

February 1960

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Recommended Citation

Lee Silverstein, *A Basic Introduction to the New West Virginia Rules of Civil Procedure*, 62 W. Va. L. Rev. (1960).

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WEST VIRGINIA LAW REVIEW

Volume 62

December, 1959

Number 1

A BASIC INTRODUCTION TO THE NEW WEST VIRGINIA RULES OF CIVIL PROCEDURE*

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On October 20, 1959, the Supreme Court of Appeals of West Virginia entered an order which will bring about a comprehensive reform of civil procedure in the circuit courts¹ of the state and in inferior courts of record which have civil jurisdiction. *Rule 1.* (For convenience, most citations to the new Rules and Forms are carried in the body of the text in italics rather than in footnotes.) The order promulgates a new system of pleading and practice known as the West Virginia Rules of Civil Procedure for Trial Courts of Record. *Rule 85.* The effective date will be July 1, 1960. *Rule 86.* The new Rules are an exercise of the rule-making power which the Supreme Court of Appeals has previously exercised from time to time;² the most familiar example is the Rules of Practice for Trial Courts,³ some of which will be superseded by the new Rules.

The primary purpose of this article is to assist the lawyers and judges of West Virginia in making the transition to the new system

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† The author gratefully acknowledges the assistance and advice of Marlyn E. Lugar, Professor of Law, West Virginia University, who read the manuscript and made many helpful suggestions for revision.

¹ The circuit court is the trial court of general jurisdiction. W. VA. CONST. art. VIII, § 12.

² W. VA. CODE ch. 51, art. 1, § 4 (Michie 1955). Compare § 4a authorizing the Supreme Court of Appeals, *inter alia*, to adopt rules establishing the West Virginia State Bar. This section also says: "The inherent rule-making power of the supreme court of appeals is hereby declared."

³ These Rules were adopted from 1936 to 1947. 116 W. Va. *i* and subsequent volumes. The Rules appeared as an appendix in W. Va. Code (Michie 1955); in BURKS, PLEADING & PRACTICE 953 (4th ed. Boyd 1952); and in 21 MICHIE, VA. & W. VA. JUR. 520 (1952).

of procedure from the present system of common law pleading with modifications.⁴ The article should also be of assistance to law students, circuit clerks, and other persons who will work with the new Rules. It is assumed that the reader has a copy of the text of the new Rules together with the Reporters' Notes appended to each Rule.⁵ Hence quotation and paraphrase will be avoided as much as possible.

It is useful to know something of the historical development leading up to the enactment of the new West Virginia Rules. They are directly modelled upon the Federal Rules of Civil Procedure for District Courts, which took effect in 1938. The Federal Rules in turn had been developed from the code pleading of the more progressive states, from the Federal Equity Rules of 1912, and from the modern British procedure.⁶ In West Virginia the modern movement for procedural reform began as early as 1928.⁷ In more recent years the West Virginia State [Integrated] Bar, created in 1948, has led the movement,⁸ with the strong support and cooperation of the West Virginia Bar Association,⁹ the West Virginia Judicial Association, the Attorney General, and numerous individual lawyers and judges.

⁴ The Reporters' Note to Rule 4 cites some of the modifications.

⁵ The Rules, including the Reporters' Notes, may be obtained from Michie Publishing Co., Charlottesville, Va. The Reporters were Professor Marlyn E. Lugar of West Virginia University College of Law and the author. They were appointed in 1954 by Attorney General John G. Fox. Later these Notes, with some modifications, were approved along with the text of the Rules by the following bodies, listed in chronological order of approval: the Committee on Civil Rules of the West Virginia State [Integrated] Bar; the Judicial Council (see W. VA. CODE ch. 51, art. 1, § 4 (Michie 1955)); the Board of Governors of the State Bar, a large majority of the members of the State Bar; and the Supreme Court of Appeals. The Notes are intended to have about the same standing as the Advisory Committee Notes which accompany the Federal Rules of Civil Procedure for District Courts.

⁶ Wright, *Procedural Reform in the States*, 24 F.R.D. 85 (1959); 1 BARRON & HOLTZOFF, FEDERAL PRACTICE & PROCEDURE 9-30 (1950); Holtzoff, *Eighteen Years' Experience Under the Federal Rules of Civil Procedure*, 1 W. VA. STATE BAR NEWS 365 (1956).

⁷ See W. VA. STATE BAR, PROPOSED RULES OF CIVIL PROCEDURE FOR TRIAL COURTS OF RECORD, Introduction (1957); Arnold, Simonton & Havighurst, *Report to the Committee on Judicial Administration and Legal Reform of the West Virginia Bar Association Containing Suggestions Concerning Pleading and Practice in West Virginia*, 36 W. VA. L. Q. 1 (1929).

⁸ See Wise, *The Public and the State Bar*, 53 W. VA. L. REV. 65 (1950); Martin, *Meeting our Responsibilities*, 1 W. VA. STATE BAR NEWS 306 (1955); Reports of the Committee on Civil Rules, 1951-59. During this period the State Bar devoted considerable time to the proposed Rules at its annual meetings and at special meetings held throughout the state.

⁹ See Reports of Committee on Judicial Administration and Legal Reform, published in ANN. PROC. W. VA. BAR ASS'N., 1955-59.

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I. A BRIEF SURVEY OF THE NEW RULES

If the reader is familiar with the Federal Rules of Civil Procedure or with state rules modelled on them, he will have no trouble finding his way around in the new West Virginia Rules. The West Virginia system of enumeration, captions, and subdivisions closely follows the Federal Rules. Even the numbering of the forms in the appendix is the same. Nevertheless, there are important differences between the two systems; these are mentioned herein at appropriate places and are summarized in an appendix to this article.

To understand the new Rules it is well to begin with the Table of Contents so as to see the general scheme of organization. The pattern of Rules 3 to 72 corresponds to the progress of a lawsuit from commencement of action to proceedings after judgment. The Rules conclude with provisions on courts, clerks, and other general matters, plus the Appendix of Forms. Rule 81 defining the scope and applicability of the Rules should be read carefully; although it is like Federal Rule in form, it is quite different in content.

1-1. *Starting an action.* Like the Federal Rules, the West Virginia Rules establish a unified system of procedure for law and equity¹⁰ and provide for a single form of action known as a civil action. *Rule 2.*¹¹ In West Virginia the new procedure for starting an action is like the old practice in one respect, but different in another. The likeness is that an action is not started until the circuit clerk issues a summons or enters an order of publication.¹² The difference is that the plaintiff's attorney must file the complaint in order to start the action; this corresponds to the Federal Rule and to

¹⁰ This change eliminates the common-law forms of action, such as assumpsit, debt, trespass on the case, detinue, and ejectment. All technical forms of declaration and answer are abolished. Rule 8(a) and 8(b). Attorneys may still find it convenient to speak of detinue, trover, etc., to describe a form of relief, but such words will lose their connotation of technical forms of action.

