argued orally. The Revised Rules set forth criteria² for when oral argument is not necessary. These criteria should be reviewed carefully. Of the cases in which argument is necessary, some cases will be more appropriate for a Rule 19 argument³, while others will be more appropriate for a Rule 20 argument⁴. In order to implement these changes, the Revised Rules require the parties to include a Statement Regarding Argument and Decision in their briefs. The brief must state whether the party believes oral argument is necessary, and, if so, which type of oral argument is requested and why. If the party requests a Rule 19 argument, the party must state whether the case is appropriate for a memorandum decision. In addition, the party may request a specific amount of additional time for argument in this section of the brief. The party must explain why good cause exists for granting additional time.

The briefs must state whether the party believes oral argument is necessary, and, if so, which type of oral argument is requested and why.

The argument section of the brief sets forth the points of fact and law presented, the standard of review applicable, citations to the authorities relied on, under headings addressing the assignments of

² Under Revised Rule 18(a), 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.

³ 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. Oral arguments under Rule 19 will be limited to ten minutes per side, unless otherwise indicated by the Court.

⁴ Cases suitable for Rule 20 oral 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. Oral arguments under Rule 20 are limited to twenty minutes per side, unless otherwise indicated by the Court.

error. Briefs must cite to the record and specifically set forth where in the record the assignment of error was preserved. The brief must end with a conclusion, setting forth the relief sought. A certificate of service must be attached to the end of the brief.

Special requirement for appeals in abuse and neglect cases. Revised Rule 11(i) sets forth that the petitioner is encouraged to file a statement of all facts pertinent to the assignments of error in lieu of filing a transcript of testimony taken in the lower court. Proceeding without a transcript will provide an expeditious and inexpensive method of appeal in abuse and neglect cases. The petitioner's brief must include a certificate by the petitioner's counsel that the facts alleged are accurate to the best of counsel's ability.

Respondent's brief

In contrast to prior practice, a respondent's brief is now required in all properly filed appeals. In most cases, the deadline for filing the respondent's brief or summary response will be forty-five days from the day the appeal is perfected. The date that the respondent's brief is due will be set forth in the Scheduling Order.

The respondent is now **required** to file a response brief.

The requirements for filing the respondent's brief are set forth in Revised Rule 10(d). The respondent's brief must contain the same requirements as the petitioner's brief set forth in Revised Rule 10(c), with the following exceptions: the statement of the case is necessary only if the respondent needs to correct any inaccuracies or omissions in the petitioner's brief, and the respondent does not need to restate the assignments of error. The respondent's brief must specifically respond to each assignment of error. The errors discussed in respondent's brief do not need to follow the order that the errors were presented in the petitioner's brief, unless following the same order would assist the Court. It is important to note, however, that 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.

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.

The respondent has the option under Revised Rule 10(e) of filing a summary response instead of a brief. The summary response must

contain an argument responsive to the assignments of error but does not need to comply with all of the requirements for a brief. The summary response must cite to the record on appeal and demonstrate the authorities relied on for the points of fact and law presented. It must also contain a conclusion indicating the relief sought. A certificate of service must be attached to the summary response. A party who files a summary response is deemed to have waived oral argument.

Special requirements in abuse & neglect cases. Under Revised Rule 11(h), the guardian ad litem for any minor child involved in an abuse and neglect appeal must file a brief or a summary response. If oral argument is held, the guardian must appear and present argument unless the Court orders otherwise. In addition, under Revised Rule 11(j), briefs filed by the parties must contain a concise summary of argument setting forth the current status of the minor children and any plans for permanent placement, and the current status of the parental rights of the children's parents. Within one week of any oral argument or as set forth by order, the parties must provide a written statement of any change in the circumstances that were set forth in the briefs.

Reply Brief

The petitioner's reply brief, if one is deemed necessary by the petitioner, will typically be due twenty days from the day the respondent's brief is due. The requirements for the reply brief are set forth in Revised Rule 10(g). The page limitation for the reply brief is twenty pages. *See* Revised Rule 38. The reply brief must comply with the same requirements that respondent must follow under Revised Rule 10 except that the reply brief does not need to contain a summary of argument if it is appropriately divided by topical headings. If a timely-filed respondent's brief asserts cross-assignments of error, the page limitation for the reply brief is extended to forty pages, and the time for filing a reply is extended, without need for further order, until thirty days after the date respondent's brief containing the cross-assignments of error was filed.

What Happens Next?

After the response brief or summary response has been filed in accordance with Revised 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**. In due course, cases that are mature will be distributed to all of members of the Court for consideration in conference. Conferences occur at regularly scheduled dates throughout the term. The Justice's discussions and deliberations in conference are not open to the public, and the schedule of matters to be considered in conference is not available in advance.

The Court will carefully consider the written arguments of all parties along with the record on appeal. Then, the Court will: (1) decide the appeal on the merits without oral argument; or (2) set the appeal for oral argument and decide the case on the merits; or (3) issue an appropriate order after considering any written and oral arguments 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). Periodically throughout the court term, the Clerk's Office will post order lists on the Court's website that will set forth the Court's action in cases considered at conference.

If the case is set for oral argument, the Clerk will send counsel of record a written Notice of Argument. If the case is decided by Memorandum Decision without oral argument, the Clerk will send counsel of record a copy of the decision. **Handling oral argument and other matters that may occur after the appeal is mature are topics that are not covered by this guide.**

Visit the Appellate Revisions page for more information:
<http://www.state.wv.us/wvsca/rules/appellate-revisions.htm>