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Rule 1. Application of rules.

These rules apply to all civil cases in the magistrate courts of the State of West Virginia. These rules supplement, and in designated instances supersede, the statutory procedures set forth in Chapter 50 of the West Virginia Code. The purpose of the rules is to help resolve cases in a just, speedy, and inexpensive manner.

Rule 2. Complaint.

A civil action is commenced by filing a complaint with the magistrate assistant, magistrate clerk, or magistrate deputy clerk. A complaint shall contain:

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

(b) A demand for judgment for the relief the plaintiff seeks.

Rule 3. Service of process.

The summons and complaint in civil actions shall be served upon the defendant in the same manner as is provided by Rule 4 of the Rules of Civil Procedure for Trial Courts of Record.

Rule 4. Answer.

(a) Filing and service. — An answer to a complaint shall be filed by the defendant with the magistrate assistant, magistrate clerk, or deputy clerk. The defendant shall serve a copy of the answer upon the plaintiff in the manner set forth in Rule 8.

(b) Time. — The answer shall be filed and served by the defendant:

(1) Within 20 days after service of the summons and complaint; or

(2) If service of the summons and complaint is made upon an agent or attorney in fact authorized to accept service upon the defendant, within 30 days after service; or

(3) Not later than the date specified in an order of publication; or

(4) In cases of unlawful entry and detainer and wrongful occupation of residential rental property, within 5 days after service of the summons and complaint.

(c) Motions to transfer. — A defendant may, in his answer or within a reasonable time, move to transfer the case to the magistrate court of another county. The motion shall be ruled on promptly by the magistrate. Upon request by any party, the magistrate may schedule a pretrial hearing on the motion in accordance with Rule 11. If the magistrate finds that venue is improper or that, under West Virginia Code § 56-1-1(b), transfer to the magistrate court of another county would promote convenience and the ends of justice, the magistrate shall transfer the case to the magistrate court of the proper county.

(d) Failure to state defense. — The failure of the defendant to state a particular defense in an answer shall not prevent the defendant from raising such defense at trial.

Rule 5. Counterclaim and cross-claim.

(a) Counterclaim. — A defendant may state as a counterclaim any claim that the defendant has against the plaintiff that is within the jurisdiction of magistrate court. Such counterclaim may be stated together with the defendant's answer and may be filed and served in the same manner as the defendant's answer, without additional cost. A reply to a counterclaim shall not be required.

(b) Failure to file counterclaim. — The failure of a defendant to institute a counterclaim permitted by this rule shall not preclude the institution of a separate action on such claim at a later time.

(c) Cross-claim. — In a case where there are two or more defendants, a defendant may state as a cross-claim any claim that the defendant has against another defendant arising out of the transaction or occurrence that is the subject matter of the complaint. Such cross-claim may be stated together with the defendant's answer and may be filed and served in the same manner as the defendant's answer, without additional cost. An answer to a cross-claim shall not be required.

Rule 6. Third-party complaint.

(a) If the defendant alleges that another person, who is not named as a party in the case, is wholly or partially responsible for the damages set forth in the complaint, the defendant may file a third-party complaint against such person. No filing fee shall be required.

(b) A third-party summons and complaint shall be served upon the third-party defendant in the same manner as an initial summons and complaint. A third-party complaint shall be answered in the same manner as is provided by Rule 4.

Rule 6A. Election of jury trial.

(a) Right to elect. — A party to a civil action in magistrate court has the right to elect that the matter be tried by a jury when the amount in controversy exceeds twenty dollars or involves possession to real estate. All parties to such cases shall be notified in writing of the right to election.

(b) Assertion of the right. — The election must be made in writing by the party asserting the right any time after the commencement of the action but not later than

(1) 20 days after the service of any first timely filed answer to the complaint, or

(2) 5 days after service of the summons and complaint in cases involving expedited proceedings such as actions for unlawful entry and detainer and wrongful occupation. When the right to a jury trial is asserted in a case involving an expedited proceeding, the trial shall be scheduled as soon as a jury panel can be assembled.