¹¹ This change is discussed in text § 4-1 *infra*. Separate docket and order books will no longer be used. Rule 79(a). Commissioners in chancery will be called commissioners. Rule 53.

¹² According to West Virginia decisions an action or suit is begun when the summons or writ is issued. *United States Oil & Gas Well Supply Co. v. Gartlan*, 58 W. Va. 267, 52 S.E. 524 (1905); *United States Blowpipe Co. v. Spencer*, 46 W. Va. 590, 33 S.E. 342 (1899). This stops the running of the statute of limitations.

The order of publication can be entered by the court as well as the clerk, W. VA. CODE ch. 56, art. 3, § 23 (Michie 1955), but entry by the clerk will usually be the more convenient procedure.

the old practice in divorce suits.¹³ This change eliminates the need for filing a praecipe with the clerk in order to start an action.¹⁴ The change also eliminates the variations in present practice in the method of starting different kinds of actions.¹⁵

1-2. *How is an Action Matured for Trial Without Rule Days?* Since Rule 3A abolishes rule days,¹⁶ what is the new system for maturing a case for trial? So far as the plaintiff is concerned, he has done all he needs to do when he files the complaint under Rule 3 and sees to it that summons is issued or an order of publication is entered. A copy of the complaint and of the summons are served on the defendant. *Rule 4(d)*. The summons informs the defendant that he must serve an answer within a set number of days. *Form 1*. The time limit is usually twenty days, but where service is made upon a statutory agent or attorney in fact, such as the state auditor, the time limit is thirty days; the thirty-day period also applies for service by publication and for personal service outside the state. *Rule 12(a)*. The defendant or his attorney can obtain an extension of time in any of four ways: (1) he may obtain an automatic extension of ten days by giving notice that he has a bona fide defense, *Rule 12(a)*; (2) he may stipulate with the plaintiff for additional time and file the stipulation with the court, *Rule 6(b)*; (3) he may apply to the court within the twenty-day period for an extension of time, *Rule 6(b)(1)*; (4) he may apply to the court after the twenty-day period for an extension of time, but must show excusable neglect or unavoidable cause, *Rule 6(b)(2)*. The first two ways of obtaining additional time are not available under the Federal Rules; nor is relief for unavoidable cause under *Rule 6(b)(2)*. In the ordinary two-party litigation, the pleadings will consist only of a complaint and an answer, and, if the defendant files a counterclaim, denominated as such in *Rule 16(a)*, an answer to the counterclaim. *Rule*

¹³ W. VA. CODE ch. 48, art. 2, § 11 (Michie 1955). The same applies to suits for annulment or affirmation of marriage.

¹⁴ In West Virginia a praecipe is a direction to the clerk to issue a summons. *State ex rel. Beckley Newspapers Corp. v. Hunter*, 127 W. Va. 738, 34 S.E.2d 468 (1945). See BURKS, PLEADING & PRACTICE § 38 (4th ed Boyd 1952).

¹⁵ A proceeding by notice of motion for judgment is not begun until the notice is filed in the clerk's office. *Citizens Bank v. Auvil*, 109 W. Va. 753, 156 S.E. 111 (1930); W. VA. CODE, ch. 56, art. 2, § 5, 6 (Michie 1955). The method of commencing several other kinds of action is also exceptional.

¹⁶ On rule day see W. VA. CODE ch. 56, art. 4 §§ 1-7 (Michie 1955); KITTLE, RULE DAYS IN VIRGINIA & WEST VIRGINIA (1914); BURKS, PLEADING & PRACTICE ch. 8 (4th ed Boyd 1952). Rule 3A also abolishes the whole apparatus of office judgments, decrees nisi, rules to plead, and similar procedures.

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7(a).¹⁷ The court may order a reply to an answer (*Rule 7(a)*) but usually this need not be done, since the plaintiff will be deemed to have denied or avoided all the defendant's averments (*Rule 8(d)*) and the plaintiff will be permitted to assert at the trial any defense of law or fact to a claim for relief asserted by the defendant, so long as no responsive pleading thereto is required, *Rule 12(b)*. Thus, so far as the pleadings are concerned, the case will be matured for trial after the last pleading is filed. Nevertheless, if either party makes pre-trial motions on the pleadings under *Rules 12(b)* or *12(c)*, the court may want to dispose of these motions before the case is ready for trial. See *Rule 12(d)*. Also a motion under *Rule 12(f)* or *Rule 56* will have to be disposed of before trial. And, similarly, if either party uses the deposition and discovery procedures (*Rules 26 to 37*) this may delay the trial. (As to functions of rule days other than the maturing of cases for trial, see *Reporters' Note to Rule 3A.*) *Rule 40* prescribes the various methods which the court may use in assigning cases for trial. Under *Rule 79(c)* the clerk will prepare trial calendars under the court's direction. If pre-trial conferences are held under *Rule 16*, this will have to be taken into account in administering *Rule 40*.

1-3. *The Content of the Complaint.* What is said in this section about plaintiffs and complaints applies also to other parties asserting claims for relief: counterclaims and crossclaims (*Rule 13*); third-party claims (*Rule 14*); interpleader (*Rule 22*); and intervenor (*Rule 24*). This same principle of interpretation applies throughout the Rules, and so does a parallel principle for defendants.

In pleadings under the new Rules, the important thing is substance rather than form. A concise, direct statement of the claim in plain English instead of legal jargon is therefore sufficient. *Rule 8(a)*, *8(e)(1)*, and *8(f)*. A demand for relief must be included. *Rule 8(a)*. The complaint may allege several kinds of things in general language or in an informal way, but certain other things, such as circumstances constituting fraud, must be pleaded with particularity. *Rule 9*.¹⁸ All averments of the claim must be set forth in separate numbered paragraphs, and each paragraph should state only a single

¹⁷ If the defendant mistakenly designates a counterclaim as part of the answer, the court can give appropriate relief. *Rule 8(c)*.

¹⁸ The provision in *Rule 9(b)* permitting negligence to be averred generally does not appear in the Federal Rule, but this has been the import of West Virginia decisions under the old practice. Lugar, *Common-Law Pleading Modified Versus the Federal Rules*, 53 W. VA. L. REV. 195, 245-51 (1951).

set of circumstances. *Rule 10(b)*. See *Appendix of Forms*. Pleading in the alternative or the hypothetical is permitted. *Rule 8(e)(2)*. The official forms demonstrate the utter simplicity of pleading which the Rules contemplate. *Rule 84, Forms 3 through 13*. Simplicity and informality, however, do not imply carelessness and sloth: the plaintiff's attorney must know every essential element of his cause of action and must state it in the pleading. The habits of care and thoroughness which have distinguished better lawyers in the past will continue to do so in the future.

Several other provisions of the new Rules will aid the plaintiff's attorney. Rule 20 permits liberal joinder of parties plaintiff or defendant. Rule 23 extends the availability of representative actions to legal as well as equitable causes of action. Rule 19, however, requires the plaintiff to join certain kinds of parties.¹⁹ Another limitation appears in Rule 17(a), which requires the plaintiff to prosecute the action in the name of the real party in interest.²⁰ Rule 18 allows great liberality in joinder of claims and remedies.²¹ The plaintiff may join a claim based on contract with a claim arising from tort, or he may seek specific restitution—"detinue"—of one converted chattel and damages for another. In a declaratory judgment proceeding, alternate forms, or a combination of forms, of relief are available. *Rule 57*. Plaintiff may also plead alternative theories of his claim, such as wilfulness or negligence. *Rule 8(e)(2), Form 10*.²² Rule 15 liberalizes amendment of pleadings and allows supplemental pleadings for events which occur after the original pleadings.²³ Rule 4(k) allows amendment of process and of proof of service.

¹⁹ As to the difference between indispensable and necessary parties, see Reporters' Note to Rule 19; 2 BARRON & HOLTZOFF, *FEDERAL PRACTICE & PROCEDURE* § 511 (1950).

²⁰ Compared to the Federal Rule, West Virginia Rule 17(a) differs by adding the clause, "and in subrogation and similar cases, the court shall apply this subdivision as well promote justice." This clause is intended to permit each local court to continue its former rule as to whether a subrogee insurance company suing in the name of the insured must disclose the subrogation. At present some courts require the disclosure; some do not. The Supreme Court of Appeals has not ruled on the question.

²¹ See, Lugar, *supra* note 18 at 137, 142-2-7; Lugar, *Common-Law Pleading Modified Versus the Federal Rules*, 52 W. VA. L. REV. 195-240 (1950). This material is especially good in comparing the old West Virginia practice and the federal practice—the latter the same as the new West Virginia practice.

²² Lugar, *supra* note 18 at 267-80; Hankin, *Alternative and Hypothetical Pleading*, 33 YALE L.J. 365 (1924).

²³ See, Lugar, *supra* note 18 at 27 for a comparison of the old West Virginia practice and the federal practice as to amendments—the latter is the same as the new West Virginia practice.

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1-4. *Can Old Forms of Pleadings Be Used?* The lawyer who has accumulated or inherited a store of forms for various kinds of pleadings can continue to use them under the new practice, subject, however, to two limitations. The first is that each pleading must be signed by the attorney filing it, and that his signature constitutes a certificate that he has read the pleading; "that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay." *Rule 11*. If more than one attorney signs the pleading, the first signature constitutes the certificate. (Federal Rule 11 does not have this provision limiting the responsibility of co-signers.) If the pleading is not signed or is signed with intent to defeat the rule, it is subject to a motion to strike as sham and false, and the attorney is subject to appropriate disciplinary action. These provisions will preclude the verbatim copying of some forms, such as standard allegations of physical cruelty in a divorce action. Rules 8 and 11 require that the complaint be tailored closely to the facts of the individual case.

The second limitation is akin to the first. The attorney should exclude allegations which are redundant, immaterial, impertinent, or scandalous, since such allegations are subject to a motion to strike (*Rule 12(f)*) as under the old practice in equity and to some extent at law.²⁴

Only eight forms of complaint appear in the Appendix, and most of these are designed for simple fact situations. For more complicated fact situations the attorney will be able to use his accumulated office forms or the ones provided in the popular form books already in use in West Virginia, subject to the limitations discussed above.

1-5. *Claims for a Sum Certain*. In place of the familiar notice of motion for judgment the creditor's attorney will substitute Form 3, 4, or 5, or one of comparable simplicity. Although the certificate of Rule 11 supplants the requirement of an affidavit supporting the notice of motion at the pleading stage, Rule 55(b)(1) requires as a prerequisite to entry of default judgment that the plaintiff or his attorney make affidavit of the amount due and of the defendant's

²⁴ HOGG, *EQUITY PROCEDURE* § 429 (3d ed. Miller 1943); *Blue v. Hazel-Atlas Glass Co.*, 93 W. Va. 717, 117 S.E. 612 (1923).

In common-law practice irrelevant or impertinent matter may be challenged by a motion to strike. *Metropolitan Life Ins. Co. v. Hill*, 115 W. Va. 515, 117 S.E. 188 (1934); SHIPMAN, *COMMON LAW PLEADING* § 316 (3d ed. Ballantine 1923). On the scope of the demurrer, see W. VA. CODE ch. 56, art. 4, § 36 and Revisers' Note thereto (Michie 1955).

failure to appear. The affidavit is thus transferred from one stage of the case to another. Under the new practice default judgment will usually be obtainable after twenty days, corresponding to the minimum period of twenty days under the notice-of-motion practice. If service is made upon an appointed or statutory attorney in fact, default judgment will require thirty days. *Rule 12(a)*. If the attorney waits longer than the twenty-day or thirty-day period, he may still obtain default judgment at any time, so long as he is not in violation of *Rule 41(b)*, which permits involuntary dismissal for failure to prosecute.

1-6. *The Defendant's Answer and Related Motions*. Much of what has been said in section 1-3 about the complaint applies equally to the defendant's responsive pleading. The term defendant includes any party who is in the position of responding to a claim for relief.

Simplicity, directness, and precision are the theme of responsive pleading. *Rule 8(b)*. The provisions on form and signing of pleadings apply to defendants. *Rules 10 and 11*. The time limits for filing the answer are discussed in section 1-2 above. The defendant is required to assert all his defenses, whether of law or fact, in his answer, except that he may elect to assert certain defenses by motion. *Rule 12(b)*, *Form 20*. Several motions may be consolidated in a single paper. *Rule 12(g)*. All motions under *Rule 12(b)* must be disposed of before trial. *Rule 12(d)*. A defense is waived by failure to assert it seasonably (*Rule 12(h)*) with a few exceptions. Under the old practice the defendant's attorney has been accustomed to filing a plea in abatement to challenge jurisdiction of the subject matter²⁵ or to challenge sufficiency of process or of service of process.²⁶ To challenge jurisdiction over the person he may have used a plea in abatement or motion to quash process.²⁷ For an objection to venue a plea in abatement or writ of prohibition has been used.²⁸ All of these possible pleas and motions will be includ-

²⁵ W. VA. CODE ch. 56, art. 4 § 31 (Michie 1955), superseded by *Rule 12(b)(1)*.

²⁶ W. VA. CODE ch. 56, art. 4, § 30 (Michie 1955), superseded by *Rule 12(b)(4)* and *12(b)(5)*.

²⁷ W. VA. CODE ch. 56, art. 4, § 30 (Michie 1955), superseded by *Rule 12(b)(2)*.

²⁸ This was the method used in *Crawford v. Carson*, 138 W. Va. 852, 78 S.E.2d 268 (1953); cf. *Sidney Smith Corp. v. Dailey*, 136 W. Va. 380, 67 S.E.2d 523 (1951); *Southern Sand & Gravel Co. v. Massaponax Corp.*, 145 Va. 317, 133 S.E. 812 (1926), cited with approval in *Sidney Smith Corp. v. Dailey*, *supra*. A motion under *Rules 12(b)(3)* will supersede the plea in abatement.