Failure to elect within the relevant time limit constitutes a waiver of the right to trial by jury.

Rule 7. Amended and supplemental pleadings.

Upon request by any party, the magistrate may permit the filing of an amended pleading, or amendment by interlineation, at any stage of the proceeding and upon such terms as may be just. Upon request, the magistrate may also permit the filing of supplemental pleadings asserting claims or defenses which have arisen since the date of the pleading to be supplemented. Permission to file an amended or supplemental pleading shall be freely given, and may be done with or without a hearing. Continuances to meet new matter asserted by way of amended or supplemental pleadings shall be granted if necessary to avoid surprise or other prejudice to the opposing party.

Rule 8. Service of pleadings, motions and other papers.

(a) When service is required. — Every pleading subsequent to the original complaint, every answer, every written motion other than one which may be heard without notice to other parties and every written notice, appearance, demand, and similar paper submitted by a party to a case shall be served upon each party to the case.

(b) How service is made. — Whenever service is required to be made upon a party represented by an attorney of record, the service shall be made upon the attorney. Service upon the attorney or upon a party shall be

made by delivering a copy, by mailing a copy to the last-known address, or by facsimile transmission to his or her office or usual place of abode. Delivery of a copy means:

(1) Handing it to the person to be served;

(2) Leaving it at the person's office with the person's clerk or other person in charge thereof; or

(3) If the office is closed or the person to be served has no office, leaving it at the person's usual place of abode with some member of the person's family above the age of 16 years.

Service by mail is complete upon mailing. Service by facsimile transmission is complete upon receipt of the entire document by the receiver's facsimile machine.

(c) Parties in default. — No service need be made on parties in default for failure to answer or appear, except that pleadings asserting new or additional claims for relief against them shall be served in the manner provided for service of summons and complaint in Rule 3.

Rule 9. Filing of pleadings, motions and other papers.

(a) When filing is required. — The originals of all papers subsequent to the answer which are required to be served upon a party pursuant to Rule 8 shall be filed with the clerk, deputy clerk, or magistrate assistant within 5 days after they have been served.

(b) Certificate of service. — There shall be attached to every such paper a statement by the attorney or by the party that the paper was served in the manner prescribed by Rule 8, setting forth the date and manner of such service.

Rule 10. Default judgment.

(a) A magistrate shall enter judgment by default against a defendant when it appears from the record that the defendant has been served with the

summons and complaint in accordance with these rules and has failed to appear or to answer within the time provided in Rule 4, and the plaintiff submits either an affidavit or sworn testimony stating:

(1) That the defendant has failed to appear or to answer the complaint or notify the court of intent to contest the case; and

(2) The relief the plaintiff requests from the court and whether it is for a sum certain or for a sum which can by computation be made certain.

(b) In the event that the plaintiff's claim is not for a sum certain, or for a sum which can by computation be made certain, the magistrate shall require further proof by affidavit or sworn testimony as is necessary to determine the propriety of the relief sought.

(c) A default judgment may be obtained in a similar manner against any party that has been served, in accordance with these rules, with a copy of a counterclaim, cross-claim, or third-party complaint, and has failed to appear or otherwise defend as required by these rules.

(d) No default judgment may be entered against a party who is an infant, an incompetent, or an incarcerated convict unless such person is represented by a guardian, committee resident, or guardian ad litem.

(e) A default judgment may be set aside in accordance with Rule 17 and Rule 20(c).

Rule 11. Notice of trial and pretrial hearings.

(a) Notice of trial. — When an answer is filed with the court denying or otherwise opposing the relief requested in the complaint, the court shall schedule a date and time for trial. Unless otherwise provided by statute or rule, all parties shall be notified by the court by first-class mail not less than 21 days before such date of trial. All such notices shall contain:

(1) The date, place and time of trial;

(2) The name of the magistrate scheduled to hear the case;

(3) A statement of the time periods in which pretrial motions must be filed, in accordance with Rule 12;

(4) A statement of the manner in which pretrial motions may be filed;

(5) A statement of the restrictions upon continuances as set forth in Rule 12; and

(6) A statement of the manner by which motions for disqualification may be filed as set forth in Rule 1B of the Administrative Rules for Magistrate Courts.

(b) Notice of pretrial hearing. — If an answer sets forth a defense of lack of jurisdiction, insufficiency of service or process, or failure to state a claim upon which relief can be granted, upon request by any party, the court shall schedule a pretrial hearing to determine whether the case should be dismissed upon such grounds prior to trial. Notice of such pretrial hearing shall be in accordance with the requirements for notice of trial as set forth in section (a).

Rule 12. Pretrial motions.

(a) Time periods. — Unless good cause is shown as to why such requirements should be excused, the following motions, if made, shall be made in writing and shall be filed with the court and served upon all parties not less than 10 days before the first date scheduled for trial:

(1) Removal to circuit court;

(2) Motion and affidavit for transfer to another magistrate;

(3) Motion for continuance; and

(4) Any other motion which, if granted, would require rescheduling of the hearing or trial.

The clerk, deputy clerk, or magistrate assistant shall provide appropriate forms on which such pretrial motions may be made.

All other pretrial motions may be made at any time in writing prior to trial, or may be made orally or in writing at time of trial.

The time periods set forth in this subsection shall not apply to summary proceedings for wrongful occupation of residential rental property or to proceedings for domestic violence protective orders.

(b) Continuance. — A motion for a continuance may be granted only upon:

(1) Compliance with the requirements set forth in section (a) of this rule;

(2) A showing of good cause; and

(3) A reasonable effort by the magistrate to notify all parties and provide them with an opportunity to respond to the motion.

Rule 13. Discovery.

Discovery shall be limited to the following methods:

(a) Production of documents and entry upon land. — If the parties are otherwise unable to agree, upon motion of any party showing good cause and upon notice of all parties, the magistrate may order another party to the action to:

(1) Produce and permit the inspection and photocopying by the moving party of any designated documents or records or tangible items which contain relevant evidence which are not privileged, and which are in the possession, custody or control of the party from whom production is sought; or

(2) Permit entry upon designated land or other property in the possession or control of a party for the purpose of inspecting, measuring, surveying or photographing the property if the subject matter is relevant to the pending action.

The court order shall specify the time, place, and manner of making the inspection and making the copies and may prescribe such terms and conditions as are just.

(b) Physical examination. — If the parties are otherwise unable to agree, upon motion showing good cause and upon notice to all parties, the

magistrate may order another party to submit to a physical examination by a physician, under the following circumstances:

(1) A plaintiff claiming relief for physical injury caused by the defendant's actions may be ordered to submit to an examination upon motion of the defendant.

(2) A defendant placing the defendant's physical condition in issue by way of defense or otherwise may similarly be ordered to submit to an examination, upon motion of the plaintiff.

(3) Notice shall be given to the party to be examined and to all other parties and shall specify the time, place, manner, conditions and scope of any such examination and the person or persons by whom it is to be made.

(4) If requested by the person examined, the party causing any such examination to be made shall deliver to the person examined a copy of a detailed written report of the examining physician setting out the physician's findings and conclusions.

(5) After such request and delivery, the party causing the examination to be made shall be entitled upon request to receive from the party examined a like report of any examination, previously or thereafter made, of the same physical condition.

(6) If the party examined refuses to deliver such report, the court on motion and hearing may order delivery on such terms as are just, and if a physician fails or refuses to make such a report the court may exclude the physician's testimony if offered at the trial.

(c) Failure to comply. — If any party refuses to obey an order made under subdivision (a) or (b) of this rule, the magistrate may:

(1) Order that the matters regarding the character or description of the property or the contents of the paper, or the physical condition of the party, or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(2) Refuse to allow the disobedient party to support or oppose designated claims or defenses, or prohibit such party from introducing in evidence designated documents or items of testimony, or from introducing evidence of physical conditions; or

(3) Stay further proceedings until the order is obeyed.