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ed in the answer or asserted by motion under Rule 12(b), except that the relief available by writ of prohibition will not be affected. *Rule 81(a)(5)*. Nor do the Rules alter the existing law as to jurisdiction and venue. *Rule 82*. Some objections available under Rule 12(b) may be raised later in the trial. *Rule 12(h)*.

In the common-law actions the form of general denial has been according to the ancient formulas of non assumpsit, not guilty, and the like. Affirmative defenses have been asserted by special plea or at times under certain general denials. Both these kinds of pleas will now be asserted in the answer. *Rules 8(b), 8(c), and 12(b)*.

A demurrer under the old practice asserts that the plaintiff has failed to state a cause of action. In the new practice four separate rules supersede the demurrer—12(b)(6), 12(c), 12(f), and 56.²⁹ The specific grounds of objection must still be stated. *Rule 7(b)(1)*. A motion under Rule 12(b)(6)—or equivalent defense in the answer—is most like the demurrer. This motion is appropriate immediately after the filing of the complaint. The motion under Rule 12(c) is appropriate after all the pleadings have been filed, including an amended complaint. (This motion is also available to the plaintiff.) If matters outside the pleadings are submitted in support of a motion under either Rule 12(b) or 12(c), the court may consider it as a motion for summary judgment under Rule 56.³⁰

Still another motion available to the defendant under the old practice has been the motion for bill of particulars.³¹ This is superseded by motion for more definite statement under Rule 12(e) as an aid to responsive pleading, and by deposition and discovery practice under Rules 26 through 37 as an aid to proof. A motion under Rule 12(e) should specify just how the complaint should be made more definite; if granted, it does not limit proof at the trial.

1-7. *Counterclaims, Cross-Claims, and Third-Party Claims*. The new provisions on these kinds of claims, Rules 13 and 14, are largely innovations in West Virginia practice.³² The defendant *must*

²⁹ See the Reporters' Notes to Rules 12(b), 12(c), and 56.

³⁰ On summary judgment, see Reporters' Note to Rule 56; CLARK, CODE PLEADING 556-67 (2d ed. 1947); Suggs & Stumberg, *Summary Judgment Procedure*, 22 TEXAS L. REV. 433 (1944).

³¹ W. VA. CODE ch. 56, art. 4, §§ 19, 20 (Michie 1955).

³² On counterclaims see Lugar, *supra* note 13 at 142-64.

assert a counterclaim arising from the same transaction or occurrence, with few exceptions. *Rule 13(a), Form 1*. The defendant *may* assert claims against the plaintiff arising from different transactions or occurrences. *Rule 13(b)*. Once the defendant has filed a counterclaim, this limits the plaintiff's right of voluntary dismissal. *Rule 41(a)(2)*. Cross-claims are limited to co-parties and to the original subject matter or property in dispute. *Rule 13(g)*. Additional parties involved on counterclaims or cross-claims may be brought in as defendants. *Rule 13(h)*. Under Rule 14 the defendant may bring into the action a third party who is or may be liable to the defendant if the defendant is liable to the plaintiff, *e.g.* if the purchaser of impure food sues the seller, the seller may implead his supplier.³³ Such liability may also be asserted by a cross-claim. *Rule 13(g)*. Rule 42(c) permits the court to hold separate trials on the various claims asserted under Rules 13 and 14.

1-8. *Discovery and Other Procedure After the Pleadings But Before Trial*. Under the new Rules the concept of a trial is changed in two ways: by minimizing the element of surprise and by eliminating proof of uncontroverted facts. The first of these objectives is accomplished through discovery practice under Rules 26 through 37, the second through discovery coupled with the pre-trial conference under Rule 16, and partial summary judgment under Rule 56(c) and 56(d).

Rules 26, 28, 30, and 31 supersede the existing procedure for taking depositions. Rule 26, 30, and 31 permit depositions for the purpose of discovery, a new function in West Virginia. Rule 33 permits written interrogatories to parties for the same purpose. Other discovery rules are self-explanatory. In order to protect parties and witnesses against possible abuses of the procedures for discovery, the Rules include several safeguards not to be found in the corresponding Federal Rules.³⁴

The pre-trial conference, Rule 16, is not new in West Virginia—it was first authorized in 1945—but the conference will take on greater importance in the context of discovery, summary judgment (*Rule 56*), and other innovations.³⁵ An hour spent at pre-trial con-

³³ *Saunders v. Goldstein*, 30 F. Supp. 150 (D.D.C. 1939). See, 2 BARRON & HOLTZOFF, FEDERAL PRACTICE & PROCEDURE § 426 (1950).

³⁴ These safeguards appear in Rules 26(b), and 30(b), 30(d), 30(e), 33, and 34(b). The changes are stated in detail in the Appendix, *infra*.

³⁵ See NIMS, PRE-TRIAL (1950); Hugus, *Pre-Trial in West Virginia*, 55 W. VA. L. REV. 110 (1953); McCarthy, *Pre-Trial in Virginia*, 40 VA. L. REV. 359 (1954); BURKS, PLEADING & PRACTICE § 259 (4th ed. Boyd 1952); Murrah, *Pre-Trial Procedure; A Statement of Its Essentials*, 14 F.R.D. 417 (1953).

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ference may save half a day of trial and a whole day of preparation for trial. Disclosures at pre-trial may pave the way for further discovery or for a motion for summary judgment under Rule 56. The summary judgment procedure will be useful where no serious dispute exists as to the facts, but only a question of law, or where liability is admitted but the amount of damages is in question. Either party may move for summary judgment (*Rule 56(a) and 56(b)*) or both parties may make the motion at the same time. If two or more claims for relief are involved, the court may grant summary judgment as to any individual claim. The discovery procedures, combined with pre-trial conference and summary judgment, should reduce the number of trials: the kind of case which would result in a directed verdict in the old practice will be appropriate for summary judgment in the new practice.

1-9. *Demand for Jury Trial.* Under West Virginia Rule 38, as under Federal Rule 38, the right of jury trial is preserved, but it must be demanded in advance, otherwise it is waived. An appropriate form of demand is by a sentence at the conclusion of the complaint or answer. If the party fails to make demand before the action is matured for trial, he may still have jury trial as a matter of right by making demand at any time up to the setting of the trial calendar. *Rule 39(b)*. The Federal Rule does not have this saving provision. Under Rule 39(c) a jury trial may be had in a case where it would not be permitted under the old practice. Rules 38 and 39 permit trial by jury on some issues and by the court on others.

1-10. *Other Rules Affecting the Trial.* Rule 41(a) on voluntary dismissals is more restrictive than the old practice permitting an indefinite number of nonsuits. The plaintiff will now be allowed only two turns at bat. This should discourage unfounded claims and inadequate preparation. The provisions on involuntary dismissal (*Rule 41(b)*) are considerably more flexible than the old practice.

Rule 42(b), which has no counterpart in the Federal Rules, supersedes the present Rule 13 for Trial Courts.³⁶ The other parts of Rule 42 allow great flexibility in consolidating or separating issues for trial. Rule 54(b) permits separate judgments if necessary.

Rules 43 and 44 somewhat liberalize the old rules for admission of certain kinds of evidence, but the great bulk of the law of evi-

³⁶ See note 3, *supra*. Rule 42(b) alters the effect of *State v. Davis*, 141 W. Va. 488, 93 S.E.2d 28 (1956).

dence is not affected by the Rules. Rule 46 clearly eliminates the need for an exception if the attorney has made an objection, while Rule 51 is similar to the present practice on objections to instructions. Rule 80 abolishes bills and certificates of exception, substituting a simpler system for preparing the papers necessary for appeal.

For verdicts other than a general verdict the old practice allows either the special verdict³⁷ or separate findings on special interrogatories in addition to the general verdict.³⁸ Rule 49(a) continues the special verdict and prescribes the methods by which the court is better able to administer it. Rule 49(b) preserves the practice of a separate findings in addition to the general verdict.

1-11. *Instructions or Charge to the Jury.* Under Rule 51 the new practice closely corresponds to the old, permitting either a series of separate instructions or a connected written charge.³⁹ The instructions or charge may not be shown to the jury or taken to the jury room, unless permitted by the court with the consent of the parties affected. Rule 51 also permits either the trial or appellate court to notice plain error in the giving or refusal to give an instruction, whether or not it has been made the subject of an objection.⁴⁰ West Virginia Rule 51 differs from the Federal Rule in two important respects: The West Virginia law forbids the judge to comment upon the evidence, and requires any instructions given by the court, whether in a connected charge or otherwise, to be in writing.

1-12. *Motion for Directed Verdict.* The new motion for directed verdict under Rule 50 is somewhat broader in scope than the old motion bearing the same name. The new motion does the work of the following motions under the old practice: (1) motion for a directed verdict at the conclusion of the evidence of the plaintiff (this motion was usually coupled with a motion to strike out or exclude such evidence); (2) demurrer to the evidence;⁴¹ (3) motion for directed verdict by any party at the close of all the evidence. The motion for directed verdict will be a part of the record for

³⁷ BURKS, PLEADING & PRACTICE § 319 (4th ed. Boyd 1952).

³⁸ W. VA. CODE ch. 56, art. 6, § 5 (Michie 1955).

³⁹ See Brennan, *Instructions to the Jury and the Proposed Rule*, 58 W. VA. L. REV. 117 (1956), criticizing a preliminary draft of Rule 51.

⁴⁰ These two provisions were added to the Rule by the Supreme Court of Appeals.

⁴¹ BURKS, *op. cit. supra* note 37 § 275.

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appeal purposes since the motion will be included in the reporter's transcript, (*Rule 80(a)*) or in an agreed statement of the proceedings. *Rule 80(e)*. Under the old practice, if, at the close of the plaintiff's evidence, the defendant moves for a directed verdict and the court denies the motion, and if the defendant then goes forward with his own proof, he waives the right to appeal from denial of the motion. The new practice does not alter this rule. A motion at this stage in a jury trial is comparable to a motion for an involuntary dismissal under *Rule 41(b)* in an action tried by the court without a jury.

1-13. *Motions After Verdict*. Once a verdict has been rendered against him, the losing party had available to him under the old practice the following motions:⁴² (1) motion in arrest of judgment, which lies for error which is apparent on the record; (2) motion for judgment *non obstante verdicto*, which relates back to error in the pleadings; (3) motion for repleader, which requires further pleadings and delays entry of judgment; (4) motion for *venire facias de novo*, which under certain fairly unusual circumstances requires a new trial. Under the new practice these four motions are abolished. *Rule 50(c)*. Relief formerly obtainable by motions in arrest of judgment, for judgment *non obstante verdicto*, and for repleader are outmoded, since the function of pleading is altered under the Rules. With the simplicity of pleading which suffices, as described in section 1-1 above, and with liberal amendment of pleadings to conform to the proof (*Rule 15(b)*) such motions no longer have a purpose to serve. Relief formerly obtainable by motion for *venire facias de novo* will be obtainable by a motion for new trial under *Rule 59(a)*.

Under the old practice, when judgment had been entered, the losing party might move the court to set aside the verdict as against the weight of the evidence and grant a new trial; the losing party may also seek a new trial for any of several other reasons.⁴³ Under the new practice these various forms of motion will continue to be available (*Rule 59(a)*) and in addition a new remedy is provided. The losing party who made a motion for directed verdict may not only seek a new trial because the verdict was against the weight of the evidence, as under the old practice, but he may also ask for entry of judgment in his favor, or ask for both forms of relief in the al-

⁴² *Id.* §§ 327-30 explains the function of each of these motions. See also Carlin, *Judgment Non Obstante Verdicto*, 51 W. VA. L. REV. 16 (1948).

⁴³ Burks, *Op. cit. supra* note 37 at §324.

ternative. *Rule 50(b)*. This new kind of motion for judgment notwithstanding the verdict is entirely different from the old motion for judgment *non obstante veredicto* which challenged the pleadings rather than the quantum of evidence.

Rules 59 and 60 bring together in one place various forms of relief previously available for reopening judgments other than by direct appeal or writ of error.

1-12. *Appellate Procedure*. Rules 72-76 of the Federal Rules prescribe the method of appeal from the judgment of a United States District Court. By contrast the West Virginia Rules omit such provisions almost entirely. West Virginia Rule 72 changes the method of computing the usual eight-months period allowed for filing an appeal. Under the old practice the time began to run at the date of entry of the final judgment or decree,⁴⁴ whereas under the new practice if the losing party timely makes one of the motions enumerated in Rule 72, the eight-months period begins to run only from the entry of the order ruling on the motion. A failure by the clerk to give notice of the entry will not stop the running of the period for appeal. *Rule 77(d)*.

A new and simpler method is provided in Rule 80 for preparing the trial transcript for appeal; Federal Rule 80 is entirely different. Also Rule 5(e) makes every pleading a part of the record at the time of filing, and Rule 4(h) is similar as to writs, process, orders, notices, etc.

The procedures by which a higher court controls the actions of a lower court—writs of prohibition and mandamus—are not affected by the Rules. *Rule 81(a)(5)*. If a trial court abuses its discretion in imposing a penalty for refusal to make discovery, this error can be corrected by writ of mandamus or prohibition issued by the Supreme Court of Appeals. *Rule 37(b)(3)*.

2. THE ROLE OF THE TRIAL JUDGE

Under the new regime in civil procedure the trial judge will take on several new functions but will discard others. This section is addressed primarily to matters of daily administration rather than unusual situations.

Under the old practice, except for a few things which might be done in the clerk's office, nearly everything which the parties did

⁴⁴ W. VA. CODE ch. 58, art. 5 § 4 (Michie 1955).

required an order signed by the judge. Under the new practice, however, the whole system of filing pleadings and motions will move along without need of any order of court; the responsibility falls rather upon the attorneys and the clerk. *Rule 5(e)*.