Rule 14. Subpoenas.

(a) Subpoena. — The clerk, deputy clerk, magistrate or magistrate assistant shall, upon the request of a party, issue a subpoena commanding the person to whom it is directed to attend and give testimony at a time and place therein specified. The clerk, deputy clerk, magistrate or magistrate assistant shall issue the subpoena signed but otherwise in blank, to a party requesting a subpoena in blank, who shall fill it in before service.

(b) Subpoena for production of documentary evidence. — A subpoena may also command the person to whom it is directed to produce the books, papers, documents or tangible things designated therein. The magistrate, upon a motion may:

(1) Quash or modify the subpoena if it is unreasonable and oppressive; or

(2) Condition denial of the motion to quash upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

(c) Service. — Service shall be made by the sheriff, by an attorney, or by any other credible person who is not a party. Service shall be made in the same manner as service of process upon individuals, and, if demanded, by providing to the witness the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the State or an officer or agency of the State, or on behalf of an indigent, fees and mileage need not be provided in advance.

A subpoena may be served at any place within the State.

Rule 15. Dismissal.

In addition to other grounds for dismissal as provided by law, the magistrate shall dismiss an action without prejudice where:

(a) Service of the summons and complaint has not been successfully made upon the defendant within 6 months of the initial filing of the complaint; or

(b) The defendant fails to file an answer and the plaintiff fails to move for a default judgment within 6 months of service of the summons and complaint upon defendant; or

(c) An action is pending for more than 6 months and there has been no order or proceeding but to continue it.

When the magistrate dismisses an action under this rule, the clerk shall immediately notify all parties who are not in default and their counsel of record that a judgment has been entered. The notice shall be mailed to the last address on record for each such party, and shall state that any dissatisfied party may move to set aside the judgment in accordance with Rule 17.

Rule 15A. Consolidation and separate trials.

(a) When actions involving common questions of law or fact are pending before a magistrate, he/she may order a joint trial of any or all such questions in the actions.

(b) The magistrate, in furtherance of judicial convenience or economy or to prevent prejudice, may order a separate trial of any claim, cross-claim, counterclaim or third-party claim pleaded or asserted in an action.

Rule 16. Trial.

(a) Conduct of trial. — Trial shall be conducted by the examination and cross-examination of witnesses under oath or affirmation, in an orderly manner, and in accordance with the West Virginia Rules of Evidence.

(b) Trial by jury. — In cases of trial by jury, a sufficient number of persons shall be notified, in accordance with the Administrative Rules for Magistrate Courts, so that, after dismissals for cause, a panel of 10 persons may be assembled who are legally qualified and free from prejudice. The magistrate may conduct the examination of potential members of the panel or may permit all or part of such examination to be conducted by the parties or their attorneys. Upon selection of the panel of 10 persons legally qualified and free from prejudice, each side shall exercise 2 peremptory challenges to reduce the number of jurors to 6. The verdict shall be unanimous, unless the parties stipulate that a verdict or finding of a stated majority shall be taken as the verdict or finding of the jury.

(c) Record of jury trial. —

(1) Every jury trial shall be recorded electronically by a magistrate. If by reason of unavoidable cause it is impossible to record all or part of a jury trial electronically, a magistrate may proceed with the hearing but shall make a written record of the failure to do so and of the cause thereof.

A magnetic tape or other electronic recording medium on which a jury trial is recorded shall be indexed and securely preserved by the magistrate court clerk or, as assigned by the clerk, by the magistrate assistant.

For evidentiary purposes, a duplicate of such electronic recording prepared by the clerk of the magistrate court shall be a "writing" or "recording" as those terms are defined in Rule 1001 of the West Virginia Rules of Evidence, and unless the duplicate is shown not

to reflect the contents accurately, it shall be treated as an original in the same manner that data stored in a computer or similar data is regarded as an "original" under such rule.