Commissioners in chancery will continue to function as in the past, but under the new title of commissioners. *Rule 53*.

2-1. *Administrative Matters*. Several rules will aid the judge in the administration of his court. For the hearing of motions the judge, with the cooperation of the local bar and the clerk, may set special days or hours. *Rule 78*. The attorney can obtain an appointment with the judge in advance and can include the time and place of this appointment in the written notice of the motion. *Rule 6(d)*, *Form 13*. At or before the beginning of a term of court, the court by local rule prescribed under *Rule 40* can require the attorneys to notify the clerk which cases are ready for trial, so that the trial docket can be made up. Since law and equity are merged, the court case will be divided into jury and court (non-jury) actions rather than law and equity. *See Rule 79(c)*. If a judge has two or more counties in his circuit, he may hear motions at the beginning of the term of court along with pre-trial conferences and non-jury matters. This would allow the attorneys time after disposition of the motions to have their jury cases ready for trial at the same term of court. Another possibility is to have motion days and pre-trial conferences in each county between terms of court. The ending of a term of court does not affect the running of time limits nor the power of the judge to act. *Rule 6(c)*. Nothing in the Rules prevents the judge while in County A from hearing a motion in an action pending in County B, *e.g.* while the judge is hearing jury trials in County A he can decide such matters as a motion for extension of time under *Rule 6(b)(1)* for an action in County B. The motion should be in writing. *Rule 7(b)(1)*. The clerk sends notice of the order to all parties affected. *Rule 77(d)*.

Rules 38(b) and *38(b)* guarantee jury trial *as a matter of right* at any time up to the setting of the trial calendar. *See* section 1-9 above. In addition the court *may* allow jury trial if requested at a later time. *Rule 39(b)*. The court may also of its own initiative summon an advisory jury. *Rule 39(c)*. The court has wide leeway by *Rule 40* in choosing a method of setting the trial calendar by

local rule promulgated in accordance with Rule 83. The pre-trial conference under Rule 16 should help determine in advance which cases will go to trial and how long each trial will take. The court has broad authority to consolidate related cases for trial. *Rule 42(a)*. The former rule on two actions in negligence between the same parties is superseded by *Rule 42(b)*.⁴⁵ The new rule is not limited to such cases, but applies to two or more actions of any kind arising out of the same transaction or occurrence. In trials without a jury or with an advisory jury the court must make separate written findings of fact and conclusions of law, which may be embodied in an opinion or memorandum of decision. *Rule 52(a)*. If a judge dies or becomes ill after a trial, a successor or special judge can sign the final judgment. *Rule 63*. Other matters affecting the trial are discussed in section 1-10 above.

2-2. Entry of Judgment and Related Matters. The court may continue to require the attorneys to prepare orders and judgments, as under the former practice. Forms 30 and 31 will be helpful for this purpose. A judgment is not effective until the clerk enters a notation of it in the civil docket book. *Rule 58*. A mere order, however, as distinguished from a judgment, will be effective at the time of granting the order, even though the clerk is required to note the substance of the order in his docket book. *Rule 79(a)*. When *Rules 58* and *79(a)* are read together, this difference between judgments and orders is apparent: *Rule 58* refers only to judgments, whereas *Rule 79(a)* mentions "appearance, orders, verdicts, and judgments." Also *Rule 79(b)* provides for "every order and judgment," and *Rule 77(d)* applies to "Orders or Judgments."

For default judgments where the sum is certain, such as an unpaid note, account, or tax return, entry of judgment will be comparable to entry of judgment on notice of motion in the old practice. See section 1-5 above. For unliquidated claims a procedure comparable to the inquiry of damages is provided. *Rule 55(b)(2)*. On such claims jury trial as a matter of right is waived unless demanded in advance (*Rules 38(b) and 39(b)*) although the court may still allow it under *Rule 39(b)*. The clerk will notify the defendant of entry of judgment by default. *Rule 77(d)*. The procedure for confession of judgment and for tender into court is prescribed in *Rule 68*. Summary judgments are discussed in section 1-8 above.

⁴⁵ See note 35 *supra*.

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3. DUTIES OF THE CLERK UNDER THE NEW RULES.

Although many of the new Rules affect the circuit clerk's office to some extent, the most important are Rules 1 through 7, 12(a), 17(c), 38-42, 45, 58, 60(a), 64, 67-79, 77-81, and 83, and also Forms 1 and 2. The foregoing discussion in sections 1-1, 1-2, 1-3, 1-6, and 1-9, and all of section 2 should be helpful to the clerks in understanding their role under the new Rules.

A part of the clerk's job will be to master the new terminology. Complaints will replace declarations and bills in chancery. Answers and motions will replace pleas in abatement, pleas in bar, special pleas, and demurrers. Praecipes, rule days, office judgments, decrees nisi, and rules to plead will no longer be needed. The names of the common-law forms of action will likewise be outmoded. Similarly all terms peculiar to equity pleading will be outmoded, such as decree pro confesso, commissioner in chancery, and issue out of chancery.

Since law and equity are consolidated the clerk will need to keep only a civil docket and civil order book instead of two separate sets of dockets and order books. *Rule 79*. All local rules of court will be entered in the civil order book. *Rule 83*. It will be necessary to think in terms of jury actions and court actions rather than law and chancery; *Rule 79(c)* requires the clerk to make this distinction in preparing the trial calendar.

Although *Rule 3A* relieves the clerk of his duties in connection with rule days, he must assume several new duties. Since the Rules permit many new kinds of motions and orders, the clerk will probably spend considerable time in receiving and filing such papers (*Rule 5(d) and 5(e)*) and in noting them in the civil docket in accord with *Rule 79(a)*. An ordinary pleading or motion is filed without order of court. *Rule 5(e)*. The clerk is required to notify all affected parties when an order or judgment is entered. *Rule 77(d)*.

Rule 69 prescribes return days for executions, suggestions, and suggestee executions. These prescribed periods will replace the present requirement that such process be returnable to rule days.

4. PROBLEMS OF INTERPRETATION OF THE RULE

The second sentence of *Rule 1* offers some guidance in interpreting the Rules: flexibility, liberality, and avoidance of technicality are to be desired. The Reporters' Notes should be helpful on

many points, since they show the purpose of each Rule and its relation to other Rules and to the former practice. Another useful source will be interpretations of the Federal Rules. Two large treatises on the federal practice have been published,⁴⁶ as well as several shorter works. Yet interpretations of the Federal Rules should be considered in the context of federal jurisdiction and practice as a whole; in some instances federal cases would not be apposite in West Virginia because of local differences in the constitutions, statutes, and rules of court other than the rule in question. Another possible source for interpretation is the decisions of state courts which have adopted rules based on the Federal Rules, but so far very few such decisions have been rendered by state appellate courts.