When requested by either party in a civil action or any interested person, the clerk of the magistrate court shall provide a duplicate copy of the tape or other electronic recording medium of any jury trial held. Unless a defendant requesting the copy has received a waiver of costs and fees the defendant shall pay to the magistrate court an amount equal to the actual cost of the tape or other medium or the sum of five dollars, whichever is greater.

Preparation and costs of a transcript of the record or any designated portions thereof shall be the responsibility of the party desiring such transcript, unless the circuit court orders payment to be made by the Administrative Director of the Supreme Court of Appeals.

(d) Jury instructions. — In cases of trial by jury, at the close of the evidence, before arguments to the jury are begun, the magistrate shall instruct the jury regarding the law that is applicable to the case. Any party or counsel for any party may provide to the magistrate written requests that the magistrate instruct the jury on the law as set forth in the requests. The magistrate shall provide all parties or their counsel the opportunity, out of the presence of the jury, to argue for or against the giving or refusal to give any instruction.

(e) Parties not represented by counsel. — When a party appears at trial without counsel, the magistrate shall inform the party, in the presence of all other parties, of the proper procedures regarding the conduct of trial and examination of witnesses. Such information shall not include counsel or advice regarding choice of tactics or strategy.

Rule 17. Setting aside judgment.

(a) Within 20 days after judgment is entered, any dissatisfied party may file a motion requesting that the judgment be set aside and a new trial held.

(b) The magistrate shall promptly schedule a hearing on the motion. The clerk, deputy clerk or magistrate assistant shall notify all parties of the time, place and date set for hearing on the motion.

(c) If good cause is shown by the party making the motion, the magistrate who entered the judgment or such magistrate's successor may set aside the judgment and order a new trial. The magistrate's decision on the motion shall be in writing. The clerk shall immediately notify all parties of the magistrate's decision.

(d) Except as stated in (e), good cause may be shown by, but is not limited to, any of the following circumstances:

(1) There is newly discovered evidence that could have a substantial effect on the outcome of the case;

(2) Important evidence was hidden from the court by the opposing party in whose favor judgment was rendered;

(3) The verdict is clearly excessive and cannot be supported by the evidence;

(4) There was a material mistake in the application of the law.

(e) Where judgment is entered by default, good cause may be shown by either excusable neglect or unavoidable cause.

Rule 18. Appeal to circuit court.

(a) Any party to a final judgment may as a matter of right appeal to circuit court. Notice of appeal shall be filed in magistrate court:

(1) Within 20 days after judgment is entered; or

(2) Within 20 days after the magistrate has denied a motion for a new trial.

(b) The magistrate shall require the appellant to post a bond with good security in a reasonable amount not less than the sum of the judgment and the reasonable court costs of the appeal, upon the condition that such person will satisfy the judgment and any court costs which may be rendered against the appellant on the appeal. The magistrate court clerk or deputy clerk shall collect the bond and the circuit court filing fee at the time the appeal is filed unless the person or entity filing the appeal is permitted to proceed without prepayment. The magistrate court clerk or deputy clerk shall forward any collected bond and fee along with the appropriate documents to the circuit court clerk.

(c) If no notice is filed within the 20-day period, the circuit court may, not later than 90 days after the date of judgment, grant an appeal upon a showing of good cause why the notice was not filed within such 20-day period.

(d) An appeal of a civil action tried before a jury in magistrate court shall be heard on the record in circuit court. An appeal of a civil action tried before a magistrate without a jury shall be by trial de novo in circuit court without a jury.

Rule 18A. Stay of execution of judgment.

Upon timely filing of an appeal or a motion to set aside the judgment, execution of the judgment shall be stayed until the appeal or motion has been decided.

Rule 19. Harmless error.

The magistrate at every stage of the proceeding shall disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Rule 20. Time.

(a) Computation. — In computing any time limit set in accordance with these rules, set by the magistrate, or set by statute:

(1) The day of the act, event or default from which the designated period of time begins to run should not be included.