4-1. *The Merger of Law and Equity.* The merger will only eliminate differences in pleading and practice. The complaint will still have to state facts clearly showing that the plaintiff is entitled to the form of relief he demands. See section 1-3 above. If the plaintiff demands a form of relief which heretofore was available only in equity, such as injunction, specific performance, or cancellation of a deed, the court ought not grant the relief if there is an adequate remedy of the kind formerly available at law. Other equitable maxims will likewise apply. In short the new Rules simplify the *statement* of the case, but they restrict the form of *relief* to that which would have been available under the old practice upon the same fact situation.

Jury trials as a matter of right will be limited to the same kinds of actions as under the old practice, except where the parties agree otherwise under Rule 39(c). If under Rule 18(b) a plaintiff seeks in the same action both a money judgment and the avoidance of a fraudulent conveyance, he would be entitled to a jury trial only on the claim for money damages. The other question would be tried by the court. In an appropriate case a partial judgment could be entered on the jury verdict. *Rule 54(b).*

If the court determines that the plaintiff does not have a case worthy of equitable relief, but that he is entitled to a legal-type remedy for the same cause of action, the court need not dismiss the case, but may permit amendment under Rule 15(a). Amendment will not be needed if only the demand for judgment was incorrect and the judgment is not by default. *Rule 54(c).* If the

⁴⁶ BARRON & HOLTZOFF, *FEDERAL PRACTICE & PROCEDURE* (1950, 1959); MOORE, *FEDERAL PRACTICE* (2d ed. 1948-55).

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amendment refers to the same conduct, transaction, or occurrence set forth in the original pleading, the amendment relates back to the time the original pleading was filed. *Rule 15(c)*.⁴⁷ This will be important if the statute of limitations has run between the time of the original pleading and the time of the amended pleading; an amended pleading based upon different conduct or a different transaction or occurrence would be subject to the defense of statute of limitations.

4-2. *The Effect of the Rules on the Code and Existing Rules of Court.* Where the new Rules are silent, does the former practice apply? This is the necessary interpretation of the Rules. Indeed, the Rules would in some instances be unworkable without this assumption. The intent was to change many basic procedures; but to the extent that no conflict exists between the old and the new, the old will continue to apply, subject to the provisions of Rule 1 that the new Rules shall be construed to secure the just, speedy, and inexpensive determination of every action.

If the former practice is to serve as a background source for filling gaps in the practice, how is this background law to be used? This law appears in the Code as statutory rules of court⁴⁸ and in the Rules of Practice for Trial Courts previously promulgated. Some of the statutory rules and the earlier Rules for Trial will be completely superseded, others only partly superseded or modified, and still others not affected at all. The approach will be as used in the past in applying rules for trial courts promulgated by the Supreme Court of Appeals without revising the Code sections to delete inconsistent provisions, subject to the provision in Rule 1 for liberal interpretation of the new Rules.

In the future the rules should be made complete and the legislature should then be requested to remove from the Code all provisions which relate solely to practice and procedure. The legislature would continue to provide for such things as fees and costs, jurisdiction and venue, statutes of limitation, and general matters of administration of courts.

⁴⁷ 3 MOORE, *op. cit. supra* note 46 ¶ 15.15.

⁴⁸ W. VA. CODE ch. 51, art. 1, § 4 (Michie 1955). By this rule-making statute of 1983, the legislature provided that ". . . All statutes relating to pleading, practice and procedure shall have force and effect only as rules of court and shall remain in effect unless and until modified suspended or amended by rules promulgated pursuant to the provisions of this section. . . ."

APPENDIX

IMPORTANT DIFFERENCES BETWEEN THE FEDERAL RULES AND THE
WEST VIRGINIA RULES

NOTE: Some of the differences between the two sets of rules are mere variations in terminology, such as the name of the court or the name of a court officer. In other instances the West Virginia Rule omits language in the Federal Rule referring to federal jurisdiction and practice. Variations of these and similar kinds are not listed below.

Rule No.	Subject Matter of West Virginia Rule	How West Virginia Rule Varies from Corresponding Federal Rule
2	One form of action	West Virginia adds supplementary clause explaining effect of rule.
3	Commencement of action.	West Virginia adds a requirement for starting action which is not found in Federal Rule.
3A	Rule days.	Federal Rules have no corresponding rule.
4(a)	Issuance of summons.	See Rule 4(c) below.
4(c)	Who serves summons.	West Virginia Rule, unlike Federal Rule, allows service by credible person, except that attorney for party may not serve original process.
4(d)	Personal service.	West Virginia Rule contains detailed provisions based on prior practice.
4(e)	Service by publication.	West Virginia Rule contains detailed provisions based on prior practice.
4(f)	Personal service outside state.	Federal Rules have no corresponding rule.
4(g)	Personal service in addition to constructive service.	Federal Rules have no corresponding rule.
4(h)	Process part of record.	Federal Rules have no corresponding rule.
5(b)	How service is made.	West Virginia Rule omits provision in Federal Rule permitting service to be made by leaving paper in conspicuous place in attorney's office if no one is there.
5(d)	Filing of papers.	West Virginia requires certificate of service; Federal Rule does not.
5(e)	Filing defined.	West Virginia provides that pleadings, etc., may be filed without an order; Federal Rule has no such provision.
6(b)	Enlargement of time.	West Virginia Rule liberalizes Federal Rule by permitting enlargement of time by stipulation of parties; and, under clause (2), upon a showing of unavoidable cause.
6(d)	Time for motions, etc.	West Virginia allows longer time limits.
9(b)	Pleading special matters.	West Virginia permits negligence to be averred generally; Federal Form 9 avers negligence generally.
11	Signing of pleadings.	In West Virginia the certificate applies only to the attorney first signing the pleading rather than to all attorneys.

Rule No.	Subject Matter of West Virginia Rule	How West Virginia Rule Varies from Corresponding Federal Rule
12(a)	When defendant must answer.	West Virginia Rule, unlike Federal Rule, allows defendant to ask for 10-day automatic extension if he has bona fide defense; also West Virginia allows 10 additional days when certain types of service are made.
17(a)	Real party in interest.	West Virginia Rule adds provision on subrogation.
17(c)	Persons under disability.	West Virginia Rule adds provision on convicts and allows clerk as well as judge to appoint guardian ad litem.
23(b)	Class action by shareholders.	West Virginia omits Federal provision requiring that plaintiff or his predecessor in interest must have owned stock at time of wrong complained of.
23(c)	Dismissal or compromise of class action.	West Virginia omits Federal requirement of notice to all parties in actions brought under Rule 23(a)(1); West Virginia leaves it to the court's discretion to require notice to members of all classes in Rule 23(a).
25(a)	Substitution upon death of party.	West Virginia requires substitution within a reasonable time instead of within two years. But see W. VA. CODE ch. 56, art. 8, § 8 (Michie 1955).
23(b)	Substitution for incapacity to be sued.	West Virginia adds provision on convicts. Cf. Rule 17(c).
26(a)	Depositions pending action.	West Virginia omits Federal provision on taking deposition of prisoner.
26(b)	Scope of examination.	West Virginia adds requirement of relevance.
26(d)(3)	When deposition may be used at trial.	West Virginia Rule adds clauses 5 and 6 not found in Federal Rule.
27(a)(1)	Depositions before action.	In West Virginia applicant has wider choice of court in which to apply. In clause 1 of second paragraph West Virginia Rule is broader than Federal Rule.
28(d)	Depositions for use outside West Virginia.	Federal Rule has no corresponding provision.
30(a)	Depositions upon oral examination.	West Virginia Rule, unlike Federal Rule, permits examination of a person not named in notice to take depositions.
30(b)	Orders for protection of parties and deponents.	West Virginia permits court to restrict time as well as place of taking depositions; also it permits court to protect against undue expense as well as annoyance, etc.
30(d)	Motion to terminate or limit examination.	West Virginia adds a new ground for the motion, <i>i. e.</i> where the examination is unduly protracted. West Virginia has a stronger provision than Federal Rule as to imposing costs against the offending party.

Rule No.	Subject Matter of West Virginia Rule	How West Virginia Rule Varies from Corresponding Federal Rule
30(e)	Supervision by court.	Federal Rule has no corresponding provision; Federal Rule 30(e) requires deposition to be submitted to witness and signed, but West Virginia Rule omits this requirement. See W. VA. CODE ch. 57, art. 4, § 1 (Michie 1955).
32(c)(4)	Error in taking deposition of party not named in notice.	Federal Rule has no corresponding provision. Cf. W. Va. Rule 30(a).
33	Interrogatories to parties.	West Virginia adds provision on undue expense. Cf. Rule 30 (b).
34(a)	Discovery of documents, etc.	West Virginia adds provision for mechanical reproduction, perhaps implicit in Federal Rule.
34(b)	Limitations on same.	Federal Rule has no corresponding provision, but principle is similar to <i>Hickman v. Taylor</i> , 329 U. S. 495 (1947).
35(a)	Physical and mental examination.	West Virginia Rule makes it clear that both physical and mental examinations may be required.
37(b)(3)	Appellate review of penalty imposed by trial court for refusal to make discovery.	West Virginia provides method of judicial review of penalty; Federal Rule has no corresponding provision in Rule 37.
39(b)	Late demand for jury trial	West Virginia permits jury trial as matter of right rather than grace if demanded at any time up to the setting of the trial calendar. Federal Rule does not have this provision.
41(b)	Involuntary dismissal of actions.	Second paragraph of West Virginia Rule does not appear in Federal Rule.
42(b)	Consolidation of actions in different courts.	Federal Rule has no corresponding provision; Federal Rule 42(b) is West Virginia Rule 42(c).
43(a)	Evidence.	West Virginia omits Federal requirement that all testimony be taken in open court.
45(c)	Service of subpoena.	West Virginia permits substituted as well as personal service; Federal Rule does not.
47(b)	Alternate jurors.	West Virginia Rule spells out procedure in greater detail than Federal Rule.
50(b)	Motion for directed verdict and for judgment—reservation of decision on motion.	In West Virginia time runs from entry of judgment, but in Federal Rule time runs from reception of verdict.
51	Instructions to jury.	West Virginia Rule forbids the court to give oral charge or to comment on the evidence; limits right to show instructions to jury; and permits trial or appellate court to notice error in instructions upon its own motion. None of these provisions appear in Federal Rule.
55(a)	...	West Virginia omits Federal provision authorizing clerk to enter default of party for failure to appear, plead, etc.

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Rule No.	Subject Matter of West Virginia Rule	How West Virginia Rule Varies from Corresponding Federal Rule
55(b)	Entry of default judgment.	West Virginia requires that default judgment must be entered by court and not by clerk; Federal Rule permits entry by clerk.
55(e)	Reference to Rule 58.	Federal Rule has no corresponding provision.
59(c)	Time for serving affidavits in support of motion for new trial.	West Virginia Rule liberalizes the Federal time limits.
59(f)	Effect of failure to move for new trial.	Federal Rule has no corresponding provision.
60(b)	Relief from judgment or order.	West Virginia adds unavoidable cause to clause (1) and prescribes different time limits for clauses (1), (2), (3), and (6) than does the Federal Rule.
62(a)	Automatic stay of execution, etc.	West Virginia Rule empowers court to allow immediate execution, whereas Federal Rule requires 10-day stay in all cases. West Virginia adds to Federal Rule a provision requiring stay pending disposition of motion under Rule 50 or 59(a), but West Virginia omits Federal provision applying to receiverships and patent accountings.
62(a)	Discretionary stay of executions, etc.	Federal Rule applies to motions under Rule 50, 59 [a and e], 60 and 52(b). West Virginia Rule applies only to motions under Rules 59(e), 60, and 52(b).
62(c),(d) (e),(f),(g)	...	West Virginia omits these provisions in the Federal Rule, which apply mainly to appellate practice, but <i>cf.</i> West Virginia Rule 62(i).
62(i)	Stay of proceedings upon appeal, etc.	Federal Rule has no corresponding subdivision, but Federal Rule 62(d) is similar.
64	Seizure of person or property.	West Virginia has more detailed provisions than Federal Rule.
65	Injunctions.	Federal Rule has detailed provision; West Virginia Rule has not, but procedure is prescribed in W. VA. CODE ch. 53, art. 5 (Michie 1955).
67	Deposit in court.	West Virginia omits Federal provision permitting delivery to court of personal property other than money.
68	Offer of judgment, etc.	West Virginia adds to Federal Rule a subdivision (b) permitting tender into court in accord with prior state practice.
69	Executions, etc.	West Virginia has more detailed provisions than Federal Rule.
71A	...	West Virginia omits provision for condemnation. See West Virginia Rule 81(a)(6).

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Rule No.	Subject Matter of West Virginia Rule	How West Virginia Rule Varies from Corresponding Federal Rule
72-76	Appeals.	West Virginia omits Federal Rules 72-76, but West Virginia Rule 72 corresponds to part of Federal Rule 73(a), and West Virginia Rule 80 corresponds to part of Federal Rule 75. See also West Virginia Rule 37(b)(3). The West Virginia Supreme Court of Appeals has its own Rules of Practice for that court, which are published at the same places as the Rules for Trial Courts (see note 3 of text, <i>supra</i>).
79(b)	Civil order book.	West Virginia requires that clerk record every order or judgement, whereas Federal Rule applies only to certain important orders and judgments.
80	Transcript of evidence, etc.	West Virginia has much more detailed provision than Federal Rule.
81(b)	What writs are abolished.	Federal Rule abolishes writ of mandamus, West Virginia does not.
Form 1	Summons.	West Virginia adds provision on compulsory counterclaim not found in Federal Form 1.
. . .	Other forms.	West Virginia has omitted some forms appropriate only to Federal practice but has added new Forms 2, 30, and 31.