(2) The last day of the time period shall be included, unless it is a Saturday, Sunday, or legal holiday.

(3) When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation.

(b) Extension. — Except as provided in section (c), any time limit which has been set by these rules, by the magistrate, or by statute, may extended in the following circumstances:

(1) If all parties to the case agree in writing to the extension.

(2) If the existing period has not expired, upon a showing of good cause.

(3) If the time period has expired, upon a showing of unavoidable cause.

Prior to ruling upon a request for an extension, the magistrate shall make a reasonable effort to notify all other parties and provide them with an opportunity to respond to the request.

(c) Extension prohibited. — Time periods for motions to set aside judgment and time periods for appeal shall not be extended unless judgment was by default and either service of process or notice of trial was insufficient.

(d) Additional time after service by mail. — When a party has received a notice or some other paper by mail and in response must take some action within a specified period from the date of mailing, 3 days shall be added to such period.

Rule 21. Clerical mistakes.

Clerical mistakes in judgments, orders, or other parts of the file and errors therein from oversight or omission may be corrected after such notice to the opposing party, if any, as the magistrate orders. During the pendency of an appeal, such mistakes may be so corrected before the record is filed in the circuit court, and thereafter while the appeal is pending may be so corrected with leave of the circuit court. Copies of corrected orders shall be provided to all parties.

Rule 22. Waiver of fees and costs for indigents.

(a) Filing of affidavit of indigency. - A person seeking waiver of fees, costs, or security, pursuant to Chapter 59, Article 2, Section 1 [§ 59-2-1] of the Code of West Virginia, shall execute before the clerk or a deputy an affidavit prescribed by the chief justice of the supreme court of appeals, which shall be kept confidential in domestic violence proceedings. An additional affidavit of indigency shall be filed whenever the financial condition of the person no longer conforms to the financial guidelines established by the chief justice of the supreme court of appeals for determining indigency or whenever an order has been entered directing the filing of a new affidavit.

(b) Review of affidavit of indigency. — If it appears from the affidavit that the person meets the financial guidelines, the clerk shall perform the service requested in conjunction with the affidavit. If it subsequently appears to the assigned magistrate that the person did not meet the financial guidelines, the magistrate shall order the person to pay the required fees, costs, or security, or the magistrate may order another appropriate remedy. If it appears from the affidavit that the person does not meet the financial guidelines, the clerk shall inform the person that the service will not be performed without the payment of the appropriate fees, costs, or security, and that the person may request review of the clerk's

determination by a magistrate. If the person requests review of the clerk's determination, the clerk shall immediately forward a copy of the affidavit to an on-duty magistrate. Upon receipt of the affidavit, the magistrate shall, within 7 days, either approve the affidavit, disapprove the affidavit, instruct the person to provide additional information, or schedule an ex parte hearing to determine indigency.

(c) Effect of filing. — The filing of an affidavit of indigency shall be deemed to toll any applicable statute of limitations or other time requirement. This rule does not govern the appointment of counsel or the payment of attorney fees.

Rule 23. Family violence contempt bond.

(a) Form of bond. — If not granted a waiver pursuant to W. Va. Code § 59-2-1, a respondent held in contempt for violation of a family violence protective order shall post a cash bond or a surety bond. If granted a waiver pursuant to W. Va. Code § 59-2-1, a respondent held in contempt for violation of a family violence protective order may post a personal recognizance bond.

(b) Forfeiture. — Upon motion by the party who petitioned for a civil contempt show-cause order, 10 days' notice to the bond obligor(s), a hearing, and a showing of non-compliance with a family violence protective order after the court has ordered the respondent to post a bond pursuant to W. Va. Code § 48-2A-10a [repealed, see now § 48-27-901], the magistrate shall render a judgment of default and order forfeiture of the bond amount. Upon collection, the clerk shall deposit the proceeds with the state auditor. If payment of a surety or personal recognizance bond is not made within 20 days of the forfeiture order, the clerk shall undertake execution against the obligor(s) for recovery of the judgment amount.